STATE OF MICHIGAN

COURT OF APPEALS

GLENN JESSO,

Plaintiff-Appellee,

v

LETICA CORPORATION,

Defendant-Appellant.

UNPUBLISHED
January 11, 2000

No. 209169
Oakland Circuit Court
LC No. 95-492395 CL

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals of right the trial court's orders denying its motion for judgment notwithstanding the verdict, new trial or remittitur, and granting plaintiff's motion for attorney fees in this wrongful discharge case. The jury found that plaintiff was discharged in violation of defendant's progressive discipline procedures[1] and awarded plaintiff $25,000 for past wage loss and $15,000 in future wage loss. The trial court awarded plaintiff attorney fees of approximately $26,000 under MCR 2.403(O). We affirm.

I

Defendant first argues that it was entitled to judgment in its favor since plaintiff's termination was in accordance with the employment handbook as a matter of law. Defendant asserts that the jury's finding that defendant violated its disciplinary procedures by terminating plaintiff was erroneous as a matter of law, and the trial court erred when it denied defendant's motion for judgment notwithstanding the verdict, because under the terms of the handbook defendant reserved to itself the right to immediately terminate an employee in the event of sexual harassment. We reject this claim of error.

A

Defendant's Plant Hourly Employee Handbook provided in pertinent part:

INTRODUCTORY MESSAGE

* * *

The purpose of this booklet is to let employees know what management expects from them, and in turn what benefits employees can expect from management. . . .

* * *

The following statements of Personnel Policy are what we intend to follow and practice.

* * *

3. We will maintain reasonable and consistent standards of job performance, objectively reflecting these standards in decisions which affect the promotion, compensation and retention of each employee.

* * *

8. We will give clear and timely information to each employee about their job responsibilities, job performance, and the company policies and activities that affect them . . . .

11. We believe that each employee has a right to be treated fairly and considerately by anyone in a position of authority as well as by their associates. We will take prompt, fair, and considerate action of any complaints by an employee regarding any aspect of their work.

* * *

PLANT RULES

To prevent misunderstanding and since some employees act in ways contrary to the good of others, the following rules have been established. They have been divided into two (2) categories and shall not be held against an employee's record for more than one (1) year. These lists should not be considered to be all inclusive. Any action deemed by plant management to be detrimental to the company, company property, or company employees will fall under either category and be subject to Standard Disciplinary Procedures as explained in this book.

GROUP I: SUBJECT TO IMMEDIATE DISCHARGE

1. Insubordination, refusal or failure to follow direct orders of supervision.

2. Intentional faulty workmanship.

3. Willfully concealing defects in workmanship or materials.

4. Intentionally punching another employee's time card in or out.

5. Possession or use of alcohol, narcotics, or weapons in the plant or on Company property.

6. Stealing in any form.

7. Sabotage.

8. Fighting, use of abusive language or threatening physical violence to a supervisor or fellow employee, committing immoral or indecent acts in the plant or on company premises.

* * *

14. Two unreported absences in any 60 day period.

* * *

GROUP II: SUBJECT TO STANDARD DISCIPLINARY PROCEDURES

1. Parking in non-designated areas.

2. Loafing or horseplay during working hours.

3. Leaving the work area before quitting time, break or lunch time.

4. Excessive tardiness or absenteeism or failure to call in.

5. Selling, distributing, or posting notices or articles on company premises during actual working hours.

6. Using the company telephone without permission.

* * *

Page eighteen of the employee handbook contains two sections, a "Sexual Harassment" section addressing discrimination of various kinds, and the "Standard Disciplinary Procedures" section:

SEXUAL HARASSMENT

Letica Corporation is committed to providing a work environment that is free of discrimination. Actions, words, jokes, posters, or comments based on an individual's sex, race, ethnicity, age, religion, or any other legally-protected characteristic will not be tolerated. As an example, sexual conduct (both overt and subtle, consensual and non-consensual) can serve to create an offensive work environment and is thus prohibited.

Any individual who has reason to believe that he or she is the victim of impermissible harassment should promptly report the facts of the incident to his or her Supervisor or to the Corporate Personnel Department. A prompt investigation will be conducted, and the employer will take appropriate corrective action where it is warranted.

Anyone engaging in any impermissible harassment will be subject to disciplinary action, including possible discharge.

If you should have any questions regarding this policy, please contact your Plant Manager or Corporate Personnel Department.

STANDARD DISCIPLINARY PROCEDURES

These disciplinary procedures apply only to seniority employees.[2] Introductory employees are subject to possible dismissal for the first infraction of any of the aforementioned rules. A verbal warning may or may not precede the following steps:

1. First Written Warning

2. Second Written Warning

3. Discharge.

Warnings over one year old will be dropped from the employee record in considering future discipline.

The purpose of this disciplinary procedure is to reform rather than reprimand or punish. We will make every effort to work with employees to help alleviate problems.

B

Defendant waived review of this issue by its actions at trial. Defendant never defended the progressive discipline claim on the basis that the handbook permitted immediate discharge at defendant's discretion. Defendant's pretrial motion for summary disposition sought dismissal of this count on the basis that defendant had, in fact, complied with the progressive discipline provision and that the instant incident was plaintiff's third offense.[3] Nor was the issue identified in the joint pre-trial order. Defense counsel stated in opening statement that plaintiff's "termination was entirely consistent with Letica Corporation's progressive discipline policy," and that before being terminated for sexual harassment plaintiff "received the three written warnings that he was allowed under Letica's personnel policies, his misconduct continued, and his employment was terminated for that reason." In seeking a directed verdict, defense counsel argued, after addressing the other counts:

> And finally there's the issue as to whether or not the defendant corporation afforded Mr. Jesso the progressive discipline that's provided for in the Letica Corporation employee handbook. In that regard the testimony was clear Mr. Letica (sic) - - I

> mean, Mr. Jesso was afforded progressive discipline. He received a first warning, he received another warning, he received another warning. Now, it got to the point where he had received three written warnings, and it was at that point in time that his employment was terminated.

Defense counsel continued in that vein in closing argument:

> . . . the defendant in this case asserts that it had a standard disciplinary procedure, which is in the binder that you have in front of you, and that standard disciplinary procedure provides for the termination of an employee who receives three written warnings. Plaintiff received four. It was as a result of those written warnings that the plaintiff received that his employment was terminated.
>
> * * *
>
> . . . . Letica Corporation's policies provide for termination in the event that an employee receives three written warnings. *The policy is stated on Page 18. If you read along with me, you'll see what it says. "Standard disciplinary procedures: First written warning, second written warning, discharge."*[4] . . . . [Emphasis added.]

Further, and significantly, defense counsel stipulated at trial that the court would instruct the jury that defendant could only discharge plaintiff "with good cause and in accordance with its standard disciplinary procedures." Although defendant now denies entering into such a stipulation, and seeks to characterize the stipulation as simply a concession that defendant discharges employees in accordance with its "stated disciplinary procedures," meaning simply the totality of the provisions set forth in the various provisions of the Employee Handbook, the stipulated instruction referred to the "standard disciplinary procedures," which is the heading of the section regarding progressive discipline.[5]

Thus, the issue now raised on appeal, and the case law submitted in support, was first presented in defendant's motion for judgment notwithstanding the verdict, filed by substitute counsel. A party may not take a position in the trial court and later seek redress in an appellate court that is based on a contrary position. *Living Alternatives v DMH*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Having tried the case on the basis that it complied with the progressive disciplinary procedures set forth in the handbook, and having stipulated to an instruction recognizing the applicability of the procedures, defendant cannot now claim that the procedures were inapplicable, that the jury erred in concluding otherwise, and that the court should have granted post-trial relief inconsistent with the position defendant took at trial.[6]

II

Defendant next argues that the trial court erred by denying its motion for remittitur of the $15,000 award for future damages, because plaintiff testified that for approximately one year before trial he had been earning a higher salary than when discharged. Defendant argues that from the moment

plaintiff's wage rate in his new job exceeded his wage rate at the time of his discharge, he no longer suffered damages. We disagree.

We review a trial court's ruling on a motion for remittitur for abuse of discretion. *Carpenter v Consumers Power*, 230 Mich App 547, 562; 584 NW2d 375 (1998). On a motion for remittitur, the trial court must determine whether the jury's award is supported by the evidence. *Id.*

The only Michigan decision defendant cites in support of its argument, *Morris v Clawson Tank Co*, 221 Mich App 280; 561 NW2d 469 (1997), rev'd 459 Mich 256 (1998), was reversed by the Supreme Court after defendant filed its appellate reply brief in the instant case. The Supreme Court reinstated the award of front pay to the plaintiff who, several years after termination of his employment, secured employment at a wage exceeding his wage at discharge:

> The Court of Appeals stated that "the trial court's award of front pay for the period after February 1993, when plaintiff obtained like employment, was clearly erroneous because plaintiff incurred no damages after that time." 221 Mich App 291. No further support is given for this statement, despite the trial court's specific finding on the basis of evidence in the record that the plaintiff's front-pay damages amount to $75,814. The trial judge, in making this ruling, had the benefit of expert testimony and the reports of those experts. The Court of Appeals is obligated to respect this finding unless it is determined to be clearly erroneous. MCR 2.613(C). There must be some reasoning to support such a determination.
>
> The amount of the circuit court's award of front pay to the plaintiff was fully supported by the record and well within its discretionary authority to grant. The Court of Appeals erred in reversing the front-pay award on this basis. . . . [*Morris, supra* 459 Mich at 277.]

Under *Morris*, defendant's argument is without merit.

Future damages are permissible in a wrongful discharge case. *Ritchie v Michigan Consolidated Gas Co*, 163 Mich App 358, 374; 413 NW2d 796 (1987), appeal after remand 176 Mich App 323; 439 NW2d 706 (1989); *Renny v Port Huron Hosp*, 427 Mich 415, 438-439, n 18; 398 NW2d 327 (1986). Inflation may be factored into determinations of front-pay, *Kovacs v Chesapeake & Ohio Railway Co*, 426 Mich 647, 651; 397 NW2d 169 (1986), and possible bonuses and raises may be taken into consideration if there is evidence to support them. *Foehr v Republic Auto*, 212 Mich App 663, 667; 538 NW2d 420 (1995).

Regarding inflation, defendant agreed to jury instruction SJI2d 53.06, which provides that "[i]f you decide that the plaintiff will sustain damages in the future, you may consider the effect of inflation in determining the damages to be awarded for future losses." There was undisputed evidence at trial that plaintiff had consistently received pay raises and been promoted during his years with defendant. Defendant's employee handbook expressed defendant's policy of maintaining competitive wages with the industry and reviewing wage rates at least twice a year. Hence, there was ample evidence from

which the jury could have imputed lost raises, and could reasonably have concluded that had plaintiff not been discharged he would have received pay increases. The award of future damages was not greater than the highest amount the evidence would support. MCR 2.611(E)(1); *Carpenter, supra* at 562-563. We find no error.

III

Defendant last argues that the trial court abused its discretion by awarding an attorney fee that was unsupported by the evidence. We disagree.

Defendant rejected the mediation award and was thus liable for actual costs, including "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation." MCR 2.403(O)(6)(b). There is no precise formula for computing the reasonableness of an attorney's fee, but the factors to be considered are

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; 3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982), quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973).]

The trial court is not limited to these factors, and need not detail its findings as to each specific factor considered. *Wood, supra* at 588.

The record indicates that plaintiff's counsel submitted detailed contemporaneous records of the time she and another attorney, Ms. Miller, worked on the case. At a hearing on December 3, 1997, defense counsel agreed that plaintiff was entitled to costs and requested an evidentiary hearing, to which the trial court agreed. Before adjourning, the trial court determined that $125 was a reasonable hourly fee, over defense counsel's objection that "[w]e consider that to be unreasonable, given the complexity of the case." The court responded:

> THE COURT: I don't. I consider it extremely reasonable, and, perhaps, less than, given the complexity of the case. All right? So you can be clear on that one.

The trial court suggested that counsel go over the time records, be specific about objections, and be prepared to take proofs at the evidentiary hearing. A week later, at the December 10, 1997, evidentiary hearing, defense counsel stated that she had reviewed the detailed contemporaneous records plaintiff's counsel had submitted setting forth the time that she and Ms. Miller, an attorney formerly at plaintiff's counsel's firm, had spent working on the case. Plaintiff's counsel also supported her request for attorney fees with copies of correspondence and motions. Defense counsel stated that the time entries submitted represented time expended on plaintiff's file subsequent to mediation and were thus proper, and did not dispute that plaintiff's trial counsel could attest to the accuracy of her records.[7] At the December 10 hearing, defense counsel expressed reservation that the hourly fee of $125 was being

applied "across the board, irrespective of each attorney's relative skill or abilities," however, counsel did not insist on an evidentiary hearing on that issue:

> MS. VANZANTEN [*defendant's counsel*]: Just one thing I want to clarify and get on this portion of the record for appellate purposes, your Honor. The $125.00 per hour rate which has been applied across the board for all the time that has been spent irrespective of each attorney's relative skill or abilities is that that is being approved by the Court –
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> THE COURT: I am satisfied with your ability, absolutely satisfied, more. To be very candid at lunch today with my brother attorneys I mentioned that I had said as far as I was concerned $125.00 is extremely reasonable. I had two attorneys say they thought $180.00 across the board is the standard going rate. I would never, because I have such tremendous respect for your group, I was wondering how many attorneys you have in that firm that you bill out at $125.00 an hour. I'll bet you're getting probably $50.00 an hour right now. I'm teasing you, because as I say, I have a great deal of respect for you.
>
> This has become a personal vendetta, I really feel that way. And if I have to pursue it I am going to bring her [defendant's corporate counsel] here and tell her what I think. Do you understand what I'm saying? Because she is not just a client she is a counsel. So unless you plan to cross-examine you want to go ahead and get full testimony at which time I order additional costs, and then I would suggest that I approve these, the documentation is there. [sic] it goes up on appeal and with your concept that you feel that maybe [sic] over, you can always scream that they spent too much time on it.
>
> The time documentation is here and all I would be look[ing] at is did you do the work. Nothing appears to me in just a cursory examination, and I did not go over item by item, but there aren't that many pages, there are four pages. And it doesn't seem in reading it that anything here is exorbitant. I see terms of six minutes – I've seen in a lot of firms, I think your office does it. You don't bill in six minute increments, don't you do fifteen minute increments?
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> MS. VANZANTEN: It depends on the case.
>
> THE COURT: The Court teaches law office economics and management and I keep up on bill[ing] practices. This seems a very gentle gesture on the part of the Plaintiff's counsel, nothing exorbitant. Take it on that name, whatever you want to do. If you do proceed, you have a co-counsel here.
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> * * *
>
> THE COURT: . . . . I'll keep these and I am going to order it absences [sic] stringent objection.

MS. GAFKAY [*plaintiff's counsel*]: Just for the record, are you ordering the $26,100.42[?]

THE COURT: I am ordering your amount requested in full at the rate of $125.00.

* * *

THE COURT: If there is an error of law I am always happy to listen.

The record supports that the trial court considered a number of the *Wood* factors, including plaintiff's counsel's experience, skill, the time and labor involved, and the difficulty of the case. The amount of time spent was documented and not disputed. The court had observed the proceedings, and determined that an across the board fee of $125 was reasonable. In light of defense counsel's failure to insist that the hearing be continued or to articulate any further basis for objection, we conclude that the trial court's finding that $125 was a reasonable hourly fee was not an abuse of discretion.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White

[1] Plaintiff's three-count complaint asserted claims for wrongful discharge in violation of a just cause contract, wrongful discharge in violation of progressive disciplinary procedures, and wrongful discharge in retaliation for plaintiff's opposing racial discrimination and harassment. The jury found for defendant on the first and third claims, and for plaintiff on the progressive discipline claim.

[2] It is undisputed that plaintiff was a seniority employee.

[3] This argument was *not* presented in the alternative; i.e. the motion did not assert that the progressive disciplinary procedures did not apply, but, if they did, they were complied with. Defendant did not argue at any time before verdict that the progressive disciplinary prodecures did not apply to plaintiff's alleged conduct.

[4] Plaintiff countered this defense on the basis that the policy applied to each single type of infraction. A former employee of defendant testified at trial that he worked with plaintiff in the maintenance department, they both had the same supervisor, and that the supervisor told him that for any single type of infraction an employee would be given three written warnings before termination could result. He testified that, usually, the first warning would be verbal. Plaintiff testified at trial that when he interviewed with defendant, the interviewer told him that defendant's disciplinary procedure was that an employee had to have three write-ups on the same conduct in order to be terminated. Plaintiff testified on redirect that the last written warning he received prior to being terminated on August 24, 1994 stated that it was a "First

written warning," and that he had to receive two written warnings under defendant's disciplinary policy before being terminated.

Plaintiff also asserted that the Sexual Harassment policy contains a provision requiring a prompt investigation and that no such investigation was conducted. There was evidence that the alleged incidents of harassment were brought to defendant's attention months after they allegedly occurred, and it was undisputed that plaintiff was not interviewed in the course of defendant's alleged investigation. Plaintiff raised the questions whether defendant conducted an investigation in accordance with the sexual harassment policy and whether defendant adhered to the employee handbook's assurances of fair treatment of its employees in conducting any investigation.

[5] The following colloquy took place during the court's discussion of jury instructions with counsel:

> THE COURT: Now, you had, you had one called "Stipulation regarding admission of good cause and *progressive* discipline by defendant." Where would you have wanted that included? And have you agreed on this? This is the one that you haven't agreed on?
>
> MS. GAFKAY [*plaintiff's counsel*]: That, we have –
>
> MR. MARSHALL [*defendant's counsel*]: We did agree on it, Judge.
>
> THE COURT: You did. And where would you want that inserted?
>
> MS. GAFKAY: I would suggest that we put that right before you read the 110.10.
>
> THE COURT: It would be right after 110.01 [sic]?
>
> MS. GAFKAY: Yes.
>
> THE COURT: and if I – let me read it and make sure I understand it, out loud.
>
> MS. GAFKAY: Okay.
>
> * * *
>
> THE COURT: . . . . Anyway, Letica Corporation discharges only for – now, I don't think you intended this. You want to look at that sentence there after the word "only"?
>
> MS. GAFKAY: ". . .only for good cause."
>
> THE COURT: Yeah. You've got "god" cause.
>
> MS. GAFKAY: Okay. . . . I'll make that change. Letica Corporation –

> MR. MARSHALL: There should also be a change in the stipulation. It should – the words "admission of" should come out.
>
> THE COURT: I'm not going to read that. I'm just going to start off, "Letica Corporation discharges employees only for good cause and in accordance with its stated disciplinary action procedure. Therefore, under Michigan law, Defendant Letica Corporation could only discharge Glenn Jesso with good cause and the –"
>
> MR. MARSHALL: ". . . and in accordance with . . . "
>
> THE COURT: I got to get the "the" scratched out "—and in accordance with its *standard disciplinary procedures*." You both agree to that? Okay. [Emphasis added.]

The court instructed the jury, in pertinent part:

> And now I'm going to instruct you on the law that's applicable to each claim.
>
> Now, in this particular case, Letica Corporation discharges employees only for good cause and in accordance with its stated disciplinary procedure. Therefore, under Michigan law, the defendant, Letica Corporation, could only discharge Glenn Jesso with good cause and in accordance with its *standard disciplinary procedures.* [Emphasis added.]

[6] We recognize that the court rules no longer require that an issue be raised in a motion for directed verdict to preserve the issue for judgment notwithstanding the verdict and appeal. See discussion in *Napier v Jacobs*, 429 Mich 222, 232 n 1; 414 NW2d 862 (1987). However, the elimination of this requirement does not undermine the rule that a party may not take a position at trial and then seek redress on appeal based on a contrary position.

[7] Trial counsel's time records stated that she spent 180 hours and twenty three minutes on the case, and Ms. Miller's time records stated that she spent twenty eight hours on the case. Attorney Glenn Lenhoff's time amounted to thirty minutes.