

STATE OF MICHIGAN
COURT OF APPEALS

MARCIA BAUER,

Plaintiff-Appellant,

v

CITY OF ANN ARBOR,

Defendant-Appellee.

UNPUBLISHED

September 26, 2000

No. 202937

Washtenaw Circuit Court

LC No. 95-002574-NZ

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

In this retaliatory discharge case, plaintiff appeals as of right from an order of judgment on the jury's verdict of no cause of action. We affirm.

In February 1993, plaintiff was hired by defendant as a clerk typist for the Ann Arbor Waste Water Treatment Plant. Her duties included general secretarial work. On December 16, 1993, the morning after plaintiff had typed a large batch of forms at work, she reported pain in both arms, from her elbows to her wrists and hands, weakness, and needle-like tingling. Plaintiff completed an employee accident report and, at the urging of defendant's risk management agent, plaintiff sought immediate medical care. Plaintiff's treating physician diagnosed her with tendinitis and ulnar nerve neuropathy and imposed several work restrictions, limiting the amount of typing, lifting, gripping, pushing and writing plaintiff should perform. Defendant accommodated plaintiff's work restrictions and paid the expenses associated with her medical treatment. When plaintiff's injury did not improve after five months, defendant's risk management office began to investigate her injury claim. After considering the statements of plaintiff's coworkers, supervisors, the opinions of two physicians, and after viewing a surveillance video that depicted plaintiff carrying several items and doing gardening work, defendant's representatives concluded that plaintiff's conduct was contrary to her claimed work restrictions. As a result, on June 28, 1994, plaintiff's employment was terminated for fraudulently misrepresenting her need for the several work restrictions. Plaintiff filed the present suit, claiming that she was discharged because she exercised her rights under the Worker's Disability Compensation Act (WDCA). See

MCL 418.301(11); MSA 17.237(301)(11).¹ The case went to trial and the jury returned a verdict of no cause.

On appeal, plaintiff argues that the trial court abused its discretion in allowing defendant to introduce irrelevant and prejudicial evidence at trial that rendered it impossible for the jury to fairly consider plaintiff's claims. We disagree.

We review a trial court's decisions to admit or to exclude evidence for an abuse of discretion. *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992); *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

Plaintiff generally contends that the trial court erred in allowing defendant to present argument and to elicit testimony suggesting she did not actually suffer a disability when she had been awarded worker's compensation benefits pursuant to her post-termination petition for benefits based on an existing disability. Plaintiff claims defendant's focus on the validity of her injury confused the jury as to the issues to be tried. A cause of action in tort arises when an employee is discharged in retaliation for filing a complaint or otherwise exercising her rights under the WDCA. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 245-249; 531 NW2d 144 (1995). To establish a prima facie case of retaliatory discharge, the plaintiff must prove the following elements: (1) the plaintiff was engaged in a protected activity; (2) the defendant knew of the protected activity; (3) the defendant acted adversely to the plaintiff; and (4) the protected activity caused the adverse employment activity. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 818; 584 NW2d 589 (1998), reversed in part on other grounds, 233 Mich App 560, 561; 593 NW2d 699 (1999). The fourth element requires a plaintiff to prove that she was discharged because she exercised her rights under the WDCA and this activity was a significant factor in the employer's decision to discharge her. *Id.* In the present case, only that fourth element was disputed at trial.

At all times below, defendant asserted the affirmative defense of fraud and argued that its decision to discharge plaintiff was based on its representatives' honest belief that plaintiff fraudulently misrepresented her necessary work restrictions, not plaintiff's exercise of her rights under the WDCA. Given that the main issue at trial concerned the reason plaintiff was discharged, argument and evidence

¹ Apparently, plaintiff relies on defendant's payment of her medical expenses in connection with WDCA requirements as the basis for the present suit, see MCL 418.315; MSA 17.237(315). We note that plaintiff filed a post-termination petition for worker's compensation benefits, see MCL 418.301(5)(e); MSA 17.237(301)(5)(e); however, because that petition was filed after plaintiff was terminated, it cannot serve as the basis for plaintiff's claim that she was discharged in retaliation for exercising her rights under the WDCA. We also note that plaintiff filed a post-termination grievance with her union, claiming wrongful discharge.

supporting defendant's representatives' belief that plaintiff made misrepresentations regarding the extent of her injuries were relevant to whether plaintiff's conduct justified her termination.²

Plaintiff specifically challenges the trial court's introduction of testimony from two of her coworkers on the basis that the testimony was irrelevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In general, all relevant evidence is admissible at trial, while irrelevant evidence is inadmissible. MRE 402; *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). "Unfair prejudice" does not occur simply because evidence is "damaging." Any relevant evidence will be damaging to some extent. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995). Rather, unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.*

Plaintiff contends that coworker, Arthita Smith's, and Ann Arbor worker's compensation specialist, Alice Bridges', testimony regarding circumstances prior to her injury was irrelevant. Evidence at trial suggested tendinitis and ulnar nerve neuropathy are "cumulative trauma disorders" (i.e., conditions that develop gradually with noticeable symptoms, as opposed to developing suddenly without symptoms). Therefore, Smith's testimony that plaintiff frequently knitted until the time of her claimed injury and Bridges' testimony regarding ergonomic improvements to plaintiff's work station prior to her injury was probative of whether the circumstances were such that defendant's representatives could conclude plaintiff had misrepresented the nature of her injury and necessary work restraints.

Plaintiff also contends that the trial court erroneously admitted Smith's testimony regarding a wreath that plaintiff made for her and erroneously admitted the wreath itself. Smith testified that plaintiff

² We note that principles of res judicata did not bar the jury's determination of the specific issue at trial. Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Huggett v DNR*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998); *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). Here, the issue before the worker's compensation magistrate on plaintiff's post-termination petition for benefits was whether plaintiff suffered a compensable injury; specifically, whether she suffered an injury that arose out of the course of her employment and resulted in a disability. The issue during arbitration of plaintiff's union grievance was whether defendant had just cause to fire plaintiff. The specific issue at trial, whether defendant terminated plaintiff in retaliation for plaintiff's exercise of her rights under the WDCA, was wholly separate from those prior adjudicated issues and could not be sustained by the same facts or evidence presented in the prior adjudication. To sustain her retaliatory discharge cause of action, plaintiff was required to present evidence that defendant terminated her employment because she exercised her rights under the WDCA, evidence that was not essential to recovery of worker's compensation benefits or essential to the arbitration of her union grievance.

gave her the wreath for her birthday in October 1993, but that she did not know when plaintiff made the wreath. Because the wreath could have been made a substantial number of months or years prior to December 1993, the wreath was irrelevant to the issues at trial. However, “[a]n error in the admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice.” *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997). The trial court’s error in regard to the wreath was harmless because other admissible evidence, such as the surveillance video depicting plaintiff carrying items including bags of dirt and flats of plants and gardening around her home in late May 1994 and testimony that plaintiff drove a stick-shift car and used a stapler on several occasions after her injury, allowed the jurors to decide plaintiff’s case. See *id.* Therefore, plaintiff has not demonstrated that Smith’s testimony regarding the wreath and introduction of the wreath itself affected a substantial right. MRE 103(a); *Williams v Coleman*, 194 Mich App 606, 621; 488 NW2d 464 (1992).

Insofar as plaintiff argues that medical records were erroneously admitted, that claim likewise lacks merit. The medical records were relevant to establishing the extent of plaintiff’s claimed injuries and, therefore, were relevant to deciding whether evidence of plaintiff’s conduct witnessed by coworkers and depicted on videotape gave defendant’s representatives the belief that plaintiff misrepresented the extent of her injuries and necessary work restrictions. Last, assuming arguendo that the trial court abused its discretion in allowing Bridges to testify that, of approximately six-hundred worker’s compensation injury reports filed with the City in 1993 and 1994, no one other than plaintiff claimed the City retaliated against her for filing such a report, the admission of this testimony did not result in unfair prejudice in light of the other evidence supporting defendant’s defense.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra