

STATE OF MICHIGAN
COURT OF APPEALS

HENRIETTA BRINEY,

Plaintiff-Appellee,

v

KELSEY-HAYES and VARITY
CORPORATION,

Defendants-Appellants.

UNPUBLISHED

August 21, 2001

No. 218621

Wayne Circuit Court

LC No. 96-643009-CK

Before: O'Connell, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendants, Kelsey-Hayes and Varity Corporation (Kelsey-Hayes),¹ appeal as of right the judgment, following a jury trial, entered in favor of plaintiff, Henrietta Briney,² a former employee of Kelsey-Hayes, in this class action lawsuit alleging breach of contract based on defendant's change of vacation policy that resulted in the loss of accrued vacation time for employees employed in 1994. We affirm.

Before 1994, Kelsey-Hayes had an accrual vacation policy whereby an employee worked one year and earned vacation to be used in the following year. During the first year of employment, an employee did not have any accrued vacation time and, therefore, could not take a vacation. On December 12, 1994, Kelsey-Hayes announced a change in the company's vacation policy effective January 1, 1995. The company's memo, entitled "Salaried Vacation Policy" stated:

Please be advised that the current practice of vacation accruals will be eliminated at the conclusion of the current year. Effective with the 1995 vacation year (January 1st thru December 31st), vacations will now be earned and taken in the same vacation year.

¹ Kelsey-Hayes became a subsidiary of Varity Corporation in 1992.

² The use of the singular "plaintiff" refers to Henrietta Briney on behalf of herself and all other similarly situated in this class action lawsuit.

Plaintiff, who began her employment with Kelsey-Hayes in 1983, filed suit against Kelsey-Hayes in October 1996 alleging that Kelsey-Hayes' change in the vacation policy breached a contract with plaintiff by depriving her of her 1994 accrued vacation time. She alleged that when the "earn as you go" policy began on January 1, 1995, she never received her accrued vacation time earned in 1994. Plaintiff moved for and was granted certification of a class action lawsuit on behalf of herself and others similarly situated on April 18, 1997. John Frait, a salaried Kelsey-Hayes employee, was chosen to represent the current salaried employees.

Trial commenced on October 6, 1998. James Johnson, an employee of Kelsey-Hayes from April 1981 through October 1995 testified that as of December 31, 1994, he had accrued 3-1/2 or 4 weeks of vacation. He indicated that in 1995 he earned vacation time that was required to be used in 1995. Thus, he lost the vacation time that he accrued in 1994 because he was not permitted to use it. He noted that the company's original vacation policy was that an employee would work without vacation the first year and take the vacation that was earned in the first year during the second year of employment, and so on.

John Frait, the class representative for the current employees, testified that he has been working for Kelsey-Hayes for twenty-seven years. He indicated that the company's vacation policy was that an employee accrued vacation in one year to be used in the next year. He indicated that under the former vacation policy, a box would appear on an employee's card in January showing the accrued vacation time from the past year that could be used in the present year. After the vacation policy was changed, the five weeks of accrued vacation that he had no longer showed up in the box. He indicated that he was not paid for his accrued vacation time, but that if he left his employment in 1995 he would have been paid. However, the new policy did not mention what would happen if an employee left his employment in a year other than 1995. He further indicated that, although the actual amount of vacation time that he is entitled to has not changed, that he does not know what happened to his "accrued vacation time." He inquired about the accrued vacation time, but was only told that the company "wasn't sure yet."

Plaintiff Henrietta Briney testified that she left her employment at Kelsey-Hayes on July 5, 1996. As of December 31, 1994, she had accrued 3.5 weeks of vacation. When the new vacation policy was implemented, she repeatedly inquired about her accrued vacation time. The company would respond that they "were looking into that." When plaintiff left her employment, she did not receive any payment for her time earned in 1994.

Raul Soto, Jr., the group manager of human resources for the technologies group at Kelsey-Hayes from April 1995 until August 1996, testified by deposition that he was in charge of informing the employees of the change in the vacation policy. He noted that the former vacation policy employed the "accrued vacation methodology." With the new vacation policy, special transition features applied during 1995 only. If employees left their employment during 1995, they would be paid for all of their 1994 accrued vacation. However, it was implicit in the vacation policy that time accrued in 1994 would be lost after 1995. Thus, an employee leaving Kelsey-Hayes after 1995 would not be paid for their accrued vacation time from 1994, but only for earned vacation time as of the date of their departure. In his personal opinion, the employees should have been paid for their accrued time or they should have been allowed to take the

vacation time because the vacation time was vested time under the former vacation policy. He testified that he received a bonus in 1995.

Following plaintiff's proofs, Kelsey-Hayes moved for a directed verdict, arguing that plaintiff failed to establish that any employee who left Kelsey-Hayes after 1995 lost any vacation time. The motion was denied.

Jill Wellman, the former director of human resources for Kelsey-Hayes who now owns a human resources consulting firm that does work for Kelsey-Hayes, testified that she was among the group members involved with the change in the vacation policy. She indicated that the objectives of the policy change were (1) to make the policy more uniform,³ (2) to make new employees eligible for vacation sooner, and (3) to further the financial objective of "freeing up" money for bonuses. To achieve this latter objective and "write down" the amount of accrued vacation in 1994, the company had to "say that they eliminated the accrued vacation and the employees could earn and take their vacation in the same year." Those employees who left the company in 1995 received payment for the time that "they had coming for the year." She contended that the change in the vacation policy was nothing more than an accounting change. She testified that her bonus in 1995, which was based on the calendar year 1994, was approximately \$30,000.

Joseph Ruffolo, vice president of employee relations from June 1981 until October 1996, testified that the 1995 vacation policy was implemented to "free money for bonuses" and not to take away anything from the employees. He indicated that when he left his employment with Kelsey-Hayes in 1996 he was not paid for the weeks he accrued in 1994. Rather, he was only paid up until the time he left – thus, 10/12 of his allotted time (he worked ten months in 1996).

On October 12, 1998, the jury returned a verdict in favor of plaintiff. The jury calculated damages for each individual class member based on their salary and vacation entitlement at the end of 1994. The original judgment was in the amount of \$395,462.07. However, at the hearing on the motion for entry of judgment, plaintiff agreed with Kelsey-Hayes that those employees who opted out of the class before September 30, 1998, should be excluded. Ultimately, a judgment in the amount of \$363,377.78 (\$362,711.50 damages plus \$666.28 costs) was entered. The trial court denied Kelsey-Hayes' motion for JNOV or new trial.

I

Kelsey-Hayes first argues that the a directed verdict or judgment notwithstanding the verdict should have been granted because plaintiff failed to present any evidence that employees had a contractual right to the vacation time accrued in 1995. In reviewing the trial court's ruling on a directed verdict and/or motion for judgment notwithstanding the verdict, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id.* at 643-644. A directed verdict

³ Some employees had negotiated vacation terms that were contrary to the vacation policy.

is appropriate only when no factual questions exist on which reasonable minds could differ. *Id.* at 644. Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted. *Wilkinson v Less*, 463 Mich 388, 391; 617 NW2d 305 (2000). Neither the trial court nor this Court may substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

Here, Kelsey-Hayes argues that it had the right to change the company's vacation policy and that the change of policy did not deprive any employee of a vested or accrued benefit. Kelsey-Hayes' argument is essentially premised on its assertion that each employee continued to receive the amount of vacation to which they were entitled under the former policy. That is, if an employee was entitled to three weeks of vacation under the former policy, then they were given three weeks of vacation under the new policy. However, Kelsey-Hayes' argument ignores the fact that under the former policy, employees worked a full year without the right to take a vacation, and during that year the employees "earned," or "accrued" vacation to be used in the subsequent year. Thus, at the end of any given year, an employee had already earned the vacation time that they would utilize in the next year.

The former written vacation policy provided that "Each January 1, you will be credited with the vacation earned in the prior calendar year." The revised vacation policy provided that:

Effective with the 1995 vacation year (January 1 thru December 31), vacation will now be earned and taken in the same year.

. . . Vacation time will be earned on a pro-rata basis during the vacation year (e.g., an employee with three weeks vacation for the entire year will earn 1.25 days vacation for each full month worked during the vacation year). The vacation earned in a year must be taken in the same year.

The question is whether plaintiff can maintain claims for breach of contract where Kelsey-Hayes unilaterally altered the vacation policy. There appears to be no dispute that an employer can unilaterally change a written policy if it gives affected employees reasonable notice of the policy change. *In re Certified Question, Bankey v Storer Broadcasting Co*, 432 Mich 438, 441; 443 NW2d 112 (1989). However, written policy statements can give rise to contractual obligations. See, e.g., *Couch v Difco Laboratories, Inc*, 44 Mich App 44; 205 NW2d 24 (1972) (by establishing a profit sharing plan, the company offered to make certain payments for the benefit of its salaried employees who continued to render services to the company; the employee, by performing the desired services, accepted that offer and, therefore, has enforceable rights under the plan). Indeed, courts have found the existence of contract rights in employers' policies when the policies created contract rights regarding deferred compensation. *Id.*

Here, it is clear from the language of the vacation policy that the change in vacation policy affected vested rights already accrued. Hence, the change in the vacation policy may give rise to a cause of action in contract for those employees who had accrued vacation time in 1994 to be used in 1995. *In re Certified Question, supra* at 457, n 17.

II

Kelsey-Hayes next argues that the trial court should have granted its motion for summary disposition with respect to the current employees because the current employees have suffered no damage and, therefore, had no standing to sue. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776, reh den 459 Mich 1204 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112; 617 NW2d 725 (2000).

In response to Kelsey-Hayes' motion for summary disposition, plaintiff attached Frait's deposition testimony wherein he testified that employees "lost" their accrued vacation and that "there was no compensation whatsoever." He also testified that in his conversations with current employees, "the concern is that they have lost compensation. They have accrued a certain amount of compensation which suddenly has evaporated." Viewed in a light most favorable to plaintiff, the evidence established that the current employees suffered damages and, therefore, had standing to join the class action lawsuit. Hence, the trial court properly denied Kelsey-Hayes motion for summary disposition.

III

Next, Kelsey-Hayes maintains that the trial court erred by instructing the jury on the elements of a contract cause of action, and by failing to give Kelsey-Hayes' request for a supplemental jury instruction. Claims of instructional error are reviewed de novo on appeal. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

As discussed above, a written policy statement can form the basis of a contract in some cases, such as here where it is alleged that the policy resulted in an employee accruing benefits. Hence it was for the jury to decide whether the former vacation policy constituted a contract with regard to accrued vacation time. Thus, the trial court properly instructed the jury on the elements of a contract cause of action.

The trial court properly rejected Kelsey-Hayes' request for a supplemental jury instruction. The supplemental jury instruction concerned Kelsey-Hayes' right to change its policies. However, Kelsey-Hayes' right to change its policies was not at issue in this case. At issue in this case is whether the change in vacation policy deprived employees of an accrued benefit. The instruction was not applicable to the present case and would add nothing to an otherwise balanced and fair jury charge and would not enhance the ability of the jury to decide the case intelligently, fairly, and impartially. *Mull v Equitable Life Assurance Society*, 196 Mich App 411, 422-423; 493 NW2d 447 (1992), aff'd 444 Mich 508; 510 NW2d 184, amended 444 Mich 1239 (1994).

IV

Kelsey-Hayes raises several arguments regarding certification of the class and the proceedings with regard to certification of the class.

a

First, Kelsey-Hayes contends that the trial judge was biased because of a comment allegedly made at the settlement conference. Kelsey-Hayes has failed to overcome the heavy presumption of judicial impartiality. There is no record evidence of actual personal bias or prejudice on the part of the trial judge. *In re Hamlet (After Remand)*, 225 Mich App 505; 571 NW2d 750 (1997). Judge Sapala properly denied the disqualification motion.

b

Kelsey-Hayes asserts that the trial court improperly included in the class three former employees who allegedly failed to opt out of the class. The trial court made a factual finding that the employees timely opted in, and there is no evidence in the record to dispute the accuracy of the trial court's ruling. Hence, we cannot conclude that the trial court's factual finding is clearly erroneous.

Similarly, Kelsey-Hayes argues that four current employees whose opt-out responses were not timely received should have been dismissed from the class because they did not want to be included in the class. The trial court found that these employees did not timely opt out. Again, there is nothing in the record to dispute the accuracy of the trial court's ruling, and we cannot conclude that the trial court's factual finding is clearly erroneous.

Kelsey-Hayes also suggests that nine current employees who had negotiated their own vacation agreements should have been dismissed from the class. The trial court refused to dismiss these employees from the class because the failure to discover that these employees had negotiated their own vacation agreement was caused by Kelsey-Hayes' continued refusal to comply with the court's order to produce a list of all employees. Because the record is insufficient to support a finding that the trial court erred in its determination, we cannot conclude the trial court's ruling was erroneous.

c

Kelsey-Hayes raises two arguments regarding certification of the class. First, it contends that the threshold requirement that the proposed representative be a member of the class was not satisfied because neither class representative had a valid cause of action. Its argument is premised on its conclusion that every employee received a vacation and therefore no employee suffered any harm. This argument was addressed above, and we concluded that plaintiff presented sufficient evidence to submit the issue of whether the vacation policy constituted a contract with regard to vacation time already accrued. Hence, we reject this argument.

Kelsey-Hayes also contends that the case did not meet the standards for class certification. This Court will reverse an order granting certification of a class only upon a showing that the order is clearly erroneous. *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 556; 492 NW2d 246 (1992).

MCR 3.501 governs class actions. MCR 3.501(A)(1) provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members.
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
- (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenience administration of justice.

With regard to factor (a), the potential class consisted of over 1,000 former and current employees. Clearly, joinder of all of the members would have been impracticable.

With regard to factor (b), the questions to be decided were whether Kelsey-Hayes change in its vacation policy deprived employees who were employed in 1994 of earned or accrued vacation time to which they were entitled as of January 1, 1995, and, if so, how much compensation each individual employee was entitled to for the loss of the accrued vacation time. The formula to be used in calculating the value of any “lost” accrued vacation time was the same for every employee: Multiply their salary as of December 1994 by the amount of vacation time earned. Whether an employee was a former employee or a current employee was not relevant. These questions are common questions for all individuals in the class. Plaintiff demonstrated questions of law and fact common to the members of the class that predominate over any questions affecting individual class members.

With regard to factor (c), as noted above, the claims of the representatives are typical of the claims of the class.

With regard to factor (d), the class representatives were willing to assert and protect the interests of the current employees. Any contention to the contrary is not supported by the record.

With regard to factor (e), maintenance of the action as a class action promoted judicial economy and promoted the convenience administration of justice. Kelsey-Hayes’ contention that the class action resulted in “chaos and the inconvenient administration of justice” is misplaced, as the record reveals that any chaos involved in this case was caused, in large part by Kelsey-Hayes’ failure to abide by court orders. Indeed, the only chaos involved identification of the class members and the giving of notice, both of which were the responsibility of Kelsey-Hayes. We conclude that the trial court’s order certifying the class was not clearly erroneous.

Last, Kelsey-Hayes raises several arguments regarding administration of the class action. Kelsey-Hayes first argues that John Frait was an inadequate class representative for the current employees. However, Kelsey-Hayes has failed to demonstrate that Frait's representation was inadequate, or, more importantly, any harm resulting from Frait's representation.

Kelsey-Hayes next asserts that the size of the class was improperly enlarged as a result of the order giving former employees sixty days to "opt in," and giving current employees only thirty days to "opt out." It maintains that "it needs no elaboration that a shorter time period will result in fewer responses." However, Kelsey-Hayes has provided no evidence to support a finding that the thirty-day period for opting out of the class improperly enlarged the class. Kelsey-Hayes did not produce any documentary evidence to sustain a finding that current employees who wanted to opt out failed to do so because of an inadequate period of time in which to do so. Hence, Kelsey-Hayes failed to demonstrate that it was prejudiced by the trial court's actions.

Kelsey-Hayes also maintains that plaintiff's attorney became unfit to adequately represent the interests of the class when she sent solicitation letters to potential class members. Kelsey-Hayes contends that counsel's communications were "clearly designed to maximize the number of opt-ins, and thus, counsel's fees." Kelsey-Hayes does not cite any Michigan law in support of its argument that "where class counsel sends such communications she is unfit to adequately represent class members' interests," nor does it present any argument showing how this class was harmed by counsel's communications. Indeed, the trial court considered the communications helpful as explaining to class members the details of how fees get paid.

Lastly, Kelsey-Hayes argues that the trial court's refusal to adjourn trial deprived them of discovery. It argues that the "continued formation of the classes on the eve of trial prevented them from conducting discovery into the facts relevant to individual class members' claims (since the identity of all class members was still unknown)."

The ruling on a motion for a continuance is discretionary and is reviewed for an abuse of discretion. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993). A motion for adjournment must be based on good cause, and a court, in its discretion, may grant an adjournment to promote the cause of justice. *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991).

Here, Kelsey-Hayes moved for a continuance on the ground that it was not able to adequately conduct discovery before trial. However, this case was filed in October 1996 and did not proceed to trial until October 1998. During that time, Kelsey-Hayes was in possession of the names of all of its former and current employees. Hence, Kelsey-Hayes could have conducted discovery had it chose to do so. Further, it is unclear what evidence Kelsey-Hayes sought to discover from the individual class members. Under these circumstances, we cannot conclude the trial court erred by denying the motion to adjourn.

Affirmed.

/s/ E. Thomas Fitzgerald