STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. SZARENSKI,

Plaintiff-Appellant,

V

MICHIGAN CONSOLIDATED GAS COMPANY,

Defendant-Appellee,

and

MONTE SCOTT,

Defendant.

UNPUBLISHED
December 14, 2001

No. 224330
Emmet Circuit Court
LC No. 98-4958-CZ

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In this wrongful termination case, plaintiff John Szarenski appeals as of right the trial court order granting defendant Michigan Consolidated Gas Company summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

A. The Underlying Incident and Report

On Wednesday, July 22, 1998, plaintiff, Monte Scott, and Dan Gustman, all employees of defendant, were installing a gas main on Old Highway 31 between Petoskey and Charlevoix. To assist them in installing the gas main, the crew was using a "Ditch Witch."[1] While using the Ditch Witch, Gustman first noticed and then mentioned that one of its tires had a broken valve stem which could cause the tire to go flat. Plaintiff, who was wearing a hard hat, stooped down

[1] A "Ditch Witch" is a machine with a metal arm that penetrates the ground in order to cut through the soil and place piping, in this case, the gas main, at the desired depth.

to inspect the valve stem and while plaintiff was bent down, Scott allegedly "doinked" plaintiff's hard hat with his hard hat.[2] Plaintiff told Scott to "knock that s--- off" and informed him and complained of having a stiff neck and a headache.[3]

After plaintiff's initial inspection of the tire, Scott drove the Ditch Witch to an area about forty or fifty yards down the road to an open area more conducive to inspection and repair. Plaintiff again kneeled to look at the tire in order to determine what tools would be necessary to fix it. Gustman, who was supervising the crew, was kneeling to plaintiff's left and Scott was standing on plaintiff's right. Scott then walked behind plaintiff and Gustman and slapped the top of plaintiff's hard hat with his hand in an attempt to simulate the sound of a boat that was being driven on Lake Michigan at the time. Plaintiff, who is a martial arts expert, immediately responded to this slap by standing up and hitting Scott five or six times in the chest and by kicking Scott's thigh.[4] According to Gustman, the entire incident lasted only a few seconds and both Scott and plaintiff apologized to each other when it was over. However, plaintiff complained to both Scott and Gustman that he was in severe pain as a result of Scott's slap and that he had "never been hurt so bad in [his] entire life." Plaintiff also testified during his deposition that based on his martial arts training and the excruciating pain caused by Scott's slap, his actions were reflexive in nature and meant to push Scott away from him.

After the incident, Gustman sent Scott back to the garage to obtain the tools necessary to repair the broken valve stem. While there, Scott informed Pat Hoffman, a field supervisor, about the incident. According to Hoffman, Scott was stunned and shaken as a result of the incident. Scott also had minor bruises that required medical attention. Hoffman decided that Scott should not return to the worksite and that, pursuant to company policy, the incident should be investigated. Hoffman called plaintiff off the job-site and asked plaintiff what had happened. Plaintiff told Hoffman that he had "just snapped" and that Scott and Gustman would have a better recollection of what occurred. Plaintiff also informed Hoffman that he did not have any injuries nor did he believe Scott had injuries.

B. Plaintiff's Injury Report and Termination

The next day, plaintiff returned to work and experienced pain and blurred vision while operating a back hoe.[5] He mentioned this pain to Gustman, who suggested to plaintiff that he go get an adjustment from a chiropractor in town. Plaintiff agreed. After being adjusted, plaintiff

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[2] Scott denies this incident ever occurred.

[3] During his deposition, plaintiff admitted that he was "kind of kidding about" the headache and stiff neck; however, he maintained that he made clear to Scott to stop hitting him on top of the head.

[4] In addition to the claims against defendant, plaintiff's complaint alleged one count of assault and battery against Scott. In response, Scott filed a counter-claim for assault and battery against plaintiff. However, after both plaintiff's and Scott's summary disposition motions were denied, and defendant's motion was granted, plaintiff and Scott entered into a settlement agreement and dismissed their claims with prejudice; therefore, Scott is not a party to this appeal.

[5] Plaintiff also had had a difficult time sleeping the night after the incident.

returned to the job-site and served as the safety person.[6] Plaintiff paid for the chiropractor visit on the company credit card and turned in the receipt to Hoffman. Hoffman told plaintiff that this charge was an unauthorized one, for which plaintiff could be fired. Plaintiff immediately reimbursed the company for the charges and informed his union steward, Gerald Johnston, that he had to pay medical expenses out of his own pocket.

The following day plaintiff continued to serve as the safety person and again went to the chiropractor for treatment. The chiropractor sent him to defendant's named physician for worker compensation injuries, Dr. Lo, to obtain x-rays of his neck and back. These x-rays were again paid for by plaintiff. The chiropractor also informed plaintiff to file an injury report with defendant. Plaintiff then decided to fill out an injury report. Initially, plaintiff claimed in the report that he was injured while operating the back hoe on Thursday, July 23. However, plaintiff later amended the report to indicate that his pain began after being slapped by Scott. Plaintiff testified during his deposition that the reason he originally wrote that the injury was caused by operating the backhoe was that he was instructed to do so by Hoffman and his union steward, Gary Johnston, so that the injury would be considered a work-related injury and therefore compensable. Plaintiff testified that he felt coerced into filing a false injury report by Johnston and that Hoffman had explicitly told him to lie about how the injury occurred. Plaintiff further testified that after he amended the report, to include the incident with Scott, Hoffman became angry.[7]

At the conclusion of the company's investigation of the incident, plaintiff was discharged for violating defendant's policies regarding violence in the workplace, which specifically indicate that "violent behavior will be subject to discipline up to and including termination."[8] Scott's employment with defendant was not terminated as a result of the incident; instead, he received three points on his record for "inappropriate conduct."

D. The Arbitration

Following his termination, plaintiff filed a grievance with the union challenging his discharge. As permitted by the collective bargaining agreement, plaintiff voluntarily submitted his grievance to arbitration, where he was represented by the union.

In his grievance, plaintiff alleged that the stated reason for his discharge – violence in the workplace – was merely a pretext for retaliating against him for either filing a workers compensation injury report or for not filing a false injury report. The arbitrator denied plaintiff's grievance, specifically finding there was no evidence that the "hard hat-to-hard hat" contact between Scott and plaintiff ever occurred. The arbitrator found that instead both plaintiff and Scott had engaged in horseplay on the day in question, that as part of that horseplay plaintiff had physically touched Scott on two occasions, and that in each instance the touching had been

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[6] The safety person is responsible for directing traffic around the maintenance area.

[7] Hoffman and Johnston denied ever advising plaintiff to file a false injury report.

[8] These were the "Company Employment Standards" and the "Violence in the Workplace" policies.

laughed off by each as a joke. The arbitrator also determined that because of the previous horseplay, Scott's slap on the top of plaintiff's head was not unforeseeable and that plaintiff's angry reaction to the attempted joke could not have been anticipated by Scott. The arbitrator also rejected the contention that Hoffman or any other of defendant's employees encouraged plaintiff to file a false injury report. Instead, the arbitrator found that Hoffman and other employees of defendant properly attempted to determine whether plaintiff had been injured in the course of operating equipment or as a result of horseplay. Thus, the arbitrator "found no misconduct on the part of the employer."

Further, in rejecting plaintiff's contention that his martial arts training caused him to react instinctively to Scott's actions and that his discharge was inappropriate due to this response, the arbitrator stated:

> The grievant was guilty of substantial misconduct and his allegations in mitigation of his actions are rejected. There is no basis upon which the employer should be required to return him to the work place due to his flawed martial arts responsiveness and conditioning. Under all circumstances, the penalty of discharge was appropriate.

E. The Instant Lawsuit

In addition to arbitration,[9] on August 24, 1998, plaintiff filed the instant lawsuit against defendant, alleging that the stated reason for his discharge was mere pretext for his being unlawfully discharged for retaliation. Specifically plaintiff alleged that he was discharged for filing an injury report or for failing to file a false injury report. On August 9, 1999, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact regarding whether plaintiff's discharge was pretextual.[10] In its motion, defendant also pointed out that plaintiff had filed a grievance regarding his termination and that it was "presently proceeding through the grievance procedures established under the CBA."

On August 30, 1999, the trial court heard argument on defendant's motion. During that hearing, the trial court was advised of the arbitrator's decision on August 26, 1999 that plaintiff's discharge was appropriate. Based on this new information, the trial court asked the parties if the arbitration proceeding was "somehow binding as res judicata or collateral estoppel on the Court in this case?"[11] The Court completed the hearing, took the matter under advisement, and

[9] The record does not indicate whether the arbitration proceeding began before or after plaintiff filed the instant lawsuit. However, the record does indicate that the arbitrator reached his decision on August 26, 1999, four days before the trial court heard argument on the parties' summary disposition motions. Thus, it is undisputed that the arbitration decision was rendered before the trial court granted summary disposition to defendant on October 7, 1999.

[10] Plaintiff also filed a motion for summary disposition; however, that motion was denied and the denial of that motion has not been appealed.

[11] The record indicates that plaintiff's wrongful termination claim was also reviewed by the Michigan Employment Security Commission (MESC). According to defendant, the hearing referee determined that plaintiff had been justifiably terminated for misconduct. However, the (continued…)

directed the parties to file supplemental authority on the question of whether the arbitration proceeding constituted a "binding adjudication of the issue presented in this motion."

In response, both parties submitted supplemental briefs on the issue. Plaintiff argued that because the CBA did not include a provision indicating that an arbitration award could be enforced in court, the arbitrator's decision was not a final judgment and therefore collateral estoppel did not bar plaintiff's claim. Plaintiff also argued that in *Storey v Meijer, Inc*, 431 Mich 368; 429 NW2d 169 (1988), the Court determined that collateral estoppel did not apply to wrongful termination cases that were previously heard in an administrative proceeding and that the reasoning of the Court should be applied to arbitration proceedings as well.

In contrast, defendant argued that because plaintiff fully participated in the arbitration proceeding conducted pursuant to the CBA and since plaintiff raised the identical claims in that proceeding, collateral estoppel should apply. Defendant also pointed out that both plaintiff and defendant were given the opportunity to call and cross-examine witnesses.

On October 7, 1999, the trial court granted defendant's motion for summary disposition. In granting the motion, the trial court specifically found that plaintiff's allegations of pretext were "nothing more" than "mere speculation" and that plaintiff failed "to establish a genuine issue of material fact concerning the reason for his termination" and therefore defendant was entitled to summary disposition. The trial court also determined that because plaintiff had received union representation at the arbitration hearing and since the retaliation claim had been heard and determined by an independent arbitrator, collateral estoppel prevented plaintiff from relitigating the issue. Plaintiff now appeals.

II. Standard of Review

This Court's review of a trial court's grant of a summary disposition motion pursuant to MCR 2.116(C)(10) is de novo. *Dressel v Ameribank*, 247 Mich App 133, 136; ___ NW2d ___ (2001), citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under (C)(10), we consider "the pleadings, affidavits, depositions, admissions, and any other documentary evidence in a light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that would preclude judgment for the moving party as a matter of law." *GC Timmis v Guardian Alarm*, 247 Mich App 247, 252; ___ NW2d ___ (2001), citing *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

In addition, whether collateral estoppel bars a particular claim is a question of law that we review de novo. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000), citing *Pierson Sand & Gravel, Inc v Keller Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1993). If collateral estoppel applies, then summary disposition is appropriate

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(…continued)

record does not contain a copy of the MESC opinion and therefore cannot be reviewed. In any event, we note that the trial court ruled that the MESC's factual determinations and conclusions were not binding on the Court, see *Storey v Meijer*, 431 Mich 368, 372-373; 429 NW2d 169 (1988), and this ruling has not been appealed.

pursuant to MCR 2.116(C)(7).[12] See *id*. at 36 n 5, quoting *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Further, in considering whether summary disposition is appropriate under MCR (C)(7), the Court is to view all the documentary evidence in the light most favorable to the nonmoving party in order to determine whether the moving party is entitled to judgment as a matter of law. *Id*.

III. Analysis

On appeal, plaintiff contends that the trial court erred by finding that there was no genuine issue of material fact on plaintiff's claim that the stated reasons for his termination were a pretext for retaliation. Plaintiff also contends that the trial court erred by finding that the doctrine of collateral estoppel barred plaintiff's retaliation claim. We will first address plaintiff's challenge regarding the trial court's reliance on collateral estoppel to grant summary disposition.

Generally, collateral precludes relitigation of an issue in a subsequent, different cause of action between the same parties, or their privies, if the prior proceeding (1) actually litigated and determined the issue and (2) entered a valid, final judgment. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001) and *Minicuci*, *supra* at 33. See also *Dearborn Heights School Dist No 7 v Wayne County MEA/NEA*, 233 Mich App 120, 125; 592 NW2d 408 (1998) ("Collateral estoppel bars relitigation of issues where the parties had a full and fair opportunity to litigate those issues in an earlier action.") In addition, for collateral estoppel to apply, the basis of the previous judgment must be "clearly, definitely, and unequivocally ascertained." *Ditmore*, *supra* at 578, citing *People v Gates*, 434 Mich 146, 158; 452 NW2d 627 (1990). Further, the principle of collateral estoppel applies to factual determinations made during a grievance hearings or arbitration proceedings. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995), citing *Fulghum v United Parcel Service, Inc*, 130 Mich App 375, 377; 343 NW2d 559 (1983) and *Lumbermen*'s *Mut Casualty Co v Bissell*, 220 Mich 352, 354; 190 NW2d 283 (1922); see *Cole v West Side Auto Employees Federal Credit Union*, 229 Mich App 639, 645; 583 NW2d 226 (1998) ("We hold that a discharged employee who alleges that he was wrongly discharged and who voluntarily submits to an arbitration procedure is barred in a lawsuit filed after the arbitration decision from seeking a factual finding different from that which was found in the arbitration decision.")

Here, the record clearly establishes that plaintiff voluntarily litigated the retaliation issue before the arbitrator and that the arbitrator determined that the claim of retaliation was without merit. The record also establishes that the basis of the arbitrator's decision was clear, definite, and unequivocal. The arbitrator found that there was no evidence to support plaintiff's claim that his discharge was pretextual or that his discharge for violence was unreasonable. Thus, the elements of collateral estoppel are present in this case. Nevertheless, plaintiff contends that because he was not represented by an attorney in the arbitration proceeding, he was not given a full and fair opportunity to litigate his case before the arbitrator collateral estoppel should not apply. We reject this argument.

[12] Defendant's supplemental motion was brought and reviewed under MCR 2.116(C)(10), however, we may review the trial court's ruling under the proper subrule. *Limbach v Oakland County Bd of County Road Comm'ners*, 226 Mich App 389, 395 n 3, citing *Shirilla v Detroit*, 208 Mich App. 434, 437; 528 NW2d 763 (1995).

In *Dearborn Heights, supra*, this Court found that when a worker is represented by a union representative at an arbitration hearing, the worker's interests are adequately represented and collateral estoppel precludes relitigation of the same issues resolved in the arbitration. *Id*. at 127. See also *Becherer v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 43 F3d 1054, 1069-1070 (CA 6, 1995) and *Sunshine Anthracite Coal Co v Adkins*, 310 US 381; 60 S Ct 907; 84 L Ed 1263 (1940). In the instant case, the record clearly illustrates that plaintiff's interests were fully and fairly represented at the arbitration hearing by the union representative as well as himself. The arbitrator heard testimony from plaintiff, Scott, and Hoffman, and found that plaintiff acted violently against Scott; that plaintiff was justifiably discharged; and that there was no evidence that defendant retaliated against plaintiff. Plaintiff has not alleged any justifiable reason why the arbitrator's decision should not be enforced, see *Cole, supra* at 645 n 5, and since it is clear that the union fully represented plaintiff's interests before the arbitration proceeding, *Dearborn, supra* 127-128, it is evident that the arbitrator's findings compel the application of the doctrine of collateral estoppel in the instant case.[13] *Id*. at 128, citing *Ayers v Genter*, 367 Mich 675, 678-679; 117 NW2d 38 (1962). Accordingly, summary disposition of plaintiff's complaint was proper pursuant to MCR 2.116(C)(7). See *Minicuci, supra* at 36 n 5.

In light of our resolution of plaintiff's retaliation claim, we need not determine whether the trial court correctly determined that summary disposition was appropriate under MCR 2.116(C)(10). Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski

[13] Though the record is unclear on the precise nature of the arbitration hearing, even if the union was the charging party on plaintiff's behalf in a MERC hearing and plaintiff was not a party to the arbitration proceeding, collateral estoppel is still applicable because there is "substantial identity" between the plaintiff and the union on the retaliation issue. *Dearborn Heights, supra* at 127, citing *Becherer v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 43 F3d 1054, 1069-1070 (CA 6, 1995) and *Sunshine Anthracite Coal Co v Adkins*, 310 US 381; 60 S CT 907; 84 L Ed 1263 (1940).