STATE OF MICHIGAN

COURT OF APPEALS

MARK HEPHNER,

Plaintiff-Appellant,

v

M&S MANUFACTURING COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 13, 2005

No. 257122
Lenawee Circuit Court
LC No. 03-031215-NZ

MARK HEPHNER,

Plaintiff-Appellee,

v

M&S MANUFACTURING COMPANY,

Defendant-Appellant.

No. 258168
Lenawee Circuit Court
LC No. 03-031215-NZ

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

In No. 257122, plaintiff appeals as of right an order granting defendant's motion for summary disposition in this worker's compensation retaliation claim. In No. 258168, defendant appeals as of right an order denying in part its motion for offer of judgment sanctions. Because the trial court did not err when it granted defendant's motion for summary disposition, we affirm in part, and because the trial court did not provide a basis for its ruling that the "interest of justice" exception applied and simply denied defendant's motion for attorney fees, we remand the case to the trial court for determination of the applicability of the exception and to articulate the basis for its decision.

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition. This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Williams, supra* at 507, quoting *Maiden, supra* at 120.]

"When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Shepherd Montessori Center Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003).

The Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., requires that employers provide compensation to employees for injuries suffered in the course of an employee's employment, regardless of who is at fault. MCL 418.301(1); *Pro-Staffers, Inc v Premier Manufacturing Support Services, Inc*, 252 Mich App 318, 323; 651 NW2d 811 (2002). In return for this almost automatic liability, employees are limited in the amount of compensation they may collect, and, except in limited circumstances, may not bring a tort action against their employer. MCL 418.131; *Pro-Staffers, Inc, supra* at 323. The WDCA prevents retaliation against workers who file claims for worker's compensation benefits. MCL 418.301(11); *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). To establish retaliation, a plaintiff must show that: "(1) he asserted his right for worker's compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant's stated reason for its actions was a pretext, and (4) defendant's true reasons for its actions were in retaliation for plaintiff's having filed a worker's compensation claim." *Id.* at 470. The plaintiff bears the burden of showing that a causal connection existed between the filing of a worker's compensation claim and the adverse employment action. *Id.*

Plaintiff first argues that he was fired in retaliation for filing a worker's compensation claim because he was terminated after being on medical leave for 12 months. He claims that defendant's policy of terminating all employees after 12 months of continuous leave is a pretext for firing seriously injured workers. Defendant presented evidence that plaintiff was terminated pursuant to its neutral policy of automatically terminating all employees after they have been on continuous medical leave for 12 months, as provided in defendant's employee handbook. A written policy of an employer purporting to require discharge in a certain circumstance that is facially neutral can stand as a shield against claims of discriminatory discharge so long as the employer establishes that the policy is applied uniformly without exceptions. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 811; 584 NW2d 589 (1998), vacated and reinstated in pertinent part 233 Mich App 560 (1999).

Our review of the record reveals that plaintiff did not set forth any evidence of a causal connection between his filing for worker's compensation benefits and his termination. Also, there is no evidence that defendant retaliated against plaintiff for filing the worker's compensation claim because plaintiff has provided no evidence demonstrating that the claim played a role in defendant's decision to terminate plaintiff's employment. It is undisputed that defendant never objected to plaintiff's worker's compensation claim or tried to interfere with his

leave. Further, plaintiff's contention that the neutrally applied termination policy was a pretext was wholly unsubstantiated. Even when viewing the record in the light most favorable to plaintiff, there is no evidence linking plaintiff's worker's compensation claim with his termination, much less a question of fact concerning the issue. Therefore, summary disposition was proper.

Plaintiff also argues that a "do not rehire" note placed in his personnel file when defendant terminated him constituted retaliation for filing a worker's compensation claim. Plaintiff contends that testimony of Douglas McArthur, defendant's human resource manager, that defendant had not instituted action to terminate his employment before his injury, together with his good performance reviews, show that the "do not rehire" notice was retaliatory. McArthur testified that plaintiff's "do not rehire" note was the result of earlier issues concerning plaintiff's attitude. Defendant also presented the personnel file summary from another former employee, Jack Reeder, which did not contain a "do not rehire" notation in support of its position. Defendant terminated Reeder two days after plaintiff's termination also for failing to return after 12 months of continuous worker's compensation leave. After reviewing the record, we cannot conclude that plaintiff presented any evidence showing a causal connection between the adverse employment action and the worker's compensation claim. In any event, because plaintiff had not yet been released to work and in fact never asked to be rehired, the "do not rehire" note is not an injury in fact and is not ripe for review.

Finally, plaintiff asserts that he was penalized for filing a worker's compensation claim because he lost his seniority, his call back rights, his rehire rights, all of his benefits, and all contributions toward his pension and 401(k). McArthur testified that plaintiff lost these benefits because *all* employees not actively working are ineligible to receive these benefits. With respect to seniority, defendant's employee handbook provides that after employees have been on 12 months of continuous leave, their names would be removed from the seniority list. The handbook also provides:

> . . . [T]he Company will continue to pay for up to (24) months [sic], your hospitalization, medical, surgical, major medical, dental, vision, and life insurance premiums while you are receiving worker's compensation payments.
>
> The Company will continue to pay your premium for this coverage for a minimum of six (6) calendar months . . . with an additional month's premium for every year of service you have with the Company up to a maximum of 24 months.

The record reflects that defendant adhered to its written policies and applied them neutrally. As such, defendant's application of its neutral policy does not constitute retaliation for filing a worker's compensation claim. Also, we note that the WDCA takes into account fringe benefits in the calculation of worker's compensation benefits, MCL 418.371(2).[1] Thus by statutory

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[1] MCL 418.371(2) provides in pertinent part:

> Any fringe or other benefit which does not continue during the disability shall be included for purposes of determining an employee's average weekly wage to the

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mandate, any other benefits plaintiff received from defendant were included in the calculation of his worker's compensation benefits. Because plaintiff failed to establish a causal connection between his worker's compensation claim and any negative employment action, summary disposition was appropriate.

In No. 258168, defendant argues that the trial court abused its discretion when it denied in part its motion for attorney fees pursuant to MCR 2.405(D). This Court reviews a trial court's decision that the "interest of justice" exception to MCR 2.405(D)(3) applies to the facts of a specific case for an abuse of discretion. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 374; 689 NW2d 145 (2004).

MCR 2.405(D) provides, in pertinent part:

> If an offer [of judgment] is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.
>
> (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

The record reflects that plaintiff made an offer of judgment in the amount of $25,000, and defendant counter offered $250. Plaintiff rejected the counter offer. Ultimately, the verdict was more favorable to defendant than the average offer. In light of these facts, the issue is whether the trial court abused its discretion when it denied defendant's motion in the interest of justice.

"'[A]bsent unusual circumstances,' the 'interest of justice' does not preclude an award of attorney fees under MCR 2.405. . . . The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the 'interest of justice' exception to the point where it would render the rule ineffective." *Derderian, supra* at 390-391, quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996). "Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous "are too common" to constitute the

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> extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount which is greater than 2/3 of the state average weekly wage at the time of injury.

unusual circumstances encompassed by the 'interest of justice' exception." *Id*. at 391. However, if an offer is made out of "gamesmanship . . . , rather than a sincere effort at negotiation," or when litigation of the case affects the public interest, such as a case resolving an issue of first impression, the exception may be applicable. *Id.* Such circumstances also exist when the law is unsettled and substantial damages are at issue. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 473; 624 NW2d 427 (2000), citing *Luidens, supra* at 35-36.

The trial court must articulate the basis for its decision. *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444, 447-450; 702 NW2d 637 (2005), quoting *Luidens, supra* at 32. In the instant matter, the trial court granted defendant's motion for costs but denied recovery of attorney fees because "the matter was a close call and the matter will be taken up on appeal." The trial court did not articulate the basis for its decision. Because the trial court did not provide a basis for its ruling, we cannot determine whether the "interest of justice" exception to MCR 2.405(D)(3) applies to the facts of this case. As such, we remand the case to the trial court for determination of the applicability of the exception and to articulate the basis for its decision. *Id.*

Affirmed in Docket No. 257122, and remanded in Docket No. 258168. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Pat M. Donofrio