

STATE OF MICHIGAN
COURT OF APPEALS

CHERYLL CONKLIN,

Plaintiff/Counter-Defendant-
Appellant,

v

EASTERN MICHIGAN UNIVERSITY
CHAPTER OF THE AMERICAN
ASSOCIATION OF UNIVERSITY
PROFESSORS,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

October 21, 2008

No. 278212

Washtenaw Circuit Court

LC No. 04-000408-CK

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Plaintiff filed this action for breach of contract, alleging that she was improperly terminated without just cause from her position as executive director of defendant, a labor union for university professors. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that there was no genuine issue of material fact that plaintiff was discharged because of economic necessity, which was sufficient to establish just cause for her discharge. Plaintiff appeals by right. We affirm.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. MCR 2.116(G)(5). Summary disposition may be granted if, except as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

For purposes of appeal, the parties do not dispute that plaintiff's employment could only be terminated for just cause. Where an individual's employment may be terminated only for just cause, bona fide economic reasons for the discharge can constitute just cause. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 114; 469 NW2d 284 (1991). Here, however, plaintiff argues

that there is a genuine issue of material fact whether defendant's economic necessity defense was a pretext for her termination. We disagree.

Initially, we reject plaintiff's argument that the trial court did not consider whether defendant's proffered economic necessity defense was a pretext for her discharge. In its decision, the trial court stated that "the record is not refuted when it comes to the evidence of economic necessity and the justification for elimination of her position." Further, during oral arguments, the court questioned the attorneys about plaintiff's claims that her discharge was politically motivated and that her duties were assumed by the new office administrator. Thus, it is apparent that the trial court was aware of plaintiff's arguments regarding pretext. In any event, our review is de novo, so we may independently consider whether the submitted evidence supports plaintiff's claim that defendant's economic necessity defense was a pretext for her termination.

In *Ewers v Stroh Brewery Co*, 178 Mich App 371, 378-379; 443 NW2d 504 (1989), this Court held that an economic necessity workforce reduction is not a per se defense to a just cause discharge, explaining:

Defendant in this case has not cited a single case, and we have found none, where a court has held that an economic necessity reduction in force claim is a per se defense to a termination where there is a just-cause requirement. Defendant would have us hold that in all cases the employer is the sole judge and final arbiter of the legitimacy of the economic necessity defense subject to review by no one. We decline to do so.

There is no per se rule that a reduction in force constitutes good cause for termination. Certainly employers have the right to adjust their work forces in response to market forces and business necessity. However, they may not use such claims as pretexts for discharges which would otherwise be subject to a just-cause attack by the employee.

After carefully reviewing the evidence presented to the trial court, we are convinced that plaintiff has met his burden of showing that a genuine issue of disputed fact exists concerning the legitimacy of the economic necessity reduction in force defense presented. Therefore, the trial judge erred in granting defendant's motion for summary disposition as to plaintiff's wrongful discharge claim.

We believe that, consistent with the language in *Toussaint [v Blue Cross & Blue Shield of Michigan]*, 408 Mich 579; 292 NW2d 880 (1980)], a jury should be permitted to determine whether "economic necessity" was defendant's true reason for discharging plaintiff. Plaintiff presented substantial proofs in opposition to the claim that Stroh's financial condition necessitated the discharge of plaintiff and others. Where an employer alleges discharge for economic necessity and the employee presents evidence that the economic necessity was pretextual and that he was discharged for another reason, the "question of just cause" is one of fact for the jury. Here there was substantial evidence produced

by plaintiff to rebut defendant's economic necessity defense sufficient to create a jury question on the legitimacy of the defense.

In *McCart*, *supra* at 115-116, the Court distinguished *Ewers* on the ground that in *Ewers* the plaintiff offered deposition testimony and documentary evidence to show that the defendant's economic reasons for discharge were a mere pretext because the defendant was experiencing substantial economic growth and operating at a substantial profit both before and after his discharge. Conversely, in *McCart*, the defendant was entitled to summary disposition because the plaintiff did not submit any evidence to rebut the defendant's economic necessity defense.

Plaintiff here likewise failed to submit evidence to rebut defendant's economic necessity defense. In *Lytle v Malady (On Rehearing)*, 458 Mich 153, 157, 175-176; 579 NW2d 906 (1998), the Court held that where an employer relies on a bona fide decision to reduce its work force, the plaintiff can survive a motion for summary disposition by presenting sufficient admissible evidence to create a reasonable factual dispute with regard to whether the employer's proffered reason was a mere pretext and that discrimination was a motivating factor behind the plaintiff's discharge. Although *Lytle* involved a claim for discrimination, its rationale is equally applicable in determining if plaintiff here presented sufficient evidence to create a factual dispute as to whether defendant's economic necessity defense lacked factual support or whether other reasons not amounting to just cause were the motivating factors behind plaintiff's discharge.

We disagree with plaintiff's argument that defendant gave conflicting reasons for its decision to discharge here, thereby supporting her claim that the proffered economic necessity defense was a pretext for her discharge. Plaintiff relies on *Thurman v Yellow Freight Systems, Inc.*, 90 F3d 1160, 1167 (CA 6, 1996), amended 97 F3d 833 (CA 6, 1996), in which the court held that "[a]n employer's changing rationale for making an adverse employment decision can be evidence of pretext." In *Thurman*, however, the defendant's reasons for its employment decision changed during the course of the case and were directly contradictory. In this case, defendant informed plaintiff in its original December 14, 2003, letter that "the Chapter's alarming financial position compels the immediate termination of the Executive Director position." Although defendant gave additional reasons warranting plaintiff's discharge for just cause in a December 19, 2003, letter which did not directly involve defendant's financial situation, those reasons were not inconsistent with the explanation defendant provided in its December 14 letter. On the contrary, the December 14 letter also informed plaintiff that "the Committee has further concluded that there is cause for your immediate termination from employment, quite apart from the Chapter's dire financial condition." Instead of setting forth its additional concerns in the December 14 letter, however, defendant invited plaintiff to schedule a meeting to provide her with "an opportunity to hear and respond to its concerns." The December 19 letter informed plaintiff that in light of her failure to schedule a meeting, it was providing her with a summary of the further grounds for the Committee's previous decision to terminate her employment for cause. Further, most of the additional grounds involved plaintiff's conduct and decisions that contributed to defendant's precarious financial situation.

We also disagree with plaintiff's argument that defendant did not intend to discharge her immediately when it sent the December 14 letter because defendant also asked for medical documentation to support her recent leave of absence. The December 14 letter provided, in pertinent part:

If you believe that you are owed unused fringe benefits, you will need to set up a meeting with me, and to bring supporting documentation with you, so that we can discuss any such claim.

Please note that while you have been absent from work from the moment this administration took office, which you attribute to “depression/anxiety,” you have presented no medical documentation of any kind, despite my telephone request for the immediate production of such documentation, and your doctors have not responded to our request for all medical records covered by the medical release that you left at the office. You have been absent from work on the basis of this claimed disability for a full week, without providing any supporting medical records. It is your responsibility to make sure that I receive all appropriate medical records, and you are directed to do so no later than Tuesday, December 16, 2003.

Viewed in context, it is apparent that the medical documentation was requested so defendant could evaluate the status of plaintiff’s leave of absence before her discharge. Further, plaintiff was informed that she would continue to receive her salary for one month, during which time she was expected to cooperate with the executive committee to assist in a smooth transition.

Similarly, we find nothing inconsistent with defendant’s opposition to plaintiff’s application for unemployment benefits in which it challenged plaintiff’s receipt of benefits for the reasons summarized in its December 19 letter. Once again, those reasons are consistent with defendant’s position in the December 14 letter that there was cause for plaintiff’s “immediate termination from employment, quite apart from the Chapter’s dire financial condition.”

For these reasons, plaintiff failed to show that there was evidence of conflicting or changing reasons for plaintiff’s discharge that created a factual issue with regard to whether economic necessity was a pretext for her discharge.

Plaintiff also argues that there is a genuine issue of material fact whether she was actually discharged because of political machinations, rather than economic necessity. We disagree.

As plaintiff observes, the evidence showed that union members organized specifically for the purpose of taking control of defendant’s executive committee after the former president was unable to implement the fiscal controls needed to address defendant’s financial problems. Still, that evidence did not undermine the evidence of the economic necessity of plaintiff’s discharge as executive director. The evidence showed that defendant was unable to address the financial concerns earlier because of plaintiff’s influence over other members of the executive committee. The formation of a new executive committee enabled the committee to address those concerns. But unlike in *Ewers, supra*, the evidence here showed that there was no genuine issue of material fact that defendant’s dire financial situation was real and substantial and was created in large part because of plaintiff’s management decisions. Thus, even though a changing political climate placed the executive committee in a position where it could address defendant’s financial condition, plaintiff failed to show that defendant’s claim that it was terminating the executive director position out of economic necessity was a pretext for plaintiff’s discharge.

Plaintiff also argues that the evidence showed that defendant did not actually eliminate her position, but only changed the title and hired someone else to perform the same work. Were this the case, it would refute defendant's claim that her position was terminated because of economic necessity. We disagree.

In *Lytle*, *supra* at 177-178 n 27, the Court followed *Barnes v GenCorp, Inc.*, 896 F2d 1457, 1465 (CA 6, 1990), to define a true workforce reduction:

It is important to clarify what constitutes a true work force reduction case. A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties.

In *Barnes*, *supra* at 1465 n 10, the court explained that "[o]f course an employer could not avoid liability by changing the job title or by making minor changes to a job indicative of an attempt to avoid liability."

At the time plaintiff was employed, she served as defendant's executive director and was assisted by two full-time employees. Defendant's reorganization was not limited to eliminating plaintiff's executive director position. Defendant also eliminated the two full-time positions and turned to student employees to assist in its operations. As plaintiff observes, defendant later created a new position for an office administrator, but that position was not the equivalent of plaintiff's former executive director position. Unlike plaintiff's former position, the new position did not require a college degree or experience in management or employee relations. Many of the duties that plaintiff formerly performed were instead assumed by members of defendant's executive committee, particularly its treasurer. In sum, the evidence showed that defendant restructured its organization so that it no longer operates with an executive director. Now, it relies on an office administrator, supplemented by student assistants, to handle the day-to-day operations that were formerly handled by its staff of three full-time employees. In addition, defendant's officers had assumed a greater role in defendant's overall management. Thus, plaintiff failed to establish support for her claim that defendant did not truly eliminate the executive director position.

Plaintiff also argues that defendant was able to quickly recover from its financial crisis, thereby indicating that her termination was not economically necessary. Although defendant had a surplus by 2004, it still owed the national chapter back dues. The evidence, however, showed that defendant's recovery was due to its reorganization, which allowed it to significantly reduce its employment costs through the elimination of two full-time positions and use of student assistants. According to defendant's treasurer, reducing defendant's labor costs, which were excessive compared to its income, was critical to defendant's economic survival. The fact that defendant's reorganization enabled it to quickly recover from its critical financial situation does not indicate that economic necessity was a pretext for plaintiff's termination.

Plaintiff also argues that she should have been offered the new position of office administrator. However, the evidence showed that the office administrator position was not created until well after plaintiff's position was eliminated. Further, defendant had no obligation to give this position to plaintiff, particularly in light of the evidence showing that plaintiff contributed to the financial crisis and resisted implementing changes to correct the problem.

In sum, defendant's evidence established that plaintiff's termination was economically necessary, and plaintiff failed to rebut that evidence with evidence showing that the asserted economic necessity was pretextual and that she was actually discharged for another reason. Accordingly, the trial court properly granted defendant's motion for summary disposition.

We affirm.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly