STATE OF MICHIGAN

COURT OF APPEALS

LYNWOOD STANLEY GIERA, Plaintiff-Appellant,	UNPUBLISHED June 19, 2012
v	No. 294959 Wayne Circuit Court
CITY OF BELLEVILLE, STEVEN WALTERS, and PHILLIP J. HECKSEL, Defendants-Appellees.	LC No. 07-700685-CH

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

In this wrongful discharge case, plaintiff Lynwood Stanley Giera appeals as of right the trial court order granting partial summary disposition in favor of defendants City of Belleville, Steven Walters, and Phillip J. Hecksel. For the reasons stated in this opinion, we affirm.

I. FACTS & PROCEEDINGS

Plaintiff brought this lawsuit after he was terminated. In 2003, plaintiff applied for the position of Belleville building official after being encouraged to apply by the then-city manager Steve Walters. Plaintiff and Walters agreed that plaintiff would work part-time as an independent contractor for $30 an hour. Walters recommended plaintiff to the city council, which had to approve all contracts in excess of $500. On September 2, 2003, the city council met and approved plaintiff's contract.[1] A resolution was issued stating in pertinent part that "a proposed service contract for an independent contractor is recommended by the city manager for the position of building official." It further stated that "therefore be it resolved, that the council of the city of Belleville hereby approves an independent contract with Lyn Giera as the Belleville Building Official and Code Enforcement Officer."

[1] We note that plaintiff disputes ever signing a written contract; however, plaintiff does not dispute that the original agreement was that he would accept the job as an independent contractor for $30 an hour, 20 hours a week.

Walters was plaintiff's supervisor. Plaintiff's job responsibilities as the building official included supervising the enforcement of the plumbing, mechanical, and electrical codes and enforcing the city codes relative to new building construction, rehabilitation of existing buildings, rental inspections, and other duties under the city ordinances as assigned by Walters.

By letter dated August 18, 2006, plaintiff was informed his position would be terminated effective September 1, 2006. No specific reason for termination was included in the letter.

After his termination, plaintiff filed a six count complaint against defendants. Count one alleged breach of contract, count two alleged violation of Belleville city code regulating labor services of public employees, count three alleged wrongful discharge, count four alleged violation of the whistleblowers' protection act, count five alleged interference with a contract, and count six alleged violation of the Veterans' Preference Act (VPA), MCL 35.401 *et seq*.

Defendants moved for partial summary disposition on March 12, 2008 in regard to all of plaintiff's claims except his breach of contract claim. The parties eventually settled the breach of contract claim. After hearing oral arguments, the trial court granted defendant's motion for partial summary disposition. Plaintiff now appeals the trial court's decision in regard to his claims set forth in counts two, three, and six.[2]

II. STANDARD OF REVIEW

We review a trial court's decision regarding a motion for summary disposition de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). The evidence is viewed in the light most favorable to the nonmoving party. *Id.*

In this case, the defendants moved for summary disposition pursuant to MCR 2.116(C)(4), (C)(7), (8), and (10), and the trial court did not indicate the grounds for its decision. We will review the trial court's grant of summary disposition under MCR 2.116(C)(10) because the record demonstrates that the trial court considered evidence outside the pleadings. *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is

[2] While plaintiff's brief on appeal states that he is seeking reversal of the trial court's order granting summary disposition in regard to counts two through six of his complaint, we decline to address counts four and five because plaintiff's brief only addresses counts two, three, and six. Accordingly, any challenge to the trial court's grant of summary disposition in regard to the other counts is abandoned on appeal. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001) ("Insufficiently briefed issues are deemed abandoned on appeal.").

entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

III. PLAINTIFF'S EMPLOYMENT STATUS

On appeal, plaintiff maintains that the trial court erred in determining that he was an independent contractor and not an employee. Plaintiff argues that his status was transformed to that of an employee based on the way he was treated, particularly the level of control exercised by Walters. Plaintiff argues that when he is properly considered an employee, he would be a member of the classified service as defined in the Belleville city code, which splits employees into two categories: classified and unclassified. Further, as an employee in the classified service he was entitled to written notice specifically stating the reasons for his removal and the opportunity to appeal to the civil service commission.

Plaintiff's argument on appeal is contrary to the position he took in the trial court, where he conceded that the civil service was not involved because he did not qualify as a civil service employee. Accordingly, on that basis alone we would affirm because a "party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989); see also *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Nevertheless, even on the merits of the arguments raised by defendant on appeal, we conclude that the trial court properly determined that there was no genuine issue of material fact in regard to whether plaintiff was an independent contractor.

"An independent contractor is defined as one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999), citing *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992); Restatement Agency, 2d, § 2, p 12 (quotations omitted).

We generally apply the economic realities test to determine an individual's employment status. *Buckley v Professional Plaza Clinic Corp*, 281 Mich App 224, 234; 761 NW2d 284 (2008). The economic realities test considers the totality of the circumstances around the work performed, with an emphasis on: "(1) control of a worker's duties, (2) payment of wages, (3) right to hire, fire and discipline, and (4) performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Mantei v Mich Pub Sch Employees Retirement Sys*, 256 Mich App 64, 78-79; 663 NW2d 486 (2003). The list of factors is nonexclusive, and no one factor is dispositive. *Buckley*, 281 Mich App at 235. Courts may consider other factors as each individual case requires. *Id.* An agreement between the parties stating that their relationship is that of an independent contract is not determinative, but is one factor to be considered. *Id.* at 234.

This Court's application of the economic realities test in *Mantei* is instructive in this case. In *Mantei*, this Court considered whether the plaintiff, who was a retired principal from the

school where he was currently acting as the principal pursuant to an at-will contract with a third party that placed administrators in school districts, was an employee of the school district. *Mantei*, 256 Mich App at 67-70.

In regard to the first factor of the test, which considers the level of control exercised, this Court in *Mantei* concluded that the fact that the plaintiff was required to follow the rules and regulations of the school district and implement the district's policies did not inevitably lead to the conclusion that the school district had a right to control his work. *Id.* at 82. Further, this Court explained that because the plaintiff retained autonomy regarding the method and manner by which he fulfilled his obligations he was not controlled by the school district to the extent that he must be considered an employee. *Id.* at 83. Accordingly, *Mantei* suggests that employers who hire independent contractors can be expected to retain some level of control over those contractors without the contractors becoming employees; the key is whether the employer controls the method and manner of the contractor's work.

In this case, most of the facts discussed by the parties and the trial court are relevant to the first factor of the economic realities test. The parties do not dispute that plaintiff was permitted to make his own hours to a large extent, and that plaintiff was not told how to carry out his inspections. On the other hand, plaintiff was instructed by Walters or his staff each day or week in regard to where he was required to perform inspections. Additionally, plaintiff claims that he was required to hold regular hours from 8 a.m. until noon, and that Walters frequently directed the order in which his work should be completed, and that he was required to do clerical work when the permit clerk was absent. Defendants do not address whether plaintiff was directed to complete inspections in a certain order or whether plaintiff was required to do clerical work; accordingly, these facts are not disputed.

Plaintiff also claims that defendants added additional tasks to his job; however, in his brief on appeal he does not set forth the additional tasks to which he is referring. The record suggests that plaintiff is referencing the fact that he began to conduct rental inspections. Walters testified in his deposition that the rental inspections were started after plaintiff informed the city that rental inspections should be performed. Accordingly, the facts demonstrate that plaintiff himself caused the responsibility for rental inspections to be added to his duties. Viewing these undisputed facts in light of the reasoning in *Mantei*, we conclude that defendants' control over plaintiff was not significant enough to suggest plaintiff was an employee of defendants. Accordingly, we conclude that the first factor, regarding control, favors a finding that plaintiff was an independent contractor.

The second factor considers payment of wages. Plaintiff was paid an hourly rate for 20 hours a week every week, and he was further paid specifically by the hour for additional rental inspection work up to a specified amount of extra hours once a year. It is not disputed that plaintiff did not receive medical benefits and plaintiff does not claim that he accrued vacation and sick time, or that he received any other benefits from the city. The only "benefit" plaintiff received was paid holidays. Further, it was not disputed that plaintiff used a 1099 tax form. Typically, 1099 tax forms are used by independent contractors. See *Buckley*, 281 Mich App at 227. Accordingly, we conclude that the second factor favors a finding that plaintiff was an independent contractor.

The third factor considers whether the city had the authority to hire, fire, and discipline plaintiff. The record in this case does not address these factors specifically; however, the inference is that the city did have the authority to hire, fire, and discipline plaintiff. There is no other person or entity other than defendants that feasibly could have had the authority to hire, fire or discipline plaintiff. Moreover, it was uncontested that plaintiff was supervised by Walters, and that the city eventually terminated plaintiff. Accordingly, this factor favors finding that plaintiff was an employee of defendants.

The final factor considers whether the city and plaintiff had a common objective. The parties do not address this factor on appeal; however, it would be illogical to conclude that defendants and plaintiff did not have a common objective. Defendants wanted an individual to act as the building official and plaintiff's job was to act as a building official; accordingly, defendants and plaintiff had a common objective. Thus, this factor favors a finding that plaintiff was an employee of defendants. We note that in *Mantei*, 256 Mich App at 85, this Court similarly found that the plaintiff and the school district had a common objective; however, it still ultimately concluded that the plaintiff was not an employee of the school district.

Finally, we consider any other relevant facts, including the parties' own characterization of their employment relationship. *Id.* at 85; *Buckley*, 281 Mich App at 235. In this case, it is not disputed that the agreement between plaintiff and the city was that plaintiff would work as an independent contractor. Moreover, the city council minutes and resolution approving plaintiff as the building official all refer to plaintiff as an independent contractor. There is nothing in the record that indicates defendants ever referred to plaintiff as an "employee." Further, plaintiff does not allege that defendants ever actually represented to him that he was an employee; he merely claims that he was treated like an employee and therefore should be considered one. Accordingly, the fact that the original employment agreement characterized plaintiff as an independent contractor is another factor that favors the conclusion that plaintiff was not an employee of defendants.

In *Coblentz*, 475 Mich at 578-579, the Court, applying the economic realities test, also considered whether the work or the undertaking in question is customarily performed by an individual as an independent contractor. *Id.* In this case, the facts demonstrate that the city previously hired independent contractors to fulfill the role of building official. Accordingly, this fact also favors a determination that plaintiff was an independent contractor and not an employee.

Therefore, even considering the merits of plaintiff's argument, the facts demonstrate that plaintiff was an independent contractor and not an employee. Accordingly, the trial court properly granted summary disposition in favor of defendants on this issue.

IV. MICHIGAN BUILDING CODE

Plaintiff argues that he was wrongfully discharged because defendants failed to comply with the termination procedure set forth in the Michigan Building Code and the International Property Maintenance Code.

It is not disputed that the city of Belleville adopted the state construction code which includes the Michigan Building Code, MCL 125.1504(2), as the regulatory building and maintenance codes for the city. The International Property Maintenance Code is also applicable in part pursuant to § 101.4.5 of the Michigan Building Code, which provides that the "provisions of the International Property Maintenance Code shall apply to existing structures and premises; equipment and facilities; light, ventilation, space heating, sanitation, life and fire safety hazards; responsibilities of owners, operators and occupants; and occupancy of existing premises and structures."

The Michigan Building Code similarly adopts provisions of the ICC Electrical Code, the International Fuel Gas Code, the International Mechanical Code, the International Plumbing Code, the International Fire Code, and the International Energy Conservation Code. §§ 101.4.1-101.4.7. In § 101.4, the Michigan Building Code provides that the "other codes listed in Sections 101.4.1 through 101.4.7 and referenced elsewhere in this code shall be considered part of the requirements of this code to the prescribed extent of each reference."

On appeal, plaintiff argues that defendants were required to comply with § 103.2 of the International Property Maintenance Code because the code was adopted by the Michigan Building Code. The 2003 version of the International Property Maintenance Code regarding appointment of a code official stated that the code official "shall not be removed from office except for cause and after full opportunity to be heard on specific and relevant charges by and before the appointing authority." § 103.2. In contrast, the Michigan Building Code section regarding appointment of a building official provides only that the "building official shall be appointed by the chief appointing authority of the jurisdiction," and does not contain any provision regarding removal procedures. § 103.2.

We interpret the Michigan Building Code using the rules of statutory construction. See *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998); *Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135 (1994). Issues of statutory interpretation are questions of law that we review de novo. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Id.* at 246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

The Michigan Building Code provides that the "codes and standards referenced in this code shall be considered part of the requirements of this code to the extent of each such reference. Where differences occur between provisions of this code and referenced codes and standards, the provisions of this code shall apply." § 102.4. Based on the plain language of the code, we conclude that because there is a difference between the Michigan Building Code and the International Property Maintenance Code regarding the appointment and removal of the building official, the Michigan Building Code provision applies, and the Michigan Building Code does not require any pre-termination hearing.

Further, the plain language of the code suggests that the International Property Maintenance Code section regarding appointment and removal of the building official is not even applicable because the provisions of the International Property Maintenance Code are only applicable to the "prescribed extent of each reference." § 101.4. The Michigan Building code

only references the International Property Maintenance Code in regard to the provisions covering "existing structures and premises; equipment and facilities; light, ventilation, space heating, sanitation, life and fire safety hazards; responsibilities of owners, operators and occupants; and occupancy of existing premises and structures." § 101.4.5. Therefore, the plain language of the Michigan Building Code does not include the provision of the International Property Maintenance Code regarding appointment of a code official.

Plaintiff's reliance on the appendix of the Michigan Building Code is similarly unavailing. The Michigan Building Code specifically states that "[p]rovisions in the appendices shall not apply unless specifically adopted." § 101.2.1. Plaintiff relies on Appendix A, § A101.4, which provides: "[e]mployees in the position of building official, chief inspector shall not be removed from office except for cause after full opportunity has been given to be heard on specific charges before such applicable governing authority." However, § A101.4 has not been specifically adopted by the Michigan Building Code and accordingly, based on the plain language of § 101.2.1, is not applicable.

Therefore, we conclude that the trial court correctly granted summary disposition in favor of defendants because the termination of plaintiff was not contrary to any applicable provision of the Michigan Building Code.

V. VETERANS' PREFERENCE ACT

Plaintiff argues that the trial court erred in granting summary disposition to defendants in regard to his VPA claim. Specifically, plaintiff argues that the undisputed facts show he was not a department head. Accordingly, plaintiff maintains that the VPA's provisions were applicable, and the failure to comply with the VPA's provisions entitle him to reinstatement and back pay.

When construing a statute, our primary goal is to ascertain and give effect to the intent of the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). We examine the specific language of the statute, and presume that the Legislature intended the meaning it has plainly expressed. *Id.* Absent an alternative definition set forth in the statute, "every word or phrase of a statute will be ascribed its plain and ordinary meaning." *Id.*

The relevant section of the VPA is MCL 35.402, which provides in pertinent part:

> No veteran . . . holding an office or employment in any public department or public works of the state or any county, city or township or village of the state, except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency . . . .

The statute further provides that if a veteran is to be removed for cause, that veteran shall not be removed "except after a full hearing . . . and at such hearing the veteran shall have the right to be

present and be represented by counsel and defend himself against such charges." MCL 35.402. A condition precedent to the removal of a veteran is written notice at least 15 days before the required hearing. MCL 35.402.

The trial court determined that summary disposition was proper because the undisputed facts demonstrated that plaintiff was a department head, and accordingly, the plain language of the VPA specifically states that the termination procedure is not applicable to department heads.

The VPA does not define "department head." This Court may consult a dictionary to determine the plain meaning of a word not defined by a statute. *McCormick v Carrier*, 487 Mich 189, 192; 795 NW2d 517 (2010). "Department" is defined in relevant part as "a distinct part of anything arranged in divisions; a division of a complex whole or organized system," and as "one of the principal branches of a governmental organization;" "head" is defined in relevant part as "the position or place of leadership," and "a person to whom others are subordinate, as the director of an institution; leader or chief," and "first in rank or position; chief; leading principal: a head official." *Random House Webster's College Dictionary* (1992).

The facts of this case demonstrate that plaintiff's only supervisor was the city manager, and that plaintiff was in charge of the entire building department, including the individuals who conducted the plumbing, electrical, and mechanical inspections. The city council minutes explicitly provide that plaintiff was not a "hiring and firing supervisor," but that he did have authority to implement necessary departmental changes.

Plaintiff stated that he was specifically hired as the building official and the ordinance officer. Plaintiff explained that the "building official is in charge of the entire building department, plumbing, electrical and mechanical." Similarly, Walters explained that the building official is "in charge of the building department operations."

Accordingly, we conclude that the trial court did not err when it found that there was no genuine issue of material fact because the facts clearly demonstrated that plaintiff was a department head, and therefore, the VPA's termination procedure was not applicable.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra