STATE OF MICHIGAN

COURT OF APPEALS

DANIEL P. MCMANAMON,

Plaintiff-Appellee,

v

CHARTER TOWNSHIP OF REDFORD,

Defendant-Appellant

and

KEVIN KELLEY and R. MILES HANDY II,

Defendants.

FOR PUBLICATION
December 5, 2006

No. 262040; 263260
Wayne Circuit Court
LC No. 99-920173-CZ

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

HOEKSTRA, P.J., (*concurring*).

I concur in the majority's conclusion that summary disposition in favor of defendant was properly denied by the trial court, but that a new trial is required to redress the verdict in this matter. I write separately because my reasons for concluding that the verdict rendered by the jury cannot stand differ somewhat from those espoused by the majority.

This case arises from statements made by Redford Township Supervisor Kevin Kelley to a local newspaper regarding the suspension and eventual termination of plaintiff from his employment as manager of an ice arena operated by the township. Alleging a failure to provide him notice of the comments and that certain of Kelley's statements were untrue, plaintiff filed the instant suit seeking damages for defamation, false light publicity, disclosure of embarrassing facts, and violation of the Bullard-Plawecki employee right to know act (ERKA), MCL 423.501 *et seq*. Before trial, however, defendants successfully sought summary disposition of all but the question of damages for plaintiff's claim that the township had violated § 6 of the ERKA, which provides in relevant part:

> (1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.

> (2) The written notice to the employee shall be by first-class mail to the employee's last known address, and shall be mailed on or before the day the information is divulged from the personnel record. [MCL 423.506.]

Thus, at the time of trial all that remained to be decided by the jury was the question of the damages, if any, suffered by plaintiff as a result of Kelley's failure to timely notify plaintiff of his divulgence of employment-related disciplinary action, i.e., plaintiff's suspension and eventual termination. At the trial on this question, plaintiff offered into evidence articles published by the Redford Observer on July 3 and 6, 1997, in which Kelley was quoted as having disclosed that plaintiff had been suspended and subsequently terminated "due to problems in the performance of his day-to-day duties" and a recent charge of misdemeanor embezzlement. Subsequent articles reporting the circumstances and procedural posture of the embezzlement charge, of which plaintiff was ultimately acquitted, were also offered into evidence by plaintiff. These later articles, published in the Observer on July 31 and September 4, 1997, also reiterated or otherwise reported statements by Kelley concerning plaintiff's termination "due to a number of performance problems."

Citing these articles, plaintiff testified at trial that Kelley had "devastated" his personal and professional reputation. As support for this contention plaintiff explained that following his suspension from employment with the township he applied for a position as arena manager for the Livonia Hockey Association. Plaintiff testified that his first meeting with the association's board went quite well, and that he fully expected to be offered the position after being called to meet with the board a second time. At this second meeting, however, plaintiff was confronted by the board with the July 6, 1997 article regarding his discharge from employment with the township and then-pending criminal charge. Plaintiff testified that he was not aware that the article had been published, that he was very upset when he learned that disciplinary information had been released to the press without his having been notified, and that Kelley's statements regarding his suspension and termination were "totally embarrassing and humiliating." Plaintiff further testified that he explained to the board that he had not been given a chance to respond to the criminal and performance allegations reported in the article, which he informed the board were false and "unsubstantiated." Despite his explanation, however, the board indicated concern about the "adverse publicity" his hiring would bring to the association and, ultimately, offered the position to a less qualified applicant.

Plaintiff thereafter found it difficult to find and hold employment comparable in responsibility and pay to that previously held by him with the township. Plaintiff explained that although currently employed in a comparable position, he had worked only part-time or at inferior positions during the three years before obtaining his current position as manager of the Kensington Ice House. In connection with this testimony, plaintiff offered evidence regarding the pay received by him for these jobs and testified that he believed he would have earned considerably more during the three-year period between his firing and having obtained a position at Kensington had he been hired by the Livonia Hockey Association.

Following the close of evidence, counsel for plaintiff argued to the jury that one of the issues before it was whether "the divulgence of the disciplinary information [led] to the loss of job opportunity." Citing plaintiff's testimony regarding his meetings with the board of the Livonia Hockey Association, counsel asserted that the answer to this question was "yes," as it was clear that the articles cost plaintiff a job with Livonia. Thus, counsel argued, plaintiff was

entitled to damages for lost income as well as damaged reputation, embarrassment, and humiliation resulting from the divulgence by Kelley. As support for this argument, counsel asserted that the four articles published by the Observer "made [plaintiff] to look like some corrupt, non-performing, incompetent manager." Counsel further asserted that Kelly had a choice to either "talk [or] keep his mouth shut until someone complied with the [ERKA]," and that he "chose to violate the law."

At the close of trial, the court instructed the jury that it was to determine the amount of damages, if any, suffered by plaintiff as a result of the township's violation of the ERKA. However, although further instructing the jury that such damages could include loss of income, embarrassment, humiliation, mortification, and damage to reputation, the court did not define or otherwise explain to the jury the parameters of the violation at issue. My concern regarding the reliability of the jury's verdict lies with both this instruction and the evidence presented and relied upon by plaintiff in arguing the damages question.

As recognized by the majority, § 6 of the ERKA does not forbid the disclosure of employment-related disciplinary action, but rather merely prohibits an employer from divulging such information to a third party without providing the employee with timely written notice of the disclosure on or before the date the information is divulged. Thus, as this Court previously recognized in this matter, the notice requirement of § 6 of the ERKA cannot be read to permit an employee to prevent divulgence of the information:

> Clearly, the notice was not intended to allow the employee to prevent the disclosure, because it would be insufficient for that purpose. Rather, the notice is intended to provide the employee with notice of the disclosure so that the employee can counter such reports with which there is disagreement. [*McManamon v Redford Charter Township*, 256 Mich App 603, 613 n 5; 671 NW2d 56 (2003).]

Thus, in my view, the damages to which a plaintiff seeking redress for violation of the notice requirement of § 6 of the ERKA is entitled, are limited to those flowing from his or her inability to counter the disciplinary information divulged by their employer. Here, however, the evidence, arguments, and instructions presented to the jury did not so limit the damages. Rather, plaintiff was permitted to offer testimony and evidence regarding his embarrassment and humiliation upon learning of the disclosure and his belief that Kelley's statements "devastated" his career. The statute does not, however, require or guarantee that the employee have knowledge of a divulgence before the divulgence is made by the employer. Rather, the statute requires only that the employer send written notice of the fact of the divulgence to the employee "on or before the day the information is divulged." MCL 423.506. Moreover, the statute offers no protection for the consequences of the divulgence outside the effect of a failure to provide such notice on the employee's ability to counter such information with which he disagrees. *McManamon*, *supra*.

The statute similarly offers no protection against disclosure or discussion of adverse action taken outside the context of employment. Plaintiff was nonetheless permitted to testify extensively at trial regarding the effect of the misdemeanor embezzlement charge, including Kelley's comments concerning the charge and subsequent acquittal, on his person and career. Testimony and evidence regarding the embezzlement charge was, however, irrelevant to the

question of the effect of the township's failure to provide notice on plaintiff's ability to counter the information.

Moreover, as noted above, the trial court failed to instruct the jury concerning the nature of the violation at issue, i.e., the failure to provide plaintiff with timely written notice of the divulgence of disciplinary information. Without such instruction, the jury could not accurately understand and deliberate the damage question. This error, when combined with the evidence submitted and arguments made by plaintiff, undermines the reliability of the jury's verdict.

In sum, the reliability of the verdict was fatally undermined by the introduction of irrelevant evidence and argument pertaining to plaintiff's upset and humiliation regarding the embezzlement charge and Kelley's comments regarding that charge that were published to the media. The embezzlement charge and the circumstances regarding its prosecution, along with Kelley's comments regarding the charge, do not constitute an adverse employment event and are thus not compensable as a violation of § 6 of the ERKA. Further, because divulgence of an adverse employment event is not prohibited by this section, the fact that Kelley's comments were made to a media representative and were subsequently published to the community at large is itself not compensable. Thus, on retrial, the evidence and instructions should be tailored to compensate plaintiff only for the consequences, if any, flowing from the township's failure to initiate notice of Kelley's comments regarding the fact of plaintiff's suspension and termination "on or before the day" of those divulgences, and the effect of such failure on plaintiff's ability to counter the divulgences by explaining his disagreement with that information to the media or a prospective employer.

/s/ Joel P. Hoekstra