STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA CARPENTER and GENE CARPENTER,

Plaintiffs-Appellants,

v

WERTH LAUNDRY, INC., formerly known as WERTH CLEANERS, INC., and DONALD WERTH,

Defendants-Appellees.

UNPUBLISHED
June 18, 1999

No. 206615
Alpena Circuit Court
LC No. 96-001853 CL

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs, who alleged that defendants violated state and federal wage laws and impermissibly terminated plaintiffs' employment, appeal as of right the order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

Plaintiffs argue that the trial court prematurely granted defendants' motion and incorrectly assessed the motion by accepting defendants' allegations at face value without seeking record support for the allegations. Whether the trial court incorrectly assessed and prematurely granted defendants' motion for summary disposition is a question of law that is reviewed de novo. *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Summary disposition may be granted before the completion of discovery if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481; 531 NW2d 715 (1994). See also *Crawford v State of Michigan*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994). Plaintiffs argued that the trial court granted summary disposition prematurely because only plaintiffs and three defense witnesses had been deposed; no disinterested witnesses, experts, coworkers or former employees had been deposed; and because there were still discovery requests outstanding from both sides. In support, plaintiffs cited a discussion by counsel at Patricia Carpenter's deposition, which does indicate that at the time of Patricia's deposition, requests for production of documents were outstanding

on both sides. However, the deposition took place on March 13, 1997, and discovery closed on May 28, 1997, after having been extended several times.[1] There is no indication in the record that plaintiffs pursued the outstanding discovery or requested to extend discovery after Patricia's deposition, apart from arguing in their response to defendants' motion, which was filed on August 5, 1997, that "[e]ven though discovery has been open for a substantial period, it has previously been extended by agreement . . . There would certainly be no prejudice to reasonable further extension."

Even if plaintiffs had timely requested a discovery extension, on the record before us, including plaintiffs' appellate brief, plaintiffs have not explained how additional discovery might add to the factual support for their position, other than arguing at the hearing on defendants' motion that discovery from coworkers and defendants' clients would support that Patricia did a great job and that they expressed that they thought highly of her. However, there was already substantial testimony from both sides that Patricia had done very good work. Thus, the trial court did not act prematurely in granting defendants' motion. *Regualos v Community Hospital*, 140 Mich App 455, 464-465; 364 NW2d 723 (1985).

Nor did the trial judge incorrectly assess the summary disposition motion by accepting defendants' allegations as true. If the party opposing summary disposition under MCR 2.116(C)(10) would bear the burden of proof at trial, that party, in order to avoid summary disposition, must provide documentary evidence showing the existence of a genuine issue on which reasonable minds might differ. In ruling on the claim for overtime wages, the trial court relied in large part on evidence provided by plaintiffs in deciding that plaintiff Patricia Carpenter was an administrative employee exempt from overtime requirements. Similarly, in ruling on plaintiff Gene Carpenter's minimum wage claim, the trial court found that plaintiffs had failed to provide documentation showing that Gene was not paid the minimum wage. Finally, in ruling on Patricia's wrongful discharge claim, the judge accepted her testimony regarding her alleged offer of "lifetime employment" but found that such an offer was insufficient, by itself, to support a wrongful discharge claim. Clearly, the trial judge properly assessed the motion – he looked at all the evidence provided by both parties, viewed it in favor of plaintiffs, and concluded that the claims could not survive as a matter of law. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 435; 566 NW2d 661 (1997).

Plaintiffs next argue that the trial court erred by summarily disposing of plaintiffs' religious discrimination claims. To establish a prima facie case of religious discrimination, a plaintiff must establish either intentional discrimination or disparate treatment. *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 200; 493 NW2d 104 (1992), rev'd on other grounds 445 Mich 109 (1994); see also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). To establish intentional discrimination, a plaintiff must show that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the adverse employment action occurred under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). Religion does not have to be the only reason, but it must be one of the reasons that made a difference in the defendant-employer's determination whether to take adverse employment action against a plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986).

Once a plaintiff establishes a prima facie case, the burden of production shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for its decision. If the employer is unable to satisfy its burden of production, it is presumed that the basis for the employer's decision was discriminatory. *Lytle, supra* at 173-174. If the defendant articulates a legitimate, nondiscriminatory reason for its decision, the burden of proof shifts back to the plaintiff, and the plaintiff must show "by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but a mere pretext for discrimination." *Id.* at 74. Disproof of the employer's articulated legitimate reason defeats summary disposition "only if such disproof also raises a triable issue that discriminatory animus was one of the factors motivating the employer's adverse action." *Id.* at 175-176.

Assuming that plaintiffs established a prima facie case, it is clear that defendants articulated legitimate reasons for their discharges. In response, plaintiffs did not satisfy their burden of proof of raising a triable issue that discriminatory animus was one factor in their discharges, however. Defense witnesses testified that Patricia was not allowed to return to work because of having walked off the job and because of her attitude. Plaintiffs did not rebut these reasons; they presented no documentary evidence in response to defendants' motion that these reasons, or the legitimate reason articulated for discharging Gene – that he told defendant Don Werth off and did not attempt to return to work after Patricia's discharge, were a mere pretext.[2] Thus, summary disposition was properly granted on these claims.

The Michigan minimum wage law ("MWL") requires that employees be paid at one and one-half their regular hourly rate for hours worked over forty hours per week. MCL 408.384a(1); MSA 17.255(4)a(1). However, an exemption exists for persons employed in a "bona fide administrative capacity." MCL 408.384a(4)(a); MSA 17.255(4)a(4)a. The federal Fair Labor Standards Act ("FLSA") has identical provisions. See 29 USC 207(a)(1) and 213(a)(1). The definition of an "administrative employee" is expressly left to the respective state and federal agencies that deal with labor issues. MCL 408.384a(5); MSA 17.255(4)a(5); 29 USC 213(a)(1).

Under 1981 AACS, R 408.726, "employment in a bona fide administrative capacity" is defined, as applicable to this case, as someone who is compensated on a salary or fee basis of at least $250 per week and whose primary duty is the performance of office or nonmanual work related to management policies or general business operations. Under 29 CFR 541.2(e)(1) and 541.2(e)(2), there are two different tests that are used to determine whether someone is employed in a bona fide administrative capacity under the FLSA – the "short test" and the "long test," with the short test applying to those who earn at least $250 per week and the long test applying to those who earn at least $155 per week. *Douglas v Argo-Tech Corp*, 113 F3d 67, 70 (CA 6, 1997). The short test, which was applicable to Patricia because she generally earned at least $250 per week, provides that a person is employed in a bona fide administrative capacity if (1) she is paid on a salary or fee basis; (2) she does mostly nonmanual work related to management policies or general operations; and (3) she regularly exercises discretion and independent judgment. 29 CFR 541.2(a)(1), (e)(2).

Under both the FLSA and the MWL, Patricia would be considered exempt if her work consisted mostly of nonmanual work related to management policies or general operations, if she

regularly exercised discretion and independent judgment, and if she was paid on a salary or fee basis. The record shows that she did indeed perform primarily management-related nonmanual work and that she regularly exercised independent judgment. She hired employees, adjusted customer's accounts, trained employees, and handled employee conflicts. The only real dispute, then, is whether Patricia was paid on a salary or fee basis.

Defendants plainly admitted that Patricia was paid hourly. Their sole basis for arguing that she was paid a salary is that she was guaranteed forty-five hours per week rather than forty hours per week and that this was equivalent to being paid a guaranteed salary. To support this argument, defendants rely on *McReynolds v Pocahontas Corp*, 192 F2d 301 (CA 4, 1951). In *McReynolds*, the court held that because a mining worker was guaranteed "three shifts" per week at a particular rate of pay, he was essentially paid a guaranteed salary for purposes of the FLSA. *Id*., 303. Defendants' reliance on *McReynolds*, however, is misplaced. In *McReynolds*, the court based its conclusion on two elements that are missing from the instant case: (1) the worker would be paid whether the company was operating or not; and (2) the term "shift" was essentially equivalent, in mining nomenclature, to wages. *Id*. Here, there was no indication that Patricia would be guaranteed a particular amount even if the laundry and cleaners had to be shut down or even if she did not work a typical amount of hours in a week. She was paid only for the time that she actually worked and was therefore not employed in a "bona fide administrative capacity," especially since the exemption is to be strictly and narrowly construed against the employer. *Douglas, supra* at 70. This conclusion is reinforced by *Douglas*, in which the court indicated that even though a worker used a time clock, he was not considered an hourly employee because his rate of pay was not actually based on these hours. *Id*. at 71. Here, Patricia's rate of pay was determined solely according to the hours on her time card. Because she was not employed in a bona fide administrative capacity under the FLSA, it is proper to conclude that she was also not employed in a bona fide administrative capacity under the MWL, since "the Michigan law obviously parallels the federal act." See *Saginaw Firefighters Ass'n v City of Saginaw*, 137 Mich App 625, 631-632; 357 NW2d 908 (1984).

Since Patricia was not exempt from the overtime requirements of the FLSA and the MWL, the next question is whether she was indeed paid for her overtime. We conclude that there was a disputed question of fact on this issue. Donald admitted that Patricia sometimes punched two timecards, one for "Werth Cleaners" and one for "Werth Laundry," and that she would only be paid overtime if she worked over forty hours for one or the other. However, the two businesses were so closely intertwined that it was disingenuous to claim that Patricia was not entitled to overtime because she worked for two separate corporations. We remand the case to the circuit court on the issue of Patricia's entitlement to overtime wages.

A remand is not necessary, however, on the issue of Gene's rate of compensation. At the time he worked for defendants, the state minimum wage requirement was $3.35 per hour and the federal requirement was $4.25 per hour. MCL 408.384; MSA 17.255(4); 29 USC 206(a)(1). The record shows that he was paid at least $4.25 per hour. Although he claimed that he sometimes had to stay overnight in Detroit and was still paid only $60, he contradicted himself by stating that he was "paid

extra" for these trips. This contradictory testimony was insufficient to generate a genuine issue of material fact. See *Quinto* v *Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Finally, plaintiffs argue that the trial court should not have summarily dismissed Patricia's wrongful discharge claim. "[C]ontracts for permanent employment are for an indefinite period of time and are presumptively construed to provide employment at will." *Rowe v Montgomery Ward & Co, Inc*, 437 Mich App 627, 636; 473 NW2d 268 (1991). The presumption of at-will employment may be overcome by oral statements of job security only if they are clear and unequivocal. *Id*., 645. In *Lytle, supra* at 170-171, the Court stated as follows:

> Plaintiff's claim of just-cause employment was also premised upon certain [unspecified] oral assurances, allegedly made by her original supervisor Ozar and the individuals who originally hired her, that her job was secure and she had potential for promotion. In evaluating these assurances, we consider all relevant circumstances, including other written and oral statements and other conduct manifesting intent. *We require such verbal assurances to be clear and unequivocal. In this case, we find that the assurances given to plaintiff were neither. Indeed, no specific statements with regard to duration of employment or grounds for termination were made. There was no indication of an actual negotiation or an intent to contract for permanent or just-cause employment*. We, therefore, find that these statements can only reasonably be interpreted as expressions of "optimistic hope" for a long and satisfying employment relationship.
>
> For these reasons, we find that plaintiff failed to raise a triable issue with respect to whether she had just-cause employment with defendant. [Citations and footnotes omitted; emphasis added.]

The basis of Patricia's argument is that Donald had told her several times that she was "there for life." As in *Lytle*, there was no discussion between Donald and Patricia regarding grounds for termination, nor was there an indication of an intent to contract for just-cause employment. Although Donald allegedly defined the duration of Patricia's employment (for life), there was no evidence that this was the result of a negotiation. Moreover, a brief and unelaborated statement such as "you are here for life" does not constitute a "clear and unequivocal" offer of permanent employment. Indeed, Patricia herself later characterized the statements as mere "compliments." Thus, the statements did not amount to an assurance that Patricia would be fired only for just cause, and the wrongful discharge claim was properly dismissed.

Affirmed on the religious discrimination, minimum wage, and wrongful discharge claims. Reversed and remanded for proceedings consistent with this opinion on Patricia's claim for overtime wages. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

[1] Plaintiffs filed their complaint on March 14, 1996. Defendants filed their motion for summary disposition on May 27, 1997. Discovery closed on May 28, 1997. Plaintiffs filed their response to defendants' motion on August 5, 1997, and the hearing on the motion took place on August 18, 1997. The circuit court's opinion and order granting defendants' motion was entered on September 15, 1997.

[2] On the day of the hearing on defendants' motion for summary disposition, plaintiffs filed an affidavit of Patricia Carpenter's to support their response to the motion. However, this affidavit and the attached copies of her personal calendars pertained only to Patricia's wage claims.