STATE OF MICHIGAN

COURT OF APPEALS

ANTOINETTE NOWACK, Plaintiff-Appellant,	UNPUBLISHED April 20, 2001
v	No. 217771 Oakland Circuit Court
BOTSFORD GENERAL HOSPITAL, Defendant-Appellee.	LC No. 97-543324-CZ

ANTOINETTE NOWACK, Plaintiff-Appellant/Cross-Appellee,	
v	No. 220466 Oakland Circuit Court
BOTSFORD GENERAL HOSPITAL, Defendant-Appellee/Cross-Appellant.	LC No. 97-543324-CZ

Before: Sawyer, P.J., and Murphy and Saad, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of the circuit court granting summary disposition to defendant on plaintiff's claims based on age discrimination and failure to pay overtime wages. Plaintiff also appeals, and defendant cross appeals, from an order of the circuit court awarding defendant mediation sanctions. We affirm in part and reverse in part.

Plaintiff was employed by defendant as a payroll supervisor from 1989 to 1995. The employment relationship deteriorated over time, particularly after plaintiff was given the added responsibilities of handling payroll for subsidiaries of defendant. Plaintiff left defendant's employ and subsequently filed this suit, alleging constructive discharge due to age discrimination and that defendant had failed to pay her overtime pay. The trial court granted summary disposition to defendant.

Plaintiff first argues that the trial court erred in granting summary disposition to defendant on her claim based upon age discrimination by creation of a hostile work environment. We disagree. The Supreme Court stated the applicable standard in *Quinto v Cross and Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996):

> In *Radtke [v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993)], we set forth the five elements necessary to establish a prima facie case of discrimination based on hostile work environment:
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> "(1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of [her protected status]; (3) the employee was subjected to unwelcome . . . conduct or communication [involving her protected status]; (4) the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. MCL 37. 2103(h); 37.2202(1)(a); MSA 3.548(103)(h); 3.548(202)(1)(a)."
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> . . . Under *Radtke*, whether a hostile work environment was created by unwelcome conduct "shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." 442 Mich 394. Consequently, to survive summary disposition, plaintiff had to present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances, Kujawski's comments to plaintiff were sufficiently sever or pervasive to create a hostile work environment.

The Court went on to conclude that the plaintiff's conclusory allegations were inadequate to survive summary disposition:

> At the stage where all that was before the court with respect to count II was the deposition testimony and the affidavit of the plaintiff, the only evidence or record supporting the plaintiff's claim of discrimination by Cross and Peters was inadequate under this standard. Had plaintiff testified in conclusory form at trial that her supervisor's conduct was "continually" demeaning and humiliating regarding her age, sex, national origin, and ability to speak English, a reasonable jury could not have found from a preponderance of the evidence that the comments were of a type, severity, or duration to have created an objectively hostile work environment.
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> Plaintiff's affidavit disclosed no specific instances of ethnic, sexist, or "ageist" remarks hostile to a protected class from which an inference of a hostile work environment could be drawn. It did not describe with particularity when, where, or how plaintiff was harassed. . . . Plaintiff's affidavit conclusorily states that Kujawski subjected her to harassing comments regarding her age, sex, national origin, and ability to speak English. As a consequence, the trial court

> properly found that plaintiff did not establish the existence of a genuine issue of material fact on an essential element of her claim.

Similarly, in the case at bar plaintiff failed to supply sufficient detail to support her claim of age discrimination. Indeed, plaintiff's discussion of this issue in her brief is virtually void of any specific details. While she does make a case for being treated poorly at the job, those complaints largely center around an excessive workload and a management unresponsive to her complaints about being overworked. She points to little in the way of a hostile workplace *due to her age*. Indeed, the only specific incident she refers to is a comment made by the head of Human Resources (not her supervisor), John Rice, to a fellow employee, Mae Reene Waynick. Waynick had expressed concern to Rice about the stressful work environment plaintiff was under to which Rice allegedly replied, "Let her try to find another job at her age." Beyond that, plaintiff merely makes conclusory allegations that Rice made similar statements to her on a number of unspecified occasions when plaintiff complained about her workload. Her brief makes an even more conclusory statement that her supervisor also made similar comments.

In light of *Quinto*, we cannot say that the trial court erred in concluding that plaintiff has failed to present sufficient details on her claim to survive summary disposition.

Next, plaintiff argues that the trial court erred in dismissing her claim that she was entitled to overtime pay under federal law. Both parties agree that this issue is resolved by determining whether plaintiff is an exempt administrative employee under 29 CFR 541.2. There is some dispute over which portion of that regulation controls, but we agree with defendant that the following provision applies:

> *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week . . . and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section. [29 CFR 541.2(e)(2).]

29 CFR 541.2(a) refers to an employee:

> Whose primary duty consists of either:
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> (1) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, or
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> (2) The performance of functions in the administration of a school system, or educational establishment or institution, or a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein;

Plaintiff clearly fits within this definition. Therefore, the question becomes whether her job included the exercise of discretion and independent judgment. That term is further explored in 29 CFR 541.207(a):

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and various possibilities have been considered. The term as used in the regulations in subpart A of this part, more over, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

Defendant refers to several aspects of plaintiff's employment which reflects the exercise of discretion and independent judgment, including the auditing of payroll information, preparing taxes, making payroll adjustments and making corrections to paychecks. Additionally, around 1993, she became responsible for effecting and coordinating the incorporation of other Botsford entities into the payroll, including assuming the responsibility for resolving problems with respect to the payroll of those other entities. Further, she supervised one, and sometimes two, other employees.

We find similar support for the proposition that plaintiff's position involved exercising discretion and independent judgment by looking at the job description dated August 22, 1989. The summary of plaintiff's duties includes "planning, coordinating, controlling and administering the activities of the Payroll Department" as well as "investigating computer system problems as they relate to the payroll system." Additionally, one of the necessary skills listed was "aptitude for accuracy, decision making, problem solving and trouble-shooting."

The revised job description, dated February 1994, is even stronger on this point. The summary adds the statement "Directs the work of the various entities in regards to payroll." It further reflects that plaintiff is "responsible for payroll system" and its various functions. The qualifications include supervisory experience and "Problem solving and troubleshooting, decision making with ability to interpret hospital policy and government regulations."

For the above reasons, we conclude that the trial court did not err in determining that plaintiff's position falls within the definition of an exempt administrative employee.

Finally, plaintiff argues that the trial court erred in dismissing her contract claim with respect to overtime wages. We disagree. Plaintiff points to no agreement to pay her overtime. Plaintiff does refer to the Employee Handbook, but even assuming that that constitutes a contract, the overtime section clearly refers to "hourly positions." Finally, in her deposition, plaintiff acknowledged that she was always classified as a salaried employee.

Accordingly, the trial court did not err in granting summary disposition on this issue.

Next, we consider the issues related to mediation sanctions. Plaintiff argues that the trial court erred in awarding sanctions from the date of the first mediation, rather than from the second mediation. We disagree. Following the first mediation, which defendant accepted and plaintiff rejected, the trial court granted partial summary disposition in favor of defendant. Thereafter, plaintiff filed a second amended complaint. The matter was remediated and once again defendant accepted and plaintiff rejected. Thereafter, the trial court granted summary disposition on all of plaintiff's claims.

Plaintiff first argues that defendant's motion for mediation sanctions arising from the first mediation was untimely under MCR 2.403(O)(8) because it was not filed within twenty-eight days of the grant of partial summary disposition following the first mediation, relying on our decision in *Braun v York Properties, Inc,* 230 Mich App 138; 538 NW2d 503 (1998). We disagree. In *Braun*, the trial court disposed of all of the claims of some of the parties and this Court held that the request for mediation sanctions as to those parties was untimely. In the case at bar, the trial court's grant of partial summary disposition did not dispose of all of the claims against defendant. It would be nonsensical to extend *Braun* to the situation where less than all of the claims by a particular plaintiff against a particular defendant have been disposed of. Simply put, so long as a claim by one party against another remains, it is impossible to determine whether the rejecting party has improved their position. That is, with a claim remaining, it is always possible that the plaintiff may nevertheless receive a verdict greater than the mediation award even though some of the claims submitted to mediation may have been disposed of.

Next, plaintiff argues that the remediation effectively vacated the original mediation, relying on our decision in *Mickowski v Keil*, 165 Mich App 212; 418 NW2d 389 (1987). In *Mickowski*, the second mediation (which, in fact, was never held) was scheduled following a substitution of counsel and an agreement by all parties that a second mediation should be held. In the case at bar, however, the second mediation was ordered by the trial court because of plaintiff filing a second amended complaint, not by stipulation of the parties. Thus, *Mickowski* is distinguishable from the case at bar.

We are not persuaded that the trial court erred in measuring mediation sanctions from the date of the first mediation, rather than the second mediation. Had plaintiff accepted the initial mediation award, the matter would have ended and defendant would not have incurred the costs of continuing the litigation. Further, plaintiff points to nothing in the second amended complaint that could not have been included in the first amended complaint and, thus, submitted at the original mediation. Accepting plaintiff's position would only encourage the filing of amended complaints to avoid (at least partially) the consequences of rejecting mediation by prompting a second mediation and "resetting the clock" on calculating the mediation sanctions. This would do nothing to encourage settlement and only serve to frustrate the goal of the mediation rule.

Lastly, plaintiff argues that the trial court should have exercised its discretion under MCR 2.403(O)(11) to decline to award mediation sanctions where the matter is disposed of by motion. The basis for plaintiff's position is that she suffered a nervous breakdown as a result of the working conditions and, in fact, received worker's compensation as a result. However, that has nothing to do with whether the claims she brought in this action were meritorious or whether she should have accepted the mediation award. We cannot say that the trial court abused its discretion in declining plaintiff's request.

For these reasons, we conclude that the trial court did not err in awarding mediation sanctions from the date of the first mediation.

Finally, turning to the cross appeal, defendant argues that the trial court erred in its calculation of the mediation sanctions. We agree. Defendant complains that the trial court failed to apply the factors set forth in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982), in analyzing the attorney fee issue. We agree. Defendant requested an attorney fee of $22,620,

reflecting 156 hours billed at $145 per hour. The extent of the trial court's analysis of this issue is as follows:

> Under the circumstances of this case, it is not unreasonable to award defendant $15,000 plus $28 in costs. That's based upon 150 hours at $100 per hour.

There is no explanation by the trial court why the number of hours billed was reduced nor why the hourly rate was reduced. Indeed, the only justification for the trial court's decision offered by plaintiff is an alleged agreement by defendant's counsel to reduce the rate to $100 per hour. However, plaintiff reads the statement by counsel out of context. Defense counsel did not agree to a rate of $100 per hour for all hours billed, but only to the hours billed by an associate. The following exchanges took place at the hearing on the mediation sanctions:

> [Ms. Sudnick, defense counsel:] Last argument was how the hourly rate of one of my associates should be reduced from a rate of $145 to $100 an hour based upon his years of experience. I would simply point out to the Court that Mr. Valentino [plaintiff's counsel] did not provide any kind of documentary evidence by affidavit or otherwise that the appropriate prevailing market rate for Mr. Wilson should of [sic] been $100 an hour rather than $145 an hour. I'd also point out that to the extent that Mr. Wilson's rate should be reduced to $100, it would then seem appropriate to increase my hourly rate to what I charge to many of my other clients which is $195 an hour rather than the 145 –
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> MS. SUDNICK: I guess I'm reasonably expensive, and I think for all of those reasons that—that I think the Petition that we filed and the fees that we're asking for are fine. If this Court is inclined to lower Mr. Wilson's rate, I'm perfectly happy to accept a reduction of $1,080 and the total amount of mediation sanctions to reflect the $100 an hour.
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> THE COURT: So she's—20,000—about 21,000 now she's down to.

Clearly, defense counsel's offer was to accept the reduction of the hours billed by the associate to $100 per hour, not a reduction of all hours and it was understood by the trial court as such. If counsel had accepted a reduction on the rate as to all hours, then the request would have been reduced by $7,020 (156 hours times a reduction of $45 per hour), not $1,080 and the new total stated by the trial judge would have been $15,600 (156 hours times $100 per hour), not $21,000. Therefore, we reject plaintiff's argument that defendant agreed to the lower rate.

Having rejected the reason given by plaintiff to justify the trial court's failure to go through the *Wood* factors, we must now decide the appropriate remedy. Defendant suggests that we should merely reinstate the original requested amount. We decline that suggestion. Just as defendant was entitled to have the trial court consider the *Wood* factors before the attorney fee request was reduced, so too is plaintiff entitled to have the trial court consider the *Wood* factors before the requested attorney fee is approved. Therefore, we accept plaintiff's invitation to

remand the matter to the trial court for a reconsideration of the attorney fee issue. On remand, the trial court shall apply the appropriate factors and articulate the reasons for its decision.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this decision. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Henry William Saad