STATE OF MICHIGAN

COURT OF APPEALS

DAVID C. GOLLMAN,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
February 24, 2011

No. 293744
Wayne Circuit Court
LC No. 01-014218-CL

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's grant of summary disposition to defendant as to damages. We reverse and remand for two reasons.

First, in deciding the motion for summary disposition, the trial court presumed all facts and inferences in favor of the moving party, rather than the nonmoving party. Rather than hearing full proofs on the damages issue, the court simply adopted defendant's calculation of plaintiff's lost overtime despite the facial inconsistencies contained in defendant's calculations and the contrary proofs submitted by plaintiff that the losses were substantially higher. In essence, the trial court, who at trial would have sat as the trier of fact, "short-circuited" the process by making conclusive factual findings on damages at a motion for summary disposition.

Second, the trial court erroneously ruled that the set-off from damages for other wages earned by plaintiff should not be reduced by the extraordinary expenses incurred by plaintiff in obtaining those wages, despite the fact that those expenses would not have been incurred had he not been wrongly discharged by defendant. When these issues are taken into consideration, the difference in the amount of damages asserted by the two parties differs by approximately $200,000.00. The resolution of that dispute was for the factfinder after the presentation of admissible evidence, not the court during a summary disposition motion.

I. Underlying Facts and Procedural History

This case has a rather tortured procedural history and the controlling issue in this case cannot be considered without a full understanding of that history.

A. The Underlying Grievance and Administrative Proceedings

Plaintiff was suspended in September, 2003 from his employment with defendant City of Detroit (City) as an assistant line supervisor in connection with alleged wrongful conduct. He filed a grievance disputing the propriety of the suspension and later, when discharged on the same grounds upon which he was suspended, filed a second grievance. We have not been provided with the record of the grievance proceedings. However, plaintiff's verified complaint summarizes that he pursued the initial grievance of the suspension using the applicable civil service rules and the provisions of his collective bargaining agreement when, at a later "step 3" hearing, he was advised that as a veteran he could exercise his right under the veteran's preference act (VPA) to have his grievance decided by the Mayor,[1] rather than by a civil service hearing officer. See MCL 35.402. He opted to do so, but his hearing was not scheduled despite numerous requests. He was discharged by the City on or about October 3, 2003 and filed a second grievance, this one relating to the discharge. Plaintiff alleges that, because defendant consistently failed to schedule a hearing, plaintiff filed suit seeking declaratory or injunctive relief and the court subsequently ordered the City to show cause why plaintiff should not be granted the relief he requested. Ultimately, that court directed the City to conduct the VPA hearing without further delay and to provide plaintiff with a complete and legible copy of the exhibits filed by it regarding the initial grievance, as they had not been provided to that time.

The VPA hearing began on August 24, 2004, and was completed on December 14, 2004. The hearing was conducted by a hearing officer who was from the same office as the attorney representing the City in the proceeding. At the close of the City's case, plaintiff asked that the hearing officer grant the equivalent of a directed verdict as there was no evidence to support the suspension or dismissal. The hearing officer declined to do so, indicating that the hearing had to proceed to a conclusion. Plaintiff's witnesses were heard on December 14, 2004. After the hearing transcripts were prepared, the parties submitted post-trial briefs and proposed findings of fact and conclusions of law. The hearing officer, however, delayed in reaching a decision and refused to respond to calls from plaintiff's counsel. When plaintiff's counsel finally reached the hearing officer, which plaintiff maintains was more than a year after he filed his post-trial brief, she advised that she was still awaiting a "rebuttal brief" from the City and that there was no strict deadline on when she was required to render a decision. Eventually, after even more time had elapsed, the hearing officer retired without rendering a decision and, in September 2008, the Mayor, who was the ultimate decision maker in a VPA hearing, resigned his office.

B. The Instant Suit

Having waited more than five years since his discharge, and nearly four years since the conclusion of the hearing, and having never received a decision, on October 27, 2008, plaintiff filed the instant action asking the trial court to order the City to show cause why plaintiff should not be immediately reinstated with full back pay, benefits, and seniority. The trial court entered an ex parte order to show cause and, on November 7, 2008, the parties appeared. At the conclusion of the hearing, the trial court entered an order requiring that plaintiff be reinstated,

[1] At that time Kwame Kilpatrick was the Mayor of the City of Detroit.

restored to his full seniority, fully restored all benefits he would have received, and be "be made financially whole, including but not limited to all back pay to which he is entitled under the Veteran's Preference Act, MCL 35.402 *et seq*." The trial court further ordered that the parties were to meet and make a good faith effort to narrow their differences as to the "basis and/or amount to which Plaintiff is entitled" and that, if they were unable to agree, they should appear on December 4, 2008, and file briefs prior to that date. The trial court also ordered that plaintiff produce copies of his tax returns for 2003-2007 and that, if he did not possess any of them, he execute appropriate IRS authorizations. Additionally, the court ordered that it would retain jurisdiction for a period of 90 days during which either party could present issues in dispute to the court.

Plaintiff's counsel then prepared an order he asserts accurately reflected the November 7, 2008, rulings and filed it on November 13, 2008, under the 7 day rule, MCR 2.602(B)(3), along with a proof of service. The order was signed and entered on November 25, 2008, pursuant to the 7 day rule. On December 1, 2008, plaintiff submitted a brief setting forth in some detail the type and amount of damages that he asserted he was entitled to under the Act,[2] but noting that he could not provide precise calculations because the City had failed to provide him with pertinent data, including data concerning automatic pay increases that occurred during the period of defendant's discharge.

On December 2, 2008, the defense submitted a brief citing *Egan v City of Detroit*, 150 Mich App 14; 387 NW2d 861 (1986), for the principle that some of the sought damages were not permitted, but did not set forth any calculation of compensable damages. Also on December 2, 2008, defendant filed an emergency motion seeking to have the November 25, 2008 order set aside. Defendant asserted it had never been served with the proposed order. Defendant further claimed that it had filed its own 7 day order on November 14, 2008, to which no objections had been received. Defendant attached a proposed order dated November 14, 2008. However, the court file did not contain such an order or proof of service, and the copies provided in the December 2, 2008, motion were not date stamped by the clerk of the court. On December 8, 2008, plaintiff's counsel filed an affidavit from a clerk in his office. The clerk averred that he personally delivered the 7 day order and proof of service to the receptionist of defense counsel's law office on November 13, 2008. Thus, the defense had provided no proofs in support of its version of events—not even a proof of service of the order it claimed it filed—while the plaintiff had submitted a proof of service and an affidavit from the clerk that provided the service.

On December 9, 2008, the trial court heard further argument on plaintiff's initial show cause motion.[3] On December 15, 2008, the trial court, rather than issuing either of the party's proposed orders, issued a new order entitled "Interim Order Returning the Plaintiff to Work."

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[2] Notably these included arguments concerning deductions from the setoffs under *Egan v City of Detroit*, 150 Mich App 14; 387 NW2d 861 (1986) for the extraordinary expenses plaintiff was forced to incur as a result of defendant's wrongful conduct.

[3] A copy of this proceeding has not been provided to this Court.

This order provided that defendant immediately reinstate plaintiff and immediately pay plaintiff $30,000 to be credited against the final judgment. The trial court also ordered plaintiff to supply tax records to defendant for review and to sign appropriate releases for tax records upon defendant's request. The order further provided that the parties were to order the December 9, 2008, transcript and comply with any other requirements set forth orally by the trial court at that hearing. Finally, the order provided that "the parties will exchange information regarding past due compensation so that a decision can be made on January 29, 2009." On January 9, 2009, plaintiff moved to hold defendant and/or its attorney in contempt for failing to comply with the Interim Order. According to the motion, defendant had still not paid plaintiff the $30,000 which, per the order, was to be paid "immediately." Plaintiff further alleged that the order had been prepared by plaintiff's counsel on December 9, 2008, shortly after the hearing at which the order was settled, and faxed to defense counsel that same day, but that defense counsel refused to either sign the order or to identify any portion to which he objected. Instead, defense counsel sent plaintiff's counsel an alternative order that did not comply with the trial court's rulings. In response to the contempt motion, defendant advised the trial court that plaintiff would receive the $30,000 check on January 30, 2009. The contempt motion was put over until February 5, 2009.

On January 28, 2009, defendant submitted a brief on damages, which argued that plaintiff's overtime should be calculated as 50 percent of the overtime worked by James Nomura, another assistant line supervisor. Notably, that brief and the brief to this Court state, without any evidentiary support, that from 2003-2008, Nomura was "the only Assistant Line Supervisor" and that had plaintiff still been working, the available overtime hours "would have been split between the two." Defendant has, to this date, failed to demonstrate that either of these asserted facts is accurate through affidavit testimony or otherwise. The submission was also lacking in information concerning applicable pay increases for the relevant time period that plaintiff had previously requested, although it included a purported mandatory 10 percent pay reduction, which apparently occurred from May 30, 2006 to July 30, 2006.

In its "Supplemental Brief" filed on February 4, 2009, defendant submitted a chart, produced for purposes of litigation, purporting to be an "Overtime Comparison Chart" comparing Nomura's overtime earnings to those of plaintiff for the period 2001-2008. However, the chart did not include Nomura's overtime earnings for 2001 or 2002. Indeed, contrary to the chart's heading, the only year in which both men's overtime was shown was 2003. In that year, according to the chart, Nomura earned $24,633 as compared to plaintiff's $37,299. The chart also fails to take into account that plaintiff was suspended from his employment as of September 3, 2003, which means that the $37,299 in overtime was earned in a period of only 8 months. At that rate, plaintiff's full year overtime earnings would have been $57,200. Thus, to the degree defendant's unsupported assertion that the two men had to share a single set of overtime hours is accepted as true, the reality is that in the only year defendant presented a comparison between the two men, plaintiff worked more than 2/3 of the overtime, not the 50 percent asserted by defendant.

At the February 5, 2009 hearing, the trial court denied plaintiff's contempt motion, presumably because defendant had turned over the $30,000 check to plaintiff after the motion was filed. At the hearing, plaintiff's counsel also advised the trial court that he had still not received records related to damages that had been requested from defendant and that no

foundation had been laid for the trial court to rely on defendant's income charts, which were produced for the litigation, lacked any evidentiary foundation, and had been provided to him less than 24 hours prior to the hearing. Plaintiff's counsel further stated that he did not want to rely on the charts defendant had prepared and had sought the records of overtime work performed by another employee, David Stokes.[4] Plaintiff asserted that his lost overtime should be calculated based upon Stokes' overtime during the relevant years and made an offer of proof to establish that he and Stokes had very similar patterns of seeking and accepting overtime hours during the time both were employed by defendant.

However, the trial court declined to order defendant to produce Stokes' overtime records. The trial court stated that it did not think that plaintiff's overtime records were comparable to Stokes' because Stokes was in a supervisory position and plaintiff was not.[5] Plaintiff objected to this ruling and asked the trial court for an opportunity to lay a foundation concerning the relationship of Stokes' overtime history and plaintiff's. Counsel noted that while the parties had "had a few discussions in chambers about it," plaintiff had never been given an opportunity to lay an evidentiary foundation for the comparison. The trial court agreed and directed plaintiff to file a brief and to return for additional proceedings on March 19, 2009.

No proceedings took place on that date, however.[6] The trial court's register of actions indicates that plaintiff filed a brief in support of his motion on March 19, 2009, although this brief is not contained in the lower court record furnished to this Court. Notably, contrary to the defendant's assertion, evidence in the record shows that plaintiff's affidavit was first filed as an attachment to this brief. Specifically, plaintiff's July 7, 2009, brief, which includes an unsigned copy of the affidavit, references his "previously filed affidavit" in support of his arguments. In addition, plaintiff also discussed this affidavit during the April 9, 2009, hearing in an unsuccessful attempt to obtain Stokes' records. According to his affidavit, plaintiff "worked more overtime hours than any other individual within the department regardless of position or title . . . because I actively sought to work overtime whenever it was available almost without exception." The affidavit went on to state that the person whose overtime hours most resembled his were those of Stokes, a line supervisor, and that plaintiff believed his lost overtime hours would be slightly more than those overtime hours actually worked by Stokes. The affidavit further stated, "Nomura did not seek to work overtime as often or for as long as Mr. Stokes and I typically did. Therefore, despite the fact that we held the same work classification, Mr.

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[4] Stokes was a "line manager" for the City.

[5] As to this ruling, we find the trial court's reasoning dubious for two reasons. First, contrary to the trial court's statement, plaintiff *was* in a supervisory position—he was an assistant line supervisor. Second, to the degree their access to overtime was similar, the job titles of plaintiff and Stokes are not controlling.

[6] The record does not contain a reason as to why this did not occur, although plaintiff's counsel asserted in his brief and at a subsequent trial court hearing that he was present in court on that date and that he waited over two hours for defense counsel who did not appear.

Nomura's overtime history would not accurately reflect the overtime I likely would have worked." The affidavit also disputed defendant's claim that the available overtime was a single unit to be "split" between plaintiff and Nomura. He attested:

> 4. I have been informed by my lawyer that in a brief filed by the City, it is contended that Mr. Nomura's totals in overtime would have to be divided by two in order to accurately estimate the amount of overtime I would have worked, because Mr. Nomura and I held the same position. There is absolutely no basis in fact for that assertion. Not only did I routinely work more overtime (both more frequently and for longer hours) than did Mr. Nomura, [it] was not as if Mr. Nomura working overtime meant that I did not, or vice versa. To the contrary whenever Mr. Nomura worked overtime, I almost always worked overtime as well. However, I frequently also worked overtime when Mr. Nomura did not. Mr. Nomura's habits with respect to overtime were so different than mine, that the use of his records as a basis for estimating my lost overtime pay would be substantially misleading and confusing.
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> 5. There were actually two different types of overtime. Scheduled overtime and overtime due to emergency.
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> 6. Scheduled overtime would typically be filled on a voluntary basis. It included holidays, special events, weekends and other predetermined occasions when overtime was available. For the most part, working scheduled overtime was done on a voluntary basis. I volunteered to work scheduled overtime almost without exception. For big events, i.e., the Thanksgiving Day Parade) (sic), all three supervisors (myself, Mr. Stokes and Mr. Nomura) would be needed, and usually all three of use worked the entire day. On other occasions, only two supervisors would be necessary and on yet others, only one was needed. I worked virtually everytime (sic) "scheduled" overtime was available. Mr. Stokes usually worked with me, and Mr. Nomura worked overtime the least often as between the three of us.
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> 7. We also had to work overtime whenever an emergency required. However, the number of supervisors and line workers needed to work during an emergency varied upon the nature and scope of the emergency.
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> 8. Some emergencies were so widespread or substantial in magnitude, that we might need "all hands on deck". Consequently everyone would be required to work. An example of such an instance would be outages due to severe weather.
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> 9. Other emergencies might be so localized as to require fewer line and/or supervisors to address them, and therefore those who wanted to work overtime typically would, while others were not required to do so. An example of such an emergency would be an outage due to an automobile accident.

> 10. As I was always ready and willing to work overtime, I typically worked everytime (sic) an emergency required the assignment of overtime. Moreover, some emergencies required "all hands" initially, but fewer were (sic) as the problem was addressed. In such instances some line workers would go home as the emergency became more contained, while others worked until it was fully resolved. I almost always volunteered to work more frequently and for longer periods than did Mr. Stokes or considerably more than Mr. Nomura.

Subsequently, defendant filed an additional supplemental brief. Defendant's brief argued that plaintiff's tax filings demonstrated that he had earned substantially more than was shown on the W-2's that plaintiff had submitted and, therefore, plaintiff's W-2's were unreliable as evidence of his earnings. However, as was later shown, the discrepancy between the tax filings and the W-2's was due to plaintiff receiving monies from cashing in his pension and a sum he won gambling, neither of which are funds to be set off from plaintiff's damages as they were not earnings from replacement employment. Defendant also provided another chart comparing plaintiff's wages with Namura's. This one, like the first, was not accompanied by an affidavit attesting to the accuracy of these charts or the manner in which they had been prepared. Similarly, no evidence was offered to support the claim that the only overtime that would have been available to plaintiff during the years in question would have been limited to 50 percent of what Namura accepted. The chart merely shows calculations based upon defense counsel's theory of damages. However, unlike the earlier chart provided by defendant, this one did include Nomura's overtime for 2001 and 2002. Moreover, it contained, without explanation, different values for both defendant and Nomura for the additional years listed in the graph than did defendant's earlier chart. It also did not take into account the fact that plaintiff worked only eight months of 2003.

Viewing this second chart, it shows that, even accepting defendant's unsupported assertion that there was a single set of overtime hours to be divided between Nomura and plaintiff, plaintiff worked substantially more overtime than Nomura. According to the chart, in 2001, plaintiff earned $33,313 in overtime while Nomura earned $26,342, a division of approximately 56 percent to 44 percent. In 2002, plaintiff earned $120,341 in overtime while Nomura earned $78,842 for an overtime division of approximately 60 percent to 40 percent. For 2003, with a calculated "full-year" overtime of $77,918 for plaintiff and a reported overtime of $38,688 for Nomura, plaintiff worked 67 percent of the "available" overtime. For the three years, then, plaintiff worked 61 percent of the "available" overtime, not 50 percent.

On April 9, 2009, counsel appeared in the trial court. Defense counsel reviewed the briefs set forth in his brief. Plaintiff's counsel again requested the records concerning Stokes' overtime history. Counsel again objected to the comparison with Nomura, stating:

> Now, [defense counsel] has essentially avoided or been able to dictate the terms under which there'll be comparisons. He's chosen a Mr. Nomura who is, who shared the same title as did Mr. Gollman, but for reasons that I set forth in the brief and in the, in the affidavit of Mr. Gollman, Mr. Nomura is not an appropriate person to make those comparisons.

> Now, it's one thing to say, for the Court to say, well, I think Mr. Nomura is or Mr. Stokes, you know, make a ruling in favor of one party's side or the other if we were to get this far in the analysis, but without those records I'm essentially preempted from even making the argument, and I want to be in a position to make the argument, your Honor. My client believes that Mr. Stokes is the most appropriate person to make comparisons to if we were to get that far in the analysis. As I submitted before, I don't believe that we should even get to comparison with other employees, but if we get that far it's our position Mr. Stokes is the person.
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> We don't have those records. [Defense counsel] has chosen Mr. Nomura. He has access to the records. I'd like access to those records for Mr. Stokes so I can at least make my argument when we have our full-blown hearing.

The trial court, without explanation stated:

> Mr. Nomura and Mr. Gollman are in the same position, so if we're going to make comparisons we should use that. I don't think that what Mr. Stokes did, notwithstanding the position of Plaintiff, would serve us well in this case.

The trial court ended the hearing noting that, after the September 8, 2009, settlement conference, the court would set a trial date.

In opposition to defendant's subsequent motion for summary disposition, in which defendant again failed to introduce evidence concerning its assertion about a limitation in available overtime, plaintiff further argued that his overtime hours were not comparable to Nomura's and cited the marked differences in the figures in defendant's proffered chart. Plaintiff also submitted a copy of his affidavit and defendant provided no admissible evidence to rebut this affidavit. Plaintiff argued that his calculated overtime for the period for which plaintiff was unemployed should instead be based on his personal average of overtime hours worked during the three years preceding the discharge and that due to the discrepancy in this portion of plaintiff's compensation, as well as disputes concerning the true amount of plaintiff's income, and extraordinary expenses, summary disposition was inappropriate.

Significantly, during the subsequent hearing, the trial court did not find that the method or foundation for the calculation proposed by plaintiff concerning either his actual replacement income or computed overtime was inadequate or otherwise inadmissible. Nevertheless, it simply adopted defendant's rationale and calculations, ruling:

> Mr. Gollman has been reinstated to his position. The only issue that was remaining to be resolved was the issue relating to compensation. And applying the formula that has been developed in the *Egan* case, that's *Egan* versus *City of Detroit*, which found at 150 Michigan Appeals 14, the litigants were instructed to exchange materials and then make a computation regarding what Mr. Egan would have made if he had not been removed from his position, taking into consideration his base pay and possible overtime. Insofar as computing overtime, it's fair and reasonable to look at a comparable position in making that determination.

> *Mr. Gollman was an assistant line supervisor, so it was the Court's feeling that any other person working in that position or similar position, that overtime pattern should be used to determine what overtime would be available to Mr. Gollman*. [Emphasis added.]

Despite the contentions advanced by plaintiff concerning the improper imputation of an annuity distribution and gambling income, or setoff for expenses, the trial court offered no basis for a conclusion, as a matter of law, that defendant's calculations were correct either as to plaintiff's replacement income or the calculations of plaintiff's overtime, or that defendant's comparison charts should be accepted as proofs at a summary disposition hearing.

Moreover, the trial court stated that plaintiff had failed to submit an affidavit in support of his position, plainly ignoring the fact that, unlike defendant, plaintiff had submitted an affidavit. When plaintiff's counsel attempted to remind the trial court that plaintiff had submitted calculations substantially differing from those submitted by the defense, the trial court stated, "Mr. Jarrett, your next move is an appeal."

The trial court entered an order granting summary disposition, but did not state whether it was pursuant to MCR 2.116(C)(8) or (C)(10). On July 30, 2010, plaintiff's counsel moved for reconsideration. In his motion, plaintiff noted that in granting summary disposition, the trial court had accepted the factual presentation of the moving party in violation of the rule that the facts as presented by the nonmoving party are to be accepted. Plaintiff also noted that he had raised issues the trial court had not considered, such as the imputation of gambling or annuity income to plaintiff and whether plaintiff was entitled to a set off from the set off. However, the trial court did not specifically address these issues but simply denied plaintiff's motion.

II. Motion for Summary Disposition

On appeal, plaintiff first argues that this Court should decline to follow *Egan v Detroit*, 150 Mich App 14; 387 NW2d 861 (1986), and allow defendant to set off the amount plaintiff earned from his interim employment from the amount of compensation due him under the VPA. While we note that one advocating a plain reading of the language of the statue might find that it does not require such a setoff, *Egan* was well-reasoned and we are not prepared to disavow it at this time. We concur with *Egan*'s conclusion that the statute was designed to make whole an employee who was wrongfully dismissed, not to provide a windfall to him if he is able to earn a greater wage during the period of the dismissal. Plaintiff does have a duty to mitigate damages. As such, earned income from interim employment should be deducted from damages. *Id*. at 26-28.

Plaintiff further argues that, even under *Egan*, the trial court improperly granted summary disposition to defendant in light of the disputed questions of fact concerning the amount of compensation due plaintiff and the amount of set off to which defendant is entitled. Because potentially dispositive facts are in dispute, summary disposition for defendant under MCR 2.116(C)(10) was inappropriate.

It is undisputed that under *Egan* plaintiff is entitled to damages that include overtime pay he would have worked had he not been wrongfully discharged. This is consistent with the

purpose of the MCL 35.402(2), i.e., to compensate the veteran for wage losses caused by improper dismissal. Given the need to properly calculate plaintiff's overtime wages, we note the trial court's error in accepting certain of defendant's factual assertions as true absent record support for the assertions and then using those unsupported facts to find that plaintiff is not entitled to damages. In particular, as noted above, defendant failed to present any support for its contention that the amount of overtime to which plaintiff was entitled could be, or was, tied to the amount of overtime worked by Nomura. A party who moves for summary disposition must do more than argue that the facts are not contested. The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b), (G)(4); *AFSCME Mich Council 25 v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Here, defendant failed to produce any evidence in support of its major factual claim, which was disputed by plaintiff and formed the underpinnings of defendant's damage calculations.

Second, even without considering any contrary evidence or arguments by plaintiff, we conclude that the trial court's unquestioning reliance on defendant's calculations and its claim that plaintiff would be entitled to half of the overtime worked by Nomura is clearly erroneous. As to the reported overtime hours, defendant's calculation of overtime for plaintiff and Nomura differed significantly in defendant's submissions below, without explanation. More importantly, defendant's own evidence clearly contradicts its assertion that plaintiff and Nomura shared overtime hours equally. It is evident from the charts that defendant submitted that Nomura regularly worked only half of the overtime hours plaintiff did. Thus, the trial court erred in accepting defendant's calculation of a 50 percent split in overtime because the evidence submitted by defendant, to the extent it could be found reliable at all, did not support defendant's assertion.

Further, the trial court erred failed to consider plaintiff's argument that the amount of compensable overtime should be calculated by averaging the overtime plaintiff worked in the years prior to his dismissal. Nothing in defendant's submissions supports a finding that plaintiff's ability to receive overtime would have changed for 2004, 2005, 2006, 2007 or 2008. The trial court should have considered this alternate method of calculating overtime and at least provided some indication on the record as to why it felt this to be inappropriate.

Moreover, given the trial court's apparent decision that comparison to other, similarly situated employees was appropriate when determining the overtime plaintiff should have received, the trial court erred in refusing to provide plaintiff with the documents he sought concerning the overtime hours worked by Stokes for the same period. Michigan has a broad discovery policy that permits the discovery of any matter that is not privileged and that is relevant to the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Contrary to the trial court's assessment of the evidence, plaintiff presented affidavit testimony tending to show that, were the court to use another employee as a comparison with plaintiff's overtime habits, the comparable used should have been Stokes, who was in a job one step above plaintiff and Nomura but who, according to plaintiff, had "overtime habits" that most closely mirrored his own. Yet the trial court simply ignored plaintiff's repeated requests for discovery designed to support his position.

Instead, the trial court simply adopted defendant's approach when it stated, "Mr. Nomura and Mr. Gollman are in the same position, and so if we're going to make comparisons we should use that." Its words of "the Court's feeling," are a vague reasoning for why a comparable should be used. This adoption is improper because it did not state why or how the overtime pattern of "any other person working in that position or similar position" was the correct method to calculate lost overtime pay. Moreover, it ignored the declarations contained in plaintiff's affidavit that, while Stokes' job title was above plaintiff's and Nomura's, the three essentially shared supervisory responsibility of the line workers. This information supported plaintiff's position that Stokes could be used as a comparable employee for purposes of calculating overtime.

We also reject the trial court's conclusion that no question of fact existed concerning the imputation of replacement income during the period plaintiff was dismissed from defendant's employment. Defendant included gambling winnings and pension annuities as setoffs to damages; however, these are not earnings. Gambling winnings are not derived from plaintiff's interim employment. *Egan*, 150 Mich App at 27-28. Further, plaintiff's pension annuities were not income earned during the dismissal period; it was earned prior to dismissal. *Id.* Therefore, these funds were not obtained through interim employment. The trial court cannot include them as setoffs to damages.

Finally, we conclude that plaintiff is entitled to a "setoff within a setoff," where expenses incurred from his interim employment, such as flying to New Orleans and staying in a hotel should be deducted from the total setoff amount. The money plaintiff earned was earned in locations away from his home, so he incurred considerable expenses to participate in the jobs. *Egan* stated, "[D]amages are generally designed to compensate for harm done." *Egan*, 150 Mich App at 27. Therefore, traditional common law damage principles properly govern the calculation of setoffs. In this case, the court should set-off only plaintiff's net income, which is his gross income minus the expenses incurred during his interim employment that would not have been incurred at his position with defendant. This is proper because this figure shows what plaintiff actually gained from this employment. To deduct his outside earnings without reducing them by the expenses required to obtain them would provide a windfall to defendant.[7]

Ultimately, calculation of damages is a question of fact. When the trial court ruled on who is the appropriate comparable, it made factual findings. Accepting defendant or plaintiff's methodology for calculating lost overtime is outcome determinative. If plaintiff's methodology for calculating lost overtime were accepted by the factfinder, then he had a much greater wage loss, where he would still have damages after the setoff from his interim employment. In addition, the question of plaintiff's damages turns on the resolution of factual disputes

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[7] Although defendant asserts that plaintiff from failed to provide documentation of these expenses, the parties did not dispute whether plaintiff had incurred these expenses, but rather disputed their inclusion in the trial court's calculation at all. To the extent the amount of these expenses is disputed, this dispute should be resolved at trial by the factfinder.

concerning what income is to be imputed and to what extent that income should be reduced by considering whether plaintiff had to incur extraordinary expenses in order to earn it. Hence, the method of calculating damages affects the outcome of this case and should be left for the factfinder to decide after it is presented with the parties' evidence, rather than through summary disposition.

Accordingly, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Douglas B. Shapiro