STATE OF MICHIGAN

COURT OF APPEALS

FAITH FREEDOM,

Plaintiff-Appellant,

v

MEIJER GREAT LAKES LTD, MEIJER, INC., and JANE STOCKTON,

Defendants-Appellees.

UNPUBLISHED
November 15, 2012

No. 296951
Midland Circuit Court
LC No. 07-002505-CD

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this case arising from the circumstances surrounding an allegedly wrongful termination, plaintiff Faith Freedom appeals by right the jury's judgment of no cause for action in favor of defendants Meijer Great Lakes, Ltd, Meijer, Inc., and Jane Stockton. She also challenges the trial court's decision to grant summary disposition on her claim of false light invasion of privacy under MCR 2.116(C)(10). Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

Plaintiff worked as a cashier at a Meijer store from March 2001 to May 2007. In October 2006, plaintiff reported that she had a shoulder injury to Curt Howard, a supervisor, that she believed was related to bagging groceries. She was off work from November 2006 to March 2007 and filed a worker's compensation claim. While plaintiff's claim was pending, Jane Stockton, a loss prevention officer, interviewed plaintiff concerning a number of transactions traced to plaintiff's register. Howard sat in on the interview as a witness and took notes. Among other things, Stockton asked plaintiff about numerous 50 percent discounts, suspicious markdowns, and the improper use of coupons. Stockton specifically inquired about an incident where plaintiff accepted six coupons totaling $55 from a co-worker, Pam Corzine, despite the fact that the coupons indicated on their face that only one was to be accepted per order. Plaintiff was able to explain some of the transactions, but Stockton ultimately identified 14 transactions totaling $382.62 as suspect. Some of these pertained to discounted bags of mulch or fertilizer. Stockton denied knowing of the worker's compensation claim.

At the conclusion of the interview, plaintiff signed a statement prepared by Stockton, allegedly because she "felt that was the only way [she] was going to be able to leave that room." Besides the discount and coupon problem, plaintiff acknowledged that she "voided some items and never took them from the cart and the merchandise exited the building." Plaintiff claimed the total calculated loss of $382.62 was added to the statement after she signed it. She also claimed the following statement was subsequently added:

> I admit that I intended to permanently deprive Meijer of the use, benefit, or payment of the above mentioned merchandise. This statement has been read to me. I have read and understand this statement and agree to it. No threats or promises have been used to make me make this statement.[1]

At the same time, plaintiff signed another statement saying: "I, Faith Freedom, I love my job and would never do anything deliberate."

Store personnel contacted the police department and an officer prepared a report listing the offense as embezzlement, but the prosecutor never charged plaintiff. Four days later, Meijer terminated plaintiff's employment. Plaintiff claimed that two other employees, Corzine and Deb Shinkel, had worker's compensation claims pending and were also fired on the same day. Meijer eventually paid $4,000 toward plaintiff's worker's compensation claim.

II. DIRECTED VERDICT

Plaintiff first argues that the trial court erred when it determined that plaintiff failed to present evidence to establish her claim that she was fired in retaliation for filing a worker's compensation claim and, accordingly, directed a verdict in defendants' favor. This Court reviews de novo a trial court's decision to grant a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW 2d 186 (2003). The trial court should only grant a motion for a directed verdict when, after viewing the evidence in a light most favorable to the nonmoving party, the evidence and all legitimate inferences fail to establish a claim as a matter of law. *Id.*

Plaintiff had the burden to establish a causal connection between the decision to fire her and her filing of a worker's compensation claim. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999). Yet, at trial, plaintiff failed to present either direct or circumstantial evidence permitting an inference that she was fired in retaliation for filing her worker's compensation claim. Her only evidence was that she was fired while her worker's compensation claim was pending and that two other employees who had such claims were also fired on the same day.

[1] It is noteworthy that plaintiff did not call her union steward to support her version of events at trial even though he was present for most of the interview and witnessed plaintiff signing the statement.

The fact that she had a worker's compensation claim pending when she was fired does not, by itself, require the conclusion that this was the reason for her termination. Rather, in order to constitute direct evidence, plaintiff would have to have presented evidence linking the pending claim to the decision to fire her, which she did not do. See *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (stating that direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions). This evidence was also not circumstantial evidence of a causal link between her claim and the decision to fire her. Relying on the mere coincidence in time between the two events, without more, does not establish a causal connection." *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468, 472-73 (2003). Rather, it "is a form of engaging in the 'logical fallacy of post hoc ergo propter hoc.'"*Id*. at 186 n 12. With regard to the other workers who might have been fired while they had claims pending, that evidence might give rise to an inference of retaliation if plaintiff had presented evidence tending to suggest that their terminations were in fact causally related to their claims. But plaintiff failed to present any evidence concerning the circumstances of Corzine and Shinkel's terminations, aside from the fact that they might have had worker's compensation claims pending at the time.

Plaintiff also relies heavily on her belief that she conclusively rebutted the claim that she was discharged for embezzlement. She notes that Stockton admitted that she might have acted carelessly rather than intentionally. Moreover, plaintiff points out that she ultimately received unemployment compensation. But, even when viewed in the light most favorable to plaintiff, this evidence does not establish a causal connection between plaintiff's termination and her decision to seek worker's compensation.

Plaintiff also points to the evidence that Meijer took no action against other cashiers who had more discounts. The evidence shows that other cashiers had a greater number of questionable transactions, but that plaintiff's transactions took place during a three-week period whereas the other cashier's transactions were spread out over five weeks to three months. No one but plaintiff had as many as 19 questionable transactions in a single week. Thus, because the other cashiers were not similarly situated to plaintiff, the evidence did not establish that plaintiff was treated differently. See *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997) (stating that a person is similarly situated where all of the relevant aspects of his or her employment situation are nearly identical). She also suggests that she was treated differently because Meijer did not warn her that the coupons had limits, which it did for cashiers after she was fired. However, the coupons themselves stated "limit one per order" and the fact that Meijer later emphasized that to the cashiers does not give rise to an inference that the real reason Meijer fired plaintiff was her worker's compensation claim, rather than her mishandling of a cash register.

There was substantial evidence to indicate that plaintiff's discharge was justified. Moreover, there was no evidence that Stockton, who did the investigation, was even aware of the worker's compensation claim. Although Howard may have been aware of the claim, there was no evidence that Howard played a significant role in the decision to investigate or terminate plaintiff. Plaintiff's evidence did not establish a causal link between her termination and her pending worker's compensation claim; in the absence of direct or circumstantial evidence tending to show that the decision to terminate her was actually motivated by a retaliatory animus, the jury would have been left to speculate whether plaintiff was fired for her mishandling of the

cash register or out of a desire to punish her for filing a worker's compensation claim. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). The trial court did not err when it directed a verdict on this claim.

III. RES JUDICATA

Plaintiff also argues that an unemployment agency determination was res judicata with respect to the determination that plaintiff did not in fact embezzle, commit coupon fraud, or intentionally allow unauthorized discounts while working for Meijer. At the time this argument was before the court, the only remaining claims were false imprisonment and intentional infliction of emotional distress. And plaintiff has not explained how an unemployment agency determination that she did not embezzle would be germane to these claims. Therefore, plaintiff has abandoned this claim of error on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

IV. VERDICT FORM

Plaintiff next argues that the question of whether she embezzled should have been included on the special verdict form. She explained that, if the jury found that she had not committed embezzlement, she intended to file a motion requesting that "those types of terms" be removed from her employment file. Whether a verdict form was proper is an instructional issue. *Hammack v Lutheran Social Servs*, 211 Mich App 1, 10; 535 NW2d 215 (1995). And this Court reviews de novo claims of instructional error. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). "Instructional error warrants reversal if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Id.* (quotation marks and citations omitted).

Jury instructions "should include all the elements of the plaintiff's claims and should not omit material issues, defenses or theories if the evidence supports them." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 26; 761 NW2d 151 (2008). In the present case, the jury was instructed on the claims of false imprisonment and intentional infliction of emotional distress. Whether plaintiff committed embezzlement is not an element of either of these causes of action and there was no equitable claim before the jury. Thus, there was no reason for the jury to decide whether plaintiff had embezzled from Meijer.

V. SUMMARY DISPOSITION

Plaintiff next argues that the trial court erred in granting defendant summary disposition of plaintiff's false light invasion of privacy claim. This Court reviews a trial court's decision on a motion for summary disposition de novo in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Bronson Methodist Hosp v Home-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012).

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The moving party must specifically identify the matters that have no disputed factual issues, and it has the initial burden of supporting its position by affidavits, depositions, admissions, or other

> documentary evidence. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists. The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. . . . A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. [*Id.* at 440 -441 (citations omitted).]

To maintain a claim of false light invasion of privacy, "a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position." *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993). The test is whether it would be "highly offensive to a reasonable person." *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986). "The actor must have had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Id.*

With respect to publication, plaintiff contends that the evidence that defendants published the improper information to the people in the interview room and told a police officer was sufficient to establish her claim. However, because these were not "broadcast[s] to the public in general, or to a large number of people," it was not a false light invasion of privacy. *Duran*, 200 Mich App at 631-632. Plaintiff points out a local newspaper reported that "a Standford woman" had been charged with embezzlement. It was the newspaper, not defendants, who was responsible for the broadcasting; and the fact that a newspaper found out about and published the story does not change the nature of defendants' actions. Moreover, the newspaper's report did not attribute conduct to plaintiff in such a way that would be unreasonable or highly objectionable to a reasonable person. Even though some people might have been able to deduce that this reference was to plaintiff, it does not transform the information into unreasonable or highly objectionable information.

The trial court also correctly held that defendants' communication to the police was privileged. See *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 618; 396 NW2d 809 (1986); see also Restatement 2d of Torts, § 587, cmt b (stating that defamation claims are subject to an absolute privilege that applies "to information given and informal complaints made to a prosecuting attorney or other proper officer preliminary to a proposed criminal prosecution whether or not the information is followed by a formal complaint or affidavit.") This privilege also applies to a false light invasion of privacy claim. See Restatement 2d of Torts, § 652F, cmt a. Accordingly, apart from the lack of publication to a sufficient body of people, plaintiff's false light claim, to the extent it is based on the reporting of a crime to a police officer, could not be sustained.

VI. PRIOR WORK HISTORY

Finally, plaintiff argues that the trial court erred in denying her motion in limine to exclude evidence of her poor work history at Meijer. In plaintiff's motion brief, she asserted that, up to the eve of trial, defendants maintained that her termination was based on the May 2007 investigation, not any earlier work history, and defendants intended to admit her history to place her in a bad light, which would be prejudicial. Additionally, at trial, plaintiff objected to the admission of her work history on the grounds that it was irrelevant. A decision on whether to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Appellate relief should not be granted unless it would be inconsistent with substantial justice or would affect a substantial right of an opposing party. *Id*.

At trial, plaintiff acknowledged that she was suspended on numerous occasions during her employment with Meijer. Specifically, she had been suspended or otherwise disciplined for cash control problems, insubordination, guest complaints, and had apparently been talked to about the use of coupons. Further, she was disciplined in April 2007 for saying she wanted to slap her team leader in front of a customer.

If plaintiff had met her burden of proving a causal connection between the filing of her worker's compensation claim and the firing, the burden would shift to defendants to show that retaliation was not a motivating factor. *Chiles*, 238 Mich App at 470. Defendants had indicated that the primary and immediate reason for discharging plaintiff was the 14 transactions at issue in May 2007. However, a jury could infer that the numerous occasions where plaintiff was suspended or disciplined had a cumulative effect. The extensive earlier discipline tended to support the claim that retaliation did not play a role in the firing. Accordingly, the evidence was relevant and the trial court did not err in permitting its admission. MRE 401; MRE 402.

Plaintiff also objected to the introduction of the information in her employment file because it was hearsay. However, defendant initially used this evidence to attempt to refresh plaintiff's recollection with respect to the prior discipline. The personnel file itself was not admitted. Plaintiff subsequently admitted that she was repeatedly suspended and that the suspensions were for cash control problems, insubordination, and guest complaints, and that she was disciplined for an inappropriate comment in front of a customer. These admissions were not out of court statements and were not hearsay. See MRE 801(c).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly