[Cite as *Kelsh v. WCI Steel, Inc.*, 2012-Ohio-403.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RICHARD M. KELSH, JR.,	:	**O P I N I O N**
Plaintiff-Appellant/ Cross-Appellee,	:	**CASE NO. 2011-T-0006**
- vs -	:	
WCI STEEL, INC.,	:	
Defendant-Appellee/ Cross-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 01477.

Judgment: Affirmed.

Martin S. Hume, Martin S. Hume Co., L.P.A., 6 Federal Plaza Central, Suite 905, Youngstown, OH 44503-1506 (For Plaintiff-Appellant/Cross-Appellee).

Susan C. Rodgers, Buckingham, Doolittle & Burroughs, L.L.P., 3800 Embassy Parkway, Suite 300, Akron, OH 44333; and *Amanda L. Walls*, and *G. Brenda Coey*, Buckingham, Doolittle & Burroughs, L.L.P., 4518 Fulton Drive, N.W., P.O. Box 35548, Canton, OH 44735-5548 (For Defendant-Appellee/Cross-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Richard M. Kelsh, Jr. ("Kelsh"), appeals the trial court's judgment entered in favor of appellee, WCI Steel, Inc. ("WCI"), following a jury trial.[1] For the reasons that follow, we affirm.

1. We note that appellee, WCI Steel, Inc., filed a notice of cross-appeal on January 21, 2011. However, appellee has failed to assign any errors on appeal pursuant to the cross-appeal or R.C. 2505.22.

{¶2} Kelsh began his employment with WCI in 1996. On May 29, 2007, at approximately 7:50 a.m., Kelsh, while at work, struck his left kneecap while climbing down the stairs of a tractor. He reported to the plant dispensary and was examined by the plant physician, Dr. Samuel Tochtenhagen. Dr. Tochtenhagen made the following diagnosis: "Beginning effusion; trauma was localized at the distal patellar tendon." Kelsh was directed to avoid climbing and excessive walking and was to return in the morning for a further evaluation. Kelsh returned to work.

{¶3} On that same day, at approximately 9:40 a.m., Kelsh telephoned the dispensary and stated that he was going to Urgent Care to have an x-ray of his knee. Kelsh was sent to Advanced Radiology-Imaging Services for an x-ray. Instead, Kelsh went to St. Joseph Urgent Care to undergo an x-ray. The emergency room doctor diagnosed a left knee contusion and released Kelsh to return to work apparently with no restriction.

{¶4} The next day, Dr. Tochtenhagen was to examine Kelsh's knee; however, Kelsh did not show for his appointment. Kelsh informed the dispensary nurse that he wanted to see his family physician, Dr. Khaterpaul, and that he was suffering from knee pain.

{¶5} On May 30, 2007, Tim Hendrick, the Company Manager of Safety and Workers' Compensation, sent Kelsh a letter stating, inter alia, that "WCI Steel Inc. extends a formal offer of restricted work for you. Please call our dispensary and schedule a return to work exam."

{¶6} The evidence presented established that WCI offered a comprehensive light duty program to accommodate sedentary work; however, Kelsh did not respond to the May 30, 2007 letter.

{¶7} Kelsh did not report to work after the incident of May 29, 2007. Kelsh did, however, report to the plant dispensary on June 1, 2007, where Dr. Tochtenhagen re-examined his knee. Kelsh informed Dr. Tochtenhagen that his knee caused him discomfort. Dr. Tochtenhagen concluded that Kelsh was able to be placed on restricted duty. However, Kelsh did not accept or appear at work for the light duty.

{¶8} WCI hired a private investigator to conduct surveillance of Kelsh's activities beginning May 31, 2007, through June 7, 2007. During this time, Kelsh, who also owns Leon's, a bar, was observed weeding, trimming bushes, raking, placing trash in a dumpster, pushing a dumpster, sweeping, climbing a ladder, carrying a ladder, painting from the roof of his building, spray painting with a sprayer weighing approximately 60 pounds while standing on a ladder, and climbing into the bed of a pick-up truck.

{¶9} During the time Kelsh was performing these strenuous activities, he attended an examination performed by Dr. Khaterpaul, his family physician. This appointment was scheduled for June 5, 2007. The evidence reveals that at this visit, Kelsh informed the doctor that it hurt to walk, that he could not stand for a long time, and that his knee was uncomfortable and painful. Dr. Khaterpaul provided Kelsh with an off-work slip from May 30, 2007, to June 15, 2007. Kelsh admitted that he did not inform Dr. Khaterpaul of the availability of light duty. Kelsh was to return to work on June 16, 2007.

{¶10} On June 8, 2007, Kelsh completed a Bureau of Workers' Compensation form requesting temporary total compensation. On that form, Kelsh indicated that he had not worked in any capacity during the disability period nor had WCI provided him with light duty work. Kelsh signed the document stating that he had completed the form in a truthful manner.

{¶11} The application was given to Dr. Khaterpaul for completion of the physician's certificate, which was then faxed to WCI on June 19, 2007.

{¶12} On July 6, 2007, Kelsh was suspended, subject to discharge, based on "violation of Company Policy, Rules and Regulations including but not limited to General Conduct[.]" Kelsh's suspension was converted to a discharge on July 11, 2007, which was upheld by an arbiter in a decision dated November 21, 2007.

{¶13} At trial, evidence was presented that Kelsh was not terminated for refusing light duty work, but for making false representations on the temporary total workers' compensation application.

{¶14} Kelsh filed a complaint against WCI on May 19, 2008. In his complaint, Kelsh asserted claims for interference and retaliation in violation of the Family Medical Leave Act ("FMLA"), retaliation under Ohio's Workers' Compensation law, and handicap discrimination under Ohio law. The trial commenced on October 12, 2010, on the FMLA and discrimination claims.

{¶15} At the close of Kelsh's case-in-chief, WCI moved for a directed verdict, which was denied by the trial court. Kelsh then moved for a directed verdict solely on his interference claim under the FMLA, which was denied by the trial court. Kelsh voluntarily dismissed the handicap discrimination claim and the case was submitted to

the jury on the FMLA claim. The jury returned a general verdict in favor of WCI on the FMLA claim. Kelsh moved for judgment notwithstanding the verdict and a new trial, both of which were denied.

{¶16} Kelsh filed a timely notice of appeal. Kelsh's first and second assignments of error for our review state:

{¶17} "[1.] The trial court erred in failing to grant Kelsh's motion for a directed verdict on his claim that WCI interfered with his rights under the FMLA.

{¶18} "[2.] The trial court erred in failing to sustain Kelsh's motion for judgment notwithstanding the verdict."

{¶19} This court employs a de novo standard of review when reviewing a motion for directed verdict and a judgment notwithstanding the verdict, as these motions present questions of law and not factual issues. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995).

{¶20} Pursuant to Civ.R. 50(A)(4), a motion for directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *."

{¶21} The Ohio Supreme Court, in *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275 (1976), stated:

{¶22} "The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party

against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions."

{¶23} **The FMLA Interference Claim**

{¶24} Kelsh asserts the trial court erred in overruling his motion for a directed verdict. Kelsh argues WCI committed interference per se when it admitted that it failed to give him customized notice of his rights under the Act, and, thus, it was error to allow the question of interference to go to the jury.

{¶25} The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period *** [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1).

{¶26} The FMLA prohibits an employer from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided under th[e] [FMLA]." 29 U.S.C. 2615(a)(1).

{¶27} To establish an FMLA interference claim, a plaintiff must establish that (1) the plaintiff is an eligible employee; (2) the defendant was an employer under the FMLA; (3) plaintiff was entitled to leave under the FMLA; (4) the plaintiff gave notice of her intention to take leave under the FMLA; and (5) the defendant denied the plaintiff FMLA benefits. *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir.2005), citing *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir.2003). The parties do not dispute that Kelsh was eligible for the FMLA and that WCI is an employer subject to the FMLA.

{¶28} Three forms of remedy are available to an employee after an employer violates his FMLA rights. First, the employee may obtain compensation for wages, salary, and benefits lost "by reason of the violation." 29 U.S.C. 2617(a)(1)(A)(i)(I). Second, the employee may receive compensation for any actual monetary losses sustained "as a direct result of the violation." 29 U.S.C. 2617(a)(1)(A)(i)(II). Third, an employee is entitled to "appropriate" equitable relief, including employment, reinstatement, and promotion. 29 U.S.C. 2617(a)(1)(B). "Even when an employee proves that his employer violated §2615, §2617 provides no relief unless the employee has been prejudiced by the violation." *Cavin*, *supra*, at 726. "The phrase 'by reason of' imposes a causation requirement upon recovery of lost compensation and benefits under the FMLA." *Breeden v. Novartis Pharmaceuticals Corp.*, 714 F.Supp.2d 33, 35 (D.C. 2010). "[A] proximate cause requirement comports with the FMLA's stated purpose of balancing employees' interests in family and health leave against the legitimate interests of employers." (Citation omitted.) *Id*. at 36. Further, the burden is on the employee to prove an impairment of his rights and a resulting prejudice from the employer's interference.

{¶29} Kelsh cites this court's opinion in *DeCesare v. Niles City School Dist. Bd. of Edn.*, 154 Ohio App.3d 644, 2003-Ohio-5349 (11th Dist.) to support his argument that as a result of WCI's failure to advise him of his rights under the FMLA, he is entitled to recovery under the Interference claim. We disagree with Kelsh's contention that *DeCesare* is "directly on point and indistinguishable from the facts of the present case."

{¶30} In *DeCesare*, the employee was suffering from leukemia. *DeCesare*, *supra*, at ¶2. As a result, the employee, a teacher, asked to be excused from her first

period class. *Id*. The employer refused the employee's request. As a result, the employee resigned her teaching position. *Id*.

{¶31} In *DeCesare*, this court addressed whether the employer violated the FMLA by not informing the employee of her rights under the FMLA. In affirming the trial court's grant of summary judgment, we held that the employer had an affirmative duty to notify the employee of her rights under the FMLA after the employee requested a reduction in her workload as a result of her leukemia—an FMLA qualifying leave. We then stated, "[w]e are not stating that DeCesare is entitled to leave under FMLA, only that she was requesting a qualifying leave. However, she was entitled to notice so that she could explore her options, including applying for leave under the FMLA." *Id*. at ¶12.

{¶32} *DeCesare* is inapposite to the instant case because there was not an issue with causation. In *DeCesare*, the alleged adverse action—the failure to inform the employee of the FMLA—was the principal cause for the loss of compensation. In *DeCesare*, this court only explored the fourth element of a claim for Interference—that is, whether the plaintiff gave notice of her intention to take leave under the FMLA.

{¶33} In the instant case, the record demonstrates that the parties disputed the proximate cause requirement. There was a question of whether Kelsh's termination was a result of WCI's failure to inform him of the FMLA. Below, Kelsh argued that he was terminated, inter alia, for his refusal to engage in "light duty" work, taking medical leave, or failing to complete a medical certification form. On the other hand, WCI maintained that Kelsh was properly terminated as a result of engaging in dishonest and fraudulent acts, i.e., falsifying an application for temporary total benefits with the Bureau of Workers' Compensation in contravention to WCI's Rules and Regulations.

{¶34} The case law is clear that no relief is granted to the employee unless the employee has been prejudiced by the violation. "'An employee who requests FMLA leave would have no greater protection against his or her employment being terminated for reasons not related to his or her FMLA request than he or she did before submitting that request.' An employee lawfully may be dismissed, preventing him from exercising his statutory rights to FMLA leave or reinstatement, but only if the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave." (Citations omitted.) *Arban v. West Pub. Corp.* (6th Cir.2003), 345 F.3d 390, 401, quoting *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262 (10th Cir.1998).

{¶35} Kelsh argues it is undisputed that WCI never informed him of his rights under the FMLA, and, on this basis, he moved for a directed verdict. The FMLA, however, does not provide for strict liability for interfering with an employee's FMLA rights. In this case, the record does not establish that Kelsh received injury or prejudice from WCI's action, and, therefore, the FMLA provides no remedy for Kelsh. There is substantial evidence in support of WCI's position that Kelsh's employment was terminated for cause. The timing of the discharge effectively terminated any leave rights he may have otherwise had. Further, it is undisputed that Kelsh falsified his application for temporary total benefits by claiming that "modified (or light duty work [was not] available with" WCI and that he had not "worked, in any capacity, (including full-time, part-time, self-employment or commission work) during the disability period[.]" In his application, Kelsh signed that he was answering "the foregoing questions truthfully and completely." Kelsh was terminated based on violation of the Rules and Regulations of WCI by engaging in "illegal, dishonest or fraudulent acts."

{¶36} The record further indicates that Kelsh's employment would have been terminated even if WCI had informed Kelsh of his rights under the FMLA. "Several courts have held that an employer's failure to provide adequate notice of FMLA procedures may constitute an interference with FMLA rights *if it causes the employee to forfeit FMLA protections*. In other words, there must be 'some adverse consequence attendant upon [the] lack of knowledge.'" (Citations omitted and emphasis added.) *Jeremy v. Northwest Ohio Dev. Center*, 33 F.Supp.2d 635, 639 (N.D.Ohio 1999). There is no evidence in the record establishing that if Kelsh had been informed of the FMLA protections, he would have completed his application honestly and not in violation of WCI's policies.

{¶37} Although Kelsh was on leave at the time of his termination, it was due to Kelsh's own actions in dishonestly filling out the form for temporary total benefits, which he knew was against the policy of WCI as stated in its handbook. Consequently, as a result of being fired for dishonesty prior to the time FMLA leave rights would have afforded any meaningful benefits, Kelsh was not entitled to leave under the FMLA.

{¶38} In answering the interrogatories, the jury determined that Kelsh suffered from a serious health condition and that he gave proper notice of the need to be absent from work, but that he did not prove by a preponderance of the evidence that WCI *interfered with his rights* under the FMLA. The jury, in a general verdict, then found in favor of WCI on the interference claim.

{¶39} Therefore, the jury's finding in favor of WCI is supported by the evidence, and the trial court properly denied Kelsh's motion for directed verdict and motion for

judgment notwithstanding the verdict. Accordingly, Kelsh's first and second assignments of error are without merit.

{¶40} Under his third assignment of error, Kelsh asserts:

{¶41} "The trial court erred in failing to grant Kelsh's motion for a new trial."

{¶42} This court reviews a trial court's decision to overrule a motion for a new trial under an abuse of discretion standard. *Mannion v. Sandel*, 91 Ohio St.3d 318, 321 (2001). Under this assigned error, Kelsh reiterates his argument that WCI failed to provide him of his rights under the FMLA, and, therefore, he was entitled to recovery. However, as we previously stated, there is no evidence that Kelsh was prejudiced by this violation, as he was terminated based on falsifying his application for benefits.

{¶43} Kelsh's third assignment of error is without merit.

{¶44} The judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.

concur.