STATE OF MICHIGAN

COURT OF APPEALS

EDWARD STANLEY KANCIK, JR., Plaintiff-Appellant/Cross Appellee,	UNPUBLISHED January 11, 2011
v	No. 294271 Oscoda Circuit Court
GREENWOOD TOWNSHIP, Defendant-Appellee/Cross Appellant.	LC No. 08-004331-CD

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's post-judgment order awarding him attorney fees. Defendant cross-appeals, challenging the trial court's order granting plaintiff's motion for a directed verdict on the issue of liability. For the reasons set forth in this opinion, we affirm the trial court's grant of plaintiff's motion for a directed verdict but vacate the court's award of attorney fees and remand for reconsideration of the attorney fee issue.

I. FACTS.

Plaintiff worked as an employee at defendant's transfer site for approximately 17 years, beginning in 1990. On November 14, 2005, while working at the transfer site, plaintiff fainted and cut his head when he fell to the ground. The treating physician believed that plaintiff fainted due to dehydration. On November 11, 2006, plaintiff fainted while driving to work, causing his truck to crash into a tree. Plaintiff was in the hospital for five days, and the doctors were unable to determine why he fainted. On November 21, 2006, a loop recorder was implanted in plaintiff to detect whether he had irregular heartbeats that may have caused his fainting. Shortly thereafter, plaintiff's driver's license was suspended as a result of the accident and his medical condition.

On January 18, 2007, John N. Beattie, M.D., plaintiff's primary cardiologist, cleared plaintiff for work without restriction. The letter from Beattie stated:

> My office notified me that you were trying to obtain a return to work permit. Based upon our recent cardiac evaluation, I believe that it would be okay for you to return to work without restrictions. However, in accordance with the laws of the state of Michigan, I must notify you that you should not drive until such time

> as a cause for your passing out has been determined and treated or until 6 months has elapsed without further incident. If you have any questions about these recommendations, please do not hesitate to contact me.

On January 22, 2007, Kristen S. Maschke, M.D, plaintiff's primary care physician, cleared plaintiff for work without restriction. The letter from Maschke stated that plaintiff "is cleared to return to work with no restrictions." Defendant admitted that plaintiff provided both releases to Paul Eddy, Greenwood Township's supervisor, on January 22, 2007.

On March 12, 2007, Eddy discharged plaintiff and provided plaintiff a letter, which stated:

> This is a letter of termination for your employment in Greenwood Township, Oscoda County, as a service worker at our Transfer site.
>
> Due to your inability to drive and unresolved medical problems, it is impossible to retain you in this position. We have held your job open for the past 4 months, hoping you would be able to return totally unrestricted. It now looks like it will be at least 2 more months before you can drive or perform the duties required.
>
> Your service the past 16 years has been the primary consideration in waiting this long to terminate your employment. We would consider you for employment again, should an opening occur and you have [a] clean bill of health and a driver's license.

Eddy said he was concerned about plaintiff's health and safety because the transfer site was located in a remote area, a half mile from the nearest house. Eddy thought it was unsafe for plaintiff to come back to work without having his medical problem resolved. Eddy said that, although plaintiff "was released to work with no restrictions, the cause of his blacking out had not yet been determined, and that was my deciding factor."

After plaintiff was discharged from his employment, the loop recorder registered two three-second breaks, which indicated that plaintiff's fainting, or cardiogenic syncope, was caused by a heart problem that could be solved by a pacemaker. Plaintiff had a pacemaker put in on June 15, 2007, and, at the time of trial, had not had not fainted since. On August 6, 2007, plaintiff's driver's license suspension was lifted.

On January 18, 2008, plaintiff filed a complaint, alleging that defendant's decision to terminate his employment violated the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. Defendant conceded that plaintiff had a physical impairment but denied liability, asserting that plaintiff's condition prevented him from fulfilling the personal safety and punctual attendance requirements of the job.

At the close of proofs at trial, defendant moved for and was granted a directed verdict on the issue of liability. The trial court submitted the issue of damages to the jury, which awarded plaintiff $52,800-$42,800 in economic damages and $10,000 in noneconomic damages.

On June 22, 2009, plaintiff filed a verified bill of costs and fees, seeking $98,289.99 in statutory attorney fees based on the fee shifting statute in the PWDCRA. Defendant objected, and plaintiff responded to defendant's objections, requesting $113,168.51 in attorney fees, which included additional time expended for responding to defendant's objections.

A hearing was held on August 17, 2009. At the hearing, plaintiff requested $115,668.51, which included $2,500 for "reviewing the brief and attending today's hearing." The trial court awarded plaintiff $35,000 in costs and attorney fees.

II. DIRECTED VERDICT.

Defendant argues on cross appeal that the trial court erred in granting plaintiff's motion for a directed verdict. This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009).

> A motion for a directed verdict . . . should be granted only when, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party, there are no issues of material fact with regard to which reasonable minds could differ. [*Cipri v Bellingham Frozen Foods, Inc (After Remand)*, 235 Mich App 1, 14; 596 NW2d 620 (1999).]

The PWDCRA protects a qualified person with a disability from discrimination. *Peden v City of Detroit*, 470 Mich 195, 204-205; 680 NW2d 857 (2004). "Once the plaintiff has proved that he is a 'qualified person with a disability' protected by the PWDCRA, he must next demonstrate that he has been discriminated against in one of the ways set forth in MCL 37.1202." *Id*. at 205. MCL 37.1202(1)(b) states that an employer shall not "[d]ischarge or otherwise discriminate against an individual . . . because of a disability . . . that is unrelated to the individual's ability to perform the duties of a particular job or position."

In this case, defendant did not dispute that plaintiff was a qualified person with a disability protected by the PWDCRA. Defendant also did not dispute that it discharged plaintiff because of his disability. The only disputed issue at trial was whether plaintiff's disability was unrelated to his ability to perform his job duties.

According to the definition section of the PWDCRA, "unrelated to the individual's ability" means that an individual's disability does not prevent him from performing the duties of the job. MCL 37.1103(l). Thus, the sole issue was whether plaintiff's disability prevented him from performing the duties of his job.

According to the job description prepared by defendant, plaintiff's transfer site duties included maintaining the transfer site during the hours scheduled, taking money from customers, helping customers unload trash, painting the transfer site building when necessary, mowing and trimming the grass when needed, keeping and turning in a log of all trash received, and delivering the money received as directed. A driver's license was not a requirement for plaintiff's job.

In addition to these duties, "one of the duties of any job is to work safely[.]" *Szymczak v American Seating Co*, 204 Mich App 255, 257; 514 NW2d 251 (1994). Thus, a disability "that

prevents someone from doing a job with due regard for the safety of himself and others is a [disability] that is related to the ability to perform that job." *Id.*

In this case, defendant argued that plaintiff's disability prevented him from showing up to work in a punctual manner. Defendant also argued that plaintiff's disability prevented him from doing his job with due regard for the safety of himself.

A. PUNCTUAL WORK ATTENDANCE

Clearly, one of plaintiff's duties was to arrive to work on time. Thus, if plaintiff's disability prevented him from arriving to work on time, his disability would be related to his ability to perform the duties of his job.

Plaintiff's driver's license was suspended shortly after his second fainting incident. As a result of the license suspension, he was no longer able to drive himself to work. As of January 29, 2007, plaintiff had made arrangements for transportation to work for the weekdays, but not for the weekends. When confronted about his lack of transportation, plaintiff told Eddy that he would walk or ride a bicycle to the transfer site if he could not make other arrangements. Eddy did not believe that walking was a viable option.[1]

There is no indication that plaintiff's disability prevented him from arriving to work on time. Although plaintiff had lost his driver's license as a result of his disability, a driver's license was not required for his job, and is certainly not a prerequisite for a timely arrival to work. Eddy's belief that plaintiff would be unable to walk or bike to work or make other transportation arrangements was pure speculation, especially considering plaintiff's 17-year history of punctual attendance.[2] Moreover, the mere potential of being unable to perform a job duty as a result of a disability is an insufficient basis. *Jesson v Gen Tel Co of Mich*, 182 Mich App 430, 435; 452 NW2d 836 (1990) ("We do not believe that *Dauten*[3] should stand for the general proposition that the potential of being unable to perform a job is sufficient to remove a claim from coverage under the HCRA [the former PWDCRA]").

B. PERSONAL SAFETY

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[1] Plaintiff testified that he was planning on moving in with a friend whose house was five or six miles from the transfer site. Plaintiff's house was eleven miles from the transfer site, however plaintiff testified that he was able to walk twenty miles.

[2] According to a Greenwood Township Committee member, plaintiff opened and closed on time and had a good record. The member said that plaintiff would find someone else to cover his shift if he could not make it to work. The member said she would give him "close to" 100 if she had to grade his work attendance.

[3] *Dauten v Muskegon Co*, 128 Mich App 435; 340 NW2d 117 (1983).

Pursuant to this Court's decision in *Szymczak*, if plaintiff's disability prevented him from doing his job safely, his disability would be related to his ability to perform the duties of his job. Review of the testimony presented reveals that Eddy was primarily concerned that the remote transfer site, where immediate help from a fainting injury would be unavailable, prevented plaintiff from performing his job safely.

In *Szymczak*, 204 Mich App at 256-257, the case relied on by the trial court in its decision to grant plaintiff's motion for a directed verdict, the plaintiff, who worked as part of a 30-person group where power tools and equipment were routinely used, suffered a congenital disorder that caused him to experience seizures about once a year. After the plaintiff experienced two seizures at work in a seven-month period, his employer placed him on medical leave, and the plaintiff sued under the former PWDCRA. *Id*. at 256-257. The defendant employer argued that its actions were lawful because the plaintiff's disability related to his ability to do his job safely. *Id*. at 256. The trial court agreed with the defendant employer and granted summary disposition in its favor. *Id*.

On appeal, this Court remanded to the trial court, concluding that summary disposition was inappropriate because there was a genuine issue of material fact whether the plaintiff's job required him to use power tools. *Szymczak*, 204 Mich App at 258. In reaching its decision, this Court stated:

> Because plaintiff's seizures generally come without warning, no one disputes that he cannot safely work with power tools or equipment. However, as long as plaintiff is not operating power tools or equipment, his seizures do not expose his co-workers to danger, and do not increase the danger he always faces as someone who experiences seizures. [*Id*. at 257-258.]

Under the *Szymczak* framework, the question is whether the location where plaintiff worked increased the danger he always faced as someone who experiences fainting. We conclude that reasonable minds could not find that the location where plaintiff worked prevented him from performing his duties safely, because it did not increase the danger he faced as someone who experiences fainting. Thus, the trial court did not err in granting plaintiff's motion for a directed verdict.

III. ATTORNEY FEES.

Defendant argues the trial court abused its discretion in awarding attorney fees. This Court reviews the award of attorney fees and costs under the PWDCRA for an abuse of discretion. *Yuhase v Macomb Co*, 176 Mich App 9, 13; 439 NW2d 267 (1989). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

There is no dispute that the PWDCRA provides for reasonable attorney fees. MCL 37.1606(3) (defining "damages" to include reasonable attorney fees); *Yuhase*, 176 Mich App at 15. At issue here is the trial court's rationale for awarding a lesser fee than requested and the analysis it used to determine what constituted reasonable attorney fees for this case.

When attorney fees are awarded, the amount awarded is for reasonable fees, not actual fees. *Smith v Khouri*, 481 Mich 519, 528 n 12; 751 NW2d 472 (2008). The burden of proof as to reasonableness rests on the party claiming compensation. *Id.* at 528-529. The trial court may not award attorney fees solely on the basis of what it perceives to be fair. *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005).

Although there is no precise formula for assessing the reasonableness of an attorney fee, factors that should be considered include: (1) the skill, time and labor involved; (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer; (3) the fee customarily charged in that locality for similar services; (4) the amount in question and the results achieved; (5) the expense incurred; (6) the time limitations imposed by the client or the circumstances; (7) the nature and length of the professional relationship with the client; (8) the professional standing and experience of the attorney; and (9) whether the fee is fixed or contingent. *Smith*, 481 Mich at 529-530. Our Supreme Court went on in *Smith* to instruct trial courts that when determining a reasonable attorney fee the trial court should:

> ". . . begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e. factor 3 under MRPC 1.5(a). In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5(a) and factor 2 under *Wood*[4]). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. *Smith*, 481 Mich at 530-531.

In this case, the trial court's decision was based on the fact that the case evaluation award was "just about what the jury came back with[,]" that most of the attorney fees were accrued after case evaluation, and that it was unfair to award some costs because they were "the cost of doing business." It is therefore clear that the trial court failed to engage in the analysis required by *Smith* or make any findings regarding the relevant factors listed in *Smith.* Failure to follow the dictates of *Smith* in reaching its conclusions regarding a reasonable attorney fee in this case resulted in the trial court abusing its discretion.[5] We therefore vacate the trial court's award of

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[4] *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982).

[5] The trial court also stated that "it's not fair to award attorney fees that are a lot more excessive than what the award was." However, in the context of civil rights litigation, it is not unusual for fees and costs greatly to exceed the actual monetary sum in dispute. *State Treasurer v Jackson*, 448 Mich 916, 918-919; 532 NW2d 538 (1995) (LEVIN, J., dissenting) ("The purpose of fee shifting is to make legal services available to victims of civil rights violations. Because many of these victims are indigent, limiting attorney-fee awards to the level of monetary damages would often make it impossible for them to retain legal counsel."). Justice Levin identified many cases where the fees and costs greatly exceeded the award of damages. *See Id.* at 919 n 8.

attorney fees in this matter and remand to the trial court for a determination of reasonable attorney fees in accordance with the dictates of *Smith* and subsequent case law.

We affirm the trial court's grant of a directed verdict in favor of plaintiff, but vacate the award of attorney fees and remand for reconsideration of the attorney fee issue. We do not retain jurisdiction. Plaintiff having prevailed on appeal is entitled to costs. MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello