

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT MCGEE,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN REGENTS,

Defendant-Appellee.

UNPUBLISHED

April 12, 2011

No. 295987

Washtenaw Circuit Court

LC No. 08-000507-CZ

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right a judgment of no cause of action. In this action under the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.*, plaintiff alleged that he was relieved of his responsibilities as a Graduate Student Research Assistant in retaliation for engaging in protected conduct; specifically, reporting concerns about possible safety violations. The jury rendered a special verdict finding that plaintiff did engage in protected activity under the WPA, but also finding that defendant did not discharge or otherwise discriminate against plaintiff. Plaintiff argues that the trial court improperly instructed the jury. We disagree and affirm.

The purpose of a Graduate Student Research Assistant (GSRA) position is to provide graduate students full funding for tuition, a stipend salary, medical benefits, and research and educational opportunities. A GSRA must be a full-time student. Faculty members decide whether to appoint a student as a GSRA. The faculty member and the student must be interested in the same area of research. A department has no authority to direct a faculty member to appoint a student as a GSRA. Finally, there must be funding for the GSRA position. If funding terminates during the GSRA appointment, then the appointment ends.

In 2004, plaintiff was given a one-year GSRA 50 percent appointment, meaning he was expected to work 20 hours a week, as a full-time student in defendant's nuclear engineering program. He was tasked with, and succeeded at, getting a small, portable neutron radiation generator operational and licensed so that it could be used in a class. Plaintiff then took a term off to do volunteer work. When plaintiff returned, defendant hired him on an hourly basis to work on a special confinement laboratory for a new large, powerful neutron radiation generator called a D711. The Nuclear Engineering department chair, William Martin, hoped to have the

laboratory completed by April of 2007. During the winter 2007 term, plaintiff prepared the laboratory.¹ However, the D711 failed and was not restored to functionality until June of 2007.

In the summer of 2007, defendant hired Michael Hartman as an assistant professor in the Nuclear Engineering department, and Hartman was tasked with completing the D711 laboratory. In July of 2007, plaintiff informed Hartman that he expected to have the safety systems finished that month; plaintiff also explained that he was finalizing the shielding and door, he wanted to continue working in the laboratory, and he would like to have a GSRA appointment instead of his hourly employment. When Hartman arrived at the university in September of 2007, the safety systems, shielding, and door were incomplete.

Hartman gave plaintiff a 25 percent GSRA appointment, meaning plaintiff would work ten hours a week. Plaintiff's tuition was covered, he received medical benefits, and he received a monthly stipend. The purpose of the appointment was to complete the D711 laboratory, in particular the shielding and safety systems. Plaintiff told Hartman that he believed the laboratory could be completed by the beginning of October of 2007, which Hartman deemed reasonable because none of the systems were unusual. The shielding was ostensibly finished by the end of September, the safety systems were not, despite the absence of any concerns raised by plaintiff about the work schedule.

Hartman wanted to perform a "dry run" of the D711 to evaluate the shielding; Hartman wanted to perform it on October 18, 2007, but plaintiff apparently did not agree to that date, and so no dry run was performed then. Hartman, plaintiff, and Dr. Joseph Miklos, a health physicist for defendant's Radiation Safety Services (RSS) department, attempted to operate the generator on October 19, 2007. Plaintiff was concerned that there was water in a chiller cap that was only supposed to contain coolant. Hartman and Miklos tested and found only the coolant. The generator then failed with a "communications fault," which turned out to be the result of improperly connected data cables.

According to Hartman, a dry run would have prevented the October 19 failure. Hartman expressed his dissatisfaction to plaintiff that a dry run had not been conducted and that plaintiff's work was not progressing at a pace that he wanted. According to Hartman, he wanted to make plaintiff aware that if plaintiff did not complete his tasks in a timely manner, he would have to be more "rigorous in [his] supervision" of plaintiff. Hartman told plaintiff that he wanted plaintiff's tasks and the Neutron Science Lab to be completed by October 31, 2007, and reiterated his deadline in an email. Plaintiff informed Hartman that he believed that the project was moving too fast and that he was concerned about the safety system. Hartman responded that the project was the reason why plaintiff was hired and that the work needed to be done. Miklos believed that Hartman expressed his concerns in an unprofessional manner and acted inappropriately toward plaintiff, but that the October 31, 2007, deadline was nevertheless realistic. Plaintiff disagreed due to the "complexity of the project and safety concerns," and also because he had

¹ We note that we are aware that shielding against neutron radiation is not a trivial matter.

exams on October 30 and November 1. Plaintiff and Hartman held a meeting, and the October 31 deadline was rescinded.

The generator was tested on November 6, 2007. The run showed that the shielding was still inadequate. Additionally, the generator suffered a breakdown from a long-standing electrical fault, requiring part of it to be shipped back to the manufacturer for repairs. The vendor's engineer arranged to reinstall the components in late January of 2008. Plaintiff met with Professor James Holloway, the Associate Dean for Undergraduate Education and a professor in the nuclear engineering department, and discussed his concerns that Hartman was not operating the laboratory safely and was developing it at an inappropriate pace. Holloway testified that plaintiff stated that he had not envisioned that he would have to deal with deadlines. Holloway testified that he did not discuss the meeting or plaintiff's concerns with Hartman, but Hartman testified that Holloway told him that plaintiff was concerned about the direction of the lab and had safety concerns. Plaintiff was able to continue work on the safety systems despite the D711 being nonoperational, but he did not complete his work on the safety systems in November of 2007.

On December 3, 2007, plaintiff sent an email to Hartman stating the he had exams the following week and wanted to return to the laboratory on December 14 to finish the safety systems before the holidays. Hartman responded that plaintiff's plan was "not acceptable" and told plaintiff that he wanted to meet with him the next day to continue working on the safety systems. Hartman told plaintiff to come to the lab the next day to set a work schedule for the week and that there were things that needed plaintiff's attention before January. According to Hartman, plaintiff never came to the lab to set a work schedule, and he was very concerned that plaintiff was not getting his tasks in the lab completed. On December 4, 2007, Hartman sent an email to plaintiff that included a list of six tasks that he wanted plaintiff to complete. Hartman also attached a form for plaintiff to keep track of the time that he spent working on his assigned tasks, which Hartman instructed plaintiff to submit on December 10. According to plaintiff, Hartman's schedule of tasks conflicted with his final exam week, and he decided to concentrate on his exams.

By December 11, 2007, Hartman had not received a response from plaintiff regarding the December 4 list of tasks, so he asked plaintiff for an update on plaintiff's progress. According to Hartman, plaintiff did not respond to this request. Later in December, Hartman sent emails to plaintiff, requesting that they schedule a meeting. Again, plaintiff did not respond to Hartman's emails. Hartman stated that plaintiff only worked on three of the six assigned tasks through February of 2008 and ultimately completed only five of them. Also in December, Hartman told Martin that he did not intend to reappoint plaintiff as a GSRA, although Martin explained that plaintiff's GSRA appointment would remain funded retroactively from September 1, 2007, through April of 2008, when his appointment was originally scheduled to end. On January 3, 2008, Carolyn Joachin, the nuclear engineering department administrator, sent Hartman and Shannon Thomas, who "takes care of accounting," an email to that effect.

In early January 2008, Hartman and plaintiff met to discuss the Neutron Science Lab, Hartman's disappointment with plaintiff's work during the previous term, and whether Hartman would appoint plaintiff as his GSRA for the winter 2008 term. Hartman felt that plaintiff deserved a second chance and offered to reappoint plaintiff as a GSRA for the winter 2008 term

(until April 30, 2008) at a 25 percent appointment. Plaintiff accepted, and Hartman reappointed plaintiff. Plaintiff's task was to finish the tasks that Hartman had assigned to him in the fall 2007 term, i.e., the safety system. According to plaintiff, he understood that the GSRA appointment was to last until April 30, 2008. On January 16, 2008, plaintiff sent an email to Hartman stating, "I will let you know when I have a working safety system. . . . Hopefully, any day."

On January 21, 2008, plaintiff sent an email to Hartman stating that he had a working safety system but that there were a few minor characteristics that he did not like, although with the purchase of some additional components, the safety system would be "100 percent" by February 1, 2008. Hartman authorized the purchases, but plaintiff did not get the parts within the time that plaintiff stated. Hartman testified that, by February 1, "there were many components of [the safety system] that weren't even installed and I don't even think purchased at that point." On February 11, 2008, plaintiff emailed Hartman, stating that he would finish the safety system by the time the D711's electrical components were reinstalled, to which Hartman responded that they needed to finish the safety system that week.

In February of 2008, Miklos and Professor Kimberlee Kearfott authorized Hartman to install a door on Kearfott's laboratory because the D711 laboratory required all adjacent laboratory spaces to be brought up to code. Kearfott's laboratory contained a radiation generator containing a cesium-137 radiation source, but, unbeknownst to Hartman, the generator was not operational at that time. Hartman reviewed the operating procedure for the generator before entering the laboratory and took with him a radiation detector and dosimeter, none of which revealed anything beyond normal background radiation readings. Hartman removed the door but did not reinstall it on February 15. The next day, Hartman asked plaintiff to accompany him to Kearfott's laboratory; plaintiff was concerned about radiation despite Hartman's assurance that Kearfott and Miklos knew what they were doing. Plaintiff assisted for about half an hour and became upset and went home.

Plaintiff contacted Miklos and Kearfott with his concerns. They agreed that Hartman had not been supposed to get near the cesium-137 source, but that plaintiff could not have received any irradiation. Miklos explained that Hartman and plaintiff had not violated any Nuclear Regulatory Commission regulations, but he and Kearfott both supported plaintiff reporting the incident to defendant's Radiation Safety Services (RSS) department. Plaintiff contacted radiation safety officer Mark Driscoll about the incident. Plaintiff also contacted Lisa Stowe, an industrial hygienist with the defendant's Department of Occupational Safety and Environmental Health (OSEH), as well as the Department of Environmental Quality, about a sink Hartman had installed in the D711 laboratory, because plaintiff was concerned that it was improperly connected to the storm drain. Stowe advised Hartman that OSEH was going to test the sink and made up a false story about how she learned about it to protect plaintiff's identity. The test ultimately showed that the sink was properly connected to a sanitary drain. Kearfott confronted Hartman about his entry into her laboratory, which Hartman "dodged." Hartman asked whether plaintiff had reported him to RSS, which Kearfott refused to answer.

On February 19, 2008, plaintiff left the laboratory to be with his ill son. Hartman asked plaintiff to call him later, but plaintiff did not do so. Hartman emailed plaintiff to ask plaintiff to schedule the completion of the safety systems and other matters for the laboratory; Hartman

advised plaintiff that failure to do so would jeopardize his continued involvement with the laboratory. Plaintiff did not respond.

Plaintiff anonymously contacted Christine Gerdes, Assistant General Counsel for defendant, to advise her that he would not return to the D711 laboratory despite outstanding tasks because of his concerns about entering the cesium-137 laboratory and alleged chemical dumping. Gerdes advised plaintiff to inform his faculty member that plaintiff would not be returning. She could not determine the identity of the caller, but she reported it to Ron Dick, the Associate Director of Academic Human Resources.

On February 20, Hartman again emailed plaintiff asking for a call. Plaintiff did not call Hartman, but later in the day, plaintiff emailed Hartman, stating, "I won't be in the lab for the rest of the week." According to Hartman, he interpreted plaintiff's email to mean that plaintiff would not be returning to the lab until the following Monday—the day the D711's electrical components were to be reinstalled. Hartman repeatedly asked plaintiff to call him, but plaintiff did not do so. That evening, Hartman sent plaintiff an email stating as follows:

Bob, effective immediately, you will no longer have any responsibilities associated with the Neutron Science Laboratory. You will continue to receive your GSRA for the remainder of the term, and it is my expectation that you will utilize your time to complete your outstanding course work in NERS 315. All equipment belonging to the Neutron Science Lab needs to be returned. Ensure that any personal files are removed from the Neutron Science Lab laptop. I trust that you will be able to comply with this request by noon on Friday, February the 22nd, so that the equipment is available for testing of the neutron generators next week.

Hartman testified that he was not aware of plaintiff's complaints to RSS or OSEH at the time he relieved plaintiff of his responsibilities. Plaintiff never told Hartman about the complaints. According to Hartman, his decision to relieve plaintiff of his duties was not related to any of plaintiff's complaints, but, rather, because plaintiff did not complete his tasks. Martin discussed plaintiff's allegation that Hartman had retaliated for the complaints with Hartman and was convinced that Hartman had not retaliated but rather felt that plaintiff was not performing his duties.

Although the safety systems were still not completed by the time the D711's electronics were reinstalled, Hartman eventually finished the D711 laboratory project. The State of Michigan licensed the D711 generator in the spring of 2008. The nuclear engineering department paid plaintiff his full salary, benefits, and tuition until April 30, 2008. According to Peggy Jo Gramer, the Senior Graduate Program Coordinator, at the time of trial, plaintiff completed all the requirements to earn his masters degree. According to Martin, plaintiff was not required to have a relationship with the D711 laboratory to apply for the PhD program in the future.

Plaintiff sued defendant under the Whistleblowers' Protection Act, and the jury reached a special verdict that defendant did not discharge or discriminate against plaintiff. The trial court entered a judgment of no cause of action, and this appeal followed. As stated, plaintiff complains that the jury was improperly instructed. We disagree.

We review preserved claims of instructional error de novo. *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008). “A verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial.” *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 108; 776 NW2d 114 (2009), citing *Jimkoski*, 282 Mich App at 9.

Significantly, plaintiff’s assertion that the jury was improperly instructed pertains only to an issue the jury never reached. So even if the instruction was erroneous, the error cannot be inconsistent with substantial justice. In *Johnson v White*, 430 Mich 47, 60-61; 420 NW2d 87 (1988), the trial court entirely omitted an instruction, but the jury’s special verdict form set the order of the jury’s deliberations and instructed the jury not to consider that issue if they found the defendants not negligent. Because the jury did find the defendants not negligent, it never reached the question to which the omitted instruction would have pertained. Therefore, despite the trial court’s failure to instruct the jury on the presumption of the decedent’s ordinary care, it was not an instructional defect inconsistent with substantial justice, because the record conclusively showed that the jury had no opportunity to consider the instruction in any event. *Id.* at 61.

The present case is conceptually analogous to *Johnson*. The trial court instructed the jury regarding plaintiff’s burden of proof under the Whistleblowers’ Protection Act. The court also provided the jury with the following instruction now challenged by plaintiff:

Your task is to determine whether Defendant discriminated against the Plaintiff. You are not to substitute your judgment for the Defendant’s business judgment, or academic judgment, or decide this case based upon what you would have done. However, you may consider the reasonableness of the Defendant’s stated business or academic judgment along with all the other evidence in determining whether the Defendant discriminated or did not discriminate against the Plaintiff.

The trial court then provided the jury with a special verdict form, containing eight questions. The first question stated, “Did Plaintiff engage in protected activity under the Michigan Whistleblowers’ Protection Act?” The second question stated, “Did Defendant discharge or otherwise discriminate against Plaintiff?” And, the third question stated, “If Defendant discharged or otherwise discriminated against Plaintiff, was it because of Plaintiff’s protected activity?” After each of these questions, the jury was instructed that if it answered the question “yes,” it should continue to the next question. But, if the jury answered a question “no,” it was to inform the court clerk that it had reached a verdict.

The jury answered the first question affirmatively. However, the jury answered “no” to the second question, finding that defendant did not discharge or otherwise discriminate against plaintiff. The court’s business and academic judgment instructions related to the third question on the special verdict form regarding causal connection. The jury did not have an opportunity to consider the allegedly erroneous instructions because it did not reach question three. *Johnson*, 430 Mich at 61. Accordingly, the business and academic judgment instructions did not affect the outcome of the trial and were not inconsistent with substantial justice. *Id.*; *Ykimoff*, 285 Mich App at 108.

We reject plaintiff's argument that the instructions confused the jury to such an extent that it did not understand what it was being asked to find on the special verdict form. The instructions did not render the special verdict form confusing. The form distinguished between the elements of discharge or discrimination and causal connection in questions two and three. It clearly stated that the jury should not consider the issue of causal connection in question three, unless it found in question two that defendant discharged or otherwise discriminated against plaintiff. Jurors are presumed to understand and follow a court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Plaintiff's only support for his contention that the jury was confused in rendering its verdict is his claim that the jury's finding that he was not discharged or discriminated against is "clearly unsustainable." Plaintiff is essentially asking this Court to review the great weight of the evidence. We decline to review this unpreserved issue, which was also not raised in the statement of questions presented. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003); *Hyde v Univ of Mich Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kristen Frank Kelly
/s/ Amy Ronayne Krause