STATE OF MICHIGAN

COURT OF APPEALS

MARY STANN,

Plaintiff-Appellant,

v

COMPUWARE, INC. and,
KATHLEEN ANDONIAN
jointly and severally,

Defendants-Appellees.

UNPUBLISHED
June 22, 2001

No. 219329
Oakland Circuit Court
LC No. 89-370250-CZ

Before: Cavanagh, P.J., and Cooper and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff Mary Stann appeals as of right a February 2, 1999, order granting defendants' motion for a directed verdict and a September 24, 1997, ruling granting defendant Compuware's motion for partial summary judgment. We affirm in part and reverse in part.

I. Procedural History

This case is before this Court for a second time. Plaintiff filed a claim against defendants on May 23, 1989, alleging retaliatory discharge, sexual harassment, and discrimination based upon age and marital status. This Court found that the summary disposition of plaintiff's retaliation claim was improperly granted because plaintiff had "presented genuine issues of material fact as to whether her complaint was a significant factor in the adverse employment decisions that followed, and whether her discharge for poor performance was pretextual." *Stann v Compuware, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 1995 (Docket Nos. 144345, 146003). This Court also held that the trial court's summary dismissal of plaintiff's sexual harassment claim, as a whole, and her discrimination charges were proper. In plaintiff's claim that the circuit court improperly dismissed her compensation claim for failure to exhaust administrative remedies, this Court reversed the lower court and held that the permissive language of the Wage and Fringe Benefits Act (WFBA), MCL 408.471 *et seq.*, did not require a complaint for unpaid wages, pursuant to a common law theory, to be filed with the Department of Labor before allowing a claimant to proceed with a lawsuit.

On September 24, 1997, the trial court granted defendants' motion for partial summary, pursuant to MCR 2.116(C)(10), on the grounds that the agreement was clear and did not leave the payment of commissions to either parties' discretion. The trial court held that since plaintiff was paid her base salary for March, her argument that she essentially provided Compuware with free labor was misleading. Additionally, the trial court dismissed plaintiff's contract complaint under the WFBA and her unjust enrichment claims because of the existence of a valid contract.

II. Factual Background

In March 1985, plaintiff obtained employment as a computer sales representative with Compuware. In July 1985, plaintiff and another sales representative, David Cronberger, were assigned to work on a major account, AT&T Communications. In October 1985, plaintiff received an overall satisfactory on her personnel evaluation (PACE).

Plaintiff and Cronberger worked together on a daily basis. According to plaintiff, Cronberger wanted to pursue a personal relationship with her as well. Cronberger ignored plaintiff's insistence that their relationship was only professional and continued his attentions periodically throughout 1985 and into 1986. Plaintiff testified that after an altercation with Cronberger in September 1986, Cronberger went to management and suggested they both he and plaintiff be removed from the AT&T account. Plaintiff became angry because she wanted to remain on the account.

Plaintiff testified that after Cronberger went to management, she privately discussed his conduct with Wendy Meade, a manager at Compuware, who advised her to report the incidents. Plaintiff then complained to personnel department staff, telling them that she did not want Cronberger to bother her anymore and that she wanted to keep the AT&T account. The personnel staff investigated and requested that plaintiff document the incidents. Plaintiff testified that approximately a week after her complaint, Kathy Andonian, her supervisor, called her at home to offer support. The vice-president of sales, Mike Lobsinger, also informed plaintiff that he would not tolerate sexual harassment.

Plaintiff acknowledged that Cronberger did not bother her again after her complaint. Plaintiff testified that shortly after her complaint, Andonian called plaintiff into her office and told her that she was perceived as a "troublemaker" by Andonian and management. According to plaintiff, Andonian cited instances where plaintiff had repeated rumors and also mentioned her complaint against Cronberger. Plaintiff stated that she felt reprimanded and decided not to turn in the documentation of the instances of sexual harassment.

Sometime between September and October of 1986, plaintiff and Cronberger were removed from the AT&T account. Compuware informed plaintiff that the removal of the account was to separate her from Cronberger. Plaintiff alleged that this occurred at Cronberger's instigation and that Andonian agreed. Plaintiff went to Andonian's supervisor, Roy Bildson, to complain about being removed from the AT&T account. According to plaintiff, Bildson also told her that she was perceived as a troublemaker and a problem.

Starting in October of 1986, and continuing throughout the third and fourth quarters, Andonian began meeting with plaintiff on an almost daily basis for what Andonian viewed as work guidance and what plaintiff viewed as harassment. In January, Andonian reduced plaintiff's accounts from 120 to 40 accounts, and in February, after plaintiff's forecasted January sales failed to fully materialize, further limited plaintiff to 8 accounts. However, Andonian raised plaintiff's accounts back to 40 towards the end of March. Andonian stated that she had become concerned that Compuware was losing business because of plaintiff's work methods. She testified that these restrictions were temporary and were imposed to enable plaintiff to focus on account management.

Plaintiff received her second PACE evaluation on March 31, 1987. The appraisal, conducted by Andonian, indicated that plaintiff's work was below standards, that she had met her quarterly quota only twice, and would not have met her yearly quota without her largest account. An accompanying memo indicated that plaintiff continued to suffer the same shortcomings as noted in her first evaluation and also identified other performance deficiencies. On April 16, 1987, after a sales presentation to management, which plaintiff admitted was "probably the worst presentation" she had ever given, plaintiff was terminated from Compuware's employment on the basis of poor performance. Pursuant to the terms of a commission agreement she had signed with Compuware, plaintiff was not paid commission on any accounts that were due at the time of her termination. According to plaintiff, she had $78,450 in outstanding sales upon her termination, for a total of $7,845 in commissions.[1]

III. Arguments on Appeal

A. Law of the Case Doctrine

Plaintiff first asserts that the law of the case doctrine applies and that it should have precluded the trial court's grant of a directed verdict. We disagree.

This Court reviews the applicability of the law of the case doctrine de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; ___ NW2d ___ (2001), citing *Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135; 580 NW2d 475 (1998). The law of the case doctrine maintains that a ruling by an appellate court, concerning a particular issue, is binding authority on the appellate court and lower courts with respect to that issue. *Ashker, supra* at 13. "Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Id*. Moreover, the correctness of the prior determination is irrelevant. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). The law of the case doctrine only applies if the facts of the case remain materially the same. *Id*.

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[1] Compuware asserts that plaintiff only had $55,950 in non-commissionable sales for March 1987. According to Timothy Thewes, the Compensation Manager at Compuware, plaintiff's March sales included: $10,500 to Clark O'Neill, $23,400 to E.I. Dupont, and $22,050 to Pan Am.

The trial court's initial grant of summary disposition, pursuant to MCR 2.116(C)(10), was reversed by this Court on the basis that material questions of fact remained. The pertinent portion of the Court's opinion stated that:

> while defendants did indeed submit evidence that plaintiff was in fact discharged for poor work performance, plaintiff's contrary evidence that her removal from the AT&T account was in response to the Cronberger situation, and that she had met her annual quota and was a high producer, presented genuine issues of material fact as to whether her complaint was a significant factor in the adverse employment decisions that followed, and whether her discharge for poor performance was pretextual. [*Stann v Compuware, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 1995 (Docket Nos. 144345, 146003.)]

Since the initial appeal involved a reversal of summary disposition, based upon this Court's conclusion that material facts remained, the decision in *Brown v Drake-Willock Internat'l, Ltd*, 209 Mich App 136; 530 NW2d 510 (1995), controls. *Brown* held that when this Court "reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Id*. at 144. Thus, this Court's previous remand to the trial court does not preclude the trial court from revisiting those issues in dispute and granting a directed verdict motion.

B. Directed Verdict

Plaintiff next argues that the trial court erred in granting a directed verdict based upon its own assessment of the credibility of witnesses and the inferences to be drawn from the facts. We agree.

The trial court's grant of a motion for directed verdict is subject to de novo review on appeal. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 634; 601 NW2d 160 (1999). Such a verdict is only appropriate when no factual question exists upon which reasonable minds could differ. *Id*. at 635. "This Court evaluates a motion for a directed verdict by considering 'the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor.'" *Tobin v Providence Hospital*, 244 Mich App 626, 643; 624 NW2d 548 (2001), quoting *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994).

In *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000), the Court stated that in order to maintain a successful retaliation claim under the Elliott-Larsen Civil Rights Act, the plaintiff must establish:

> (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action.

It is uncontested that plaintiff successfully demonstrated that she engaged in a protected activity, that this was known by defendant, and that defendant took an adverse employment action against plaintiff. The issue is whether a causal connection existed between plaintiff's sexual harassment complaint and the subsequent adverse employment actions.

The trial judge made several noteworthy statements during closing arguments. In answer to plaintiff's contention that Compuware's response to her sexual harassment charge was to take away the AT&T account, the trial court stated that "[t]here is no testimony to that outside the plaintiff's testimony." When plaintiff insisted that the jury should decide whether she was labeled a "troublemaker" for her sexual harassment complaint, the court replied "that was strongly denied by Ms. Andonian [sic] the troublemaker referred to her complaint of sexual harassment." The court then used the following rationale when it granted defendants' motion:

> there was testimony of the plaintiff that she had reported the sexual harassment claim. And that was the only basis for her being terminated. However the testimony of Mrs. Andonian which is [sic] who was an excellent witness in this court's opinion, of all the events that took place regarding plaintiff [sic] employment of her being given certain accounts including the so-called guest ATT account with Mr. Cronberger who was the object of her sexual harassment charge.

Based on the trial court's statements during closing arguments and in its actual ruling, it appears that the court did not follow the appropriate standard for a directed verdict. Rather than considering the evidence in the light most favorable to plaintiff, and making all reasonable inferences in her favor, the trial court decided that it believed Andonian's testimony and disbelieved plaintiff. *Tobin*, *supra* at 643.

Moreover, several issues of material fact remained upon which reasonable minds could have differed. In particular, there was a factual dispute concerning the timing of the decision to take away the AT & T account. Plaintiff claimed that the decision was made after her sexual harassment charge. Conversely, defendants argued that the decision was made many months before plaintiff's complaint, as the AT&T account was considered a "guest" account.[2] Additionally, there was evidence that plaintiff was a high producer and that defendants' criticisms did not begin in earnest until after her sexual harassment complaint. There was also evidence that plaintiff refused to follow prescribed sales methods and that her presentation skills were lacking.

The evidence presented did not provide a definitive reason for plaintiff's termination.

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[2] Andonian testified about an October 7, 1986 memorandum that included a statement about putting a plan together to move the AT&T account. This memorandum was written after plaintiff filed her complaint but Andonian testified that the decision was made months before to make the AT&T account a National account and that it was only assigned to plaintiff and Cronberger as a guest account. Andonian admitted that there was no written documentation of the plan to make the AT&T account national prior to plaintiff's complaint.

Consequently, it is not unreasonable to believe that a juror could find that plaintiff was terminated in retaliation for her sexual harassment claim. If the evidence can lead reasonable jurors to disagree, it is inappropriate to grant a motion for directed verdict. *Tobin, supra* at 652. Therefore, the trial court's grant of a directed verdict was improper.

C. Summary Disposition on Plaintiff's Unpaid Commissions

Plaintiff further asserts that the trial court erred in granting defendants' summary disposition on her claim for unpaid commissions. We disagree.

A trial court's grant or denial of summary disposition is subject to de novo review on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). A trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817, reh den 461 Mich 1205 (1999).

On April 8, 1986, plaintiff signed a document entitled "Commission Plan Overview" (Plan).[3] The 1986 Plan provides in pertinent part:

> Duration – this plan is effective from April 1, 1986 through September 30, 1986. At the end of this period a new plan may be introduced or the current plan continued . . . .
>
> * * *
>
> Termination – If an employee leaves the company prior to March 31, 1986, all commissions will be based on absolute sales amounts and paid based on the commission schedule. No prorating will take place.
>
> Sales – A sale is defined to take place at the time a signed contract is approved by management, and an invoice is sent. The sale will be considered final if payment was received within 30 days of the date of the invoice. If payment is not received in this time period, the sale will not be considered final and no bonus or commission will be paid until payment is received. The salesperson must be an active employee of Compuware at the time the sale becomes final in order to receive any commission.

[3] In fact, plaintiff had signed identical documents on March 28, 1985 and October 18, 1985. There were also affidavits of other employees that had signed the same agreements as plaintiff.

Plaintiff was terminated on April 16, 1986, six months after the stated expiration date on the Plan. Plaintiff claims that she is entitled to $7,845 in commissions on her March 1987 sales. However, defendants assert that plaintiff agreed to and, in fact, signed the Plan, which specifically states that an employee must be an active employee of Compuware in order to receive any commission.

The meaning of contractual language is a question of law subject to de novo review. *Saint Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). "We construe contractual language according to its plain and ordinary meaning, and avoid technical or constrained constructions." *Id*. The ultimate goal in interpreting contracts is to give effect to the parties' intentions. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). However, when the terms of a contract are unambiguous, the plain meaning of the words can not be impeached with extrinsic evidence. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

In the instant case, the plan states that it was effective from April 1, 1986 through September 30, 1986 and that at the end of this period a new plan could be introduced *or the current plan continued*. The language is clear that in the absence of a new plan, the current plan would remain in effect. The plain meaning of the terms of the plan shows that it was in effect when plaintiff was terminated.

Assuming that the plan was effective when plaintiff was terminated, plaintiff argues that this Court must determine if its provisions were enforced in good faith, whether they resulted in unjust enrichment, and if they conformed with public policy. Plaintiff cites *Burkhardt v City Nat'l Bank*, 57 Mich App 649, 652; 226 NW2d 678 (1975), to support her position that a contract, which provides a party discretionary power as to the manner of its performance, implies that such discretion will be exercised in good faith. Plaintiff further argues that *O'Connor v March Automatic Irrigation Co*, 242 Mich 204; 218 NW 784 (1928), mandates that commission contracts have a good faith requirement. *O'Connor* involved a salesmen whose contract specified that commissions would not be received until the defendant received compensation from the purchaser. *Id*. at 212. That Court found the contract to be valid but noted that the defendant could not arbitrarily cancel or neglect to fulfill orders merely to avoid paying plaintiff's commissions.

However, in *Barber v SMH, Inc*, 202 Mich App 366, 372; 509 NW2d 791 (1993), this Court "refused to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in the employment context." In that case, the plaintiff argued that his claim was based on contract theory and that good faith and fair dealing prevented defendants from depriving him of commissions on future sales. *Id*. That contract provided that: "[i]*n the event of termination of this agreement by either party, commission will be paid on all orders received and shipped as of the date of the termination.*" *Id*. at 374 (Emphasis in the original). The Court held that the plaintiff's entitlement to post-termination commissions were based upon the contract provisions. *Id*. at 373. Michigan does not recognize an implied covenant of good faith and fair dealing in the employment context. *Id*. at 372.

Further, there was no indication in the instant case that Compuware's refusal to pay commissions was discretionary. The plan clearly states that commissions are to be paid annually and are based on yearly sales. Sales are defined in the plan as taking place after management approves the contract, an invoice is sent, and payment is received within thirty days of the date on the invoice. The plan also requires that a salesperson be an active employee to receive a commission. Plaintiff does not argue that Compuware refused to approve the contracts or that it delayed in sending out the invoices. Instead, plaintiff claims that Compuware terminated her to avoid paying her March commissions. However, there is no indication that Compuware tried to delay or interfere with the attempts of plaintiff's customers to pay their accounts.

To the extent that plaintiff argues unjust enrichment this claim must also fail. *Barber* found that an unjust enrichment theory could only be pursued when "there is no express contract covering the same subject matter." *Id*. at 375. In the instant case there was an express contract concerning commissions.

Plaintiff's claim, that the contractual provisions conflicted with public policy, is also without merit. Plaintiff cites no statutes or caselaw that prohibit individuals from making contracts concerning commissions. See *Maids Internat'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997). In fact, caselaw is replete with examples of valid contracts concerning the payment of commissions. See *Barber, supra; O'Connor, supra*; *Clark Brothers Sales Co v Dana Corp*, 77 F Supp 2d 837 (1999). Some of these cases include clauses requiring that an individual be an active employee to receive commissions. *Barber, supra.*

Plaintiff also refers to the Wage and Fringe Benefits Act (WFBA), MCL 408.471 *et seq.*, and the Michigan Sales Representatives' Commissions Act (SCRA), MCL 600.2961, as supportive of her position that an employer is required to promptly pay wages or commissions. However, the WFBA requires an employee to file a written complaint with their department within twelve months after the alleged violation. MCL 408.481. Plaintiff was terminated from Compuware on April 16, 1987 and filed this action on May 23, 1989, more than two years after the alleged violation. Since the time frame to bring a cause of action under the WFBA has ended, the only claim plaintiff can pursue is under a common law theory. Additionally, the SCRA was enacted in 1992 and caselaw states that it can not be applied retroactively. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 579-580; 624 NW2d 180 (2001).

Accordingly, we affirm the trial court's granting of summary disposition with respect to the unpaid commissions.[4]

D. *In Limine* Rulings

Lastly, plaintiff asserts that the trial court erred in several of its *in limine* rulings and prevented plaintiff from presenting relevant evidence. We disagree.

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[4] However, in the event that plaintiff is found upon a new trial to have been wrongfully terminated, she would not be precluded from attempting to recoup her lost commissions.

A trial court's decision on whether to admit evidence will only be disturbed on appeal if there is a clear abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Such abuse is only found when "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). The key to admissibility of evidence is relevance. *Department of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Relevant evidence is that evidence which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Tobin*, *supra* at 637.

Plaintiff asserts that she should have been allowed to present evidence of other acts of retaliation at Compuware against women complaining of sexual harassment. In particular, plaintiff wanted two former female Compuware employees to testify at trial. These two women had filed lawsuits in 1998, claiming that the Compuware chairman of the board and chief executive officer sexually harassed them. Plaintiff opined that this evidence was appropriate under MRE 404(b)(1) because it tended to show that defendants had a common scheme or system in dealing with sexual harassment complaints.

The trial court stated that this evidence was irrelevant because it did not involve plaintiff's supervisor. Moreover, the trial court noted that these incidents happened eleven years after plaintiff was discharged and that there was no indication that the CEO was ever aware of plaintiff's complaint. The trial court further found that allowing plaintiff's witnesses to testify about their experiences of being allegedly sexually harassed by the CEO of Compuware could be more prejudicial that probative. We find that according to these facts, the trial court was within its discretion when it denied plaintiff's request to present these witnesses.

Plaintiff also sought to call Compuware's CEO as a witness in an effort to elicit testimony concerning the company's financial situation and the corporate culture at Compuware. Plaintiff argues that the CEO was in charge of stock option decisions that could be critical in determining plaintiff's damages and that his testimony would be relevant because "he was in the chain of authority for the decision to fire Mary Stann."

However, trial testimony established that the financial information sought by plaintiff was available from other sources. Furthermore, the trial court noted the CEO's lack of personal involvement and that plaintiff's counsel even stated that he had no knowledge of the CEO's role in plaintiff's termination. Thus, we find that the trial court did not abuse its discretion when it denied plaintiff's request to call Compuware's CEO as a witness.

Plaintiff also asserts that the trial court erred in quashing her subpoenas for the records of sales personnel employed with Compuware from 1988 to the present, records showing compensation paid to those sales representatives, and personnel files of those representatives. Plaintiff maintains that these numbers are relevant because they tend to show what plaintiff could have earned as a salesperson with Compuware and take into account the new product lines available. Moreover, plaintiff opines that these employees were all subject to the same company rules and regulations that plaintiff would have had to follow.

However, the court did permit plaintiff to obtain averages based on the eight employees that worked with plaintiff in the same region and on the same type of accounts, for their remaining years of employment with Compuware. Specifically, the court said the differences in the products, employees territories, and levels of experience were too speculative to provide accurate information concerning plaintiff's lost future earnings. Based on the trial evidence, we find that the trial court did not abuse its discretion in granting defendant's motion. The trial court correctly considered the information relevant to plaintiff's situation, namely the wages of sales personnel that were working during her tenure and in the same sales region. Evidence of other sales personnel salaries would have been speculative.

Accordingly, we reverse the trial court's grant of a directed verdict, as material issues of fact remain and the trial court failed to follow the correct standard for the granting of a directed verdict. We affirm the trial court's grant of partial summary disposition to Compuware on the issue of commissions and the granting of defendants' *in limine* motions. We remand to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly