

STATE OF MICHIGAN
COURT OF APPEALS

ASMA AHMED,

Plaintiff-Appellant,

v

HALO MEDICAL GROUP, PLLC and HEART
AND VASCULAR INSTITUTE OF AMERICA
PLLC d/b/a HEART AND VASCULAR
INSTITUTE,

Defendants-Appellees.

UNPUBLISHED

December 17, 2020

No. 352068

Wayne Circuit Court

LC No. 19-012314-CD

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Asma Ahmed worked for Halo Medical Group, LLC for several years, during which Halo allegedly violated state minimum wage laws by failing to pay her overtime and at least a minimum wage for all hours worked. Ahmed filed suit, but the circuit court summarily dismissed her claims before any discovery could be had. Because summary disposition was not supportable on the minimal record then available, we vacate in part the court’s summary disposition order and remand for continued proceedings.

I. BACKGROUND

Asma Ahmed worked for Halo Medical Group as “Technical Director of Cardiovascular Sonography.” Ahmed scanned patients’ hearts and prepared reports. Halo paid Ahmed \$29 an hour for 40 hours a week for her work. Ahmed alleged that Halo forced her to see patients all day without a break, and to perform too many daily scans to keep within safe radiation exposure limits. Ahmed further alleged that she was required to clock out every day at 6:00 p.m. when the clinic closed. Halo then forced Ahmed to remain in the office for up to five hours writing reports. Yet, Halo never paid Ahmed overtime. Ahmed contended that Halo also required her to work through her state-mandated 30-minute lunch break and would dock her pay for that unused break.

After seven years of employment, things came to a head in June 2019. Ahmed complained to “Dr. Elder” “that her workload was too much, not in line with State mandates” and that she was being denied breaks and overtime pay. On June 12, 2019, the office manager “Amber” “berated” Ahmed for completing only 13 scans while a coworker had completed 16. When Ahmed attempted to explain her position that the overscheduling of scans violated state law, Amber allegedly “stood up and physically assaulted” her. Ahmed claimed that the practice manager, Hanady Beydoun, observed the confrontation but told Ahmed that Amber would not be disciplined. Later that day, Ahmed advised Beydoun that she had not gotten a break that day and needed one. Beydoun warned Ahmed that if she took a break she would no longer have a job. Ahmed took her break, and was notified of her termination the next day.

Ahmed filed suit on September 25, 2019. She accused Halo of terminating her in retaliation for her complaints about Halo’s legal violations. Ahmed further alleged that Halo violated the Michigan Improved Workforce Opportunity Wage Act (WOWA), MCL 408.934 and MCL 408.934a, by failing to pay her overtime compensation for hours worked beyond 40, failing to pay her during “breaks” actually worked, and failing to pay her for any hours worked beyond her 40-hour schedule. In Count II, Ahmed alleged that Halo wrongfully discharged her in violation of “longstanding public policy” and the Whistleblowers’ Protection Act (WPA). We note that Ahmed has appealed only the dismissal of her wage claims. We limit our factual analysis accordingly.

In lieu of an answer, Halo filed a motion for summary disposition under MCR 2.116(C)(8) and (10). Halo characterized Ahmed as an at-will employee who was rightfully terminated and was not protected by the WOWA. Halo asserted that the WOWA did not apply to Ahmed’s overtime challenge because the act exempts employees “employed in a bona fide executive, administrative, or professional capacity.” MCL 408.934a(4). Halo did not attach any evidence to establish Ahmed’s role, instead merely stating, “[Ahmed] as the ‘Director of Cardiovascular Sonography’ is not entitled to overtime pay because” this qualified as an “executive/professional capacity.” Halo did not address Ahmed’s claim that she was not paid any wage, let alone minimum wage, for her untaken breaks and evening hours of report writing.

Ahmed accused Halo of mischaracterizing her role by placing too much emphasis on her title. Ahmed asserted that she was a “technician,” not truly a “director.” According to U.S. Department of Labor regulations, Ahmed argued that such technicians are not exempt from overtime and minimum wage requirements. Ahmed requested an opportunity to file an amended complaint, but her suggested revisions applied only to her wrongful termination allegations, not her WOWA claims.

In a brief reply, Halo reiterated its argument that Ahmed had not avoided the WOWA exception for professional and administrative employees. Again, Halo focused on the overtime claims while ignoring Ahmed’s claim that that she was not paid at all for other hours worked. Halo provided a more detailed explanation of why it believed Ahmed was exempted from the overtime provision. Pursuant to 29 CFR 541.300(a), Ahmed made sufficient money to be defined as working in a professional or administrative capacity. Moreover, her primary duties required advanced knowledge in a scientific field or “learning customarily acquired by a prolonged course of specialized intellectual instruction.” And her work required the exercise of discretion and independent judgment. Halo explained, quoting an affidavit prepared by Beydoun:

[Ahmed] was [Halo's] director of cardiovascular sonography. [Ahmed's] duties required certification and specific intense training. . . .

[Ahmed] was a trained cardiovascular sonography director for which [Halo] didn't supervise. . . . [Ahmed] performs her duties with little or no direction from any other staff member of [Halo]. [Ahmed's] primary duties included "performing echocardiograms to evaluate different aspects of the heart. Again, these duties can only be performed by a certified individual with specific training in Cardiac Sonography."

In her affidavit, Beydoun also attested that Ahmed "never complained to" her about safety issues or the lack of breaks. Beydoun claimed that Ahmed "walked off the job and quit," rather than being terminated. Relevant to Ahmed's job duties, Beydoun attested:

7. [Ahmed] is the Director of Technicians. Her pay is based on a negotiated rate of \$29 per hour. Her duties can only be performed by a certified/licensed technician which requires a college/certified program.

8. [Ahmed] performs her duties with little or no direction from any other staff member of [Halo].

9. [Ahmed's] primary duties include performing echocardiograms to evaluate different aspects of the heart. Again, these duties can only be performed by a certified individual with specific training in Cardiac Sonography.

At the hearing on Halo's summary disposition motion, the court indicated that it had not considered Beydoun's affidavit, which was not submitted until Halo's reply brief. Ahmed advised the court for the first time that the parties were battling over unemployment benefits in a separate administrative action. Two hearings had occurred up to that point and transcripts had been ordered, but were not yet ready. Halo focused solely on Ahmed's wrongful termination claim and made no additional argument regarding Ahmed's wage claims.

The circuit court granted Halo's motion and dismissed Ahmed's complaint in its entirety, ruling:

. . . [T]wo things are undisputed.

That [Ahmed] was an at-will employee^[1] and the Court at the end of the day believes that [Halo] is entitled to summary disposition for the following three reasons.

* * *

¹ The court did not identify the second undisputed "thing[]."

And she's not entitled to overtime under the [WOWA].^[2]

* * *

And for those reasons and as more fully set forth in [Halo's] briefing the Court will grant the Motion for Summary Disposition partially on (C)(8), in terms of what hasn't been pled.

And as well as on (C)(10), there aren't any questions of material fact even looking at the evidence in the light most favorable to the non-moving party, the Plaintiff in this matter.

Halo requested clarification that the court was dismissing the claims related to Ahmed being forced to work while off the clock, and the court answered in the affirmative. Ahmed objected as Halo had not addressed that claim in its motion, reply, or at the hearing.

As noted, Ahmed's appeal of the denial of her unemployment application was ongoing during these proceedings. Ahmed did not learn until two days after she filed the current lawsuit that her claim for unemployment benefits had been denied. She appealed that decision to the Michigan Unemployment Insurance Agency on October 28, 2019. The administrative hearings took place on November 14, and December 3, 2019, and January 7, 2020. Given the timing, Ahmed could not provide the transcripts to the circuit court in this matter. We granted Ahmed's motion to expand the record on appeal to include the transcripts from the first two hearing dates. *Ahmed v Halo Med Group, PLLC*, unpublished order of the Court of Appeals, entered May 20, 2020 (Docket No. 352068). It appears that Ahmed's administrative appeal was unsuccessful.

Ahmed focuses on those portions of the hearing transcripts relating to her independence on the job and the training necessary to perform her position. Beydoun testified that Amber, the office manager, was Ahmed's "direct supervisor." Ahmed described this testimony as contrary to Halo's earlier descriptions of Ahmed's independent role. Beydoun further testified that Halo paid Ahmed more than \$700 each week, and that Ahmed "does have the professional degree" and was certified by the Board of Echocardiography, although there was no state licensing requirement.

II. ANALYSIS

On appeal, Ahmed has abandoned her claims that her termination violated the WPA and public policy. Instead, Ahmed focuses her attention on the dismissal of her claims that Halo failed to pay her overtime and illegally withheld pay when she worked through breaks and for hours after the end of her shift.

² The other two reasons related only to the now abandoned wrongful termination claims.

We review de novo a trial court's decision on a motion for summary disposition. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005).

A motion under MCR 2.116(C)(8) “tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted.” *Begin v Mich Bell Tel Co*, 284 Mich App 581, 591; 773 NW2d 271 (2009). We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if no factual development could possibly justify recovery. *Id.*

A motion under MCR 2.116(C)(10) “tests the factual support of a plaintiff's claim.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). “Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh*, 263 Mich App at 621. “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 might differ.” *West*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

We review de novo underlying issues of statutory construction. *Id.* at 140.

MCL 408.934(1) sets the minimum wage in Michigan “[s]ubject to exceptions specified in this act,” i.e., the WOWA. In 2019, the minimum wage was \$9.45 an hour. MCL 408.934(1)(f). MCL 408.934a(1) provides that Michigan employers must pay employees “not less than 1-1/2 times the regular rate at which the employee is employed for employment in a workweek in excess of 40 hours.” MCL 408.934a(4) provides that the overtime requirement of subsection (1) does not apply under certain conditions. Relevant to this appeal, MCL 408.934a(4)(a) provides that the overtime provision does not apply to “[a]n employee employed in a bona fide executive, administrative, or professional capacity.”

Ahmed correctly argues that the exception in MCL 408.934a(4) does not apply to MCL 408.934(1)'s requirement that employers pay a minimum wage. The MCL 408.934a(4) exceptions apply only to the requirements outlined in MCL 408.934a(1)-(3) pursuant to the plain language of the statute. Accordingly, neither Halo nor the circuit court could rely on Ahmed's purported professional or administrative employment to excuse Halo's failure to pay Ahmed a minimum wage for all hours worked. Halo did not address this aspect of Ahmed's complaint in its motion for summary disposition or its reply brief and therefore, the circuit court could not simply cite the briefs to support its dismissal of this claim. We vacate that portion of the court's order and remand for the court to consider the merits of Ahmed's claim.

The circuit court also erred in dismissing Ahmed’s overtime claim under the WOVA. As noted, MCL 408.934a(4)(a) exempts from overtime requirements those employees “employed in a bona fide executive, administrative, or professional capacity.” We preliminarily note that Ahmed could not qualify as an executive employee as she did not supervise any other employees and was not in a management position. See Mich Admin Code R 408.701(f). The record at this early stage in the proceedings also could not support that Ahmed served in an administrative or professional capacity.

Although administrative and professional capacity are not defined by statute, they are defined by the Michigan Administrative Code:

(b) “Administrative capacity” means an employee to whom all of the following apply:

(i) Compensation is on a salary basis at no less than the federal standard salary level per week for overtime exempt employees.

(ii) The employee’s primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer.

(iii) The employee uses discretion and independent judgment in matters of significance.

* * *

(i) “Professional employee” means an employee who is compensated on a salary or fee basis at no less than the federal standard salary level per week for overtime exempt employees and whose primary duty is any of the following:

(i) Work in a field of science or learning that requires knowledge acquired by a prolonged course of specialized instruction.

(ii) Work in a recognized field of artistic endeavor that depends upon the talent of the employee.

(iii) Work in an educational institution as a teacher, tutor, instructor, or lecturer.
[Mich Admin Code R 408.701.]

To qualify as an administrative employee, Ahmed had to meet all three qualifications in Mich Admin Code R 408.701(b). Her salary exceeded “the federal standard salary level per week for overtime exempt employees.” At the time of Ahmed’s termination, 29 CFR 541.600 set that salary at \$913 weekly, \$1,826 biweekly, or \$3,956 monthly.³ Ahmed’s gross weekly salary with

³ The United States Department of Labor, Wage and Hour Division Fact Sheet #17C sets out different salary limits than the CFR. However, Ahmed’s salary is also higher than the \$455 weekly limit enumerated by the department.

a pay rate of \$29 an hour and a schedule of 40 hours a week is \$1,160. Although the parties did not perform these calculations for the circuit court, Ahmed’s salary could easily be determined with the information given. And her salary exceeded the minimum level set out by federal law.

Mich Admin Code R 408.701(b)(ii) is identical to the federal requirement for administrative work. U.S. Department of Labor, Wage and Hour Division, Fact Sheet #17C, p 2, available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17c_administrative.pdf> (accessed November 18, 2020), describes work in an administrative capacity as “the performance of office or non-manual work directly related to the management or general business operations of the employer” and “work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment.” This type of work includes “safety and health” work. *Id.* As it is undisputed that Ahmed worked in the health field and performed echocardiograms on patients, the second element of administrative work is also met.

The third element of the administrative employment test is that “[t]he employee uses discretion and independent judgment in matters of significance.” The U.S. Department of Labor describes this provision as follows:

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in light of all the facts involved in the employee’s particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. . . . The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. [*Id.*]

“Matters of significance” “refers to the level of importance or consequence of the work performed.” *Id.*

The circuit court took none of these factors into consideration in rendering judgment. In its summary disposition motion, Halo merely cited Ahmed’s job title and claimed that she was either an executive or professional employee; it did not attempt to characterize Ahmed as an administrative employee. In her responsive brief, Ahmed did not deny being an administrative employee. This was not surprising as Halo had not raised that exemption. It was not until its reply brief that Halo argued that Ahmed was exempted from the overtime requirement as she worked in an administrative capacity. But a reply brief is limited “to rebuttal of the arguments in the

nonmoving party or parties' response brief." MCR 2.116(G)(1)(a)(iii). Moreover, the only information from which the circuit court could conclude that Ahmed acted with independence was Beydoun's affidavit, which the court claimed it did not rely upon. Accordingly, summary disposition of Ahmed's overtime claim was not supportable on the ground that she served in an administrative capacity.

Nor was dismissal appropriate based on Ahmed's serving in a "professional capacity." An employee is considered to be employed in a professional capacity if any one of three conditions is met. The only condition of relevance to this appeal is whether Ahmed performed "[w]ork in a field of science or learning that requires knowledge acquired by a prolonged course of specialized instruction." This requirement is similar to the federal minimum wage act as well. Unlike the state regulations, 29 CFR 541.300(2)(i) provides that the knowledge need only be "customarily" acquired by specialized instruction. There is therefore an exemption from the federal minimum wage act when an employee's skills are generally learned through higher education, but the particular employee gained his or her knowledge "through a combination of work experience and intellectual instruction." U.S. Department of Labor, Wage and Hour Division, Fact Sheet #17D, p 1, available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17d_professional.pdf> (accessed November 18, 2020). A "field of science or learning" includes medicine, biological sciences and "other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning." *Id.* "[A] prolonged course of specialized instruction" equates with "specialized academic training," such as "having the appropriate academic degree." *Id.*

Again, in its motion for summary disposition, Halo relied solely on Ahmed's title to argue that she fell within the professional employee exemption. Ahmed contended that she was a "technician," a category not within the professional employee exemption. In this regard, Ahmed attached U.S. Department of Labor, Wage and Hour Division, Fact Sheet #17O, available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17o_technicians.pdf> (accessed November 18, 2020). Those guidelines provide that "[t]echnologists and technicians, such as engineering technicians, ultrasound technologists, licensed veterinary technicians, avionics technicians and other similar employees are not exempt" from the overtime requirements "because they generally do not meet the requirements for the learned professional exemption." *Id.* at 1.

Halo replied to this challenge by claiming that Ahmed's "duties required certification and specific intense training," that she was a "trained cardiovascular sonography director," and that performing echocardiograms requires certification and "specific training." However, the only evidence of this was Beydoun's affidavit, which the circuit court purportedly did not consider. The circuit court also did not have access to Beydoun's testimony in the administrative proceeding that Ahmed had a degree and board certification, although not state licensure. It may very well be true that Ahmed's position is professional in nature, but the circuit court could not make this conclusion as a matter of law on the record before it. Accordingly, we must also vacate that portion of the summary disposition order dismissing Ahmed's overtime claim and remand for continued proceedings.

We vacate in part the circuit court's summary disposition order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher