STATE OF MICHIGAN

COURT OF APPEALS

TERESA ELDRIDGE,

Plaintiff-Appellant,

v

FRED CHARTIER d/b/a C & H LANDSCAPING, assumed name for C & H COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 20, 1996

No. 176451
LC No. 92437916 CZ

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM

In this sex discrimination case, plaintiff appeals as of right from a grant of summary disposition for defendant pursuant to MCR 2.116 (C)(10).

Plaintiff argues that the trial court erred in refusing to recognize its own scheduling order, which by its terms, waived all dispositive arguments not presented in accordance with it. She asserts that evidence of her improper conduct, acquired by defendant after her discharge, does not preclude her sex discrimination claim. Finally, she argues that there was a genuine issue of material fact as to whether defendant would have fired her based on the after-acquired evidence. We reverse.

I

Plaintiff was employed by defendant as a technician in defendant's lawn spray division. On April 7, 1991, she discovered that she was pregnant. She informed defendant that she could no longer work with chemicals and had to reduce her heavy lifting. Defendant told her he had no other job for her and fired her. Defendant hired a male to perform her old duties.

On July 24, 1992, plaintiff filed suit against defendant alleging violation of the Elliott-Larsen Civil Rights Act, because he fired her for being pregnant. MCL 37.2101 *et seq.*; MSA 3.548 (101) *et seq*. She alleged that there were other jobs in the company that she could have performed, and defendant failed to accommodate her.

* Circuit judge, sitting on the Court of Appeals by assignment.

On October 11, 1992, the trial court entered a scheduling order requiring that all dispositive motions be heard by May 5, 1993. According to the order, motions not brought by that date were deemed waived.

On April 26, 1994, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). On May 20, 1994, plaintiff filed an answer. On that same day, the trial court entered a second scheduling order requiring the parties to file briefs in support of their motions.

Defendant asserted in his motion that he was justified in firing plaintiff, because she conspired with defendant's office manager to collect unemployment benefits while employed by defendant. He claimed that it was irrelevant that he became aware of her misconduct after he fired her. The trial court agreed with defendant and granted his motion for summary disposition pursuant to MCR 2.116(C)(10).

II

We review de novo a judge's grant of summary disposition pursuant to MCR 2.116(C)(10). We examine the record to determine whether a defendant was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1994), aff'd 446 Mich 482 (1994).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when there is no genuine issue of material fact. *Id*. We consider the pleadings and any other evidence in favor of the party opposing the motion. *Id*.

First, plaintiff argues that the order granting summary disposition is invalid where the trial court heard defendant's motion after the deadline set in the October 11, 1992 Scheduling Order. Plaintiff has failed to properly present this issue for appeal, because she has failed to support her argument with any authority. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). A party may not merely announce his position and leave it to us to discover and rationalize the legal basis for the claim. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *In re Toler*, *supra*. Regardless, the ability to amend pretrial orders is within the sound discretion of the trial court. *Hanlon v The Firestone Tire & Rubber Co*, 391 Mich 558, 565; 218 NW2d 5 (1974). MCR 2.401(B)(2) indicates as much by specifically providing that the trial court may enter more than one scheduling order. The May 20, 1994 order in effect amended the previous one. Therefore, the order granting defendant's motion for summary disposition is valid.

III

The trial court erroneously concluded that plaintiff could not maintain her sex discrimination claim. In granting summary disposition for defendant, the court relied on *Bradley v Philip Morris, Inc*, 194 Mich App 44; 486 NW2d 48 (1991), aff'd after remand 444 Mich 634; 513 NW2d 797 (1994). In *Bradley*, this Court held that just cause for termination may include facts and circumstances existing at termination but not known to the employer. However, *Bradley* did not address a claim brought

under the Civil Rights Act. *Wright v Restaurant Concept Management Inc*, 210 Mich App 105, 109; 532 NW2d 889 (1995).

Recently, this Court addressed the issue of after-acquired evidence in the context of a discrimination case. *Wright, supra*. In *Wright*, we noted that the United States Supreme Court in *McKennon v Nashville Publishing Co*,[1] held that an employee discharged in violation of the Age Discrimination in Employment Act is not barred from all relief. In that case, after the discharge, the employer discovered evidence of wrongdoing that would have led to the employee's discharge on lawful and legitimate grounds. *Wright, supra* at 109. The *Wright* Court found no reason not to apply the reasoning of *McKennon* to actions brought under Michigan's Civil Rights Act. MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. This Court followed the reasoning of *Wright* in *Horn v Dep't of Corrections*, 216 Mich App 58; 548 NW2d 660 (1996).

Even though a plaintiff is not barred from bringing an action where after-acquired evidence is discovered that would have justified the discharge, damages may be limited. Any wrongdoing by the employee is to be reflected in the matter of the relief awarded. *Wright, supra*. Generally, neither reinstatement nor front pay is appropriate. *Id*.

Here, the trial judge determined that no genuine issue of material fact existed regarding whether defendant would have dismissed plaintiff for improperly collecting unemployment benefits while employed by defendant. However, we find that a genuine issue of material fact does exist.

Plaintiff submitted an affidavit swearing that defendant condoned her actions and collected unemployment benefits himself. Defendant submitted the affidavit of Donald Rockman of the Michigan Employment Security Commission which stated that defendant did not collect unemployment benefits as alleged by plaintiff. Defendant also submitted his own affidavit which stated that he did not condone plaintiff's actions. The conflicting affidavits present a classic factual question that must be determined by the trier of fact.

On remand, if the trier of fact determines that defendant would have fired plaintiff for her misconduct, damages are limited in accordance with *Wright*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock

[1] 531 US ___; 115 S Ct 879; 130 L Ed 2d 852 (1995).