STATE OF MICHIGAN

COURT OF APPEALS

GERALD HARRINGTON

Plaintiff-Appellee,

v

FIRST INDEPENDENCE CORPORATION, FIRST INDEPENDENCE ONE STOP PAYMENT CENTER, INC., LAWRENCE JONES, DON DAVIS and WILLIE DAVIS,

Defendants-Appellants,

and

FIRST INDEPENDENCE NATIONAL BANK, LESTER ROBINSON, MARC STEPP, CHARLES E. MORTON, M.D., ELOISE CULMER-WHITTEN, GERALD VAN WYKE, DON BARDEN, C. ARNOLD CURRY, CHARLES ADAMS, BISHOP P. A. BROOKS, DENNIS H. SILBER, and LEONARD D. POSEY,

Defendants.

UNPUBLISHED
March 14, 1997

No. 183383
Wayne Circuit Court
LC No. 90-021558-CL

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

Defendants, First Independence Corporation, First Independence One Stop Payment Center, Inc., Lawrence Jones, Don Davis and Willie Davis, all appeal as of right from a judgment entered upon a jury verdict in favor of plaintiff in the amount of $320,000. We reverse and remand for entry of judgment in favor of defendants.

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

Plaintiff began working for First Independence National Bank (hereinafter the "bank") in 1974. He steadily advanced throughout his career at the bank, eventually attaining the title of executive vice president. While an officer at the bank, plaintiff helped form First Independence Corporation (hereinafter the "corporation") in 1984, and then the One Stop Payment Center, Inc. (hereinafter the "payment center") in 1987. The corporation served as a holding company for the bank and also as a vehicle for the bank to engage in certain business activities that it was prohibited from engaging by itself. In line with this scheme, the payment center was formed as a subsidiary of the corporation. Plaintiff divided his work activities between all three entities, but received compensation only from the bank. In May 1990, defendant Lawrence Jones was hired as the bank's new president. Shortly thereafter, on July 16, 1990, the bank's board of directors voted to terminate plaintiff's "employment and position as an officer of the bank and all affiliated or related First Independence companies and entities."

Plaintiff subsequently commenced this lawsuit against the bank, the corporation, the payment center, and several individual defendants. Plaintiff's amended complaint alleged that he was terminated in violation of an alleged just-cause employment contract with all three entities and in retaliation for threatening to report alleged unlawful activities. The complaint alleged causes of action for breach of contract and retaliatory discharge against the bank, the corporation and the payment center, a cause of action against the bank for violation of the Michigan Whistle-blowers' Protection Act (WPA), MCL 15.362; MSA 17.428(1), and a cause of action for sexual harassment. On March 2, 1992, the trial court granted summary disposition of the breach of contract and retaliatory discharge claims as to the bank and each of the individual defendants, but denied summary disposition on all other counts. Plaintiff then filed a second amended complaint, adding a federal whistle-blowers' claim against the bank pursuant to 12 USC 1831j, and a claim for tortious interference with an employment relationship against several individual defendants.

Upon the filing of the second amended complaint, defendants removed the case to federal court in light of the newly asserted federal claim. The federal court subsequently granted summary disposition of the Michigan WPA claim, holding that 12 USC 24 (Fifth) allows a federally insured depository institution to dismiss its officers "at pleasure" and "pre-empts any state-based remedy in conflict with the bank's ability to dismiss 'at pleasure.'" Additionally, the federal court granted summary disposition of the § 1831j federal whistle-blowers' claim, finding that plaintiff failed to produce sufficient evidence to show that he was discharged in retaliation for engaging in protected activity. The case was then remanded back to state court for trial on the remaining state law claims

As a result of the federal court's rulings, all claims against the bank had been dismissed and the case proceeded to trial against only the corporation, the payment center, and various individual defendants. At the conclusion of trial, the sexual harassment claim was voluntarily dismissed by plaintiff and the claim for tortious interference with an employment relationship was dismissed by the trial court. The jury subsequently returned a verdict in favor of plaintiff on the breach of contract and retaliatory discharge claims and awarded plaintiff damages of $320,000. Defendants' post-trial motions to set aside the jury verdict, for judgment notwithstanding the verdict (JNOV), new trial, and/or remittitur were all denied by the trial court. This appeal followed.

Defendants raise several issues on appeal, one of which we find dispositive. We agree with defendants that their motion for judgment notwithstanding the verdict should have been granted on the grounds that the evidence was insufficient to establish an employer-employee relationship between plaintiff and either the corporation or the payment center.

When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. If the evidence is such that reasonable minds could differ, the question is for the jury and JNOV is improper. *McLemore v Detroit Receiving Hospital*, 196 Mich App 391, 395; 493 NW2d 441 (1992).

The economic reality test is used to determine if an employer-employee relationship exists. *Osner v Boughner*, 180 Mich App 248, 263; 446 NW2d 873 (1989); *Northern v Fedrigo*, 115 Mich App 239, 242; 320 NW2d 230 (1982). See also *Chilingirian v Fraser*, 194 Mich App 65, 69; 486 NW2d 347 (1992), remanded 442 Mich 874; 500 NW2d 470 (1993), aff'd on remand 200 Mich App 198; 504 NW2d 1 (1993). The economic reality test examines the totality of the circumstances surrounding the employment relationship. *Osner*, *supra*. Relevant facts to consider include: (1) control of a worker's duties; (2) payment of wages; (3) the right to hire, fire and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. *Osner*, *supra*; *Chilingirian*, *supra* at 69. All factors are viewed as a whole and no single factor is controlling. *Chilingirian*, *supra* at 69-70. Applying this test, we find that the evidence was insufficient to show that either the corporation or the payment center was plaintiff's employer.

The evidence at trial established that the corporation did not conduct any day-to-day business of its own. Instead, it was formed to serve as a holding company for the bank and also as a vehicle for the bank to engage in certain activities that it was prohibited from engaging on its own. The evidence revealed that the corporation never hired any employees of its own, nor did it have a payroll, personnel, or accounting department. Instead, all matters pertaining to the corporation were handled by bank employees, such as plaintiff, as an integral part of advancing the bank's business and objectives. Although plaintiff testified that he received additional compensation for his increased responsibilities with respect to the corporation, he admitted that it was the bank, not the corporation, who paid his compensation. Plaintiff did not receive any compensation or other benefits directly from the corporation.

The payment center, in contrast to the corporation, did have its own employees and its own payroll, separate and apart from the bank. According to the evidence, however, plaintiff was never designated an employee of the payment center, nor did he ever receive any wages, benefits or other form of compensation from the payment center. Rather, his sole source of compensation was the bank. As with the corporation, plaintiff did devote a portion of time to matters involving the payment center, but, again, this was done as an integral part of plaintiff's employment with the bank. Plaintiff was never compensated for his work by the payment center, nor classified as an employee of the payment center, even though the payment center had its own payroll department and employees.

Viewed most favorably to plaintiff, the evidence demonstrated, at most, that plaintiff assumed some duties with respect to the corporation and payment center by virtue of his employment with the bank, but failed to establish that either entity was plaintiff's employer.

It is axiomatic that there can be no cause of action for breach of an alleged employment contract absent an employment relationship. See e.g., *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 249; 531 NW2d 144 (1995). Because the evidence failed to show that plaintiff was an employee of either the corporation or the payment center, the trial court erred in failing to grant JNOV in favor of the corporation and payment center with respect to plaintiff's cause of action for breach of a just cause employment contract. A retaliatory discharge claim is likewise premised on the existence of an employer-employee relationship. See *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). Accordingly, JNOV in favor of the corporation and payment center with respect to plaintiff's cause of action for retaliatory discharge should also have been granted.[1]

Finally, we must also reverse the trial court's judgment with respect to the three individual defendants. In an order dated March 2, 1992, the trial court granted summary disposition of the breach of contract and retaliatory discharge claims as to "all individual defendants." Plaintiff subsequently added a cause of action for tortious interference with an employment relationship against several individual defendants, but that action was dismissed at trial and did not go to the jury. Only the breach of contract and retaliatory discharge claims were submitted to the jury. Accordingly, because all claims against individual defendants had been dismissed from the case, it was error to render judgment against any of the individual defendants. See *Wiand v Wiand*, 178 Mich App 137, 146; 443 NW2d 464 (1989).

In light of our resolution of the foregoing issues, it is unnecessary to address defendants' remaining issues on appeal.

Reversed and remanded for entry of judgment in favor of defendants.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] Defendants also argue, as they did below, that plaintiff's retaliatory discharge claim was pre-empted by the whistle-blowers' protection act, MCL 15.361 *et seq.*; MSA 17.428(1) *et seq*. See *Dudewicz v Norris Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993). The trial court agreed with respect to the issue of pre-emption, but concluded that plaintiff's claim of retaliatory discharge was effectively tried as a statutory whistle-blowers' claim. However, a statutory whistle-blowers' claim may only be brought by an "*employee*" who has been "discharge[d], threaten[ed], or otherwise discriminate[d] against" by an "*employer*." MCL 15.362; MSA 17.428(2). The act defines an "employee," in relevant part, as "a person who performs a service for wages or other remuneration under a contract for hire, written or

oral, express or implied." MCL 15.36(1)(a); MSA 17.428(1)(a). Assuming, without deciding, that plaintiff's claim of retaliatory discharge can properly be characterized as a statutory whistle-blowers' claim, in light of our conclusion that plaintiff was not an employee of either the corporation or the payment center, JNOV would also be appropriate with respect to any whistle-blowers' claim.