STATE OF MICHIGAN

COURT OF APPEALS

RAMONA BELTOWSKI,

Plaintiff-Appellee,

v

SANDUSKY HERITAGE INN,

Defendant-Appellant,

and

JOSEPH B. HUMPHREY,

Defendant.

UNPUBLISHED
August 2, 1996

No. 173378
LC No. 92-21135-CL

Before: MacKenzie, P.J. and Saad and O'Connell, JJ

PER CURIAM.

Defendant Sandusky Heritage Inn appeals from jury verdicts in favor of plaintiff Ramona Beltowski. Plaintiff, a former employee of Sandusky Heritage Inn (Inn), sued the Inn and defendant Humphrey, its owner, for wrongful discharge, intentional infliction of emotional distress, and violation of the Whistle Blowers' Protection Act (WPA), MCL 15.361 et seq.; MSA 17.428(1) et seq. The jury returned verdicts of $11,350 against defendant Humphrey for intentional infliction of emotional distress and $13,650 against defendant Inn for wrongful discharge. The jury also found defendant Inn liable on the WPA claim for $13,650 in lost wages, $15,000 for emotional and physical distress, and $10,000 in exemplary damages. We reverse the award of exemplary damages, but affirm the remaining verdicts.

Plaintiff began working for defendant Inn as a housekeeper in 1989, and was promoted to head housekeeper in 1991. In the spring of 1990, plaintiff became aware that defendant Humphrey was sexually harassing another employee, Debra Burns. Burns ultimately stopped working for the Inn, and filed for unemployment benefits. Defendant Inn refused to pay unemployment benefits for Burns. At the hearing before the Michigan Employment Security Commission (MESC), plaintiff testified about defendant Humphrey's sexual harassment of Burns.

According to plaintiff, after the hearing, Humphrey confronted her, yelled at her, and called her a liar. Humphrey told plaintiff that he would say that she stole from the Inn. The next day the Inn manager, Humphrey's daughter, informed plaintiff that she had no more supervisory duties and that the desk clerks would now monitor and check the housekeepers' work. Following similar incidents, plaintiff left her job at the Inn and filed suit against defendants.

Defendant Sandusky Heritage Inn raises ten issues on appeal.

I.

Defendant Inn argues that the trial judge erred by allowing plaintiff's wrongful discharge count to go to the jury because the WPA provides plaintiff's exclusive remedy. We agree that the WPA provides plaintiff's exclusive remedy. *Dudewicz v Norris Schmid, Inc.*, 443 Mich 68, 79; 503 NW2d 645 (1993). However, reversal is not required. Plaintiff was awarded identical amounts for lost wages under both her WPA and wrongful discharge claims. The judgment specifically provides that plaintiff can recover only once for lost wages. Defendant is liable for only one wage loss award.

II.

Defendant Inn contends that the award of exemplary damages must be reversed because the WPA does not provide for exemplary damages. We agree. The WPA contains no express provision for exemplary damages. The $10,000 award for exemplary damages is therefore reversed. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 28-29, 54-57; 427 NW2d 488 (1988).

Defendant Inn also says that the jury's award of exemplary damages merely duplicates the damage award for intentional infliction of emotional distress. Our reversal of the exemplary damages award renders this issue moot.

III.

Defendant Inn claims that the awards for emotional distress against each defendant is duplicative. Defendant Inn cites no authority to support its contention that the jury's awards against two different defendants under two different theories constitutes duplicate recovery. The acts which caused plaintiff's damages under her WPA action were not the same acts which caused her damages under her claim for intentional infliction of emotional distress. The jury did not award duplicate damages. The trial judge properly denied defendant in a new trial or JNOV. *Orzell v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995); *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 547; 481 NW2d 762 (1992).

IV.

Defendant Inn asserts that the damages awarded for emotional distress must be reversed because plaintiff's claim was based upon breach of an employment contract. We disagree.

Emotional distress damages may not ordinarily be recovered in an action for breach of an employment contract. *Valentine v General American Credit Inc*, 420 Mich 256, 259; 362 NW2d 628 (1984). However, plaintiff's claim for intentional infliction of emotional distress was not based upon her wrongful discharge, but rather was based upon Humphrey's actions prior to her discharge. Plaintiff's WPA claim against defendant Inn was based upon its violation of MCL 15.362; MSA 17.428(2). An employer's duty not to retaliate against an employee for reporting a violation of the law arises independently from the employment contract. MCL 15.362; MSA 17.428(2); *Phillips v Butterball Farms (After Second Remand)*, 448 Mich 239, 246-247; 531 NW2d 144 (1995). An action seeking damages from an employer for violation of the WPA is provided by statute, and therefore is regarded as a tort rather than contract claim. MCL 15.363; MSA 17.428(3); *Phillips, supra*; *Dunbar v Mental Health Dep't*, 197 Mich App 1, 10; 495 NW2d 152 (1992). Accordingly, plaintiff may receive mental distress damages for these claims. *Phillips*, at 253.

V.

Defendant Inn alleges that the trial judge erred when instructing the jury regarding plaintiff's burden of proof for her WPA claim. We disagree. Review of the instructions as a whole show that they sufficiently informed the jury of plaintiff's burden of proof. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990); *Hopkins v Midland*, 158 Mich App 361, 378; 404 NW2d 744 (1987).

VI.

Defendant Inn also appeals the trial judge's failure to instruct the jury regarding plaintiff's duty to mitigate damages. We find no error.

A discharged employee's failure to mitigate damages is an affirmative defense; the employer must prove that the employee failed to mitigate her damages by failing to seek other employment or rejecting an unconditional offer of reinstatement. *Rasheed v Chrysler Corp*, 445 Mich 109, 124; 517 NW2d 19 (1994). Defendant Inn did not produce evidence showing that plaintiff failed to mitigate her damages. The trial judge properly refused to give the requested instruction since there was no evidence to support it. *Murdock v Higgins*, 208 Mich App 210, 218; 527 NW2d 1 (1994).

VII.

Defendant Inn argues that the judgment erroneously contains two awards for lost wages which gives plaintiff a double recovery. We disagree. As pointed out in Issue I, *supra*, the judgment does not allow a double recovery for wage loss. The judgment specifically states that "the jury award for past economic loss of $13,650 on Count II (Constructive Discharge) and on Count IV (Whistleblowers Protection Act) shall only be recovered once by plaintiff as against defendants, Sandusky Heritage Inn, Inc."

VIII.

Defendant Inn contends that the trial court improperly limited its argument that plaintiff was somehow attempting to blackmail defendants by threatening to disclose defendant Humphrey's sexual harassment of Burns. We disagree. There was no evidence from which a jury could infer that plaintiff was attempting to blackmail defendants by threatening to disclose Humphrey's sexual harassment of Burns. The trial judge did not abuse his discretion by limiting closing arguments to inferences which could reasonably be drawn from the evidence. *Heintz v Akbar*, 161 Mich App 533, 539; 411 NW2d 736 (1987).

IX.

Defendant Inn claims that the jury's verdicts against defendant Humphrey are inconsistent. The jury found defendant Humphrey liable to plaintiff for intentional infliction of emotional distress, yet returned a no cause verdict on plaintiff's assault claim against Humphrey. We find no inconsistency. Plaintiff's assault claim was based on two incidents following Burns' unemployment benefits hearing. The claim for intentional infliction of emotional distress was based upon several additional incidents. The two counts were based on different proofs, and required different findings. The verdicts are not so logically and legally inconsistent that they cannot be reconciled. *Granger v Fruehoff Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987).

X.

Finally, defendant Inn argues that the trial judge erred by admitting evidence regarding Humphrey's sexual harassment of Debra Burns. Defendant says that this evidence was not relevant to the issues at trial and resulted in unfair prejudice to defendants. We disagree.

The evidence in question was relevant to the issues in the case, and did not result in undue prejudice. Evidence regarding another accusation of sexual harassment against Humphrey was relevant to the issues of credibility and retaliation. The trial judge did not abuse his discretion by admitting this evidence. *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1993).

We reverse the award of $10,000 in exemplary damages. We affirm the judgment in all other respects.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Peter D. O'Connell