2019 IL App (2d) 180915-U
No. 2-18-0915
Order filed July 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SHANNON STRATTON,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	No. 17-L-210
	)	
PACTIV, LLC,	)	Honorable
	)	Jorge L. Ortiz,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment for defendant. Therefore, we affirmed.

¶ 2 Plaintiff, Shannon Stratton, appeals from the trial court's grant of summary judgment in favor of defendant, Pactiv, LLC, on plaintiff's claim for severance pay under the Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 *et seq.* (West 2016)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed her complaint on March 22, 2017, alleging the following. On July 13, 2003, she agreed to become an employee of defendant as an accounts payable supervisor. She was

promoted to a senior accountant in the payroll and benefits finance department on January 1, 2007, and to a general accounting supervisor in that department on October 1, 2011. She was a salaried employee, and part of her duties included entering and verifying the payment of severance packages of other employees of defendant. Further, by working in the finance department for 10 years, she became familiar with the terms of severance packages. "In particular, she became aware that it was the policy and practice of [defendant] to provide two weeks of severance pay for each year of service of a terminated employee." Plaintiff was discharged as an employee on September 21, 2016. However, defendant did not offer her severance pay and denied her request for severance. Plaintiff alleged that defendant's failure to pay severance violated the Wage Act's requirement that an employer pay timely "final compensation" to an employee upon termination. See 820 ILCS 115/2 (West 2016).

¶ 5 On May 1, 2017, defendant filed a motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). Defendant argued that plaintiff failed to plead facts showing that defendant's alleged practice of paying severance to other employees manifested an assent to pay severance to plaintiff. The trial court denied defendant's motion on August 8, 2017.

¶ 6 A. Cross-Motions for Summary Judgment

¶ 7 Defendant subsequently filed a motion for summary judgment on July 23, 2018; defendant's allegations included the following. In June 2016, plaintiff received two written warnings for failing to meet her supervisor's attendance and performance expectations. She was advised that future violations of defendant's policies and continued failure to maintain a satisfactory level of performance would result in discipline. On September 20, 2016, plaintiff's supervisor discovered that plaintiff had shared confidential salary information with another

employee about his peers. Two days later, defendant terminated plaintiff's employment due to her continued poor work performance and for violating department policies by sharing sensitive compensation information with an unauthorized employee.

¶ 8 Defendant attached to its motion sections of plaintiff's deposition. In it, she admitted: that there were salaried employees who did not receive severance when terminated; that she received the two written warnings (which were also attached as exhibits); that she had given salary information to another employee; and that Scott Hodal was present at her termination meeting.

¶ 9 Defendant also attached to its motion Hodal's affidavit, in which he stated as follows. He was the Director of Human Resources and Compensation for defendant. He was responsible for administering the human resources policies for the corporate accounting department. Defendant paid severance benefits to employees at termination pursuant to a written Severance Benefits Plan (which was attached), and to employees eligible under defendant's voluntary severance plan. Employees who were to receive severance were required to sign a separation agreement and release of claims form. Defendant determined that plaintiff was not eligible for severance benefits at termination because she was terminated for poor work performance, and it did not offer her the opportunity to execute the release form. She was terminated because of her "continued unsatisfactory work performance, including her failure to follow standard work processes and accounting department policies by disclosing sensitive compensation information with an unauthorized employee and failing to meet the performance expectations of the position."

¶ 10 Defendant further argued as follows. Plaintiff's claim failed as a matter of law because she never had an employment contract or agreement with defendant for severance pay at termination. Plaintiff could not rely on defendant's past practices with respect to other employees

to create an entitlement for severance benefits under the Wage Act. Even otherwise, the undisputed evidence established that defendant did not have a practice of offering severance benefits at termination. Rather, 4,497 (88.3%) of the 5,090 employees terminated from defendant in the three years before plaintiff's termination were not offered severance pay at termination. For employees who were offered severance pay at termination, the vast majority of them (443 out of 593, or 94.9%) were eliminated pursuant to a group reduction in force (RIF) or voluntary separation program. Of the 1,003 employees who were terminated for cause as was plaintiff, 989 (98.6%) were not offered severance benefits at termination. Thus, employees who were terminated for cause like plaintiff were typically not offered severance benefits at termination.

¶ 11 Plaintiff filed a motion for summary judgment on the same day as defendant. She argued that it was undisputed that defendant had an established practice of paying severance to involuntarily-terminated employees; that defendant did not offer to pay her severance; and that she suffered damages. Plaintiff pointed out that the Wage Act required defendant to pay her final compensation, which included compensation owed "pursuant to an employment contract or agreement between the two parties." 830 ILCS 115/2 (West 2016). The Illinois Administrative Code defined an agreement as "the manifestation of mutual assent on the part of two or more persons," that was "broader than a contract" and could "be manifested by words or by any other conduct, such as past practice." 56 Ill. Adm. Code 300.450 (2014). The Administrative Code defined "severance" under the Wage Act as "a payment that an employee is entitled to be paid upon separation from employment pursuant to an agreement between the parties or established practice of the employer." 56 Ill. Adm. Code 300.530 (2014). Plaintiff argued that defendant had an established practice of providing severance payments to its employees, as in the three years before her termination, 391 salaried employees (91%) were involuntarily terminated with an

offer of severance, whereas 40 salaried employees were involuntarily terminated with no offer of severance.

¶ 12 Included in plaintiff's motion was a stipulation of facts that the parties had signed that day, which stated as follows, in relevant part. Plaintiff became an employee of defendant on July 13, 2008, as an accounts payable supervisor. As an accounting supervisor, plaintiff was to be compensated as a salaried, "exempt" employee. She was involuntarily terminated effective September 22, 2016, and her termination was not pursuant to a group RIF or layoff. At the time of plaintiff's termination, she had accrued 13 years of service and had a salary of $87,246.15. The amount of severance that defendant would have offered a salaried employee eligible to receive severance benefits with 13 years of service was 26 weeks of pay, which for plaintiff's salary would have been $43,623.08. Employees who were terminated from defendant pursuant to a voluntary severance plan accepted severance as an incentive to separate from the company. Defendant offered those employees the voluntary severance plan instead of implementing an involuntary RIF. The parties stipulated to a spreadsheet that listed employees who were terminated from defendant from September 22, 2013, to September 22, 2016, with an offer of severance, and another spreadsheet that listed those who were terminated without such an offer. The spreadsheets contained the categories of job title, whether exempt from the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*)[1], the termination reason, and "Add'l Term Reason Info." The parties agreed that the three-year period of time reflected in the exhibits was a sufficient

[1] Employees who are compensated by a threshold salary are exempt from overtime pay requirements. See *Young Chul Kim v. Capital Dental Technology Laboratory, Inc.*, 279 F.Supp.3d 765, 776 (N.D. Ill. 2017). Thus, the spreadsheet category is a short-hand for showing whether the employee was salaried or earned an hourly wage.

amount of time in which a term or condition of employment through past practice could be established.

¶ 13 B. Trial Court's Ruling

¶ 14 The trial court granted defendant summary judgment on October 18, 2018; we summarize its memorandum order. Plaintiff was involuntarily terminated in September 2016. "The reasons given were failure to meet performance expectations, including attendance, and sharing confidential salary information with another employee." It was undisputed that defendant never offered plaintiff severance or discussed its severance benefits with her. Defendant determined that the circumstances of her termination for poor work performance and failure to improve did not warrant offering her severance benefits at termination. Plaintiff was not terminated pursuant to a RIF or layoff.

¶ 15 The issue was whether defendant owed plaintiff severance pay "pursuant to an employment contract or agreement between the two parties." 820 ILCS 115/2 (West 2016). Case law provided that an employee was able to prove an agreement for certain payments from the employer based on the past practice between the employer and that specific employee. Plaintiff did not assert that there was mutual assent based on prior practices between her and defendant, but rather relied on the Department of Labor's regulation defining severance to include an established practice of the employer. This would necessarily have to refer to the employer's practice relating to other employees who have left the company. Defendant argued that the regulation was invalid because it went further than the Wage Act, and that even if the regulation was valid, the data showed that no such practice existed. Defendant also argued that its written severance plan defined eligibility, which did not include being fired for cause, and that the plan

provided for severance only if the employee signed a separation and release agreement, which plaintiff did not do.

¶ 16 The regulation in question went beyond the " 'mutual assent' " between two parties described in the Wage Act and permitted the creation of an agreement based on the " 'established practice' " of the employer with other employees. "Because the regulation embodied in § 300.530 [was] at odds with the language of the [Wage Act], and with basic principles of Illinois contract law, the [the trial court found] the regulation to be unenforceable, and that [plaintiff's] claim based on that regulation must fail."

¶ 17 Even if the regulation were valid and allowed for past practice involving other employees to create an obligation to plaintiff, her claim would fail. Based on the documents stipulated to by the parties, in the three years before plaintiff's termination, 5,190 employees left defendant. Of those, there were about 100 for whom no information was available, leaving 5,090 relevant for comparison. From that number, 4,497 (88.3%) were not offered severance, and only 593 (11.7%) were. Of the 593 who were offered severance, the termination reason was known for 467, and most of those were due to a RIF or were voluntary. Plaintiff argued that the appropriate group for comparison was only salaried employees. There were 35 salaried employees who left during the relevant time, of which 27 (77.1%) were terminated for cause and were not offered severance. Plaintiff asserted that the group of 35 was not an accurate comparison because those listed as having been terminated as part of a RIF should be counted as part of the group of those involuntarily terminated. She essentially argued that there must have been something wrong with the performance of those employees, or they would not have been chosen for the RIF. However, there was no evidentiary basis for that assumption, and the trial court declined to engage in speculation.

¶ 18 The most comparable group to plaintiff was that of the salaried employees terminated for cause, of which 77% did not receive severance, which did not establish a practice to obtain severance. Additionally, defendant's written severance plan was in evidence and provided for severance only for employees who signed a release of claims, which plaintiff did not. Assuming the severance plan was followed, there was no one in the group of employees who received a severance who did not sign a release. The trial court ruled that there was "insufficient evidence to support a finding that an established practice existed for payment of severance to employees in positions comparable to" plaintiff's, and it granted summary judgment for defendant.

¶ 19 Plaintiff timely appealed.

¶ 20 II. ANALYSIS

¶ 21 Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Perry v. Department of Financial & Professional Regulation*, 2018 IL 122349, ¶ 30. "When parties file cross-motions for summary judgment, they mutually agree that there are no genuine issues of material fact and that the case may be resolved as a matter of law." *Oswald v. Hamer*, 2018 IL 122203, ¶ 9. We review *de novo* a trial court's ruling on a motion for summary judgment. *First Midwest Bank v. Cobo*, 2018 IL 123038, ¶ 16.

¶ 22 Under section 115/2 of the Wage Act:

> "Payments to separated employees shall be termed 'final compensation' and shall be defined as wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the

> employee by the employer pursuant *to an employment contract or agreement* between the 2 parties." (Emphasis added.) 820 ILCS 115/2 (West 2016).

Pursuant to section 12 of the Wage Act (820 ILCS 115/12 (West 2016)), the Director of Labor and his representatives have the power to promulgate rules and regulations to administer and enforce the provisions of the act, and adopt, amend, or rescind rules and regulations.

¶ 23 The Administrative Code defines an "agreement" as:

> "the manifestation of mutual assent on the part of two or more persons. An agreement is broader than a contract and an exchange of promises or any exchange is not required for an agreement to be in effect. An agreement may be reached by the parties without the formalities and accompanying legal protections of a contract and may be manifested by words or by any other conduct, such as past practice. Company policies and policies in a handbook create an agreement even when the handbook or policy contains a general disclaimer such as a provision disclaiming the handbook from being an employment contract, a guarantee of employment or an enforceable contract. While a disclaimer may preclude a contract from being in effect, it does not preclude an agreement by two or more persons regarding terms set forth in the handbook relating to compensation to which both have otherwise assented. An agreement exists even if does not include a specific guarantee as to the duration of the agreement or even if one or either party reserves the right to change the terms of the agreement." 56 Ill. Adm. Code 300.450.

The Administrative Code states that "[s]everance is a payment that an employee is entitled to be paid upon separation from employment *pursuant to an agreement between the parties or established practice of the employer*." (Emphasis added.) 56 Ill. Adm. Code 300.530.

¶ 24 On appeal, plaintiff argues that the trial court erred in granting summary judgment for defendant because: (1) defendant did not meet its burden of showing that section 300.530 was invalid; (2) the trial court inappropriately assessed the "credibility" of the evidence; and (3) the trial court erroneously found that she was terminated for cause, where the question was a disputed issue of fact upon which reasonable persons could have drawn different conclusions. We address plaintiff's arguments in reverse order, beginning with her third assertion.

¶ 25 Plaintiff notes that in stating that she was most comparable to the group of salaried employees terminated for cause, the trial court necessary found that she was terminated for cause. She argues that, however, the undisputed facts based solely upon admissible evidence do not support this conclusion. Plaintiff admits that she received a written warning on June 15, 2016, and a second written warning the following day, but she argues that the trial court should not have considered the hearsay statements within the warnings. Plaintiff also admits that on August 30, 2016, she shared information with another employee that the employee was not authorized to have. Plaintiff maintains that her action was unintentional, in that she realized afterwards that the employee was not authorized to have the information. Plaintiff admits that she was involuntarily terminated on September 22, 2016, but she argues that the trial court improperly considered Hodal's affidavit stating that she was terminated because of "continued unsatisfactory work performance, including her failure to follow standard work processes and accounting department policies by disclosing sensitive compensation information with an unauthorized employee and failing to meet the performance expectations of the position." According to plaintiff, Hodal made an inadmissible legal conclusion because he lacked foundation for his statements. Plaintiff argues that there was also no evidence that she engaged in any rule or policy violation, and the definition of "for cause" commingles the innocuous situation

of an employee not satisfying a supervisor's standards of performance, which is a highly subjective area, with the wrongdoing of an employee violating a rule or policy, a much more objective category.

¶ 26 Plaintiff's argument is without merit. She stipulated that she was involuntarily terminated without being part of a RIF or layoff, which is essentially being terminated for cause. Plaintiff further admitted receiving the written warnings that defendant attached as exhibits. The information in them was not hearsay because it was not offered for the truth of the matter asserted, *i.e.*, that plaintiff violated attendance and other rules, but rather to show defendant's basis for firing her. Further, plaintiff admits that she gave another employee information that he was not authorized to have, which equates to a rule or policy violation. Additionally, Hodal did not lack foundation for the statements in his affidavit, as he was defendant's Director of Human Resources and Compensation, and plaintiff testified in her deposition that he was present at her termination meeting. We note that plaintiff did not file a counter-affidavit to rebut Hodal's statements, so they must be taken as true for purposes of summary judgment. See *MidFirst Bank v. Riley*, 2018 IL App (1st) 171986, ¶ 34 (facts in an affidavit supporting summary judgment which are not contradicted by counteraffidavit are admitted and must be considered true for purposes of the motion).

¶ 27 We next address plaintiff's argument that the trial court erred in assessing the "credibility" of the evidence. According to plaintiff, the trial court disregarded that reasonable persons could disagree about the interpretation of the evidence in this case. Plaintiff argues that the parties stipulated to the spreadsheets of employees terminated from defendant, but that she contested the "termination reason" in the spreadsheets as a legal conclusion. She admits that defendant would testify to the termination reasons, but she argues that she did not admit that the

conclusions were true, nor did she waive her ability to explore the bias, motive, or other credibility issues with the conclusions. For example, plaintiff argues that the reasons listed are unreliable because of a lack of corporate records, the unknown definition of the reasons listed, such as "performance termination," and the subjective manner in which the termination reason could be determined. Plaintiff also contends that she argued that for RIFs, a company logically would not terminate its top performers, and it is likely that the individuals in the RIF list could be considered terminated for performance, rule violation, or other reason.

¶ 28 Plaintiff argues that the trial court similarly erred in assessing the "credibility" of the data by determining a comparable group of employees to plaintiff, and disregarding the reasonable inferences she argued could be drawn from the data. According to plaintiff, the trial court provided "no credible basis" for why her inference from the data—that in 91% of involuntary terminations, salaried employees received severance—should be disregarded or was otherwise an unreasonable inference.

¶ 29 We reject plaintiff's argument. Plaintiff signed a stipulation stating that the information contained in the spreadsheets was "accurate," without limitation. "Stipulations are included in the category of judicial admissions which may not be controverted in the case in which they are made." *National Union Fire Insurance Co. of Pittsburg, PA v. DiMucci*, 2015 IL App (1st) 122725, ¶ 56. Moreover, accepting that defendant would testify to the termination reasons listed, plaintiff would need to supply some sort of evidence to show that the reasons were unreliable, such as deposition testimony. "A party opposing a motion for summary judgment cannot rest on its pleadings if the other side has supplied uncontradicted facts that would warrant judgment in its favor [citation], and unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact." *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220,

¶ 20. Additionally, a party who files a cross-motion for summary judgment, as plaintiff did here, concedes the absence of factual issue and asks the court to decide the question presented as a matter of law. *In re Application of Douglas County Treasurer*, 2014 IL App (4th) 130261, ¶ 46. For all of these reasons, the trial court did not err in relying on the termination reasons listed in the spreadsheets.

¶ 30 Regarding the categories of employees, plaintiff does not dispute that the trial court's calculations are correct, but rather that it did not correctly categorize her. Summary judgment is not appropriate if it is possible to draw more than one reasonable inference from even undisputed facts. *Irvin v. Southern Illinois Healthcare*, 2019 IL App (5th) 170446, ¶ 42. The trial court stated that plaintiff was most similarly-situated to salaried employees who were terminated for cause. Although plaintiff asserts that it is a more or equally reasonable inference that she belongs within the category of salaried employees who were involuntarily terminated, plaintiff ignores the fact that her proposed category contains people who were terminated pursuant to a RIF or layoff, where it is undisputed that she was not. Accordingly, putting her in that category would be an unreasonable inference. It is also not a reasonable inference that employees who left defendant due to a RIF or layoff were the equivalent of being terminated for reasons of a performance or rule violation, because defendant would not have to wait for a RIF or layoff to terminate such employees, especially if it meant saving money on severance. Further, as the trial court pointed out, such an argument amounts to pure speculation, with no basis in the evidence. The only reasonable inference from the undisputed facts is that plaintiff is most similar to the salaried employees terminated for cause, of which 77% did not receive severance, showing that defendant did not have a practice to provide severance to employees similarly-situated to plaintiff. The trial court therefore did not err in granting summary judgment for defendant.

¶ 31 Based on our determination that the trial court did not err in concluding that defendant did not have a practice of paying severance to employees similarly-situation to plaintiff, we need not address whether section 300.530 of the administrative code is unenforceable.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the judgment of the Lake County circuit court.

¶ 34 Affirmed.