STATE OF MICHIGAN

COURT OF APPEALS

BOBBY ANN ROBINSON, PH.D.,

Plaintiff-Appellant,

v

PETER A. COHL, KATHLEEN M. ABBOTT, SAGINAW BAY SUBSTANCE ABUSE SERVICES COMMISSION, MICHAEL J. WEGNER, EUGENE GWIZDALA, WALTER AVERILL, E.J. HOULE, PHILIP GRIMALDI, and THOMAS LOCK,

Defendants-Appellees.

UNPUBLISHED

No. 193303
Saginaw Circuit Court
LC No. 94-001261-CZ

Before: O'Connell, P.J., and White and Bandstra, JJ.

WHITE, J. (concurring in part and dissenting in part.)

I concur in the majority's determinations regarding plaintiff's wrongful discharge, race discrimination, and defamation claims. I respectfully dissent from the majority's determination regarding plaintiff's retaliation claim (Section III).

To establish a prima facie case of unlawful retaliation under the CRA, a plaintiff must show that (1) she engaged in a protected activity; (2) this was known by the defendant; (3) the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the CRA, if an employer's decision to terminate or otherwise adversely affect an employee is a result of the employee raising the spectre of a discrimination complaint, retaliation prohibited by the CRA occurs. *McLemore v Detroit Rec Hospital,* 196 Mich App 391, 396; 493 NW2d 441 (1992). A plaintiff need not present direct evidence that an employer's motivation for its adverse employment actions was retaliatory. Where a plaintiff presents circumstantial evidence, the question is whether the evidence,

when viewed in a light most favorable to plaintiff, is sufficient for the fact-finder to infer that the defendant was motivated by a desire to retaliate. *Id.*

Plaintiff's letter to defendants dated July 12, 1993, stated that defendants' criticisms and reprimand demonstrated "an increasing trend of harassment that I have endured by the SBSASC Board since February 1993." Plaintiff's letter indicated that a copy was being sent to her personal attorney and the Civil Rights Commission. The September 3, 1993 minutes of the Commission's Finance Committee meeting reflect that plaintiff stated at the meeting that defendants' reprimands of her were indications that she was being targeted, and that the Board "would face a discrimination suit." Thus, plaintiff's invocation of her right was sufficient under *McLemore, supra.*

Defendants argue, and the majority agrees, that defendants' criticism of plaintiff's job performance began several months before plaintiff's July 12, 1993 letter, on which plaintiff's retaliation claim is based, and that they thus could not have retaliated against plaintiff.

Neither party has cited Michigan cases on point. The issue has arisen in federal court, however, and Michigan courts may look to federal decisions for guidance. See *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).

The mere filing of a discrimination complaint does not "clothe the complainant with immunity for past and present inadequacies, [and] unsatisfactory performance." *Kneibert v Thomson Newspapers, Michigan Inc*, 129 F3d 444 (CA 8, 1997). In *Kneibert*, the plaintiff appealed a grant of summary judgment in the defendant's favor of his age discrimination claim under the Age Discrimination and Employment Act (ADEA)[1] and retaliation under the Missouri Human Rights Act. Regarding the retaliation claim, the United States Court of Appeals for the Eighth Circuit stated:

> Upon examining the record, we conclude that Kniebert failed to produce evidence to establish a causal connection between the filing of his charge and Thomson's adverse employment actions against him. In fact, Kneibert admitted in his deposition that the only evidence of retaliation by Thomson was the two memoranda he received from Shields threatening Kneibert's dismissal and that, before the filing of his complaint, Shields had never threatened him with dismissal. However, **Kneibert received repeated reprimands from Shields for his performance problems *before* Kneibert filed the charge. *After* the filing of his charge, Kneibert continued to receive reprimands for the same problems he exhibited before the charge. Kneibert's future with Thomson was deemed 'uncertain' in July, 1994—well in advance of the filing of his charge on March 22, 1995.** The mere sequential relationship between the filing of Kneibert's charge and the increasing seriousness of the reprimands is insufficient to establish causality. Simply filing a discrimination complaint does not 'clothe the complainant with immunity for past and present inadequacies, [and] unsatisfactory performance . . . . [129 F3d at 455. Italicized emphasis in original, emphasis added.]

In *Canitia v Yellow Freight System, Inc*, 903 F2d 1064 (CA 6, 1990), the district court found that the plaintiff failed to establish a prima facie case of retaliatory discharge under Title VII and granted summary judgment in the employer's favor. The United States Court of Appeals for the Sixth Circuit analyzed the timing of the employer's disciplinary actions of the plaintiff in relation to the date the plaintiff appeared as a witness (January 1986) for another employee, Few, who successfully sued Yellow Freight. The court decision in Few's favor was issued in April 1986, and the plaintiff was discharged in December 1986.

> . . . . We must examine the timing of events, Canitia's participation in co-employee Few's discrimination claim, and Canitia's frequent disciplinary problems to determine whether he had established a prima facie case.
>
> It appears that Canitia received at least twelve warning letters in the three years *prior* to his Few testimony in early 1986 (in addition to warning letters that were subsequently retracted and oral warnings) with respect to his duties as a city pick-up and delivery driver. Plaintiff was one of a number of witnesses who testified for Few in his claim against YFS, and there is no record of any pattern of retaliation against such witnesses generally by YFS. During the nine months preceding July 1986, it appears that Canitia received six warning letters, including one concerning his alleged low productivity, which YFS characterized as 'abuse of company time.' A one-day disciplinary suspension was given him in a July 2, 1986 terminal hearing which plaintiff grieved. This suspension was ultimately upheld and YFS attempted to counsel plaintiff concerning this productivity problem.
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> Still later in 1986 YFS, after surveillance of plaintiff's activities on the job, discharged Canitia, who again followed the grievance process challenging the action as retaliatory. The discharge was reduced to a ten-day suspension without pay. After returning to work, again in late 1986, YFS surveilled plaintiff to determine whether his productivity had reached an acceptable level. Allegedly, an even longer delay occurred while Canitia was making a delivery at Euclid Industries. Notice was again given Canitia, who appeared for a hearing on December 26, 1986, and was once again discharged by YFS. Canitia again filed a grievance. This time the discharge was sustained at the end of the grievance procedure.
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> Assuming that Mr. Marino [member of YFS' management] alluded to plaintiff's testimony in the *Few* case, despite his denial, is this enough, in light of the history of disciplinary actions against Canitia, to constitute a genuine issue of material fact with regard to the charge of retaliation? Canitia states in his brief that his own testimony was cited by this court in *Few* [], as a basis for affirming a judgment for Few, a black female employee who claimed discrimination in her discharge. Canitia's name is mentioned, 845 F.2d 124, citing from a portion of the district court findings as one of the YFS employees who in 1983 complained about 'unfair discipline on certain individuals.' His other argument is that there are no specific production standards at YFS, and that subjective judgment is a basis for discipline in this respect.

> The fact remains that Canitia had been terminated previously and twice recently disciplined (despite grieving each YFS action) for actions similar to those involved in the discharge at issue. This is a strong factor to take into account in considering the issues here. Summary judgment may be appropriate in Title VII cases even where certain facts may be in dispute.
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> In contrast to the facts as described in our previous opinion, 894 F.2d at 197, a careful examination of the record reveals that **Canitia received seven warning letters to his file in 1984, plus at least three in 1985, so that what occurred in 1986 after his testimony in the *Few* case does not reflect a sudden surge of disciplinary actions.** We find the situation here to be comparable to the facts in *Cooper v City of North Olmsted*, 795 F.2d 1265 (6th Cir. 1986) [aff'd 848 F2d 189 (CA 6, 1988).]
>
> In *Cooper*, a Title VII plaintiff claimed that she was discharged in retaliation for bringing a complaint before a state civil rights commission. The plaintiff had been cited for rules violations six times in the seven-month period preceding the state complaint, and nine times in the four months following the complaint. The court found: '**While a disparity in the amount of disciplinary action may certainly be sufficient in appropriate cases to support an inference of retaliation, this is not such a case.'** 795 F.2d at 1272.
>
> Here, as in *Cooper*, we are not examining the case of a trouble-free employee during the months and years before the incident which he alleges gave rise to a retaliatory motive and subsequent and sudden job warnings by the employer. In the case at issue three disciplines instituted against Canitia were vindicated to some degree after full grievance procedure review. [903 F2d at 1066-1067. Emphasis added.]

The majority in effect concludes that where there is no direct evidence of retaliation, an inference of retaliation is impermissible, as a matter of law, where the employer's dissatisfaction with the employee predated the employee's complaint. While earlier dissatisfaction may weigh against a finding of retaliation, I do not agree that it defeats such a finding as a matter of law. Rather, I conclude that the nature of the earlier dissatisfaction and discipline must be considered as well as the employee's overall record. Such an analysis was employed by the courts in *Canitia* and *Cooper, supra,* before reaching the conclusion that there was no retaliation as a matter of law.

The instant case differs from *Canitia* and *Cooper, supra*, because Robinson had ten years of positive evaluations before defendants' criticisms began in February 1993; because reasonable jurors could find that defendants' two criticisms and reprimand preceding her July 12, 1993 letter were unfounded; and because of the heightened severity and qualitative differences of the criticisms and discipline that occurred after July 12, 1993.[2] Defendants admitted in response to plaintiff's requests to admit that the third criticism was without basis,[3] and reasonable jurors could conclude that the first two criticisms, which concerned plaintiff's support of another African-American female employee, led only to defendants admonishing plaintiff to do what the Board said. Further, in the instant case, unlike *Kneibert, supra,* it is undisputed that plaintiff's performance from her hiring in 1983 to February 1993

was positive and that her performance had not been called into question until shortly before her letter, which objected to the recent criticisms.

Additionally, in the instant case, almost immediately after defendants received plaintiff's July 12, 1993 letter, defendants took actions adversely affecting plaintiff's employment that, viewed in a light most favorable to plaintiff, could be found to have been retaliatory. Three days after plaintiff's July 12, 1993 letter, the Board voted on a motion to employ attorney Cohl to look into plaintiff's "concerns." In August 1993, the Board voted to employ Cohl. In September 1993, the Board approved a recommendation to reduce plaintiff's salary by approximately $6,600. Plaintiff's letter to the Board dated September 17, 1993, which was a follow-up to her letter of July 12, 1993, stated that at the same time the Board approved the recommendation to reduce her salary, it voted to increase the amount allotted for legal fees from $3,000 to $10,000. Plaintiff's letter charged that the move to reduce her salary was an act of reprisal for her grievance submitted on July 12, 1993 and was a blatant act of race discrimination. In March 1994, defendants authorized Cohl and Abbott to prepare an employment agreement specifying that plaintiff was an at-will employee, and terminated plaintiff after she refused to sign the agreement. Plaintiff also presented evidence that defendants accepted Cohl and Abbott's report as true, even though plaintiff provided explanations which contradicted the findings of the report and maintained that past minutes of the Board corroborated her claims. A reasonable factfinder could conclude that defendants' adverse employment actions concerning plaintiff escalated after the July 12 letter, in retaliation for the letter.

Because a reasonable factfinder could find that defendants took adverse employment actions against plaintiff in response to plaintiff's having raised the spectre of a discrimination claim, I would reverse the grant of summary disposition of plaintiff's retaliation claim.

/s/ Helene N. White

[1] 29 USC § 621 *et seq*.

[2] The first two complaints were related to whether another SBSASC African-American female employee, Sandra Crosby-Robinson, who held the position of Women/Family Coordinator at defendant Commission, was qualified to retain that position or should be laid off.

Regarding the first complaint, the Board's minutes of February 11, 1993 reflect that one Board member (Gwizdala) criticized plaintiff at a Board meeting on February 9, 1993, for sending a Freedom of Information Act request to the Center for Substance Abuse Services (CSAS) regarding the qualifications required by other local coordinating agencies for the position of Women/Family Coordinator.

Plaintiff argues, and the Board's minutes of February 4, 1993 corroborate, that plaintiff submitted a copy of her FOIA letter to the Board on that date and the Board voiced no objections to the letter being sent.

The February 11, 1993, Board minutes reflect that plaintiff believed that Crosby-Robinson was qualified to retain the position, while the Board or certain members thereof apparently adopted the opinion of the CSAS that Crosby-Robinson was not qualified to retain the position because she lacked a master's degree. The Board minutes reflect that eight of fifteen persons holding the Women/Family Coordinator position did not have master's degrees, but according to CSAS, those persons had experience that compensated for the lack of the degree.

Page two of the Board's February 11, 1993, minutes state in pertinent part:

> Dr. Robinson stated that the person was qualified and that it would be discriminatory to layoff the person and then receive the funds later and re-hire someone else. [Board member] Mr. Gary Loster made a motion which was supported and carried that legal counsel be consulted regarding this.

The Board's minutes of the February 18, 1993 meeting stated in pertinent part:

> . . . . Commissioner Gwizdala stated that a motion he made at the February 9, 1993 meeting was not included in the minutes. [There is no indication in the record that plaintiff was responsible for preparing the minutes of the Board's meetings.] Commissioner Gwizdala had made the following motion. . . :
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> 'The SBSASC Board will give an order to the Executive Director of the SBSASC that the Director comply with all requests which are given by the Center for Substance Abuse Services (CSAS). . . .

It is unclear but apparently the case that the motion required that plaintiff abide by CSAS's stance that Crosby-Robinson's Women/Family Coordinator position be eliminated.

I note that the Board seems to have changed its stance several months later regarding the Women/Family Coordinator position, apparently on advice of counsel. The Board's minutes of May 20, 1993 state that a motion was passed calling for the Board to appeal CSAS's decision to eliminate the Women/Family Coordinator position, based in part on information obtained through the FOIA regarding the qualifications of other persons holding that position:

> Commissioner Averill, M.D., made the following motion:
>
> > The SBSASC Board appeal the decision made by the Center for Substance Abuse Services. The SBSASC, also, give the Legal Counsel all the information they have on the other Coordinating Agency's Women/Family Coordinator's [sic] who do not have

> Master's Degrees. (The C.A. received this information a few months ago under the "Freedom of Information Act.") This motion instructs that SBSASC Legal Counsel file suit.
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> An addendum was added to this motion, as follows:
>
> Inform SBSASC Legal Counsel that the SBSASC Board would like frequent progress reports on this matter.
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> This motion along with the addendum to the motion was [sic] supported by Mr. Fred Porterfield. Motion Carried.
>
> Mr. Housle asked what will be done with the Women/Family Coordinator in the meantime. Commissioner Averill said she [Crosby-Robinson] still had the option that the Treatment & Personnel Committee gave her, which would provide four months of employment while the SBSASC is trying to get the funds back.

The Board's second complaint also regarded Crosby-Robinson. On May 20, 1993, the Board voted to vacate the Women/Family Coordinator position and offer Crosby-Robinson the position of Prevention Specialist with the understanding that the position was temporary. The Board also voted to require Crosby-Robinson to sign a letter acknowledging that her new position would be temporary. The Board instructed plaintiff to obtain Crosby-Robinson's signature on the letter.

The Board's minutes of its May 27, 1993 meeting reflect that, after several commissioners stated that Crosby-Robinson was refusing to sign the agreement which would place her in a temporary position, defendant Commissioner Gwizdala stated that plaintiff did not do what the Board told her to do and defendant Commissioner Averill stated that he got the impression that rather than following through and supporting the SBSASC Board, Dr. Robinson was "in collusion" with the employee and this is inappropriate behavior on the part of the director. Later, the Board passed a motion that plaintiff either had to follow the Board's order or resign and that a disciplinary letter go in her file.

Plaintiff argues, and the record supports, that she made several efforts to have Crosby-Robinson sign the agreement, but that Crosby-Robinson refused. Crosby-Robinson wrote a letter to the Board to that effect, stating that she was uncomfortable signing the agreement for temporary employment, and that she understood that if she did not sign it, she could not hold the position. Plaintiff testified at deposition that she "accepted" Crosby-Robinson's decision to not sign the letter, that she did not say to Crosby-Robinson that she was doing the right thing by not signing it, although she did tell her that she respected her decision and courage.

The Board's third criticism is discussed in n 3, *infra*.

[3] The Board's third pre-July 12, 1993 criticism was that plaintiff attended Saginaw County Board of Commission meetings twice, without Board approval. The Board's minutes of its May 27, 1993 meeting state that defendant Commissioner Averill criticized, but did not formally reprimand, plaintiff.

The minutes further reflect that plaintiff explained that anytime she attended such meetings, it was with the approval of the former Board chairperson, Al Holiday.

Plaintiff submitted a letter from Holiday to that effect, dated May 28, 1993, along with her July 12, 1993, letter to the Board, discussed *supra*. Holiday's letter stated

> [A]ny appearances that Dr. Robinson made before the Saginaw County Board of Commissioners were from my direction as Chairman. . .

Defendants admitted in response to plaintiff's second requests for admissions, number 44, that they had no reason to disbelieve Holiday's letter.