STATE OF MICHIGAN

COURT OF APPEALS

CALVIN WEST and MARGO WEST, Jointly and Severally,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION, RANDY KOYL, KEVIN SPARKS, and JOHN TATE, Jointly and Severally,

Defendants-Appellees,

and

JIM REEVES,

Defendant.

UNPUBLISHED
January 25, 2002

No. 224408
Wayne Circuit Court
LC No. 98-808017-CZ

Before: Griffin, P.J., and Meter and K. F. Kelly, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the trial court's Opinion and Order granting summary disposition in favor of defendant General Motors.[2] We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

Plaintiff worked as a maintenance supervisor at General Motors. Before the events resulting in the instant appeal occurred, plaintiff had an apparently impeccable thirty-year work history with defendant corporation. In 1993,[3] plaintiff was transferred to the Romulus plant.

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[1] Plaintiff Margo West's claim is a derivative claim for loss of consortium. Accordingly, the term "plaintiff" when employed in the singular refers exclusively to plaintiff Calvin West.

[2] Because the trial court granted summary disposition as to defendant General Motors only, the term "defendant" when used in the singular, refers to defendant General Motors.

[3] In his brief on appeal, plaintiff represents that he transferred to the Romulus plant in 1993 and in its brief on appeal, defendant represents that plaintiff transferred in 1992. Because the date that plaintiff transferred does not bear on any of the issues raised on appeal, we merely note the (continued…)

Because of a collective bargaining agreement between General Motors and the UAW, the Romulus plant had a Union Work Center. Defendant Jim Reeves was the UAW committee person and acted to resolve grievances between union members and management.

On or about May 4th, 1997,[4] plaintiff went to Reeves' office to discuss attendance problems that he had with two hourly employees. Instead of following the proper protocol of contacting the on-call committeeperson, plaintiff went straight to Reeves' office. Reeves told plaintiff to leave and follow the proper procedure. According to plaintiff, when plaintiff refused to leave, Reeves became enraged and physically shoved plaintiff. Reeves initially denied that he touched plaintiff, but later indicated that being a rather large man, when he stood up, his stomach did make contact with plaintiff's person.

After the incident in Reeves' office, plaintiff notified his supervisor and thereafter called the Romulus police to make a complaint. Plaintiff never followed up on this complaint or otherwise advised police that he wanted Reeves arrested.

On May 22nd, plaintiff asked his supervisor, John Tate, if he could leave work early to tend to his ill mother. Tate accommodated plaintiff's request and permitted plaintiff to leave without completing his entire shift.

On May 30, 1997, plaintiff asked Tate how he should record his absence on his timesheet. Tate advised that plaintiff could mark it as "excused" which according to corporate policy, allows supervisors to receive compensation for eight straight hours despite the early departure. However, defendant claims that when plaintiff submitted his timesheet for May 22nd, plaintiff not only sought compensation for eight straight hours, but further claimed four hours of overtime.

On June 2, 1997, Tate reviewed plaintiff's timesheet and noticed the four hours of improperly claimed overtime. On June 4, 1998, plaintiff had a meeting with his two supervisors, Randy Koyl and John Tate. After this meeting, plaintiff was placed on a "no overtime" work restriction and put on further notice that the four hours of overtime claimed for May 22nd was not proper and if plaintiff recorded overtime that he did not work in the future, it would be considered fraud for which plaintiff could be terminated. At this time, plaintiff was also required to use the entrance designated for salaried employees and further required to ensure that he "swipe" his badge to unlock the entrance to the plant. This would thus allow management to keep track of plaintiff's time.[5]

(…continued)

discrepancy.

[4] There is a discrepancy in the record regarding whether the confrontation occurred on May 4th or May 5th. The trial court states in its Opinion and Order that the event occurred on May 5th. Jim Reeves, however, testified in his deposition that the incident occurred on May 4th.

[5] Although all salaried employees are required to use this entrance, not all supervisors were required to swipe their badges every time that they entered and exited the plant. If one supervisor swiped his badge to unlock the entrance, then another supervisor could also enter. Plaintiff, however, was required to swipe his badge *every time* that he entered and exited the

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On June 5, 1997, plaintiff filed a complaint with the NAACP naming Koyl and Tate as defendants. Plaintiff neither advised nor intimated to Koyl and Tate that he intended to file such a complaint. Although plaintiff contends that he locked the complaint in his desk when he left for vacation, Koyl testified that while searching for an unrelated report, he discovered an inter-office memorandum referencing the complaint sitting on top of plaintiff's desk. Koyl admitted that after he discovered the memorandum, he knew that plaintiff named both Koyl and Tate as defendants. Additionally, Koyl testified in his deposition that he advised Tate that plaintiff apparently filed a complaint with the NAACP and that plaintiff named them both as defendants. Koyl advised plaintiff that plaintiff had the right to do whatever he wanted to do as regards the NAACP complaint. Thereafter, Koyl testified that he did not hear anything further about the complaint. Plaintiff did not follow up with the NAACP on the status of his complaint.

Thereafter, plaintiff was transferred from the first shift to the afternoon shift. This transfer caused him a hardship because plaintiff had another business that he operated during the evening hours.

In early September of 1997, the forty-hour work week restriction imposed upon plaintiff was lifted. Approximately one month later, on October 16, 1997, plaintiff asked his then supervisor Mike Hurd, if he could leave early that evening. Hurd allowed plaintiff to leave after plaintiff completed his eight "straight" hour work day. However, in addition to the eight straight hours plaintiff actually worked, plaintiff also claimed two hours of overtime for October 16, 1997.

Personnel Director Molly Katko inquired about the discrepancy in plaintiff's timesheet. At first, plaintiff acknowledged that he did not work the two hours of overtime on October 16th, advising that he made up the time on October 17th but did not otherwise make a notation to this effect on his timesheet for that date. Thereafter, plaintiff gave a different rendition claiming that he actually worked for those two additional overtime hours on October 16th. However, contrary to plaintiff's version, Hurd claimed that plaintiff left the plant early and did not return. Although plaintiff claims that he was present and actually spoke with people during that time, he testified in his deposition that he could not specifically recall their names.

As a result of the alleged time fraud, plaintiff was suspended. Thereafter, on January 8, 1998, Production Manager Joe Hinrichs made the decision to terminate plaintiff's employment for recording overtime hours not actually worked. Plaintiff's complaint for violation of the Michigan Civil Rights Act, Whistleblowers' Protection Act, (hereinafter "WPA") along with additional claims for wrongful discharge and assault and battery ensued. The trial court granted defendant summary disposition on all claims. Plaintiff appeals as of right. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

II. Summary Disposition – Standards of Review

This Court reviews de novo motions for summary disposition. A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the claim itself to determine whether plaintiff's

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plant.

pleadings set forth a prima facie case. *Estate of Bradford v O'Connor Chiropractic Clinic*, 243 Mich App 524, 529; 624 NW2d 245 (2000). Conversely, a motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the claim. A reviewing court considers all documentary evidence submitted to determine whether a genuine material factual issue exists upon which reasonable minds may differ. *Smith v Global Life Insurance Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

III. Plaintiff's Claim Under the Whistleblower Protection Act[6]

First, plaintiff argues that the trial court erred by finding no causal connection between plaintiff calling the police and the adverse employment consequences sustained thereafter and thus erred by granting defendant summary disposition. Plaintiff contends that because he reported the alleged assault by Reeves to the Romulus police, he suffered adverse employment actions. In support, plaintiff points out that less then three weeks after he reported the assault to the police, Tate accused plaintiff of time fraud and thereafter became "suspicious" of plaintiff and undertook to monitor his time closely and then terminated his employment for an unproven, minor offense.

Whether one claiming a violation of the WPA sets forth a prima facie case is a question of law that this Court reviews de novo." *Roulston v Tendercare, Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

To establish a prima facie case pursuant to the WPA, plaintiff must demonstrate: 1) engagement in a protected activity as defined by the act; 2) subsequent discharge; 3) a causal connection between the protected activity and the discharge. MCL 15.362; *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 325; 559 NW2d 86 (1996).

Plaintiff alleges that he went to see Reeves in his office on or about May 4, 1997 to discuss certain issues surrounding a couple of his employees. According to plaintiff, Reeves jumped up angrily from his desk, cussed at plaintiff and physically pushed plaintiff about the chest area. As a result of this incident, plaintiff advised his supervisor, security, and two individuals from the personnel office. Displeased with the "nonchalant" response of supervisory personnel, plaintiff called the Romulus police to report the incident. A review of the record reveals that approximately three weeks hence, plaintiff's immediate supervisor accused him of time fraud. And, on June 5, 1997, approximately one month after the Reeves incident and his contemporaneous police report, plaintiff was placed on a work schedule restricting him to forty hours per week with no overtime, transferred to afternoons, required to swipe his badge and ultimately discharged.

Clearly, reporting an allegation of physical assault to the police comes within the purview of a "protected activity" for purposes of the WPA. *See Roulston, supra* at 279 (stating that a "protected activity" pursuant to the WPA consists of reporting a violation of law to a public body.) The record is clear that before the Reeves incident, plaintiff had an unblemished thirty-year history with defendant corporation. Approximately one month after the Reeves incident,

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[6] MCL 15.362.

however, plaintiff's supervisors placed defendant on a "no overtime" restriction and required plaintiff to swipe his badge ostensibly for improperly claiming overtime hours not actually worked. According to the testimony presented, whereas other supervisors could enter the plant without necessarily swiping their card, plaintiff had to ensure that he swiped his card every time that he entered and exited the plant so that plaintiff's supervisors could closely scrutinize his time.

At the outset, we note the guiding principle that "remedial statutes, such as the WPA, are to be liberally construed in favor of the persons intended to be benefited." *Terzano v Wayne County*, 216 Mich App 522, 530; 549 NW2d 606 (1996) (citation omitted) (emphasis omitted.) Although defendant insists that the adverse employment actions taken against plaintiff were a legitimate response to plaintiff seeking compensation for overtime hours not actually worked, nonetheless, whether plaintiff's telephone call to the police reporting the alleged assault or his conduct relative to his overtime hours constituted the *actual* reason for the subsequent adverse employment decisions creates a genuine factual issue for resolution by the trier of fact. See *Henry v City of Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999).

On these contested facts and the legitimate inferences drawn therefrom in a light most favorable to the plaintiff, we cannot find, as a matter of law, that there is absolutely no causal connection between plaintiff's telephone call to Romulus police and the subsequent adverse employment decisions. Accordingly, we find that plaintiff set forth a prima facie case pursuant to the WPA and that there remain genuine factual issues for the trier of fact to definitively resolve. Accordingly, the trial court improvidently granted defendant's motion for summary disposition. Although the trial court did not specifically identify the court rule upon which it relied to grant defendant summary disposition, we find that summary disposition pursuant to either MCR 2.116(C)(8) or (C)(10) was equally improper.

III. Plaintiff's Race Discrimination Claim[7]

Next, plaintiff argues that the trial court erred by finding that plaintiff failed to allege or otherwise establish that other supervisors, outside of the protected class, sought compensation for something other than their regular shift without consequence which is a vital component to plaintiff's claim for race discrimination thereby entitling defendant to summary disposition. Plaintiff contends that for the same conduct, he was treated differently than other supervisors because of his race. We disagree.

The Michigan Civil Rights Act, MCL 37.2202(1)(a) provides in pertinent part:

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[7] We note at this juncture that the issues contained in plaintiff's Table of Contents do not mirror the issues contained in plaintiff's Statement of Questions Presented. Whether the trial court erred in granting defendant summary disposition based on plaintiff's failure to set forth a prima facie case of race discrimination pursuant to the Michigan Civil Rights Act appears in the Table of Contents and in the brief, but does not otherwise appear in the Statement of Questions Presented. Consequently, this court need not address this issue considering that such independent issues are not properly presented for appellate review. *Greathouse v Rhodes*, 242 Mich App 221, 240; 618 NW2d 106 (2000). Notwithstanding, we will address the merits of plaintiff's argument.

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment, because of . . . . race . . . .

The two broad categories recognized pursuant to this section are intentional discrimination claims relying upon a "disparate treatment" or "disparate impact" theory. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). In the case at bar, plaintiff relies upon a "disparate treatment"[8] theory.

To set forth a prima facie case, a plaintiff may establish intentional discrimination directly or indirectly. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997). As our Supreme Court recently explained, in some instances, the plaintiff may be able to produce direct evidence of racial bias thus permitting the plaintiff to prove the unlawful discrimination as in any other civil case. *Hazle v Ford Motor Company*, 464 Mich 456; 628 NW2d 515 (2001). However, in most instances, a plaintiff will not have any direct evidence of racial antipathy. Consequently, a plaintiff in this circumstance must rely on indirect evidence to fashion a prima facie case. In those instances where the plaintiff must rely on indirect evidence, the plaintiff must satisfy the prima facie test enunciated in *McDonnell Douglas*[9] to survive summary disposition.

To establish a *McDonnell Douglas* prima facie discrimination case, a plaintiff must prove (1) protected class membership; (2) adverse employment action; (3) qualification for the position; and (4) termination or discharge under circumstances that give rise to an inference of unlawful discrimination. See *Lytle v Malady (On Remand)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998); *Wilcoxon, supra* at 361. And, "[c]ircumstances give rise to an inference of discrimination when the plaintiff 'was *treated differently than persons of a different class for the same or similar conduct*.'" *Wilcoxon, supra* (quoting *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991)). See also *Town v Michigan Bell*, 455 Mich 688, 695; 568 NW2d 64 (1997).

In the case *sub judice*, plaintiff satisfies the first three elements. As an African-American, plaintiff is a member of a protected class. Plaintiff was disciplined and ultimately discharged thus suffering adverse employment actions. And, there is no dispute concerning plaintiff's qualifications for his position. The quarrel here is the final element; whether plaintiff was discharged under "circumstances that give rise to an inference of unlawful discrimination."

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[8] Conversely, a discrimination claim premised upon a disparate impact theory involves, "`employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'" *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 450-451; 622 NW2d 337 (2000) (quoting *Int'l Brotherhood of Teamsters v United States*, 431 US 324, 335, n. 15, 97 SCt 1843, 52 L Ed 2d 396 (1977).

[9] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L ED 2d 668 (1973).

Wilcoxon, supra at 361. The trial court found that plaintiff's evidence on this critical element failed thus entitling defendant to judgment as a matter of law. We agree.

To establish the requisite circumstances giving rise to an inference of unlawful discrimination, plaintiff must produce evidence that plaintiff *was treated differently* than persons in an unprotected class *for the same or similar conduct*. *Id.* at 361. A review of the record reveals that the adverse employment actions undertaken by defendant against plaintiff which eventually resulted in plaintiff's termination began when plaintiff's supervisors discovered that after plaintiff received permission to leave before he completed his entire shift he thereafter submitted timesheets requesting compensation not only for eight hours of straight time, but also for overtime hours that he did not actually work. Consequently, to satisfy the fourth element of a prima facie case, plaintiff must present evidence that other non-minority supervisors were permitted to leave their shifts early and thereafter seek compensation for *overtime hours* not actually worked for those shifts, all without adverse consequence.

Although plaintiff argues that other non-minority supervisors left their shifts early and received payment, plaintiff did not produce any evidence to establish that these non-minority supervisors submitted timesheets seeking compensation for overtime hours not actually worked without adverse employment consequences. Accordingly, we find that the trial court did not err in granting defendant's motion for summary disposition in this regard.[10]

IV. Retaliation Under the Michigan Civil Rights Act

Finally, plaintiff argues that the trial court erred in determining that plaintiff failed to bring forth competent evidence establishing that defendant discharged plaintiff because plaintiff filed a complaint with the NAACP sufficient to withstand summary disposition. To that end, plaintiff argues that filing a civil rights complaint was a protected activity and that after Koyl discovered that plaintiff filed the complaint, Koyl and Tate set out to unearth reasons to discipline plaintiff. Again, we do not agree.

To prove a prima facie case of retaliation for purposes of the Michigan Civil Rights Act, plaintiff must establish:

> (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that 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. *Mitan v Neiman Marcus*, 240 Mich App 679, 681 ; 613 NW2d 415 (2000) (citation omitted.)

In the instant case, no one challenges that filing a complaint with the NAACP constitutes a protected activity. The evidence considered in a light most favorable to plaintiff reveals that

[10] Because we find that plaintiff failed to set forth a prima facie race discrimination case, we need not address plaintiff's argument that his discharge was merely a pretext to discriminate.

Koyl discovered a memorandum referencing the complaint on plaintiff's desk and thus knew that plaintiff filed a complaint with the NAACP and that plaintiff identified him as one of the defendants therein. And, there is no dispute that plaintiff suffered adverse employment actions ultimately resulting in the termination of plaintiff's employment after thirty years of service. Plaintiff, however, still must overcome the final hurdle and establish a causal connection between plaintiff's protected activity and the adverse employment consequences.

A review of the record establishes that plaintiff filed a complaint with the NAACP on June 5, 1997. This was *after* plaintiff's supervisors disciplined him for timesheet discrepancies and imposed the restrictions that plaintiff claims constitutes retaliation. As the trial court properly noted, there is no evidence establishing the vital causal connection between plaintiff's NAACP complaint and the adverse action taken against him as a result of the June 4, 1997 meeting with his supervisors, Tate and Koyl. Indeed, as the trial court noted, plaintiff did not put forth any evidence indicating that plaintiff "rais[ed] the spectre" of a discrimination complaint during the meeting on June 4, 1997 sufficient to suggest that defendant's actions were retaliatory in nature. *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 396; 493 NW2d 441 (1992).

Additionally, the record establishes that the restriction on plaintiff as far as the forty-hour work week was *removed* in September of 1997 *after* plaintiff filed his complaint with the NAACP. However, on October 16, 1997, after plaintiff received warning that if he attempted to receive compensation for overtime hours not actually worked in the future, defendant would consider this time fraud for which plaintiff would face termination, plaintiff nevertheless claimed two hours of overtime that he did not actually work. Because of this timesheet discrepancy, defendant through its agents, initially suspended plaintiff and then subsequently discharged plaintiff for this conduct.

After a review de novo of the record, and affording plaintiff the benefit of all reasonable doubt, we agree with the trial court that plaintiff failed to present documentary evidence sufficient to establish a genuine factual issue upon which reasonable minds could differ that the discipline imposed upon plaintiff and his eventual discharge was in retaliation for filing a complaint with the NAACP. Accordingly, the trial court did not err in granting defendant's motion for summary disposition on plaintiff's retaliation claim under the Michigan Civil Rights Act.

V. Plaintiff's Assault and Battery Claim and the Workers' Disability Compensation Act

Finally, plaintiff submits that because Reeves committed an intentional tort when he physically shoved plaintiff, the Worker's Disability Compensation Act (hereinafter "WDCA") does not apply considering that the act was designed to address accidental injuries incurred in the workplace and does not otherwise apply to an intentional tort. We do not agree.

The WDCA set forth at MCL 418.131(1) provides in pertinent part that:

> The right to recovery of benefits as provided in this act shall be the employee's *exclusive remedy* against the employer for a personal injury . . . . The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist *only when an employee is injured as a result of a deliberate act of the*

> *employer and the employer specifically intended an injury*. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. (Emphasis added.)

In *Gray v Morley, (After Remand)*, 460 Mich 738, 742; 596 NW2d 922 (1999), our Supreme Court stated that it is "clear that the intentional conduct by the employer is the requisite standard triggering the exception to the exclusivity provision [of the WDCA.]" And, to establish the requisite "intentional conduct" necessary to take the action outside of the exclusivity provision, plaintiff must demonstrate that the employer possessed a "specific intent to injure" *Id*. by showing that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id*. citing MCL 418.131(1); see also *Travis v Dreis and Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996). Further, to establish knowledge on the employer's part, the proponent may show that "a *supervisory or managerial employee had actual knowledge* that an injury would follow from what the employer deliberately did or did not do." *Travis, supra* at 174. (Emphasis added.)

In the case at bar, for plaintiff to state a successful claim against defendant corporation, plaintiff must establish that defendant possessed "actual knowledge" that an injury would flow from the employer's actions. The difficulty is that Reeves does not serve in a supervisory or managerial capacity. In fact, Reeves is an hourly employee; it is *plaintiff* that is a member of the managerial staff. As the trial court properly observed, if Reeves served in a supervisory or managerial position, presumably, his own intent when he undertook the conduct in question would perhaps suffice to establish the requisite "actual knowledge that injury was certain to occur" to remove his conduct from without the purview of the WDCA. However, looking at all of the evidence in a light most favorable to plaintiff, and resolving all reasonable doubt in plaintiff's favor, plaintiff failed to present any evidence to establish the requisite "actual knowledge" on defendant corporation's part necessary to remove Reeves' conduct outside of the exclusivity provision of the WDCA. Accordingly, we hold that the trial court did not err when it granted defendant's motion for summary disposition in this regard.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Griffin
/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly