STATE OF MICHIGAN

COURT OF APPEALS

SALLY WITUCKI and LAWRENCE WITUCKI,

Plaintiffs-Appellees,

v

BAY COUNTY and BARBARA TORKA DUFRESNE,

Defendants-Appellants.

UNPUBLISHED
September 27, 2002

No. 233253
Bay Circuit Court
LC No. 98-003506-CL

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendants appeal from a judgment of the circuit court entered in favor of plaintiffs following a jury trial on plaintiffs' employment discrimination claims. We reverse and remand.

Plaintiff Sally Witucki ("plaintiff") was employed as the Bay County Deputy Register of Deeds, a political appointee of Defendant DuFresne, the Bay County Register of Deeds. Specifically, plaintiff claimed that she suffered a disability related to her back condition and that, as a result of that disability, she was terminated from her employment. Defendants deny that plaintiff's condition was the reason for the termination.[1]

Defendants moved for summary disposition, which was denied, with the trial court briefly opining that a genuine issue of material fact existed. Following a jury trial, a verdict was rendered in plaintiff's favor for $130,000 in back wages. The jury awarded no damages for mental and emotional suffering or for loss of consortium. Defendants now appeal, arguing that the trial court erred in denying its motion for summary disposition.[2]

Defendants argue that there was no genuine issue of material fact on either the question whether plaintiff was disabled within the meaning of the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq.*, or whether plaintiff was discriminated against because of a disability.

[1] Mr. Witucki's claim is derivative of plaintiff's primary discrimination claim.

[2] Although it would seem that the denial of a motion under MCR 2.116(C)(10) should be regarded as moot once the matter has gone to trial, MCR 2.116(J)(2)(c) specifically allows the aggrieved party whose motion is denied to wait until after the matter proceeds to final judgment to raise the issue on appeal.

We agree with defendant that, even assuming plaintiff was disabled within the meaning of the act, plaintiff had not established a genuine issue of material fact on whether she was terminated because of her disability and, therefore, the trial court erred in denying summary disposition.

In considering whether summary disposition should be granted on the basis of no genuine issue of material fact, the court must consider the evidence in the light most favorable to the nonmoving party and give that party the benefit of any reasonable doubt. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). Further, "in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.*

Plaintiff identifies five items as establishing that defendants' motivation in terminating her was discriminatory:

- DuFresne's own testimony as to her "mind set" regarding back conditions;
- DuFresne's sudden change in attitude toward plaintiff once plaintiff developed the back condition;
- Evidence regarding DuFresne's inquiries regarding the Americans with Disabilities Act in relation to terminating plaintiff;
- The evidence that DuFresne's nondiscriminatory reasons for terminating plaintiff were not mentioned or documented until after DuFresne made the decision to terminate plaintiff;
- That defendants' nondiscriminatory reasons for terminating plaintiff were unsubstantiated by any evidence other than DuFresne's self-serving statements as to their existence.

We are not persuaded that any, or all, of these establish a genuine issue of material fact on the issue whether defendants were discriminatorily motivated in the decision to discharge plaintiff.

First, with respect to DuFresne's "mind set" regarding back conditions, plaintiffs presumably refer to the following passage from DuFresne's deposition:

> Q. Did you have further conversations with Mr. Redman [from the human resources department] about Ms. Witucki?
>
> A. In January I believe I did because I was very concerned at that point that perhaps there could be an ADA.
>
> Q. Because?
>
> A. Because it was a back injury and my mind set is such that any time anybody has a back they claim a work injury.
>
> Q. And meaning whether it is or not?

A. Whether it is or not. That's my mind set, and I wanted to make darn sure that the County was not going to be sued for anything and so we just waited until she got ready to come back to work.

Q. Knowing all the time you were going to let her go anyway?

A. You bet. You bet I was.

Q. And—

A. If she would have been back to work on the day after my election, she would have been gone.

Q. The conversation that you had with Mr. Redman that you believe occurred around January, 1997 what was Mr. Redman's contribution to the conversation; what did he say?

A. He said wait until she gets back to work as I recall. Now this is—I'm trying to recall this. Wait until she gets back to work, if she brings any doctors' slips in and then we'll have our counsel review them.

Q. Okay. Did you indicate to Mr. Redman your concern about employees claiming for example work related injuries when they weren't?

A. No.

We do not believe that this testimony establishes that DuFresne's motivation was discriminatory or that it contradicts the nondiscriminatory explanation given by DuFresne for wishing to terminate plaintiff. Rather, it establishes her motivation in the timing of the termination: after plaintiff's return to work so that plaintiff could not claim an inability to work and, therefore, a workers' compensation claim.

As for the second item, DuFresne's alleged sudden change in attitude towards plaintiff, plaintiff points to no evidence in the record to support such a change in attitude or that the change was sudden. However, even accepting a sudden change in attitude, that merely shows correlation, not causation. That is, plaintiff has at most shown that DuFresne's change in attitude towards plaintiff's job performance merely occurred at the same time as plaintiff's medical problems. It does not contradict DuFresne's claims as to the reasons for the discharge or that it was the medical condition, and not the job performance issues, that were the true motivating factors behind plaintiff's discharge.

As for the third item, DuFresne's inquiries to the human resources department regarding the Americans with Disabilities Act. Again, plaintiff does not identify the inquiries to which she is referring. We must assume that it was the conversation with Redman set out above under the first item. Again, however, that conversation shows at best that DuFresne timed the discharge to limit plaintiff's ability to file a false workers' compensation claim and that DuFresne was overly concerned with the possibility of such false claims, not that DuFresne discharged plaintiff because of the medical condition.

As for the fourth item, that DuFresne's stated reasons for discharging plaintiff were neither mentioned nor documented until after DuFresne had made the decision to discharge plaintiff, plaintiff presents no authority for the proposition that discharge reasons must be documented or mentioned to others before a decision to discharge is made. Certainly if DuFresne had done so it would have strengthened defendants' case, but the failure to do so does not automatically negate DuFresne's stated reasons for the discharge nor does it do anything to establish that her true motivation was discriminatory. This is particularly true given that plaintiff was a political appointee and, thus, an at-will employee. Simply put, DuFresne needed no reason to terminate plaintiff beyond her desire to do so; we are merely concerned with whether DuFresne had a legally improper reason for the discharge. Thus, at the summary disposition stage, the focus is not on what evidence defendants have to support DuFresne's testimony, but what evidence plaintiffs have to contradict it. And, in that respect, plaintiffs point to no such evidence that DuFresne's stated reasons are contrived.

Finally, as to the fifth item, the analysis is essentially the same as the last. While other evidence would certainly strengthen defendants' case, it is not required. That is, defendant's lack of a particular piece of evidence is not "admissible evidence" that "discrimination was a motivating factor" behind the discharge. *Lytle, supra* at 176.

In summary, plaintiff directs us to no evidence available at the summary disposition stage which created a genuine issue of material fact on the issue whether plaintiff was discharged due to her disability. This Court observed in *Fonseca v Michigan State Univ*, 214 Mich App 28, 31; 542 NW2d 273 (1995), that

> although a hunch or intuition may, in reality, be correct, the law requires more if a plaintiff is to avoid summary disposition. A plaintiff who claims a decision was discriminatorily motivated must produce some facts from which a factfinder could reasonably infer unlawful motivation.

We are not persuaded that plaintiff produced any facts at the summary disposition stage to support the proposition that the discharge decision was discriminatorily motivated. Accordingly, we conclude that the trial court erred in denying defendants' motion for summary disposition.

In light of our resolution of this issue, we need not address the remaining issues raised by defendants.

Reversed and remanded with instructions to enter judgment in favor of defendants. We do not retain jurisdiction. Defendants may tax costs.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad