S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SHANNON KING and THOMAS KING, Plaintiffs-Appellants, v DENTON TOWNSHIP and DENTON TOWNSHIP AMBULANCE SERVICE, Defendants-Appellees.	UNPUBLISHED July 6, 2004 No. 243350 Roscommon Circuit Court LC No. 00-722089

Before: Murray, P.J., and Neff and Donofrio, JJ

PER CURIAM.

Plaintiff[1] appeals as of right from a judgment granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) dismissing plaintiff's claim of retaliatory discharge. We affirm.

I. Material Facts

In 1997, plaintiff was hired as a paramedic for the emergency medical service (EMS) in Denton Township. On June 27, 1999, plaintiff participated in the drafting of a letter to the township supervisor, Joseph Faino, regarding her supervisor, Gregory Wagner. The letter generally addressed complaints of sexual harassment and verbal abuse by Wagner, among other things. Although the letter was not signed, plaintiff testified at her deposition that she was one of four people who collaborated in writing the letter to Faino.

After Faino received the anonymous letter, he posted a note along with a copy of the letter on the refrigerator in the ambulance dormitory, and requested that the drafter of the letter contact him. According to plaintiff, she and three other individuals responded to the notice and met with Faino to discuss their concerns. Plaintiff testified that she and the other three employees said the allegations were true and elaborated on them, although no one specifically admitted to writing the letter.

In September 1999, plaintiff learned that she was pregnant and notified Wagner of her pregnancy. According to plaintiff, Wagner told her that she would not receive any preferential

[1] Because plaintiff Thomas King's claim is derivative in nature, we will, for ease of reference, use the singular term "plaintiff" to refer to plaintiff Shannon King.

treatment and that she would be required to perform her job duties as a paramedic. A few weeks later, plaintiff's doctor restricted her workweek to no more than forty hours a week. At this point, Wagner asked plaintiff to have a "return-to-work"[2] form signed by her doctor, which her doctor did not do. According to Wagner, his motivation for having plaintiff fill out the form was because he was concerned for plaintiff's safety, the safety of her unborn child, and the safety of the patients served by the EMS. Plaintiff testified that she had to request a ninety-day maternity leave from the township board under the Family Medical Leave Act (FMLA) because her doctor would not sign the return-to-work form.

According to plaintiff, Wagner understood that she would not be able to return to work after the initial ninety-day leave period because she would still be pregnant, and he informed her that she could request an extension of the initial ninety days. Plaintiff testified that Wagner told her that she could request the extension at the same time that she requested the initial ninety days of leave. Plaintiff's letter to the township board contradicted this testimony, as in the letter plaintiff stated that Wagner told her she could seek the initial ninety-day leave, and at the end of the leave, seek an extension. Nonetheless, in the letter, plaintiff requested both ninety days of maternity leave and an additional extension for the duration of her pregnancy:

> I am writing this letter to request my 90 day maternity leave. Do [sic] to the fact that my physician will not sign the return to work slip that was given to me by Greg Wagner, I will be unable to work on the ambulance. Unless there are hours available to me at the township hall where I could work less than 40 hours a week and lift less than 25 LB I will have to take my maternity leave. *It was brought to my attention by Mr. Wagner that I can ask for an extenuation [sic] on my maternity leave after I have been off and will be unable to return to work without restrictions.* I am submitting that request at this time. If hours that I could work at the township become available I would like to work them to reduce my maternity leave. [Emphasis added.]

Plaintiff also testified that Wagner told her "not to worry" and that if she did not seek an extension with the initial request, he would do so for her.

On October 6, 1999, the Denton Township board unanimously approved plaintiff's request for ninety days of maternity leave, but also determined that plaintiff must request any extension, in writing, at the end of the ninety-day period. Plaintiff did not attend the board meeting. The board's decision was reflected in detail in its minutes. Carol Asher, the Denton Township clerk, testified that she mailed a copy of the minutes of the board meeting to plaintiff; however, plaintiff denied receiving it. Plaintiff indicated that she did not make an additional request for an extension because Wagner told her that he would take care of everything.

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[2] The return-to-work form required the signing doctor to certify that the patient could work a twenty-four-hour shift with undiminished mental alertness, and that the patient could perform specific tasks, such as lifting a 125-pound load for ten seconds. Interestingly, the return to work form was initially provided by plaintiff to Wagner for use by the township. Plaintiff received the form from her husband, who obtained it from his employer, Houghton Lake Ambulance Service.

On December 14, 1999, plaintiff's ninety-day leave period ended, and plaintiff did not request an extension. In fact, after submitting the initial letter requesting the leave, plaintiff did not contact anyone at the township regarding whether her leave was granted or to request an extension. On January 3, 1999, Wagner wrote a letter to the township board asking that plaintiff be terminated because her leave expired, she did not call him to return to work, and she did not request an extension of her leave as instructed by the board. On January 5, 2000, the township board granted Wagner's request.

The trial court granted defendants' motion for summary disposition, concluding that there was no genuine issue of material fact that plaintiff was not engaged in protected activity and that there was no causal connection between Wagner's alleged animus and plaintiff's termination.

II. Standard of Review

This Court reviews a trial court's grant of summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court outlined the review standard applicable to motions brought under MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358, 547 NW2d 314 (1996).

III. Discussion

On appeal, plaintiff contends that the trial court erred in granting defendants' motion for summary disposition. We disagree.

The specific provision of the Civil Right's Act (CRA) under which plaintiff's claim is brought is MCL 37.2701(a), which provides:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

In order to establish a prima facie case of retaliation under the CRA, a plaintiff must prove the following:

> (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. [*Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003); see also *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).]

In order to meet the first element necessary in a claim for retaliatory discharge, plaintiff must demonstrate that she was engaged in a protected activity. Here, plaintiff claimed that she participated in the drafting of the June 27, 1999, letter[3] along with three other employees, and that they met with Faino, admitting the truth of the allegations contained in the letter and elaborating further on such allegations. Although Faino contradicts plaintiff's contentions, we cannot make findings of fact or judge the credibility of witnesses in deciding a motion for summary disposition. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). Accordingly, viewing the evidence in a light most favorable to plaintiff, a genuine issue of material fact exists regarding this element.

The second element necessary to establish a prima facie case of retaliation requires plaintiff to demonstrate that the employer knew of the protected activity. Here, plaintiff's employer was Denton Township, and not Wagner, and it was the township board that actually terminated plaintiff's employment. There is no evidence to suggest that any board member knew that plaintiff had engaged in protected activity. However, plaintiff contends that Wagner's actions should be imputed to the board. Where a supervisor consciously works toward the opportunity to employ a neutral mechanism, such as the township board in this case, in order to accomplish a discriminatory purpose, the mechanism can no longer be considered neutral. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 540-541; 398 NW2d 368 (1986). In such cases, the discriminatory animus of the supervisor may be imputed to those who actually made the decision to terminate. *Rasheed v Chrysler Corp*, 445 Mich 109, 136; 517 NW2d 19 (1994). Under this theory, there must be evidence that Wagner had knowledge of plaintiff's protected activity.

Although Wagner denied knowing who drafted the letter, viewing the evidence in a light most favorable to plaintiff, a reasonable jury could conclude that Wagner had knowledge of plaintiff's participation in the letter. First, there was evidence that plaintiff was one of Wagner's most vocal critics. Additionally, the general rumor around the station was that plaintiff wrote the letter. Further, according to plaintiff, Wagner's two best friends at the EMS indicated to her that they knew she wrote the letter. Thus, viewing this circumstantial evidence in a light most favorable to plaintiff, a genuine issue of material fact exists regarding this element.

Under the third element of a retaliation claim, plaintiff must demonstrate that there was an adverse employment action. This element is not contested on appeal. Plaintiff was discharged and this constitutes an adverse employment action. *Peña, supra*.

In order to establish the fourth element necessary for a retaliation claim, plaintiff must show that there was a causal connection between her termination and her complaint of sexual

[3] Although plaintiff did not specifically allege a violation of her civil rights under the CRA, an expression of concern to an employer regarding possible discrimination may be sufficient to apprise the employer of a possible claim under the CRA. *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992).

harassment. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997); see also *West v General Motors Corp*, 469 Mich 177, 184-185; 665 NW2d 468 (2003).[4] "To establish causation, the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett*, *supra* at 315. "Summary disposition for the defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action." *West*, *supra* at 184. In order to prevail, a plaintiff must show that his employer took adverse employment action "because of" the plaintiff's protected activity, and that the adverse employment action was "in some manner influenced by the protected activity . . . ." *Id.* at 185. Moreover, "[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination based retaliation is claimed." *Id.* at 186 (footnote omitted).

We conclude, as did the trial court, that plaintiff failed to demonstrate that her participation in writing the letter was a significant factor in the board's decision to terminate her employment. Plaintiff's retaliation claim is premised on two main factors: (1) that another employee, Melissa Clewley, was treated differently than she was, and (2) that Wagner assured plaintiff that she did not need to worry about her position with Denton Township.[5]

Plaintiff initially contends that Clewley was treated differently from plaintiff in four ways: (1) that plaintiff was not permitted to perform light work whereas Clewley was; (2) that plaintiff was forced to take leave under the Family Medical Leave Act (FMLA) whereas Clewley was not; (3) that plaintiff was forced to have a medical release signed, unlike Clewley; and (4) that a temporary full-time employee was not hired to take plaintiff's place as was done for Clewley. A close examination of the record evidence shows, however, that no such dissimiliar treatment existed.

First, plaintiff offered no evidence that light work was available for her at the time of her pregnancy, as it was for Clewley. Additionally, plaintiff was admittedly unable to perform the duties of a paramedic at the time of her pregnancy. It was undisputed that plaintiff was to avoid prolonged lifting and working shifts greater than eight hours. Plaintiff admitted that she worked twelve or twenty-four hour shifts as part of her job as a paramedic, and that, in the course of her job as a paramedic, she had to be able to move 125 pounds for ten feet in ten seconds. Although she was unsure if 125 pounds of lifting was an accurate requirement, plaintiff admitted that, as a paramedic, there is strenuous lifting. Further, plaintiff admitted that the return-to-work form was not in use by the EMS at the time Clewley left her position in 1998 because it was plaintiff who supplied the form to the EMS in spring or summer of 1999.

Remaining is plaintiff's contention that she was treated differently than Clewley because a temporary, full-time paramedic was hired in Clewley's place, but not for plaintiff. The

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[4] Although the *West* Court was faced with a claim brought under the Whistleblowers' Protection Act, the Court indicated that a whistleblower claim is analogous to an antiretaliation claim based on other prohibited kinds of employment discrimination. *West*, *supra* at 186 n 11.

[5] On appeal, plaintiff presents evidence that other employees were "harassed" by Wagner. Such evidence detracts from plaintiff's claim, in that the evidence tends to show that Wagner treated all the employees in the same fashion, including plaintiff. See *West*, *supra* at 187.

evidence demonstrated that the temporary, full-time paramedic[6] program was unsuccessful, and that it was a one-time experiment. Further, both pregnant employees were provided the same opportunity to return to the ambulance service after their pregnancies. However, plaintiff never sought reemployment with the township, and she did not seek an extension of her leave as instructed by the board. Therefore, plaintiff has not demonstrated that she was treated differently than Clewley for the same or similar conduct, and therefore did not demonstrate a causal connection between her engaging in a protected activity and her discharge.[7]

Plaintiff further contends, however, that along with disparate treatment, she was also "set-up" for termination by Wagner. In support of this contention, plaintiff relies on her deposition testimony that Wagner informed her that her job was safe. According to plaintiff, Wagner told her that she could request at the same time both her initial leave, and an extension of that leave, from the township board. Plaintiff further contended that Wagner stated that if she did not simultaneously seek the extension and initial request, he would seek the extension for her:

> *Q*. (By Mr. Parker) Okay. At what – was it at that same time that Mr. Wagner told you that *if you did not ask for an extension* he would do it for you?
>
> *A*. Yes.
>
> *Q*. Okay. It was the day you took that slip in to him. Correct?
>
> *A*. Yes.
>
> *Q*. Well, what – do you remember specifically what it was he said?
>
> *A*. That I could ask for an extension at the same time that I had asked for my FMLA. And so, therefore, I did so in that (indicating) letter right there. And – but, however, *if I did not, not to worry, my job was not in jeopardy*, that he would do so for me. [Emphasis added.]

As previously noted, plaintiff submitted a FMLA letter to the township board indicating that Wagner informed her that she could request an extension of her maternity leave after she had been off and if she was still unable to return to work. However, it is further apparent from the letter that plaintiff *did* make a simultaneous request for leave and an extension of that leave, which according to plaintiff's testimony, alleviated Wagner from later making a request on plaintiff's behalf. Thus, Wagner's failure to seek an extension from the board on plaintiff's behalf was not part of a "set-up" or because of any animus, but resulted from plaintiff's decision to seek the extension at the time she made the initial request.

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[6] It was uncontradicted that the temporary paramedic was terminated due to her below-average performance.

[7] Although plaintiff testified that Wagner treated her differently following the drafting of the letter by yelling at her and calling her "stupid," plaintiff admitted that Wagner had a history of yelling and swearing at her and the other employees, one of the reasons the letter was initially drafted.

Moreover, the township clerk testified that plaintiff was mailed a copy of the minutes of the township board's meeting, informing her of the need to seek an extension at the end of her initial ninety days of maternity leave. Michigan courts presume that a letter mailed out in the ordinary course of business is received by the addressee. *Good v Detroit Auto Inter-Insurance Exchange*, 67 Mich App 270, 274-275; 241 NW2d 71 (1976), citing *Long Bell Lumber Co v Nyman*, 145 Mich 477, 481; 108 NW 1019 (1906).[8] And, although plaintiff created a factual dispute over whether she actually received the letter, *Long Bell*, *supra* at 481, we do not believe this created a genuine issue of *material* fact regarding whether plaintiff was unlawfully retaliated against. The undisputed facts remain that plaintiff knew the board's decision was discretionary, she knew that she had made both requests in her original request, and that she had not appeared at the board meeting where her request was to be considered. That there is a question regarding whether plaintiff actually received the minutes in the mail from someone other than Wagner does not address whether the board acted unlawfully because of Wagner's alleged animus. See, e.g., *English v Colorado Dept of Corrections*, 248 F3d 1002, 1010-1011 (CA 10, 2001). In other words, whether plaintiff actually received the letter is of no consequence to whether the board's decision was discriminatory, for Wagner was uninvolved with the mailing of the letter, and plaintiff has only asserted that the board acted with a retaliatory motive because of Wagner's alleged animus, not the clerk's.

In conclusion, plaintiff provides no evidence that demonstrates a causal connection between plaintiff's protected activity and her termination other than her allegation that Wagner knew that she wrote the complaint about him. There is no evidence to suggest that plaintiff's participation in writing the letter was a significant factor in her termination, or that she was terminated because of her engaging in a protected activity. Accordingly, as plaintiff has failed to demonstrate a causal connection between her conduct and her termination or that her conduct was a significant factor in her termination, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio

[8] We note that plaintiff made no effort to determine whether her request had been approved by the township board. Assuming she did not receive the minutes in the mail, it remains undisputed that the minutes of the board meetings were a matter of public record, providing plaintiff with either constructive notice of their content, or at least an opportunity to find out what the board decided regarding her requests.