STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL C. LEE,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
December 4, 2008

No. 274530
Wayne Circuit Court
LC No. 05-502988-CD

Before: Whitbeck, P.J, and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition. We affirm.

I. FACTS

Plaintiff began working for the Detroit Police Department[1] on April 26, 1986, as a patrol officer. On July 6, 1995, he was promoted to Sergeant. On July 9, 2000, he was promoted to Lieutenant. In 2004, plaintiff was promoted from Lieutenant to Inspector, which made him the commanding officer of the Gang Enforcement Section of the police department. During his employment with defendant, plaintiff received various awards and commendations, while only receiving one disciplinary suspension.

On October 27, 2004, plaintiff was involved in a meeting to discuss the deployment of officers to schools that would be used as voting precincts during election day 2004. Plaintiff originally wanted to deploy officers to all areas around schools designated as polling places. However, plaintiff's direct supervisor, Commander George Hall, Jr., informed plaintiff that he was required to deploy officers to specific schools, in order to receive funding from the United States Department of Homeland Security. In a subsequent written memorandum directed to the

[1] This opinion refers by title to several employees of the Detroit Police Department. We note that several, if not all, of these individuals may no longer be employed with the department, or may currently hold a different title within the department. The titles used herein were the ones held in 2004.

Detroit Police Department's Deputy Chief for criminal investigations, Craig Schwartz, plaintiff described an incident that occurred at the meeting. Plaintiff's memorandum stated, in pertinent part, as follows:

> "[Commander Hall] said, "I just want to know did you assign those crews to specific schools." [Plaintiff] responded that the crews were assigned to districts, and attempted to explain the rationale behind the decision. [Commander Hall] interrupted [plaintiff] again, grabbed [plaintiff's] hand and shouted, "Look, nigger,"[sic] He then paused, looked at Inspector McCarty and said, "Oh, I'm sorry Rick, you know you one of us, too [sic].[2] Anyway, assign those crews to specific schools."

Plaintiff stated in the memorandum that he was bringing the incident to the attention of Deputy Chief Schwartz in hopes that plaintiff's allegations would be thoroughly investigated. Plaintiff testified that it would have been Deputy Chief Schwartz's duty to convey the memorandum to Detroit Police Chief Ella Bully-Cummings. Plaintiff does not have any evidence that Deputy Chief Schwartz informed Chief Bully-Cummings. Plaintiff also informed Commander Richard Shelby, Inspector Leslie Montgomery, and his wife, Sergeant Erika Lee, that he was going to file a complaint with the United States' Equal Employment Opportunity Commission (EEOC) and possibly file a lawsuit against the city of Detroit.

Plaintiff does not have direct evidence that Chief Bully-Cummings knew of, or was "angry" about, plaintiff's memorandum. Commander Shelby testified that although plaintiff's memorandum was indirectly referred to on a website, he did not have direct evidence that Chief Bully-Cummings was aware of plaintiff's memorandum. Sergeant Lashinda Houser, the officer assigned to the EEOC Office, testified that she assisted with the investigation of plaintiff's memorandum, and that it was likely that Chief Bully-Cummings was aware of the complaint because it was the chief's duty to make the final recommendation for resolution with the EEOC.

On November 12, 2004, plaintiff was transferred from the Gang Enforcement Section to the Records and Identification Section (Records Section) of the Detroit Police Department. Plaintiff testified that employment in the Records Section was "reserved for those the department wishes to informally punish." Commander Shelby also testified that the Records Section was referred to as a "wasteland." Plaintiff asserted that as a result of the transfer to the Records Section, he lost the opportunity to work on holidays and make "triple pay."

Plaintiff testified that Chief Bully-Cummings instructed several Commanders to speak with plaintiff and discourage him from pursuing his complaint and to tell plaintiff that he was hurting his career by allowing the investigation to continue. In December 2004, Assistant Chief Walter Martin informed plaintiff that filing a lawsuit against the department would hurt his

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[2] Both plaintiff and Hall are African-Americans; Inspector McCarty is Caucasian.

career; primarily by hindering the likelihood that plaintiff would be promoted to Commander. Assistant Chief Martin also requested that Commander Shelby talk to plaintiff and Commander Hall in an attempt to resolve the matter. Assistant Chief Martin testified that he did not remember discussing plaintiff's memorandum during the December conversation, and that he did not know that plaintiff initiated an investigation.

Chief Bully-Cummings stated that she transferred plaintiff to the Records Section because he failed to demonstrate competency and ability as the commanding officer of the Gang Enforcement Section. Assistant Chief Martin testified that he did not make recommendations to Chief Bully-Cummings about plaintiff's reassignment or the decision to eliminate the rank of Inspector and subsequently demote plaintiff.

Plaintiff filed his complaint in this case on February 2, 2005, alleging violations of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiff was later informed that his commission as an Inspector would lapse on September 1, 2005, and he would be relegated to Lieutenant, the highest rank he previously attained. Plaintiff alleged that as a result of the demotion, he lost tangible benefits, such as the use of a cellular telephone, the use of an automobile, and automobile insurance. Defendant retired from the Detroit Police Department on December 18, 2005.

On April 24, 2006, plaintiff moved to amend his complaint to add a claim of improper retaliation under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Defendant moved to dismiss the complaint based on both the absence of a claim justifying relief and the absence of a genuine issue of material fact. Defendant argued that plaintiff could not show that his transfer to the Records Section was initiated in response to his November 2, 2004 memorandum, as plaintiff's conversation with Assistant Chief Martin occurred after his transfer and Chief Bully-Cummings was not informed of plaintiff's memorandum. Defendant also argued that plaintiff did not engage in a "protected activity" under the WPA, and that plaintiff did not suffer discrimination through an adverse employment action. Defendant also opposed plaintiff's request to amend, arguing that a claim under ELCRA was duplicative of the claim under the WPA, and that both would be futile.

The trial court heard oral arguments regarding defendant's motion for summary disposition and plaintiff's motion to amend his complaint on July 14, 2006, and granted defendant's motion for summary disposition, while denying plaintiff's motion to amend, on July 20, 2006. The trial court found that plaintiff failed to demonstrate a prima facie violation of the WPA, because plaintiff did not report Commander Hall's use of a racial epithet to an "outside public body." In addition, the trial court determined that plaintiff failed to show the presence of a genuine issue of material fact that his transfer and subsequent demotion were done in retaliation for his November 2, 2004 memorandum. The trial court denied plaintiff's motion to amend his complaint to add a count of retaliation under the ELCRA, reasoning that "[j]ust as temporal proximity is not enough to show causation under the WPA, so it is not enough under Elliott-Larsen."

On July 28, 2006, plaintiff moved the trial court for reconsideration, arguing that it should reassess its determination that plaintiff failed to report his complaint to higher public authority in light of this Court's decision in *Brown v Mayor of Detroit*, 271 Mich App 692; 723 NW2d 464 (2006), aff'd in part, vacated in part 478 Mich 589 (2007). On October 31, 2006, the

trial court denied plaintiff's motion for reconsideration. The trial court determined that *Brown* was inapplicable because it only applied to situations where public employees reported criminal conduct, and in this case plaintiff did not complain of criminal conduct. Plaintiff now appeals.

II. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition. We disagree.

A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(3)(b); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

B. Analysis

The WPA, MCL 15.362, provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

To establish a prima facie case of violation of the WPA a party must establish: "'(1) that plaintiff was engaged in protected activities as defined by the act; (2) that plaintiff was subsequently discharged, threatened, or otherwise discriminated against; and (3) that a causal connection existed between the plaintiff's protected activity and the discharge, threat, or discrimination.'" *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 491; 705 NW2d 689 (2005), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589, 595; 734 NW2d 514 (2007), quoting *Phinney v Verbrugge*, 222 Mich App 513, 553; 564 NW2d 532 (1997). A protected activity consists of (1) reporting a violation of a law, regulation, or rule to a public body, (2) being about to report such a violation to a public body, or (3) being requested to participate in an investigation by a public body. *Roulston v Tendercare, Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000).

Plaintiff first argues that the trial court erred in finding that he failed to plead a cause of action under the WPA because the act required him to report the alleged misconduct to an outside public body. We agree.

In *Brown*, *supra* at 591, our Supreme Court determined that the WPA does not require a public employee to report misconduct to an outside agency. The Court's ruling is retroactive and applies to this case. See *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 400; 738 NW2d 664 (2007) (holding that decisions are retroactive unless "'exigent circumstances' justify the 'extreme measure' of prospective-only application.").

Applying *Brown* to this case, the trial court did err in determining that the WPA required plaintiff to report to an outside public body. Plaintiff directed his memorandum to Deputy Chief Schwartz for investigation, believing it was the deputy chief's duty to inform Chief Bully-Cummings of the complaint. The chief of the Detroit Police Department would certainly be a public body under the plain language of the statute. Therefore, plaintiff was not required to report beyond Chief Bully-Cummings to be protected by the WPA, and the trial court erred in concluding otherwise.

Next, plaintiff argues that the trial court erred in granting summary disposition to defendant on the issue of causation. We disagree.

The trial court determined that plaintiff could not satisfy the third element of his WPA claim—that a causal connection existed between the alleged protected activity and plaintiff's transfer, plaintiff's loss of his Inspector commission, or the alleged threats from Assistant Chief Martin. The trial court concluded that plaintiff did not present any evidence that Chief Bully-Cummings, who made the employment decisions about which plaintiff complains, based those decisions on plaintiff's November 2, 2004 memorandum. The trial court also found that the conversations between plaintiff, Commander Shelby, and Assistant Chief Martin did not constitute "threats" under the WPA because they occurred after plaintiff's transfer to the Records Section, and because the only evidence submitted to the trial court indicated that the loss of plaintiff's Inspector commission was temporary.

The trial court did not err in its determination that plaintiff failed to demonstrate a causal nexus between his protected activity and his transfer to the Records Section. If a plaintiff can prove the prima facie elements of a WPA claim, the defendant has the burden to produce evidence of a legitimate business reason for the adverse employment action. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If the defendant can provide such evidence, the burden returns to the plaintiff to show that the proffered reason was pretext for the adverse employment action. *Id.* The trial court can then grant summary disposition if the plaintiff cannot provide sufficient evidence that the defendant's rationale is pretext. *Id.* at 660 To prevent summary disposition, a plaintiff must prove pretext either directly, by demonstrating that a retaliatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered rationale is so unlikely that it should not be analyzed by the trial court. *Id*., see also *Roulston*, *supra* at 281.

Defendant produced the affidavit of Chief Bully-Cummings, who stated that she transferred plaintiff because "he failed to demonstrate competency and ability as the commanding officer of the Gang Enforcement Section during a meeting subsequent to a double homicide which occurred in September 2004." According to Chief Bully-Cummings, during the September 2004 meeting, plaintiff failed to provide her "specific and substantial intelligence regarding gangs within the City of Detroit," and therefore was transferred to the Records Section on November 15, 2004. Plaintiff failed to provide evidence that Chief Bully-Cummings, who

the evidence showed was solely responsible for plaintiff's transfer, knew that he threatened to file a lawsuit, or knew of his November 2, 2004 memorandum, before transferring plaintiff. Plaintiff also did not provide direct evidence that Chief Bully-Cummings took the November 2, 2004 meeting into account when deciding to transfer plaintiff. Plaintiff admitted that he did not have any such evidence during his deposition. While plaintiff demonstrated temporal proximity between the November 2, 2004 memorandum and his transfer, "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West*, *supra* at 186-187. Therefore, the trial court did not err in determining that there was no genuine issue of material fact that plaintiff's transfer was not causally linked to his November 2, 2004 memorandum.

Further, the trial court did not err in determining that there was no genuine issue of material fact that the loss of plaintiff's Inspector commission was not causally linked to his November 2, 2004 memorandum. Even if we assume that plaintiff's loss of his Inspector commission constituted a materially adverse employment action, which is questionable given that he was reinstated with back pay within two weeks, plaintiff did not present evidence showing that defendant's proffered non-discriminatory reason for the loss of rank was pretext. *Taylor*, *supra* at 659. Chief Bully-Cummings averred that the entire rank of Inspector was eliminated in the summer of 2005, as a cost-cutting measure. The evidence presented to the trial court indicated that the decision to eliminate the rank of Inspector was made solely by Chief Bully-Cummings. Plaintiff did not present evidence that Chief Bully-Cummings took his November 2, 2004 memorandum into account when making the decision to eliminate the rank of Inspector, he did not provide evidence that he was treated differently than the other Inspectors who lost their commissions, and he did not provide evidence that the dire financial conditions asserted by Chief Bully-Cummings did not exist. Accordingly, because plaintiff failed to offer any evidence to support that the proffered reason for the loss of his Inspector rank was pretext, summary disposition was proper.[3]

Finally, we reject plaintiff's argument that the trial court erred in dismissing his claim arising from the alleged threats by Assistant Chief Martin in violation of the WPA. The WPA prohibits employers from threatening their employees regarding their compensation, terms, conditions, location, or privileges of employment, in retaliation for engaging in a protected activity. MCL 15.326; see also *Heckman*, *supra* at 491-492. Again, a protected activity consists of: (1) reporting to a public body a violation, or suspected violation, of a law, regulation, or rule; (2) being about the report such a violation; or (3) being asked by a public body to participate in an investigation. *Roulston*, *supra* at 279. Here, the December 2004 conversation between plaintiff and Assistant Chief Martin occurred after plaintiff had already reported the violation to

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[3] While plaintiff provided an affidavit in his motion for reconsideration, executed on August 1, 2006, disputing Chief Bully-Cummings' affidavit, that evidence was not provided to the trial court when the trial court determined defendant's motion for summary disposition. Therefore, it will not be considered by this Court on appeal. *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996).

the department, i.e., after plaintiff had "blown the whistle." Further, plaintiff testified that the alleged threats made by Assistant Chief Martin concerned plaintiff's filing of a lawsuit against the city, not the November 2, 2004 memorandum. Therefore, because the alleged threats were not designed to stop plaintiff from reporting a violation, or to punish him for reporting a violation, they do not fall within the purview of the WPA, and the trial court did not err in granting defendant's motion for summary disposition.[4]

III. AMENDMENT OF COMPLAINT

Plaintiff also argues that the trial court erred in denying his motion to amend his complaint to add an ELCRA claim. Again, we disagree.

A. Standard of Review

A trial court's decision whether to permit a plaintiff to amend a complaint is reviewed for an abuse of discretion. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. Analysis

If a trial court grants summary disposition on the basis of failure to state a claim or the lack of a material factual dispute, it is required to grant the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the amendment would not be justified. MCR 2.116(I)(5). An amendment is not justified if it creates undue delay, or where it would be futile or would prejudice the defendant. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). An amendment is futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

A prima facie case of unlawful retaliation under the ELCRA is established where a plaintiff: (1) engages in a protected activity, (2) that is known by the defendant, (3) suffers an adverse employment action, and (4) shows a causal connection between the protected activity and the adverse employment action. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003). In order to show causation in a retaliatory discrimination case, a plaintiff is required to prove something more than temporal proximity between the protected activity and the adverse employment action. *West*, *supra* at 186. In addition, the protected activity must have been a significant factor in the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). If the plaintiff cannot show causation

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[4] We note that the trial court granted summary disposition for a different reason. However, "'[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.'" *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005), quoting *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

between the protected activity and the adverse employment action under the WPA, he cannot show sufficient causation to sustain a retaliation claim under the ELCRA. Similar standards are used to determine causation for both claims. See *Taylor, supra* at 658-659.

Plaintiff moved the trial court to amend his complaint to assert an ELCRA retaliation claim based on the loss of his Inspector commission and transfer to the Records Section. We previously concluded that the trial court did not err in determining that plaintiff provided insufficient evidence of a causal nexus between his November 2, 2004 memorandum and his transfer to the Records Section and the temporary loss of his Inspector commission. Therefore, because the causal requirements for claims under the ELCRA are the same as those for the WPA, the trial court did not abuse its discretion in determining that plaintiff's amendment would be futile.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette