STATE OF MICHIGAN

COURT OF APPEALS

CLAYTON JENKINS, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED July 28, 2009
v	No. 284659 Washtenaw Circuit Court
TRINITY HEALTH CORPORATION, d/b/a ST. JOSEPH MERCY HOSPITAL, Defendant-Appellant/Cross-Appellee.	LC No. 05-000894-CD

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant, Trinity Health Corporation d/b/a St. Joseph Mercy Hospital, appeals as of right a judgment, following a jury trial, in favor of plaintiff, Clayton Jenkins, for retaliatory discharge in an employment case alleging same-sex sexual harassment. Specifically, defendant appeals from the trial court's denial of its pre-trial motion for summary disposition and its motions for directed verdict and judgment notwithstanding the verdict. Plaintiff cross-appeals the trial court's dismissal of his claim of quid pro quo sexual harassment. We affirm.

I. Standard of Review

We review de novo a trial court's grant or denial of a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Review is restricted to the evidence presented in the trial court at the time the motion was decided. *Pena v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When reviewing a summary disposition motion pursuant to MCR 2.116(C)(10), this Court considers the pleadings, depositions, affidavits, admissions and any other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 341 (2004). Summary disposition is properly granted if the documentary evidence demonstrates that there is no genuine issue regarding any material fact and the moving party is entitled to a favorable judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

The same standard applies for deciding motions for directed verdict and JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review their denial de novo. *Id.* A motion for directed verdict or JNOV should be granted

only if the evidence and all legitimate inferences, viewed in the light most favorable to the nonmoving party, fail to establish a claim as a matter of law. *Id.* If the evidence could lead reasonable jurors to different conclusions, the question is for the jury. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

II. Factual and Procedural History

Plaintiff was hired by defendant hospital in November 1998. He worked as a patient escort until January, 2003, when he transferred to the Central Supply Processing Distribution unit ("CSPD") where he worked as a stat messenger.[1] He worked as the sole stat messenger on the midnight shift four days per week. The dispatcher on two of those shifts was Donny Johnson and the two worked alone on these shifts; plaintiff was the only stat messenger and Johnson was the only dispatcher. Jim Hines was the director of the department. Plaintiff testified that when he began work at CSPD, Hines informed him that Johnson was "in charge" of plaintiff's work. Hines worked during business hours only.

During his service as a patient escort, plaintiff received multiple commendations and positive evaluations. The record does not indicate any performance or behavioral problems involving plaintiff prior to his transfer to CSPD and plaintiff presented testimony at trial from another employer who praised his work performance.[2]

Plaintiff testified that he and Johnson initially had a good working relationship, but that it deteriorated in late March and early April 2003, as a result of what plaintiff considered to be sexual harassment. Plaintiff testified that Johnson brought body oils to work, asked plaintiff to smell them and demonstrated to plaintiff how he put the oils on his own body. According to plaintiff, Johnson began complimenting his looks and dress and on two occasions invited him out to a local bar. Plaintiff testified that these incidents made him uncomfortable, but that he simply "tried to look past" these events.

Plaintiff testified that he became more upset after Johnson touched him on several occasions. He testified that on the first occasion Johnson touched him on his arm and shoulder while saying how nice plaintiff looked. According to plaintiff, he asked Johnson not to touch him and Johnson responded by saying that he was "just playing." Plaintiff testified that some days later, however, when he was about to go on a delivery, Johnson put his hand on plaintiff's back and "started rubbing on me" and said that he wanted to go with him on the deliveries. Plaintiff testified that he again asked Johnson not to touch him and told him that he did not want to be "touched like that." Plaintiff testified that it "became apparent that this was getting out of

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[1] The job of a stat messenger is to follow the directions of the unit's dispatcher to pick up and deliver equipment and supplies from one place in the hospital to another. He performs both routine deliveries and "stat," i.e., urgent, deliveries.

[2] The record reveals a single employment conflict involving plaintiff that may have occurred after his transfer but prior to the alleged harassment. This incident involved a disagreement between plaintiff and another employee. However, according to the supervisor's testimony, any management concerns about that incident concerned the other employee, not plaintiff.

control." The final incident described by plaintiff occurred some days later when plaintiff was sitting when he "felt a hand on my thigh" and that he "jumped up" and saw that it was Johnson who was touching him. He testified that at that point he became furious with Johnson, telling him "don't touch me."

Plaintiff testified that sometime prior to the third incident he reported a concern about these events to Hines. Then in May or June, after the third incident he complained again to supervisor Hines about Johnson's actions and that Hines took notes during the conversation. He testified that he asked Hines to have him transferred to a different shift so that he would not have to work with Johnson any longer and that he did not want Johnson to lose his job, but he wanted the problem to stop. He testified that he "begged to be moved" to a different department or a different shift, but that Hines would not allow him to transfer.

Plaintiff also testified that after his initial report to Hines, Johnson told him that he was going to "make your job miserable" and that since Johnson had been there 20 years while plaintiff was new to the department, he, not plaintiff, would be believed by management. According to plaintiff, Johnson also told him that he and Hines had a business relationship outside the hospital and that "[plaintiff] would be fired before he was." Plaintiff testified that he reported these statements to Hines and that he gave Hines the name of two other employees who could, at least in part, corroborate his complaints who, according to plaintiff, were never contacted by Hines. Hines disputed that he did not follow up with these other employees.

In his testimony, plaintiff stated that on the day following his complaint, Hines directed plaintiff to attend a meeting with himself and Arlene Malvitz, a human resources administrator. Plaintiff testified that he gave Malvitz the same information he had given Hines and that Malvitz took notes. According to Malvitz's notes, plaintiff told her that once he rejected Johnson's advances, Johnson became hostile and told him, "I'm gonna make your job worse" and "I can make you sweat, I'm in charge, I'm the boss."

Plaintiff testified that he told Malvitz that he did not want Johnson to be fired but that he wanted Johnson to know that sexual harassment would not be tolerated. Hines advised plaintiff that he would conduct an investigation and get Johnson's side of the story before making any decisions. Plaintiff testified that he was not permitted to know the details of the investigation, but that Malvitz told him that his complaint regarding Johnson could not be substantiated because it was one person's word against another.

Plaintiff testified that he talked to Hines "a lot" about the problem and one time asked if Hines should recuse himself from the investigation given that Hines and Johnson had a business relationship outside the hospital. According to plaintiff, Hines became "very upset" in response to the request to recuse himself and he refused to do so. On another occasion, at the end of his shift, he saw Hines and again complained about the situation and Hines responded: "I don't care if you two hug and kiss, I just want the work done."

Plaintiff testified that upon learning of the complaint, Johnson became very angry and wrote a letter to Hines stating that the allegations were false and that plaintiff was a "con artist" who "refused to do his job" and urging Hines to fire plaintiff. According to plaintiff, from there things deteriorated as Johnson repeatedly made false reports that plaintiff was not doing his job properly and Malvitz and Hines refused to take any action or even to allow plaintiff to see the

report of their investigation. Plaintiff also submitted records from his counseling at the company's Employee Assistance Program in which he recounted the events involving Johnson, the fact that "he feels as though this dispatcher is getting him into trouble at work" and that Johnson and others were retaliating against him by the way he was assigned tasks and complaints filed against him.

Plaintiff complained that Johnson was doing things to sabotage his work such as sending him to a unit, but not telling him that the unit had asked that a cart be brought, as well as giving him extra assignments and assignments that occurred very late in the shift that required him to work extra time. He testified and documentary evidence was submitted that Johnson submitted several negative write-ups about plaintiff over the following months. Hines and Malvitz placed plaintiff on a "performance improvement plan" (PIP) which directed, among other things, that plaintiff "accept/receive directions from dispatchers without questioning [or] complaining" and stated that management would "promptly respond to perceived violations of work assignments from dispatchers." The PIP also required plaintiff to remain in the dispatch area while waiting for runs and to be "friendly and positive." Plaintiff complained that he was being put on the PIP in retaliation for having filed the complaint against Johnson. After being placed on the plan, plaintiff consulted an attorney who wrote a letter to defendant alleging that the plan was retaliation for the sexual harassment complaint. Plaintiff testified that it was his belief that the PIP was designed for him to fail it as it left him in a hostile work environment and directed him to accede to all directions from Johnson. Plaintiff's attorney's letter asked defendant to communicate the results of the investigation into the complaints. However, no investigation results were provided and the investigative notes revealed that after an initial inquiry into plaintiff's complaints of sexual harassment, the only thing being investigated was plaintiff's work performance, not whether he had been sexually harassed or retaliated against by Johnson. Plaintiff attempted to appeal being placed on the PIP, but was advised by Rocky Buehler, who had taken over Malvitz's human resources position, that hospital policy did not provide for appeals of such actions. At trial, plaintiff argued that not allowing him to appeal the PIP was a retaliatory action

In March 2004, during the course of the PIP, another hospital worker, who was plaintiff's former girlfriend, reported that plaintiff "grabbed" her, called her a bitch and told her: "don't fight the feeling." Plaintiff denies this occurred.

Following this alleged incident, Plaintiff was terminated. Defendant states that the discharge was due to a combination of this incident and plaintiff's failure to comply with the PIP.

At trial, plaintiff's supervisors testified as to many complaints they had received from individuals other than Johnson about plaintiff's work performance and attitude which occurred after the alleged sexual harassment by Johnson and several from other dispatchers and hospital workers who complained about plaintiff's refusal to follow directions and his anger. The supervisor's testimony further disputed many of plaintiff's claims. For example, contrary to plaintiff's testimony, they testified that they did speak with plaintiff and asked for his side of the story as part of their investigation into the incident with his female co-worker. They also testified that when plaintiff complained about Johnson's alleged sexual harassment, they promptly investigated those complaints and that plaintiff made no further complaints of sexual harassment.

After he was fired, plaintiff filed suit alleging theories of quid pro quo sexual harassment and retaliatory discharge. Defendant moved for summary disposition, which the trial court granted as to the quid pro quo claim, but denied as to the retaliatory discharge claim. At the conclusion of the five day trial, defendant moved for a directed verdict on the remaining claim which the trial court denied concluding that "reasonable minds can differ based on all the inferences that can be drawn from what's been produced at this trial as to whether or not retaliation was indeed a factor."

The trial court instructed the jury that in order to find that plaintiff's discharge was retaliatory, they had to find that plaintiff had demonstrated by a preponderance of the evidence that (1) plaintiff engaged in protected activity, i.e. that he had a good faith belief that he was subject to sexual harassment when he made his complaint to defendant; and (2) that while plaintiff's protected activity did not have to be the sole cause of his discharge, it must have been "a factor which made a difference in the decision to discharge plaintiff." The defendant did not object to these instructions at trial and does not challenge them on appeal. The verdict form, to which defendant did not object, directed the jury to answer the question: "Did the defendant, Trinity Health Corporation retaliate against plaintiff, Clayton Jenkins, when it discharged the plaintiff?" The jury answered the question "Yes" and found compensation for back wages in the amount of $11,500 and for emotional distress in the amount of $13,500.

After trial, defendant filed motions for judgment notwithstanding the verdict and new trial. The trial court denied the motions, concluding that "it is a question for a fact finder to determine the motivation of the employer . . . it depends on many facts and inferences, and things that juries are obligated to arrive at to make a determination as to the credibility of the employee . . . . All these things were presented to the jury. The jury made its decision and the Court finds that that decision was consistent with a reasonable view of the evidence. There may have been another reasonable view but that's what jury questions are all about; reasonable minds can differ."

Defendant appeals from those rulings. Plaintiff cross-appeals from the trial court's dismissal of his quid pro quo claim.

III. Retaliatory Discharge

Plaintiff claimed he was discharged in retaliation for filing a same-sex sexual harassment complaint against another co-worker, Johnson. Defendant asserts the trial court erred in failing to dismiss this claim at various stages because there was no evidence to support a conclusion that plaintiff's filing of the complaint was a "significant factor" in the decision to terminate his employment.

The Civil Rights Act, MCL 37.2202(1), provides, in relevant part:

> An employer shall not do any of the following:
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> (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 religion, race, color, national origin, sage, sex, height, weight, or marital status.

The statutory provision pertaining to retaliation states:

> 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 change, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701(a).]

In order to establish a prima facie case of retaliation, a plaintiff is required to demonstrate:

> (1) that he 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. [*Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 697 NW2d 646 (2005), amended 473 Mich 1205 (2005) (citation omitted).]

Plaintiff's filing of a complaint against Johnson alleging same-sex sexual harassment constituted the necessary "protected activity" for purposes of a retaliation claim. MCL 37.2701(1); *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Clearly, defendant was aware of the complaint because it was documented and defendant claimed it conducted an investigation. Further, there is no dispute that plaintiff's employment with defendant was terminated, qualifying as an adverse employment action. Thus, plaintiff readily established the first three elements of his retaliation claim. At issue here is the fourth element—the causal connection.

To meet the requirement of establishing a "causal connection," a plaintiff must show that his participation or involvement in a protected activity comprised a "significant factor" in his employer's adverse employment action. *Barrett, supra*. Consistent with claims of discrimination, if a plaintiff can establish a prima facie case for retaliation, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer articulates a legitimate and nondiscriminatory reason, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason. *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). The *Roulston* Court recognized that once this question is reached, the question of "mixed motive, i.e. retaliation plus a legitimate business reason, must be considered" and went on to conclude that the presence of a "mixed motive" does not immunize the defendant and that the protected activity need not be the sole motivation for the discharge. The issue, regardless of other motivations, is whether the protected activity was a "significant factor" in the decision to discharge. The plaintiff may prove this either by persuading the trier of fact that a retaliatory reason likely motivated the employer or that the employer's proferred explanation is unworthy of credence. *Taylor v Modern Eng Inc*, 252 Mich App 655, 660; 653 NW2d 625 (2002).

It is true that Johnson was not the only co-worker complaining about plaintiff's attitude and work behavior. However, regardless of whether defendant actually had non-retaliatory reasons to fire plaintiff, if the retaliation was a significant factor in the termination, the existence of complaints filed by other employees does not insulate defendant. Whether plaintiff's protected

activity was a "significant factor" in defendant's decision to discharge remained a question of fact that needed to be decided by the jury.

We note that per the verdict form, the jury found that defendant "retaliate[d] against plaintiff, Clayton Jenkins, when it discharged the plaintiff" and that the jury was instructed that while plaintiff's protected activity did not have to be the sole cause of his discharge, the jury could only find that the discharge was retaliatory if the protected activity had been "a factor which made a difference in the decision to discharge plaintiff." Those instructions are consistent with the "significant factor" standard and neither at trial nor on appeal has defendant claimed that the instruction and verdict form were improper.

In this case, there was a disputed fact question, which the jury resolved in plaintiff's favor. Reasonable minds could disagree on that fact question and so the trial court's denial of defendant's motions was not error.

IV. Preclusion of Evidence

Defendant also contends the trial court abused its discretion by not permitting defendant to call three properly listed witnesses and admit certain documentary evidence as part of its case in chief solely to expedite conclusion of the trial. We review a trial court's decision to admit evidence for an abuse of discretion. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 275-286; 730 NW2d 523 (2006).

Defendant does not dispute that the trial court had the authority to exclude the evidence. Rather, the issue is whether the preclusion, for the sake of expediting the conclusion of the trial, constituted an abuse of discretion and was unfair or compromised defendant's case. Defendant argues that the testimony of two other messenger dispatchers was necessary to substantiate that defendant had received complaints regarding plaintiff's behavior and demeanor from employees other than Johnson that justified the initiation of the PIP and plaintiff's subsequent termination.

Although we agree with defendant that this evidence was relevant, defendant has not demonstrated that the testimony of these witnesses would substantially differ from the evidence already submitted through Hines and other witnesses. Under MRE 403, relevant evidence may be excluded where it is "needless presentation of cumulative evidence." Counsel's questioning of Hines thoroughly explored the complaints made by these dispatchers and the trial court did not abuse its discretion in concluding that the proferred testimony was cumulative. *Bowen v Nelson Credit, Inc*, 137 Mich App 76, 84; 357 NW2d 811 (1984).

Defendant similarly asserts that the trial court abused its discretion in excluding testimony from a third witness who would have testified so as to substantiate the report of plaintiff's inappropriate workplace conduct with Turner and provided a response to plaintiff's presentation of a witness who disputed that plaintiff had admitted the incident with Turner. We conclude that exclusion of this witness' testimony was not an abuse of discretion. Turner herself testified regarding the alleged incident involving plaintiff that resulted in her report of sexual harassment. Moreover, supervisors Buehler and Hines each testified as to Turner's complaint and the security report documenting the alleged incident was accepted as evidence. Finally, the issue was not whether Turner's complaint was valid, but whether the complaint existed and how defendant responded to it. Accordingly, this witness's ability to substantiate the event,

particularly given the evidence that was admitted, was of little significance and was cumulative. *Id.*

Finally, defendant argues that the trial court abused its discretion in precluding admission into evidence of documents verifying plaintiff's criminal history in support of its contention that plaintiff lied in completing his employment application and of notes prepared by Hines regarding complaints received regarding plaintiff's behavior. We disagree. All of the evidence contained in these documents was presented to the jury through witness testimony. Plaintiff acknowledged his criminal history, but denied being intentionally deceptive on his employment application because he believed his convictions had been expunged. Given plaintiff's acknowledgment and detailed discussion, the admission of the written criminal record would not have been anything other than cumulative.

Additionally, in recognition of this evidence, plaintiff stipulated not to pursue a claim for front pay or reinstatement as part of this damages. *Wright v Restaurant Concept Mgt, Inc*, 210 Mich App 105, 112-113 n 1; 532 NW2d 889 (1995). Defendant argues that "[e]vidence of employee misconduct occurring before termination is admissible as substantive evidence even if the former employee did not know of the misconduct until after the termination." *Id.* at 108 (citation and quotations omitted). However, defendant has ignored that "[a]n employer should not be absolutely insulated from liability for violations of state civil rights laws because of the fortuitous discovery, after the employee's termination, of employee wrongdoing sufficient to have caused his termination." *Id.* at 110.

As for the trial court's exclusion of Hines's notes regarding complaints, this evidence was also cumulative in light of the witness testimony regarding the existence of the content of these complaints. Thus, exclusion of the documents verifying the allegations was not error.

V. Quid Pro Quo Sexual Harassment

On cross-appeal, plaintiff asserts the trial court erred in granting partial summary disposition in favor of defendant on his claim of quid pro quo sexual harassment. We disagree.

The trial court concluded both that the alleged actions of sexual harassment were not inherently sexual and that plaintiff failed to create a question of fact as to the "quid pro quo" nature of those actions. "Quid pro quo" means "something for something," thereby requiring some type of exchange. Black's Law Dictionary (5th ed). Thus, "quid pro quo harassment occurs only when an individual is in a position to offer tangible job benefits in exchange for sexual favors or, alternatively, threaten job injury for a failure to submit." *Champion v Nationwide Security, Inc*, 450 Mich 702, 713; 545 NW2d 596 (1996).

Plaintiff has not alleged that Johnson made such promises or threats specifically in exchange for his alleged request of sexual favors. Moreover, there is no evidence that Johnson promised any benefits to plaintiff if he provided sexual favors, nor that he threatened plaintiff with a job injury if plaintiff spurned Johnson's advances. The evidence supports a claim that

plaintiff suffered retaliation as a result of having made a complaint about having been harassed about Johnson, not that he suffered retaliation simply for his refusal to accept the alleged advances. Thus, the trial court properly found an absence of evidence of a quid pro quo.[3]

We do not agree with defendant's position that the relevant inquiry is whether Johnson was plaintiff's direct supervisor. We believe that Johnson had sufficient control over plaintiff's working environment to have been able to commit quid pro quo sexual harassment. However, plaintiff completely failed to show Johnson ever made any explicit or implicit offer of benefit or threat of harm. Rather, plaintiff's allegations more properly describe hostile work environment sexual harassment—a claim that plaintiff did not assert. Therefore, the trial court correctly dismissed plaintiff's quid pro quo sexual harassment claim. Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

[3] Given this conclusion, we need not determine whether or not any of the alleged actions either individually or taken as a whole, were "inherently sexual."