STATE OF MICHIGAN

COURT OF APPEALS

CAROL J. UPTON, Plaintiff-Appellant,	UNPUBLISHED January 12, 2010
v	No. 292044 Iosco Circuit Court
PHOENIX COMPOSITE SOLUTIONS, INC., SANDRA SCANLON, and JOHN CHAGNON, Defendants-Appellees.	LC No. 08-004129-NZ

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

In this "whistleblower" case, plaintiff, Carol J. Upton, appeals as of right from the trial court's order granting the motion for summary disposition of defendants Phoenix Composite Solutions, Inc., Sandra Scanlon, and John Chagnon. We affirm. We decide this appeal without oral argument.[1]

I. Basic Facts And Procedural History

Defendants hired Upton as an at-will employee in January 2007. She was originally hired as a receptionist but was made a purchasing assistant within a month. According to her version of the facts, she struggled to get along with Scanlon (her supervisor and wife of the company president and co-owner), who was rude and unprofessional toward her. In August 2007, Upton sent Scanlon an e-mail message complaining about not being paid for overtime hours that she had worked. She then filed a complaint with the Department of Labor, and on September 5, 2007, the Department sent a letter informing the company of the claim. According to Upton, from late August on, Scanlon and others at the company suddenly seemed to find fault with much that she did. Upton indicated that when they found out in December 2007 that the Department of Labor decided to rule in her favor, they decided to get rid of her. The official ruling in her favor was issued on January 7, 2008, and Upton was fired on January 9, 2008. According to Upton, the close timing proves that it was more than a coincidence.

[1] MCR 7.214(E).

In defendants' version of the facts, Upton was a problem employee from the start. When they hired her, Upton failed to tell them about a string of jobs from which she had been fired. Defendants asserted that Upton repeatedly had problems with accuracy in her work and with following directions. Upton's May 24, 2007 performance evaluation showed that she needed improvement in many areas, noting that she had to redo work a number of times, did not always follow directions, had problems with accuracy, and needed to be more businesslike. According to defendants, problems with Upton continued after that evaluation: she was given warnings on June 1 and 7, 2007, for "refusal to obey instructions" and "substandard work." On September 6, 2007, Upton was given another warning for an attendance violation. Defendants concede that they were notified of Upton's wages claim on September 7, 2007, and note that she was seeking overtime pay when she had been instructed not to work overtime unless it was specifically authorized. Despite having received these warnings, Upton continued to disregard instructions.

Defendants note that Upton admitted in her deposition that she weekly had problems processing purchase orders and that she was the only one experiencing these problems. In December, Upton's co-workers complained about her in writing. Finally, defendants asserted, John Scanlon, the company president, asked the director of another division, Martin Gute, to investigate. Gute interviewed Upton and other employees and concluded that the problems all resided with Upton; according to Gute, Upton was a "cancer to the company and must be dismissed." Although Scanlon had decided in December 2007 to terminate Upton's employment, he did not actually do so until early January because of the holidays and the medical condition of defendants' human resources person. On January 9, 2008, defendants provided Upton with a four-page letter, signed by Chagnon, terminating her employment and detailing the reasons they were unhappy with her performance.

Upton filed suit in April 2008, alleging a violation of the Whistleblowers' Protection Act (WPA),[2] and defendants moved for summary disposition. The trial court agreed with defendants that Upton failed to show a causal link between the protected activity (filing the wage claim) and being fired, noting that there had been problems with her attitude and performance both before and after she filed the wage claim. The trial court concluded that Upton's extensive disciplinary record, predating her wage claim, distinguished her case from those she cited. Thus, the trial court ruled that Upton failed to establish a prima facie case because there was no evidence of the necessary causal link.

II. Applying The WPA

A. Standard Of Review

We review de novo a trial court's decision to grant or deny a motion for summary disposition.[3] Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the nonmoving

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[2] MCL 15.361 *et seq*.

[3] *Roberson v Occupational Health Centers of America*, 220 Mich App 322, 324; 559 NW2d 86 (1996).

party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.[4] Whether a plaintiff set forth evidence to establish a prima facie case under the WPA is a question we review de novo.[5]

B. Statutory Provisions

The WPA provides that:

> 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.[6]

C. Legal Standards

"To establish a prima facie case, a plaintiff must demonstrate that (1) the plaintiff was engaged in a protected activity as defined by the act, (2) the plaintiff was subsequently discharged, and (3) there existed a causal connection between the protected activity and the discharge."[7] "If a plaintiff is successful in establishing a prima facie case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the adverse employment action."[8] Once the defendant does this, "the plaintiff has the burden to establish that the employer's proffered reasons were a mere pretext for the adverse employment action."[9] "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[10]

D. Applying The Standards

Here, the only element in dispute is that of causation. We conclude that the trial court did not err in finding Upton failed to prove this element. "[A] temporal relationship, standing alone,

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[4] MCR 2.116(G)(4); *Roberson*, 220 Mich App at 324-325.

[5] *Roberson*, 220 Mich App at 325.

[6] MCL 15.362.

[7] *Roberson*, 220 Mich App at 325.

[8] *Shaw v Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009).

[9] *Id*.

[10] *Roulston v Tendercare, Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

does not demonstrate a causal connection between the protected activity and any adverse employment action . . . . [A] [p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action."[11] Here, Upton provided no evidence that there was any connection between her filing a wage claim and her being fired; "[m]ere speculation or conjecture is insufficient to establish reasonable inferences of causation."[12] While Upton argues that defendants stepped up their discipline of her after she filed her claim and that these adverse actions should be examined, she minimizes the fact that she was never a problem-free employee. She received a rather unfavorable performance review in May 2007, and had numerous, ongoing difficulties with following instructions that she never resolved. Unlike *Henry v Detroit*,[13] which Upton cited in support of her case in the trial court, there is no evidence other than timing that Upton's protected activity triggered any unwarranted adverse employment action. In contrast, defendants' assertion that it had legitimate reasons for firing her is supported with abundant evidence, and defendants cannot be faulted for recognizing they needed to document the problems they were having with her.

Even if one assumes that Upton stated a prima facie case, her suit was properly dismissed because she presented no evidence showing that the reasons defendants gave for firing her were merely pretextual. Once she filed her claim, defendants would be bound to pay it if the decision was in her favor. Her argument that they maintained her employment to generate documentation supporting their decision to fire her is not sensible. Defendants already had sufficient documentation to fire Upton and could have added the reason that she worked overtime without authorization. Upton produced no evidence that defendants acted in retaliation for her filing the claim or that defendants' proffered reasons for firing her were not credible.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

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[11] *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).

[12] *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 140; 666 NW2d 186 (2003).

[13] *Henry v Detroit*, 234 Mich App 405; 594 NW2d 107 (1999).