STATE OF MICHIGAN

COURT OF APPEALS

RANDY BISARD, Plaintiff-Appellant,	UNPUBLISHED July 1, 2010
v	No. 291246 Mason Circuit Court
EAGLE XPRESS and ALAN J. DEMEESTER, Defendants-Appellees.	LC No. 08-000119-NZ

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition for defendants pursuant to MCR 2.116(C)(10) in this action based on the Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq*. For the reasons set forth in this opinion, we affirm the trial court. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a truck driver, was directed by defendants to deliver a load to Akron, Ohio on January 31, 2008. Plaintiff claims that he was fired when he threatened to report defendants to the Michigan Department of Transportation ("MDOT") for requiring that he violate rules and regulations; specifically, he claimed he was being directed to deliver the load without a sufficient break and to fudge his time logs to falsely indicate otherwise. Defendants acknowledged that plaintiff was fired when he refused to take the load, but asserted that plaintiff was fired for his refusal and not in response to any threat to report. Defendants further claimed that the load could have been delivered at a later time such that plaintiff would not have been in violation of any rules or regulations.[1]

Plaintiff testified that he was in Gilman, Illinois on January 31, 2008, and began driving at 6:45 a.m. He stopped for gas along the way and then drove straight through to Ludington, MI.

[1] Under the regulations at issue, a truck driver can drive for 11 hours and then must take at least a ten-hour break. Further, the truck driver's hours cannot exceed 70 hours per week.

Plaintiff said that he came in around 5:30 p.m., which means he had been on the road for approximately 10.75 hours.[2]

Plaintiff said that upon arrival, he filled out an inspection report noting mechanical problems[3]. He said he was then told he was being assigned another load that had to be in Akron, Ohio by 8:00 a.m. the next morning. He indicated that the load sheet he was given listed the 8:00 a.m. time. Plaintiff denied being told that the load did not need to be there at 8:00 a.m. He claimed he could not take the load because, having almost met the 11-hour ceiling, he would be required to take a ten-hour break and would not be able to make the 8:00 a.m. deadline. He also commented that defendants knew he had his kids every other weekend; plaintiff would have exceeded the 70-hour restriction while away and thus, would have had to stay off duty in Akron and miss the visitation with his children. Plaintiff claimed that, simultaneously with refusing the load, he advised Al DeMeester, the president of the company and the person who fired him, that if he were forced to go he would be contacting MDOT. Plaintiff asserted that he contacted MDOT the day after he was fired. Plaintiff also testified that there was a history with defendant corporation, whereby defendants would dispatch plaintiff with loads back to back, even though he would be over the limit of hours.

Plaintiff gave somewhat inconsistent testimony on whether anyone had ever told him to drive outside of the hours requirement. He first stated that no one from defendant Eagle Xpress directly asked him to drive outside of the hours requirement and that he did so voluntarily. He then said that "Jack" (Jack Wingate) specifically told him to violate regulations on January 31, 2008 by testifying as follows:

> A: [Jack] told me to make it work. He made me go ahead and he pretty much said just drive there, you know, however I got to do it, just get it there.
>
> * * *
>
> A: He told me that if I was out of hours that you can make it work or to make it work and that they could try to flex the times a little bit.
>
> * * *
>
> Q: Get a later delivery date?
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> A: Maybe, yeah.

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[2] Using slightly different time frames, plaintiff has alternatively asserted that it was 10.25 hours. This fact is not critical.

[3] Plaintiff claimed that he had a taillight out, that the steering wheel "was not at a straight-across", that he was missing a splashguard, and that he had a clutch problem. He acknowledged that he was told the clutch would be fixed.

Q: So that would have allowed you to take your applicable rest period and then still get to Akron, Ohio, and not have violated the company policy; is that correct?

A: No.

* * *

A: He was talking about flexing the time on my log sheets, make it work like that.

Q: So you're saying that Jack specifically told you to falsely report your log sheets?

A: He didn't say it like that.

Q: How did he say that?

A: He said "make it work."

Q: You took that to mean?

A: To mess with my log sheets. If I was out of hours, he told me to drive. I mean -

Plaintiff further testified that if a load is not delivered by the delivery time, the company has the choice of making the driver lay over until the next day. When asked if Jack could have meant, in using the term "work it out", for plaintiff to take the ten-hour break and then get the load there as soon as possible, plaintiff said he couldn't "read his mind." Wingate attested that he told plaintiff he "needed to make it work and get the loads done", but did not direct plaintiff to violate regulations.

In maintaining that it was intended that he manipulate the log sheet, plaintiff stated:

Well, it's implied. It's my job. I mean, obviously they've said several things like this at different times, you know, I mean--basically it's your load, get it there. Its got to be there at eight o'clock. You know, you ain't got eight hours to do it, make it work.

Plaintiff further stated that he had seen Donna Hallin, an employee of defendant, change records on the computer several times in order to comply with the 70-hour time limit. He said he would write up his daily logs with Donna so that the documents were consistent.

Defendants submitted three affidavits in support of their motion for summary disposition. Jack Wingate attested that he directed plaintiff to carry the load, and had him check with Donna Hallin regarding hours when plaintiff raised this as an issue. Wingate acknowledged that plaintiff advised he would have had to go off duty in Akron. He said that in response he "indicated to Mr. Bisard that all I was concerned with was the drop of the load, and that he needed to make it work and get the load done." Wingate said he never directed plaintiff to

violate any rules or regulations, and that when plaintiff refused the load, Al DeMeester fired plaintiff. Wingate claimed that plaintiff never threatened to report or advised that he had reported anything to any government agency.

DeMeester, the president of Eagle Xpress, attested that he fired plaintiff for refusing to carry the load and not because of a threat to report. Further, DeMeester claimed that no one ever directed plaintiff to violate any rules or regulations and that he was never threatened with reporting or advised that anyone else had been threatened. DeMeester claimed he directed plaintiff to verify with Hallin that he had enough hours, and that when it was confirmed that he did, plaintiff was fired for refusing to take the load. Hallin attested that she verified for plaintiff that he had enough hours to travel to Akron without violating any state or federal regulations. Further, she claimed plaintiff never made any threat to her that he was going to report Eagle Xpress or any employee.

At the first of two hearings on the motion for summary disposition, the court inquired whether plaintiff had previously delivered a load to the Akron company and was advised that plaintiff had done so twice. The court indicated that it needed to see whether the load sheets for those two deliveries said 8:00 a.m. but were delivered later, and also wanted evidence from the Akron company indicating whether the 8:00 a.m. delivery time was firm. The trial court noted plaintiff's claim that he was being told to leave in time to get the load there by 8:00 a.m.; he contrasted this with defendants' claim that the 8:00 a.m. designation was simply a notation on the delivery order and that delivery could be had at any time on the day in question. That being the case, defendants were arguing, plaintiff could have taken a ten-hour break, left at 3:30 a.m., and gotten the load there by 3:00 p.m. the following day.

An affidavit was provided by a Mr. Cline of the Akron company; however, it is not part of the record. It is referenced in the court's opinion and in a responsive affidavit by plaintiff that he sought to have admitted with his motion for reconsideration. The trial court stated:

> Defendant did present affidavit statements to the effect that . . . the delivery to Akron on February 1, 2008 could have been properly done without MDOT violation if Plaintiff had retired for the night after arriving home at 5:30, obtained his required sleep hours, and then departed in the early morning hours at approximately 3:00 a.m. in that the Akron terminal was open for business until 5:00 p.m. on February 1, 2008. The trip itself normally took twelve hours or less, thus a 3:00 a.m. departure would have gotten Mr. Bisard to Akron by 3:00 in the afternoon. Plaintiff argues that the delivery order itself specified a delivery time of 8:00 in the morning. However, via further discovery subsequent to our December 15, 2008 hearing, Defendant has supplied an affidavit from the receiving dock at Akron that they do not expect such an order to require an 8:00 a.m. delivery but that any delivery pursuant to normal hours that day would be accepted. Therefore, defendant's statement that the 8:00 a.m. order is simply a default time was confirmed by the Akron terminal. In addition, defendant argues

> that Mr. Bisard has made the same delivery two or more times on prior occasions and is aware that there is not an 8:00 a.m. deadline per se.[4]

With his March 6, 2009, motion for reconsideration, plaintiff submitted an affidavit stating that he had delivered to the Akron company several times and that its "specific known policy was delivery mandated at the time designated on the load/run sheet." Plaintiff further averred that his employer specifically told him that the delivery had to be when designated and that through contacts with the company "it was clear and certain that this was the required time." In denying plaintiff's motion for reconsideration, the court stated that it was not enough to simply deny the truth of the matter asserted or say that plaintiff's position would be proven at trial.

On appeal, plaintiff argues that he was engaged in a protected activity in that he refused an order to work beyond his allowed hours and falsify his log sheets. He had been driving for 10.25 hours, and had .75 hours left before his allowed hours for the day would expire and a ten-hour break would be required. His complaint in this matter avers that he was discharged after he advised his supervisors that he would report the violations to MDOT, a measure that would have protected public interests. Further, plaintiff argues on appeal that he contradicted defendants' claim that the 8:00 a.m. delivery time was flexible, thus the trial court erred in making findings of fact in favor of defendants.

Whether summary disposition was properly granted is a question of law that is reviewed de novo. *Vega v Lakeland Hosp*, 479 Mich 243, 245; 736 NW2d 561 (2007). When considering a motion for summary disposition under MCR 2.116(C)(10), this Court must review the evidence "submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 552. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997).

In *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002), this Court explained:

> When considering claims under the WPA, we apply the burden-shifting analysis used in retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq*. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). If the plaintiff has successfully proved a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for the plaintiff's discharge. *Id*. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the

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[4] It is not clear whether the Cline affidavit would have established the two prior deliveries. Despite being part of the trial court's opinion, there is no indication from the record before us that the load orders for the two prior deliveries were ever provided.

> plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge. *Id.*

"Once a defendant presents a legitimate nondiscriminatory reason rebutting a plaintiff's prima facie case of discrimination, even if it is in the context of a motion for summary judgment, the plaintiff must put forth factual allegations to raise a triable issue of fact as to whether the proffered reasons were a mere pretext." *Clark v Uniroyal Corp*, 119 Mich App 820, 825-826; 327 NW2d 372 (1982).

In *Roulston*, 239 Mich App at 281, this Court further stated:

> Once the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered. *Melchi v Burns Int'l Security Services, Inc*, 597 F Supp 575, 583 (ED Mich, 1984). The *Melchi* court offered four standards for proving pretext in a retaliatory discharge case: (1) whether participation in the protected activity played any part in the discharge, no matter how remote, (2) whether the plaintiff's protected activity was a substantial factor in the discharge, (3) whether the plaintiff's protected activity was the principal, but not sole, reason for the discharge, or (4) whether the discharge would have occurred had there been no protected activity. 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. [*Hopkins v Midland*, 158 Mich App 361, 380; 404 NW2d 744 (1987).]

The plaintiff bears the burden of casting doubt on the employer's articulated reasons for an adverse employment decision. *Taylor*, 252 Mich App at 659-660.

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. [Emphasis added.]

Viewing the facts in a light most favorable to plaintiff, it must be accepted that plaintiff made a threat to DeMeester to report an hours violation. Moreover, it is undisputed that plaintiff was discharged. Thus, this case turns on the evidence relative to whether a causal connection existed between the threat to contact MDOT and plainitff's discharge.

Plaintiff averred that there was a connection. However, defendants responded and stated that no threats had been made and that, in any event, plaintiff was fired for refusing to carry the

load. Thus, plaintiff had to come forward with evidence showing that the proffered reason was a pretext.

The trial court focused on whether there was an hours violation. Cline's affidavit established that the load could have been delivered later than 8:00 a.m. on the scheduled date. In his affidavit, plaintiff professes to know the Akron company's shipping and receiving policies, but he cannot lay a foundation for knowing the policies of a company with which he has no affiliation. Plaintiff also attests in his affidavit that his employer specifically told him that the delivery had to be at the time designated on the load run sheet. However, in his deposition he indicated he was not directly told the delivery had to be at 8:00 a.m., but that he inferred as much based on the delivery order and prior practice. Plaintiff's affidavit cannot be used to contradict his deposition testimony. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006), lv den 478 Mich 866 (2007). Thus, the evidence established that plaintiff could have carried the load without an hours violation. His testimony did not establish that he was told otherwise. Where there was no violation and no express direction to violate an hours restriction, plaintiff has not established that firing him for not carrying the load was a pretext for a firing based on the threat to report.

Even if plaintiff made a threat to report and it was *a* reason for the discharge, we conclude that plaintiff has failed to establish pretext. At best, plaintiff's assertions could create a genuine issue of fact as to whether there was a mixed motive for the firing. As noted above, plaintiff would have to show that "a retaliatory reason more likely motivated the employer" or "that the employer's proffered explanation is unworthy of credence." *Roulston*, 239 Mich App at 281. It is undisputed that plaintiff refused to carry the load. While defendants may have been affected by a threat to report, there is no evidence to indicate that this, as opposed to the refusal, more likely motivated defendants. Similarly, in the face of the refusal, defendants' claim that the firing was motivated by the refusal is not unworthy of credence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens