

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT A. TURNBELL,

Plaintiff-Appellant,

v

SEVERSTAL STEEL NORTH AMERICA, INC.,
GEORGE LEE, JOSEPH RYAN, and MARLENE
BANKWITZ,

Defendants-Appellees.

UNPUBLISHED

October 19, 2010

No. 293043

Wayne Circuit Court

LC No. 08-115821-CD

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the orders granting defendants' motions for summary disposition, dismissing plaintiff's claims for worker's compensation retaliation, age discrimination, and violation of the Employee Right to Know Act, MCL 423.501. Because plaintiff failed to demonstrate a question of material fact regarding whether defendants engaged in worker's compensation retaliation, we affirm.

This case concerns Severstal's termination of plaintiff from his job as a production supervisor. Plaintiff began working at Severstal in November 2004 and worked in the ladle preparation department. Plaintiff supervised four employees on the day shift and up to 12 employees on each of the afternoon and midnight shifts. Plaintiff was responsible for enforcing Severstal's rules and regulations, especially those concerning safety, for fixing unsafe conditions and to set an example for the hourly workers. Among the rules for which plaintiff was responsible were the "cardinal rules," safety rules that were considered particularly important. If a cardinal rule was broken, the violator was subject to discipline including possible discharge. One of the cardinal rules was to follow the confined spaces procedures. Confined spaces procedures were the steps an employee should take to protect his or her safety when he or she entered a confined space not designed for regular employee use.

On the day at issue, one of the hourly workers informed plaintiff that a wedge – a steel block with a handle – had fallen into the ladle hole while a ladle was in it. Plaintiff went over to the hole and saw the wedge. Plaintiff did not try to use a hook to get the wedge out of the hole, instead, plaintiff got a ladder to go down into the hole. Carzoo Settles, Mark McCormack, and Corey Sayger were nearby. Plaintiff asked all three men to hold a ladder while he went into the hole to retrieve the wedge. Plaintiff testified that one of them said, "No, I'm not going to."

Sayger said, “You’re not suppose to go down there.” Sayger told plaintiff that he could not go down there because it was a confined space and a permit was required. Plaintiff climbed into the hole without anyone holding the ladder. According to George Lee, plaintiff’s supervisor, Sayger told Lee that plaintiff returned and stated that it was not a big deal and that no one saw him. Thereafter, one or more of the witnesses reported to management that plaintiff went into the ladle hole in violation of safety regulations. After an investigation, Severstal terminated plaintiff.

Plaintiff’s first issue on appeal is that there was a genuine issue of material fact regarding whether defendants engaged in worker’s compensation retaliation. A motion for summary disposition is reviewed de novo, and the evidence with regard to each issue is viewed in the light most favorable to the nonmoving party. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence set forth specific facts showing there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The Worker’s Disability Compensation Act (WDCA) provides:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under [the Worker’s Disability Compensation Act] or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act. [MCL 418.301(11).]

To make a claim under the WDCA, the burden of proof is on the plaintiff to prove “there was a causal connection between the protected activity, i.e., the filing of his worker’s compensation claim, and the adverse employment action.” *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999). A plaintiff must show that “(1) he asserted his right for worker’s compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant’s stated reason for its actions was a pretext, and (4) defendant’s true reasons for its actions were in retaliation for plaintiff’s having filed a worker’s compensation claim.” *Id.*

This Court has previously determined that the tests for discrimination used under the Michigan Civil Rights Act (MCRA), MCL 37.2101, should be applied to claims for discrimination under the WDCA. *Chiles*, 238 Mich App at 470. Proof of discriminatory treatment in violation of the MCRA may be established by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 132-134; 666 NW2d 186 (2003). Direct evidence is evidence, which, if believed, “requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Id.* at 133.

In a direct evidence case “where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendants’ discriminatory animus was more likely than not a ‘substantial’ or ‘motivating’ factor in the decision.” *Id.*

Plaintiff initially argues that there was direct evidence of animus regarding the fact that he had filed two previous worker’s compensation claims, which is sufficient for plaintiff to survive defendants’ motions for summary disposition. Plaintiff asserts that the direct evidence of worker’s compensation retaliation consisted of a statement by another employee, Jesse Wilson, that plaintiff had a “target on his back” and the statements from one of plaintiff’s supervisors, Joseph Ryan, disputing plaintiff’s claims for worker’s compensation. Plaintiff contends that these statements combined with the fact that no other employee who violated a safety rule had a pending claim for worker’s compensation and was discharged demonstrate animus against plaintiff. None of this evidence amounts to direct evidence of worker’s compensation retaliation.

Plaintiff’s account of Wilson’s remark that plaintiff had a “target on his back” was not direct evidence of animus. Wilson did not testify that he made the remark in his deposition. To the contrary, Wilson indicated that he did not remember when plaintiff returned from his shoulder injury and plaintiff’s attorney failed to ask him about the remark. Moreover, as defendants argue in their brief on appeal, even if the remark was made, it is not clear to what it was referring. Plaintiff argues that the remark concerns animus regarding plaintiff’s worker’s compensation claim. However, Wilson testified regarding plaintiff’s potentially lethal errors on the job and the remark might have something to do with those instead. The remark was ambiguous at best and is not direct evidence of animus.

In addition, evidence that plaintiff was treated differently from other safety rule violators was not direct evidence of animus. The record does reflect that other individuals who violated cardinal safety rules were disciplined through suspensions rather than by termination. But plaintiff was differently situated than those individuals. The record reflects that one of plaintiff’s subordinates, Sayger, warned plaintiff that entering the ladle pit was forbidden. Plaintiff disregarded the warning and entered the pit. When questioned regarding attributes of a confined space, plaintiff could not delineate any. He was unable to summarize any of the cardinal rules. There was no record evidence that other safety rule violators had been specifically warned of the prohibition before violating the rules. Lee testified that he discovered that the ladle pit was a confined space after he entered it and before a massive training program on the cardinal rules. There was no evidence in the record regarding the qualifications of the other employees. Under the circumstances, the fact that plaintiff was treated differently was not direct evidence of animus.

With regard to remarks made by Ryan questioning the validity of plaintiff’s worker’s compensation claims, *Sniecinski* lays out a five-factor test to determine whether a remark is direct evidence of animus or amounts to a “stray remark.” *Sniecinski*, 469 Mich at 136 n 8. This Court should consider:

- (1) whether [the remarks] were made by a decision maker or an agent within the scope of his employment,
- (2) whether they were related to the decision-making process,
- (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias,
- (4) whether they were isolated or part of a pattern of biased

comments, and (5) whether they were made close in time to the adverse employment decision. [*Id.*]

In this case, Ryan's statements amounted to stray remarks. First, Ryan did not make the decision to terminate plaintiff. Marlene Bankwitz, a human resources attorney, made the termination decision. While Ryan can initiate discipline against an employee, he did not have the authority to impose the discipline. Second, Ryan was the person who notified Bankwitz regarding the safety rule violation and Bankwitz interviewed him as part of plaintiff's assessment by the human resources department. Third, Ryan's statements to Bankwitz were vague and ambiguous. Ryan stated that he believed plaintiff should not have received worker's compensation for his injuries, but there was no connection between that belief and Bankwitz's decision to terminate plaintiff. Ryan's statements appeared in Bankwitz's notes along with a significant amount of information regarding the ladle pit incident. Making Bankwitz aware that plaintiff had a pending claim for worker's compensation and indicating his feelings about the validity of the claim do not create a connection between any animus and plaintiff's termination. Moreover, the statements were not part of a pattern of discrimination. These were the only statements that appear in the record. Finally, while Ryan made the statements close in time to the decision to terminate plaintiff, the ultimate decision regarding whether to terminate plaintiff resided with Bankwitz. Significantly, plaintiff's safety violation of one of the cardinal rules occurred immediately before his termination. Timing alone does not show animus. In sum Ryan's statements amounted to "stray remarks" and were not direct evidence of animus.

Plaintiff further argues that there was sufficient circumstantial evidence to avoid summary disposition. In an action alleging employment discrimination based on indirect evidence of discrimination, the plaintiff must present a rebuttable prima facie case through proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *Sniecinski*, 469 Mich at 134. To establish a prima facie claim of retaliation under the MCRA, a plaintiff must show: (1) that he engaged in a protected activity, (2) that the activity 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 Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005). Upon a showing of a prima facie case of employment discrimination in violation of the MCRA, the burden shifts to the defendant employer to articulate "a legitimate, nondiscriminatory reason" for its action against the plaintiff. *Feick v Monroe County*, 229 Mich App 335, 339; 582 NW2d 207 (1998). Once a defendant in an employment discrimination suit articulates a legitimate nondiscriminatory reason for the action taken, the burden shifts to the plaintiff "to show by a preponderance of the evidence that the legitimate reason offered by [the defendant] was a mere pretext for discrimination." *Id.* at 343. A plaintiff can do so by showing that the reason has no basis in fact, by showing that it was not the actual factor motivating the decision, or by showing that the factors proffered were jointly insufficient to justify the decision. *Id.*

In this case, plaintiff did not demonstrate a prima facie case for discrimination on the basis of worker's compensation retaliation. Plaintiff engaged in a protected activity by filing claims for worker's compensation. It is clear that defendants were aware that plaintiff had filed for worker's compensation benefits. And, Serverstal took an adverse employment action against him: it terminated his employment. But, plaintiff failed to show that he was terminated because

of his claims for worker's compensation. The only evidence that plaintiff produced was the remarks of Wilson and Ryan and the evidence that plaintiff was treated differently from other similarly situated plaintiffs. This evidence did not demonstrate that Severstal terminated plaintiff as a result of his worker's compensation claims. It merely shows that defendants were aware of the claims.

Plaintiff also argues that his termination was as a result of his filing for worker's compensation because he was qualified for his job as demonstrated by his past experience and his ability to adequately perform the job over the three years he was with defendant. He further asserts that other similarly situated employees could not articulate the safety rules, but were not terminated. Plaintiff also contends that Bankwitz was not qualified to assess plaintiff because she could not articulate the safety rules.

Contrary to plaintiff's argument, the evidence indicated that plaintiff was not qualified for his job. He was unable to articulate the safety rules. Although other employees also had difficulty summarizing the cardinal rules, there was no evidence that they violated any of the rules after being warned by one of the employees they supervise. The evidence demonstrated that plaintiff was unable to adequately protect his own safety, let alone the safety of subordinate employees. Bankwitz, as a member of the human resources department, was qualified to assess whether plaintiff was qualified. Therefore, plaintiff failed to demonstrate a prima facie case of retaliation.

Defendants provided a legitimate business reason for terminating plaintiff, which did not amount to pretext. In a dangerous work place where ladles carrying molten steel are part of the job, plaintiff showed a total disregard for safety rules by entering a confined space without following the required protocols after being warned that such an act was forbidden. When Ryan, Lee, and Bankwitz spoke with plaintiff following the incident, he continued to show a lack of awareness of the safety rules and a disregard for their importance. Plaintiff argues that the safety rule violation was a pretext for worker's compensation retaliation because no other employee who violated a cardinal rule was discharged. While the evidence indicated that no other employee was terminated for violating a cardinal rule, plaintiff was differently situated than other employees. He was warned prior to violating the safety rule by a subordinate that what he was doing was prohibited. Yet, he proceeded to break the rule. Plaintiff was unable to articulate the cardinal rules and the definition of a confined space even after 40 hours of training and a warning by Lee that management was increasingly enforcing the safety rules. Even viewing the evidence in the light most favorable to plaintiff, plaintiff failed to demonstrate a question of material fact regarding whether defendants engaged in worker's compensation retaliation. The trial court did not err.

Plaintiff's second issue on appeal that the trial court erred in finding that Ryan and Lee could not be held individually liable under the WDCA is moot. Even when an issue has been preserved for appeal, this Court need not address it if the issue has been rendered moot. *Driver v Cardiovascular Assoc*, 287 Mich App 339, ___; ___ NW2d ___ (2010). Because we concluded there was no violation of the WDCA, we need not address whether Ryan and Lee can be held individually liable under the WDCA.

7.219. Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR

/s/ Christopher M. Murray

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio