STATE OF MICHIGAN

COURT OF APPEALS

JAMES MENGHINI,

Plaintiff-Appellant,

v

EDWARDS AUTOMOTIVE, INC.,

Defendant-Appellee.

UNPUBLISHED
October 26, 2010

No. 293927
Dickinson Circuit Court
LC No. 08-015499-NI

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's August 17, 2009 order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this worker's compensation retaliatory discharge case. For the reasons set forth in this opinion, we affirm the trial court's grant of summary disposition.

I. FACTS

The record in this case reveals that plaintiff began working for defendant automotive dealership on March 12, 2000, in its parts department. Prior to his employment with defendant, plaintiff had worked for another dealership where he had injured his back. While there is testimony in the record that plaintiff made defendant aware of his prior injury at the time that he was hired, Jeff Edwards, one of the owners of the dealership and in charge of personnel matters, did not recall being made aware of plaintiff's history of back problems.

Testimony of both parties revealed that plaintiff's employment record with defendant did not contain any documentation of work infractions for a number of years. Then, in 2007, while lifting tires onto a tire rack, plaintiff reinjured his back. Plaintiff described the injury as minor, and following a short period of physical therapy, plaintiff returned to work in the parts department. However, defendant issued a written discipline documentation form to plaintiff for not wearing the back brace provided by defendant. Jeff Edwards admitted that the dealership did not have a specific written policy at the time the discipline form was given to plaintiff requiring plaintiff to have worn a back brace.

On February 28, 2008, plaintiff was hauling parts from the parts department to the body shop when he developed pain in his leg. He again underwent physical therapy and received another written discipline documentation form for not wearing a back brace while lifting parts.

After plaintiff returned to work from his second injury, Jeff Edwards testified that he transferred plaintiff to the service department because of his back injuries. Despite not requesting the transfer, plaintiff testified that he was initially "happy for that move." A month later, in March 2008, plaintiff asked Jeff Edwards for an increase in pay to make up for the difference between what he was making in the service department and what he made in the parts department because of the lack of overtime. At his deposition, plaintiff testified that Jeff Edwards told him, "You're lucky to have a job – that we're actually going to keep you here – due to your injuries."[1]

In mid-June 2008, plaintiff advised Jeff Edwards that he needed back surgery and that he would need two to four weeks off work. According to plaintiff, Jeff Edwards told him, "[d]o what you got to do." Then, on Friday, June 27, 2008, the incident which led to plaintiff's discharge occurred when defective rims, which had been previously removed from plaintiff's truck,[2] were removed from the parts department by plaintiff and two other employees, Gordy Pepin and David Beaudion. Defendant contends that it was not the removal of the rims that led to plaintiff's discharge, but rather his remark directed at Angela Berg, and their loss of trust in plaintiff as an employee. According to Berg, on the day that plaintiff and the other two employees removed the rims, plaintiff stated to Berg: "You don't see anything, you don't say anything, I'm taking my rims." At the time the statement was made, Berg was a relatively new employee and grew concerned over the weekend about what she had been told by plaintiff. On Monday, June 30, 2008, Berg told her boss, Jim Gayan, what had happened and that she was put in an uncomfortable position. Gayan then told Jeff Edwards, and they both spoke with Berg. Berg testified that she was crying both times she talked about the incident.

Plaintiff does not dispute that he and the other employees removed the rims which were to be used by Pepin. Rather, he disputes Berg's allegations that his remark directed at her about not seeing anything was meant as a threat. According to plaintiff, he jokingly told Berg, "If anybody asks, you didn't see anything."

Following his discussion with Berg, Jeff Edwards and his brother Dale Edwards,[3] called plaintiff into Jeff's office and informed him that he stole the rims and that they had called the police. According to plaintiff, Jeff Edwards stated they did not want to involve the police, so instead they had made a decision to terminate plaintiff. Defendant contended that plaintiff was discharged because of the perceived threat he made to Berg, which had resulted in defendant losing trust in him as an employee.

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[1] Jeff Edwards denied making this statement, though he admitted he refused plaintiff's request for a pay increase.

[2] Plaintiff purchased a truck from defendant and the chrome wheels began to chip, plaintiff made a warranty claim to have the wheels replaced. Plaintiff was provided with a new set of rims, and the defective rims were stored in defendant's parts department for almost six months. Defendant's policy was to store the warranty parts until General Motors either notified Edwards that General Motors wanted the parts back or that Edwards could scrap them.

[3] Jeff and Dale Edwards are co-owners of the dealership.

Plaintiff filed suit against defendant on December 2, 2008, alleging that defendant terminated him in violation of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. On June 30, 2009, defendant moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact that plaintiff's termination was not motivated by his worker's compensation claim. Plaintiff opposed the motion, asserting that the record contained both direct and indirect evidence of retaliation. Oral arguments were heard on August 6, 2009, and the trial court granted defendant's motion, reasoning as follows:

> I am finding that there are no material facts in dispute. That the Plaintiff was aware—or the Defendant was aware of Plaintiff's back problems, by the Plaintiff's own testimony when he was hired. That they wrote him up twice for not wearing the back brace. And if he didn't know he was supposed to wear it the first time, he certainly should have been aware that he was supposed to wear it the second time.
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> And the fact that Mr. Jeff Edwards made this statement that you're lucky you have a job, I don't believe is direct evidence of discrimination. I think it states a fact that he—by the Plaintiff's own position, he was not being accommodated. The employer was placing him in a work situation which was less strenuous and the Plaintiff appreciated it because he liked the service area better than the parts.
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> I think this comes down to the employer being faced with a situation, and even if the employer were mistaken in terms of the Defendant's—or the Plaintiff's leadership role or the fact that he acted alone, the mere fact that he tells a fellow employee, a new employee, essentially, you didn't see anything here, um, look the other way, nothing happened, um, the Plaintiff says he was joking. She was very upset about this, according to her testimony. She told her husband about it. She came to work that Monday morning and informed her supervisor about it. Her supervisor, Mr. Gayan, felt so concerned that he reported it to Jeff Edwards, who then reported it to Dale Edwards. This whole time this woman was in tears because she felt that she was being placed in the middle of something that she didn't want to be in the middle of.
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> And then we have any employer looking at the situation and thinking, what else do I do here? I mean, I have one employee saying that another employee is doing something that he shouldn't be doing and he wants me to cover up for him.
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> And when this comes to the attention of the employer, I think Mr. Dale Edwards, when he . . . talks about trust being violated, I think he was justified in doing what he was doing. And I don't see any connection between that termination and the Defendant's [sic] rights under the–and his assertion of his rights under the Workers Compensation Act.
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> I—Dale Edwards testified that he felt Mr. Menghini was a good employee. He thought he was a value to the company for . . . eight years. But there comes a

> time when an employer has to step back and say this . . . can't be tolerated for the good of the organization. Not because he was going to be making a dent in the—in the employers workers comp experience rate.
>
> There is nothing to indicate, no direct evidence, that the employer discriminated and there is—the circumstantial evidence does not set forth a prima facie case such that the termination could be deemed a pretext.
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> And I am adopting the language of the Chiles—or the Hartman court where it stated that accordingly applying either the indirect evidence or direct evidence analysis, Plaintiff has failed to set forth a triable issue of fact. Under the Chiles burden shifting test, Plaintiff failed to satisfy his burden of demonstrating that the evidence, even when construed in his favor, was sufficient to permit a reasonable fact finder to conclude that the Defendant's proffered reason for his termination was pretextual.
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> On the other hand, if the direct evidence approach applies, Plaintiff has failed to set forth a genuine issue of material fact regarding whether any discriminatory animus arising from his filing of the workers compensation claim was more likely than not a substantial and motivating factor in the decision to terminate him, or whether Defendant would have made the same decision even if the alleged impermissible consideration had not played a role in the decision.

Thus, the trial court found that plaintiff was unable to show by either direct or indirect evidence that the employer retaliated against plaintiff for the filing of a worker's compensation claim. The trial court further found that defendant's legitimate justification of plaintiff's discharge—the threat to Berg and their loss of trust in him as an employee—were not mere pretexts. For the reasons set forth in this opinion, we concur with the legal conclusions reached by the trial court.

II. LAW

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant because there was both direct and circumstantial evidence that plaintiff was terminated in retaliation for filing a worker's compensation claim. We review a trial court's decision on a motion for summary disposition de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition under (C)(10), we must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*.

Employees have a cause of action in tort if they are discharged in retaliation for filing a worker's compensation claim. *Phillips v Butterball Farms Co, Inc* (*After Second Remand*), 448 Mich 239, 245-249; 531 NW2d 144 (1995). Indeed, MCL 418.301(11) provides as follows:

> 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 this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

To establish a retaliatory discharge claim under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., plaintiff must prove that: (1) he asserted his right to worker's compensation, (2) he was discharged or his employment was otherwise adversely affected, (3) defendant's stated reasons for its action was pretext, and (4) defendant's true reason for its actions was in retaliation for plaintiff's having filed a worker's compensation claim. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999). In other words, plaintiff must show that his employer acted adversely and in retaliation for his exercise of his rights under the WDCA, and that any legitimate reason for the action put forth by the employer was in fact merely a pretext for retaliation. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 817-818; 584 NW2d 589, vacated 230 Mich App 801 (1998), reasoning adopted by conflict panel 233 Mich App 560 (1999).

Further, plaintiff bears the burden of showing that a causal connection existed between the protected activity and the adverse employment action. *Chiles*, 238 Mich App at 470. In cases involving circumstantial evidence, a plaintiff must proceed under the burden-shifting approach articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Under this approach, the plaintiff must present a rebuttable prima facie case based on proofs from which a factfinder can *infer* that the plaintiff was subjected to unlawful retaliation. See *Sniecinski*, 469 Mich at 134. "Once a plaintiff has presented a prima facie case . . ., the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id*.; *Hazle*, 464 Mich at 464. If the defendant presents evidence to rebut the presumption, "the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski*, 469 Mich at 134.

However, the burden-shifting approach of *McDonnell Douglas* does not apply when a plaintiff presents direct evidence of discrimination. *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997). Direct evidence is "'"evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."'" *Sniecinski*, 469 Mich at 132-133, quoting *Hazle*, 464 Mich at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

> In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a "substantial" or "motivating" factor in the decision. In addition, a plaintiff must establish her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse decision. Stated another way, a defendant may avoid a finding of liability by proving that it would have made the

same decision even if the impermissible consideration had not played a role in the decision. [*Sniecinski*, 469 Mich at 133 (citations omitted).]

III. DIRECT EVIDENCE OF RETALIATION

Plaintiff first argues that the trial court erred when it failed to recognize that Jeff Edwards's statement to plaintiff—"You're lucky to have a job—that we're actually going to keep you here—due to your injuries"—was not the only piece of direct evidence in this case. More specifically, plaintiff argues that the following evidence, coupled with the statement, constituted direct evidence of retaliation: (1) plaintiff was disciplined both times he injured his back at work; (2) upon his return to work from his second back injury, he was reassigned from the parts department to the service department without a pay differential; and (3) plaintiff was terminated ten days before he was scheduled to have back surgery.

Again, direct evidence is "'"evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."'" *Sniecinski*, 469 Mich at 132-133, quoting *Hazle*, 464 Mich at 462, quoting *Jacklyn*, 176 F3d at 926. Under this definition, none of the evidence proffered by plaintiff, either taken alone or in combination, constitutes direct evidence of retaliation.

Our review of the record leads us to conclude that there was no evidence proffered by plaintiff that he was disciplined for being injured. Rather, the record clearly leads to the conclusion that plaintiff was disciplined for not wearing a back brace. Additionally, there was no evidence presented from which we may infer that plaintiff's prior written discipline documents were even a factor in defendant's decision to discharge plaintiff. Nor did plaintiff present any evidence that his reassignment was punishment for his injury, arguing instead that the employer's true motive was to protect plaintiff from further injury.[4] Assuming such motive to be true, we cannot comprehend how an employer's desire to keep an employee free from injury is tantamount to punishment. Contrary to plaintiff's argument that his reassignment was a form of punishment was plaintiff's own testimony wherein he stated that he was happy about his reassignment to the service department.

We next turn to whether the timing of plaintiff's termination—ten days before his surgery—requires us to conclude that plaintiff was retaliated against because he filed a worker's compensation claim several months earlier.[5] Here, plaintiff merely asserts that he was discharged ten days prior to having surgery. Presumably, plaintiff is arguing that defendant discharged him ten days prior to his surgery in an effort to avoid the costs associated with the

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[4] In his brief plaintiff asserts that his reassignment also operated as "a disguise to cover up the Defendant's Appellee's real objective in limiting its own liability. The Defendant/Appellee did not want Mr. Menghini to get injured on the job ever again."

[5] The parties do not dispute that plaintiff filed a claim for worker's compensation benefits after reinjuring his back on February 28, 2008, and was not discharged until June 30, 2008.

surgery. However, plaintiff fails to direct this Court to any evidence that defendant would escape such liability or that defendant considered his surgery date as a reason for plaintiff's discharge. Plaintiff does not cite any legal authority that such evidence, either in conjunction with other evidence or standing alone, constitutes retaliation. Accordingly, we conclude that the mere timing of plaintiff's surgery relative to his discharge did not constitute direct evidence of retaliation against plaintiff for filing a worker's compensation claim.

Plaintiff next argues that the statement made by Jeff Edwards: "you're lucky to have a job—that we are actually going to keep you here—due to your injuries" constituted direct evidence of retaliation by defendant.

While acknowledging Jeff Edwards' assertion that he never made the statement at issue, for purposes of our analysis, we assume the statement was made by Jeff Edwards in the manner and context presented in plaintiff's deposition. According to plaintiff, he was unhappy about his reduction in pay since his reassignment so he requested a pay raise. In response to plaintiff's request, Edwards made the contested statement. According to plaintiff's deposition testimony, the statement was made three months prior to plaintiff's termination and no one else employed by defendant ever made a similar statement.

We are cognizant of our Supreme Court's holding that a single remark from a supervisor in the context of a discussion regarding plaintiff's termination, even if the statement might be subject to multiple interpretations, is sufficient to constitute direct evidence, and the remark's weight and believability are matters for the fact-finder to determine, *DeBrow v Century 21 Great Lakes, Inc* (*After Remand*), 463 Mich 534, 539-540; 620 NW2d 836 (2001). However, a stray remark that is outside the context of the termination decision is not necessarily probative of an employer's discriminatory intent. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 301-302; 624 NW2d 212 (2001). Rather, certain factors must be considered, such as (1) whether the remark was made by a person involved in the termination decision, (2) whether the remark was made during the decision making process, (3) whether the remark was vague, ambiguous, or isolated, and (4) whether the remark was proximate in time to the termination. *Id*. at 292.

We find *DeBrow* distinguishable from the present case. In contrast to the facts presented in *DeBrow*, Jeff Edwards' alleged statement was not made in the context of plaintiff's termination. Applying the criteria as summarized in *Krohn* to the evidence presented in this case, we conclude that the contested statement constitutes a stray remark rather than direct evidence of retaliation. First, the remark was made in response to plaintiff's request for a pay increase, in March 2008. Plaintiff makes no assertion that any improper remarks were made when he was terminated on June 30, 2008. Additionally, the record clearly reveals that while Jeff Edwards was involved in the decision to terminate plaintiff, he made that decision with his brother, Dale. As a final point, plaintiff admitted that this was the only allegedly improper remark made by anyone at Edwards Automotive. All of these considerations inevitability lead to the conclusion that the statement constitutes a stray remark rather than direct evidence of retaliation.

Accordingly, to conclude from any of the evidence proffered by plaintiff that his subsequent termination was motivated by discriminatory animus, this Court must infer the relevant fact in issue. Such a reasoning process is inconsistent with the definition of direct

evidence. See, e.g., *Sniecinski*, 469 Mich at 132-133. In other words, even if this Court takes all of the above evidence at face value, it does not require the conclusion that "'unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazle*, 464 Mich at 462, quoting *Jacklyn*, 176 F3d at 926. For all of these reasons, plaintiff failed to present direct evidence of retaliation in this case.

IV. PRETEXT

Having found that plaintiff failed to present direct evidence of retaliation, we next turn to plaintiff's argument that the trial court erred in dismissing his claim because the record establishes that, at the very least, there is a genuine issue of material fact as to whether defendant's proffered reason for termination was pretextual.

We must begin our analysis of plaintiff's argument by assuming, without deciding, that plaintiff presented a rebuttable prima facie case based on proofs from which a factfinder can *infer* that plaintiff was subjected to unlawful retaliation. See *Sniecinski*, 469 Mich at 134. Plaintiff seemingly concedes that defendant has articulated "a legitimate, nondiscriminatory reason for the adverse employment action." *Hazle*, 464 Mich at 464. Therefore, we are only to consider plaintiff's sole argument presented on this issue: that such "reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski*, 469 Mich at 134. A plaintiff may show that a proffered reason was mere pretext by showing that the reason is false, that the reason is not the actual reason for the action, or that the reason does not warrant the adverse employment action. *Lytle v Malady*, 458 Mich 153, 174; 579 NW2d 906 (1998).

Defendant's legitimate, nonretaliatory reasons for plaintiff's termination were (1) plaintiff was discharged for his remarks made to a co-worker while he and other employees were removing rims from the dealership, and (2) plaintiff's remarks to his co-worker caused Jeff and Dale Edwards to lose trust in him.

As evidence of pretext for its decision to terminate him, plaintiff refers this Court to the fact that defendant failed to either investigate or discipline the other two employees involved in taking the rims. Defendant's failure to investigate or discipline others involved in the taking of the rims does not show that defendant's proffered reason is false, that the reason is not the actual reason for the action, or that the reason does not warrant the adverse employment action. *Lytle*, 458 Mich at 174. Arguably, the fact that there was no investigation into the other employees' involvement in the incident and that they were never disciplined in any way, proves the veracity of defendant's legitimate, nonretaliatory reasons for plaintiff's termination. Jeff and Dale Edwards testified that plaintiff's termination was based on what he said to his co-worker, and that statement causing them to lose trust in him, rather than the actual taking of the rims. Plaintiff was the only one who made a remark to Berg, and he was the only one disciplined.

Plaintiff further argues that because it was common practice for employees to take warranty parts for their own use, defendant's reason for his termination was mere pretext. He refers this Court to testimony from some of defendant's employees to support this proposition. While there was testimony that employees had been allowed to take defective parts for their own use, it was either done with permission or without defendant's knowledge. Further, Jeff and Dale Edwards testified that it was not a common practice for employees to take warranty parts

for their own use. But even if this was a common practice, again, plaintiff was terminated because of the comment he made to his co-worker, which caused Jeff and Dale Edwards to lose trust in him, not the actual taking of the rims. Accordingly, plaintiff failed to show that defendant's proffered reason was mere pretext for retaliation. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello