STATE OF MICHIGAN

COURT OF APPEALS

AVA L. MCBRAYER,

Plaintiff-Appellee,

v

DETROIT MEDICAL CENTER and KAREN SPYBROOK,

Defendants-Appellants.

UNPUBLISHED
December 21, 2010

No. 294268
Wayne Circuit Court
LC No. 05-503671-NI

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.,

PER CURIAM.

Defendants appeal by leave granted from the trial court's order denying in part[1] their motion for summary disposition under MCR 2.116(C)(10)[2] in plaintiff's action alleging violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. We reverse and remand.

Plaintiff was employed as a patient care associate ("PCA") at Children's Hospital of Michigan ("CHM"), a subsidiary of defendant Detroit Medical Center ("DMC"), from 1999 to November 2007. As a PCA, plaintiff was responsible for providing patient care services under the direction of the nursing staff. Plaintiff's daughter was diagnosed with leukemia in 2000 and received treatment at hospitals, including CHM, until her death in July 2007. Plaintiff was dissatisfied with the treatment her daughter received at CHM. Additionally, plaintiff believed she was wrongfully denied leave time under the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq*., at various times during her daughter's illness.

[1] The trial court granted summary disposition to defendants on plaintiff's claim for an alleged violation of public policy. Plaintiff has not filed a cross appeal challenging that decision.

[2] Defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). Because the parties submitted documentary evidence and because the trial court relied on evidence outside the pleadings, this Court assumes that summary disposition was granted under MCR 2.116(C)(10). See *Mino v Clio School Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003), citing *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

Plaintiff's CHM personnel file contained letters she had sent to DMC along with records of phone calls she made to DMC's employee hotline complaining about her rate of pay and the denial of her FMLA leave requests. Between April 2006 and October 2007, plaintiff additionally sent letters or complaints on eight separate occasions to various public agencies and private organizations regarding her insurance benefits, pay issues, denial of FMLA leave, denial of bereavement pay following the death of her father, alleged racial discrimination by DMC, and the care her daughter received as a patient at CHM.[3] There is no evidence that DMC or plaintiff's supervisors were aware of any of these complaints, which were not included in plaintiff's CHM personnel file, and plaintiff testified in her deposition that she did not see the need to provide CHM or her supervisors with copies of the complaints.

Following her daughter's death, plaintiff applied for a transfer to an open PCA position at a different DMC subsidiary, Harper Hospital. Plaintiff was interviewed and hired by defendant Karen Spybrook, a nurse manager at Harper. Plaintiff began working at Harper on November 12, 2007, retaining the same hourly rate of pay and employee identification number. Over the next six weeks, plaintiff was involved in three separate altercations with her new Harper supervisors and coworkers. On November 27, 2007, plaintiff became hostile when manager Angela Woodley-Williams provided her with a schedule in which she was required to work two weekends in a row. On December 17, 2007, plaintiff began yelling at a charge nurse over a change in her shift assignment. When another employee attempted to intervene, he and plaintiff became engaged in a shouting match. One week later, on December 24, 2007, plaintiff refused a nurse's request for assistance in repositioning a patient, saying that the patient would just "mess up again"; plaintiff eventually agreed to help when she had time, but did not return to help for an hour-and-a-half.

The decision to suspend plaintiff based on the December 17 and December 24 incidents was made by defendant Spybrook, together with Karen Rawski, a Human Resources Generalist for Harper Hospital, and Carolyn Wright, Harper's Administrative Director of Nursing for Patient Care Services. Following an investigative meeting and the determination by DMC's Occupational Health Services that plaintiff was fit for duty without restrictions, Rawski, Wright and Spybrook decided to terminate plaintiff's employment for the reason that she had committed three major infractions under DMC's Progressive Discipline Policy, including "conduct that endangers, or may be detrimental to[,] the well being of a patient, co-worker, physician, contractor or visitor."[4]

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[3] These complaints were made to the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), the United States Department of Labor, the Equal Employment Opportunity Commission (EEOC), the Michigan Department of Labor & Economic Growth, the National Association for the Advancement of Colored People (NAACP), the Michigan Office of Financial Insurance Services, and the Michigan Department of Civil Rights. In a 2007 letter and an October 18, 2007 follow-up phone call to the Department of Labor complaining about an interruption in her insurance benefits, plaintiff asserted—falsely—that she had been fired by CHM.

[4] Plaintiff maintains on appeal that as a transfer rather than a new hire, plaintiff should not have been subject to a probationary period after her transfer. However, plaintiff did not raise this

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Plaintiff then initiated this lawsuit against defendants DMC and Spybrook, asserting claims for violation of the WPA and of a discharge in violation of Michigan public policy. Plaintiff alleged that the complaints she made in 2006 and 2007 to various state and federal agencies and private organizations constituted protected activity under the WPA, MCL 15.362, and that she was illegally terminated on the basis of such protected activity. The trial court partially denied defendants' motion for summary disposition, holding that a question of fact existed as to whether a causal connection existed between plaintiff's WPA-protected activity and her firing.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). The determination whether a prima facie case has been established under the WPA is a question of law that this Court reviews de novo. *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997).

A WPA claim is brought under MCL 15.362, which 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.

The WPA is a remedial statute and is liberally construed, favoring the persons the Legislature intended to benefit. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 398; 572 NW2d 210 (1998). The main purpose of the WPA "is to alleviate 'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses.'" *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 612; 566 NW2d 571 (1997), quoting *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 75; 503 NW2d 645 (1993).

Actions under the WPA are analyzed using the burden-shifting framework that is applied in retaliatory discharge actions 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); *Anzaldua v*

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issue in her complaint as a separate basis for relief or in connection with claim under the WPA, and does not rely on it on appeal except to argue that defendants' insistence in denying her employment status is "suspicious" and that this false assertion should be dispelled. Based on our finding that plaintiff has failed to set forth prima facie evidence demonstrating a causal connection between the subject complaints and the termination of her employment, we need not decide whether this dispute provides evidence to rebut a claim that defendants' alleged motivation for the discharge was pretextual.

Band, 216 Mich App 561, 580; 550 NW2d 544 (1996). The plaintiff bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case that (1) he was engaged in protected activity as defined by the WPA, (2) he was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. *West v General Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003); *Shaw v Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. *Shaw*, 283 Mich App at 8; *Phinney*, 222 Mich App at 563. If the defendant carries this burden, "the plaintiff has the burden to establish that the employer's proffered reasons were a mere pretext for the adverse employment action." *Shaw*, 283 Mich App at 8.

We hold that plaintiff has failed to set forth prima facie evidence demonstrating a causal connection between the subject complaints and the termination of her employment.[5] "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West*, 469 Mich at 186. A plaintiff may establish a causal connection through either direct or circumstantial evidence. *Shaw*, 283 Mich App at 14. Direct evidence is that which, if believed, requires the conclusion that the protected activity was at least a motivating factor in the adverse employment action. *Id*., citing *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 132-133; 666 NW2d 186 (2003). Circumstantial evidence is sufficient if it facilitates "'reasonable inferences of causation, not mere speculation'" or conjecture. *Shaw*, 283 Mich App at 14-15, quoting *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). "[T]he evidence presented will be sufficient to create a triable issue of fact [only] if the jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation." *Shaw*, 283 Mich App at 15.

After a review of the parties' briefs, the record, and all exhibits, we conclude that no reasonable juror could infer from the evidence presented that plaintiff's complaints to third parties about DMC during her employment at CHM constituted a motivating factor in the decision to fire her from her position at Harper, because there is absolutely no evidentiary support for a finding that those involved in the decision had any knowledge of the complaints. "'[A]n employer is entitled to objective notice of a report or a threat to report by the whistleblower.'" *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 326; 559 NW2d 86 (1996), quoting *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). When there is no evidence that the employer knew about protected activity at the time of the plaintiff's discharge, the requisite causal connection cannot be established. *West*, 469 Mich at 184-188; *Roberson*, 220 Mich App at 329.

Although plaintiff asserts that her CHM file is "overflowing" with documentation of her accusations against DMC of discrimination regarding her FMLA claims and other benefits, it is undisputed that neither her CHM personnel file nor her Harper personnel file contained indicia of

[5] In light of our resolution of this issue, it is unnecessary to address defendants' contention that plaintiff has failed, in the first instance, to establish that the complaints she lodged with various agencies and organizations constituted protected activity under the WPA.

any of her complaints to outside agencies and organizations, and she admitted in her deposition that she did not bring these complaints to the attention of DMC or any of her superiors. Plaintiff testified, without elaboration, that defendant Spybrook "knew" about the complaints, but presented no evidence in support of this bare assertion. Plaintiff additionally testified that a CHM supervisor told her to "stop writing letters" because "HR was tired of seeing [plaintiff's] name." However, plaintiff further testified that it was only her "assumption" that the supervisor was referring to the complaints she had filed *externally*, and she admitted that the supervisor did not refer to those complaints. Plaintiff asserted in her brief below, and repeats in her brief on appeal, that Woodley-Williams told her that she was "under a tiny microscope" and that "if anyone was leaving it would be her." However, no record evidence of this statement exists.

All three Harper employees involved in the decision to terminate plaintiff stated in affidavits that they lacked access to her CHM file, that they had no knowledge of her problems with or complaints about CHM or DMC prior to her termination, and that the decision to fire her was based solely on the three instances of misconduct. Plaintiff has not sufficiently rebutted the averments that those involved in the decision to terminate her employment lacked knowledge of the complaints she had filed. Although plaintiff contends that Spybrook's testimony at an April 2008 Division of Unemployment Appeals hearing contradicts her claim that she lacked access to plaintiff's CHM file,[6] Spybrook's testimony is limited to an acknowledgement that she had plaintiff's employment file with her at the hearing and that, because of her position, she had access to this employment file and to plaintiff's employment history; this testimony is fully consistent with the statement in her affidavit that she did not have access to plaintiff's CHM file *until* the time of the April 2008 hearing.

In further support of her assertion that the Harper decision-makers were aware of the subject complaints at the time of her termination, plaintiff cites Woodley-Williams' written record of the November 27, 2007 incident, in which it was noted that plaintiff told Woodley-Williams that she had a "harassment suit against DMC and CHM" and accused Woodley-Williams of "being part of the retaliation against her." However, Woodley-Williams was not involved in the decision to fire plaintiff, and there is no evidence that Wright, Spybrook or Rawski were aware of any such harassment suit—which, in fact, did not exist. Plaintiff similarly cites her notation, on a form that was completed at the time of her suspension, that, "These are false charges that are being filed this is retaliation due to the charges that was file [sic] at EOC and regarding the death of [plaintiff's daughter]" [sic]. Nevertheless, there is no evidence the Harper decision-makers had any knowledge that plaintiff had lodged a complaint with the EEOC during her employment with CHM more than one year before. Indeed, Rawski stated in her affidavit that she did not know what plaintiff's notation meant, and that it was entirely irrelevant. Moreover, at the time plaintiff made this notation, the decision to suspend her on the basis of her violations of DMC policy had already been made.

[6] Defendants argue that testimony from the Division of Unemployment Appeals hearing is inadmissible in this civil action pursuant to MCL 421.11(b)(1)(iii), and they have filed a motion in limine in the trial court seeking to preclude admission of this evidence on that basis.

After a full year of discovery, plaintiff is unable to demonstrate knowledge on the part of defendant's decision-makers of plaintiff's protected activities until after her termination. A plaintiff's engagement in a "protected activity" under the WPA does not protect her from otherwise legitimate, or unrelated, adverse job actions. *West*, 469 Mich at 187. The admissible evidence overwhelmingly supports the conclusion that plaintiff was suspended, and ultimately fired, based solely on her violations of DMC policy, and that the Harper employees who made the decision to terminate her employment were entirely unaware of the alleged protected activity on which her WPA claim was based.

Reversed and remanded for entry of an order granting summary disposition to defendants. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly