

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM ROGER BUELL,

Plaintiff-Appellant,

v

GRAND BLANC TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED

July 24, 2012

No. 303696

Genesee Circuit Court

LC No. 10-093134-CL

Before: O'CONNELL, P.J., AND JANSEN AND RIORDAN, JJ.

PER CURIAM.

Plaintiff, William Roger Buell, appeals as of right the trial court's order granting summary disposition to defendant, Grand Blanc Township (the Township) in this action involving the Michigan Whistleblowers' Protection Act (WPA), MCL 15.362. We affirm.

Buell began working for the Township in 2005 when he was hired as the Director of the Department of Public Services (DPS). As Director, Buell oversaw the daily operations of the water and sewer system and maintained the grounds, cemeteries, parking lots, and buildings in the Township. Beginning in 2008, Buell's supervisor was Richard Dunnill, the Township Superintendent.

Buell's claimed "whistleblowing" activities began on February 20, 2009, when he submitted a written report to Dunnill stating that the fire chief contract violated state law because it was not approved by the city and the Township. Dunnill reviewed Buell's comments and took them under advisement, although he did not form an opinion on the matter. Dunnill also informed the Township board about Buell's complaint, though the board did not take any immediate action based on the complaint.

The next alleged reporting incident occurred on February 27, 2009, when Buell told the Township attorney that Dunnill was not a resident of the Township, which was a violation of state law. Though the Township attorney told Buell not to be concerned, Buell continued to pursue the matter and eventually reported it to the county prosecutor and attorney general, both of whom refused to become involved in the matter. Although the complaint was directed at Dunnill, Dunnill was not concerned because his contract did not require him to be a resident, the board knew he was not a resident, and the board had the power to waive the residency requirement.

Lastly, on March 18, 2009, Buell submitted a memo to Dunnill about structures in Deer Run Farm subdivision that had open foundations and were dangerous. Dunnill agreed that it was a dangerous situation, but he was satisfied when wood was placed over the foundation structures. Buell continued to pursue the matter and requested that the structures be demolished. Eventually, the board acquired the necessary approval to demolish the structures.

After reporting these violations, Buell perceived a change in Dunnill's behavior. Buell observed that Dunnill was visibly upset, was short with Buell, would grit his teeth in Buell's presence, and Dunnill no longer met daily with Buell. Buell felt that Dunnill's change of behavior was a reaction to the reports, although Dunnill never referenced or spoke of Buell's reporting behavior. Buell also felt that Dunnill and Kirk Richardson, another employee of the Township, began to take over projects that belonged to Buell. Buell also overheard his supervisor say that the Township was trying to invalidate Buell on one of his projects.

Then, in the Spring of 2009, Dunnill recommended to the Township board that Buell be removed as the Director of the DPS and be reassigned to a new position as Township Engineer. Dunnill felt this was necessary because Buell was having problems with employees and Buell's skills were better suited to that of Township Engineer, as Buell was a certified engineer. The board agreed with Dunnill that Buell's skills were better suited to an engineering position and that such a decision may save the Township money. Simultaneous with this decision was the creation of an entirely new engineering department, with a budget, staff, and office space. As Township Engineer, Buell was placed in charge of the new department.

Buell, however, felt that he was coerced into becoming the Township Engineer and that it was a demotion. Dunnill and the Township board felt it merely was a change of position. While Buell had his attorney review the contract before signing it, no one in the Township would tell Buell why his position was being changed, he was told it was a done deal, and he was instructed to not speak to anyone about the change of employment. Buell was suspended from the next day of work, with pay, and no one explained to him why he was being suspended. Richardson was chosen to replace Buell as Director of the DPS, now called the Department of Public Works.

As Township Engineer, Buell continued to report directly to Dunnill and his salary was derived from the water and sewer fund. While Buell's new tasks included the surveying, designing, and engineering of multiple projects, he complained to Dunnill that he lacked the sufficient "tools" to complete all of these tasks. Buell also continued to experience difficulties working with other employees and Dunnill. In May of 2009, Buell made a hand gesture in the shape of a gun and pointed it at two employees, one of whom was Richardson. An investigation was conducted that resulted in a five day suspension as well as Dunnill reporting Buell's threatening hand gesture to the police. While Buell appealed his suspension and claimed that Richardson and the other employee were retaliating because of a dispute over a project, the suspension was upheld. Though Dunnill claims to have investigated Buell's complaints, Buell felt that his complaints were not taken seriously and no one investigated his allegations. Another issue arose when Dunnill submitted a written evaluation of Buell on October 27, 2009. This written performance review was part of a new initiative that Dunnill implemented for all the department heads. Dunnill scored Buell's job performance as Township Engineer at 42 out of 95 points, noting that Buell loved investigating but had poor skills when it came to cooperating, creating a plan, following through, and staying on task.

On January 8, 2010, Dunnill delivered a letter to Buell, which was a recommendation to the board that the Township Engineer position be eliminated due to the Township's financial difficulties. While Buell wanted to discuss the letter, Dunnill refused. The letter referenced a hearing that was scheduled for January 14, 2010, and informed Buell that he could attend, present information, and bring an attorney. In an attempt to gather opposition to Dunnill's recommendation, Buell contacted everyone he knew in the Township and distributed flyers about his value to the Township. Despite these efforts, the board voted to terminate Buell's employment in a seven to one vote. Dunnill and every board member, including the member who voted against termination, stated that the Township Engineer position was eliminated solely because of financial reasons, as outside contractors could be hired on an as-needed basis to save the Township money.

On February 24, 2010, Buell filed a WPA complaint against the Township, arguing that a substantial factor in his termination was his reporting of the legal violations involved with the fire chief's contract, Dunnill's residency, and the Deer Run Farm subdivision. After discovery, the Township filed a motion for summary disposition pursuant to MCR 2.116(C)(10), alleging that Buell's demotion claim was time-barred and Buell failed to demonstrate a causal link between his protected activity and his termination. The trial court agreed with the Township and granted the motion for summary disposition, stating that there was no definite evidence linking the protected activities to the termination. Buell now appeals.

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

According to the WPA, an employer may not "discharge, threaten, or otherwise discriminate against an employee" when the employee engages in a protected activity such as "reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011); see also MCL 15.362. In order to establish a prima facie case under the WPA, a plaintiff must demonstrate that: "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the adverse employment decision." *Id.* at 630-631. If a plaintiff is able to establish the prima facie case, the burden then shifts to the defendant to "articulate a legitimate business reason for the plaintiff's discharge." *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If the defendant is able to produce "evidence establishing the existence of a legitimate reason for the discharge, the 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.*

The WPA also “imposes a 90-day limitations period for a civil action arising from a violation of the act.” *Anzaldua*, 292 Mich App at 631; see also MCL 15.363(1). In this case, Buell presented evidence and arguments relating to his alleged demotion to Township Engineer occurring on April 20, 2009. However, Buell did not file his WPA claim until February 24, 2010, well beyond the 90-day limit in the WPA. While Buell cannot recover for an untimely claim based on his alleged demotion, evidence relating to his demotion may be considered. See *Campbell v Human Servs Dep’t*, 286 Mich App 230, 238; 780 NW2d 586 (2009).

Even considering evidence of Buell’s alleged demotion, there was no genuine issue of material fact regarding the causation element of Buell’s timely WPA claim based on his termination.¹ “A plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence.” *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009). If a plaintiff only presents circumstantial evidence, such evidence still “‘must facilitate reasonable inferences of causation, not mere speculation.’” *Id.* at 15, quoting *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). “In other words, the evidence presented will be sufficient to create a triable issue of fact if the jury could reasonably infer from the evidence that the employer’s actions were motivated by retaliation.” *Shaw*, 283 Mich App at 15. “Summary disposition for the defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action.” *West*, 469 Mich at 184.

Buell argues there is a genuine issue of material fact regarding the causal connection based on evidence of the temporal proximity between his reporting activities and Dunnill’s change of behavior, Buell’s demotion to Township Engineer and replacement by an inferior candidate, an unprecedented harsh performance review, and unfair suspensions. Yet, “[t]o prevail, plaintiff had to show that his employer took adverse employment action *because of* plaintiff’s protected activity,” not merely that “his employer disciplined him *after* the protected activity occurred.” *West*, 469 Mich at 185 (emphasis in original). Even viewing the evidence in a light most favorable to Buell, there is no evidence that Dunnill or any other Township employee had a negative reaction to Buell’s reporting activity. No one verbally expressed anger or displeasure with Buell based on his reporting behavior. While Buell claims that Dunnill’s behavior changed after the reporting activity, “a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action.” *West*, 469 Mich at 185. Buell may have felt that Dunnill’s behavior changed because of the reporting activities, but that is speculation, not evidence. Buell failed to present any actual evidence that Dunnill was reacting to or relying on Buell’s reporting activity when Dunnill began acting differently toward Buell, when Dunnill made the recommendation to reassign Buell to Township Engineer, when Richardson was chosen to replace Buell, during the performance

¹ The parties are not disputing the other two elements of the WPA claim, namely, that Buell engaged in protected activity and he was discharged.

review, or when Buell was suspended for making a hand gesture in the shape of a gun. Moreover, Dunnill and the board members all testified that they were not bothered by Buell's reporting activity and that the decision to terminate Buell was purely financial. Hence, "[t]he most that plaintiff demonstrates here is that he was disciplined, and eventually discharged." See *West*, 469 Mich at 185. Buell has presented no evidence "that the adverse employment action was in some manner influenced by the protected activity." See *Id.*

Furthermore, even if Buell had established the prima facie case, he failed to demonstrate that the financial reason given for his termination was pretextual. A plaintiff can establish that a defendant's proffered reason for the adverse employment action was pretextual in the following ways: "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Campbell*, 286 Mich App at 241, quoting *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

The board members and Dunnill testified that the Township Engineer position was eliminated because of financial reasons. Buell attempts to refute this financial reason with evidence that the water and sewer fund, from which his salary was derived, was healthy. Yet, even assuming that the water and sewer fund was healthy, the Township would still realize a cost savings by eliminating a position that was unnecessary or one that could be accomplished more efficiently through outsourcing. Buell failed to provide any evidence that outsourcing engineering jobs would not save the Township money, especially considering the unrefuted evidence that outsourcing even part time DPS jobs resulted in a tremendous cost savings for the Township. While Buell also suggests that evidence of pretext is that the Township did not provide him with the necessary tools to effectuate cost savings measures as Township Engineer, Buell again resorts to mere allegations without presenting any evidence that the Township deliberately "prevented him from receiving the [tools] he needed to meet his employer[s] requirements." See *Taylor*, 252 Mich App at 661.

Lastly, Buell claims that the Township's behavior violated the Veterans' Preference Act (VPA), MCL 35.401, because he was denied a hearing before his termination. In order to preserve an issue for appellate review, it has to be raised before, addressed, and decided by the lower court. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). While Buell mentioned this VPA claim in his response to the Township's motion for summary disposition, he did not reference it in his complaint, he did not amend his complaint pursuant to MCR 2.118, and the trial court never addressed or decided the VPA claim. Therefore, this claim is not preserved for appellate review and is only reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

There is no evidence that the Township violated the VPA. Before terminating a veteran's employment, a veteran is entitled to a hearing "before the township board[,] if a township employee, and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges." MCL 35.402. A hearing in front of the Township board was held on January 14, 2010, and Buell knew he had a right to attend, to offer information, and to bring an attorney. Even assuming that this hearing was in some way deficient, a veteran is not even entitled to a hearing if he is a department head. MCL 35.402. All of the evidence presented in the lower court suggests that Buell was the Chief Engineer in charge

of the Engineering Department. While Buell now claims that the Engineering Department was not a real department, Buell failed to present any actual evidence in the lower court that the Engineering Department was fictitious. Consequently, Buell has failed to demonstrate plain error affecting his substantial rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan