

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA RADFORD,

Plaintiff-Appellant,

v

HURLEY HEALTH SERVICES, a/k/a HURLEY
MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
September 27, 2012

No. 304725
Genesee Circuit Court
LC No. 09-092637-NZ

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition and dismissing plaintiff's claims. We affirm.

Plaintiff worked for defendant as a social worker. In April of 2004, plaintiff left her employment with defendant after filing a workers' compensation claim asserting that she had been exposed to environmental hazards at the workplace, including mold and chemicals. In April of 2007, defendant reemployed plaintiff pursuant to an agreement between the parties resolving plaintiff's 2004 worker's compensation claim. On November 26, 2007, a water leak flooded plaintiff's workspace. After working two days, plaintiff filed a worker's compensation claim on November 28, 2007, asserting that her work space environment caused her to experience breathing difficulties and allergy symptoms. Dr. A. Martin Lerner examined plaintiff that same day and wrote a letter requesting that plaintiff not return to her work place unless the building underwent a government registered environmental check. Defendant had the work place professionally cleaned, but did not arrange for a governmental inspection as Dr. Lerner requested. Plaintiff briefly returned to work on December 5, 2007, before filing another workers' compensation claim and leaving the work place. Plaintiff visited Dr. Marek Didluch that same day. On December 5, 2007, plaintiff faxed to defendant a note from Dr. Didluch stating that plaintiff was "not able to go back to work until 12/10/2007." Plaintiff never returned to work after December 5, 2007. On December 19, 2007, defendant sent plaintiff a disciplinary action stating that her employment was suspended pending a request for discharge because of her repeated failure to appear for work or notify defendant regarding her absences. Defendant terminated plaintiff on January 8, 2008.

On December 1, 2009, plaintiff sued defendant for retaliatory discharge in violation of public policy and disability discrimination in violation of the Michigan Persons With Disability Civil Rights Act (PWDCRA). Plaintiff argued that defendant terminated her in retaliation for filing her November 28 and December 5, 2007, workers' compensation claims, and that defendant discriminated against her because of her disability with respect to the compensation and terms of her reemployment in April of 2007 and by terminating her on January 8, 2008. On March 25, 2011, defendant moved for summary disposition under MCR 2.116(C)(10) as to both of plaintiff's claims. Following a hearing, the trial court granted defendant's motion and dismissed both of plaintiff's claims.

Plaintiff first argues that the trial court erred by granting summary disposition and dismissing her claim of retaliatory discharge in violation of public policy. We disagree. We review de novo the trial court's decision on a motion for summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). The moving party has the initial burden to identify and support with evidence the claim for which it contends there is no genuine issue as to any material fact and that entitles it to judgment as a matter of law. MCR 2.116(G)(4). If the moving party does so, "[t]he burden then shifts to the nonmoving party to establish with evidence, not mere allegations or denials in pleadings, that a genuine issue of disputed fact exists. *AHO v Dep't of Corrections*, 263 Mich App 281, 288; 688 NW2d 104 (2004). If the nonmoving party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.*

In general, at-will employment may be terminated at any time, except when the reason for the termination is so contrary to public policy as to be actionable. *Prysak v RL Polk Co*, 193 Mich App 1, 9; 483 NW2d 629 (1992). An action for discharge in retaliation for filing a workers' compensation claim is grounded in the public policy expressed by the statute. *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 245-249; 531 NW2d 144 (1995). "[T]he plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge." *Roulston v Tendercare, Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000). To establish her prima facie case of retaliatory discharge, the plaintiff must prove "(1) that [she] engaged in a protected activity; (2) that this 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." *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997); see also *AHO*, 263 Mich App at 288-289.

Where a plaintiff, as is the case here, seeks to establish her prima facie case of retaliatory discharge by circumstantial evidence, the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), applies. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 133-134; 666 NW2d 186 (2003). Under this approach, the plaintiff must produce evidence from which it may be inferred that she was subjected to unlawful retaliation. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537-538; 620 NW2d 836 (2001). If the plaintiff presents evidence of a prima facie case, "the burden then shifts to the defendant to articulate a legitimate," nonretaliatory reason for

the termination. *Sniecinski*, 469 Mich at 134. “If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant’s reasons were not the true reasons, but a mere pretext for” the adverse employment action. *Id.*

In this case, it was uncontroverted that plaintiff’s filing of workers’ compensation claims constituted a protected activity of which defendant was aware. *DeFlaviis*, 223 Mich App at 436. Regarding the third element of plaintiff’s claim, we note that “what might constitute an adverse employment action in one employment context might not be actionable in another employment context.” *Chen v Wayne State Univ*, 284 Mich App 172, 201; 771 NW2d 820 (2009). Defendant argued that plaintiff’s repeated absences without notice constituted voluntary resignation, and, thus, defendant did not terminate plaintiff or take any adverse action against her. But the record established that defendant made the decision to formally end plaintiff’s employment and did so knowing that this was against plaintiff’s wishes. Consequently, we find that plaintiff established the third element of her prima facie case by showing that defendant took an adverse action against her. *DeFlaviis*, 223 Mich App at 436.

Nevertheless, plaintiff failed to present evidence sufficient to establish a genuine issue of material fact regarding a causal connection between her workers’ compensation claims and her termination. *Id.*; *AHO*, 263 Mich App at 288-289. Plaintiff argued in the trial court that a reasonable fact-finder could infer a causal connection between her workers’ compensation claims and her subsequent termination on the basis that defendant granted her only one week of benefits; plaintiff’s supervisor mocked her when asked if an approved agency had tested the work site, and that defendant had frustrated Dr. Lerner in providing written excuses for plaintiff’s absences. The record supports that that the incident with plaintiff’s supervisor was an isolated incident and not evidence of animus for filing workers’ compensation claims, given that the supervisor lacked the authority to terminate her, and it occurred weeks before plaintiff’s termination. See *Sniecinski*, 469 Mich at 136 n 8. Moreover, although plaintiff claimed defendant failed to cooperate with Dr. Lerner to document the reason for her absences, plaintiff presented no evidence supporting a causal link between these acts and her termination. “Mere speculation or conjecture is insufficient to establish reasonable inferences of causation.” *Id.* at 140. Accordingly, plaintiff failed to establish a prima facie case of retaliatory discharge.

Further, even if we assumed that plaintiff established a prima facie claim of retaliatory discharge, her claim would still fail because she did not rebut defendant’s stated legitimate reason for termination, i.e., plaintiff’s repeated absences without notice. The record shows that defendant sent plaintiff a request for admissions stating that Dr. Didluch cleared plaintiff to return to work on December 10, 2007, but that she did not return to work on or after December 10, 2007. Because plaintiff failed to respond to the request for admissions, she was deemed to have admitted the truth of defendant’s request under MCR 2.312(B)(1). The record does not indicate that this admission was ever withdrawn or amended the matter, so it was conclusively established. MCR 2.312(D)(1); *Hilgendorf v St John Hosp & Med Center*, 245 Mich App 670, 688-690; 630 NW2d 356 (2001). Plaintiff did not present any evidence establishing a question of material fact regarding whether defendant’s stated reason for termination was mere pretext. *Sniecinski*, 469 Mich at 134. Accordingly, the trial court did not err in granting summary disposition and dismissing plaintiff’s claim of retaliatory discharge in violation of public policy.

Plaintiff also argues that the trial court erred by granting summary disposition and dismissing her disability discrimination claim. We disagree.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing in part that it complied with the PWDCRA and that there was no genuine issue of material fact as to plaintiff's disability discrimination claim. The trial court, however, granted summary disposition solely on the basis of the statute of limitations and did not address the merits of plaintiff's disability discrimination claim. The record establishes, and both parties acknowledge on appeal, that the trial court erred in determining that the statute of limitations barred plaintiff's disability discrimination claim. Defendant argues that summary disposition was nevertheless appropriate under MCR 2.116(C)(10) on the merits of plaintiff's claim. This Court will affirm a lower court's ruling when the court reached the right result, even though for the wrong reason. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005). Moreover, this Court may address an issue raised before, but not decided by, the trial court, where the lower court record provides the necessary facts for appellate consideration. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

To prove her PWDCRA discrimination claim, plaintiff must establish (1) that she has a disability the act protects, (2) that the disability is unrelated to her ability to perform the duties her job, and (3) that she has been discriminated against in one of the ways described in the statute.¹ *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). "If the plaintiff presents a prima facie case of purposeful discrimination, the burden then shifts to the defendant to rebut such evidence" by articulating a legitimate, nondiscriminatory reason for the contested employment action. *Id.* at 205; *Sniecinski*, 469 Mich at 134.

Plaintiff asserted that she was disabled under the PWDCRA because she had occupational asthma, chemical sensitivity, common variable immune deficiency syndrome, and sick building syndrome, and that these maladies were a disability unrelated to her abilities to perform her job duties. Plaintiff also alleged that defendant discriminated against her with respect to her wage rate, benefits, and status as a temporary employee following her reemployment in April of 2007 under the parties' settlement of plaintiff's 2004 workers' compensation claim. The record established that the parties, including plaintiff and her counsel, signed a "Bureau of Workers' Disability Compensation Voluntary Payment Form" memorializing their settlement agreement. The voluntary payment form did not indicate, and plaintiff presented no evidence, that she was entitled to any employment terms different from what she actually received during her reemployment. The record also provides no evidence that plaintiff protested the terms of her employment to which she agreed between April and December of 2007. Accordingly, plaintiff did not establish a prima facie case of disability

¹ "[T]he PWDCRA provides that an employer shall not '[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position.'" *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999), quoting MCL 37.1202(1)(b).

discrimination on the basis of her terms of reemployment, i.e., that she was discriminated against with respect to terms of reemployment because of her disability. *Peden*, 470 Mich at 204.

Plaintiff also alleged that defendant discriminated against her by terminating her because of her disability. However, for the reasons discussed above with respect to her retaliatory discharge claim, plaintiff failed to establish a prima facie case of discrimination on the basis of a disability or overcome defendant's proffered nondiscriminatory reason for her termination. *Id.* at 204-205. Accordingly, although the trial court erred by relying on the statute of limitations, its grant of summary disposition was correct. *Hess*, 265 Mich App at 596.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.201.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck