STATE OF MICHIGAN

COURT OF APPEALS

JUDY LYNN TAHFS,

Plaintiff-Appellant,

v

RADAKOVIC MANAGEMENT COMPANY, INC., d/b/a STAR MANOR OF NORTHVILLE, DIANA GABRIEL and SHERRY LAVANDOWSKI,

Defendants-Appellees.

UNPUBLISHED
September 18, 2012

No. 305165
Wayne Circuit Court
LC No. 09-029946-CD

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Judy Lynn Tahfs, appeals the trial court's order granting summary disposition to defendants, Radakovic Management Company, Inc. d/b/a Star Manor of Northville (Star Manor), Diana Gabriel, and Sherry Lavandowski. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Star Manor is a long-term care facility in Northville with approximately 37 residents. Star Manor's Director of Nursing, Carole Najduch, hired plaintiff as the evening shift nurse supervisor in April 2009. Plaintiff is a registered nurse and her position at Star Manor required her to supervise several nursing assistants, help residents as needed, perform wound assessments for residents, and distribute medication. Plaintiff received a positive 90-day evaluation from Najduch on July 1, 2009. However, in August 2009, Najduch and Star Manor's Administrator, Diana Gabriel, began to have concerns about plaintiff's conduct at work.

According to Gabriel, on August 11, 2009, plaintiff exposed her breasts to Gabriel and other Star Manor managers while talking about her breast enhancement surgery. Gabriel told plaintiff to cover herself and not to expose herself again. Gabriel testified that, a week later, on August 18, 2009, a resident's family member complained that, in the dining room with others present, plaintiff talked about her breasts, boasted that they were larger than those of the other nurses and, to prove the point, she pulled her shirt tight to outline her breasts. Plaintiff denies that she exposed her breasts to staff members and she suggested that the person who complained about her conduct in the dining room may have mistaken her for another employee.

Also in August, complaints emerged that plaintiff mocked a resident and, on another occasion, made disparaging comments to a resident's family members about the day shift nurse, Sherry Lavandowski. On August 19, 2009, Gabriel decided to "shadow" plaintiff during her evening shift because of her concerns about plaintiff's job performance. According to Gabriel, plaintiff failed to follow various Star Manor policies, including those related to resident safety. While Gabriel was in the facility that evening, she also received a complaint from a resident that, when plaintiff was on duty, it was so noisy that she could not sleep. Gabriel testified that she spoke to plaintiff about her observations before she left that night and she believed the issues were amicably resolved. However, plaintiff did not come to work the next day and informed Najduch she was upset about the criticism from Gabriel. Gabriel called plaintiff and left a message for her to contact her to discuss her concerns. Instead, plaintiff called Najduch and said she would not call Gabriel and she asked Najduch if she was going to be fired.

Gabriel testified that she considered plaintiff's refusal to call her a form of insubordination and she instructed Najduch to terminate plaintiff's employment. However, Najduch convinced Gabriel to give plaintiff another chance and Najduch volunteered to conduct a second orientation to make sure plaintiff knew and would follow all policies and procedures. According to Najduch, she gave plaintiff a second orientation and training at the end of August.

On September 3, 2009, Lavandowski was in Najduch's office to talk to Najduch about an issue involving a resident. Patricia Kachmarchik, the records coordinator for Star Manor, was also present. According to Kachmarchik, plaintiff walked into the office and rudely brushed past Lavandowski. Najduch testified that plaintiff "pushed" past Lavandowski. Lavandowski testified that plaintiff pushed her out of the way, and that she "bumped" her shoulder into Lavandowski's shoulder, causing Lavandowski to bump into a book shelf. Najduch testified that plaintiff and Lavandowski had a verbal confrontation. Najduch asked plaintiff to leave so she could finish her conversation with Lavandowski, but plaintiff refused. Lavandowski testified that she "assisted" plaintiff out of the office and closed the door. Kachmarchik testified that Lavandowski "guided" plaintiff out of the office, and Najduch said Lavandowski "ushered" plaintiff out of the office. In a written statement, Star Manor employee Myisha Nobles stated that, from outside the office, she saw Lavandowski push plaintiff into the hallway. However, none of the women testified that Lavandowski physically harmed plaintiff or that plaintiff sustained any apparent injury. Lavandowski maintained that she did not "push" plaintiff and she had no intent to injure her or knowledge that an injury might result.

Plaintiff characterized her encounter with Lavandowski very differently, though she gave inconsistent testimony about the incident. Plaintiff testified that she went into Najduch's office to get a piece of candy and that Lavandowski was talking to Najduch. Plaintiff then testified that she was already in Najduch's office when Lavandowski entered. In either case, plaintiff testified that Lavandowski physically picked her up and threw her out of the office and into a wall, which caused her right knee to turn.

Najduch testified that, because both plaintiff and Lavandowski said inappropriate things during the encounter, she instructed them to apologize to one another, and they did so. Lavandowski recalled that she sought out plaintiff after the incident to apologize because she did not want the incident to interfere with their working relationship. According to plaintiff,

however, Lavandowski confronted her in the shower room, grabbed the keys around plaintiff's neck to get her attention, and then apologized.

Plaintiff testified that her knee was in so much pain from hitting the wall outside Najduch's office that she asked Najduch if she could leave to see a doctor. Though she stated that was crying because of the pain, plaintiff testified that Najduch refused to let her leave. The next day, plaintiff called to inform Najduch that a doctor instructed her to stay home from work between September 4 and September 8, 2009 to rest her knee.[1] Plaintiff testified that, while she was at home that week, she talked to Star Manor employee Heather Lilac, who said she heard a rumor that plaintiff was going to be terminated. Plaintiff offered inconsistent testimony about her communication with Najduch during her leave of absence. According to plaintiff, when she called in on September 4th, Najduch told her to stay home and rest. Later, plaintiff testified that Najduch told her that she believed Gabriel intended to fire her. Thereafter, plaintiff testified that Najduch actually told her that if she made a police report about the incident with Lavandowski, Gabriel would terminate her. Najduch denies ever talking to plaintiff about her intention to make a police report until the day after plaintiff did so.

Plaintiff made a complaint about Lavandowski at the Northville Police station six days after the incident, just before her shift on September 9, 2009. Evidence established that plaintiff reported Lavandowski's conduct to the police because she believed she was going to be terminated. Plaintiff testified that, while she was on leave for her knee injury, she contacted a labor lawyer and told him about the incident with Lavandowski and her fear that she could be fired and he instructed her to make a police report. Plaintiff also conceded that she told her boyfriend that she intended to make a police report because she thought she was going to be fired. Najduch stated that plaintiff called her on September 10th and said she filed the police report because she heard from someone at work that she was going to be terminated. Further, Star Manor's human resources administrator, Joyce Mackens, wrote a note on September 9, 2009 in which she stated that plaintiff called and said, because she was going to be fired, she planned to make a criminal complaint against Lavandowski on her way to work.

On the day plaintiff made her police complaint, Officer Anthony Tilger conducted an investigation at Star Manor. At that time, both Gabriel and Najduch were at a conference out of town, and Joyce Mackens was the administrator in charge. According to Mackens, Officer Tilger conducted interviews outside the building and, while he was there, plaintiff was disruptive

[1] Records indicate that, on September 4, 2009, plaintiff went to an urgent care facility complaining that she bumped a wall and that her knee was painful and swollen. The doctor diagnosed plaintiff with a ligament strain and instructed her not to work until September 8, 2009. Defendants challenge the veracity of plaintiff's claims regarding her knee by pointing out that plaintiff went to her gym, Planet Fitness, on September 7, 2009, despite her claim she needed total bed rest for the week. Records also show that plaintiff had a history of right knee problems. In 2004, plaintiff tore her right medial meniscus and underwent arthroscopic surgery. On February 19, 2010, plaintiff underwent another arthroscopic procedure and a partial medial menisectomy because of a torn medial meniscus and degenerative arthritis.

and insubordinate. According to Mackens, she ordered plaintiff to get to work, but plaintiff ignored her directive and did not actually start working until more than an hour after her shift began. Mackens filled out a form indicating that she gave plaintiff a verbal warning for conducting numerous personal conversations while on duty that day. Gabriel testified that she later learned that, while Officer Tilger was there, plaintiff confronted Lavandowski and said, "I'm going to make sure that you never practice as a nurse again. I'm going to have your license." In an affidavit, Patricia Kachmarchik stated that, when Officer Tilger was at Star Manor, plaintiff approached her and "in a confrontational, threatening tone told [her] that [she] was a Christian and had better tell the truth." According to Kachmarchik, plaintiff was "standing uncomfortably close to [her] and [she] found [plaintiff's] demeanor and behavior to be intimidating and threatening." Officer Tilger also told Gabriel that, while he was interviewing one of the witnesses outside, plaintiff went into a bathroom and yelled through a window screen, "I never said that." Gabriel further stated that she had to pay Lavandowski to stay longer that day because plaintiff was pacing up and down the halls and refused to begin her shift.

On the same day, plaintiff failed to follow proper procedures for distributing medication. There was a pill missing from a packet of Depakote, which is an anti-seizure medication. When that happens, nurses are supposed to replace the pill from a back-up supply, document the error, contact the pharmacy about the error and contact the director of nursing. Plaintiff did none of those things, she did not otherwise report the problem, and the patient never received the medication. Najduch considered this incident grounds for plaintiff's termination. Gabriel decided to terminate plaintiff based on the aggregation of incidents described above. However, Gabriel specifically denies that she fired plaintiff for reporting the Lavandowski incident to the police. Rather, she testified that the police have been called to Star Manor for other incidents and that this would have no impact on her employment decisions. Plaintiff disputes this and testified that when Gabriel fired her on September 11, 2009, she told plaintiff she was being terminated for contacting the police about Lavandowski. Indeed, plaintiff refused to participate in her exit interview and, according to Najduch, she "held up her cell phone indicating that she had it all on tape and would see us in court." Plaintiff denies that she ever recorded any portion of the exit interview.

The record reflects that, as a result of plaintiff's police report, Lavandowski pleaded no contest to a charge of disturbing the public. She was placed on non-reporting probation for six months and continued to work at Star Manor. Plaintiff filed this action on March 23, 2010, and alleged that defendants wrongfully terminated her employment under the Whistleblowers' Protection Act and that defendants are liable for common law battery.

Defendants filed a motion for summary disposition on April 15, 2011. Defendants argued that Lavandowski should be dismissed because she may not be held liable for battery under the sole remedy provision of the worker's disability compensation act, MCL 418.131(1). Defendants also argued plaintiff's claim under the Whistleblowers' Protection Act must fail because she admitted she acted in bad faith by reporting the Lavandowski incident to the police because she heard she was going to be fired. Defendants claimed that, even if she acted in good faith, plaintiff did not report anything to authorities within the scope of her employment that is imputable to her employer and she cannot establish a causal connection between the police contact and her termination. Moreover, defendants maintained that there were legitimate, non-discriminatory reasons for plaintiff's termination that plaintiff cannot overcome. In response,

plaintiff asserted that there is a genuine issue of material fact about whether plaintiff's termination was motivated by her report about Lavandowski's conduct. She further argued that she did not act in bad faith because she informed Najduch that she intended to call the police the day after the incident, before she heard she might be terminated. Finally, plaintiff argued that defendants cannot establish a nondiscriminatory reason for her termination because she herself testified that Gabriel told her she was being fired for filing a police report.

Following oral argument, the trial court granted summary disposition to defendants. Specifically, the trial court dismissed the battery claim on the basis of the exclusive remedy provision under the worker's disability compensation act. The court also ruled that plaintiff's claim under the Whistleblowers' Protection Act must fail because she acted in bad faith by waiting to file the police report against Lavandowski, and doing so only after she heard that she was going to be terminated. The trial court further ruled that, even if she acted in good faith, plaintiff offered only her own inconsistent testimony to support her whistleblower claim and otherwise cannot establish a causal connection between her alleged protected activity and her termination.

II. ANALYSIS

A. BATTERY

Plaintiff argues that the trial court erred by granting summary disposition on her battery claim. As this Court explained in *Pugh v Zefi*, 294 Mich App 393, 395-396; 812 NW2d 789 (2011):

> We review de novo the circuit court's grant or denial of a motion for summary disposition. *Woodman v Kera LLC*, 486 Mich 228, 236; 785 NW2d 1 (2010). Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact except as to the amount of damages and the moving party is entitled to full or partial judgment as a matter of law. The court must consider the pleadings, affidavits, depositions, admissions, and other evidence in a light most favorable to the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

The trial court ruled that plaintiff's battery claim is barred under the workers disability compensation act, MCL 418.131(1), which provides that, "[t]he right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury . . . ." "It is well settled that the exclusive remedy provision applies when an employee is injured by the negligent acts of his employer or by the negligent acts of a coemployee." *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000). Plaintiff argues that Lavandowski's conduct falls under the intentional tort exception to the exclusive remedy provision, which provides as follows:

> The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that

> an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1).]

Plaintiff's claim fails because she has not established that Lavandowski committed an intentional tort within the language of the exception. While battery is generally considered an intentional tort, in a case involving an employer and co-employees, the plaintiff's burden "is not synonymous with the showing required for a classic intentional tort." *Johnson v Detroit Edison Co*, 288 Mich App 688, 696; 795 NW2d 161 (2010). Rather, a plaintiff must make the showing set forth in MCL 418.131(1), of an intent to injure through evidence of "actual knowledge that an injury was certain to occur." *Id*. Lavandowski specifically testified that she had no intent to injure plaintiff when she led her out of Najduch's office. She also stated that she had no knowledge that plaintiff had any physical problem that might make her conduct in any way certain to cause plaintiff injury. Thus, no evidence shows that Lavandowski had "actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." Further, no circumstantial evidence suggests that Lavandowski intended to hurt plaintiff. No witness suggested that Lavandowski's conduct evidenced any intent to harm plaintiff, Lavandowski apologized for her role in the encounter, and there is no evidence of a history of animosity on Lavandowski's part toward plaintiff. Because plaintiff failed to establish that Lavandowski had an actual intent to injure her, the trial court correctly ruled that plaintiff's claim is barred by the exclusive remedy provision and correctly granted summary disposition to defendants.

B. WHISTLEBLOWERS' PROTECTION ACT

Plaintiff argues that the trial court erred by granting summary disposition to defendants on her claim under the Whistleblowers' Protection Act. MCL 15.362 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.

"To establish a prima facie case under the WPA, plaintiff must show that (1) she was engaged in a protected activity as set forth in the act, (2) defendant discharged her, and (3) a causal connection existed between the protected activity and the discharge." *Ernsting v Ave Maria College*, 274 Mich App 506, 511; 736 NW2d 574 (2007).

We hold that the trial court correctly granted summary disposition to defendants because plaintiff did not engage in a protected activity within the meaning of the WPA. As this Court reiterated in *Henry v City of Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999):

> The underlying purpose of the act is the protection of the public. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378; 563 NW2d 23 (1997). "The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id.* at 378-379. "Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses." *Id.* at 379.

While our Court has held that the WPA applies to reported abuses of both employers and employees, *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 574-575; 753 NW2d 265 (2008), here, as the trial court correctly ruled, the evidence clearly established that plaintiff decided to make the police report about Lavandowski's conduct simply because she anticipated her own termination. As discussed, Najduch stated that plaintiff called her and told her the reason she filed the police report was because she heard from someone at work that she was going to be fired. Mackens wrote a note on the day plaintiff reported the incident that plaintiff called and said she knew she was going to be fired, so she intended to make the report on her way to work. Plaintiff also admitted that she told her boyfriend that the reason she intended to go to the police was because she believed she was going to be fired. Plaintiff failed to establish a genuine issue of material fact to counter this evidence and, quite simply, this does not constitute the kind of conduct protected by the WPA.

"The primary motivation of an employee pursuing a whistleblower claim 'must be a desire to inform the public on matters of public concern, and not personal vindictiveness.'" *Shallal v Catholic Social Services of Wayne Cty*, 455 Mich 604, 621; 566 NW2d 571 (1997), quoting *Wolcott v Champion Int'l Corp*, 691 F Supp 1052, 1065 (WD Mich, 1987). Whether plaintiff reported Lavandowski because she thought it would protect her job when she thought she might be terminated, or whether she was engaged a form of preemptive reprisal for her anticipated termination, no evidence suggests she made the report with any "desire to inform the public on matters of public concern . . . ." *Id.* We cannot countenance the use of the WPA "'as an offensive weapon by [a] disgruntled employee[ ].'" *Shallal*, 455 Mich at 622, quoting *Wolcott*, 691 F Supp at 1066. Accordingly, the trial court correctly granted summary disposition to defendants and we need not address the parties' remaining arguments.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio