STATE OF MICHIGAN

COURT OF APPEALS

TRICIA M. CALDWELL,

Plaintiff-Appellant,

v

COMMUNITY HEALTH CENTER OF BRANCH COUNTY,

Defendant-Appellee.

UNPUBLISHED
July 28, 1998

No. 198238
Jackson Circuit Court
LC No. 95-074513 NO

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10). Plaintiff's complaint alleged that she was discharged from her employment in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.* We reverse and remand.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). The court must review the evidence, and all reasonable inferences drawn from it, and decide whether any genuine issue of material fact exists to warrant a trial. *Baker, supra*. Summary disposition should only be granted if, except regarding the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

To establish a prima facie case under the WPA, a plaintiff must show that (1) she was engaged in protected activity as defined by the act, (2) the defendant discharged her, and (3) a causal connection exists between the protected activity and the discharge. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). On appeal, the parties raise two issues: (a) whether plaintiff

engaged in protected activity under the WPA, and (b) whether defendant's decision to fire plaintiff for allegedly poor job performance was a mere pretext for discrimination under the WPA.

Defendant suggests that plaintiff failed to prove that she engaged in any protected activity under the WPA. "Protected activity" under the WPA includes being about to report a violation of a law, regulation or rule to a public body. *Chandler*, *supra*. This element must be supported by clear and convincing evidence. *Id*. See also MCL 15.363(4); MSA 17.428(3)(4). In discussing the "about to report" element, the Supreme Court in *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 613-621; 566 NW2d 571 (1997), held that the employee had the burden of showing that she was about to report a violation to a public body and that her report was warranted, but that her proof need not consist of a concrete action. *Id*. at 615. In *Shallal*, the plaintiff made an express threat to her employer that if he did not straighten up, she would report his abuse of agency funds. *Id*. at 614. The Court found that this threat clearly evidenced an intent to report the matter, and was sufficient to satisfy the "about to report" requirement of the WPA. *Shallal*, *supra* at 619-621.

In the instant case, plaintiff sent a memo to defendant's chief financial officer (Rossi) explaining that she suspected a wage violation and expressly informing him that she had "no choice but to report this to the Michigan Department of Wage and Labor … and the United States Department of Wage and Labor." Thus, we conclude that plaintiff satisfied the "about to report" language of the WPA, *Shallal*, *supra* at 619, and that the trial court properly denied defendant's motion for summary disposition on this basis. *Lynd v Adapt, Inc*, 200 Mich App 305, 306; 503 NW2d 766 (1993).

Next, plaintiff maintains that the trial court erred in granting defendant summary disposition on the basis that she had failed to establish a genuine issue of material fact regarding the causal connection between her statement of intent to report defendant's labor law violations and her subsequent termination. We agree.

After a plaintiff successfully presents a prima facie case of discrimination under the WPA, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the plaintiff's discharge. *Phinney v Perlmutter*, 222 Mich App 513, 563; 564 NW2d 532 (1997). If the defendant carries its burden, the burden shifts back to the plaintiff to prove that defendant's proffered legitimate reason for the discharge was not the true reason, but merely a pretext for discrimination. *Id*. The plaintiff may satisfy this burden directly by demonstrating that a discriminatory reason more likely motivated the defendant or indirectly by showing that the defendant's proffered explanation is not worthy of credence. *Id*.

Plaintiff presented evidence raising a genuine issue of material fact regarding whether defendant's allegations of her poor performance served as a pretext to its actual, discriminatory motivation in terminating her employment. In support of its motion for summary disposition, defendant produced affidavits of plaintiff's supervisors, a survey of plaintiff's department (discussed further below) and some other evidence that problems such as employee resentment of plaintiff and a backlog in record transcriptions existed in her department prior to her threat to report defendant's wage violation. However, plaintiff's affidavit accompanying her answer to defendant's motion for summary disposition alleged that the record transcription backlog had existed before her term of employment began, and that

during her tenure she reduced the transcription turnaround time. The parties apparently agree that prior to plaintiff's threat to report defendant, defendant requested that she prepare a plan of action to address the problems within her department. Defendant contends that its request for the plan was unique to plaintiff, but plaintiff counters in her affidavit that defendant expected each department to formulate such a plan every six months. While plaintiff admitted that a meeting aimed at improving her relationship with her employees took place prior to her threat to report defendant, plaintiff also stated that defendant subsequently gave her a raise based on Rossi's assessment that she had been doing a fine job. About the time that plaintiff threatened to report defendant, defendant's chief executive officer ordered Rossi to conduct a survey of all the employees in her department. When some employees expressed dissatisfaction with her leadership and management skills, defendant utilized that survey as a factor in the decision to terminate her employment. The timing of the survey gives rise to an inference that the survey was conducted specifically to gather evidence against plaintiff regarding her allegedly poor job performance.

Construing this conflicting evidence in the light most favorable to plaintiff, we conclude that a question of fact exists as to whether defendant's allegations that plaintiff poorly performed her job were a pretext for terminating plaintiff's employment. The approximate four-month lapse of time between plaintiff's threat to report defendant and the date defendant terminated her employment did not break the causal connection between these events, particularly when plaintiff was asked to resign within two months of reporting the wage problem. *Terzano v Wayne Co*, 216 Mich App 522, 533; 549 NW2d 606 (1996). On these facts, it was for the jury to decide defendant's true motivation for discharging plaintiff, and the trial court improperly granted defendant summary disposition.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage