STATE OF MICHIGAN

COURT OF APPEALS

ANDREW MILLER and BARBARA MILLER,

Plaintiffs-Appellants,

v

TENNECO AUTOMOTIVE, INC., a/k/a TENNESSEE GAS PIPELINE, d/b/a WALKER MANUFACTURING COMPANY, and JOHN ULERY,

Defendants-Appellees.

UNPUBLISHED
December 28, 1999

No. 213482
Hillsdale Circuit Court
LC No. 96-026317 CZ

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiffs[1] appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse in part and affirm in part.

This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Marx v Dep't of Commerce*, 220 Mich App 66, 70; 558 NW2d 460 (1996). A motion for summary disposition under MCR 2.116(C)(10) may be granted when, except with regard to damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

Plaintiffs first claim that the trial court erred in granting summary disposition of plaintiffs' claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.* The trial court found that plaintiffs failed to establish a prima facie case under the WPA. We disagree with the trial court.

To establish a prima facie case under the WPA, a plaintiff must show (1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, 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); *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999), lv pending. At issue in this case is the causation element.

We find that, giving the benefit of reasonable doubt to plaintiffs, the nonmoving parties, and making all reasonable inferences in favor of plaintiffs, *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995), plaintiffs created an issue of fact regarding the causal connection between plaintiff's reports regarding the plant's air quality to state authorities and plaintiff's discharge. The causal connection can be inferred from the fact that plaintiff's discharge occurred shortly after his reports regarding the air quality. Moreover, plaintiffs produced an affidavit from a former engineering supervisor at the plant, Kenneth Stone, in which Stone states that he overheard Frank Dillon, the engineering manager, say: "We're going to have to get rid of Andy [plaintiff] because he is causing too much trouble." In addition, the tape recording of the meeting between plaintiff, Ulery, and Flint, during which plaintiff is discharged, reveals that management was concerned with plaintiff's testing of the carbon monoxide levels in the plant and his reports to authorities. If the jury believes plaintiff's evidence, it could infer a causal connection between plaintiff's reports and his discharge. See *Henry, supra* at 414; *Tyrna v Adamo, Inc*, 159 Mich App 592, 601; 407 NW2d 47 (1987).

Defendants argue they established a legitimate, non-discriminatory reason for plaintiff's discharge, i.e. that plaintiff failed to comply with defendants' reasonable request that he visit the company doctor, and that plaintiff failed to show that this reason was pretextual. We disagree. The evidence from which a causal connection can be inferred is also evidence that defendants' proffered reason for discharge was pretextual. A plaintiff may meet the burden of showing pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Phinney v Perlmutter*, 222 Mich App 513, 563; 564 NW2d 532 (1997). Especially persuasive in this case is Stone's affidavit, which is direct evidence of management's intent. Whether the reports to state authorities regarding the plant's air quality or plaintiff's failure to comply with defendants' request to visit the company doctor was the real reason for plaintiff's discharge should be determined by a jury. *Henry, supra* at 414. Accordingly, the trial court should not have granted summary disposition to defendants on plaintiffs' claim under the WPA.

Plaintiffs next argue the trial court erred in granting summary disposition in favor of defendants on their claim of intentional infliction of emotional distress based on reports made to the police and the Department of Social Services that plaintiff may be locking his children in closets. The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). Liability for intentional infliction of emotional distress will only attach where the plaintiff shows conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id*. at 234; see also *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 616; 396 NW2d 809 (1986). It is initially for the Court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). However, where reasonable persons may differ, it is for

the jury, subject to the control of the court, to determine, whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. *Id.*

We agree with plaintiff there are factual conflicts in the record regarding the reason the reports were made. Specifically, defendant Ulery testified in his deposition that plaintiff told him that "he had beat his wife and locked his kids in the closet like every other employee out there had been doing." The transcripts of the taped meetings include statements by plaintiff that one or more employees of the plant had confided to him that they had locked their children in closets because of the effect of the carbon monoxide at the plant, but does not include any statements that plaintiff himself had locked his children in closets. However, during his deposition plaintiff apparently denied making any statements about children being locked in closets. Such a factual dispute precludes this Court from determining whether the act of reporting plaintiff for potential child abuse was extreme and outrageous. Accordingly, the trial court erred in concluding as a matter of law that defendants' actions did not constitute extreme and outrageous conduct.[2]

Plaintiffs finally address the trial court's grant of summary disposition in favor of defendants' on their defamation claim. Plaintiffs' argument on this issue is conclusory and devoid of citation to authority. Accordingly, we decline to consider this issue. *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987); *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

Reversed in part and affirmed in part. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff

[1] Plaintiff Barbara Miller's claims are derivative of her husband's claims. We assume, without deciding, that Mrs. Miller is a proper party to this lawsuit because the issue is not before this Court.

[2] We do not consider defendants' argument regarding damages because it was not addressed below.