STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW HOOKER and DIANE HOOKER, Plaintiffs-Appellants,	UNPUBLISHED March 18, 2004
v	No. 245673 Jackson Circuit Court
W.A. FOOTE MEMORIAL HOSPITAL, Defendant-Appellee.	LC No. 01-004570-CL

Before: Jansen, P.J., and Markey and Gage, P.J.

PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff Matthew Hooker (Hooker), a computer network specialist at defendant hospital, was terminated on June 1, 2001, after receiving four corrective action documentation forms for violations of defendant's progressive corrective action policy which includes four levels of discipline: a documented verbal warning, a written warning, a final written warning, and, finally, discharge. Hooker received his first corrective action document form on November 21, 2000, from supervisor, Clark Beach, for wearing pants which violated defendant's dress code. On April 26, 2001, Beach issued Hooker two additional corrective action documentation forms. One was for a violation of defendant's dress code, and the second was for unbecoming conduct or inappropriate behavior arising from Hooker's profanity to a subordinate employee. On June 1, 2001, Beach issued Hooker the final corrective action documentation form, for which Hooker was terminated in accordance with defendant's progressive policy, again for conduct unbecoming or inappropriate behavior during a meeting with two of Hooker's superiors. During his deposition, Hooker admitted that he had engaged in unprofessional behavior during the meeting by using profanity.

Plaintiffs filed a complaint alleging that Hooker's termination was retaliatory in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., because Hooker had allegedly threatened to report Beach to Microsoft, the Business Software Alliance (BSA), and the legal authorities when Beach ordered him to illegally uninstall unlicensed software from defendant's computers during the course of an internal software licensing audit. The circuit court

granted defendant's motion for summary disposition based on its determination that plaintiffs had failed to show that Hooker was about to report Beach's activities to a public body; therefore, he was not engaged in activity protected under the WPA. Moreover, the circuit court held that plaintiffs had failed to show that Hooker's termination was causally connected to his alleged protected activity.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). This Court recently stated the legal standard to be applied when reviewing a motion for summary disposition brought under MCR 2.116(C)(10) in *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 611-612; 658 NW2d 494 (2003):

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A motion for summary disposition should be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Veenstra, supra* at 164. In deciding a motion brought under this subsection, the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Veenstra, supra* at 164. The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material facts exists." *Id.* The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. *Veenstra, supra* at 164.

The WPA states that "[a]n employer shall not discharge . . . an employee . . . because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation . . . to a public body . . . ." MCL 15.362. To establish a prima facie case under the WPA, a "plaintiff must show that (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), citing *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997). In the present case, it is undisputed that Hooker was discharged, so plaintiffs only had to provide facts from which a trier of fact could reasonably conclude that Hooker had been engaged in protected activity and that the activity was causally connected to his discharge. *Shallal, supra* at 610.

Plaintiffs first contend that the trial court erred in determining that Hooker was not engaged in protected activity because he had asserted in his deposition and in an affidavit that he had informed Microsoft that Beach was proposing to uninstall the software. The circuit court, however, did not consider this issue and did not reach that conclusion in its order. Moreover, plaintiffs, in fact, expressly stated during the hearing on defendant's motion that they were proceeding only under the "about to report" criterion. Therefore, this issue is not preserved because plaintiffs did not raise it below, and it was not addressed by the circuit court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). But, even if plaintiffs had preserved this issue, Microsoft does not constitute a public body as defined in MCL 15.361(d). In order for Hooker to be protected by the WPA, plaintiffs had to establish a question of fact regarding whether he was about to report violations to a public body. *Shallal, supra* at 610-611. We believe that plaintiff established such a question of fact. But, in order to satisfy their burden of establishing a prima facie case, plaintiffs had the additional burden of showing causation. *Shallal, supra* at 610. "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 v General Motors Corp*, 469 Mich 177, 184; 665 NW2d 468 (2003). Thus, in order to avoid summary disposition, plaintiffs must demonstrate that defendant engaged in employment action adverse to Hooker "*because of*" Hooker's protected activity. They may not merely rely on a showing that the adverse employment action was taken "*after*" Hooker allegedly engaged in protected activity. *Id*. at 185 (emphasis in *West*). We conclude that plaintiffs have failed to meet this requirement.

Here, Hooker testified during his deposition that he had no evidence other than the fact that the Microsoft audit had occurred and that he had threatened Beach to support his allegation that the corrective action forms he received after the audit and his subsequent termination were causally connected to his alleged protected activity. In opposing defendant's motion for summary disposition, plaintiffs could not rest upon the allegations stated in their pleadings; they were required to set forth in affidavits or via other documentary evidence that a genuine issue of material fact existed. *Allen v Comprehensive Health Services*, 222 Mich App 426, 433-434; 564 NW2d 914 (1997). Plaintiffs here did not present any such evidence.

Plaintiffs, however, allege that the fact that Hooker was terminated approximately five months after he allegedly threatened to report Beach provides circumstantial evidence of causation. Our Supreme Court, however, has recently clarified that "such a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *West, supra* at 186. Instead, "[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *Id*.; see also *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 662; 653 NW2d 625 (2002). In respect to causation, plaintiffs offered only evidence of the temporal proximity, and Hooker's deposition testimony that he had received a Foote excellence award in 2000 in an effort to show that plaintiff possessed a positive employment record before engaging in the protected activity. But, during his deposition, Hooker concluded that his entire department received an award in 2000 for its handling of the Y2K transition. Moreover, the evidence presented during defendant's motion shows that Hooker received the first of the corrective action documents on November 21, 2000, before Hooker allegedly threatened to report Beach in January of 2001. Therefore, we

conclude that the circuit court correctly determined that plaintiffs failed to establish causation and, therefore, failed to establish a prima facie case of retaliatory discharge under the WPA.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage