STATE OF MICHIGAN

COURT OF APPEALS

DAVID HOLUBOWICZ,

Plaintiff-Appellant,

v

JACKSON COUNTY,

Defendant-Appellee.

UNPUBLISHED
December 21, 2006

No. 270992
Jackson Circuit Court
LC No. 05-004698-CD

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In this case alleging wrongful discharge under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

Plaintiff was employed by defendant as the assistant facilities manager and reported to facilities manager Jerry Bethel. Beginning in 2003, the county commenced a renovation product to transform its old medical care facility building into a new county Human Services Building (HSB). Bethel bore responsibility for the project, but both he and plaintiff were in charge of overseeing the project. Employees of the maintenance department were required to perform some of the work on the building, particularly in relation to demolition. To assist them, the county utilized the services of some trustees from the jail and persons assigned to perform community service.

According to Bethel, because there was no water at the job site and in an effort to make the project run smoothly, he directed maintenance employee Jim Nichols to sell the scrap material retrieved from the demolition project and use the proceeds to buy such items as water, coffee, and food for the workers. Employee Dennis Spitler apparently assisted Nichols at times. Plaintiff, who supervised both Nichols and Spitler, was present when Bethel gave this direction.

When Bethel announced he would retire effective June 18, 2004, plaintiff applied for the position. Although plaintiff had the support of several Jackson County commissioners, judges, and department heads, county administrator Taraskiewicz chose an outside candidate, Dave Comiskey, for the position. On June 30, 2004, plaintiff entered the county's Deferred Retirement Option Plan (DROP). Under the program, he was permitted to continue active employment with the county for three years – until June 30, 2007. On July 6, 2004, Taraskiewicz orally warned plaintiff that certain of plaintiff's actions were "inappropriate and

bordering on insubordination." In a July 9, 2004, letter to plaintiff regarding the oral warning, Taraskiewicz noted that plaintiff had indicated that he could not give Taraskiewicz 100% support with regard to the decision to hire Comiskey. Taraskiewicz advised plaintiff to "decide whether you are going to be supportive of the new Facilities Director or whether you should be returning to the County." Comiskey commenced employment on July 19, 2004.

Sometime thereafter, plaintiff suspected that Comiskey did not have a driver's license. Believing that a driver's license was a requirement for the position of facilities manager, plaintiff reported his suspicions to three county commissioners. According to plaintiff, within days of reporting his suspicions to the commissioners, Comiskey placed him on a Performance Improvement Plan (PIP) due to "accountability and productivity concerns." In a letter to plaintiff dated September 17, 2004, Comiskey stated:

> Today I met with you . . . to review your progress with the performance improvement plan issued to you on August 12, 2004. I am encouraged by the change I have observed so far. You appear to be meeting the intent of the plan and you have made positive effort in working toward running the department as a team.
>
> Although your progress has been positive, I am extending the performance improvement plan for another 30 days. During the next 30 days you are to continue to follow the provisions in the original performance improvement plan dated August 12, 2004, with the following modification:
>
> - You are to provide me with your written time detail report every Friday.
>
> If you continue on the same path I have seen in the past month, and assuming no other issue arises regarding job performance, I anticipate that we will end the performance plan at that time.
>
> We will meet again on or about October 18th to evaluate your job performance under this plan.

The PIP was terminated on October 18, 2004.

According to plaintiff, in late October 2004, facilities employee Tim Yost informed plaintiff that a natural gas regulator was removed from the high pressure gas line leading to the incinerator at the Jackson County animal shelter and that nobody should light the pilot lights. Plaintiff arranged to have the gas shut off. Comiskey became upset when plaintiff explained the situation to him the following day. In early November 2004 plaintiff told three or four county commissioners that Comiskey approved the illegal removal of the natural gas regulator.[1]

---

[1] Plaintiff also reported the incident on January 27, 2005, to the new county administrator, Robert Elliott, and on February 7, 2005, provided a memorandum detailing the incident. Comiskey also provided a report of the incident to Elliott indicating that the removal of the (continued…)

In late 2004, maintenance employee Porras was assigned to work at the HSB. He complained to his supervisor about the sale of the scrap and the use of the proceeds to purchase food and beverages. The Michigan State Police conducted an investigation that resulted in a January 2005 report that revealed that the sale of the scrap had netted over $10,000, all of which was paid in cash or by check to Jim Nichols. None of the money had been turned over to the county treasurer. The county human resources department also conducted an investigation, which included interviews with several witnesses. Ultimately, the department decided to terminate the employment of both Nichols and Spitler for their roles in the sale of the scrap.[2]

On January 27, 2005, Comiskey demoted plaintiff from assistant facilities manager to plumber. According to plaintiff, during the meeting Comiskey repeatedly put his face near plaintiff's face, pounded his fists on the table, and smacked his fist into his other hand while screaming, cussing, and making threatening statements. Plaintiff called 911 during the altercation. A police officer from the Jackson Police Department took statements from both plaintiff and Comiskey, and plaintiff later filed a complaint against Comiskey.

(…continued)

regulator did not present a safety concern.

[2] Both Spitler and Nichols grieved the discharges through their union. Labor Arbitrator Brodsky ruled that there was a legitimate just cause basis for imposing discipline in the case of Spitler and Nichols. She held that their sale of scrap and purchase of coffeemakers, water dispensers, and food and beverages violated county work rules and County Policy # 5160. She opined that Spitler and Nichols could not lay the blame on Bethel:

> Like Mr. Porras, the grievants should have inherently known that the system was corrupt. The grievants cannot lay the blame at Mr. Bethel's feet an have their behavior excused on the basis that they simply followed his orders. It is easy at this point to make Mr. Bethel the "fall" guy since he is safely ensconced in retirement. The grievants are imputed with the knowledge that Bethel was not high enough in the County hierarchy to authorize the use of County monies for a separate substantial HSB "keep the job going" fund. Furthermore, scrap was cashed in for a considerable amount of time after Bethel retired and who was allegedly authorizing the operation then?
>
> Thus the entire operation, despite its apparent overtness, was wrong. . . . It is undeniably a form of conversion and the grievants and other HSB project workers benefited from the operation's ill-gotten gains. The Union witnesses agreed that it would be wrong to pass out $10 bills to keep the job going, but it is certainly easier to rationalize rewarding the workers with Dove Bars and pistachios for a hard day's work. In sum, regardless of the grievants' alleged lack of familiary with Policy #5160, they failed to take proper care of the Employer's scrap in violation of Rule #6 ["Employees shall take proper care and use of the County's property and other employee's property."]. Moreover, although what was accomplished may or may not fit a strict definition of stealing, the conversion of scrap proceeds to purchase goods consumed by HSB workers is a violation of at least the spirit of Rule #12 ["Employees shall not steal or attempt to steal."]

On February 1, 2005, Comiskey suspended plaintiff from February 2 – 10, 2005, without pay for "insubordination and workplace violence." The letter to plaintiff identified plaintiff's instances of misconduct, and also stated:

> You have also been advised that the County is investigating allegations that you have threatened and intimidated other employees[3] and *the State Police and County are investigating allegations of improper disposition of salvage from the Human Services Building and other projects.* The County reserves the right to impose additional discipline up to and including discharge based on the outcome of those investigations.
>
> You are directed to attend a disciplinary hearing on February 10, 2005 at 10:00 AM regarding those matters. [Emphasis supplied.]

On February 8, 2005, plaintiff filed a complaint against Comiskey under the Jackson County workplace violence policy.[4] New administrator Elliott delegated to deputy county administrator Treacher the duty to determine if plaintiff should be disciplined for his role in the sale of scrap.

A disciplinary hearing was held on February 22, 2005. At that meeting, plaintiff requested an adjournment to give him time to decide whether to provide the county with tapes and transcripts of certain recorded conversations between himself and Comiskey.[5] In a

---

[3] According to plaintiff, Comiskey solicited complaints from plaintiff's subordinates, whom plaintiff described as "resentful" toward plaintiff because plaintiff insisted that they do their jobs.

[4] On March 3, 2005, interim human resources director Joni Johnson informed plaintiff by written memorandum:

> On February 8, 2005, you filed a workplace violence incident report for an incident that occurred on January 31, 2005 between you and Dave Comiskey, Facilities Manager. The investigation into this incident is now complete.
>
> It has been found that the evidence indicates that you were threatened by Dave Comiskey and therefore a violation of the County's Workplace Violence Policy did occur. In addition, the evidence also indicated that you also were in violation of the Workplace Violence Policy with your aggressive behavior and you could have avoided any further confrontation by leaving the building when you were directed to do so.
>
> Appropriate disciplinary action will be taken with Mr. Comiskey.

[5] Apparently as a result of Elliott's review of the tape recordings between plaintiff and Comiskey, as well as other information, on March 7, 2005, he recommended the termination of Comiskey's employment. The Board of Commissioners apparently adopted the recommendation soon thereafter.

memorandum to plaintiff dated March 4, 2005 (subsequent to review of the tapes and transcripts), deputy administrator Treacher stated in relevant part:

> After reviewing all of the relevant information in this matter, including the State Police Report, I have concluded that your employment should be terminated effective immediately.
>
> Although you are an employee-at-will who is subject to termination with or without cause at any time, there is more than adequate cause for your termination. The reasons include the following:
>
> 1. The County's investigation and the investigation conducted by the State Police have confirmed that you were well aware that scrap and other items of considerable value from the Human Services Building were sold to OMNISource and that the proceeds were not turned over to the County. Proceeds from the sale of those items since June 30, 2003 were in excess of $10,000.00. A portion of the proceeds was used to purchase food and beverages for employees and others at the Human Services Building.
>
> Upon questioning, you also stated that you were aware that Larry's Hauling was removing a large amount of material from the Human Services Building.
>
> Such sales of County property violate Work Rule No. 6 which requires that employees take proper care and use of County Property.
>
> Such sales and disposition of County property also violate County Policy No. 5160. The Policy provides that excess County property may only be sold at the discretion of the Facilities Manager and the Administrator/Controller. It is also evident that you were aware of this Policy as you not only purchased excess property in (at least) 2003 but also signed several of the disposition forms.
>
> Moreover, at no time after Mr. Comiskey became the Facilities Manager in July, 2004, did you advise him or me of such sales or the existence of the food and beverage fund at the Human Services Building.
>
> 2. Your actions have caused your relationship with Mr. Comiskey and other Department employees to deteriorate to the point that they can no longer work effectively with you. Complaints have been received from other employees in the department, including Dave Porras, Lee Dempsey, and Tim Yost, about your threatening and intimidating conduct towards them.

Plaintiff filed a complaint against defendant under the WPA on May 12, 2005. In Count I he alleged that he was discharged for speaking with county commissioners regarding his suspicion that Comiskey did not have a driver's license. He also alleged that he was discharged because he told commissioners in November 2004 about Comiskey approving the removal of the natural gas regulator at the animal shelter. In Count II plaintiff alleged that defendant discharged him because he filed a complaint with the Human Resources Department claiming that he had

been the victim of workplace violence by Comiskey on January 31, 2005. In Count III plaintiff alleged that he was discharged for making a complaint on January 31, 2005, to a Jackson city police officer about the alleged assault by Comiskey.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), contending that plaintiff failed to create a question of fact with regard to whether defendant had retaliatory animus toward plaintiff based upon his protected activity that motivated the discharge. Specifically, with regard to Count II, defendant argued that plaintiff's report to the human resources department did not constitute protected activity because the report was to plaintiff's employer, rather than a separate public body. With regard to the entire complaint, defendant argued that plaintiff failed to establish a causal nexus between what he allegedly reported and his discharge. Defendant also argued that it established a legitimate reason for the discharge and that plaintiff failed to demonstrate that the reason given by defendant was simply a pretext. Plaintiff filed a cross-motion for summary disposition, arguing that defendant failed to establish a material issue of fact with respect to plaintiff's showing of pretext.

Following a hearing, the trial court granted summary disposition in favor of defendant:

> It is a (C)(10) motion. The reason for the discharge that's proferred is that the employees sold scrap without authority and without turning over the funds to the county, and we're talking about proceeds in excess of $10,000.00, kept no records of it, had no authority to do it. And I think that's - - the records show all that is correct, and also that the Plaintiff knew about this at the time he was there, he knew it violated county policy, and he didn't do anything about it. The employees that did this were fired. I think that this is a legitimate reason for the plaintiff's discharge. I don't think that there's a pretext. I don't' think he's been singled out. His supervisor was fired two or three days later. . . .

Plaintiff argues that the trial court erroneously determined that there was no genuine issue of material fact that defendant's articulated reason for termination was legitimate and non-retaliatory because defendant admitted that its articulated reason was not the real reason for plaintiff's termination. This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999).

Plaintiff's whistleblower claim was brought under MCL 15.362, which states:

> 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.

The elements necessary to establish a prima facie case of a WPA violation are: (1) that plaintiff was engaged in protected activities as defined by the act; (2) that plaintiff was subsequently discharged, threatened, or otherwise discriminated against; and (3) that a causal connection existed between the protected activity and the discharge, threat, or discrimination. *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 491; 705 NW2d 689 (2005). The trial court did not address the issue of whether plaintiff established a prima facie case. Rather, the court based its running on the ground that there was no genuine issue of material fact that defendant presented a legitimate, non-discriminatory reason for the discharge and that plaintiff presented insufficient evidence to establish a genuine issue of material fact with regard to whether defendant's purported reason for terminating plaintiff was a pretext.

When considering claims under the WPA, this Court applies the burden-shifting analysis used in retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq*.; *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281, 608 NW2d 525 (2000). If the plaintiff has successfully proved a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for the plaintiff's discharge. *Id*. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge. *Id*.

Here, defendant offered evidence that it discharged plaintiff because of his knowledge that the scrap was being sold and that the proceeds were being kept for use by the employees rather than being turned over to the county treasurer. This evidence satisfies defendant's burden.

Plaintiff argues that this was not the true reason for his discharge and is merely a pretext. In order for plaintiff's claim to survive the motion for summary disposition, plaintiff must "demonstrate that the evidence in the case ... is 'sufficient to permit a reasonable trier of fact to conclude that [plaintiff's protected activity] was a motivating factor in the adverse action taken by the employer....' " *Hazle v Ford Motor Co*, 464 Mich 456, 465, 628 NW2d 515 (2001), quoting *Lytle v Malady (On Rehearing*), 458 Mich 153, 176; 579 NW2d 906 (1998). In other words, a plaintiff must " 'raise a triable issue that the employer's proffered reason ... was a pretext for [retaliating against plaintiff's protected activity].' " *Hazle, supra* at 465-466. "A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Roulston, supra* at 281, citing *Hopkins v Midland*, 158 Mich App 361, 380; 404 NW2d 744 (1987).

Plaintiff raises several arguments in support of his contention that defendant's proferred reason for discharging plaintiff was pretexual. Plaintiff first argues that Treacher's testimony eliminates any question of fact regarding pretext. Specifically, plaintiff contends that Treacher conceded that the reason given in the termination letter – particularly the violation of Work Rule No. 6 and County Policy No. 5160 -– was not the true reason for discharge. Plaintiff's contention is based on the following excerpt of Treacher's deposition testimony:

> Q: (Plaintiff's attorney): Well, then why is it that the county decided to fire Dave Holubowicz?

> A. There were, I believe, reasons given in the termination letter, but those are not the true reasons he was fired. **That is, we don't bear the burden of proof on those areas because he was an at-will - the position's an at-will position.**

When read in context, Treacher's comment does not support plaintiff's argument that Treacher denied that plaintiff was terminated because he allowed the unapproved sale of the scrap. Rather, Treacher's use of the phrase "that is," suggests that he is explaining what he meant by his previous comment. In other words, although there were reasons given for the termination, defendant did not have to provide a reason for the termination because plaintiff was an at-will employee. Additionally, Treacher also testified:

> Q. (Plaintiff's attorney): Your problem from a county standpoint is that Mr. Holubowicz was aware of it [scrap sales]. Is that where you're coming from?
>
> A. Yes.
>
> Q. Okay. And you've never lumped Mr. Holubowicz in with Mr. Spitler or Mr. Nichols, is that correct, in terms of responsibility for this scrap violation policy?
>
> A. Well, no. I don't know if I'm answering your question exactly. Do I lump him in with them? I believe that he and Jerry Bethel were as guilty, yes. Probably more guilty.

Treacher's comments, read in context, do not support plaintiff's argument that Treacher conceded that the articulated reason for termination was false.

Plaintiff also argues that Bethel had discretion under County Policy No. 5160 to sell excess county property and that he was not obligated to second-guess Bethel's exercise of discretion. However, a review of the record reveals that plaintiff was aware that a procedure existed for the approval of the sale of county property and that the procedure was not complied with in regard to the sale of the scrap.[6]

Plaintiff further argues that defendant began soliciting complaints against plaintiff in December 2004 after plaintiff reported the incident at the animal shelter. He argues that "they show that defendant was attempting to build a case to fire plaintiff and, hence, are evidence of pretext." However, a review of the record reveals no evidence that defendant began an investigation against plaintiff in retaliation for having engaged in a protected activity. Rather, Porras made a complaint regarding the sale of scrap to his supervisor and the complaint led to an

---

[6] Plaintiff also argues that "Treacher's disapproval of plaintiff's reporting [of the incident at the animal shelter] also establishes pretext." We are unable to determine what, precisely, plaintiff is attempting to argue. Nonetheless, there is nothing in the record to indicate that plaintiff was prevented from filing any reports.

investigation by the human resources department and the Michigan State Police. The human resources department interviewed employees who worked on the HSB project. After the investigation was completed, one employee (Nichols) was discharged and one employee (Spitler) was recommended for discharge but was eventually given a 13-month suspension. Contrary to plaintiff's suggestion, the evidence shows that the investigation was not aimed at plaintiff but, rather, at the practice of selling scrap from the HSB project and keeping the proceeds for use at the job site.

Lastly, plaintiff contends that he bore no responsibility for the sale of the scrap and was not involved in the practice. He contends that Bethel is solely responsible for the decision to sell the scrap and use the funds for food and beverages. However, as stated above, plaintiff was one of two people involved in "overseeing the complete remodeling project of the Human Services building" (plaintiff's words) and was aware that the county had procedures in place for the sale of county property. Plaintiff was familiar with County Policy No. 5160 and should have inherently known that use of the proceeds from the sale of scrap to purchase food and beverages for workers violated county policy.

Defendant cited a legitimate non-retaliatory reason for plaintiff's termination and plaintiff failed to present substantive evidence showing that defendant's reasons for terminating plaintiff were either untrue or a pretext for the adverse employment action. We therefore affirm the order granting summary disposition in favor of defendant.[7]

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[7] In light of our decision, we find it unnecessary to address defendants' alternative grounds for affirmance of the trial court's grant of summary disposition.