STATE OF MICHIGAN

COURT OF APPEALS

CLAYTON JENKINS,

Plaintiff-Appellee/Cross-Appellant,

v

TRINITY HEALTH CORPORATION, d/b/a ST. JOSEPH MERCY HOSPITAL,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 28, 2009

No. 284659
Washtenaw Circuit Court
LC No. 05-000894-CD

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

TALBOT, J. (*concurring in part, dissenting in part).*

I concur with the majority regarding the trial court's proper dismissal of plaintiff's quid pro quo sexual harassment claim and the determination that the preclusion of certain evidence did not comprise error. However, I am compelled to disagree with the majority's affirmance of plaintiff's claim of retaliatory discharge because I believe it cannot be sustained and should have been resolved in favor of defendant on summary disposition. I am especially concerned by the majority's selective recitation of facts and failure to give an even-handed and objective representation of undisputed facts, which are both necessary and determinative for the proper resolution of this matter. In particular, the majority treats defendant's explanations for its action in terminating plaintiff's employment as merely tertiary or irrelevant, rather than, as I believe, comprising a sufficient and non-retaliatory basis for plaintiff's firing. As such, I believe it necessary to proceed in this dissent by providing a more comprehensive and inclusive recitation of the factual history in this case.

I. Factual and Procedural History

Plaintiff worked the midnight shift in the Central Supply Processing Distribution Department (CSPD) as a stat messenger. Although dispatchers assigned work to the stat messengers and directed their activities during the shift, they did not have supervisory authority. Plaintiff's direct supervisor was the director for CSPD, James (Jim) Hines.

The incidents which led to plaintiff's complaint arose from interactions involving dispatcher Donald (Donny) Johnson. In late April/early May 2003, plaintiff indicated that Johnson brought in body oils to work and invited plaintiff to go with him to a karaoke bar. Plaintiff did not claim that Johnson made any suggestive comments or engaged in any explicit

sexual remarks during these interactions. While these incidents made plaintiff uncomfortable, he did not immediately report the events or seek the intervention of his supervisor.[1] In addition to these incidents, plaintiff reported three specific interactions to demonstrate sexual harassment. These incidents involved: (1) Johnson touching plaintiff on the arm and shoulder and verbally complimenting his appearance; (2) Johnson touching plaintiff and running his hand down plaintiff's back, while indicating he would accompany plaintiff on his stat messenger runs; and (3) while plaintiff was sitting in a chair reading in the CSPD area, Johnson placing his hand on the front of plaintiff's left thigh. Plaintiff asserts that the incidents made him uncomfortable and he verbally instructed Johnson not to touch him.

Following the third incident of touching, plaintiff complained to Hines, who immediately scheduled a meeting with a representative of defendant's human resources department, Arlene Malvitz. Plaintiff identified an alleged "witness" who would confirm that Johnson was gay. Plaintiff also complained that Johnson fell asleep at work, failed to answer the phones, held assignments until the end of plaintiff's shift and alleged inequity regarding the number of runs he was being assigned, asserting the work was not being evenly distributed amongst messengers. Malvitz determined that plaintiff's claims could not be sufficiently substantiated following her completion of an investigation. Although plaintiff contended that he did not receive written confirmation of this outcome, he acknowledged that Hines verbally informed him of the general determination but would not discuss any detailed findings based on confidentiality. While plaintiff continued to express complaints regarding Johnson's work performance, none of plaintiff's subsequent complaints referenced improper physical contact by Johnson or any sexually suggestive comments. Plaintiff contends that following notification of his complaint Johnson told him he would make his work-life miserable and that defendant would fire plaintiff before it would terminate Johnson.

I believe it is important to correct certain purported factual representations made in the majority opinion. Although plaintiff contended that Hines responded to one of his complaints by indicating "I don't care if you two hug and kiss, I just want the work done," Hines denied making this statement but did agree that he probably indicated he did not care whether plaintiff and Johnson liked each other as long as the work was completed and the department ran smoothly on their shift. In addition, the majority opinion asserts Hines refused to transfer plaintiff to an alternative shift or department. In actuality, Hines investigated the options available to plaintiff on another shift in his department. However, no open positions for a stat messenger existed on the alternative shifts and other employees did not wish to voluntarily switch shifts with plaintiff. Hence, an intra-departmental transfer was not available. In addition, the availability to plaintiff of an inter-department transfer is not automatic because plaintiff must follow a job posting and application procedure, and it was not within the Hines' authority to merely effectuate such a transfer. As a matter of policy, transfers could not be implemented when a Performance Improvement Plan (PIP) remained in effect. In addition, plaintiff did

[1] Contrary to the majority's version, plaintiff indicated he might have informed his supervisor, Hines, of Johnson's actions before the third incident, but was not definitive regarding having verbalized a complaint.

contend that Hines should not be involved because of a business or personal relationship with Johnson. However, this claim was never substantiated as Hines denied any close or personal relationship with Johnson and merely agreed on one occasion to allow Johnson to speak with him, outside of the work place at Hines' home, regarding his interest in being an Amway distributor, which Hines declined.

Although plaintiff asserts his work record was unblemished until he complained of the events involving Johnson, defendant proffered evidence that other employees complained of plaintiff's job performance and demeanor both before and after the filing of his sexual harassment complaint. For example, other CSPD employees complained that plaintiff was asking other messengers to make his runs or refused assignments, was displaying an openly hostile attitude to Johnson, was disrespectful when he received calls from dispatchers and would stare in an intimidating manner.[2] Specifically, in September 2003, a confrontation ensued between plaintiff and Johnson, resulting in the completion of a report by hospital security staff. The disagreement involved the transportation of oxygen tanks and centered on Johnson's refusal to give plaintiff new oxygen tanks until he had brought the expended tanks back to CSPD from the units and plaintiff's attempt to transport the tanks in an improper manner, using a regular messenger cart. According to security personnel, plaintiff brought a staff person from another department in to witness the confrontation and that plaintiff repeatedly sought to have security staff "catch" Johnson asleep on the job. Security documented a statement by a witness provided by plaintiff indicating that Johnson made a comment, which implied that Johnson was arbitrarily changing the procedure in requiring the retrieval of the expended oxygen tanks before distributing new tanks. Notably, plaintiff did not deny that the procedure for transportation of the tanks had been posted and discussed in a CSPD staff meeting.

After receiving a number of complaints and counseling plaintiff on several occasions, Hines instructed plaintiff to report to him if he felt he was being treated unfairly and that Hines, as his supervisor, would follow-up. Hines also consulted with Rocky Buehler, the assigned Human Resources representative for CSPD. At the time he was contacted by Hines, Buehler had no knowledge of plaintiff's previous sexual harassment complaint against Johnson. Buehler recommended that plaintiff be placed on a Performance Improvement Plan (PIP) to formally address job performance concerns. Hines completed the form, which was reviewed by Buehler and his supervisor before being implemented. The PIP was to be in effect for a 90-day period and contained a list of "Performance Behaviors Expected," which primarily required plaintiff to (a) maintain personal confidentiality within his assigned work area, (b) not behave in an offensive or hostile manner toward co-workers, (c) remain in his assigned work area unless fulfilling a job responsibility, (d) display courteous and respectful behavior within his department and to other employees and (e) refrain from the use of derogatory comments or racial slurs. According to defendant, the behaviors listed in the PIP comprise expectations consistent for all employees in plaintiff's position and the initiation of a PIP is not considered a disciplinary

[2] By way of example, it was reported that plaintiff referred to Johnson as an "Uncle Tom" and, on at least one occasion, referenced Johnson by using the "N" word. Plaintiff denied having made such statements.

procedure but, rather, is a "support process" intended to assist employees in meeting job performance expectations.

Following review of the PIP with Hines and Buehler, plaintiff refused to sign the document without first discussing it with an attorney. Plaintiff's attorney forwarded correspondence to defendant's Director of Human Resources indicating his client was the subject of retaliation for having filed a sexual harassment complaint and disputed the necessity of the PIP. Shortly after receiving the PIP, plaintiff initiated treatment for depression and was off work from early November 2003 until January 2, 2004, overlapping almost completely with the effective dates of the PIP. When plaintiff returned from his medical leave, Buehler and Hines verbally informed him that the PIP remained in effect and that the dates had been extended due to his being off work.

In March 2004, Hines received a complaint from Joseph Sophie, the manager of Environmental Services regarding plaintiff questioning his staff about the demotion of an employee in Sophie's department. Approximately one week later, Hines received a report from the Security Department in which another employee, Sheila Turner, accused plaintiff of sexual assault in addition to verbally demeaning her to other employees. Following receipt of these allegations, Hines immediately turned the matter over to Buehler in Human Resources for investigation. Buehler discussed the complaint with Turner, but did not interview plaintiff. According to Buehler, a witness confirmed that plaintiff acknowledged the behavior he was accused of by Turner and other witnesses concurred that plaintiff was referring to Turner as a "bitch" and indicating he would retaliate against her. Following these interviews, Buehler spoke with his supervisor who concurred that plaintiff's employment should be terminated and that recommendation was conveyed to Hines. Concurrently, Hines informed Buehler that plaintiff was not meeting the expectations delineated in his PIP. Buehler and Hines called plaintiff into work and asked him to comment on the allegations. Plaintiff denied the incident or any verbally inappropriate references pertaining to Turner and averred that he and Turner had a previous sexual relationship that had ended poorly and that she was a "scorned woman." At the conclusion of this meeting, plaintiff was informed that he was discharged. The Corrective Action Report indicated the reasons for termination as the violation of hospital policy prohibiting sexual harassment and "[c]onduct, behavior or language creating unsafe, offensive, hostile or threatening environment for employees," and failure to successfully complete the PIP.

At plaintiff's request, a Fair Treatment Review hearing was scheduled to appeal his discharge. Plaintiff was provided the opportunity to submit written testimonials comprised of letters and commendations he received in previous employment settings and while with defendant along with photographs and letters to substantiate his previous relationship with Turner. Plaintiff denied any intimidation or improperly interceding in situations in Environmental Services. Following conclusion of the review hearing, plaintiff's termination was sustained.

II. Retaliatory Discharge

Plaintiff claimed he was discharged in retaliation for filing a same-sex sexual harassment complaint against another co-worker, Johnson. Defendant asserts the trial court erred in failing to dismiss this claim because there is no direct evidence or indication that plaintiff's filing of the complaint was a "significant factor" in the decision to terminate his employment.

In order to establish a prima facie case of retaliation, a plaintiff is required to demonstrate:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 697 NW2d 646 (2005), amended 473 Mich 1205 (2005) (citation omitted).]

To meet the requirement of establishing a "causal connection," a plaintiff must show that his participation or involvement in a protected activity comprised a "significant factor" in his employer's adverse employment action. Merely demonstrating a causal link is insufficient. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Consistent with claims of discrimination, if a plaintiff can establish a prima facie case for retaliation, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer articulates a legitimate and nondiscriminatory reason, a plaintiff must present evidence that the asserted reason by the employer is merely pretextual. *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000).

While plaintiff established the first three elements of his retaliation claim, causation was not established. The primary question to be resolved is whether plaintiff created a question of material fact regarding the existence of a sufficient causal connection between the protected activity and the adverse employment decision. Plaintiff vociferously contends that Johnson's myriad of complaints regarding his job performance, after filing of the harassment complaint, unduly influenced the actions of Hines and Human Resources staff in both placing him on a PIP and ultimately, deciding to terminate his employment. At best, plaintiff's contention is tenuous and speculative. Johnson was certainly not the only co-worker complaining about plaintiff's attitude and work behavior, which plaintiff admitted had deteriorated but blamed on others and his situation.[3] While Johnson's complaints may have influenced the decision to place plaintiff on a PIP, the record is void of any connection to demonstrate that such influence comprised a significant factor in his termination other than plaintiff's own subjective belief and assertion, which is insufficient to meet his burden of proof in opposing the motion for summary disposition. *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 81; 433 NW2d 820 (1988).

Plaintiff does not dispute that Hines placed him on the PIP based on Buehler's recommendation and has not contradicted Buehler's testimony that he was unaware of plaintiff's filing of a sexual harassment complaint approximately four months prior. Although plaintiff contends that the content of the PIP mirrors Johnson's complaints, he ignores that other

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[3] Specifically, at trial, when questioned by his own attorney regarding complaints by other staff members about his job performance, plaintiff stated: "And when I look back overall, I need to take ownership [sic] part of my behaviors as not getting' along with people."

dispatchers and employees also voiced concerns similar to Johnson and has not contradicted defendant's position that the behaviors described in the PIP were not unique to plaintiff, but rather comprised important job expectations for any stat messenger. Even if Johnson's provision of assignments to plaintiff or treatment during his shift was different or retaliatory, there is no evidence that such behavior was a significant factor in the decision to terminate plaintiff's employment, as Johnson had no authority over plaintiff's hiring or firing. While plaintiff may have experienced or perceived a hostile work environment, there is no causal connection between that alleged experience and his termination and plaintiff has not included in his complaint a claim of hostile work environment. Therefore, plaintiff has failed to establish a prima facie case of retaliatory discharge because there was no evidence of a "significant" causal connection between his dismissal and his engagement in a protected activity ten months previously.

In addition, plaintiff was terminated immediately following the filing and investigation of Turner's sexual harassment complaint. Even if a link could be established between plaintiff's filing of a sexual harassment complaint and his subsequent discharge; it is insignificant in light of defendant's articulated reasons for the firing. Although plaintiff may assert that the method and outcome of the investigation for this complaint was unfair or different from the treatment of his prior sexual harassment complaint, that comprises a claim of disparate treatment, which plaintiff did not raise. It is undisputed that Buehler and his supervisor recommended plaintiff's termination following Turner's complaint and that concurrently Hines reached a similar conclusion based on plaintiff's failure to improve his job performance. Having substantiated Turner's complaint against plaintiff, defendant was imminently justified in acting to terminate his employment as a violation of known policies and expectations of behavior. As such, defendant came forward with legitimate nonretaliatory reasons for the termination, which plaintiff has failed to demonstrate constituted a mere pretext.

Citing to various federal cases, plaintiff contends that Hines served as a conduit or "cat's paw" for Johnson's retaliatory animosity. "In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *EEOC v BCI Coca-Cola Bottling Co*, 450 F3d 476, 484 (CA 10, 2006).[4] In addressing this argument, it is important to note that while federal decisions in civil rights cases are often used for guidance they are not binding on Michigan courts. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 410 (1997).[5]

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[4] See also *Arendale v City of Memphis*, 519 F3d 587, 604 n 13 (CA 6, 2008), which held: "When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a 'rubber-stamp' or 'cat's paw' theory of liability."

[5] Our Supreme Court has, at least nominally, recognized the "cat's paw" theory in retaliatory discharge cases. See *Ramanathan v Wayne State Univ Bd of Governors*, 480 Mich 1090, 1096; 745 NW2d 115 (2008).

Pursuant to the "cat's paw" theory, the subordinate rather than the nominal decisionmaker, serves as the impetus for the adverse employment action. Accordingly, when the decisionmaker acts in conformance with the retaliator's animus or bias, "without [him]self evaluating the employee's situation," the retaliator "clearly causes the tangible employment action, regardless of which individual actually" implements the discharge. *Llampallas v Mini-Circuits Lab, Inc*, 163 F3d 1236, 1249 (CA 11, 1998) (citations omitted). "In effect, the [retaliator] is the decision maker, and the titular 'decisionmaker' is a mere conduit for the [retaliator's] discriminatory animus." *Id.*

Plaintiff's reliance on this theory is misplaced. It is important to recognize that when a decisionmaker makes a determination based on an independent investigation, any causal link between the subordinate's retaliatory animus and the adverse action is deemed to be severed. *Wilson v Stroh Cos*, 952 F2d 942, 946 (CA 6, 1992); *BCI Coca-Cola, supra* at 485. The fact that Buehler and Human Resources made an independent investigation of Turner's charges, demonstrates that Hines, in following their recommendation to terminate plaintiff's employment, was acting in his true role as an agent of the employer and not merely a conduit or dupe of the subordinate. Even if plaintiff were to decry that the investigation merely comprised a sham or a façade, the record is not supportive. Buehler investigated Turner's complaint by speaking with her and alleged witnesses. Hines was not involved in this investigation as Turner's complaint was immediately turned over to Human Resources. Contrary to plaintiff's contention, his version of the event was obtained before he was actually terminated. Even if Turner had an ulterior motive in making the allegations, it is insufficient to find that her personal agenda caused the adverse action and is irrelevant with regard to plaintiff's claims regarding the existence of retaliatory motives. When an employer's decisionmaker obtains or attempts to procure all sides of the story or complaint, the employer is not held liable solely because one of the participants may retain a hidden bias against plaintiff. *Llampallas, supra* at 1250. "[S]imply asking an employee for his version of events may defeat the inference that an employment decision was . . . discriminatory." *BCI Coca-Cola, supra* at 488. Notably, plaintiff cannot establish any causal connection between Turner's allegations and his prior filing of a sexual harassment complaint.

Because plaintiff failed to establish a sufficient causal connection between the filing of his sexual harassment complaint and his termination, I believe the judgment should be reversed and the damages award vacated.

/s/ Michael J. Talbot