

STATE OF MICHIGAN
COURT OF APPEALS

DIANE BOOKER,

Plaintiff-Appellant,

v

HENRY FORD HEALTH SYSTEMS,

Defendant-Appellee.

UNPUBLISHED

October 22, 2009

No. 286293

Wayne Circuit Court

LC No. 07-704108-CL

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's suit against her employer originally alleged counts for religious discrimination, disability discrimination and retaliation, but the only issue before us is whether the trial court erroneously made a factual determination regarding her retaliation claim.

Plaintiff was an x-ray technician; her supervisor was Lori Turner. In March 2005, plaintiff requested April 21 as a day off to go to a doctor appointment. Turner gave her permission to be off, but on April 13 Turner changed her mind due to scheduling problems. Plaintiff apparently notified her union representative and began a letter to the regional administrator, Paul Szilagyl. Before plaintiff finished the letter, however, Turner relented and allowed her to take the day off. Although according to plaintiff she had never been disciplined by her employer between 1980 and 2005, starting in June 2005 she began to get written up by Turner for various infractions. Specifically, plaintiff was cited for tardiness on June 30, 2005; dress code violations on July 1, 2005, and August 1, 2005; shutting down the x-ray department due to equipment malfunction without notifying management on December 16, 2005; and closing the department when a patient was waiting in May 2006. For this last conduct, plaintiff was suspended for five days and warned that, "further occurrences may result in progressive actions up to termination."

In September 2006, plaintiff was scolded by Turner for not getting her work done. In response, plaintiff became loud and argumentative, going out to the hallway outside Turner's office and shouting that she wanted witnesses. Turner called for security and notified

defendant's human resources department, then filed a "Corrective Action," checking the line for termination of plaintiff's employment. Plaintiff was suspended pending the outcome of an investigation by human resources personnel which, after finding plaintiff's conduct violated standards of conduct, terminated her employment.

Plaintiff's theory was that Turner engineered the firing in retaliation for plaintiff's having sent the letter to Szilagyl in April 2005. The case proceeded through discovery and to the threshold of trial. On the morning of trial, the court addressed defendant's motion for summary disposition. Regarding plaintiff's retaliation claim, the court noted that there was no evidence Turner single-handedly fired plaintiff, but plaintiff could have a claim if she could prove that defendant's reason for firing her was a subterfuge; however, she would need more evidence than she had presented to that point to support that claim. The court stated, "Nothing in the facts of this case that suggest that your client was in anyways [sic] discriminated against." The court continued, "I don't see retaliation. I don't see anything based on anything that Ms. Turner did. Ms. Turner didn't fire her. Human resources, I don't see any retaliation on their part. If you say that's it[, t]hat's it. Then you lose."

In this Court, plaintiff argues that the trial court improperly decided a fact question in this case, specifically, that the human resources department, and not Turner, fired plaintiff and that issues of fact remain regarding what part Turner played in plaintiff's firing.

Defendant argues that plaintiff simply failed to present any evidence that Turner had any input in the decision, other than initiating the complaint. Plaintiff was required to support her prima facie case with evidence of a connection between the alleged protected activity and the adverse employment decision.¹ Plaintiff did not provide *any* evidence that her termination was a pretext for discrimination. Thus, her claim fails.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although we view substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base her case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff brought her retaliation claim under the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, which provides that a person or persons shall not "retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.1602(a). This Court stated in

¹ Defendant does not concede that plaintiff's letter to Szilagyl qualifies as protected activity, but it is the only action that possibly qualifies as such.

Aho v Dep't of Corrections, 263 Mich App 281, 288-289; 688 NW2d 104 (2004) (citations omitted):

To establish a prima facie case of unlawful retaliation under § 602(a), a plaintiff must show: (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. To establish a causal connection, a plaintiff must demonstrate that his participation in the protected activity was a “significant factor” in the employer’s adverse employment action, not merely that there was a causal link between the two events. Thus, mere discriminatory or adverse action will not suffice as evidence of retaliation unless the plaintiff demonstrates a clear nexus between such action and the protected activity.

If the plaintiff establishes a prima facie case, “the burden shifts to the defendant to articulate a legitimate business reason for discharge.” *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If the defendant provides such a reason, the burden shifts back to the plaintiff to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.

Plaintiff is correct that she has evidence that Turner was the decision-maker because the “Corrective Action” form Turner completed and signed had “termination” checked under the heading, “Current type of action.” It is unknown whether this is an order, a request, or a recommendation. Thus, the trial court’s statement that Turner did not fire plaintiff was an improper factual finding.

However, the court’s finding that plaintiff failed to show retaliation was correct. Even if plaintiff’s allegations—that Turner kept disciplining plaintiff for exaggerated misdeeds, culminating in termination, because Turner resented plaintiff for reporting to Szilagyl—were sufficient to state a prima facie case of discrimination, defendant responded by presenting evidence that Turner fired plaintiff because of her conduct in September.² Plaintiff does not argue that this would not be a legitimate business reason for her discharge. And, as the trial court correctly noted, plaintiff presented no evidence to show that this reason was a mere pretext to conceal the true, discriminatory reason.

² Moreover, it should be noted that plaintiff has shown no more of a causative link than the unsuccessful plaintiff in *Aho*. There, the length of time between the adverse action and the act supposedly causing the retaliation was five years, and the plaintiff had no evidence that retaliation was a “significant factor” in the firing decision. 263 Mich App at 291-292. Although the length of time in the present case is much less than five years, *Aho* noted that periods as short as three months have been found insufficient to support a causal nexus. *Id.*

The trial court's statement that Turner had not fired plaintiff is only one of several reasons it gave for granting defendant's motion. The trial court's conclusion that plaintiff presented nothing to show retaliation was correct, and by itself provides sufficient grounds for granting defendant's motion.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Pat M. Donofrio