# STATE OF MICHIGAN

# COURT OF APPEALS

JESSICA MOYER,

Plaintiff-Appellant,

v

COMPREHENSIVE REHABILITATION CENTER, INC. and DOES 1-5,

Defendants-Appellees.

UNPUBLISHED
September 16, 2010

No. 292061
Jackson Circuit Court
LC No. 07-002182-CZ

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

In this case brought in part under the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*., plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendant Comprehensive Rehabilitation Center, Inc., [1] under MCR 2.116(C)(10) on her WPA claim. For the reasons set forth in this opinion, we affirm the trial court's grant of summary disposition.

Defendant operates residential treatment homes for individuals with physical, mental, and emotional disabilities. Plaintiff worked as a home manager for defendant. Plaintiff alleges that she was demoted from managing two homes to one home and then discharged after she made multiple reports of various resident care issues to the state over an approximate two month period, running from May 4, 2007 to July 12, 2007. Plaintiff argues that the trial court erred in finding that plaintiff had failed to show a genuine issue of material fact regarding the causal element of her WPA cause of action. Plaintiff asserts that the court's error stems, in part, from not considering defendant's action during the entire two month period as evidence of its motive and intent in firing her. Further, plaintiff argues that the court erred in concluding that claims stemming from protected activity occurring prior to May 15, 2007 were barred by the statute of limitations. We review the court's grant summary disposition de novo, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004), considering the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to plaintiff, *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

[1] Further references to "defendant" in this opinion are to Comprehensive only.

Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A WPA claim is 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 goals of the WPA are "to protect the integrity of the law by removing barriers to employee efforts to report violations of the law," and "to protect the public by protecting employees who report violations of laws and regulations." *Faulkner v Flowers*, 206 Mich App 562, 568; 522 NW2d 700 (1994). The WPA is a remedial statute and is liberally construed, favoring the persons the Legislature intended to benefit. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 398; 572 NW2d 210 (1998). To establish a prima facie case under the statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

Assuming without deciding that genuine issues of material fact exist regarding the first two elements of the cause of action, we turn to the question of whether the court erred in finding that a causal connection, beyond proximity in time, could not be established between any protected activity occurring after May 16, 2007 and the adverse employment event. Plaintiff may establish a causal connection between the protected activity and a discharge through direct evidence, which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. *Shaw v Ecorse*, 283 Mich App 1, 14-15; 770 NW2d 31 (2009). Further, it is not required that plaintiff show that the protected activity is the exclusive reason for discharge, *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 454; 750 NW2d 615 (2008), as the direct evidence presented will be sufficient to create a triable issue of fact if the jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation. *Shaw*, 283 Mich App at 15.

Plaintiff argues that there is a temporal component to her causal proofs, but adds that it is not the only evidence of retaliation. She asserts that expressed displeasure with her filing of reports regarding a patient's care and a negative shift in treatment by her superiors immediately following her report of resident mistreatment, constitute evidence of a causal connection. Plaintiff argues that in order to establish the requisite causation, evidence of actions and events occurring on and before May 15 established defendant's motive and intent for discharging her in July. Plaintiff argues that she was called into a meeting after making her first report about the patient's care, at which time it became clear to her that her superiors were unhappy with the reporting. There is some support in her deposition testimony for this allegation. However, we

cannot find evidence from the record to support plaintiff's contention that her demotion resulted from her reporting violations to the state. Rather, the record shows that it was plaintiff's performance as manager of the two homes that lead to defendant removing one of the homes from her supervision. This is echoed, but not directly stated, in plaintiff's May 4 resignation letter.

As for her leaving employment with defendant altogether, there was no testimony from the various witnesses to the events of the day she left employment that the protected reporting was even mentioned. There was substantial testimony, including from plaintiff, that the dispute that lead to what she claims was a discharge, involved care of a resident who required transportation to the hospital while plaintiff was unavailable.

Plaintiff also speaks of management becoming very hostile toward her, including receiving persistent glares from supervisors. Clearly, her supervisors had power over plaintiff, but the cited hostile action is both highly subjective and detached from the exercise of that power. Cf. *West*, 469 Mich at 187 (concluding that, along with "the temporal sequence of events," evidence that two supervisors acted in a "nonchalant" manner toward the plaintiff was not enough to establish the requisite causation). Thus, examining the record in its entirety, we cannot find that the complained of treatment was tantamount to persistent, harassing conduct intended to provoke a response that could be used to justify a discharge. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 541-542; 398 NW2d 368 (1986), overruled on other grounds by *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005).[2] Accordingly, the trial court did not err in granting summary disposition on the basis that plaintiff had not established the requisite causal link.

Plaintiff further argues that, because she proved the elements required for a prima facie WPA claim, the trial court was required to consider whether defendant had a legitimate business reason to fire plaintiff or whether plaintiff can prove that reasons were merely pretextual. However, because the trial court correctly concluded that the prima facie case had not been established, defendant's burden to show a legitimate business reason for plaintiff's termination did not arise. See *Brown v Mayor of Detroit*, 271 Mich App 692, 709; 723 NW2d 464 (2006), aff'd in part, vac'd in part on other grounds 478 Mich 589 (2007).

The trial court also found that plaintiff had failed to file a claim within 90 days as required by the WPA for any incidents prior to May 15, 2007. The WPA provides, "A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1). Plaintiff urges that the claims that were based on defendant's actions prior to the 90 days before she filed her complaint were not barred from recovery, because they were a part of a continuing violation of the WPA against plaintiff. In *Phinney v Perlmutter*, 222 Mich App 513, 546; 564 NW2d 532 (1997), the Court held that the continuing violations doctrine applies to claims under the WPA. However, *Garg* held that the continuing violations doctrine is

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[2] Amended 473 Mich 1205 (2005).

contrary to Michigan law. The Court reasoned that the policy of the continuing violations doctrine asserted in *Sumner* was contrary to, and had "little relationship with," the plain language of the Legislature in the applicable statute of limitations that simply stated that a plaintiff shall not bring a claim for injuries outside the limitations period. *Garg*, 472 Mich at 281-282.

Plaintiff argues that this case is not bound by *Garg* because it was based on the Michigan Civil Rights Act[3] rather than the WPA, and because *Phinney* was not expressly overruled. However, we find the *Phinney* opinion unpersuasive because its result was based on the Supreme Court's reasoning in *Sumner*, which was overruled. Here, the language of the WPA unambiguously requires claims to be made "within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1). Applying the reasoning of *Garg*, to allow recovery for a claim that was not within 90 days of the occurrence of the WPA violation "is simply to extend the limitations period beyond that which was expressly established by the Legislature." *Garg*, 472 Mich at 282. Based on the precedent set forth by our Supreme Court in *Garg*, we are bound to conclude that the continuing violations doctrine is not applicable to WPA claims.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

[3] MCL 37.2101 *et seq.*