STATE OF MICHIGAN

COURT OF APPEALS

KYRIA GORE,

Plaintiff-Appellant,

v

BRENDA BELCHER, DETROIT BOARD OF EDUCATION, and DETROIT PUBLIC SCHOOLS,

Defendants-Appellees.

UNPUBLISHED
March 17, 2011

No. 294157
Wayne Circuit Court
LC No. 08-114429-NZ

Before: SAWYER, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendants on plaintiff's claim that she was terminated from her employment in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* We affirm.

We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion for summary disposition under MCR 2.116(C)(10)[1] is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31. We also review de novo as a question of law whether a plaintiff has established a prima facie case under the WPA. *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

[1] Plaintiff contends that the trial court relied on MCR 2.116(C)(8) in determining that she was not engaged in a protected activity. To the contrary, the trial court granted summary disposition on plaintiff's WPA claim under MCR 2.116(C)(10).

MCL 15.362 of the WPA provides:

> 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.

"To establish a prima facie case under this 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) (internal footnote omitted). If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to show a legitimate reason for the adverse employment action. *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). Once the defendant does so, the burden shifts back to the plaintiff to establish that the defendant's proffered reason is a mere pretext for unlawful retaliation. *Id.*

It is undisputed that plaintiff was discharged from her employment. Thus, she established the second element of her prima facie WPA claim.[2] Her arguments on appeal involve the first and third elements. With respect to the first element, the WPA protects the following activities: "(1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation." *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007).

Plaintiff contends that her refusal to lie during a student disciplinary hearing constituted a protected activity. The first two categories of activity protected under the WPA involve reporting or being about to report a violation. Here, plaintiff did not report and was not about to report a violation of any law, regulation, or rule. Assuming that defendant Belcher's request that plaintiff "bolster" her version of events could be considered a request to lie, as plaintiff contends, plaintiff testified that she told Belcher that she would not lie and provided a truthful description of events at the hearing. The plain language of the WPA was intended to benefit only those employees engaged in protected activity as defined under the act. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998). The Legislature chose to protect

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[2] Plaintiff acknowledges that her August 27, 2007, suspension occurred outside the 90-day limitations period for WPA claims. See MCL 15.363(1). In addition, her complaint identifies only her termination as the basis for her WPA claim.

employees who report or are about to report a violation. *Id.* at 399, 405-406. The Legislature did not include as a protected activity the scenario presented here.

Plaintiff also contends that she is a "type 2" whistleblower and that, as such, the WPA protects her despite that she did not report a violation. Because plaintiff did not assert this argument until she moved for reconsideration in the trial court, it is not preserved for our review.[3] See *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 117; 724 NW2d 485 (2006). We may nevertheless address the argument because it involves a question of law regarding which all the necessary facts for its resolution have been presented. *Id.* at 118.

As stated in MCL 15.362, the second type of whistleblower, or a "type 2," whistleblower, is an employee who "is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action." See also *Shaw*, 283 Mich App at 10. Plaintiff correctly argues that MCL 15.362 does not require that a type 2 whistleblower report a violation in order to be protected under the WPA. *Id.* at 11-12. Rather, the statute prohibits taking action against the employee *because* she is requested to participate in an investigation, hearing, or court action. MCL 15.362. Here, plaintiff does not allege that she was terminated because she was requested to participate in the student disciplinary hearing, but rather claims that her refusal to lie during the hearing resulted in retaliatory action against her that ultimately resulted in her termination. Because plaintiff cannot show, and has not even alleged, that her employment was terminated because of her mere participation in the hearing, she is not a type 2 whistleblower. MCL 15.362 does not protect a plaintiff who refuses to lie during a hearing conducted by a public body.

Therefore, plaintiff's refusal to lie during the student disciplinary hearing was not a protected activity under the WPA and, accordingly, plaintiff cannot establish a prima facie case based on that activity. Defendants concede, however, that plaintiff's filing of the two police reports, one against a student and the other against Belcher, involved protected activity. Thus, we must next examine whether plaintiff presented sufficient evidence to create a genuine issue of material fact regarding whether she was terminated in retaliation for filing the police reports.

"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*, 469 Mich at 184.

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[3] Defendants incorrectly contend that plaintiff failed to raise this argument altogether in the trial court and that, as such, this Court lacks jurisdiction to address it. Contrary to defendants' assertion, plaintiff raised the argument in her motion for reconsideration. In any event, even if plaintiff had not raised the argument below, this factor would not have affected this Court's jurisdiction because the order granting summary disposition is a final order appealable to this Court as of right. MCR 7.202(6)(a)(i); MCR 7.203(A)(1).

> A plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence. Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. [*Shaw*, 283 Mich App at 14.]

To establish causation through circumstantial evidence, the evidence must facilitate a reasonable inference of causation rather than mere speculation. *Id.* at 14-15. Evidence will be sufficient to defeat a motion for summary disposition "if the jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation." *Id.* at 15.

The evidence shows that plaintiff worked for DPS for approximately 19 years before she was transferred to Crockett Technical High School and that she received her first disciplinary write-up the year after her transfer, during her 20th year of employment. On October 11, 2006, two students engaged in a physical altercation in her classroom, during which plaintiff was injured. The evidence, when viewed in the light most favorable to plaintiff, supports an inference that Belcher asked plaintiff to lie or "bolster" her testimony regarding one of the students at a disciplinary hearing, but she did not do so.

On December 1, 2006, after plaintiff returned from medical leave, a student made death threats to another student in her classroom. Plaintiff took the student to an administrator and received a work rule violation for leaving her classroom unattended. On March 6, 2007, a student threatened that her mother was going to physically assault plaintiff. Plaintiff participated in a meeting with Kristen Maher and the mother of the student and was satisfied that the student's mother was not going to assault her. Thereafter, plaintiff was notified that a decision had been made to allow the student back into her classroom and that her refusal to comply would result in a written reprimand. Plaintiff refused to allow the student into her classroom and received a write-up. During a meeting regarding the matter, Belcher was angry and demanded that the student return to plaintiff's classroom, to which plaintiff replied, "Whatever." Also according to plaintiff, Belcher told her "not to make waves" and stated, "you don't want a war with me[.]" Belcher further indicated that she "had people downtown that would jam [plaintiff] up."

On the following day, March 22, 2007, plaintiff filed a police report against the student, constituting the first protected activity in which she engaged with respect to her WPA claim. Plaintiff claims that, based on statements that a detective told her, she believed that Belcher was upset about the police report and felt that plaintiff was in a "power struggle" with her. Even if this evidence is admissible, plaintiff failed to show that subsequent disciplinary actions were a result of her filing the police report. The record shows that plaintiff received write-ups for missing staff meetings and memos regarding her tardiness and failure to turn in lesson plans. Plaintiff did not deny missing the staff meetings, but claimed that she was required to miss some meetings because of physical therapy appointments.

On June 5, 2007, plaintiff was late to work because of a flat tire. She maintained that she was unable to alert somebody of her tardiness because the phone lines were down and she did not have an administrator's phone number with her. She then received another work rule violation. Plaintiff maintained that Belcher confronted her in a hostile manner regarding her repetitive tardiness despite that the incident involving the flat tire was the only day on which she

was late for work. When Belcher maintained that she had videotape evidence to prove plaintiff's tardiness, plaintiff responded that Belcher was a "liar." Plaintiff received another violation for arriving late on June 11 and 12, 2007, but she denied being late on those days.

Belcher informed Lauri Washington in the employee relations department about plaintiff's warnings and reprimands on June 8, 2007, and forwarded a copy of plaintiff's file, stating that plaintiff's behavior had become confrontational. Thereafter, allegations arose that plaintiff had threatened Maher and made a disparaging remark about her. Plaintiff denied making the remark and maintained that Belcher and Maher fabricated the allegation to harass her. According to plaintiff, Belcher was irate and approached her while waving her hands in the air, causing plaintiff to back up in a defensive stance. Viewing the evidence in plaintiff's favor and accepting her version of events, nothing indicates that the incident was related to plaintiff's filing of the police report against the student.

Belcher again informed Washington that plaintiff's behavior had become combative and confrontational. On June 17, 2007, plaintiff filed a police report against Belcher, the second protected activity on which her WPA is based. Plaintiff thereafter filed three grievances against Belcher, two in July and one in September 2007. Plaintiff alleged that Belcher abused her authority, unfairly docked her pay, and harassed her in an effort to have her placed on administrative leave. She asserted in her September grievance that Belcher's actions were retaliatory for plaintiff's previous grievance filed in July. Notably, plaintiff did not assert in any of the grievances that Belcher's actions were retaliatory for plaintiff's filing a police report.

In short, plaintiff failed to present any evidence indicating that she was discharged in retaliation for filing the police reports. Plaintiff maintained at her deposition that the timing of the events was the primary factor indicating that her filing of the police report against Belcher was a cause of her termination. While a temporal connection may be evidence of causation, it does not itself establish a causal connection. *Shaw*, 283 Mich App at 15. A plaintiff must show something more than a mere coincidence in time between the protected activity and the termination. *West*, 469 Mich at 186. As stated in *West*:

> To prevail, plaintiff had to show that his employer took adverse employment action *because* of plaintiff's protected activity, but plaintiff has merely shown that his employer [terminated] him *after* the protected activity occurred. Plaintiff had to demonstrate that the adverse employment action was in some manner influenced by the protected activity, but has failed to make such a demonstration. [*Id.* at 185.]

Plaintiff relies on the fact that she received an "outstanding education" award for the 2006-2007 school year, the same year during which the write-ups and reprimands occurred, but that fact does not in any way show causation between plaintiff's filing of the police reports and her termination. Plaintiff also claims that Gordon Anderson, the assistant director of labor relations, expressed that plaintiff's suspension was not warranted and recommended that she be permitted to return to work. Plaintiff mischaracterizes Anderson's memo in which he advises that his objection to plaintiff's termination was based on the failure to follow the guidelines for corrective discipline and impose progressive discipline before terminating an employee. Thus,

Anderson's memo does not establish causation between the filing of the police reports and plaintiff's discharge.

The evidence fails to demonstrate a genuine issue of material fact regarding whether the filing of the police reports caused plaintiff's termination. Rather, the evidence shows, at best, that such a connection is merely speculative. Accordingly, plaintiff has failed to establish a prima facie WPA claim. *West*, 469 Mich at 183-184. For the same reasons, plaintiff has failed to demonstrate an issue of fact regarding whether defendants' legitimate, nonretaliatory basis for her termination was merely pretextual. The trial court properly granted summary disposition in defendants' favor.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Karen M. Fort Hood