STATE OF MICHIGAN

COURT OF APPEALS

LYNN FOX,

Plaintiff-Appellant,

and

ANNE HUGHES,

Plaintiff,

v

SHERIDAN BOOKS, INC.,

Defendant-Appellee.

UNPUBLISHED
May 17, 2011

No. 295118
Washtenaw Circuit Court
LC No. 08-000724-CD

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as I conclude that plaintiff established a prima facie case of retaliatory discharge and demonstrated a question of fact whether the proffered reason for her discharge was pretextual.

I. OBJECTIVE NOTICE

The trial court and the majority conclude that plaintiff failed to present a prima facie case on the causal connection between the protected activity and plaintiff's termination based on a lack of objective notice. Viewing the facts in the light most favorable to plaintiff, I conclude that there is sufficient evidence of objective notice such that summary disposition should have been denied.

First, there is a strong temporal connection between plaintiff instigating the two telephone calls to MIOSHA and her termination. Although the temporal connection is not enough by itself, the majority concedes that it is sufficient when coupled with evidence of management's displeasure at learning of the protected behavior. *Kaupp v Mourer-Foster, Inc*, 485 Mich 1033; 776 NW2d 893 (2010) (KELLY, C.J., concurring). Here, plaintiff provided sufficient evidence of defendant's displeasure regarding the contact with MIOSHA. Anne Hughes testified that she had a telephone conversation with Amy Burbank, the production manager, who indicated that management was angry about the MIOSHA call. Specifically,

every time Hughes asked about how the department was supposed to run during the roof construction and why the issue was "getting out of control" and "such a big deal," Burbank told her it was because "[s]omebody in your department or some friend of somebody in your department called MIOSHA." The testimony made clear that management was upset that MIOSHA had been called. Hughes even testified that Mark Witkowski, the company's vice-president for operations, stated that "somebody ratcheted this up," which language evidences displeasure. Thus, the evidence of displeasure, coupled with the close temporal connection between the calls to MIOSHA and plaintiff's firing, was sufficient to establish a jury question on causation. *Kaupp*, 485 Mich 1033 (KELLY, C.J., concurring); *West v GMC*, 469 Mich 177, 186-187; 665 NW2d 468 (2003); see also *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000).

The majority concludes that this in insufficient because it erroneously concludes that there is no evidence that defendant had objective notice of the employee's protected activity. There is no real dispute that defendant received notice of a report made to State of Michigan's Occupational Health and Safety Administration (MIOSHA), given that Dennis Collins from MIOSHA contacted defendant.[1] Accordingly, defendant clearly had objective notice of a report, satisfying the "objective notice standard."

Similarly, there is evidence that defendant had reached the conclusion, based on objective events, that the report to MIOSHA had been made by plaintiff. Danna Findlay, defendant's vice president of human resources, testified that

> the assumption was it was [plaintiff] because she's the only one that had made the complaint at the facility to begin with. So the assumption I think naturally, whether it be wrong or right, was that well, [plaintiff] must have called because she was the one that went to Mimms and that was the only complaint we had heard about.
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> * * *
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> You know, after the first call [from MIOSHA] came in, like I said, the presumption was, and discussion was probably amongst Mark [Witkowski, defendant's vice president of operations], myself, and Rhonda [Holbrook,

[1] Although Witkowski testified that Collins did not identify himself as a MIOSHA employee, Collins testified to the contrary. In addition, Burbank testified that Witkowski knew a MIOSHA officer had called and Buckingham testified that she was present when the call from MIOSHA came in and deduced it was from MIOSHA just based on what she heard from their side of the conversation. Furthermore, Witkowski testified that he eventually came to the conclusion that it was MIOSHA that had called. Thus, management was aware that a report had been made to MIOSHA.

> defendant's safety officer], was kind of literally like well, it must have been [plaintiff] because she was the one that made a complaint to begin with.
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> * * *
>
> We presumed it was probably somebody on behalf—as soon as [Collins] said it wasn't one of your employees, we presumed, well, it had to be on behalf of somebody, and [plaintiff] was the presumption because she was the only one that complained.

Plaintiff also provided the testimony of Bill Bury, from defendant's maintenance department, who testified that he mentioned to Witkowski that plaintiff "had called somebody but [he] didn't know who and she was kind of upset over the whole thing."

The majority relies on Findlay's testimony that after Collins informed them it was not an employee who made the call, they dropped the issue. However, this ignores Findlay's testimony, quoted above, that, upon hearing it was not an employee, management then presumed the calls were on plaintiff's behalf. A jury is certainly welcome to balance these conflicting statements at trial, but this Court must take the record in the light most favorable to plaintiff, which means accepting Findlay's testimony that management assumed the calls had been made on plaintiff's behalf.

The majority then suggests that all of this evidence amounts to mere speculation, which cannot constitute objective notice. A prima facie case of objective notice does not, however, mean that the plaintiff must prove that the employer knows with absolute certainty that it was the plaintiff that made the report. In order to survive a motion for summary disposition on these grounds, a plaintiff must instead provide "evidence [that] yields an inference that the [defendant] believed [the report was made by plaintiff.]" *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257-258; 503 NW2d 728 (1993). See also, *Healy v Motorcity Casino*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2003 (Docket No. 243568) (noting that even though the defendants provided evidence to the contrary, "the initial inference remains valid"). Accordingly, I conclude that the record contained sufficient evidence of objective notice to defendant to survive summary disposition.

II. PRETEXT AND MIXED MOTIVES

The majority also concludes that, even if plaintiff had established a prima facie case, she failed to show that defendant's proffered reason for her termination was a pretext. Although defendant has clearly provided a legitimate basis to explain plaintiff's termination, based on the record, I find an outstanding question of fact on this issue as well.

First, the legitimate basis on which defendant relies is clearly tied to the MIOSHA report. That is, it was only after the report was made to MIOSHA and MIOSHA contacted defendant that Witkowski ordered plaintiff's email to be monitored, which email provided defendant with the basis for termination. Second, plaintiff provided evidence that she was terminated without any attempts to rehabilitate her performance, which was different treatment than other employees received. Such treatment is evidence of pretext. See *id.* Finally, as noted in *Roulston*, 239 Mich

App at 281, "[o]nce the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered." Pretext occurs when "participation in the protected activity played *any* part in the discharge, no matter how remote." *Id.* (emphasis added). Here, there is sufficient evidence to create a question of fact whether defendant's proffered reason for discharge was simply a pretext given their belief that plaintiff had contacted MIOSHA regarding the working conditions.

III. CONCLUSION

Because plaintiff provided sufficient evidence to demonstrate a prima facie case, including causation and objective notice, and created a question of fact as to whether defendant's professed reasons for firing her were a mere pretext, I would conclude that the trial court erred in granting summary disposition and remand for trial.

/s/ Douglas B. Shapiro