STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL WILTSE, Plaintiff-Appellant,	UNPUBLISHED December 15, 2015
v	No. 323402 Bay Circuit Court
DELTA COMMUNITY COLLEGE, JEAN GOODNOW, and MARGARET MOSQUEDA, Defendants-Appellees.	LC No. 13-003951-CZ

Before: SAAD, P.J., and STEPHENS and O'BRIEN, JJ.

PER CURIAM.

In this action arising from plaintiff's dismissal from his position as the Director of Public Safety and Training at Delta College, plaintiff appeals from the trial court's order that granted defendants' motion for summary disposition under MCR 2.116(C)(10). For the reasons provided below, we affirm.

I. BASIC FACTS

Delta College employed plaintiff as its Director of Public Safety and Training since August 2005, where he oversaw Delta's police department and police academy. Plaintiff reported to defendant Margaret Mosqueda, who in turn reported to Delta's President, defendant Jean Goodnow.

As Delta's top law enforcement officer, plaintiff understood that he had to follow Delta's rules and regulations, which provided in relevant part:

> Whatever I see or hear of a confidential nature, or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

Plaintiff also understood that any violation could result in disciplinary action, up to and including discharge.

In November 2012, Delta learned that a professor and a student may have had an inappropriate sexual relationship. Plaintiff investigated the matter, and in the course of his

investigation, he confirmed that a sexual relationship had existed but nonetheless concluded that no criminal wrongdoing had occurred.

Plaintiff then disclosed the nature of the investigation to many individuals, including some members of the Delta police department, his then girlfriend (now his wife), the Bay City Police Chief, the Wayne County Community College Police Chief, and Greg Mallek, who was the Athletic Director at another college and was a friend of plaintiff who had worked at Delta. The conversation with Mallek occurred in December 2012, during the work day at a restaurant over lunch, where plaintiff drank alcohol. Notably, in this conversation, plaintiff divulged the name of the professor. Plaintiff explained that he provided the name because Mallek, being a former Delta employee, was "familiar" with its employees.

In February 2013, Mallek revealed to Shelly Raube, the Athletic Director at Delta, that he learned about the situation with the professor from plaintiff. Concerned with the disclosure of confidential information, Raube reported the disclosure to her superior, which eventually was reported to Jean Goodnow, the President of Delta.

On June 6, 2013, Goodnow and Mosqueda met with plaintiff and asked him about the disclosure to Mallek. Plaintiff admitted that he made the disclosure to Mallek, as well as to other individuals. He also admitted that his behavior was "unprofessional."

After considering various options, Goodnow decided to terminate plaintiff's employment for "serious willful misconduct." On June 13, 2013, plaintiff was summoned to a meeting, where his employment was formally terminated. Plaintiff asked what the serious willful misconduct was, and he was told it was based on his breach of confidentiality and oath of office. No one was hired to replace plaintiff; instead, his duties were allocated between two existing employees, one of whom was a white male and the other was a black male.

Plaintiff thereafter filed suit in circuit court. In his second amended complaint, he alleged violations of the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, and the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* The trial court granted defendants' motion for summary disposition because it found that there was no evidence to support plaintiff's claims.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The motion is appropriately granted "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 genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

III. WPA CLAIM

The relevant portion of the WPA provides the following:

> 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. [MCL 15.362.]

Thus, in order to establish a prima facie case under the WPA, a plaintiff must prove that "(1) plaintiff was engaged in protected activity as defined by the act, (2) the defendant took an adverse employment action against the plaintiff, and (3) 'a causal connection exists between the protected activity' and the adverse employment action." *Debano-Griffin*, 493 Mich at 175, quoting *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). Here, there is no question that plaintiff suffered an adverse employment action, but he has failed to prove the existence of the first and, necessarily, the last element.

The WPA protects two types of whistleblowers. "[A] type 1 whistleblower [is] one who, on his own initiative, takes it upon himself to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation." *Henry v Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999). A type 2 whistleblower is one who participates "in a previously initiated investigation or hearing at the behest of a public body." *Id.*

Plaintiff claims that he qualifies as both a type 1 and type 2 whistleblower. We disagree.

Plaintiff posits that he was engaged in protected activity as a type 1 whistleblower when he talked to Mallek and others about the professor/student sexual relationship. However, plaintiff was not "report[ing]" the incident to any public body. To satisfy this element, it requires more than simply relaying information to any public body. The plaintiff must have reported the incident "in an attempt to bring the, as yet hidden, violation to light *to remedy the situation or harm done by the violation*." *Id.* (emphasis added); see also *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54, 62; 832 NW2d 433 (2013) (holding that the plaintiff's phone call to the police, which was not done so that the police could investigate or enforce the law, was not protected activity under the WPA). Like the plaintiff in *Hays*, plaintiff here did not make the disclosures in order to "remedy" anything. His investigation had already been completed by the time he made the disclosures, and he concluded that no criminal wrongdoing had occurred. In

short, there was no violation to remedy in plaintiff's eyes.[1] Instead, plaintiff claims that he made the disclosures in order to get feedback on investigative "best practices." Even accepting that highly specious testimony as true, this does not transform his disclosures into "reports" under the WPA. See *Hays*, 300 Mich App at 62. In fact, when plaintiff was asked why he told Mallek the professor's name, which arguably constituted the confidential breach, while omitting that information from the other individuals, he explained that he did so because Mallek, as a former Delta employee, was "familiar" with the Delta staff. Again, this makes it clear that the disclosure was not done in order to seek any remedy for any potential violation but was done to keep a friend updated on the latest events at campus.

Plaintiff argues that his motive in making the disclosure is irrelevant under our Supreme Court's decision in *Whitman v City of Burton*, 493 Mich 303; 831 NW2d 223 (2013). However, plaintiff's reliance on that opinion is misplaced. In *Whitman*, the plaintiff was employed by the defendant city as its chief of police. An ordinance allowed for unelected officials, such as the plaintiff, to be compensated for unused sick and personal time. *Id.* at 306-307. But because of significant budget concerns in the city, the mayor and the department heads agreed to forgo such payments. *Id.* at 307. The plaintiff, however, later made "repeated complaints" to the mayor and the city attorney that the refusal to pay him his accumulated unused sick and personal leave time was a violation of a local ordinance. *Id.* at 306. This Court relied on our Supreme Court's language in *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 622; 566 NW2d 571 (1997), and held that because the plaintiff reported the violation "to advance his own financial interests" and not "to inform the public on a matter of public concern," his actions did not fall under the protection of the WPA. *Whitman v City of Burton*, 293 Mich App 220, 228-230; 810 NW2d 71 (2011), rev'd 493 Mich 303 (2013). The Supreme Court, in reversing this Court, disavowed the relied-upon language in *Shallal* as dicta and held that the plaintiff's underlying motive, even if for selfish reasons, in making the reports was irrelevant under the statute; what was important was that the reports were made. *Whitman*, 493 Mich at 319-321. The situation in *Whitman* is easily distinguishable from the instant case because the plaintiff in *Whitman* actually reported the ordinance violation to have it remedied, while plaintiff here made his disclosures knowing that not only was there no violation to remedy, but that the people to whom he disclosed the information had no authority to do so even if there were any actionable violations. As a result, plaintiff's WPA type 1 claim fails as a matter of law.

Plaintiff also argues that he engaged in protected activity as a type 2 whistleblower when he made the disclosures to members of his police department. However, as already noted, a type 2 whistleblower is one who, *inter alia*, "is requested by a public body to participate in an investigation." MCL 15.362. But the plain language of the statute only protects individuals from actions that were requested by a public body. The disclosures to members of the police

[1] Moreover, even if the professor's relationship with the student constituted a Delta College policy violation, it is clear that "reporting" to his girlfriend, the Bay City Police Chief, the Wayne County Community Police Chief, and an employee of another college was not done to remedy that violation since none of these people would have had any authority to do anything about the policy violation.

department were not requested by Delta. Delta merely asked plaintiff to investigate if any crime had taken place with respect to the professor's relationship with the student. Plaintiff explained that no one else in his department was involved with the investigation except for himself. In fact, the disclosures happened well after plaintiff had concluded his investigation. Accordingly, plaintiff has failed to provide evidence that he engaged in protected activity as a type 2 whistleblower, and his claim was properly dismissed.

Moreover, even if the disclosures to members of the Delta police department could be viewed as protected activity, plaintiff is not entitled to the reinstatement of his claim. Goodnow testified that she considered all of plaintiff's disclosures to be breaches of confidentiality, including the disclosures to the members of the Delta police department. She also admitted that all of these perceived breaches went into her decision to terminate plaintiff's employment. Thus, assuming the disclosures qualified as protected activity, plaintiff has provided direct evidence of a type 2 WPA claim. See *Shaw v City of Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009) (stating that direct evidence is evidence that, if believed, "requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions"). However, if a defendant can establish that it would have made the same employment decision even if the impermissible consideration had not played a role in the decision, then the defendant nevertheless is entitled to judgment. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 133; 666 NW2d 186 (2003);[2] see also *Debano-Griffin*, 493 Mich at 176. Here, no reasonable jury could conclude that plaintiff would not have been fired if Goodnow had not considered the disclosures to the members of the Delta police department. The record is very clear that Goodnow fired plaintiff because he made disclosures to numerous people, most of which had no reason to know of the events that occurred at Delta. Arguably, the most egregious disclosure was to Mallek, to whom plaintiff admitted that he provided the name of the professor involved. If Goodnow had not considered the disclosures to the Delta police, the evidence is unmistakable that she still would have fired plaintiff for the disclosures to Mallek, the Bay City Police Chief, the Wayne Community College Police Chief, and plaintiff's girlfriend. Thus, plaintiff's WPA claim based on being a type 2 whistleblower was properly dismissed as a matter of law.

II. ELCRA CLAIMS

The ELCRA prohibits employers from discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a). Plaintiff brought two claims in the circuit court: one for discrimination based on race and gender and one for a hostile work environment.

[2] While *Sniecinski* involved a discrimination claim under the ELCRA, because WPA claims are analogous to discrimination claims, discrimination law is used to analyze WPA claims. See *Debano-Griffin*, 493 Mich at 176 (applying burden-shifting approach in discrimination cases to WPA case); *Shaw*, 283 Mich App at 14 (citing to *Sniecinski*, even though opinion addressed WPA claim).

A. DISCRIMINATION

"The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133, 153; 120 S Ct 2097; 147 L Ed 2d 105 (2000). A plaintiff can establish a claim of discrimination through direct or circumstantial evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision." *Sniecinski*, 469 Mich at 135. As such, "direct evidence" is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, 464 Mich at 462 (quotations omitted); see also *Danville v Regional Lab Corp*, 292 F3d 1246, 1249 (CA 10, 2002) ("Direct evidence demonstrates on its face that the employment decision was reached for discriminatory reasons.").

Contrary to plaintiff's suggestion, there is no direct evidence of racial or gender discrimination. Plaintiff posits that he provided direct evidence of racial discrimination because of an incident that occurred two years before plaintiff was fired. Specifically, plaintiff relies on the events surrounding the shooting death of a black homeless man, Milton Hall, by seven or eight Saginaw police officers in July 2012. Hall was wielding a knife at the time and did not obey direct orders from the police. Hall was shot at least 46 times according to media reports. The killing was captured on video and made national news. Sometime after the incident, plaintiff provided a television interview where he, according to Goodnow, stated that the shooting was justified and that at his police academy at Delta, police are trained "to shoot to kill."[3] In response to plaintiff's interview, Delta received complaints about plaintiff's "shoot to kill" curriculum at the Delta police academy. According to plaintiff, one complaint alleged that the Delta police academy was teaching its cadets to "shoot [to] kill black men." Goodnow wanted plaintiff to respond to that complaint by writing an apology letter. Plaintiff testified that during this discussion with Goodnow, she got very close to his face and yelled at him. Plaintiff respectfully declined to write an apology letter, as he did not see how one was warranted. Plaintiff claims that because he was asked to write an apology letter on this issue, it demonstrates racial discrimination. We disagree. The request to write the apology letter had nothing to do with plaintiff's race; instead, it had to do with how Delta's police academy, due to plaintiff's comments in the media, was perceived in the community.[4] Goodnow was not comfortable with Delta's academy being perceived by the public as instilling a "shoot to kill" mentality, let alone a "shoot to kill black people" mentality. In other words, even if the events in 2012 unfolded as plaintiff describes, this evidence "on its face" does not "require a conclusion" that plaintiff's race was a motivating factor in Goodnow's decision to fire him.

---

[3] Plaintiff testified that he used the term "shoot to eliminate the threat" instead of "shoot to kill," but any discrepancy is irrelevant for our analysis.

[4] Plaintiff admitted that race has nothing to do with the state of Michigan's policy, which he was obliged to follow at the Delta police academy, that requires teaching cadets to shoot at the target's center mass "to eliminate the threat."

Plaintiff also suggests that Goodnow fired him because she stereotyped him as "a white skin-head, probably KKK, macho white male, who shoots to kill, a la the movie character Dirty Harry." There is no direct evidence of any such stereotyping. Plaintiff admitted at his deposition that no one, including Goodnow, ever made any such comments to him. Plaintiff relies on the fact that, after he was fired, Goodnow inquired about the rationale behind the Delta police academy's shaved-head policy for its cadets.[5] Plaintiff's argument is specious. First, Goodnow's concern about the shaved heads was in relation to her desire to have the police academy, in her view, be more "approachable" and "not detracting." Goodnow thought that, because "community policing" was the wave of the future, she wanted people to feel comfortable and not afraid to engage with the police. Thus, it was her personal opinion that the bald, shaved-head look worked against this goal because some people could be threatened by that appearance. Importantly, there was no evidence that this policy was only for white male cadets. Therefore, plaintiff's attempt to somehow equate Goodnow's dissatisfaction of that policy with the proposition that she thought plaintiff was a "white skin-head, probably KKK, macho white male, who shoots to kill, a la the move character Dirty Harry" is meritless.

Because there is no direct evidence of any racial or gender discrimination, we employ the familiar burden-shifting approach set forth in *McDonnell Douglas v Green*, 411 US 792; 92 S Ct 1817; 36 L Ed 2d 888 (1973), which requires a plaintiff to prove by circumstantial evidence that he was unlawfully terminated by the defendant. *Hazle*, 464 Mich at 462-463. Under this approach, a plaintiff must first offer a "prima facie case" of discrimination. *Id.* at 463. A plaintiff must prove that (1) he is a member of a protected class, (2) he was subjected to an adverse employment action, (3) he was qualified for the job, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Id.* Alternatively, the fourth element can be established by showing that the defendant treated a similarly situated person not in the protected class differently than him. *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

Plaintiff easily can establish the first two elements, but the last two are another matter. To be qualified for the job, a plaintiff must have performed his job at a level that "met the employer's legitimate expectations." *Id.* at 699. In making the disclosures to numerous people, plaintiff failed to meet defendants' reasonable expectations. Indeed, plaintiff admitted to Goodnow and Mosqueda that his actions were "unprofessional." Several days after making this admission, plaintiff again approached Goodnow and apologized for his "unprofessional" actions. Therefore, not only did plaintiff not meet defendants' expectations, he admitted as much. Consequently, plaintiff cannot establish this third element.

Regarding the fourth element, plaintiff cannot establish that someone outside of his protected class was given his job. In fact, no one was hired to replace plaintiff. Instead, his duties were divided amongst two current employees: a white male and a black male. This circumstance does not give a rise to an inference of unlawful discrimination.

[5] There was evidence that all the cadets at the Delta academy had to shave their heads bald.

Furthermore, for this fourth element, plaintiff cannot show how he was treated differently than someone who was not a white male and similarly situated.

In support of this element, defendant claims that he was treated differently than the female athletic director, Raube, who plaintiff alleges "made the same 'confidential disclosures'" to Mallek, yet was not disciplined. However, there was no admissible evidence that Raube made any such disclosures. The only evidence plaintiff relies on is his own testimony, where he purports to know the contents of Mallek's and Raube's conversation. Obviously, plaintiff has no personal knowledge about the nature of Mallek's and Raube's private conversation, and it is not properly considered. See MCR 2.116(C)(6) (stating that deposition testimony shall only be considered to the extent that its content would be admissible as evidence); MRE 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). In fact, Raube testified that she was unaware of the circumstances behind the professor's departure from Delta until Mallek informed her.

Plaintiff also alleges that Raube made other disclosures that did not result in her getting disciplined. Plaintiff claims that Raube wrongfully disclosed to another school's coach that a Delta student-athlete had a criminal sexual conduct conviction, which purportedly would be a violation of the Family Educational Rights and Privacy Act, 20 USC 1232g. The evidence shows that Raube and a Delta coach were having a conversation about a Delta player having a CSC conviction, when this other coach from another school may have been nearby. Raube explained that if this other coach overheard anything, it was not intentional, and in any event, the student's name was never mentioned. Looking at the evidence in a light most favorable to plaintiff, we cannot conclude that Raube was similarly situated to plaintiff. First, the evidence shows that any disclosure to this non-Delta coach was accidental. This is distinguishable from plaintiff's deliberate conduct. Second, the evidence shows that Raube never mentioned the student's name, unlike plaintiff, who disclosed the professor's name to Mallek. Third, even assuming arguendo that Raube made the unauthorized disclosure, there was no evidence that Goodnow was aware it. If Goodnow was not aware of Raube's alleged disclosure, then Raube cannot be considered similarly situated to plaintiff. See *Town*, 455 Mich at 700 (stating that for two employees to be similarly situated, "all of the relevant aspects" of the employment must be "nearly identical"). In other words, the fact that Raube was not disciplined for any alleged disclosures cannot be used as proof of disparate treatment when the decision maker at issue was not aware of any wrongdoing on Raube's part.

Finally, plaintiff argues that Goodnow was similarly situated to him, yet was treated differently. Plaintiff alleges that Goodnow engaged in an inappropriate sexual relationship with a Delta faculty member and was not disciplined. While Goodnow testified that her having a sexual relationship with a faculty member would have been improper, there was absolutely no evidence to support plaintiff's allegation. Goodnow and the other faculty member at issue both testified that no such relationship existed, and no other relevant evidence was introduced. Plaintiff's reliance on unsubstantiated gossip is wholly inadequate to create a question of fact.

In sum, plaintiff has failed to establish a prima facie case of racial or gender discrimination; there was no direct evidence that race or gender played a role in the decision to terminate his employment. Furthermore, plaintiff failed to show how the circumstances of his termination could lead to an inference that race or gender played a role. This is especially true

when he cannot show how he was replaced by someone outside his protected class and cannot show how he was treated disparately from a similarly situated employee.

B. HOSTILE WORK ENVIRONMENT

Plaintiff further argues that he provided sufficient evidence to establish a prima facie case that he was subjected to a hostile work environment based on his race. We disagree. Under the ELCRA, in order to establish a prima facie case of hostile work environment based on racial harassment, a plaintiff must establish that (1) he belonged to a protected group, (2) he was subjected to communication or conduct on the basis of race, (3) he was subjected to unwelcome racial conduct or communication, (4) the unwelcome conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment, and (5) respondeat superior. See *Haynie v State*, 468 Mich 302, 307-308; 664 NW2d 129 (2003).

In his brief on appeal, plaintiff relies solely on the discussion that took place between plaintiff and Goodnow in 2012, when Goodnow requested that plaintiff write an apology letter to a person who complained that plaintiff was instilling a "shoot to kill black people" mentality at the Delta police academy, to support his claim of a hostile work environment based on race.

As already discussed, Goodnow's desire to have plaintiff write a letter of apology did not implicate race. Instead, it arose from Goodnow's desire to not have Delta's police academy viewed negatively in the public eye—plaintiff's public comments were the motivating factor, not his race. Accordingly, this incident cannot form the basis of a hostile work environment claim based on race. Furthermore, plaintiff's reliance on "the anger and intensity" of the discussion is misplaced. While plaintiff testified that Goodnow got close to him and yelled, he also explained that Goodnow was yelling "[a]bout the [Milton Hall shooting] incident, and she was inches away from my face, talking about how this was not a good shooting, how these officers were wrong . . . and she completely disagreed with what happened." Therefore, it is clear that any emotion on Goodnow's part was not exhibited for the purpose of any racial harassment, but was because of Goodnow's belief that the Saginaw police committed a grave injustice and plaintiff failed to appreciate it.

Moreover, plaintiff offered no evidence to show how Goodnow's isolated request to have an apology letter issued was intended to interfere or in fact substantially interfered with his employment or created an intimidating, hostile, or offensive work environment.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Colleen A. O'Brien