STATE OF MICHIGAN

COURT OF APPEALS

LEONARD SCOTT MOSHER,

Plaintiff-Appellant,

v

CITY OF KALAMAZOO,

Defendant-Appellee.

UNPUBLISHED
January 17, 2019

No. 342978
Kalamazoo Circuit Court
LC No. 2017-000206-CZ

Before: LETICA, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant with regard to plaintiff's claim of unlawful retaliation under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. We agree with the trial court's conclusion that plaintiff failed to establish a material question of fact as to the existence of a causal connection between plaintiff's protected activity and the adverse employment action taken by defendant. Accordingly, we affirm.

I. FACTUAL BACKGROUND

Plaintiff began working for defendant as a mechanical inspector and plan reviewer on September 27, 2016. Plaintiff was an at-will employee during a six-month probationary period. His job duties included inspecting new construction and remodeling projects to ensure compliance with applicable codes. At the time of his one-month performance evaluation, Robert McNutt—plaintiff's supervisor and defendant's building official—indicated that plaintiff met expectations in all areas and was "making progress as expected at this point."

Relevant to this appeal, plaintiff was tasked with inspecting a newly constructed residential dwelling at 1812 Elder Street. The property was owned by Habitat for Humanity, and Shaun Wright was the primary mechanical contractor for the project. On the morning of January 6, 2017, plaintiff met with Wright at the Elder Street property to determine whether the heating system was capable of maintaining a temperature of 68 degrees Fahrenheit in each bedroom as

required by the Michigan Residential Code.[1] The heat was not turned on when plaintiff arrived at the property, so he agreed to complete the inspection later, after the heating system had been running for several hours. When plaintiff returned around 3:00 p.m., the heating system was blowing 80-degree air from headers in the living room and dining room. Using a digital thermometer, plaintiff measured the temperatures in the bedrooms and determined that the temperature did not rise above 64 degrees in either room. Plaintiff therefore concluded that the heating system did not satisfy the code requirements. After communicating with Tom Tishler from Habitat for Humanity on January 11, 2017, plaintiff noted in defendant's records that the inspection was "disapproved."

When Tishler and Wright followed up with plaintiff in February, plaintiff explained that the heating system did not satisfy the requirements of the Michigan Residential Code. At some point thereafter, Wright contacted McNutt about the issue. McNutt visited the property, observed that the building was warm throughout, and approved the mechanical permit. McNutt later explained that he disagreed with plaintiff's assessment because the code required that the heating facilities be capable of "maintaining" the specified temperature, and it did not appear that plaintiff allowed the building to obtain that temperature before inspecting it.

Despite defendant's standard policy and for unknown reasons, plaintiff did not receive a two-month performance evaluation. By the time of plaintiff's four-month performance evaluation, McNutt reported that plaintiff needed improvement in several areas, including the categories for cooperation with others, open mindedness, judgment, problem solving ability, accuracy, relations with employees, relations with supervisor, internal and external customer service, and exercising self-control. In the comments section, McNutt wrote:

> [Plaintiff] struggles with the constructive criticism and the thought that he may not be correct in the interpretation of the codes. He tends to be argumentative when some[]one questions his work. He has a felling [sic] that the contractors are testing him and he feels that he needs to hold them to the most strict letter of the codes when not every situation falls into the strictest letter of the codes. He is disruptive to the rest of the inspection staff when he is trying to convince the other inspectors that he is correct and everyone else is wrong.

Defendant fired plaintiff on March 17, 2017.

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[1] Rule 303.9 of the 2015 Michigan Residential Code provides:

> **Required heating.** Where the winter design temperature in Table R301.2(1) is below 60°F (16°C), every *dwelling unit* shall be provided with heating facilities capable of maintaining a room temperature of not less than 68°F (20°C) at a point 3 feet (914 mm) above the floor and 2 feet (610 mm) from exterior walls in habitable rooms at the design temperature. The installation of one or more portable space heaters shall not be used to achieve compliance with this section.

Plaintiff initiated this action, alleging that defendant violated the WPA by terminating his employment because he reported a violation of state law, i.e. the Michigan Residential Code, to defendant. Plaintiff alleged that defendant retaliated against him for failing the Elder Street inspection because it learned that Wright planned to appeal the inspection results and defendant did not have a board of appeals in place. Defendant denied a retaliatory motive for plaintiff's termination and, during discovery, it asserted that plaintiff "was terminated due to poor job performance, his incompetent application of the code, and his inability to get along with coworkers, staff and citizens."

McNutt testified that he fired plaintiff because plaintiff became increasingly difficult to work with. McNutt indicated that plaintiff did not follow appropriate procedures, despite repeated instructions, and was so belligerent that some of defendant's other inspectors refused to speak to plaintiff. McNutt acknowledged that plaintiff made some improvement after his second performance evaluation, but then other inspectors reported plaintiff saying he planned on "going back to rocking the boat" after his six-month probationary period ended. Laura Lam, the former director of Community Planning and Development, testified that she was not surprised by the declining results on plaintiff's four-month performance evaluation because McNutt had already spoken to her about the issues identified in the evaluation. Several other employees recalled instances of plaintiff's negative or disruptive attitude.

Defendant moved for summary disposition, arguing that plaintiff did not engage in activity protected by the WPA and that he could not establish a causal nexus between his report of the code violation at the Elder Street property and his subsequent termination. The trial court agreed and dismissed plaintiff's case. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Kelsey v Lint*, 322 Mich App 364, 370; 912 NW2d 862 (2017). A dispositive motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. A trial court deciding a motion for summary disposition under this rule must consider the "pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties in the light most favorable to the nonmoving party." *Robins v Garg (On Remand)*, 276 Mich App 351, 361; 741 NW2d 49 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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 might differ." *Id*.

III. ANALYSIS

In granting defendant's motion for summary disposition, the trial court opined that the circumstances involved in this case were distinguishable from "classic" WPA activity, noting that plaintiff was performing his job duties and that McNutt, acting as plaintiff's supervisor, disagreed with and overruled plaintiff's decision. Plaintiff first argues that the trial court erred

by focusing on what it perceived to be classic WPA activity, rather than the precise mandates of the WPA. We agree.

"To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action." *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013). Among other activities, the WPA protects an employee who "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 . . . ." MCL 15.362. The unambiguous language of the WPA does not require that the plaintiff report a violation to an outside agency or higher authority. *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007). Consequently, "[i]t does not matter if the public body to which the suspected violations were reported was also the employee's employer." *Id*. at 595. Furthermore, the WPA does not contain limiting language requiring that "the employee be acting outside the regular scope of his employment." *Id*. at 596.

In light of these established principles, the trial court's opinion that plaintiff's case was distinguishable from "classic" whistleblower activity was irrelevant to the viability of plaintiff's cause of action. Plaintiff believed that the Elder Street property did not meet code requirements and reported this determination to defendant by advising McNutt of his decision and marking the results of the inspection as "disapproved" in defendant's records. The mere fact that plaintiff's job required him to inspect properties for code compliance does not alter the fact that he reported "a violation or a suspected violation of a law or regulation or rule . . . to a public body,"[2] MCL 15.362, which is activity that falls within the protections of the WPA without regard to whether "the reporting is part of the employee's assigned or regular job duties," *Brown*, 478 Mich at 596.

Plaintiff also contends that the trial court erred by considering his motivation for reporting the code violation at the Elder Street property. Plaintiff is correct that the statutory language does not incorporate any sort of intent element on the employee's part as a prerequisite for bringing a claim for unlawful retaliation under the WPA. *Whitman*, 493 Mich at 313. However, we do not construe the trial court's ruling as having been based upon plaintiff's motivation or intent. Rather, the trial court briefly referenced the issue of intent in hypothesizing about how a "classic" WPA claim might arise under similar circumstances.[3] Nevertheless, as

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[2] For purposes of the WPA, a public body includes "[a] county, *city*, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, *or a* board, *department*, commission, council, agency, *or any member or employee thereof*." MCL 15.361(d)(*iii*) (emphasis added).

[3] The trial court reasoned that if the circumstances surrounding plaintiff's report had been closer to what the court perceived to be classic whistleblower activity, it would "raise[] questions in terms of not his performance of the job but his performance as a citizen trying to make sure that

defendant notes in its appellate brief, the trial court's opinion regarding the nature of plaintiff's report was not the ultimate basis for its ruling. In fact, the court concluded that even if it were to assume that plaintiff engaged in protected activity, plaintiff could not establish the necessary causal relationship between the protected activity and his subsequent discharge.

Turning to plaintiff's claim of error concerning the trial court's analysis of the causation element, "[a] plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence." *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009). When the plaintiff relies on circumstantial evidence, the burden-shifting framework applied to other types of employment discrimination statutes applies. *Debano-Griffin v Lake Co*, 493 Mich 167, 171, 175-176; 828 NW2d 634 (2013). "A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful [retaliation]." *Id*. at 176 (quotation marks and citation omitted; emphasis omitted; alteration in original). The burden then shifts to the employer to offer a legitimate reason for the adverse employment action. *Id*.; *Shaw*, 283 Mich App at 8. In order to avoid summary disposition, the plaintiff bears the burden of showing "that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a 'motivating factor' for the employer's adverse action." *Debano-Griffin*, 493 Mich at 176. In other words, the plaintiff must establish a triable question of fact as to whether the employer's proffered reasons were a mere pretext for unlawful retaliation. *Id*. Pretext can be established "directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

Plaintiff maintains that the trial court erred by granting defendant's motion for summary disposition because he presented sufficient evidence of the causal nexus between his report of a code violation at the Elder Street property and his subsequent termination. According to plaintiff, the close timing between his report, his negative performance evaluation, and his eventual termination were strongly indicative of a causal connection between his protected activity and the adverse employment actions taken by defendant. Plaintiff also emphasizes McNutt's reaction to the inspection results and the role McNutt played in the relevant events in order to suggest that plaintiff's termination was intended, in part, to appease Wright and improve relations between defendant and Habitat for Humanity. Lastly, plaintiff contends that defendant provided inconsistent and shifting reasons for terminating his employment, thereby demonstrating that its proffered reasons were pretexts. We disagree.

Plaintiff inspected the Elder Street property on January 6, 2017, and determined that the heating system did not satisfy the code requirements. On January 11, 2017, he formally "disapproved" the mechanical inspection in defendant's records. On February 13, 2017, plaintiff received his four-month performance evaluation, indicating that he needed improvement in

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the law was complied with." The trial court did not otherwise reference plaintiff's motivation in reporting the violation, other than to note that plaintiff was performing his job duties.

several areas. Plaintiff was fired on March 17, 2017, approximately eight days after McNutt reversed plaintiff's denial of the mechanical permit for the Elder Street property.

Although temporal proximity between protected activity and adverse employment action may be evidence of causation, it does not establish the requisite causal nexus in and of itself. *Shaw*, 283 Mich App at 15. As the trial court noted in its oral ruling, the record reveals intervening circumstances that negate the inference of causation arising from the timing of these events. While plaintiff's initial performance evaluation contained positive feedback, that evaluation only covered his first month of employment, during which he was training. He did not begin to independently inspect properties until the period covered by his second evaluation, at which point the deficiencies in his performance and attitude had become apparent. McNutt cited these deficiencies in plaintiff's second evaluation, and McNutt's criticisms were largely corroborated by other employees. Furthermore, while the parties focused primarily on the propriety of plaintiff's inspection of the Elder Street property throughout the lower court proceedings, McNutt described numerous other examples of plaintiff's unsatisfactory performance and behavior, discussing the same with Lam and following up with an email to defendant's human resources department after plaintiff's termination. In light of these intervening circumstances, the timing of the events does not suggest a retaliatory motive.

We are unpersuaded by plaintiff's arguments concerning the implications of McNutt's involvement in reversing the Elder Street inspection results. Plaintiff contends that McNutt "vehemently disagreed" with his opinion regarding the code compliance at the Elder Street property, but the record does not support this assertion. McNutt and plaintiff both testified that they discussed plaintiff's inspection of the Elder Street property, but the record contains little detail about the content of their conversation or McNutt's initial response. Rather, McNutt testified that he did not know the details of the inspection failure until after he spoke with Wright about it. While it is true that McNutt ultimately reversed plaintiff's decision, McNutt did not reinspect the property or overrule plaintiff's decision until after plaintiff received the four-month performance evaluation on February 13, 2017, indicating that he required improvement in areas such as judgment, problem solving, accuracy, and human relations; struggled with constructive criticism about the correct interpretation of the code; and was generally disruptive to the rest of the inspection staff. In fact, the record does not demonstrate that McNutt was even aware of Wright's dissatisfaction or intent to appeal plaintiff's decision until February 15, 2017, at the earliest, when Wright copied McNutt on an email regarding the situation. Thus, plaintiff's contention that McNutt gave him a poor evaluation and ultimately terminated his employment in order to accommodate Wright and Habitat for Humanity is completely speculative and insufficient to avoid summary disposition. See *id*. ("Speculation or mere conjecture 'is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.' ") (citation omitted).

Plaintiff also makes much of what he characterizes as defendant's shifting or conflicting reasons for his termination. But, again, his argument is unsupported by the record. Although the reasons articulated by defendant and its representatives varied somewhat, the same general factors were consistently referenced beginning from the time of plaintiff's four-month performance evaluation and continuing throughout the litigation of this matter. Specifically, those factors included defendant's dissatisfaction with plaintiff's understanding of the code and inspection methods; his inability to cooperate with others, including staff, supervisors, and third

parties with whom he interacted in the course of his work; and his disruptive attitude. Defendant presented ample evidence of these factors and each constitutes a legitimate, nonretaliatory reason for terminating plaintiff's employment. Even viewing the evidence in the light most favorable to plaintiff as the nonmoving party, plaintiff did not present sufficient evidence from which reasonable minds could differ as to whether a causal connection exists between plaintiff's report of the code violation and defendant's subsequent termination of plaintiff's employment. Therefore, plaintiff failed to establish a prima facie case under the WPA, and the trial court did not err by granting summary disposition in defendant's favor.

Affirmed.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter