STATE OF MICHIGAN

COURT OF APPEALS

CHERYL DEBANO-GRIFFIN,

Plaintiff-Appellee,

v

LAKE COUNTY and LAKE COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellants.

UNPUBLISHED
August 25, 2011

No. 282921
Lake Circuit Court
LC No. 05-006469-CZ

ON REMAND

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

This case has been before this Court on two prior occasions, and both prior opinions concluded (though not unanimously, and each time on different grounds) that plaintiff had failed to establish a prima facie case that defendants violated the Whistleblower's Protection Act when they terminated plaintiff's employment by eliminating her position. See *Debano-Griffin v Lake Co*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2009 (Docket No. 282921), rev'd and remanded 486 Mich 938 (2010) and *Debano-Griffin v Lake Co*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2010 (Docket No. 282921), vacated by order *Debano-Griffin v Lake Co*, unpublished order of the Court of Appeals, entered February 24, 2011 (Docket No. 282921). We hold that plaintiff failed to establish a genuine issue of material fact on the causation element of her claim, and therefore reverse the trial court's order denying defendants' motion for summary disposition and remand for entry of an order granting defendants' motion.

The Supreme Court remand order requires us to consider defendants' remaining argument raised on appeal, that is, whether plaintiff established a genuine issue of material fact on causation. For the reasons articulated by Presiding Judge (now Justice) ZAHRA and Judge WHITBECK in the December 16, 2010, opinion of this Court, we conclude that plaintiff failed to establish a genuine issue of material fact under the guiding principles of *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003). Although that opinion accurately stated the proper analysis and conclusion on this issue, we add below some additional points in support of our conclusion.

First, at oral argument before this Court, plaintiff strenuously argued that she presented evidence establishing more than just a temporal relationship (the protected activity and the adverse employment decision were admittedly made close in time) between her complaints and the decision to eliminate her position. The additional evidence consists of the fact that *before* she complained about the funding issue plaintiff saw a budget document with her position funded, but then *after* she complained her position was no longer funded. This evidence, however, merely shows that defendants had knowledge of plaintiff's complaints prior to their decision to eliminate plaintiff's position (temporal relation) and is not the kind of evidence required by *West*, i.e., "something more than" establishing proximity between the two events. *West*, 469 Mich at 185 ("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 disciplined him *after* the protected activity occurred.") (Emphasis in original.). Without evidence addressing something other than temporal proximity, see *id*. at 186, plaintiff cannot create a genuine issue of material fact on causation.

Second, the fact that defendants' budget was not in a deficit or near deficit condition when the decision to eliminate plaintiff's position was made does not help plaintiff establish pretext in defendants' decision. Our courts have repeatedly held that neither the courts nor a jury may second-guess an employer's business judgment as a means of establishing pretext, *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001) and *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990), and challenging the soundness of an employer's fiscal decision would improperly do so. *Reynolds v Sch Dist No 1*, 69 F3d 1523, 1535-1536 (CA 10, 1995).

For these reasons, we reverse the trial court's order and remand for entry of an order granting defendants' motion for summary disposition. We do not retain jurisdiction.

Defendants may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra