STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND WAYNE TACKETT, Plaintiff-Appellant,	UNPUBLISHED December 8, 2011
v	No. 296805 Wayne Circuit Court
GROUP FIVE MANAGEMENT COMPANY, Defendant-Appellee.	LC No. 08-106659-CD

THOMAS M. MCGREGOR, Plaintiff-Appellant,	
v	No. 296819 Wayne Circuit Court
GROUP FIVE MANAGEMENT COMPANY, Defendant-Appellee.	LC No. 08-105824-CD

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs Raymond Wayne Tackett and Thomas M. McGregor appeal as of right from orders granting summary disposition to defendant Group Five Management Company in this action asserting violations of Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. We reverse and remand.

I. BACKGROUND LAW AND STANDARD OF REVIEW

Plaintiffs argue that the circuit court erred in granting summary disposition against them because there are genuine issues of material fact under MCR 2.110(C)(10), precluding summary disposition. We agree. We review summary disposition rulings de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006). Statutory interpretations (here, of the WPA) are reviewed de novo. *Id.*

The WPA imposes certain duties on employers:

> An employer shall not discharge, threaten or otherwise discriminate against any employee regarding the employee's compensation, terms, conditions, location, or privileges of employment *because 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 (emphases added).]

Thus, the elements of a cause of action under the WPA are: (1) the plaintiff engaged in protected activity; (2) the plaintiff was discharged or discriminated against; and (3) a causal connection exists between the protected activity and the adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

There are now considered to be three types of protected activity: (1) reporting to a public body a violation of law, regulation, or rule; (2) being about to report such a violation to a public body; and (3) being asked by a public body to participate in an investigation, hearing, or inquiry held by that public body, or in a court action. *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007). Here, although plaintiffs claim to be what they call type-two whistleblowers, they are actually claiming type-three whistleblower status (under the newer enumeration), because they claim whistleblower status based on being asked to give depositions in underlying fire-litigation actions (*Draper* and *Meda*). *Truel v City of Dearborn*, 291 Mich App 125, 138; ___ NW2d ___ (2010) (echoing *Ernsting* by enumerating three types of whistleblowers). Nevertheless, for consistency with plaintiff's claims and for the sake of clarity in this opinion, we will refer to plaintiffs as claiming type-two status.

A plaintiff may prove unlawful retaliation by direct or circumstantial evidence. *Sniecinski v Blue Cross Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003); *Shaw v City of Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009). In cases involving direct evidence of retaliation, a plaintiff may prove unlawful retaliation in the same manner as a plaintiff would prove any other civil case. See *Sniecinski*, 469 Mich 132 (discussing analogous employment claims). Direct evidence is evidence that, if believed, requires the conclusion that unlawful retaliation was at least a motivating factor in the employer's adverse employment action. *Shaw*, 283 Mich App at 14. In a direct-evidence case involving alleged mixed motives (i.e., where the adverse employment action could have been based on both permissible and impermissible reasons), a plaintiff must prove that retaliatory animus was, more likely than not, a substantial or motivating factor in the decision. See *Sniecinski*, 469 Mich at 133.

In cases involving circumstantial evidence of retaliation against a whistleblower, a plaintiff must proceed by using the burden-shifting approach of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See, generally, *Sniecinski*, 469 Mich at 133-134; see also *Shaw*, 283 Mich App at 14-15. The burden-shifting approach allows a plaintiff to present a rebuttable prima facie case on the basis of proofs from which the trier of fact could infer that the plaintiff was the victim of unlawful retaliation. See *Sniecinski*, 469 Mich at 134. To establish a rebuttable prima facie case of whistleblower retaliation, the plaintiff must show that he was engaged in protected activity, he was discharged, and a causal connection

existed between the protected activity and the discharge. *Henry v City of Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999).

Once a plaintiff has presented a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. See *Sniecinski*, 469 Mich at 134; see also *Eckstein v Kuhn*, 160 Mich App 240, 246; 408 NW2d 131 (1987). If the employer does so, the presumption is rebutted, and the burden shifts back to the claimant to show that the employer's reasons were a mere pretext for retaliation. See *Sniecinski*, 469 Mich at 134; see also *Eckstein*, 160 Mich App at 246.

II. PROTECTED ACTIVITY

In *Henry*, 234 Mich App at 407, the plaintiff, a former police commander, testified by way of deposition in an action brought by a fellow law enforcement officer against the police department. This Court held that the plaintiff had engaged in protected activity as a type-two whistleblower (now considered a type-three whistleblower under the enumeration given in *Ernsting*, 274 Mich App at 510). *Henry*, 234 Mich App at 412-413. The panel reasoned that a deposition is part of the trial or discovery process in civil litigation, governed by the Michigan Court Rules, and that MCR 2.305(A) provides that a party may subpoena another party to give deposition testimony. *Henry*, 234 Mich App at 412-413. The panel further reasoned that a subpoena is a court-ordered command for the person to attend and testify. *Id.*

The *Henry* Court stated that a person who is an employee of the entity whose conduct is at issue in the underlying litigation, who has provided testimony by deposition in that litigation, and who "*would be subject to a court-ordered subpoena to compel his attendance in any event*, meets the definition of a type 2 whistleblower." *Henry*, 234 Mich App at 413 (emphasis added).[1] Because both McGregor and Tackett meet those three elements from *Henry* for being type-two whistleblowers, the circuit court erred in holding that plaintiffs did not engage in protected activity as a matter of law.

Contrary to defendant's argument, when a whistleblower claimant gives deposition testimony or is requested to do so, there is no requirement that the testimony be about a violation or suspected violation of a law, regulation, or rule; indeed, *Shaw* rejected such a requirement. *Shaw*, 283 Mich App at 10-12.

Defendant also argues, citing *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997), that plaintiffs did not have knowledge relevant to the protection of the public. Defendant cites the statement in *Shallal* that "[t]he primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, and not personal vindictiveness." *Id.* at 621 (internal quotation marks and

[1] *Shaw* does not provide otherwise because, in that case, one of the plaintiffs, John Bedo, testified at a deposition pursuant to a subpoena. *Shaw*, 283 Mich App at 9, 13. Given the subpoena to Bedo, the panel stated that his deposition testimony was at the behest of a public body, i.e., the court. *Id.*

citation omitted). This argument by defendant lacks merit. This case did not involve a situation, as in *Shallal*, where an employee knew of a violation or suspected violation of law and made a report about it to a public body (or a threat to do so) out of improper motive (purely to advance her own interests). *Id*. at 621-622. Rather, here, plaintiffs are allegedly type-two whistleblowers, not the kind of type-one whistleblowers at issue in *Shallal*, where the alleged whistleblower kept the violation quiet until it was in her personal interest to threaten to report it. *Id*. In addition, *Shallal* considered the "primary motivation" issue not within the context of whether there was protected activity, but within the context of causation. *Id*. Finally, whether a particular motivation was primary or secondary should generally be considered a question of fact. See, generally, *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). We find *Shallal* distinguishable from the present case.[2]

III. CAUSATION

A. DIRECT EVIDENCE

The next disputed element is causation. *Shallal*, 455 Mich at 621. Plaintiffs argue that they have presented direct evidence of retaliatory motive because the management members who were involved in deciding to terminate plaintiffs exhibited a pattern of comments indicating retaliatory motive. We disagree that there was direct evidence of causation.

The testimony cited by plaintiffs indicates that defendant instructed its employees, and specifically Tackett, not to talk to anyone about the fire. Even if believed, this evidence does not directly compel the conclusion that defendant intended to fire plaintiffs because they were requested to give deposition testimony. Plaintiffs argue that defendant anticipated deposition testimony by plaintiffs that would harm its interests, and, in anticipation of the testimony, made statements about how damaging the fire litigation could potentially be and tried to instruct McGregor how to avoid answering questions. Again, this evidence, even if believed, does not directly compel the conclusion that, when defendant's managers decided to fire plaintiffs and when they did so, the managers were motivated by a desire to retaliate against plaintiffs for their deposition testimony. We conclude that, although the evidence of alleged retaliatory comments may be circumstantial evidence, it is not direct evidence of causation, i.e., retaliatory motive.[3]

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[2] The present case is also distinguishable from *Whitman v City of Burton*, ___ Mich App ___; ___ NW2d ___; 2011 WL 2622315 (2011), wherein the plaintiff acted in bad faith and in his own personal interest by threatening to report certain conduct.

[3] Plaintiffs also argue that maintenance supervisor Kurt Herbeck's deposition testimony in this case (to the effect that McGregor was transferred to Bloomfield on the Green because he was not a team player, wanted to buck the system, and did not want to go along with the plan) shows that defendant was retaliating for McGregor's immediately-preceding disclosure to the fire department and fire investigator of the dangerous wiring problems. This argument by plaintiffs can be read to suggest that McGregor was a type-one whistleblower (because disclosure to a fire department is a reporting to a public body, see MCL 15.362). However, plaintiffs elsewhere admit that they are claiming type-two whistleblower status, based on being requested to

B. CIRCUMSTANTIAL EVIDENCE

The next issue is whether plaintiffs' circumstantial evidence generates sufficient proof of causation to withstand summary disposition. This key clause in MCL 15.362—"because an employee is requested . . . to participate in . . . a court action"—requires, by its unambiguous language, that the retaliation occur because the employee was *requested* to participate in the court action, not because of the participation itself, nor because of the content of the participation. Thus, the alleged retaliatory statements by defendant's management employees, if occurring after the *request* for the depositions, would qualify as evidence of the prohibited kind of retaliation. Plaintiffs alleged that in a pre-deposition meeting with McGregor on November 2, 2007, regional manager Mary Kae Bradley and the defense attorney questioned McGregor about the wiring and tried to instruct him how to avoid answering questions, and Bradley appeared visibly nervous about what McGregor might say. The notice of McGregor's deposition is dated November 13, 2007, after the pre-deposition meeting, and it is not styled as a renotice of deposition. Nevertheless, the trier of fact could conclude that the pre-deposition meeting with McGregor occurred because there had already been a request for McGregor's deposition, before the formal notice of deposition was completed. Indeed, it would make no sense to convene a pre-deposition meeting if no deposition had been requested.

Tackett testified that he participated in a December 18, 2007, pre-deposition meeting that was also attended by the fire-litigation defense attorney and Bradley. According to Tackett, Bradley said that defendant could not afford to lose the litigation and that the litigation "could cost us our jobs." Bradley allegedly told Tackett that he did not have to remember or know anything, and when Tackett retorted that he would not lie for defendant and would be as honest as he could, Bradley got angry.

The evidence presented by plaintiffs (that they were told not to make comments about the fire or to discuss it with the fire department or the investigator, and that defendant's agents made certain statements at pre-deposition meetings) is consistent with defendant having, even at an early stage in the fire-investigation process, and certainly by the time of the pre-deposition meetings, an intent to retaliate against plaintiffs "because [of]" their being requested to testify. MCL 15.362.

In addition to the foregoing evidence in plaintiffs' favor is the following evidence regarding the discharge of Tackett. In the *Meda* deposition, Tackett testified that he knew from personal observation that there was aluminum wiring in the Canterbury Woods apartments. Tackett also testified about a service request he wrote that stated that there were burned wires. He wrote "burned wires" on the service request because "there was evidence of a spark in there, an arc." The day after Tackett's deposition in *Meda*, defendant terminated Tackett. While temporal proximity alone is insufficient to establish retaliatory intent or causation, *West*, 469 Mich at 186, here the temporal proximity is but one of a set of evidentiary pieces that can be viewed together to form a picture suggesting retaliatory intent.

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participate in a court action. Therefore, we only consider the arguments relating to the type-two status claimed.

In addition, there were somewhat different reasons presented for why defendant terminated plaintiffs, and these different reasons can be interpreted as indications that the real reason was retaliatory (and such interpretation is for the trier of fact). Tackett testified that two managers told him that he was being terminated as part of readjustments the company was implementing. Bradley testified that defendant terminated Tackett because he was a slow worker and that "[p]eople weren't decided to be terminated because of their pay . . . ."[4] Vice President Jill Jackson testified that Tackett was fired because he was at the upper end of the pay scale, he received a free apartment, and he took too long to finish his projects. Jackson also testified that Tackett liked to talk a lot and failed to follow directions. Kurt Herbeck, Tackett's supervisor, testified that he recommended Tackett's discharge to Bradley because he was slow, had low productivity, and lacked the knowledge necessary to do the maintenance technician's job.

There was also evidence of somewhat conflicting reasons being given for McGregor's firing. McGregor testified that his performance was never mentioned to him by Jackson as a reason for the firing, but Jackson testified that poor performance was indeed a factor. In addition, Jackson indicated that the firing was related to downsizing, but Michael Tobin, defendant's president, testified that the decision to fire McGregor was made before the reduction in force and was based on unspecified "concerns."

It is not necessary for plaintiffs' proofs to be conclusive at the summary disposition stage—only that there be a genuine issue of fact. MCR 2.116(C)(10). In the context of this summary disposition proceeding, it is not the role of this Court, or the circuit court, to act as a trier of fact and to rule on how evidence should be weighed and interpreted, especially when motive or intent is at issue. See *Foreman*, 266 Mich App at 135-136; see also *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Viewing the evidence in the light most favorable to plaintiffs, see *Ernsting*, 274 Mich App at 510, because both plaintiffs presented sufficient evidence of causation (retaliatory intent), that element of their whistleblower claims was satisfied for purposes of defeating summary disposition.

IV. PRETEXT

The burden thus shifts to defendant to present evidence that the true reason for the discharge was nonretaliatory. Defendant has stated that it fired plaintiffs as part of a reduction in force. According to Tobin, the decision was made to pick the best employees and to let others go. Defendant has also asserted that plaintiffs were slow in their work. These reasons shift the burden back to plaintiffs to show that defendant's proffered reasons were a pretext for retaliation. A plaintiff can show pretext by evidence indicating that a retaliatory motive was, more likely than not, the reason for the termination, or by evidence tending to disprove the reasons presented by the employer. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 660; 653 NW2d 625 (2002).

[4] This seemed to contradict an earlier statement by Bradley during which she mentioned Tackett's pay in response to a question concerning the input she gave regarding his termination.

Plaintiffs have sufficient evidence of pretext to raise a genuine issue of fact. First, plaintiffs presented evidence of varying or conflicting reasons being given for why McGregor and Tackett were terminated. This tends to disprove the nonretaliatory reasons presented by the employer. Second, Tackett testified that plaintiffs, as employees, were instructed not to discuss the fire with anyone. While this alone does not compel the conclusion that the later reduction in force was a mere pretext, it is, as under the causation analysis, one piece of the evidentiary puzzle that, when viewed along with other pieces such as McGregor's being "coached" about his upcoming deposition, can be interpreted as showing pretext. In addition, defendant contended that plaintiffs worked too slowly, but plaintiffs validly assert that this contention is largely and materially uncorroborated. While the slow-work allegations may ultimately be held true, at this stage, when viewed along with the other evidence, they are questions for the jury.

Tackett argues that defendant did not tell him that he was fired for performance problems or for pay-scale reasons, telling him only that he was being terminated because of "readjustments" at the company, which was allegedly "overstaffed." The alleged fact that Tackett was not told, at the time of his termination, about two of the reasons now given for his termination could reasonably be interpreted by the trier of fact as evidence that the alleged "real reasons" were pretexts, perhaps given to cover up another reason (retaliation).

V. CONCLUSION

With regard to both plaintiffs' claims, there are genuine issues of material fact concerning whether defendant violated the WPA. Thus, the trial court erred in granting summary disposition to defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro