STATE OF MICHIGAN

COURT OF APPEALS

DANIEL SCOTT THOMAS,

Plaintiff-Appellant,

v

LIVERNOIS VEHICLE DEVELOPMENT, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
November 8, 2011

No. 297786
Wayne Circuit Court
LC No. 09-009461-CZ

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff, Daniel Scott Thomas, appeals as of right the grant of summary disposition in favor of his former employer, defendant, Livernois Vehicle Development, L.L.C. (hereinafter "LVD"), on Thomas's claim of retaliatory discharge. We affirm.

Thomas asserts that he was discharged in violation of the Elliot-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*, after he provided an e-mail validating the sexual harassment claim of his girlfriend and former coworker, Amanda Workman. In January 2008, Workman had complained that another coworker, Mark O'Malley, had sent her inappropriate e-mails and made comments that made her feel uncomfortable. A written complaint form was completed by Workman and investigated by LVD's Human Resources Manager, Barbara Behler. The investigation affirmed Workman's complaints and Behler issued a written warning to O'Malley regarding his behavior. Two months later, Workman again contacted Behler to report that O'Malley had engaged in inappropriate conduct. When Behler sought to gain additional information pertaining to the incident, Workman indicated that she was not seeking another investigation and did not want to be responsible for O'Malley facing further disciplinary action and possible discharge. As a result, at Workman's request, Behler merely documented the incident and did not pursue it further. Workman later acknowledged that she had re-established a friendly, platonic relationship with O'Malley. Subsequently, on August 26, 2008, Workman tendered her written resignation to LVD. Workman cited her reasons for resigning as a dispute over cancellation of her previously approved vacation time and feeling unappreciated. No mention was made to her previous complaints of sexual harassment as a factor in the submission of her resignation. The next day, on August 27, 2008, after Workman was no longer an employee of LVD, she received another suggestive e-mail from O'Malley, which confirmed the previous complained of incidents of sexual harassment. Workman forwarded the e-mail to

Thomas and Thomas printed the e-mail and provided a copy to Behler. When providing the e-mail to Behler, Thomas indicated he was trying to be a "good employee". He also stated that he wanted to avoid being placed in the middle of any controversy.

About a month later, LVD received correspondence from an attorney on behalf of Workman threatening to file a lawsuit for unlawful sexual harassment. On October 2, 2008, Thomas was informed by LVD that his employment was being terminated. Although Thomas acknowledged that he was told that his discharge was for financial reasons, he believed the action was in retaliation for his providing a copy of the August 27, 2008, e-mail in support of Workman's sexual harassment complaint. Thomas cited in support of his contention of retaliation a statement weeks earlier by his supervisor, "If this thing with Amanda goes south, you're going to get the short end of the stick." Thomas also asserted that the change in his parking area and a recent negative performance evaluation demonstrated the retaliatory nature of his discharge. The next day, LVD contacted Thomas to return him to work stating new contracts were available to permit the continuation of his employment. Thomas returned to work but was again terminated in November 2008.

LVD brought a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), alleging that Thomas could not demonstrate retaliatory discharge as he was not engaged in a protected activity and the lack of a causal connection between his provision of a copy of Workman's e-mail and his termination. In addition, LVD argued that Thomas could not prove that the economic reasons cited by LVD for termination his employment were pretextual. The trial court granted summary disposition in favor of LVD, finding that Thomas was not engaged in a protected activity at the time of his discharge. We review de novo a trial court's decision to grant summary disposition. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

Pursuant to MCL 37.2701(a), an employer may not "[r]etaliate or discriminate against a person because the person has opposed a violation of [the ELCRA], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.2701(a). To establish a prima facie case of retaliation, a plaintiff is required to demonstrate:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

The first hurdle for Thomas to overcome in establishing a prima facie case of retaliation is the demonstration that he was engaged in a protected activity. Protected activity under the ELCRA has been described as "oppos[ing] a violation of th[e] act, or . . . mak[ing] a charge, fil[ing] a complaint, testif[ying], assist[ing], or participat[ing] in an investigation, proceeding, or hearing under th[e] act." MCL 37.2701(a); see also *Barrett v Kirtland Community College*, 245 Mich App 306, 318; 628 NW2d 63 (2001).

We disagree with the trial court regarding whether Thomas was engaged in a protected activity. This Court has determined that although "[a]n employee need not specifically cite the CRA when making a charge under the act. . . . the employee must do more than generally assert unfair treatment. The employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim . . . pursuant to the CRA." *Barrett*, 245 Mich App at 318-319.

At the time Thomas provided the e-mail, it was known that he was involved in a romantic relationship with Workman. Workman had complained on several previous occasions about O'Malley's conduct, thus prompting an investigation and formal action. The e-mail that Thomas provided to Behler established the veracity of those previous complaints. Although Thomas stated that his intent in providing those e-mails was to be a "good employee," it is reasonable to conclude that Thomas was attempting to bolster Workman's potential claim under the ELCRA. That inference is certainly strengthened when taking into consideration Thomas's relationship with Workman. Moreover, his report of the memo was in opposition to behavior that arguably violated the ELCRA. Further, while it is true that the e-mail in question was sent to Workman at a time that she was no longer employed by LVD, the contents of that e-mail related to events that occurred during her employment and that would potentially form the basis of a future suit.

Although we conclude that the trial court erred in holding that Thomas was not engaged in protected activity, we affirm the trial court's grant of summary disposition on an alternative basis. Once a plaintiff establishes a prima facie case, the burden shifting analysis delineated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), comes into play. *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993). "If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate business reason for the discharge. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge." *Roulston v Tendercare, Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). To be actionable, Thomas must prove that the protected activity was a significant factor in causing the employer to take the adverse action. *Barrett*, 245 Mich App at 325.

Thomas does not dispute LVD's assertion regarding the loss of significant business in July 2008 and the layoff of numerous employees in the following months. His contention that his discharge was because of his provision of an e-mail verifying previous complaints of sexual harassment by Workman, which had already been accepted and sustained by Behler's investigation, is insignificant when juxtaposed against the economic climate and financial impact experienced by LVD because of the loss of revenue from its major client. It is undisputed that LVD terminated a significant number of its personnel in the months immediately preceding and following Thomas's final termination. Rather than suggesting an improper motivation, the fact that Thomas was immediately recalled from his initial discharge when work became available evidences an attempt by LVD to retain his services or a response to his threats to implicate wrongdoing on behalf of LVD to one of its important customers. Thomas has provided no evidence to dispute LVD's assertion that, due to severe financial constraints experienced by the

company, it was necessary to discharge a significant number of employees.[1] In addition, Thomas has failed to contradict evidence that none of the research and development projects worked on by Thomas were marketable or had generated revenue for LVD such that his discharge was contrary to the company's economic benefit. As a result, Thomas has failed to demonstrate that his involvement in protected activity was causally connected to the adverse employment action. Consequently, defendant is entitled to summary disposition.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

[1] To the extent that plaintiff argues that his supervisor's observation that plaintiff may get "the short end of the stick" evidences a connection between the protected activity and the adverse employment action, we disagree. That alleged isolated comment does not overcome the significant evidence that the adverse employment action was the result of defendant's major financial difficulties.