STATE OF MICHIGAN

COURT OF APPEALS

IRA LEE TODD, JR.,

Plaintiff-Appellant,

v

KWAME KILPATRICK and CITY OF DETROIT,

Defendants-Appellees.

UNPUBLISHED
February 14, 2012

No. 300594
Wayne Circuit Court
LC No. 08-119322-NZ

Before: SERVITTO, P.J., and TALBOT and K.F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendants, former mayor and convicted felon Kwame Kilpatrick and the City of Detroit, in plaintiff's action under the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*. We reverse, finding that plaintiff was engaged in a "protected activity" under the WPA when he reported that an individual living in Kentucky who was under investigation for criminal wrong-doing in Detroit bragged that he had a personal and professional relationship with the mayor.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff filed a complaint against defendants, claiming that he had been unlawfully demoted in violation of the WPA after reporting suspected illegal activities of a known criminal that had ties to the mayor. Specifically, plaintiff alleged that as a member of the prestigious Violent Crime Task Force, he was involved in investigating a number of unsolved "hit-man" style murders in Detroit. Vincent (Vito) Smothers and Ernest (Nemo) Davis were two suspects believed to be part of a ring of hit men. It was suspected that, following a hit, Smothers and Nemo would go to Kentucky and stay with Nemo's relative, James Davis, until it was safe to return to Michigan. As part of his investigation and in the hope of locating Smothers, plaintiff contacted police officials in Kentucky. Sergeant Shane Ensminger (a Kentucky police officer) advised plaintiff that James Davis was well known to law enforcement in Kentucky. It was rumored that Davis was involved in selling large quantities of narcotics in both Detroit and Lexington and that he was engaged in a major development project in the Detroit area. Ensminger told plaintiff that Davis claimed to have both personal and professional connections with Mayor Kwame Kilpatrick.

Smothers and his wife, Cecily Smothers, were eventually arrested. Plaintiff elicited confessions from both Smothers and his wife regarding a number of local homicides, including the high-profile murder of a police officer's wife. It was believed that the police officer paid to have his wife killed in order to carry on his extramarital affair and collect insurance proceeds. Plaintiff briefed Deputy Chief Marshall Lyons and Commander James Tolbert regarding the possible connection between James Davis and Kilpatrick and requested authorization to travel to Kentucky to meet with the Lexington Police Department and federal task force to obtain additional information on James Davis' criminal activity. Plaintiff claimed that, following his reports and briefing, he was immediately placed on furlough and was subsequently removed from the task force. Tolbert told plaintiff he could have his old position if he "kept a low profile, kept his mouth shut, and did not have anything further to do with Kentucky or James Davis."

Plaintiff maintained that there was a culture of fear within the Detroit Police Department regarding the mayor and his associates. Police officers were unceremoniously reassigned or suffered other job-related consequences when investigating the mayor, his relatives, or any of his friends. It was understood that the mayor's associates were "off-limits." Plaintiff pointed to the as-yet-unsolved murder of exotic dancer Tamara Green (a/k/a Strawberry) and the downfall of officers who attempted to investigate Green's connection to an alleged party at the mayor's home (the Manoogian mansion). Plaintiff argued that the mayor's legacy continued when, after requesting permission to further investigate James Davis' connection to the mayor, plaintiff was assigned out of the task force.

The trial court granted defendants' motion for summary disposition, finding that plaintiff failed to establish a prima facie case for a claim under the WPA. Specifically, the trial court found that plaintiff had not engaged in a "protected activity." The court wrote:

> Plaintiff satisfied the reporting requirement [of the WPA], having presented evidence that he told Lieutenant Rochon, Commander Tolbert and Deputy Chief Lyons, verbally and in writing, that "Lexington Police provided information that James Davis and Mayor Kilpatrick are connected either personally or professionally."
>
> Plaintiff has not shown, however, that the alleged activity he reported violated any law, regulation or rule. Plaintiff concedes that he was not present when James Davis made the assertions and that he did not know whether James Davis was telling the truth or not. Even if, however, there existed evidence of some sort of acquaintanceship between James Davis and Kilpatrick, that association would not be sufficient to constitute "a violation of a law, regulation, or rule." Indeed, Plaintiff cites no law, regulation or rule, suspected or actual, that Mayor Kilpatrick's alleged association with James Davis violated or could have been suspected of violating. Essentially, Plaintiff is implying that further investigation might have produced evidence of the mayor's involvement in illegal or criminal activity of some sort, activity that would violate a law, regulation or rule. The WPA simply is not intended to provide protection for reporting unsubstantiated, hearsay information that may or may not lead to evidence of suspected or actual violations of law in the future.

> Nor is there a supportable legal argument at this point for the position that Plaintiff was protected by the WPA because he mistakenly thought there was a law being violated by Mr. Kilpatrick's association, if it existed, with James Davis.
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> Moreover, even if Defendant took adverse action against Plaintiff because it believed Plaintiff reported a violation, the statute does not protect an employee who is perceived to be a whistleblower but who has not engaged in protected activity.
>
> Plaintiff's argument that his reporting or suspected violations of the law by James Davis and Ernest Davis, independent of any connection to Kwame Kilpatrick, suffices to constitute engaging in protected activity is somewhat disingenuous because it is not the reporting of the Davis brothers' suspected illegal activities that Plaintiff contends caused the adverse employment action. Rather, it is the reporting of a possible link between Kwame Kilpatrick and James Davis that Plaintiff asserts led to his reassignment out of the [task force], and Plaintiff cites no existing law making an acquaintanceship between people unlawful, without more, even if one of the individuals is suspected of criminal activity.

The trial court denied both plaintiff's motion for reconsideration and plaintiff's motion to amend the complaint. Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to de novo review. *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). We also review de novo a trial court's decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 563; 766 NW2d 896 (2009). The trial court must consider all evidence submitted by the parties in a light most favorable to the non-moving party. *Lanigan*, 282 Mich App at 563. A trial court must deny the motion if, after reviewing the evidence, reasonable minds might differ as to any material fact. *Id.*

III. ANALYSIS

Plaintiff argues that the trial court erred when it concluded that he did not engage in a protected activity. Plaintiff writes, "the trial judge mistakenly concluded that in order to find a causal connection between [plaintiff's] report and his transfer, she was required to find that only that portion of [plaintiff's] report that stated a specific violation of law caused the retaliation. The judge should have considered [plaintiff's] report on James Davis' criminal activity and Davis' claim of being personally associated with the Mayor as one integrated report in deciding whether a causal connection existed." We agree.

MCL 15.362 provides:

> 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.

The underlying purpose of the WPA is protection of the public. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 378; 563 NW2d 23 (1997). The WPA "meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id.* It is a remedial statute, and must be liberally construed to favor the persons that the Legislature intended to benefit. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998). The WPA is aimed at alleviating "'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses,'" by encouraging employees, who are the group best positioned to report violations of the law, to report violations by reducing their fear of retribution through prohibiting future employer reprisals against whistle blowing employees. *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 612; 566 NW2d 571 (1997), quoting *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 75; 503 NW2d 645 (1993), overruled in part on other grounds *Brown v Detroit Mayor,* 478 Mich 589; 734 NW2d 514 (2007). Therefore, the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern. *Shallal,* 455 Mich at 621.

In order to set forth a prima facie case under the WPA, plaintiff has to show that: 1) he was engaged in a protected activity; 2) he suffered an adverse employment action; and, 3) there was a causal connection between the protected activity and the adverse employment action. *West v Gen Motors Corp,* 469 Mich 177, 183–184; 665 NW2d 468 (2003). The trial court granted summary disposition in defendants' favor because it concluded that plaintiff failed to meet the first prong of this three-part test. We believe that the trial court applied an overly-narrow definition of "protected activity" and erred in concluding that plaintiff failed to set forth a genuine issue of material fact for a jury.

The plain language of the WPA was intended to benefit only those employees engaged in "protected activity" as defined under the act – those employees who report or are about to report a violation of law, regulation, or rule. *Chandler v Dowell Schlumberger, Inc,* 456 Mich 395, 406; 572 NW2d 210 (1998). The fact that the public body to which plaintiff reported was also his employer is not fatal to maintaining the cause of action. See *Brown,* 478 Mich at 594–595. Nor is there any limiting language in the WPA that requires that plaintiff be acting outside the regular scope of a plaintiff's employment. *Id.* In granting summary disposition, the trial court looked only to whether plaintiff's report of a connection between Davis and the mayor involved a violation of, or a suspected violation of, a law, regulation or rule. Instead, the trial court should have considered plaintiff's report in its totality and considered *both* the fact that plaintiff reported

criminal behavior on the part of Davis *and* the fact that plaintiff reported a connection to the mayor. Even if there were aspects of plaintiff's report that were not "protected," the evidence should have been considered as a whole in order to determine whether a trier of fact could find that some portion of plaintiff's activity was protected and was a motivating factor in the adverse employment action.

There was no need for plaintiff to report criminal wrongdoing on the mayor's part in order to set forth a prima facie case. In *Dolan*, our Supreme Court held that a plaintiff's reporting of a third party's suspected violation of the law constituted protected activity. *Dolan*, 454 Mich at 375-376, 382. The plaintiff in that case was a ticket agent who was instructed by the airport to report suspicious individuals fitting a designated profile as a means of curbing drug trafficking or terrorist activities. Shortly thereafter, the plaintiff's employer (one of the airlines) issued a notice that ticketing agents were no longer to report such individuals without first contacting the airline. *Id.* at 375. Believing that the plaintiff had violated this policy, the airline terminated her employment. *Id.* at 376. Our Supreme Court found that the trial court erred in granting the airline's motion for summary disposition on the plaintiff's WPA claim:

> [W]e decline to limit application of the WPA to reported violations of the employer alone. In accordance with the plain language of the act, plaintiff has alleged that she was fired because she reported or was believed to have reported a violation of the law. This allegation is sufficient to state a claim of wrongful discharge from employment under the WPA. In addition, we find that the reported violation in the present case was sufficiently related to the employment setting to be protected under the WPA. [*Id.* at 382.]

In *Terzano v Wayne Co*, 216 Mich App 522; 549 NW2d 606 (1996), the plaintiff was a licensed electrician who worked for defendant airport. As part of his inspection duties, the plaintiff told his supervisor that he had ordered construction work at a restaurant within the airport be stopped because it was being performed without a license and that improper wiring posed a potential fire hazard. The city inspector later ordered the restaurant to close and the construction to cease. The restaurant was held by the largest tenant of the airport. The plaintiff and his supervisor were reprimanded by the airport for reporting the violations and the plaintiff was ordered to have no further contact with the city inspectors. The plaintiff was terminated four months later, just two weeks shy of the end of his probationary term. The jury found for the plaintiff in his WPA action and the trial court refused to upset the verdict. *Id.* at 524-526. This Court affirmed, finding that the WPA protects employees who, while acting in the scope of employment, report third-party violations or suspected violations of law that directly affect their employer's business. *Id.* at 523.

> We are convinced that an employee may be just as fearful of telling authorities about violations of law committed by an entity that has a direct financial effect on the business of his employer as the employee would be to report a violation of law committed by his employer. Under either circumstance, the employer may suffer financial harm or embarrassment and, hence, the employee may be reluctant to report the violation for fear of employer retaliation. To this extent, the legislative objective of encouraging employees to report illegal activities would be thwarted if the WPA were not applied. In addition, the employee who reports such third-

> party conduct may be in the best or only position to observe such wrongful conduct. The rationale for applying the WPA in such circumstances is as strong as in the situations where the employer itself is the perpetrator of the reported violation. The objectives of the WPA are furthered by affording plaintiff protection. [*Id.* at 532.]

Dolan and *Terzano* support plaintiff's position that his report on Davis' criminal activity, standing alone, was protected under the WPA. The trial court erred in finding that plaintiff's actions did not fall within a "protected activity" for purposes of the WPA. Plaintiff did not simply report on Davis' alleged connection to the mayor, but also reported on Davis' suspected criminal activity, including: 1) acting as an accessory after the fact in allowing his relative and Smothers to hide out in Kentucky following hits; 2) engaging in drug sales; and, 3) participating in mortgage fraud. Reporting on Davis' criminal activity was clearly protected by the WPA. Though reporting a relationship between Davis and the mayor would not have otherwise qualified as a protected activity, the information must be taken together with the report of Davis' criminal wrong-doing. The trial court should have considered plaintiff's report on Davis' criminal activity and Davis' claim of being personally associated with the mayor as one integrated report.

In concluding that plaintiff was not engaged in a protected activity, the trial court only addressed the first prong of the prima facie case. Because the case must be remanded, a short discussion regarding the remaining elements of a prima facie case is warranted: specifically, 2) whether plaintiff suffered an adverse employment action, and 3) whether there was a causal connection between the protected activity and the adverse employment action.

Adverse employment action is defined "as an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities;" rather, "there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another are not controlling." *Pena v Ingham Co Rd Comm*, 255 Mich App. 299, 311, 660 NW2d 351 (2003), quoting *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999). Nevertheless, there are "typical" adverse employment actions, including termination, "a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Pena*, 255 Mich App at 312, quoting *White v Burlington N & SF R Co*, 310 F3d 443, 450 (CA 6, 2002). Taking the evidence in a light most favorable to plaintiff, there was a genuine issue of material fact that plaintiff suffered adverse employment action. He was taken off of the Smothers' case and transferred out of the highly prestigious task force. Plaintiff was brought back to the Criminal Investigation Bureau after a few months, but was then assigned desk duty in the Homicide Division. At the time of his deposition, plaintiff was working in another precinct. Benito Mendoza (plaintiff's supervisor at the task force) testified that he was ordered to down-grade plaintiff's service rating even though Mendoza found no reason to do so. Plaintiff testified that he lost a lot of overtime as well as other perks associated with being a member of the task force, to say nothing of the loss of prestige.

The question then becomes whether the adverse employment action was motivated by plaintiff's protected activity. "Summary disposition for the defendant is appropriate when a

plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action." *West*, 469 Mich at 184. A plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence. *Sniecinski v. Blue Cross Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003).

> Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. To establish causation using circumstantial evidence, the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. Speculation or mere conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. In other words, the evidence presented will be sufficient to create a triable issue of fact if the jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation. [*Shaw v City of Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009) (quotations and citations omitted).]

Again, taking the evidence in a light most favorable to plaintiff, there is a genuine issue of material fact as to whether plaintiff's reporting about Davis' criminal activity and Davis' claimed relationship to the mayor motivated his transfer out of the task force. Although the alleged relationship between Davis and the mayor was known by other members of the task force, plaintiff was the only individual who sought permission and funding to go to Lexington and further investigate Davis' connection to violent crime and mortgage fraud in Detroit. Plaintiff testified that Tolbert told plaintiff he could have his old position on the task force if he "kept a low profile, kept his mouth shut, and did not have anything further to do with Kentucky or James Davis." Thus, although defendant proffered other reasons for plaintiff's adverse employment action, including his poor performance at Smothers' preliminary examination and his alleged violation of protocol when arresting and transporting Cecily Smothers, there was certainly a genuine issue of material fact as to whether retaliation was a motivating factor in plaintiff's transfer out of the task force.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly