STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER STAY, Plaintiff-Appellant,	UNPUBLISHED February 9, 2012
v	No. 301709 Calhoun Circuit Court
CONNECTIONS EMPLOYMENT RESOURCE and VICKIE CUMMINS, a/k/a VICKI CUMMINGS, Defendants-Appellees.	LC No. 2010-000716-CL

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Plaintiff Christopher Stay appeals as of right from an order of the Calhoun Circuit Court granting summary disposition to defendants Connections Employment Resources (CER) and Vickie Cummins. For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff worked in a laundry facility located in a Veterans Administration facility from June 2007 until he was discharged on December 28, 2009. The laundry facility was operated by CER. CER is a program of Summit Pointe, which operates community health services in Calhoun County. At the time he was terminated, plaintiff's job was to sort through bags of soiled linens coming from the Veterans Administration facility and other local hospitals. The bags generally consisted of laundry items such as wash cloths, towels, sheets, pillow cases, pajamas, scrubs, gowns, and mops. However, it was not uncommon to find biohazards such as needles in linen bags. Therefore, employees sorting through the bags were required to wear two layers of protective gloves and gowns.

On Friday, December 18, 2009, plaintiff reported to work at 5:00 a.m. At approximately 7:30 a.m., plaintiff's coworker, Jody Carpenter, saw an item in one of the linen bags that he did not recognize. Carpenter called the plant manager, Cummins, over to look inside the bag. According to Cummins, while she was looking in the bag, plaintiff stuck out his hand and put it in the bag. At her deposition, Cummins testified that this was improper because they did not know what the item was or whether it was dangerous. Further, Cummins testified that she had warned plaintiff in the past not to poke bags with his fingers. Cummins testified that she reached out to prevent plaintiff from putting his hand in the bag; however, she did not recall making any

contact with plaintiff. Cummins then took the bag and disposed of it. Cummins did not make a written report regarding the incident.

Plaintiff testified that he looked inside the bag and saw something white that looked unfamiliar. Plaintiff stated that he "reached down to squeeze it, and [Cummins] slapped [his] hand and told [him], you got to touch everything?" Plaintiff stated that it was a quick stinging slap. The slap was through plaintiff's protective gloves and did not cause a bruise.

Later that day, plaintiff told another employee about the incident and stated he would like to talk to someone about it. The employee called the Veterans Affairs (VA) police for plaintiff. The VA police arrived shortly thereafter and spoke with plaintiff and Carpenter. After speaking with the VA police, plaintiff went back to work. The VA police were unable to speak with Cummins because she left early that day.

Around 3:00 p.m., Karen Woods, the Director of Human Resources, called plaintiff into an office and told him that he could not come back to work until the police investigation was complete. Woods also decided to remove Cummins and Carpenter from the workplace until the matter was sorted out by the police. Plaintiff and Carpenter were suspended that day. Cummins was not suspended until the following Tuesday, after the VA police had an opportunity to speak with her about the incident. All three individuals were placed on paid suspension.

After investigating the matter, the VA police closed the investigation as being an unfounded complaint. On January 4, 2010, plaintiff received a termination letter from CER dated December 28, 2009. The letter stated that plaintiff was being terminated effective December 29, 2009, for his continual disregard of the standards contained in the CER Employee Handbook.

On March 10, 2010, plaintiff filed a three-count complaint against CER and Cummins. Count one was for assault and battery. Count two was for negligent hiring, supervision, or retention of an employee. Count three was for violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. CER and Cummins denied the allegations and, after conducting discovery, filed a motion for summary disposition pursuant to MCL 2.116(C)(10). CER and Cummins argued that plaintiff's claims for assault and battery and negligence were barred by the exclusive remedy provision of the Workers' Disability Compensation Act (WDCA), MCL 418.311(1). Additionally, CER and Cummins argued that plaintiff was unable to meet his burden under the WPA because there was no evidence showing that plaintiff's discharge was connected to his filing a police report. After hearing arguments from the parties, the trial court granted CER and Cummins's motion for summary disposition.[1]

II. WHISTLEBLOWERS' CLAIM

Plaintiff argues that the trial court erred when it granted CER and Cummins's motion for summary disposition with regard to plaintiff's WPA claim. "Appellate review of the grant or

[1] Plaintiff only appeals the WPA and assault and battery rulings.

denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "The determination whether evidence establishes a prima facie case under the WPA is a question of law that this Court reviews de novo." *Roulston v Tendercare, Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

Plaintiff argues that he established a direct link between his protected activity and his discharge. We disagree. The WPA, at 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.

A "plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge." *Roulston*, 239 Mich App at 280. To establish a prima facie case under MCL 15.362, "a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West*, 469 Mich at 183-184.

CER and Cummins do not challenge plaintiff's argument that he was engaged in a protected activity. Also, there is no doubt that plaintiff was discharged. Plaintiff, however, failed to present any evidence establishing a causal connection between his protected activity and his discharge. The only evidence presented by plaintiff to support his claim was that he was suspended within hours of reporting the alleged assault to the police and fired ten days later. "Although the employment actions about which plaintiff complains occurred after his report to the police, such a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *Id*. at 186.

> Plaintiff must show something more than merely a coincidence in time between protected activity and adverse employment action.[12]

[12] Relying merely on a temporal relationship is a form of engaging in "the logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this)" reasoning. *Rogers v Detroit*, 457 Mich 125, 168; 579 NW2d 840 (1998) (Taylor, J., dissenting), majority opinion overruled by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). [*West*, 469 Mich at 186.]

Further, even if we assumed that plaintiff established a prima facie claim of retaliatory discharge, plaintiff's claim would still fail. When a plaintiff establishes a prima facie case of retaliatory discharge,

> 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*, 239 Mich App at 281 (citation omitted).]

CER articulated a legitimate business reason for plaintiff's discharge. Cummins testified that she had warned plaintiff on prior occasions not to poke the linen bags because it was dangerous. Further, plaintiff's disciplinary record showed he had been disciplined 13 times in less than two years; this included a suspension for safety infractions and failing to follow directions. The December 18, 2009, incident showed that plaintiff was still committing safety infractions and not following directions. Thus, CER clearly had a legitimate business reason to terminate plaintiff.

Plaintiff argues that the reason given for his discharge was a mere pretext. However, plaintiff provides no support for this assertion except a citation to a deposition not found in the lower court record and his own perception of his job development that appears to be directly contradicted by plaintiff's disciplinary record. Thus, when viewing all the evidence in the light most favorable to plaintiff, plaintiff has failed show that his discharge was retaliatory in nature. The only evidence presented was the temporal relationship between plaintiff talking with the police and plaintiff's suspension and discharge. Standing alone, this was insufficient.

II. ASSAULT AND BATTERY

Next, plaintiff argues that the trial court erred when it concluded that his assault and battery claim was barred by the exclusive remedy provision of the WDCA. As noted earlier, "[a]ppellate review of the grant or denial of a summary-disposition motion is de novo . . . ." *West*, 469 Mich at 183. Whether the facts alleged by a plaintiff are sufficient to sustain an intentional tort claim is a question of law for the courts. *Johnson v Detroit Edison Co*, 288 Mich App 688, 696; 795 NW2d 161 (2010).

"Typically, an employee's exclusive remedy against an employer for work-related personal injury, or occupational disease, is those benefits provided by the WDCA." *Id*. at 695-696; MCL 418.131(1).[2] However, the WDCA provides an exception to the WDCA's exclusive remedy provision "if an employee can prove that the employer committed an intentional tort." *Johnson*, 288 Mich App at 696; see also MCL 418.131(1) ("The only exception to this exclusive remedy is an intentional tort.").

[2] MCL 418.131(1) provides, in relevant part: "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease."

Plaintiff argues that the intentional tort exception applies because he alleges claims of assault and battery against CER and Cummins.[3] Plaintiff argues that because assault and battery are, by definition, intentional torts, they fall with the intentional tort exception. This argument is unpersuasive because it is based on the traditional definitions of assault and battery. MCL 418.131(1), however, provides a narrower definition of an intentional tort that "is not synonymous with the showing required for a classic intentional tort." *Johnson*, 288 Mich App at 696. Subsection 131(1) provides, in relevant part:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996), the Michigan Supreme Court, in separate opinions, outlined the proofs that are necessary for a case to fall within the intentional tort exception to the exclusive remedy provision in MCL 418.131(1):

> If we read both sentences of the intentional tort exception together, it becomes evident that an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Travis*, 453 Mich at 180 (opinion of BOYLE, J.).][4]

Plaintiff failed to establish an intentional tort as defined by MCL 418.131(1). If the facts are as plaintiff alleges, then one can reasonably conclude that Cummins acted deliberately when she slapped plaintiff's hand. Plaintiff, however, has provided no evidence that Cummins specifically intended, or made a conscious choice, to injure plaintiff. To the contrary, the evidence tends to show that Cummins acted to prevent plaintiff from injuring himself or others.

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[3] Although plaintiff has asserted claims of assault and battery against both CER and Cummins, the analyses for both defendants are ultimately the same because they revolve around the intentional tort exception. The intentional tort exception applies to claims against coemployees as well as to claims against employers. *Graham v Ford*, 237 Mich App 670, 673; 604 NW2d 713 (1999). Further, "[a] corporation is vicariously liable only where 'some employee . . . act[s] with the requisite intent to impute an intentional tort to a corporation.' Therefore when the employer is a corporation, a particular employee must possess the requisite state of mind in order to prove an intentional tort." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 171-172; 551 NW2d 132 (1996) (citation omitted). Thus, the issue for both defendants ultimately comes down to the intent of Cummins.

[4] A majority of the Supreme Court concurred in the test established in Justice BOYLE's lead opinion. *Travis*, 453 Mich at 191-192.

In his deposition, plaintiff testified that he looked in the bag and saw an unfamiliar item. Plaintiff then put his hand out and squeezed the item. Although seemingly harmless, Cummins testified during her deposition that the linen bags often contained biohazards such as needles. Cummins stated that it was improper for plaintiff to reach into the bag because he did not know what the item was. Therefore, she used her arm to stop him. Plaintiff has provided no evidence to rebut the testimony that it was dangerous to poke linen bags and that Cummins was acting to protect plaintiff. Even if Cummins deliberately slapped plaintiff's hand, all the evidence shows that she did it to prevent plaintiff from potentially injuring himself.

Plaintiff is also unable to establish Cummins's intent to injure through the alternative means provides provided in MCL 418.131(1). In *Palazzola v Karmazin Prod Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997), this Court stated:

> Recognizing that direct evidence of intent is often unavailable, the *Travis* Court explained that the second sentence of the exception provides an alternative means of proving an employer's intent to injure. . . . To paraphrase the *Travis* Court . . . , a plaintiff alternatively can prove intent to injure by establishing the following elements:
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> (1) "Actual Knowledge"—This element of proof precludes liability based upon implied, imputed, or constructive knowledge. Actual knowledge for a corporate employer can be established by showing that a supervisory or managerial employee had "actual knowledge that an injury would follow from what the employer deliberately did or did not do."
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> (2) "Injury certain to occur"—This element establishes an "extremely high standard" of proof that cannot be met by reliance on the laws of probability, the mere prior occurrence of a similar event, or conclusory statements of experts. Further, an employer's awareness that a dangerous condition exists is not enough. Instead, an employer must be aware that injury is certain to result from what the actor does.
>
> (3) "Willfully disregard"—This element requires proof that an employer's act or failure to act must be more than mere negligence, e.g., failing to protect someone from a foreseeable harm. Instead, an employer must, in fact, disregard actual knowledge that an injury is *certain* to occur. [Emphasis in original.]

There is no evidence that Cummins deliberately disregarded actual knowledge that injury was certain to occur. The only relevant evidence submitted by plaintiff was his deposition testimony in which he stated that Cummins slapped his hand when he reached into the bag and squeezed the unknown item. Assuming an injury resulted from the slap, plaintiff presented no evidence that Cummins had actual knowledge that an injury was certain to occur and that she willfully disregarded that knowledge. Therefore, the intentional tort exception does not apply to plaintiff's claim and summary disposition was appropriate.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter