STATE OF MICHIGAN

COURT OF APPEALS

RACHEL BROCK, Plaintiff-Appellant,	UNPUBLISHED December 11, 2012
v	No. 306380 Genesee Circuit Court
CONSUMER SERVICES, INC., Defendant-Appellee.	LC No. 306380

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Plaintiff Rachel Brock, an African-American woman, contends that defendant Consumer Services, Inc. (CSI) terminated her employment in retaliation for her complaint of racial discrimination in the workplace. The circuit court granted summary disposition in CSI's favor, finding that Brock failed to demonstrate a causal connection between her complaint and the termination of her employment. Because Brock produced no evidence rebutting defendant's legitimate, non-invidious reasons for her employment termination, we affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

CSI is a nonprofit corporation that provides billing and other services for mental health service providers. It maintains offices in Mason and Flint. In January 2006, CSI hired Brock to work as a biller in its Flint billing office. Brock came to CSI with significant billing experience gained at another nonprofit organization providing mental health services. Within a year, CSI promoted Brock to billing supervisor in Flint.

As a billing supervisor, Brock's first performance evaluation was generally positive. Cynthia Thompson, Brock's immediate supervisor, judged that Brock's performance "fully meets job requirements" in nine out of 15 areas, although Thompson noted that Brock "needs to gain a better understanding of commercial insurance, working unpaid or denied claims" and "understanding accounts payable and receivable." In five of the 15 performance categories, Brock "often exceed[ed] job requirements."

In mid-2008, Kim Rogers replaced Thompson as Brock's supervisor. Rogers' initial evaluation of Brock was more positive than Thompson's had been, describing that Brock "consisten[tly] exceed[ed] job requirements" in five areas, and often exceeded job requirements in nine. Rogers noted that Brock "is very detail-oriented" and that contractors viewed Brock as

"the 'go-to' person for any billing issues." Like Thompson, Rogers identified that Brock needed "to work on her knowledge of commercial insurances." Nevertheless, Rogers recommended that Brock receive a 3% wage increase "based on high level of professionalism, commitment to company, and expectant work increase for upcoming evaluation period."

In 2009, CSI hired Jennifer Griese as its billing supervisor in Mason. Griese, a Caucasian woman, had no experience with mental health billing before joining CSI. She too reported to Rogers. At her deposition, Brock claimed that Griese enjoyed privileges that had not been extended to Brock, including greater access to the billing program and the ability to work at home.

Brock began to suspect Rogers of harboring a racially discriminatory animus in 2009, when Rogers hosted a "retreat" at her home for the Mason billing staff. The Flint billing staff, consisting of Brock and her two African-American subordinates, was not invited to the retreat. Brock asserts that Kathleen Taylor, CSI's CEO, later admitted that the August retreat was supposed to have included Brock and her Flint staff. Brock testified that when she confronted Rogers about the retreat, Rogers told Brock that "she was going to do something separate with the Genesee County staff." Apparently no second retreat ever occurred. As additional evidence, Brock recounted that when Taylor requested that Brock attend CSI's "operations" meetings, Rogers expressed, "I guess we could use a little color."

In November 2009, Rogers met with Brock for a "coaching" session. Rogers described coaching as an opportunity to discuss with an employee "what's happening that's good, what's happening that's bad." According to a "coaching agenda" prepared by Rogers in advance of the session, the first subject to be discussed concerned "unresolved billing issues." Other issues included delinquent claims, "communication," and "time clock." Brock and Rogers had a second coaching session in January 2010. Rogers' agenda reflected a number of negative comments, including: "I am hearing many complaints about lack of communication from providers, staff, and other billers," "Rachel is not present in the office when she needs to be," and

> Rachel spends much time defending her "territory", which is not conducive to team work. All of the providers are aware that there is an issue brewing, and they choose sides. We have to bridge this gap and Rachel needs to be a leader. I am hearing from providers and staff alike that Rachel does not promote an open door policy, and I ask that she DOES so.

After this meeting, Brock expressed to Rogers: "I'm beginning to think that this is about the color of my skin."[1]

[1] Rogers denies that Brock made this statement. Because this is an appeal from a grant of summary disposition, we credit Brock's version of events.

Brock testified that on September 13, 2010, she met with Chelsea Gleason, CSI's Human Resource Director, and voiced her feelings that she was being treated unfairly and that Rogers "would basically blow me off."[2] Brock recounted:

> I needed somebody to intervene.
>
> > So I went to Chelsea. And she said that I could – I believe she said I could file a grievance. I shared with Chelsea that I was concerned about things getting worse because of me pursuing this. And she said that she understood. She asked me if I felt like it was because, and she stopped. And I said because what? And she said you know. And I said no, what? And she said because you're black. And to be honest with you, I felt so relieved to hear somebody else say it, and especially somebody white say it, because I had been feeling that for so long but Kim would deny it. And I didn't want to keep saying it when she was denying it because when I would ask her, she would change. She would treat me better for a little while. So to hear it come from somebody else, it made me feel better.

Brock's deposition testimony continued:

> Q. Well, you told her you were being treated differently?
>
> A. Correct.
>
> Q. Did she ask you why you were being treated differently?
>
> A. She asked me if I thought – she said do you think it's because? And I said because what? And she said you know. And I said no. She said because you're black. And I said Chelsea, as a matter of fact, that's exactly what I think.
>
> Q. And then what did Chelsea say to you?
>
> A. She shook her head yes and she said yeah.

Gleason advised Brock that she could file a grievance, and Brock agreed "[t]o go through with it." Although Gleason told Brock that she would "get back" to her, Brock asserts that Gleason never did so.

A few days after her meeting with Gleason, Brock received a "Performance Improvement Plan" (PIP) authored by Rogers. The plan commenced as follows:

> Rachel has not demonstrated the consistent performance necessary to adequately prioritize task that are critical to the supervisory position. A pattern

[2] CSI disagrees with Brock's recitation of the meeting's events and insists that the meeting did not take place on September 13, 2010, but rather on September 30, 2010. Once again, we view the record in the light most favorable to Brock.

> has developed in which important work is started and then not completed. Rachel has not followed through on several high-priority projects to their completion, which results in others being reassigned the tasks that were previously assigned to Rachel. This is not an efficient use of departmental time and effort.

The PIP continued by identifying a number of "key deficiencies," and concluded that "after a reasonable amount of time has passed, should it be determined that the overall performance continues at the level that is 'below expectation', progressive discipline may be enforced." Brock signed the PIP on September 16, 2010. Brock claims that on or about September 30, 2010, she had a "heated" telephone conversation with Rogers. According to Brock, Rogers "got upset and she says and this doesn't have anything to do with the color of your skin."

Brock's job performance had also been the subject of criticism by her co-workers. In March 2010, one of the billing specialists Brock supervised complained to Rogers that Brock treated her badly. The employee refused to file a formal complaint. Later, Brock informed Rogers that she and the employee had worked out their differences. However, in November 2010, the employee made a written complaint regarding Brock's demands and her failure to work as a team. A second employee working under Brock voiced similar complaints.

In early November 2010, CSI's management decided to eliminate one of its two billing supervisor positions and to consolidate the corporation's billing operations in Mason. On November 9, 2010, Rogers and Taylor consulted with Gleason about the method for selecting an employee for termination. Gleason then informed Taylor and Rogers that Brock had "indicated that she felt she had been discriminated against." Taylor and Rogers insist that Gleason had not previously informed them of Brock's race discrimination complaint. Taylor instructed Gleason to memorialize her September meeting with Brock. According to Gleason's account of the September meeting, Brock did not want her complaint "to get back to" Rogers.

On November 18, 2010, CSI terminated Brock's employment. Rogers' written notification to Brock advised that CSI made "the decision to terminate your employment due to your job performance, complaints received, and a decision to eliminate the Billing Supervisor position you now hold."

Brock filed this action in 2011. Her complaint alleges a single count of retaliation in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. The circuit court granted summary disposition in CSI's favor, finding that Brock had failed to rebut CSI's legitimate, nondiscriminatory reasons for her employment termination.

II. ANALYSIS

"We review de novo the circuit court's summary disposition ruling." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). CSI's motion for summary disposition invoked MCR 2.116(C)(10), which tests a claim's factual support. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.

To establish a prima facie case of retaliation under the CRA,[3] a plaintiff must show "(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) (quotation marks and citation omitted). "To establish causation [when bringing a retaliation claim under the CRA], the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

CSI concedes that Brock has established the first three elements of a prima facie case, but disputes that any causal link exists between Brock's race discrimination complaint and the termination of her employment. The circuit court did not directly address whether Brock set forth a prima facie retaliation claim, instead ruling that because Brock was fired "for a legitimate nondiscriminatory reason" no evidence supported that her employment termination was pretextual.

We decline to consider whether Brock established a prima facie discrimination claim given that the circuit court correctly held that she did not rebut the legitimate, nondiscriminatory reasons proffered in support of her termination. After presenting a prima facie case of discrimination under the CRA, the plaintiff must nevertheless "proceed through the familiar steps set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973).]" *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id*. at 464. If the defendant produces a legitimate, nondiscriminatory reason for its action, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id*. at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). A plaintiff can establish pretext by substantiating that the proffered reasons for the adverse employment action (1) "had no basis in fact," (2) "were not the actual factors motivating the decision," or (3) were "insufficient to justify the decision." *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

CSI introduced evidence tending to prove that Brock was fired because the corporation decided to eliminate one billing supervisor position. CSI chose Brock for termination rather than Griese based on Brock's documented performance deficiencies. By advancing these legitimate,

[3] The antiretaliation portion of the CRA prohibits discrimination or retaliation "against a person because the person has opposed a violation of this act, 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).

nondiscriminatory reasons for terminating Brock's employment, CSI shifted to Brock the burden to articulate evidence that, when viewed in the light most favorable to her, would permit a reasonable fact finder to conclude that CSI's proffered reasons for its decision constituted pretexts. *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

Brock theorizes that CSI's justifications for her termination qualify as pretexts in light of the close proximity between her September 2010 complaint of race discrimination and her November 2010 termination. But even when viewed in the light most favorable to Brock, this evidence does not suffice to demonstrate that CSI's articulated reasons for her termination were pretextual.

> Close timing between alleged protected activity and the termination of a plaintiff's employment may establish the "causal connection" element of a plaintiff's prima facie case of retaliation, and "[t]he proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory [here, retaliatory] basis." [*Taylor v Modern Engineering, Inc*, 252 Mich App 655, 661; 653 NW2d 625 (2002) (alterations in original), quoting *Town v Mich Bell Tel Co*, 455 Mich 688, 697; 568 NW2d 64 (1997).]

As the Sixth Circuit has explained, "Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation." *Mickey v Zeidler Tool & Die Co*, 516 F3d 516, 525 (CA 6, 2008). As this Court pointed out in *Taylor*, however, "the short time between plaintiff's participation in protected activity and the termination of plaintiff's employment, without more, is insufficient to establish that the stated reason was a mere pretext." *Taylor*, 252 Mich App at 662.

We emphasize that were we to assume that Brock had established a prima facie case, the causation element would derive in part from the relatively close proximity between her complaint, the PIP, and her termination. In other words, the timing of events supplies an *inference* of causation. But once CSI put forth legitimate, nondiscriminatory reasons for terminating her employment, Brock faced a second legal hurdle: producing some evidence that CSI's articulated reasons for firing her qualified as false, as pretexts, or as insufficient to warrant termination. Brock attempts to surmount this obstacle by relying on the same temporal evidence, contending that because she was fired only two months after voicing her complaint, the two must be related. She has produced no independent evidence suggesting that CSI's desire to reduce its billing supervisor positions to one qualified as unnecessary, or rebutting the criticisms of her performance outlined in the PIP.[4] Viewed in the light most favorable to Brock, the record is

[4] Under certain circumstances, very close temporal proximity may suffice to create a triable issue of retaliatory discharge. For example, if an employee claims discrimination and is almost immediately fired, an inference of causation may be created that overcomes any post-hoc

devoid of evidence creating an issue of fact for the jury regarding whether CSI's proffered reasons for her discharge constituted mere pretexts. Thus, the circuit court properly granted CSI summary disposition of Brock's retaliation claim.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

rationales for the employee's firing. See, e.g., *Casna v City of Loves Park*, 574 F3d 420, 427 (CA 7, 2009). Here, the termination decision was made two months after Brock complained. Further, no evidence other than speculation supports that Taylor or Rogers knew of the complaint.