

STATE OF MICHIGAN
COURT OF APPEALS

JAMES PARKS,

Plaintiff-Appellant,

v

CARMIKE CINEMAS, INC.,

and

ROBERT BANDA,

Defendants-Appellees.

UNPUBLISHED

March 12, 2013

No. 306651

Saginaw Circuit Court

LC No. 10-008581-CZ

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In this employment dispute, plaintiff James Parks appeals by right the trial court's order granting summary disposition in favor of defendants Carmike Cinemas, Inc. and Robert Banda (collectively, the Cinema) under MCR 2.116(C)(10). We affirm.

I. FACTS

A. BACKGROUND FACTS

In May 2005, Carmike Cinemas, Inc. began operating the Fashion Square 10 theater in Saginaw, Michigan. At that time, Parks was an assistant theater manager. In December 2005, Shelley Ballard, Carmike's district manager, promoted Parks to theater manager. In November 2007, Banda replaced Ballard as Carmike's district manager.

Beginning in November 2008, Banda submitted a series of audit summaries to Carmike; Parks signed each summary to indicate that he agreed with it and would correct the issues. On November 1, 2008, Banda's summary indicated that he was disappointed with the lack of cleanliness in the theater, particularly the popcorn kettle and the restrooms. On November 7, 2008, Banda disciplined Parks for failing to follow instructions and failing to maintain the theater's cleanliness. In May 2009, Banda's summary indicated that the theater's cleanliness was unacceptable and that repair items were being ignored. Banda again disciplined Parks for unsatisfactory work performance and failing to follow instructions, citing the cleanliness of the front entrance, restrooms, manager's office, and popcorn kettle.

Parks testified that he informed Saginaw Police Officer Chris Fredenburg that he could not get the theater to fix the lighting. He testified that he brought broken parking lot lights to Banda's attention, and procured bids for their repair. When Officer Fredenburg was asked whether he spoke with Parks about Parks' frustration with the Cinema's response to safety issues, Officer Fredenburg responded affirmatively; he testified that "there was a level of frustration building out of late 2008 into that early 2009 with security issues, with lighting." Officer Fredenburg also testified that Parks told him that he was not "getting any response into getting that problem fixed." Parks testified that he frequently reported other security concerns to the police, stating that he "call[ed] the township police every weekend" because he lacked security staff and because some theater patrons were armed with weapons.

On March 20, 2009, Saginaw Chief of Police Donald Pussehl, Jr., wrote Carmike about his concerns about the theater, including an increase in disorderly behavior and a lack of security personnel. Banda indicated in an affidavit that he received a bid on August 12, 2009, and submitted it to Thomas Bridgman, Carmike's division manager. He also testified at deposition that he received two previous bids, but neither approved nor rejected them. Gary Krannacker, Carmike's vice president of operations, indicated in an affidavit that he approved Bridgman's request to repair the parking lot lighting on August 28, 2009. Also on August 28, 2009, someone discharged a gun in the theater's parking lot.

On September 9, 2009, the Saginaw Township Assistant Manager informed Carmike in a letter that it had received a complaint from the Saginaw Police Department about the malfunctioning lighting poles, and that Carmike would "face a civil infraction" if it did not fix the lighting. Cassandra Maude, a subsequent theater manager, indicated in an affidavit that the lighting was repaired on September 24, 2009.

On October 6, 2009, Banda submitted an audit summary that indicated that he was "completely satisfied with the progress of Management staff to work on the areas of cleanliness concerns." However, on November 28, 2009, Banda submitted an audit summary that indicated that "we have just taken another step backwards" and cited the cleanliness of the area around the theater. He noted that he informed Parks that "he will be held responsible if these daily duties are not handled with an extreme sense of priority [sic][.]"

In January 2010, Banda again disciplined Parks for unsatisfactory work performance, citing "long lines at the box office, an inoperable popcorn popper, and plaintiff's failure to procure a requested bid to repair marquee lighting." Banda wrote that, because Parks ignored his requests concerning the theater's appearance and cleanliness, "I feel termination is the only alternative." The Cinema terminated Parks' employment.

Parks subsequently filed a civil suit, claiming that the Cinema violated the Whistleblowers Protection Act,¹ committed tortious interference with his business expectancy, breached his legitimate expectations of employment, and committed age discrimination. At his deposition, Banda testified that he had never hired a theater manager over 40 years old.

¹ MCL 15.361, *et seq.*

However, Banda testified that he employs a 58 year-old theater manager who has never been disciplined. Banda testified that the two replacement theater managers he hired after terminating Parks were each 27 years old.

On April 25, 2011, the Cinema moved the trial court for summary disposition. The trial court initially granted the Cinema's motion on all of Parks' claims except the Whistleblowers' Protection Act claim. After the Cinema moved the trial court for reconsideration, it also granted the Cinema's motion on that claim.

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.² The trial court dismissed all of Parks' claims under MCR 2.116(C)(10). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence and reasonable inferences from the evidence in the light most favorable to the nonmoving party.³ A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.⁴

III. WHISTLEBLOWERS' PROTECTION ACT

A. LEGAL STANDARDS

The Whistleblowers' Protection Act (the Act) provides in pertinent part that

[a]n employer shall not discharge . . . an employee . . . 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[.]^[5]

To establish a prima facie case under the Act, the plaintiff must establish that he or she (1) was engaged in a protected activity, (2) was discharged or discriminated against, and (3) the discharge or discrimination was causally connected to the protected activity.⁶ If the plaintiff has

² *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

³ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

⁴ *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007); *West v Gen Motors Corp*, 469 Mich 177, 185; 665 NW2d 468 (2003).

⁵ MCL 15.362.

⁶ *West*, 469 Mich at 183-184.

established a prima facie case, the burden shifts to the defendant to establish a legitimate business reason for the discharge.⁷ If the defendant establishes a legitimate business reason for the discharge, the burden shifts back to the plaintiff to show that the reason was merely a pretext.⁸

B. APPLYING THE STANDARDS

Parks argues that the trial court erred when it granted the Cinema's motion for summary disposition on his Whistleblowers' Protection Act claim.

Though we agree that Parks was engaged in protected activity under the Act when he reported his concerns about lighting and safety to the police, we conclude that there is no genuine issue of fact concerning whether Parks' reports were causally related to the Cinema's decision to discharge him. A plaintiff must show that "his employer took adverse employment action *because of* plaintiff's protected activity"⁹ A plaintiff may establish causation by circumstantial evidence.¹⁰ However, "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."¹¹

Parks argues that the temporal relationship between his reports and his discharge creates a reasonable inference that his discharge was causally related to his reports. A close temporal relationship between the protected activity and an adverse job action, combined with the plaintiff's positive employment history, may demonstrate causality.¹² However, a temporal relationship—without more—does not demonstrate a causal relationship.¹³

Here, Parks did not have an extremely positive employment history. The Cinema began initiating disciplinary actions against Parks before he contends that he was engaged in protected activity. Banda's repeated audit reports do not contain any reference to Parks' reports to police, but do indicate problems with cleanliness; Parks signed each report. Banda's decision to terminate Parks' employment was only loosely temporally related to his protected activity. Finally, the reason that Banda gave when he terminated Parks was related to his previous disciplinary problems, not to his protected activity. Because Parks has shown only a temporal relationship between his activity and discharge, we conclude that the trial court properly granted the Cinema's motion for summary disposition.

⁷ *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009).

⁸ *Id.*

⁹ *West*, 469 Mich at 185 (emphasis in original).

¹⁰ *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).

¹¹ *Id.* at 164.

¹² *Henry v City of Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999).

¹³ *West*, 469 Mich at 186.

IV. TORTIOUS INTERFERENCE

We agree with the Cinema's contention that, because Parks' argument about his disagreement with the trial court's holding ends mid-sentence, we should consider this issue abandoned. "An appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for those claims."¹⁴ Here, it is clear from the previous paragraph that Parks argues that the trial court improperly determined that Banda was not a third party to the business relationship between Parks and Carmike. However, Parks' analysis ends mid-sentence, and Parks provides no authority or legal analysis to support his claim. We note that, generally, a party who is the employer's agent is not a "third party" to a contract.¹⁵ In light of the general authority on this issue, we will not attempt to discover and rationalize the basis for Parks' claim. We conclude that Parks has abandoned this issue.

V. BREACH OF EMPLOYMENT EXPECTATIONS

A. LEGAL STANDARDS

"In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason."¹⁶ However, an employee's legitimate expectations created by reliance on the employer's company policies may create a just-cause employment relationship.¹⁷ To determine whether a policy created a legitimate expectation of just-cause employment, courts must determine whether the employer made a promise that was reasonably capable of instilling in the employee a legitimate expectation of just-cause employment.¹⁸

B. APPLYING THE STANDARDS

Parks argues that the trial court erred when it determined that there was no question of fact whether the Cinema's employment policies created a legitimate expectation of just-cause employment. We disagree.

Here, the policy that Parks attempts to rely on expressly disclaims any promise:

These guidelines do not guarantee that any particular level of discipline will be administered and Carmike has the right, depending on the circumstances, to impose any level of discipline up to and including termination. These

¹⁴ *DeGeorge v Warheit*, 276 Mich App 587, 594; 741 NW2d 384 (2007).

¹⁵ *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004).

¹⁶ *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982); see *Nieves v Bell Indus, Inc*, 204 Mich App 459, 462; 517 NW2d 235 (1994).

¹⁷ *Id.*; *Rood v Gen Dynamics Corp*, 444 Mich 107, 138; 507 NW2d 591 (1993).

¹⁸ *Nieves*, 204 Mich App at 462-463; *Rood*, 444 Mich at 140.

guidelines do not affect or change the “at will” employment status of all Carmike’s employees.

Because the policy that Parks attempts to rely on clearly states that it does not change the employees at-will employment status, we conclude that no reasonable juror could find that it creates a legitimate expectation of just-cause employment.

VI. AGE DISCRIMINATION

A. LEGAL STANDARDS

“The opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, *age*, sex, height, weight, familial status, or marital status” is a civil right.¹⁹ An employer may not discharge an employee for any of these reasons.²⁰ An employee demonstrates a prima facie case of age-based employment discrimination on the basis of disparate treatment if the employee was: (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and (4) was replaced by a younger person.²¹

B. APPLYING THE STANDARDS

Parks argues that the trial court erred when it determined that he had not rebutted the Cinema’s legitimate business reasons for terminating his employment. We disagree.

We conclude that Parks did not show that the Cinema’s reasons for terminating his employment were merely pretextual. Once the employee has established a prima facie case, the employer has the burden to articulate legitimate reasons for terminating the employee’s employment.²² If the employer establishes a legitimate business reason for termination, the employee must demonstrate that the employer’s reason was merely a pretext for unlawful discrimination.²³ Here, the Cinema presented evidence that it terminated Parks’ employment because of his failure to properly maintain the theater. Thus, the burden shifted back to Parks to present evidence from which reasonable minds could conclude that the Cinema’s reason for terminating his employment was pretextual.

A party proves that the employer’s reason for termination is pretextual “(1) by showing that the reason(s) had no basis in fact, (2) by showing that they were not actual factors

¹⁹ MCL 37.2102(1) (emphasis supplied).

²⁰ MCL 37.2202(1)(a).

²¹ *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998).

²² *Id.*

²³ *Id.* at 174.

motivating the decision, or (3) if the reason(s) were motivating facts, by showing that they were jointly insufficient to justify the decision.”²⁴

Parks presented no evidence that he properly maintained the theater and no evidence that Parks’ lack of cleanliness was not an actual factor that motivated the Cinema’s decision. Parks presented a conclusory statement—but no evidence—that the Cinema did not follow its internal disciplinary policies when it terminated his employment. We conclude that the trial court did not err when it determined that there was no genuine issue of material fact whether the Cinema’s reasons for terminating Parks’ employment were pretextual.

We affirm.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ William C. Whitbeck

²⁴ *Meagher v Wayne State Univ*, 222 Mich App 700, 712; 565 NW2d 401 (1997).