STATE OF MICHIGAN

COURT OF APPEALS

ADAM FLORES and LYNDA FLORES, Plaintiffs-Appellees,	UNPUBLISHED January 11, 2005
v ATOFINA CHEMICALS, INC., Defendant-Appellant,	No. 249988 Wayne Circuit Court LC No. 02-219532-NZ
and JOSEPH ALLI, VICTOR PICKERILL and WILLIAM MALNAR, Defendants.	

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant, Atofina Chemicals, Inc., appeals by leave granted the trial court's partial denial of its motion for summary disposition regarding plaintiff, Adam Flores', claim under Michigan's Whistleblower's Protection Act, MCL 15.361 *et seq*., and plaintiff, Lynda Flores', derivative loss of consortium claim.[1] We reverse.

On appeal, defendant claims that the trial court improperly ruled that there was a genuine issue of material fact regarding whether defendant had knowledge of plaintiff's intent to report a violation of law or regulation to a public body. We agree.

An appellate court reviews a trial court's decision to grant or deny a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201

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[1] Because Lynda Flores' claim is a derivative claim, we refer to Adam Flores in the singular throughout the remainder of this opinion. Because the individually named defendants were dismissed from this cause of action, we refer to Atofina Chemicals, Inc., as the defendant throughout this opinion.

(1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.*; *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). Summary disposition is appropriate under MCR 2.116(C)(10) if the affidavits, pleadings, depositions, admissions and other documentary evidence, when viewed in the light most favorable to the non-moving party, demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Universal Underwriters Group*, *supra*, p 720. This Court reviews de novo a trial court's determination of whether evidence establishes a prima facie case under Michigan's Whistleblower's Protection Act ("WPA"). *Manzo v Petrella (On Remand)*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

In this case, plaintiff was employed with defendant from October 1977 until his termination in March 2002. On the evening of March 21, 2002, as plaintiff was driving his car toward defendant's plant in Riverview, Michigan for the midnight shift, he noticed a strong odor, which he knew as dimethylamine ("DMA"), originating from "process 47" at the plant. Plaintiff's subsequent investigation of the odor resulted in a complete shut-down of "process 47" and evacuation of that unit. During plaintiff's shift, plaintiff also halted work on "process 46" due to safety concerns regarding the assigned task related to "process 46" that night.

On March 22, 2002, plaintiff was called to a meeting with management at 3:00 p.m. As Plant Manager of the Riverview facility and Regional Director of Manufacturing at the time, Joseph Alli ultimately decided to terminate plaintiff's employment for his failure to immediately communicate to the proper plant personnel the circumstances surrounding the work stoppage at "process 46" to effectuate a prompt solution. Other work-related incidents were taken into consideration in discharging plaintiff, including plaintiff's poor performance on a wastewater project, a prior physical altercation with another employee and reports that other employees were losing confidence in plaintiff's ability to perform in emergency situations. Plaintiff brought the instant action against defendant based on the circumstances of his discharge.

Plaintiff sued under Michigan's WPA, which provides, in relevant part:

> Sec. 2. 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 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. [MCL 15.362.]

To establish a prima facie case under this statute, a plaintiff must demonstrate (1) that he was engaged in protected activity, (2) that the defendant terminated his employment, and (3) that there exists a causal connection between the plaintiff's termination and the protected activity. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). Michigan's WPA defines "protected activity" as (1) reporting a violation of law, rule or regulation to a public body, (2) being about to report a violation of law, rule or regulation to a public body, or

(3) being requested by a public body to assist in an investigation. *Id*. Thus, under the statute, one who is "about to report" is protected at the same level as one who has reported to a public agency. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 616; 566 NW2d 571 (1997). However, reporting to an employer or reporting to a public body pursuant to an employer's policy is not protected activity. *Chandler*, *supra*, p 403. The purpose of the act is to encourage employees to report any violations by prohibiting employers from taking retaliatory actions against whistleblowers. *Shallal*, *supra*, p 612.

Plaintiff offered proof of his discharge. However, even assuming plaintiff was engaged in a protected activity, plaintiff failed to establish a causal connection between the activity and his discharge. Specifically, we conclude that plaintiff failed to establish that defendant had objective notice of his alleged intent to report the emission to an outside authority. A plaintiff is required to prove a causal connection between his protected actions and the subsequent employment action. *West v GMC*, 469 Mich 177, 184; 665 NW2d 468 (2003). Part of a trial court's determination of whether a causal connection exists includes a determination of whether the defendant had objective notice of the plaintiff's intent to report a violation to an outside agency. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 326; 559 NW2d 86 (1996). In *West*, *supra*, pp 187-188, the Michigan Supreme Court held that the plaintiff failed to establish a prima facie case under the WPA because the plaintiff did not demonstrate a causal connection between his discharge and a police report he filed. The Court found that there was no evidence that those investigating the plaintiff or making the decision to discharge him were aware of his report to the police. *Id*. at 187.

As in *West*, *supra*, the evidence fails to show that defendant had objective notice of plaintiff's alleged intent to report the emission to a public body. Plaintiff admitted in his deposition that he never told any other employee at the plant that he was about to report the emission to an outside agency. Plaintiff testified as follows at his deposition:

> Q. You knew you were going to call the local authorities?
>
> A. Yes.
>
> Q. Did you tell anyone that you were going to call the local authorities?
>
> A. No.
>
> Q. Did you tell anyone at Atofina that you were going to call the state authorities?
>
> A. I had told them I was in the middle of my investigation.
>
> Q. Did you tell anyone at Atofina that you were going to contact anyone outside of the company?
>
> A. No, I didn't see anyone that night. I was the only member of supervision there.

Moreover, plaintiff admitted that he never mentioned to anyone at the plant that he had a binder with handwritten notes about the emission. Plaintiff merely speculated that defendant should have known he would report the incident because: he told two supervisors about the events of that night; his paperwork was incomplete when he was discharged; on a daily operations report words indicating a leak and an odor were crossed-through; and defendant was under a consent order to notify outside authorities of reportable amounts of emissions.

Plaintiff's incomplete paperwork did not provide defendant with objective notice of his intent to report the emission to an outside agency. The evidence suggests no more than that the documents plaintiff completed and was completing were for defendant's internal reporting system. Although plaintiff asserts that he informed two supervisors of his findings regarding the odor from "process 47," such information on its own does not establish that defendant had notice of plaintiff's intent to report these same findings to an outside authority. Moreover, plaintiff also fails to demonstrate a connection between his oral report of the incident to two supervisors and his termination. The evidence shows that the only supervisor that was irritated with plaintiff at the end of his shift was aggravated because plaintiff failed to supervise the completion of a task assigned at "process 46." According to the plant manager, plaintiff was later discharged for his failure to follow defendant's communication procedures with regard to "process 46," not for his decisions regarding the emission at "process 47."

Plaintiff merely speculates that the words "about a leak" and "odor" were crossed-out of the daily operations report because defendant was attempting to hide the emission. However, plaintiff failed to establish that defendant had anything to do with the markings, and the record indicates that the words about a leak and odor remained legible. Plaintiff failed to offer proof, other than his own assumption, that the emission met a reportable level. Although not dispositive, we note that plaintiff never reported the allegedly reportable amount to any outside agencies after he was discharged. Moreover, after plaintiff's termination, another employee performed a "root cause analysis" to determine the source of the odor at "process 47." Defendant asserted that, had the analysis revealed a reportable amount, defendant would have filed the appropriate notification. Regardless, the markings that are crossed through on an internal report that shows that there was an odor is insufficient evidence to establish that defendant knew plaintiff intended to report the odor to public authorities.

While the emission problem plaintiff contends he was about to report and his discharge occurred within a twenty-four hour period, timing alone is insufficient to prove a causal connection between a protected action and a subsequent discharge. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 662; 653 NW2d 625 (2002). Although timing is relevant to a causal connection analysis, a prima facie case requires proof that the employer had notice of the employees protected activity. See *Roberson*, *supra*, p 326.

We conclude that plaintiff failed to show that defendant had the requisite notice. Because an employer must receive objective notice that a whistleblower has reported or threatens to report a violation in order to be held accountable for its actions pursuant to the WPA, we hold that the trial court improperly denied defendant's motion for summary disposition regarding plaintiff's claim brought under the WPA. Because plaintiff's claim fails, we also hold that Lynda Flores' derivative loss of consortium claim also fails. See *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996) (a derivative claim for loss of consortium can no longer stand when the primary claim fails). Therefore, we reverse the trial court's denial

of defendant's motion for summary disposition regarding plaintiff's claim under the WPA and Lynda Flores' derivative loss of consortium claim and order the dismissal of these claims.

Reversed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder