STATE OF MICHIGAN

COURT OF APPEALS

LINDA GIFFELS and LAWRENCE GIFFELS,

Plaintiffs-Appellees,

v

MILLINGTON COMMUNITY SCHOOLS, MEACHUM JUNIOR HIGH, LAWRENCE KROSWEK, and GARY IWINSKI,

Defendants-Appellants.

UNPUBLISHED
April 6, 2010

No. 286785
Genesee Circuit Court
LC No. 07-086476-CZ

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Defendants appeal by leave granted an order of the circuit court denying their motion for partial summary disposition according to MCR 2.116(C)(10) (no genuine issue of material fact) and MCR 2.116(C)(8) (failure to state a claim). We reverse and remand for partial summary judgment in favor of defendants.

Plaintiffs were school employees of Millington Community Schools. At all times relevant to this appeal, plaintiff Larry Giffels was retired from teaching, but remained employed by the district as the driver education coordinator. Plaintiff Linda Giffels was employed by the district since approximately 1980, and was teaching at defendant Meachum Junior High School. Plaintiffs went to a conference from Wednesday, April 25, through Friday, April 27, 2007 in Mt. Pleasant. On May 3 or 4, plaintiffs submitted copies of two meal receipts from the conference for reimbursement. The receipts submitted were purportedly for breakfast on Thursday of the conference and Friday lunch, both at the Old Country Buffet. Upon investigation, it was found that the copies of the receipts submitted were missing information about the time and location of the restaurants that were on the original receipts. The original receipts demonstrated that the receipt for breakfast was from the day after the conference at an Old Country Buffet near plaintiffs' home. At their investigative interviews on May 11, plaintiffs denied altering the receipts or that the request was inaccurate. The district superintendent, defendant Lawrence Kroswek, immediately placed Linda on administrative leave because he determined that she was

not truthful during the interview. On May 18, 2007, Kroswek terminated Larry's employment for the same reasons.[1]

Plaintiffs alleged that defendants' adverse actions against their employment were in retaliation for a report plaintiffs made to the township about the ineligibility of an electee to the school board. An election was held on May 8, and candidate Jane Cole won a seat on the school board. Plaintiffs thought that Cole had moved from the district, so Linda asked Larry to inform the township officials and inquire about the election results. Larry informed a township employee, Diane Jones, and Jones confirmed Cole's ineligibility for school board election on May 10, 2007. Jones informed Kroswek of Cole's ineligibility on May 10, and spoke with him again on May 14. Kroswek stated that during the May 14 conversation, Jones spontaneously told him that Larry was the person who raised the issue of Cole's eligibility to the township. Additionally, Kroswek learned of plaintiffs' lawsuit on June 14, 2007, and tenure charges were presented against Linda to the school board on June 20.

On June 12, 2007, plaintiffs filed this litigation, alleging a violation of the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*., conspiracy, public policy violations, and intentional infliction of emotional distress. Defendants filed a motion for partial summary disposition, challenging the allegations offered in support of the WPA retaliation claim as well as the ability to prove this claim. The trial court denied the motion for summary disposition, concluding that factual issues precluded partial summary disposition in defendants' favor.

On appeal, defendants contend that partial summary disposition was proper because plaintiffs' complaint failed to support a WPA retaliation claim and because plaintiffs could not demonstrate that they were involved in a protected activity or that any protected activity caused defendants to retaliate. In light of the fact that plaintiffs failed to meet the causation element of a retaliation claim, we hold that summary disposition against plaintiffs' WPA claim was errantly denied. A trial court's determination of a motion for summary disposition is reviewed de novo.[2] *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

Plaintiffs made a claim against defendants for violating the WPA. A whistleblower claim is brought under MCL 15.362, which states:

> 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

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[1] Proceedings stemming from this matter before the State Tenure Commission are the subject of the appeal in Docket No. 287175. We note that in the tenure appeal, there was factual evidence indicating that plaintiffs' request for reimbursement would have been honored until the district's accounting clerk, Pamela Lawe, called the photocopied receipts into question because the location, date, and time of the purchase was missing.

[2] In light of our holding regarding the causation element, we do not address the motion for summary disposition brought pursuant to MCR 2.116(C)(8).

> 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.

To establish a prima facie case under the statute, 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 v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). Standing alone, a temporal relationship, between protected activity and any adverse employment action does not establish a causal connection. *Id*. at 186. Plaintiff must demonstrate more than merely a coincidence in time between the protected activity and the adverse employment action. *Id*.

The allocation of burdens in a WPA claim was set forth in *Brown v Mayor of Detroit*, 271 Mich App 692, 709; 723 NW2d 464 (2006), aff'd in part, vac'd in part on other grounds 478 Mich 589 (2007), as follows:

> [T]he plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. If the plaintiff succeeds, 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. [Internal quotation marks and citations omitted.]

A plaintiff may establish a causal connection through direct evidence, which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. *Shaw v Ecorse*, 283 Mich App 1, 14-15; 770 NW2d 31 (2009). Here, plaintiffs point to the timing of defendants' actions against them as evidence of retaliation. According to plaintiffs, they questioned Cole's eligibility for the school board at the township office on May 10, 2007. Kroswek was informed of Cole's ineligibility no later than May 10, but stated that he did not learn that it was Larry that questioned the election until May 14. Kroswek performed an investigatory interview of Linda on May 11 and Larry was interviewed separately at the same time. Linda was placed on administrative leave at the conclusion of this interview and Larry was discharged on May 18. On June 14, Kroswek learned of plaintiffs' lawsuit against defendants. That same day, Kroswek sent a letter to Linda informing her that he intended to file tenure charges against her before the board of education, which were heard by the board on June 20. Certainly, the disciplinary actions of defendants against plaintiffs were proximate in time with plaintiffs' inquiry regarding Cole.

However, a temporal relationship standing alone does not demonstrate a causal connection between the protected activity and any adverse employment action. *West*, 469 Mich at 186. Defendants submit that plaintiffs were subject to discipline due to the inaccurate receipts that they submitted for reimbursement on May 3 or 4. Kroswek testified that he spoke with the

school's attorney three times between the first week of May and May 10 to determine how to respond to the false expense report. After the investigative interview on May 11, Kroswek decided to take disciplinary action because he determined that defendants did not respond truthfully. Kroswek found that defendants were not truthful because they stated that the receipts that they turned in were not altered, and that they ate breakfast on Thursday during the conference at an Old Country Buffet in Mt. Pleasant. There is no Old Country Buffet in Mt. Pleasant and the copies of the receipts turned in were changed from the originals to omit the location of the restaurants and the date of the meals.

All of these actions took place prior to May 14, when Kroswek reportedly learned that Larry had complained to the township about the election. The trial court found a genuine issue of material fact for the jury to decide when Kroswek learned that Larry reported Cole's ineligibility. Even if Kroswek learned of Larry's reporting as it occurred on May 10, his investigation of plaintiffs predated this knowledge. Additionally, Kroswek stated that he decided to pursue tenure charges before the board against Linda in late May or early June, before learning of the lawsuit, after further consultation with the school's attorney. Defendants have satisfied their burden to prove a legitimate reason for the adverse employment decision. See *Brown*, 271 Mich App at 709. However, it is not required that plaintiff show that the protected trait or activity is the exclusive reason for discharge. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 454; 750 NW2d 615 (2008).

A plaintiff can prove pretext directly by persuading the court that a retaliatory reason more likely motivated the employer. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 660; 653 NW2d 625 (2002). Plaintiffs state that Kroswek's admitted desire to have Cole on the school board was evidence of his motive to retaliate against plaintiffs for their complaint. Despite Kroswek's wishes, there is no record evidence that he had any control over the election or attempted to influence its outcome. Further, the evidence also demonstrated that Kroswek did not ask Jones who inquired about Cole's eligibility and that Jones did not recall a reaction from Kroswek when learning that Larry reported Cole's ineligibility. According to Kroswek, Jones spontaneously volunteered this information during a second phone call about the matter on May 14. To establish causation using circumstantial evidence, the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. *Shaw*, 283 Mich App at 14-15. Kroswek's acknowledged political preference is not sufficient to demonstrate that he retaliated against plaintiffs.

Plaintiffs also argue that evidence of selective enforcement demonstrates that the receipt investigation was a pretext for defendants' retaliatory response. Kroswek testified that a bus driver in the district was given only a two-day suspension without pay as a result of turning in a reimbursement request for a meal she did not pay for. However, Kroswek also testified that the bus driver was remorseful and honest, and that she was acting on a previous supervisor's direction to turn in *any* receipt. The facts of record that determined defendants' response to the situation are not analogous. An employee discharged for violating a selectively enforced rule or policy would be permitted to have the jury decide the validity of the discharge. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 624; 292 NW2d 880 (1980). However, whatever policy defendants administered was applied to both plaintiffs and the bus driver, who were disciplined for similar infractions. The enforcement was not selective, even though the penalty varied.

Plaintiffs argue that evidence of disproportionate treatment also demonstrates that the receipt investigation was a pretext for defendants' retaliatory response. The largest amount that plaintiffs could be reimbursed was $5 for breakfast and $7 for lunch. Plaintiffs state that it is not proportional to terminate veteran teachers for, at most, $12 in disputed reimbursements. However, Kroswek testified that the disciplinary actions were motivated by untruthful responses in the investigatory interviews rather than the amount of money involved. A plaintiff may show pretext by showing that reasons for the adverse decision were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). On its face, seeking termination over $12 may not be equivalent, but the nature of the offense and plaintiffs' responses to the inquiry were the factors for discharge. The severity of the employment sanction does not demonstrate the cause of defendants' response.

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*, 283 Mich App at 15. The trial court denied defendants' motion because there were credibility questions of motive and intent involved that a jury should decide. The court stated that the proportionality and selective enforcement of the employment charges against plaintiffs were questions for the jury. However, the facts of plaintiffs' claims of selective enforcement and proportionality were not disputed, and, as discussed above, a jury could not reasonably infer from these facts that plaintiffs' report caused a retaliatory response from defendants.

Plaintiffs have not been able to produce evidence to establish that their report caused defendants' decisions to sanction them. On the contrary, defendants have proven that they had legitimate reasons to sanction plaintiffs through a process that began prior to plaintiffs' report, and plaintiffs could not prove that the investigation was a pretext to defendants' alleged retaliation. Plaintiffs' engagement in a "protected activity" under the WPA does not protect them from otherwise legitimate, or unrelated, adverse job actions. See *West*, 469 Mich at 187. Plaintiffs' reliance on the timing of the adverse employment decision merely serves to encourage speculation. *Taylor*, 252 Mich App at 662. Liberally applying the WPA does not transform mere speculation into a genuine issue of material fact. *West*, 469 Mich at 188 n 15. Therefore, the trial court erred in denying defendants' partial motion for summary disposition because a juror could not reasonably conclude that plaintiffs' report caused defendants' investigation and sanctions against plaintiffs. See *Shaw*, 283 Mich App at 15.[3]

[3] Defendants' challenge to the denial of the motion for change of venue was not raised in the application for leave to appeal, and the transcript of the hearing was not provided. An appeal is limited to the issues raised in the application. MCR 7.205(D)(4). Finally, the proper manner in which to raise this issue was an interlocutory appeal from the order denying the motion for a change of venue. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 744-745; 550 NW2d 265 (1996). Therefore, we do not address it.

Reversed and remanded for entry of partial summary disposition in favor of defendants on their WPA claim. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens