STATE OF MICHIGAN

COURT OF APPEALS

LYNN FOX,

Plaintiff-Appellant,

and

ANNE HUGHES,

Plaintiff,

V

SHERIDAN BOOKS, INC.,

Defendant-Appellee.

UNPUBLISHED
May 17, 2011

No. 295118
Washtenaw Circuit Court
LC No. 08-000724-CD

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Plaintiff Lynn Fox appeals as of right the trial court's order that granted defendant's motion for summary disposition and dismissed plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*[1] In granting defendant's motion, the trial court concluded that plaintiff failed to establish a prima facie case of retaliatory discharge and, alternately, even if she had, plaintiff could not demonstrate that her termination was pretext for retaliatory discharge. We affirm.

Plaintiff worked at defendant's distribution center as the distribution coordinator. In April 2008, the roof of the distribution center was replaced. On April 24, plaintiff asked her husband to contact the state of Michigan's Occupational Health and Safety Administration (MIOSHA) to complain about the working conditions at the distribution center caused by the roofing project. She instructed her husband to withhold her name from MIOSHA. After speaking with plaintiff's husband, who did not identify himself, Dennis Collins, a safety

[1] In the same order, the trial court granted summary disposition to defendant on plaintiff Anne Hughes's claim that defendant committed a retaliatory discharge in violation of public policy. The trial court's ruling as to Hughes is not at issue on appeal.

supervisor for MIOSHA, called defendant and spoke with members of defendant's management staff over the telephone about the complaint that had been made. Collins informed them that someone, not an employee, complained of noise due to the roofing project. On May 5, plaintiff again asked her husband to contact MIOSHA. He did, and Collins made a second telephone call to members of defendant's management staff. Collins informed them that someone, not an employee, complained of fumes. On May 8, plaintiff was fired for insubordination, unbecoming conduct, and a negative attitude. Subsequently, plaintiff filed this WPA claim, which was dismissed by the trial court on defendant's motion for summary disposition. This appeal ensued.

On appeal, plaintiff asserts that the trial court erroneously granted summary disposition to defendant by concluding that defendant did not have objective notice of her protected activity under the WPA. We disagree.

"The determination whether the evidence established a prima facie case under the WPA is a question of law to be determined de novo." *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997). We also review de novo a trial court's ruling on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper 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." We must consider the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

An employer shall not discharge an employee because the employee, or a person acting on behalf of the employee, reported to a public body a violation or a suspected violation of a law, regulation, or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States. MCL 15.362. Our courts analyze WPA claims under a burden shifting scheme, where the plaintiff must first establish a prima facie case of retaliatory discharge. *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). "If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate business reason for the discharge." *Id.* at 281. If the defendant carries such a burden, then the plaintiff must prove that the proffered reason was only a pretext for the discharge. *Id.*

"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 v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). In this appeal, only the final prong of the prima facie case is at issue. "Summary disposition for the defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between the protected activity and the adverse employment action." *Id.* at 184. "[T]he 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 v City of Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009). "Objective notice," while not a separate element in the prima facie case, is relevant to determining whether a causal connection has been demonstrated. *Chandler v Dowell Schlumberger, Inc*, 214 Mich App 111, 117; 542 NW2d 310 (1995), aff'd 456 Mich 395 (1998). "[A]n employer is entitled to objective notice of a report or a threat to report by the whistleblower." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). "An employer's subjective fear of

retaliation will not substitute for some form of notice of threatened action." *Id.* Stated differently, objective notice requires that the employer be aware of the employee's protected activity.

Here, plaintiff relies on the deposition testimony of Danna Findlay, defendant's vice-president of human resources, and William Bury, a maintenance employee at the distribution center, to support her claim that defendant had objective notice that she initiated the complaints with MIOSHA. As to Findlay, plaintiff relies on her deposition testimony that after Collins' first telephone call she and others from defendant's management staff discussed the possibility that plaintiff made the complaint to MIOSHA because "she was the only one who had complained." But Findlay further explained that after they were informed that Collins stated that the person who made the complaint was not an employee, the discussion about who had contacted MIOSHA "kind of dropped and ended there. It was a dead issue. Because we couldn't fathom at that point." Also, Findlay stated that there were no further discussions about who had contacted MIOSHA. Thus, rather than establishing objective notice, we conclude that Findlay's testimony shows that members of defendant's management staff in fact did not know who initiated the complaint with MIOSHA and that they gave up speculating about the caller's identity when they learned that the caller was not an employee.

Bury's deposition testimony was that on the day the second complaint was made to MIOSHA, he overheard plaintiff tell a person over the telephone that the roof was being worked on and it smelled, but that he did not know with whom plaintiff was talking. Further, Bury stated that he "might have mentioned" to a member of defendant's management staff that plaintiff made a telephone call to someone and that plaintiff was upset. Because there is no evidence of any connection between what Bury reported hearing and the second complaint, we fail to perceive any basis on which to conclude that this information shows that defendant had objective notice that plaintiff was responsible for making the second complaint to MIOSHA.

Further, plaintiff admitted in her deposition testimony that she concealed her identity from MIOSHA by asking her husband to contact them. In addition, unlike the plaintiff in *Roberson v Occupational Health Ctrs of America, Inc*, 220 Mich App 322, 326; 559 NW2d 86 (1996), plaintiff did not tell any of defendant's employees that she intended to file a complaint with MIOSHA. Significantly, in *Roberson*, we found that the plaintiff's statement to her manager that she would call MIOSHA "f[e]ll short of giving her employer notice of a report or a threat to report the deplorable conditions of the building." *Id.* at 327. Here, plaintiff told no one that her husband contacted MIOSHA on her behalf.

Consequently, we conclude that there is no indication, other than speculation, that members of defendant's management staff had objective notice that plaintiff was the person who initiated the complaints with MIOSHA. Even though the WPA is to be liberally construed, our Supreme Court has noted that "'liberally construing' a statute does not transform mere speculation into a genuine issue of material fact." *West*, 469 Mich at 188 n 15. If defendant did not know of plaintiff's protected activity, then a causal connection cannot exist between that activity and plaintiff's discharge. *Chandler*, 214 Mich App at 117. Because there is no indication that defendant had objective notice of plaintiff's protected activity, the mere coincidence between her purported protected activity and her subsequent termination is insufficient to prove causation. *West*, 469 Mich at 186. We find that plaintiff has not

demonstrated the existence of any material question of fact whether a causal link existed between her purported protected activity and her termination.[2] The trial court, therefore, properly granted summary disposition to defendant. *West*, 469 Mich at 184.[3]

Because the trial court correctly concluded that plaintiff failed to establish a prima facie case of retaliatory discharge, we need not address her argument that she presented evidence to establish that defendant's proffered reason for her termination was a pretext for a retaliatory discharge. But even if plaintiff had established a prima facie case of retaliatory discharge, defendant would still be entitled to summary disposition. From our review of the record, we would conclude that plaintiff has not raised a triable issue that defendant's proffered reason was a pretext for retaliating against her purported protected activity. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659-660; 653 NW2d 625 (2002). In this case, defendant articulated legitimate, nonretaliatory reasons for its decision to discharge plaintiff, and plaintiff failed to establish that defendant's proffered reasons were a pretext for retaliatory discharge.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot

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[2] Plaintiff also relies on the proposition that evidence of an expression of clear displeasure with the plaintiff's protected activity by the plaintiff's supervisor coupled with a close temporal connection between the protected activity and adverse employment action will generally be sufficient to establish a jury question on causation. *West*, 469 Mich at 186-187; see also *Kaupp v Mourer-Foster, Inc*, 485 Mich 1029; 776 NW2d 893 (2010) (KELLY, C.J., concurring). Even assuming there is sufficient evidence to show that members of defendant's management staff were upset upon learning of the complaints to MIOSHA, plaintiff still cannot establish a causal connection because even under this theory, a necessary requisite for showing a causal connection is objective notice.

[3] Plaintiff also claims that her termination was contrary to defendant's policy in favor of "progressive discipline of employees." We decline to address this issue because plaintiff did not include it in the statement of questions presented, MCR 7.212(C)(5); *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 646; 732 NW2d 116 (2007), nor has plaintiff adequately addressed the issue on appeal, *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

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SHAPIRO, J. (*dissenting*).

I respectfully dissent as I conclude that plaintiff established a prima facie case of retaliatory discharge and demonstrated a question of fact whether the proffered reason for her discharge was pretextual.

I. OBJECTIVE NOTICE

The trial court and the majority conclude that plaintiff failed to present a prima facie case on the causal connection between the protected activity and plaintiff's termination based on a lack of objective notice. Viewing the facts in the light most favorable to plaintiff, I conclude that there is sufficient evidence of objective notice such that summary disposition should have been denied.

First, there is a strong temporal connection between plaintiff instigating the two telephone calls to MIOSHA and her termination. Although the temporal connection is not enough by itself, the majority concedes that it is sufficient when coupled with evidence of management's displeasure at learning of the protected behavior. *Kaupp v Mourer-Foster, Inc*, 485 Mich 1033; 776 NW2d 893 (2010) (KELLY, C.J., concurring). Here, plaintiff provided sufficient evidence of defendant's displeasure regarding the contact with MIOSHA. Anne Hughes testified that she had a telephone conversation with Amy Burbank, the production manager, who indicated that management was angry about the MIOSHA call. Specifically,

every time Hughes asked about how the department was supposed to run during the roof construction and why the issue was "getting out of control" and "such a big deal," Burbank told her it was because "[s]omebody in your department or some friend of somebody in your department called MIOSHA." The testimony made clear that management was upset that MIOSHA had been called. Hughes even testified that Mark Witkowski, the company's vice-president for operations, stated that "somebody ratcheted this up," which language evidences displeasure. Thus, the evidence of displeasure, coupled with the close temporal connection between the calls to MIOSHA and plaintiff's firing, was sufficient to establish a jury question on causation. *Kaupp*, 485 Mich 1033 (KELLY, C.J., concurring); *West v GMC*, 469 Mich 177, 186-187; 665 NW2d 468 (2003); see also *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000).

The majority concludes that this in insufficient because it erroneously concludes that there is no evidence that defendant had objective notice of the employee's protected activity. There is no real dispute that defendant received notice of a report made to State of Michigan's Occupational Health and Safety Administration (MIOSHA), given that Dennis Collins from MIOSHA contacted defendant.[1] Accordingly, defendant clearly had objective notice of a report, satisfying the "objective notice standard."

Similarly, there is evidence that defendant had reached the conclusion, based on objective events, that the report to MIOSHA had been made by plaintiff. Danna Findlay, defendant's vice president of human resources, testified that

> the assumption was it was [plaintiff] because she's the only one that had made the complaint at the facility to begin with. So the assumption I think naturally, whether it be wrong or right, was that well, [plaintiff] must have called because she was the one that went to Mimms and that was the only complaint we had heard about.
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> * * *
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> You know, after the first call [from MIOSHA] came in, like I said, the presumption was, and discussion was probably amongst Mark [Witkowski, defendant's vice president of operations], myself, and Rhonda [Holbrook,

[1] Although Witkowski testified that Collins did not identify himself as a MIOSHA employee, Collins testified to the contrary. In addition, Burbank testified that Witkowski knew a MIOSHA officer had called and Buckingham testified that she was present when the call from MIOSHA came in and deduced it was from MIOSHA just based on what she heard from their side of the conversation. Furthermore, Witkowski testified that he eventually came to the conclusion that it was MIOSHA that had called. Thus, management was aware that a report had been made to MIOSHA.

> defendant's safety officer], was kind of literally like well, it must have been [plaintiff] because she was the one that made a complaint to begin with.
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> * * *
>
> We presumed it was probably somebody on behalf—as soon as [Collins] said it wasn't one of your employees, we presumed, well, it had to be on behalf of somebody, and [plaintiff] was the presumption because she was the only one that complained.

Plaintiff also provided the testimony of Bill Bury, from defendant's maintenance department, who testified that he mentioned to Witkowski that plaintiff "had called somebody but [he] didn't know who and she was kind of upset over the whole thing."

The majority relies on Findlay's testimony that after Collins informed them it was not an employee who made the call, they dropped the issue. However, this ignores Findlay's testimony, quoted above, that, upon hearing it was not an employee, management then presumed the calls were on plaintiff's behalf. A jury is certainly welcome to balance these conflicting statements at trial, but this Court must take the record in the light most favorable to plaintiff, which means accepting Findlay's testimony that management assumed the calls had been made on plaintiff's behalf.

The majority then suggests that all of this evidence amounts to mere speculation, which cannot constitute objective notice. A prima facie case of objective notice does not, however, mean that the plaintiff must prove that the employer knows with absolute certainty that it was the plaintiff that made the report. In order to survive a motion for summary disposition on these grounds, a plaintiff must instead provide "evidence [that] yields an inference that the [defendant] believed [the report was made by plaintiff.]" *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257-258; 503 NW2d 728 (1993). See also, *Healy v Motorcity Casino*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 2003 (Docket No. 243568) (noting that even though the defendants provided evidence to the contrary, "the initial inference remains valid"). Accordingly, I conclude that the record contained sufficient evidence of objective notice to defendant to survive summary disposition.

II. PRETEXT AND MIXED MOTIVES

The majority also concludes that, even if plaintiff had established a prima facie case, she failed to show that defendant's proffered reason for her termination was a pretext. Although defendant has clearly provided a legitimate basis to explain plaintiff's termination, based on the record, I find an outstanding question of fact on this issue as well.

First, the legitimate basis on which defendant relies is clearly tied to the MIOSHA report. That is, it was only after the report was made to MIOSHA and MIOSHA contacted defendant that Witkowski ordered plaintiff's email to be monitored, which email provided defendant with the basis for termination. Second, plaintiff provided evidence that she was terminated without any attempts to rehabilitate her performance, which was different treatment than other employees received. Such treatment is evidence of pretext. See *id.* Finally, as noted in *Roulston*, 239 Mich

App at 281, "[o]nce the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered." Pretext occurs when "participation in the protected activity played *any* part in the discharge, no matter how remote." *Id.* (emphasis added). Here, there is sufficient evidence to create a question of fact whether defendant's proffered reason for discharge was simply a pretext given their belief that plaintiff had contacted MIOSHA regarding the working conditions.

III. CONCLUSION

Because plaintiff provided sufficient evidence to demonstrate a prima facie case, including causation and objective notice, and created a question of fact as to whether defendant's professed reasons for firing her were a mere pretext, I would conclude that the trial court erred in granting summary disposition and remand for trial.

/s/ Douglas B. Shapiro