STATE OF MICHIGAN

COURT OF APPEALS

BARBARA BOLISH, Plaintiff-Appellee,	UNPUBLISHED January 2, 2014
v	No. 310100 Ingham Circuit Court
MILLER PARK TOWNHOMES, L.L.C., AMHERST PARTNERS, L.L.C., and ANDREA FARR, Defendants-Appellants.	LC No. 10-001345-NZ

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants appeal as of right from the judgment entered against them in the amount of $113,900 in this Whistleblowers Protection Act ("WPA"), MCL 15.361 *et seq.*, case. Because plaintiff failed as a matter of law to establish a prima facie case of retaliation, we vacate the judgment and reverse the trial court's orders denying defendants' motions for summary disposition and judgment notwithstanding the verdict ("JNOV").

I. BASIC FACTS

Defendant Miller Park Townhomes, L.L.C. ("Miller Park") owned and operated a townhome complex in Lansing. It had a loan through Huntington Bank, but it defaulted on that loan. Huntington Bank filed a lawsuit seeking the appointment of a receiver, and Scott Eisenberg, who was a managing partner at defendant Amherst Partners, L.L.C. ("Amherst"), was appointed the receiver for Miller Park in February 2008.

One of the first things that Eisenberg did as receiver was to hire Novlett Ellis to act as a property manager consultant. At the time Eisenberg was appointed as receiver, Miller Park had an existing on-site property manager and on-site maintenance manager. Eisenberg initially kept these existing employees, but in less than a year, had gone through several on-site property managers, with plaintiff being the fourth one, who was hired in December 2008. Eisenberg also replaced the on-site maintenance manager with Bernardo Ruiz, but he could not recall when this

happened. Eisenberg explained that all of these employees[1] were hired by Miller Park and not Amherst.

Plaintiff was 63 or 64 years old when she started working at Miller Park.[2] Plaintiff's wage was $14 per hour. Before being hired, plaintiff interviewed with both Eisenberg and defendant Andrea Farr. Farr is an employee of Amherst and is its officer manager/controller. She described herself as being a "Jack of all trades" and at the bottom of the Amherst hierarchy.[3] When plaintiff started working at Miller Park, she was aware that Miller Park was in receivership and that she would be working for a limited time at that property. But on direct examination, plaintiff stated that she was "under the impression" that she was being hired by Amherst and that once Miller Park closed, she would move on to another property. Eisenberg and Farr testified that plaintiff was expressly told that this was a short-term position and that she was being hired by the receivership. Because the identity of plaintiff's employer was relevant in the context of a WPA violation, defendants submitted plaintiff's paystubs into evidence. Those paystubs all listed Miller Park as the payor but with Amherst's Birmingham address.[4] Further, plaintiff's Employment Eligibility Verification Form (Form I-9) also provided that Miller Park was her employer. In short, there were no documents that ever referenced that plaintiff was employed by Amherst. In addition, Farr testified that all Amherst employers had internal Amherst e-mail addresses assigned to them, but plaintiff simply had a yahoo account that she was to use (miller.park@yahoo.com).

At trial, there was evidence that Farr was unhappy with various aspects of plaintiff's performance and eventually advocated for plaintiff to be fired. Some examples included the mishandling of a security deposit, authorizing work without obtaining multiple quotes, accepting rent payment from tenants when Miller Park had already initiated eviction proceedings against those tenants, and an alleged violation of the Fair Housing Act, 42 USC 3601 *et seq*.

At trial, plaintiff stressed that none of the above instances was ever documented in her personnel file. Plaintiff attempted to use this fact to show that plaintiff was not terminated based on her performance. However, Farr testified that no "personnel files" were maintained for the receiverships, in general. All she maintained for plaintiff was a folder that contained her tax information. Moreover, even though none of these instances was "documented" in any type of

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[1] The two "employees" were the on-site property manager and the on-site maintenance manager. Ellis was an independent contractor, who got issued a 1099 from Miller Park.

[2] Plaintiff's exact age in December 2008 is unknown because her birth date is not apparent from the trial transcript. However, she was 65 years old on March 9, 2010.

[3] Farr explained that Amherst's employees consist of four managing partners, four managing directors, three directors, one associate, an administrative assistant, and herself.

[4] Eisenberg explained that he used his Amherst Birmingham address because, since he was responsible for Miller Park and there were no accounting personnel on-site at Miller Park, he wanted any financial/accounting documents to be mailed directly to him. Regardless, the word "Amherst" did not appear on the checks.

"personnel file," there was no dispute that these instances occurred. There were numerous e-mails admitted into evidence that documented Farr's concerns, and plaintiff confirmed that she was aware of these concerns contemporaneous with their occurrence.

The evidence established that, as early as October 2009, Farr had advocated multiple times to Eisenberg for plaintiff's employment to be terminated. She raised these concerns with Eisenberg because he had the sole authority to make that kind of decision. Eisenberg confirmed that he had received numerous reports from Farr and Ellis of plaintiff's poor performance, but he did not want to hire a new property manager because replacing property managers was "a painful process." Further, Eisenberg explained that he knew he was "getting close to the end of the receivership" and did not see the need to change managers for this remaining period of time.

During this time, Ingham County had initiated foreclosure proceedings against Miller Park because of the unpaid property taxes.

On March 9, 2010, plaintiff was working at the Miller Park site. She needed to talk with Ruiz, the maintenance manager, but could not locate him. She deduced that he was inside the on-site garage and got her keys to open the door. Plaintiff testified that as she entered, Ruiz, from the inside, slammed the door closed on her, striking her on the face and front of her body. Plaintiff went back to her office and called Ellis; Ellis instructed plaintiff to contact Farr and Eisenberg. Plaintiff then called Farr and left a voice message, requesting Farr to call her back before she called the police. Plaintiff then called Eisenberg and left a similar voice mail. Eisenberg, who was occupied in a conference call at the time, could see that plaintiff was calling him. He sent an e-mail telling her that if there was an emergency, she should call Farr or Ellis, and they could address it.

Plaintiff testified that after not hearing from anyone, she called the police to report the assault. Officer Heins[5] responded and talked with plaintiff. However, he did not conduct any further investigation and, in fact, never filed any type of police report for the incident. Ruiz was never criminally charged as a result of the incident.

Plaintiff remained at work most of the remainder of the day and left around 5:00 in the afternoon. The next day, Wednesday, March 10, 2010, plaintiff called in sick. She went to the doctor's office either on Wednesday, March 10, or Thursday, March 11, and the doctor recommended that she take the rest of the week off and wrote a note/letter to this effect. Plaintiff faxed a copy of the doctor's letter to Farr and Eisenberg on Thursday, March 11, at 9:00 p.m., but because it was sent so late, Farr did not receive it until Friday morning.

According to Eisenberg, Ingham County's foreclosure became complete as of March 10, which was evidenced by the March 10 recording of the Notice of Judgment of Foreclosure in Ingham County's Register of Deeds. As far as Eisenberg was concerned, this meant that Ingham County owned the property as of March 10. Eisenberg also testified that, because the county then owned the property, there was no need for the receivership to maintain its employees, and

[5] No first name was mentioned for Officer Heins.

that he had authorized Farr to terminate plaintiff's employment, effective March 9. Eisenberg testified that while Ruiz's employment also was terminated, Ruiz was allowed to stay on a few days longer because, for safety reasons, he was concerned about leaving the property without a maintenance person. Ruiz was paid for 48 hours, or six days work, after March 9. Neither Amherst nor the receivership hired any other employees to replace plaintiff or Ruiz. Even though no "employees" were hired, Angela Llorens, an independent contractor, was assigned to wind down the Miller Park office.[6] Farr testified that she and Llorens went to the Miller Park office on March 10 to tell plaintiff in person that her employment was terminated, but plaintiff was not there. Farr stated that, thereafter, she called plaintiff twice on March 10 and left messages informing her that her employment was terminated. Plaintiff testified that she did not receive any messages.

Consequently, when Farr received plaintiff's fax on Friday, March 11, noting that plaintiff was taking the rest of the week off "due to illness,"[7] she was confused and assumed that plaintiff never received the voice messages. Farr then wrote a termination letter to plaintiff. Eisenberg approved the content of the letter, which was dated March 12, 2010, and provided, in pertinent part, the following:

> This letter follows the verbal notification you received on Wednesday, March 10, 2010, that your employment with Miller Park Townhomes is terminated. Your last date of employment was Tuesday, March 9, 2010.

The letter was signed "Andrea Farr, Amherst Partners, LLC, Receiver."

Farr emphasized that, while she signed plaintiff's termination letter, she was not the actual decision maker; the decision maker was Eisenberg. Eisenberg also testified that he was the ultimate decision maker.

Since being fired, plaintiff was only able to secure employment for six months, from January 2011 through June 2011, making $15 per hour.

Plaintiff filed her complaint on March 22, 2010, alleging one count of defendants violating the WPA. Defendants Miller Park, Amherst, and Farr were sued jointly and severally.

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[6] According to Farr, Llorens was at Miller Park less than five days after March 9. While cross-examining Farr, plaintiff's counsel stated that he spoke to Llorens and she said she worked "through the end of March," but Farr denied this assertion. Nevertheless, counsel's statement was not evidence.

[7] Farr testified that the fax contained a portion written by a doctor that stated that plaintiff was taking the rest of the week off "due to illness," and plaintiff also had a hand-written portion that stated, "I will not be [in] on Friday. I am ill." The fax never referenced the alleged assault or any resulting injury. Farr had assumed that plaintiff's "illness" referred to the same sickness that had caused plaintiff to miss two days of work the previous week.

Plaintiff claimed that she was fired because she contacted the police to report Ruiz's alleged assault on her.

Defendant subsequently moved for summary disposition under MCR 2.116(C)(10), arguing, *inter alia*, that plaintiff could not prove causation (i.e., that her call to the police was a cause in her employment being terminated). Defendants argued that, pursuant to the Supreme Court's decision in *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003), "[d]ischarge occurring after a report to police standing alone does not demonstrate the causal connection between protected activity and an adverse employment action."

In opposing the motion for summary disposition, plaintiff primarily argued that defendants never articulated a legitimate reason for firing plaintiff. Plaintiff relied upon Farr's deposition testimony that she did not know Eisenberg's actual reasons for firing plaintiff. Notably, neither party submitted any depositions or affidavits of Eisenberg to the trial court.

Plaintiff reasoned that since defendant never provided any affidavit or deposition from Eisenberg explaining why plaintiff was terminated, the necessary inference is that plaintiff was fired for calling the police. In support of this contention, Plaintiff cited to the two-justice dissenting opinion from *West*, which provided that "[a] lack of an action preceding the police report supports an inference that the report caused the adverse employment action."

In rebuttal, defendants stated that, since plaintiff was an at-will employee, no reason needed to be given to her when her employment was terminated. Further, the fact that Farr did not explicitly know why plaintiff was terminated is of no consequence because, as she stated, the person who ultimately decided to fire plaintiff, and had the sole authority to do so, was Eisenberg, the receiver; Farr simply was carrying out his orders as his agent by writing the termination letter.

Without providing any analysis or reasoning, the trial court denied defendants' motion because it determined that there was a genuine issue of material fact of whether plaintiff was fired as a result of the protected activity.

At the conclusion of the three-day trial, the jury found defendants liable. On the verdict form, the jury found that (1) plaintiff was "an employee of the Defendants," (2) plaintiff engaged in protected activity, (3) defendants terminated plaintiff, (4) the termination was at least, in part, related to the protected activity, and (5) plaintiff suffered damages as a result of the discharge. The jury awarded plaintiff $68,000 for damages to the present date but awarded nothing for future damages.

Following the verdict, the trial court entered a judgment in favor of plaintiff for $113,900, which included $45,900 in costs and attorney fees.

Defendants then moved for JNOV and, in the alternative, a new trial or remittitur. Defendants reiterated their argument that plaintiff failed to establish a prima facie case of retaliation because she offered nothing other than a temporal proximity between her calling the police and her eventual discharge.

Plaintiff responded that more than a temporal relationship existed between the protected activity and plaintiff's termination. The jury heard that the termination letter was issued March 12 but was retroactive to the date of the assault, March 9. Plaintiff claimed that this was direct evidence of a causal connection.

At the motion hearing, the trial court denied defendants' motion, and with respect to the issue of causation, the trial court simply noted that "the evidence that Defendant[s] point[] to was presented to the jury, and they made the determination that there was a Whistleblower Protection Act Violation, so the court is denying the motion."

II. ANALYSIS

Defendants argue that the trial court erred in denying their motions for summary disposition and JNOV. We agree that defendant's motion for summary disposition should have been granted.

A.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

B.

MCL 15.362, of Michigan's WPA, provides, in relevant part, the following:

> 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 . . . reports or is about to report . . . a violation or a suspected violation of a law . . . .

"To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action." *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013).

Defendants initially argue that plaintiff cannot meet the first element because her call to the police did not relate to a public concern. While this claim had some basis in the law when defendants filed their brief on the basis of *Whitman v City of Burton*, 293 Mich App 220; 810 NW2d 71 (2011), that decision was later reversed by our Supreme Court in *Whitman v City of Burton*, 493 Mich 303; 831 NW2d 223 (2013). This Court in *Whitman*, while relying on *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997), stated that the

"critical inquiry is whether the employee acted in good faith and with a desire to inform the public on matters of public concern." *Whitman*, 293 Mich App at 230 (quotation marks omitted). Consequently, this Court determined that the plaintiff, who sought payment under a local ordinance for his unused sick and personal hours, could not establish as a matter of law a prima facie case because he "acted entirely on his own behalf" and there was no "indication that good faith or the interests of society as a whole played any part in [the] plaintiff's threatened decision to go to the authorities." *Id.* at 230-231 (quotation marks and brackets omitted). The Supreme Court reversed and held that the plain language of the WPA did not require a plaintiff to have any particular motivation. *Whitman*, 492 Mich at 313, 320-321.

Thus, in light of our Supreme Court's recent pronouncement in *Whitman*, it is clear that whether plaintiff had any concerns for the public when she called the police is irrelevant. Accordingly, because she contacted the police regarding "a violation or a suspected violation of a law," i.e., an assault, her activity was protected. MCL 15.362.

However, defendants also argued that summary disposition was warranted on the basis that plaintiff's argument, that there was a temporal proximity between her termination and her call to the police, without more, was insufficient evidence of the causal connection necessary to establish a prima facie case under the WPA. We agree.

To reiterate, in order to establish a prima facie case, a plaintiff must, *inter alia*, prove that "a causal connection exists between the protected activity and the adverse employment action." *Whitman*, 493 Mich at 313. However, "[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West*, 469 Mich at 186. In other words, a "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *Id.*

There is no dispute that plaintiff failed to show, in opposing defendants' motion for summary disposition, anything more than a close proximity between the decision to fire her and her calling the police. Plaintiff's argument that the fact that defendants never documented any reason for her termination in the termination letter or her personnel file was additional evidence of a causal connection is without merit because plaintiff was an at-will employee. As such, plaintiff could have been fired at "any time for any, *or no*, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982) (emphasis added); see also *Prysak v RL Polk Co*, 193 Mich App 1, 9; 483 NW2d 629 (1992). Further, in opposing defendants' motion for summary disposition, plaintiff claimed, "A causal connection existed between the protected activity and the discharge in that [defendants] didn't fire [plaintiff] on March 12th, but made it retroactive to the date of the report to the police." But this argument simply restates plaintiff's previous argument that the close temporal proximity between the two events shows a relationship between her report to the police and her termination, which, standing alone, is not sufficient to establish a prima facie case of retaliatory discharge. *West*, 469 Mich at 186. Accordingly, the fact that defendants did not provide a reason to plaintiff in no way is evidence that plaintiff was fired *because she reported an assault to the police*. Thus, plaintiff failed, as a matter of law, to establish a prima facie case of retaliation.

Plaintiff's contention that defendants were required to prove that plaintiff was fired for a non-retaliatory reason constitutes an impermissible attempt by plaintiff to shift the burden of proof to defendants. Claims under the WPA are analyzed under the familiar burden-shifting approach, where "the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge." *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000). Only *after* a plaintiff succeeds in establishing a prima facie case, does the burden shift to the defendant to articulate a legitimate business reason for the discharge. *Id*. at 281. Then, if the defendant does produce such evidence, then "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." *Id.* Thus, it is clear that a defendant need not articulate any permissible reason for a plaintiff's termination until that plaintiff establishes a prima facie case of retaliation.

Here, plaintiff has misconstrued the above approach. Plaintiff argues that she established a prima facie case because, in addition to the temporal proximity, defendants did not document the reason for her termination in the termination letter or her personnel file. But, as noted earlier, the lack of any reason being documented is not evidence that plaintiff was fired for calling the police. At best, it would be evidence that defendants' proffered reasons for firing plaintiff were a pretext. But because plaintiff never established a prima facie case, the analysis never gets beyond this first step of the burden-shifting framework.

Because we conclude that defendants were entitled to summary disposition as a matter of law, we need not review defendants' other claims of error.

We vacate the judgment and reverse the trial court's order denying defendants' motions for summary disposition. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder

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RONAYNE KRAUSE, J. *(concurring)*

I concur in result only.

/s/ Amy Ronayne Krause