

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN LARUE,
Plaintiff-Appellant,

UNPUBLISHED
October 21, 2014

v

GARY P. MULNIX, DDS, PLLC, and GARY P.
MULNIX,

No. 316842
Ingham Circuit Court
LC No. 12-000732-CD

Defendants-Appellees.

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants according to MCR 2.116(C)(10). The trial court found that plaintiff could not establish a prima facie case that she was discharged from employment in retaliation for her pursuit of worker's compensation benefits. We affirm.

Plaintiff was employed as a dental hygienist by Douglas Gray, DDS, for 26 years before defendant Gary P. Mulnix, DDS, purchased the practice in October 2010. Mulnix averred that he was pleased that plaintiff and other staff members remained with the practice after the purchase. However, Mulnix averred he was later surprised to find that plaintiff had provided unsatisfactory teeth cleaning to patients. He explained that the unsatisfactory cleanings were not initially documented because they occurred during the time he was preoccupied with operating his new business.

Approximately one month after Mulnix bought the practice, plaintiff tripped on equipment at work. Coworkers assisted plaintiff to her feet and took her to a nearby urgent care facility. Mulnix worked with plaintiff's daughter that day to help with a workers' compensation claim.

The following month, December 2010, plaintiff was terminated from employment. The termination letter indicated that a change in staff was to be expected after a change in office ownership. Plaintiff subsequently filed her complaint alleging that she was fired in retaliation for her workers' compensation claim.

Defendants moved for summary disposition according to MCR 2.116(C)(10), arguing that plaintiff did not establish that she was terminated for retaliatory reasons and could not rebut

that she was fired for poor job performance. Defendants argued that x-rays and affidavits proved plaintiff's work difficulties. Plaintiff argued that there was no evidence that she had poor work performance. She maintained that the alleged work performance issue arose after her medical care became too costly. The trial court granted defendants' motion for summary disposition, finding that plaintiff could not demonstrate a causal link between filing for workers' compensation and her termination from employment. The trial court further found that defendants demonstrated legitimate business reasons for terminating plaintiff's employment.

A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff argues that the trial court improperly dismissed her lawsuit alleging retaliatory discharge for filing for workers' compensation contrary to the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.* MCL 418.301(13) provides, specifically:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

The purpose of the WDCA is to “ ‘promptly deliver benefits to employees injured in the scope of their employment.’ ” *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 272; 826 NW2d 519 (2012), quoting *Dunbar v Mental Health Dep't*, 197 Mich App 1, 6; 495 NW2d 152 (1992).

To establish a prima facie case of retaliation under the WDCA, a plaintiff who suffered a work-related injury is required to produce evidence of the following:

(1) that the employee asserted a right to obtain necessary medical services or actually exercised that right, (2) that the employer knew that the employee engaged in this protected conduct, (3) that the employer took an employment action adverse to the employee, and (4) that the adverse employment action and the employee's assertion or exercise of a right afforded under MCL 418.315(1) were causally connected. [*Id.* at 275, citing *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Plaintiff had the burden to demonstrate “that there was a causal connection” between her filing of a workers' compensation claim and defendants terminating her employment. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999). If a prima facie claim of retaliatory discharge is shown, the burden shifts to the defendant to demonstrate a legitimate,

nonretaliatory reason for terminating a plaintiff's employment. *Cuddington*, 298 Mich App at 276-277, citing *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001).

The trial court found that plaintiff could not demonstrate a causal link between filing for workers' compensation and her termination from employment. Plaintiff's circumstantial evidence of retaliation includes that she was terminated from employment by a letter dated December 13, 2010, which was soon after her November 17, 2010 injury and subsequent workers' compensation claim. However, a correlation between the time of the protected activity and time of the adverse employment action does not demonstrate a causal relationship. See *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 287; 696 NW2d 646 (2005); see also *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).

Additionally, even if plaintiff had established a prima facie claim, the record confirms that defendants met their burden of demonstrating legitimate business reasons for terminating plaintiff's employment. Mulnix stated that plaintiff was terminated for job performance issues. As a dental hygienist, her job responsibilities included cleaning teeth and performing x-rays. Mulnix supervised plaintiff for the 27 days between the time he purchased the practice and plaintiff was injured. Upon inspection after plaintiff cleaned a patient's teeth, he averred, he more than once requested that plaintiff remove the remaining calculus. He asserted that he even rescheduled a cleaning once due to the amount of remaining calculus and informed family members to avoid plaintiff's cleanings. He further averred that he personally reviewed about 10 patient records for patients treated by plaintiff between October 22, 2010, and December 3, 2010, that demonstrated plaintiff's poor job performance, including poor calculus cleaning and failure to timely provide x-rays.

Jody Jenkins, a hygienist who worked for defendants after plaintiff's injury in November 2010, noticed calculus accumulation that was never treated on a number of plaintiff's patients. Plaintiff argues that the trial court should not have considered Jenkins's affidavit because it was second-hand information, as she never observed plaintiff's work and could not tell whose work was deficient. However, Jenkins's affidavit did not state that plaintiff's work was deficient. Jenkins stated in her affidavit that she brought to defendant Gary Mulnix's attention patients that she was treating that were previously treated by plaintiff who had a significant amount of calculus accumulation that was not previously addressed. Jenkins additionally indicated that she observed x-rays from multiple years for multiple patients previously treated by plaintiff that also demonstrated calculus accumulation.

Plaintiff also argues that the patient records referred to in Jenkins's affidavit should have been attached to the affidavit. MCR 2.119(B)(2) provides:

Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to the affidavit unless the papers or copies:

* * *

(d) are of such nature that attaching them would be unreasonable or impracticable, and this fact and the reasons are stated in the affidavit or the motion.

Although not specified, attaching confidential medical records to the affidavit may not have been reasonable or practicable, and defendants offered the records provided that plaintiff agree to a protective order. There is no record of a protective order for the dental records being entered.

In sum, the trial court's determination that defendants established a legitimate business reason for plaintiff's discharge was not in error.

The trial court also found that plaintiff did not demonstrate that defendants' legitimate business reasons were a pretext. We agree. After a defendant discloses "a legitimate nondiscriminatory reason rebutting a plaintiff's prima facie case of discrimination," the plaintiff must demonstrate an issue of fact regarding whether the defendant's reasons were pretext. *Clark v Uniroyal Corp*, 119 Mich App 820, 825-826; 327 NW2d 372 (1982). A plaintiff must set forth factual allegations which imply that the defendant had a retaliatory reason that was a more likely motivation or factual allegations that demonstrate the defendant's proffered reason was not trustworthy. *Id.* A plaintiff can establish that the reasons for an adverse employment action were pretext by demonstrating "that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision." *Cuddington*, 298 Mich App at 277, citing *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Plaintiff argues that she demonstrated pretext by showing that her work was completed in a satisfactory manner. Similarly, plaintiff argues that there was no documentation of her deficient work performance and all her interactions with Mulnix were positive. Plaintiff stated that, after examining patients, he told her that he was happy she stayed because she did a good job and never expressed concerns about her work. Mulnix acknowledged that he was pleased that plaintiff and other staff members remained with the practice after he purchased it. However, he explained that he had not documented any work performance issues because they occurred in the first month of operation and he was preoccupied with operating a new business.

Again, Mulnix indicated that he more than once requested that plaintiff remove the remaining calculus after inspecting the teeth of plaintiff's patients. Also, he indicated he investigated and discovered more problems with plaintiff's work (including the observations of Jenkins) while she was away from the practice, precluding any confrontation over plaintiff's work. Accordingly, the record does not support plaintiff's allegation that her performance was a pretext for her termination.

Plaintiff also argues that the trial court improperly made a determination of credibility in granting summary disposition to defendants. Plaintiff contends that the trial court determined that the affidavits of Mulnix and Jenkins were more credible than plaintiff's contradictory affidavit. We disagree. The trial court reviewed the evidence, permissibly made reasonable inferences, and determined that there were no genuine issues of any material fact to warrant a trial.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Christopher M. Murray