STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE NAVE,

Plaintiff-Appellant,

v

MCLAREN BAY REGION,

Defendant-Appellee.

UNPUBLISHED
July 23, 2020

No. 348941
Bay Circuit Court
LC No. 18-003268-CD

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Michelle Nave, appeals as of right the trial court's order granting summary disposition in favor of defendant, McLaren Bay Region ("the Hospital"). Plaintiff worked for the Hospital for approximately twenty years, holding various positions, finally working as a nursing clerk. The Hospital terminated her employment on the basis of what the Hospital contends was plaintiff's inappropriate behavior. Plaintiff contends that the Hospital's stated basis for her termination is pretextual, and instead she was terminated based on her hearing disability, or as retaliation for her own complaints of harassment or for having made a worker's compensation claim. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1).

I. BACKGROUND

Plaintiff began working for defendant hospital in 1996. Plaintiff held several positions, including surgical assistant, phlebotomist, laboratory assistant, and patient care associate. In 2008, plaintiff began working as a nursing clerk. She was originally a "float clerk," but was eventually assigned to the fourth floor, where she reported to KH.[1] As a nursing clerk, plaintiff had many responsibilities that involved interacting with hospital staff, doctors and nurses, patients, and

[1] It is not clear from the record when KH first assumed some kind of supervisory role over plaintiff, but KH formally became plaintiff's manager in 2013.

patients' families. Nursing clerk responsibilities also included clerical work, such as entering orders, relaying messages, and working with various kinds of documentation and paperwork. Plaintiff contends that she suffers from hearing difficulties that began in the 1990's. She explained that those difficulties include finding certain pitches either painful or inaudible, and being unable to distinguish words spoken in a noisy environment.[2] Plaintiff testified that she never had any problems on any other floors, but the fourth floor was the noisiest, which caused her to have difficulties performing her job. She testified that she repeatedly asked for management to take steps to reduce the noise level on the floor, but admittedly never put such a request in writing.

In July 2015, plaintiff slipped and fell in defendant's parking lot, injuring her knee. Plaintiff filed a workers' compensation claim that same month. Plaintiff alleged that KH subsequently began to harass her, stating that she received complaints about the loudness of plaintiff's voice and about plaintiff's "rude behavior." Plaintiff also alleged that after she had surgery on her knee in September 2015, which caused her to miss more than three full weeks of work, KH began "targeting" her by continually referencing plaintiff's inability to control the loudness of her voice and claiming that plaintiff was talking too loudly even when she was not talking. According to plaintiff, KH targeted her every day, sometimes multiple times per day. Plaintiff stated that she made verbal complaints about KH's behavior to KR, a human resources manager for the Hospital, in November 2015 and February 2016 but that KR never conducted any further investigation.

Plaintiff admitted that she had no direct evidence that KH's alleged harassment was related to plaintiff's workers' compensation claim, but the harassment began when she returned to work. However, plaintiff provided a "conference summary" drafted by KH in 2011, when KH was a clinical coordinator and not yet plaintiff's manager, reflecting that KH had "spoken to [plaintiff] on at least 3 occasions about the noise level of her voice" and indicating that "managers, doctors, nurses, other clerks and management" had complained about plaintiff's voice. The summary reflects that plaintiff explained "her hearing is off and she has always had problems with the loudness of her voice," and questioned whether plaintiff should "see a doctor about her hearing."

In February 2016, KH issued plaintiff a written reprimand because plaintiff was being loud and disruptive. In March 2016, plaintiff transferred to the sixth floor and reported to LD, who issued plaintiff a final written reprimand in April 2016 because plaintiff was being loud and making inappropriate comments about prior staff. Defendant terminated plaintiff's employment in July 2016 because LD received complaints that plaintiff was "butting into" other employees' conversations and that plaintiff was loudly announcing patients' names and other private information in front of other patients. KR provided a collection of disciplinary reports and related documents pertaining to plaintiff and dating to 2004, 2006, 2007, 2010, 2011, 2012, and 2016, created by or under a variety of managers. The documents generally reflected a pattern of improper conduct, ranging from asking inappropriate questions or making inappropriate statements, refusing orders, disclosing confidential information, being rude or discourteous. LD is now deceased.

[2] Plaintiff testified that she was given a hearing test in the 1990's, but the only hearing test in evidence was performed in December 2015.

Plaintiff filed this action, alleging that defendant discriminated and retaliated against her in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1201 *et seq*. Plaintiff also alleged that defendant retaliated against her in violation of the Worker's Disability Compensation Act of 1969 (WDCA), MCL 418.101 *et seq*. Defendant moved for summary disposition under MCR 2.116(C)(10) with respect to plaintiff's discrimination claim under the PWDCRA and plaintiff's retaliation claim under the WDCA. At the motion hearing, defendant's counsel also argued that it was appropriate for the trial court to grant summary disposition with respect to plaintiff's retaliation claim under the PWDCRA. The trial court granted summary disposition in favor of defendant on all counts of plaintiff's complaint. The trial court denied plaintiff's motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary disposition de novo. *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 11; 930 NW2d 393 (2018). Summary disposition under MCR 2.116(C)(10) is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In reviewing the motion, this Court considers the "pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court will generally affirm a correct outcome, even if the trial court employed incorrect reasoning. *Kirl v Zinner*, 274 Mich 331, 336; 264 NW 391 (1936).

III. PWDCRA

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant on her claims of retaliation and discrimination under the PWDCRA. We disagree.

Plaintiff has consistently maintained that defendant's motion for summary disposition addressed only her claims of discrimination under the PWDCRA and retaliation under the WDCA, but not her claim of retaliation under the PWDCRA. We disagree. Nothing in defendant's motion purported to explicitly limit the scope of the motion. Defendant's motion would, ideally, have explicitly addressed retaliation under both the PWDCRA and WDCA. However, the gravamen of defendant's defense is that plaintiff was terminated solely due to her improper conduct, which had been a longstanding problem. Such an argument is clearly applicable to all three of the counts in plaintiff's complaint. Furthermore, even if defendant failed to properly address plaintiff's claim of retaliation under the PWDCRA, trial courts are authorized to grant summary disposition *sua sponte* under MCR 2.116(I)(1) "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact." *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009) (quotation marks omitted). Because, as we will discuss, summary disposition was correctly granted on this record, plaintiff's objections to any infirmities in the presentation of defendant's motion are not grounds for reversal. See *Kirl*, 274 Mich at 336.

The PWDCRA provides, in relevant part, that a person or persons shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.1602(a). To establish a prima facie case of unlawful retaliation, a plaintiff must show "(1) that [s]he engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Aho v Dep't of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004). To establish a prima facia case of discrimination under the PWDCRA, the plaintiff must demonstrate that (1) the plaintiff is disabled as defined by the act; (2) the disability is unrelated to the plaintiff's ability to perform his or her job; and (3) the plaintiff was discriminated against in one of the ways described in the act. *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004).

Initially, we reject defendant's and the trial court's conclusions that there is no question of fact whether plaintiff is disabled. A "disability," in relevant part, includes a physical characteristic of an individual that substantially limits at least one major life activity. MCL 37.1103(d)(*i*)(A). Hearing is a major life activity. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 477; 606 NW2d 398 (1999). A plaintiff must provide "some evidence from which a factfinder could conclude that her disability caused substantial limitations when compared to the average person." *Lown v JJ Eaton Place*, 235 Mich App 721, 731; 598 NW2d 633 (1999). Plaintiff testified that she finds some sounds, and noisy environments, painful; and she has difficulty understanding speech where background noise is present. Although plaintiff's hearing test results seemingly indicated she had minimal difficulty perceiving tones, plaintiff is clearly describing a disability more akin to a sensory processing disorder. Thus, the hearing test does not objectively refute her testimony. Cf., *People v Lemmon*, 456 Mich 625, 643-646; 576 NW2d 129 (1998); *Scott v Harris*, 550 US 372, 378-381; 127 S Ct 1769; 167 L Ed 2d 686 (2007). "A party's own testimony, standing alone, can be sufficient to establish a genuine question of fact." *Jewett v Mesick Consol Sch Dist*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348407), slip op at p 7. Because a trier of fact could therefore reasonably accept plaintiff's testimony about her hearing problems, there is a genuine question of material fact whether she is disabled.[3]

Nevertheless, to maintain a claim of discrimination under the PWDCRA, the plaintiff must show that any adverse employment conduct was *because of* the plaintiff's disability or membership in a protected class. *Peden*, 470 Mich at 203-204; *Downey v Charlevoix Co Bd of Comm'rs*, 227 Mich App 621, 630, 632-633; 576 NW2d 712 (1998). Likewise, to establish claim of retaliation under the PWDCRA, a plaintiff must show "a causal connection between the protected activity and the adverse employment action." *Aho*, 263 Mich App 288-289. Thus, under either theory, a

[3] We note that even if plaintiff were not actually disabled, a discrimination claim under the PWDCRA may be maintained on the basis of an employer merely believing the plaintiff to be disabled, irrespective of the correctness of that perception. See *Chiles*, 238 Mich App at 475-476.

PWDCRA claim necessarily fails if the plaintiff cannot establish a causal nexus between the disability or protected activity and the adverse employment action.

Plaintiff testified that she complained to KR twice of harassment by KH. Therefore, plaintiff ostensibly[4] engaged in a protected activity because she "opposed a violation" of the PWDCRA, *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 435; 653 NW2d 415 (2002), and this was known by defendant, *Aho*, 263 Mich App at 288. Defendant took an adverse employment action by terminating plaintiff. *Aho*, 263 Mich App at 288. For purposes of this appeal, we will presume, although we do not decide, that there is a genuine question of fact whether there was a causal connection between the protected activity and the adverse employment action. See *id*. As noted, there is a question of fact whether plaintiff was in fact disabled and whether her disability was known to defendant. We will, again, presume but not decide that plaintiff has established a prima facie case that she was discriminated against on the basis of her hearing disability.

If a plaintiff successfully establishes a prima facie case of discrimination or retaliation, the defendant then has the burden of establishing that its adverse action was undertaken for a legitimate nondiscriminatory or business reason. *Aho*, 263 Mich App at 289; *Rollert v Dep't of Civil Serv*, 228 Mich App 534, 538; 579 NW2d 118 (1998). Here, defendant has articulated proper reasons for plaintiff's termination: failure to follow instructions, inappropriate conduct, announcing patient names in front of other patients, and " 'butting into' other employee's issues." Plaintiff does not appear to seriously dispute that defendant has articulated legitimate, nondiscriminatory reasons for her discharge. Rather, plaintiff alleges those reasons are either untrue or were pretextual. A plaintiff can establish pretext "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

Plaintiff primarily argues that defendant cannot prove any legitimate reasons for her discharge without resort to inadmissible hearsay. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is not admissible unless a specific exception applies." *Campbell v Dep't of Human Servs*, 286 Mich App 230, 245; 780 NW2d 586 (2009). As noted, defendant has provided a collection of disciplinary documents pertaining to plaintiff dating back to 2004, which may be used to establish legitimate reasons for an adverse employment decision and refute an assertion of pretext. See *Jewett*, ___ Mich App at ___, slip op at p 6. Such business records are admissible pursuant to MCR 803(6). Plaintiff contends that the records may not be admitted without affidavits from the authors of some of the complaints reflected in those records. However, at a summary disposition stage, the evidence must merely be substantively admissible in content, not necessarily immediately admissible as presented. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009). The

[4] The evidence does not seem to show that plaintiff complained of harassment based on her hearing difficulties, but we will presume plaintiff's complaints referenced her hearing disability for the limited purpose of resolving whether plaintiff established a prima facie claim.

disciplinary records show that plaintiff has a long history of not performing her job properly and engaging in conduct that ranged from insubordinate to belligerent to potentially illegal.[5] Thus, we disagree with plaintiff that defendant has failed to establish legitimate nondiscriminatory or business reasons for its adverse employment actions.

Plaintiff otherwise contends that defendant's proffered reasons were pretextual because of the close temporal proximity between her protected actions and her discharge, and because of defendant's failure to conduct any investigation into plaintiff's claims of harassment. However, neither timing nor temporal proximity are sufficient to establish causation. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 286; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). Plaintiff apparently mentioned harassment once during a 2015 meeting with KR and possibly in a 2016 email, and defendant did not follow up on plaintiff's concerns, contrary to its policies. We are unpersuaded that the evidence shows intentional indifference, rather than mismanagement. Plaintiff's complaints seem to have been vague, unconnected to any mention of her disability, and largely based on her perception of KH as simply being an abusive manager to everyone.

Furthermore, plaintiff testified that KH's harassment began after plaintiff made her worker's compensation claim. This suggests that if KH's treatment of plaintiff was unrelated to plaintiff's legitimately poor performance at her job, it was more likely linked to the worker's compensation claim than to any disability. Alternatively, the fact that the disciplinary documents date back to 2004, involved other management personnel, and involved performance problems seemingly unrelated to plaintiff's hearing is powerful evidence that defendant had a good-faith belief in plaintiff's performance issues and thus did not engage in pretext. *Jewett*, ___ Mich App at ___, slip op at pp 7-8. Finally, the gravamen of plaintiff's claim seems to be that requiring plaintiff to control the volume of her voice is *per se* discrimination on the basis of her hearing disability. Plaintiff has not provided any evidence that defendant was more than nominally aware that plaintiff's hearing was "off," and that plaintiff *possibly* had a more serious disability. We therefore conclude that the trial court properly granted summary disposition in favor of defendant as to plaintiff's PWDCRA claims, because defendant articulated proper reasons for plaintiff's discharge, and plaintiff has not shown that defendant's reasons were pretextual.

IV. WDCA

Plaintiff argues that the trial court erred by granting summary disposition on her claim of retaliation under the WDCA. We disagree.

The purpose of the WDCA, MCL 418.101 *et seq*., 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) (quotation marks and citation omitted). MCL

[5] Defendant contends that some of plaintiff's loud verbalizations were in violation of the federal Health Insurance Portability and Accountability Act of 1996, 42 USC § 1320d *et seq*. (HIPAA), which imposes certain confidentiality requirements. We specifically do not express any views whatsoever as to whether plaintiff actually did violate HIPAA. We only observe that a hospital's perception that a staff member might be violating HIPAA is a reasonable basis for concern.

418.301(13) provides, "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." "To establish a prima facie case of retaliation under the WDCA, an employee who has suffered a work-related injury must present evidence: (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." *Cuddington*, 298 Mich App at 275.

Only the fourth element is in dispute in this case. We conclude that plaintiff has failed to meet her burden of showing that there was a causal connection between the protected activity, i.e., the filing of her workers' compensation claim, and the adverse employment action, i.e., KH's alleged harassment. As noted, plaintiff has clearly established a close temporal connection between her worker's compensation claim and the commencement KH's perceived harassment. 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. Here, plaintiff admitted that there was nothing more than a temporal connection between the filing of her workers' compensation claim and the adverse employment action. Therefore, the trial court did not err by granting defendant's motion for summary disposition on plaintiff's retaliation claim under the WDCA.

Affirmed.

/s/ Michael J. Riordan
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause