STATE OF MICHIGAN

COURT OF APPEALS

LINDA M. LEWANDOWSKI,

Plaintiff-Appellant,

v

ARENAC COUNTY,

Defendant-Appellee.

UNPUBLISHED
December 22, 2020

No. 350272
Arenac Circuit Court
LC No. 18-013992-CD

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

In this retaliation action, plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) to defendant. The trial court granted summary disposition on the basis that plaintiff failed to prove that termination of her employment had a causal connection to her protected activities under the Whistleblowers' Protection Act (WPA), MCL 15.369 *et seq*. We affirm.

I. FACTS

Plaintiff was the Director of the Equalization Department for defendant for a period of 10 years. In the spring of 2018, plaintiff reported to a member of the Board of Commissioners (the Board) that she believed that her subordinate clerk, Michael Henninger, was preparing corrective and quit claim deeds for residents of the county while using county resources. After sending some inquiries to recent customers of the Equalization Department, the Board sought the assistance of law enforcement. Ultimately, the Michigan State Police concluded that Henninger's conduct was "unethical, but not necessarily illegal."

During the same time frame, a class-action union grievance was filed against the county in regard to a job posting plaintiff had placed, alleging hiring practices that were in violation of the county employees' collective bargaining agreement (CBA). The grievance indicated that after posting a Level II Appraiser position internally, plaintiff posted a "less restrictive" posting externally and hired an external candidate at a rate of pay that exceeded the pay for an entry-level employee. The grievance was signed by Henninger in his capacity as a union steward, and included the signature of 14 union members.

On July 19, 2018, defendant terminated plaintiff's employment. Her termination letter set for the reasons for discharge as follows:

> 1. Your public posting for the Level II vacancy in your department changed the qualification requirements from the internal to the public posting, in violation of our labor agreement with the Teamsters.
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> 2. You hired an individual who did not meet the original requirements of the Level II position.
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> 3. You placed the hired individual on a wage scale for which that person was not qualified, thereby causing the County unnecessary expense.
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> 4. As the person responsible for your Department, you failed to recognize that one of your employees was actually conducting a personal business through the office using County records, equipment[,] and supplies for personal gain.

Plaintiff did not ask any questions when she was handed the termination letter. Her union representative filed a grievance on her behalf, but the grievance was denied. Thereafter, plaintiff filed a one-count complaint alleging retaliation in violation of the WPA.

Plaintiff, Henninger, some individual Board members, and the Chairman of the Board's secretary were deposed as part of discovery in this case. Thereafter, defendant filed a motion for summary disposition, which plaintiff opposed. Nonetheless, following a brief hearing on the matter, the trial court concluded:

> I think that the [sic], when you look at the circumstances around the dismissal, I think that the job posting was in error; I think the hire was in error; I think the salary at which the person hired for, was in error; and I think the fact that [the clerk] was allowed to have a legal document drafting service on the side and apparently a part and parcel of his job was a responsibility of the Defendant, or I mean the Plaintiff, I'm sorry.

The court further stated,

> I think that no matter what would have happened with that investigation I think the first three reasons for the firing all happened temporally close. But they don't seem to be directly related other than the fact that the person who was complained of, also, in a small county, happens to be the Union President and has his name on top of the grievance.
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> * * *
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> At the end of the day[,] I think the conclusions that are drawn from the reasons don't support a basis to believe that this was a retaliatory firing due to the whistleblower, the protected activity. It was a list of things that the Plaintiff had done that were probably not to the satisfaction of the Commissioners.

The trial court thus granted defendant's motion for summary disposition. This appeal followed.

II. ANALYSIS

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Summary disposition under MCR 2.116(C)(10) is proper 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." "Because a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, the circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Joseph v Auto Club Inc Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012) (citation omitted).

"The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). When the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

The WPA states, in relevant part:

> 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, 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. [MCL 15.362.]

In order to establish a prima facie case of retaliatory termination, a plaintiff must show that he was engaged in protected activity as defined by the act, he was discharged, and "a causal connection exists between the protected activity" and the discharge. *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999). This may be proven by direct or circumstantial evidence. *Sniecinski v Blue Cross Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003); *Shaw v City of Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009).

Direct evidence is evidence that, if believed, requires the conclusion that unlawful retaliation was at least a motivating factor in the employer's adverse employment action. *Shaw*, 283 Mich App at 14. In a direct-evidence case involving both permissible and impermissible reasons for the adverse action, the plaintiff must prove that retaliation was more likely than not a substantial or motivating factor in the decision. See *Sniecinski*, 469 Mich at 133. However, "a temporal relationship, standing alone, does not demonstrate a causal connection between the

protected activity and any adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).

Further, cases involving circumstantial evidence require the application of the burden-shifting framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Debano-Griffin v Lake Co*, 493 Mich 167, 175-76; 828 NW2d 634 (2013). This burden-shifting approach allows a plaintiff to present a rebuttable prima facie case on the basis of proofs from which the trier of fact could infer that the plaintiff was the victim of unlawful retaliation. *Sniecinski*, 469 Mich at 134. Once a plaintiff has presented a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. *Id*. If the employer does so, the presumption is rebutted, and the burden shifts back to the plaintiff. *Id*. The employer, however, may be entitled to summary disposition if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a "motivating factor" for the employer's adverse action. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001).

Further, "a plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful retaliation]." *Id*. at 465-466 (quotation marks and citations omitted). "An employee can show pretext by showing that (1) the reasons proffered had no basis in fact; (2) that if they have a basis in fact, they were not the actual factors motivating the decision; or (3) if they were factors, they were jointly insufficient to justify the decision." *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). "The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext." *Id*. at 566.

As a preliminary matter, on appeal, neither party disputes that plaintiff reported a suspected violation of a law to the Board, thereby participating in an activity that is protected under the WPA. Moreover, we disagree with plaintiff's contention that the trial court erred by not finding that plaintiff participated in such an activity. Indeed, in the court's oral opinion, the trial court stated in part, "I think the conclusions that are drawn from the reasons don't support a basis to believe that this was a retaliatory firing due to the whistleblower, the protected activity." This sentence alone suggests that the trial court did indeed conclude that plaintiff participated in a protected activity under the WPA. Additionally, plaintiff's termination is an adverse employment action. Accordingly, the only issue before this Court is whether a causal connection exists between plaintiff's protected activity and her termination.

A. DIRECT EVIDENCE

Plaintiff argues that she presented direct evidence of defendant's retaliatory motive because her letter of termination referenced Henninger's actions, which were the subject of her protected activity, as a reason for her dismissal. We disagree that this is direct evidence of causation.

The key clause in MCL 15.362—"because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law"—requires, by its unambiguous language, that the retaliation occur because the employee makes such a report, regardless of the content or result of such reporting. In this case, plaintiff's termination letter stated that one of the

reasons for her dismissal was that "[a]s the person responsible for your Department, you failed to recognize that one of your employees was actually conducting a personal business through the-office using County records, equipment and supplies for personal gain." Plaintiff argues that because she reported this behavior to the Board, this statement is direct evidence of retaliatory action based on her protected activity.

On the other hand, defendant argues that this statement reflects only the Board's dissatisfaction with plaintiff's performance of her supervisory responsibilities. We agree with defendant's position, and we note that the letter does not directly compel the conclusion that when defendant decided to fire plaintiff and did so, defendant was motivated by a desire to retaliate against plaintiff for reporting the clerk's activities. Rather, the statement expresses only that plaintiff failed to perform her supervisory duties in regard to her department. In whole, we are not persuaded that plaintiff's termination letter contains direct evidence of causation or, more specifically, a retaliatory motive.

B. CIRCUMSTANTIAL EVIDENCE

Nonetheless, plaintiff presents a theory that suggests a causal connection between her protected activities and her termination through circumstantial evidence. First, plaintiff notes that a causal link exists because defendant was the same body that received her report and later terminated her. She also notes the additional expenses associated with the investigation, including the need to employ the services of a contract employee who handles labor relations. Finally, plaintiff states that "connecting the whistleblowing to the investigation, to the grievance filed at the instigation or by the hand of [Henninger], to the involvement and expense of a labor specialist, to the decision to retain [Henninger] and terminate [plaintiff], to the resolution of the grievance almost immediately thereafter, all of these not-merely-convenient-nor-coincidental facts establish plaintiff's prima face case."

However, as defendant pointed out at trial, plaintiff has not shown anything more than a temporal connection between several different events. As previously noted, "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.

Nonetheless, assuming arguendo that plaintiff's theory was enough to allow an inference of a causal connection between the protected activity and plaintiff's termination, the burden then shifts to defendant to present evidence that the true reason for the discharge was nonretaliatory. *Sniecinski*, 469 Mich at 134. Plaintiff's termination letter identified four reasons for her termination:

> 1. Your public posting for the Level II vacancy in your department changed the qualification requirements from the internal to the public posting, in violation of our labor agreement with the Teamsters.
>
> 2. You hired an individual who did not meet the original requirements of the Level II position.

> 3. You placed the hired individual on a wage scale for which that person was not qualified, thereby causing the County unnecessary expense.
>
> 4. As the person responsible for your Department, you failed to recognize that one of your employees was actually conducting a personal business through the office using County records, equipment and supplies for personal gain. [Term Ltr.]

The testimony of several individuals, including plaintiff's own testimony, supports a conclusion that the events identified within the first three reasons for termination indeed occurred and caused the Board displeasure with plaintiff's mishandling of the events. Accordingly, these reasons shifted the burden back to plaintiff to show that defendant's proffered reasons were a pretext for retaliation. *Sniecinski,* 469 Mich at 134.

C. PRETEXT

Plaintiff argues specifically that she had not done anything differently with the Appraiser II job posting than she had in the past, and that plaintiff had testified that she didn't include the certification in the external listing in order to "save space." Plaintiff further argues that she was never disciplined for any prior listings and it was one of the commissioners who participated in the interviews who instructed her what wage to pay for the position. Moreover, plaintiff suggests that there were no unnecessary expenses to defendant because the hired individual received a pay cut and no increases were paid to other members of the union in resolving the grievance. Plaintiff suggests that the other three reasons for her termination were merely pretextual and the result of the grievance filed by Henninger after plaintiff reported his activities to the Board.

Contrary to plaintiff's assertion, we conclude that sufficient evidence was presented to support a conclusion that the other reasons for plaintiff's termination identified by defendant were not mere pretext. The record before us supports defendant's contention that plaintiff's actions regarding posting and hiring an individual to fill the Appraiser II position were not in conformance with the governing CBA. Whether or not plaintiff was seeking to save space or had handled prior postings the same way is irrelevant in regard to whether the action was a violation of the CBA. Additionally, by hiring an individual who was not fully qualified at the time of hire, and paying that hired individual a wage that was higher than what he was eligible for, plaintiff caused defendant to incur unnecessary costs. That defendant later corrected the hired individual's wage does not eliminate the initial additional expenses. Accordingly, plaintiff's contention that no additional costs were incurred as a result of the employee's eventual pay cut is incorrect. Moreover, it is undisputed that these actions resulted in a class-action grievance that had to be resolved by the Board. In whole, we agree with the trial court's conclusion that these actions alone were sufficient to justify plaintiff's termination.

Given these circumstances, plaintiff was then required to show that a reasonable fact-finder could still conclude that plaintiff's protected activity was a "motivating factor" for the employer's adverse action. *Hazle,* 464 Mich at 464-465. Plaintiff failed to do so. Indeed, the trial court concluded that "the conclusions that are drawn from the reasons don't support a basis to believe that this was a retaliatory firing due to the whistleblower, the protected activity. It was a list of things that the Plaintiff had done that were probably not to the satisfaction of the Commissioners."

We agree. Each of the reasons identified errors committed by plaintiff within her role. None of the reasons listed suggests a retaliatory motive by defendant.

Nonetheless, plaintiff also takes issue with the trial court's characterization of plaintiff's inaction regarding Henninger's side-work activities as "malfeasance." We note that the trial court later clarified that the word "nonfeasance" would have better described plaintiff's failure to be aware of and address Henninger's activities while under her supervision. Finally, plaintiff suggests that the trial court created a "job duty" exception to the WPA when it concluded that defendant was responsible for correcting Henninger's behavior, and that this exception stripped plaintiff of her protected status. However, this assertion is unsupported by the record. Indeed, the trial court never indicated that the protections of the WPA didn't apply to plaintiff. Instead, the trial court simply concluded that the reasons for plaintiff's termination were related to defendant's dissatisfaction with plaintiff's job performance in the areas of posting a position, hiring, setting employee wages, and, finally, supervision of her department. We agree. Moreover, as the trial court noted, none of the proffered reasons were retaliatory in nature and there was no causal relationship between plaintiff's protected activity and her termination.

In whole, because there were no genuine issues of material fact concerning whether defendant violated the WPA, the trial court did not err by granting summary disposition to defendant.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Deborah A. Servitto