

STATE OF MICHIGAN
COURT OF APPEALS

JERI KAUPP,

Plaintiff-Appellant,

v

MOURER-FOSTER, INC.,

Defendant-Appellee.

UNPUBLISHED

July 14, 2009

No. 281578

Ingham Circuit Court

LC No. 05-001441-NZ

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

In this wrongful termination suit filed under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition to defendant.¹ The trial court concluded that the evidence did not create a question of fact whether plaintiff was fired for engaging in a protected activity under the WPA and that a reasonable fact-finder could only conclude that plaintiff's termination was not connected to activities protected under the WPA. We conclude that a reasonable fact-finder could find that plaintiff was terminated for engaging in protected activity and so reverse the grant of summary disposition and remand for trial.

We review a trial court's decision on a motion for summary disposition *de novo*. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(3)(b); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West, supra* at 183. "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." *Id.*

¹ For reasons that are not explained in the record, the summary disposition motion was not filed until after the deadline set by the trial court for such motions to be filed and heard.

Under the WPA:

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, or a person acting on behalf of 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.]

To establish a prima facie case of violation of the WPA, a plaintiff must set forth evidence: ““(1) that plaintiff was engaged in protected activities as defined by the act; (2) that plaintiff was subsequently discharged, threatened, or otherwise discriminated against; and (3) that a causal connection existed between the plaintiff's protected activity and the discharge, threat, or discrimination.”” *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 491; 705 NW2d 689 (2005), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589, 595; 734 NW2d 514 (2007), quoting *Phinney v Verbrugge*, 222 Mich App 513, 553; 564 NW2d 532 (1997).

At trial, if a plaintiff can produce evidence as to these three elements, the burden then shifts to defendant to produce evidence of a legitimate business reason for plaintiff's discharge. *Taylor v Modern Engineering, Inc.*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If the defendant can produce such evidence, the burden then returns to the plaintiff to present evidence that the proffered legitimate business reason was a pretext for the discharge. *Id.* A plaintiff may demonstrate pretext in either of two ways. First, a plaintiff may do so directly, by demonstrating that a retaliatory reason more likely motivated the employer. Second, a plaintiff may do so indirectly, by showing that the legitimate business reason proffered by the defendant is unworthy of credence. *Id.*

Defendant has conceded that plaintiff was engaged in a protected activity and that she was terminated shortly after her supervisor learned of the protected activity. Thus, it is not disputed that the first two prongs of the three prong test under the WPA have been met. This leaves us to determine only whether there is a question of fact as to the third prong of the test, i.e. that “a causal connection existed between the plaintiff's protected activity and the discharge, threat, or discrimination.” Our Supreme Court has held that a person can demonstrate the requisite causal connection by “present[ing] evidence that his superior expressed clear displeasure with the protected activity engaged in by the plaintiff.” *Id.* at 186-187.

Accordingly, we will consider what evidence the parties have offered at this point in the litigation and determine (1) whether plaintiff has presented evidence of causation beyond a mere temporal relationship of the protected activity to the firing and if so, (2) whether defendant has presented evidence of a legitimate business reason for the firing and if so, (3) whether plaintiff has presented evidence that the asserted legitimate business reason was pretextual.

I. Causal Relationship

Defendant concedes that plaintiff, an employee handling the company payroll, was engaged in activities protected by the WPA, specifically communication with the Michigan Department of Labor and Economic Growth (DLEG) and the United States Department of Labor (DOL) regarding defendant company's alleged unilateral refusal to pay overtime to its employees, alteration of time card records to disguise this denial of overtime pay, and other suspect payroll activities.

Plaintiff was hired by defendant insurance agency in February 2005 as an accountant. Plaintiff originally handled accounts receivable and banking for defendant. However, shortly after plaintiff was hired, she was assigned to handle human resources duties and became responsible for administering defendant's payroll. Plaintiff's supervisor was Ed Tobin, a CPA who served as the company's comptroller. The co-owner of the company is John Foster.

According to plaintiff's deposition testimony, shortly after she took over the payroll job, she began to notice "red flags all over the place" concerning a failure by the company to pay overtime. Plaintiff testified that she was not certain that the company was acting unlawfully and that "I just wanted to find out whether we were or not." For this reason, and because she had received no answers from her superiors when she asked them about the issue, she sent an e-mail on August 22, 2005, to the DLEG setting forth the company's overtime practices and asking if they were lawful. The practices she described in her email were that the employer refused to calculate overtime based on weekly hours and did so only based on bi-weekly hours, that she was directed not to pay for certain hours properly worked by employees, that overtime that had been approved by a supervisor was retroactively extinguished, and that the employer had made an unauthorized deduction from an employee's paycheck. She received an email back from a DLEG staffer advising her that these appeared to be improper activities on the part of the employer. Although plaintiff did not initially identify her company in the email there was a follow-up telephone conversation with a DOL investigator in which plaintiff identified the defendant company.

These protected activities occurred in late August 2005. Plaintiff was fired by defendant approximately three weeks later on September 15, 2005. As already noted, this temporal relationship is not enough in and of itself to create a question of fact on the causal relationship of the two events. Such a temporal relationship, without any other evidence of linkage, may be merely fortuitous. However, plaintiff has presented substantial evidence that links her protected activity to the discharge such that a reasonable fact-finder could conclude that "a causal connection existed between the plaintiff's protected activity and the discharge." *Heckman, supra*.

First, plaintiff testified that prior to making the contact with the DLEG and DOL she had on many occasions between February and August brought her concerns about unpaid overtime to the attention of her supervisor, Ed Tobin, the company's comptroller. According to her testimony, Tobin repeatedly assured her the matter would be addressed, but that, in fact, nothing changed and "I would never hear back from him." Plaintiff's testimony in this regard provided evidence from which it could be inferred that the company wanted to continue its questionable overtime practices regardless of their legality. Plaintiff also testified that she suggested to Tobin that they contact the DOL to determine what the law was so that the company could assure it was

acting lawfully. She testified that after bringing the matter up on several occasions, Tobin and another payroll employee “started getting very, for lack of a better description, hostile with me” and that she told them “we can’t continue violating the law, if we are.” She stated that in response to her questions, she received an “indignant attitude” and that “no one would answer my questions.” Thus, plaintiff’s testimony provides an inference that the company was unhappy with her investigation into the overtime question and that the company ignored her suggestions that the DLEG and DOL be contacted to obtain clarification about the company’s payroll responsibilities under the law. This is an inference of causation that goes beyond a mere temporal relationship.

Second, on September 14, 2005, three weeks after her contacts with DLEG and DOL, plaintiff received an email from the company’s co-owner relieving her of all payroll responsibilities and telling her, “do not become involved in any human resource issues.” The email did not explain the reason for the removal of these responsibilities from plaintiff. An employer has the right to alter an employee’s job responsibilities and is not required by law to explain or justify such changes. Plaintiff concedes that in her case, the removal of these responsibilities did not alter the “compensation, terms, conditions, location, or privileges of [her] employment” and so is not actionable. However, the fact that the defendant had the right to take a certain action does not make that action, or its context, irrelevant to the question of whether her subsequent termination was due to the company being displeased about her protected investigation.² Thus, the company’s action in taking away plaintiff’s payroll responsibilities leads to an inference of causation that goes beyond a mere temporal relationship.

Third, plaintiff testified that after getting an email response from the DLEG representative and speaking with the DOL investigator, she promptly made copies of her email and the response and gave them to Tobin and the other payroll worker and also told them of the information she had obtained by phone. She gave Tobin the name and phone number of the DOL investigator she spoke with so that he could follow up if he wished to do so. She testified, “I was really taken aback by their reaction. They were angry with me.” She was then told by Tobin to do no additional work on the issue of legal compliance. She stated that she “was rebuffed and basically admonished for even contacting [DLEG and DOL].” According to plaintiff’s testimony, after these events, she regularly asked Tobin what was being done and had “conversations regarding these issues every day, if not numerous times every day,” but that the company’s payroll practices did not change. This leads to an inference of causation that goes beyond a mere temporal relationship.

Fourth, plaintiff testified that her supervisor, Tobin, “told me that he took my questions and my [DLEG] e-mail to John Foster [the company’s owner]. . . . [Tobin] took my questions that I had written to the DOL up to John and talked to John about those.”³ In addition, plaintiff

² Defendant has proffered an affidavit from its owner that his removal of payroll responsibilities was not related to her protected activity. However, a jury is not obligated to accept the truth of this affidavit particularly where the affidavit does not set forth any alternative explanation for the action.

³ These statements are not hearsay. MRE 801(d)(2).

testified that she had had at least one direct conversation with Foster expressing her concerns about the legality of the company's payroll practices. Further, when asked in deposition whether Foster believed that his company's payroll practices were lawful, plaintiff testified that "John Foster's reply to me was that he doesn't care what a government agency tells him to do, nobody is going to tell him how to run a company that belongs to him." This leads to an inference of causation that goes beyond a mere temporal relationship.

Thus, plaintiff has proffered some evidence that can lead to an inference "that [her] superior expressed clear displeasure with the protected activity engaged in by the plaintiff." *Id.* at 186-187. Given the evidence proffered by plaintiff, we conclude on de novo review, that plaintiff has presented sufficient circumstantial and direct evidence of a causal connection – beyond a mere temporal relationship - between the protected activity and the firing to at least create a question of fact as to the causal connection.

II. Legitimate Business Reason

Having concluded that plaintiff's proofs create a question of fact as to the causal connection of the protected activity with her termination, we must next consider whether defendant has proffered evidence that there was a "legitimate business reason" for firing plaintiff.

Defendant's brief asserts that plaintiff was fired because she "reacted negatively to John Foster's September 14 email" removing her payroll duties. This refers to a conversation between plaintiff and comptroller Tobin shortly after plaintiff received the email. Plaintiff and Tobin report that conversation differently and only a finder of fact can determine which version is accurate.

The parties agree that after plaintiff received the email from Foster, she spoke with Tobin. Tobin testified that during that conversation plaintiff "was quite upset and indicated to me during that time that she could not work with John [Foster]" and that "based on what she said and how she felt about John Foster I didn't think she would be an effective employee."

When plaintiff got up to prepare for work the next morning, September 15, 2005, she found a voice mail from Tobin on her phone saying, "We discussed it and there is no need for you to come in. Based on what's transpired, we feel you can no longer be an effective employee." When Tobin was asked in deposition with what people he believed plaintiff could not work effectively, he stated that he was referring to Foster, the president of the company.

Tobin testified that he made the decision to fire plaintiff and that he obtained approval from Foster for the termination.

Based on Tobin's testimony, we conclude that defendant has provided some evidence of a legitimate business reason for plaintiff's discharge, namely plaintiff's alleged statement during that meeting that she could not work with the company's owner.

III. Pretext

Having found that defendant has offered evidence of a legitimate business reason for terminating plaintiff, we must now determine whether plaintiff has proffered evidence that creates a question of fact whether this reason was merely a pretext. We conclude that she has, both directly, i.e. by demonstrating that a retaliatory reason was the more likely motivation, as well as indirectly, i.e., by showing that the legitimate business reason proffered by the defendant might be unworthy of credence. *Taylor, supra.*

First, the sole reason given by Tobin for the firing was that he concluded that plaintiff could no longer work effectively for the company's owner. However, given the facts of this case, a jury, even with no direct rebuttal evidence, could reasonably conclude that this explanation was pretextual. In other words, a juror could reasonably conclude that the assertion that plaintiff could not "work effectively" with the company's owner was nothing more than a veiled statement that the company wanted to get rid of plaintiff for having contacted the DLEG or DOL against the company's wishes. The claim that plaintiff could not "work effectively" can also be reasonably viewed as a concern that plaintiff would attempt to contact these agencies again, particularly while she still had access to the company's payroll records. Given the evidence of defendant's displeasure with plaintiff's contacts with the labor agencies, the jury is not required to accept defendant's explanation, particularly where even if literally true, it can be connected to the protected activity. This conclusion is buttressed by plaintiff's testimony that during the time she handled terminations for defendant, "when they start talking about getting ready to terminate somebody . . . [Tobin] would start getting his ducks in a row." She further testified that based on this experience, once she received the email, she "asked [Tobin], am I about to lose my job, because when John Foster starts taking things away from you, you are on your way out the door. I had fired enough people there with him to know exactly what was happening."

Second, there is a question of fact as to what occurred during the final conversation between plaintiff and Tobin. Tobin testified that plaintiff became emotional and said that she could not work with Foster. Plaintiff denies that she said she "could not work with" Foster, but instead that she "would not violate the law" for Foster. She also testified that she requested and was granted permission to take the afternoon off so as to avoid saying something she would regret later. Not only does her testimony contradict Tobin's, it also squarely focuses the conversation on the company's alleged violation of labor law. Indeed, according to plaintiff when during this final meeting, she asked "why are we just not complying with the law?", Tobin's "answer, as it always was, was that we have to do what John says. John is the one that owns the company and he is the one that is going to determine what we do or don't do." Plaintiff further testified that in her final conversation with Tobin he told her, "I spoke to John [Foster], we have done things this way, we are not going to change our ways. This is how we have always done it and this is how we are going to do it." This creates at least an inference that plaintiff's alleged unwillingness to work with Foster was nothing more than an unwillingness to participate in the unlawful activity.

Third, plaintiff testified that her statements during the Tobin conversation went the issue of the protected activity and not to any general unwillingness to work with her superiors. She testified that the conversation concerned her fears that her change in duties was a result of her protected activity and that the company would continue to violate the law. Where, as here, the

alleged emotional statements that justified her discharge are statements concerning the removal of the work duties out of which her protected activity arose, a reasonable juror might conclude that the removal of her payroll responsibilities was intended to create a reaction on her part that could be used to justify her discharge. If the removal of her payroll responsibilities was a pretext to create a confrontation, then the discharge that resulted from that pretext can be seen as pretextual.

Fourth, according to plaintiff, Tobin himself expressed fears of retaliation by Foster if he made any attempt to change the company's questionable payroll practices, "[H]e said to me . . . 'Jeri, where am I going to go? If I lost this job, where am I going to go [at my age]?'". Her supervisor's alleged statement that he feared being fired if he took any action to change the company's unlawful practices may support the claim that plaintiff was fired for that very same action.

Finally, plaintiff testified that when she said to Tobin, "I will not violate the law for anybody, I am not going to do it." he responded, "You won't have to." This statement leads to at least an inference that it was her refusal to violate the law, rather than a generalized inability to work with her boss, that led to his decision to fire her.

The differing versions of what was said in the final conversation between plaintiff and Tobin should be resolved by a determination of witness credibility. For that reason, summary disposition was improper. *White v Taylor Distributing Co*, 275 Mich App 615, 626; 739 NW2d 132 (2007), *aff'd* 482 Mich 136 (2008) ("[T]he granting of a motion for summary disposition is suspect and improper where the credibility of a witness or deponent is crucial."). However, as noted, even accepting Tobin's version of the conversation, the fact-finder would have to determine whether or not the company's reliance on what plaintiff allegedly said was the actual reason for her discharge or was simply a pretext.

The trial court found that there was no question of material fact, concluded that plaintiff "was [not] fired because of the protected activity [but instead] due to her unprofessional response from having one of her responsibilities or duties removed," and found that "[t]his court does not . . . see that this was retaliatory or that the Whistle blower violation occurred." We disagree. Given the evidence in this case, whether or not plaintiff was fired as a result of her protected activity under the WPA is a question of fact and summary disposition was improper,

Reversed and remanded for trial.

/s/ William C. Whitbeck

/s/ Douglas B. Shapiro

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BANDSTRA, J. (*dissenting*).

I respectfully dissent from the majority’s conclusion that we should reverse the trial court’s determination that summary disposition was warranted against plaintiff in this case.

As the parties agree, there is no question here that plaintiff engaged in a protected activity as defined by the Whistle Blower Protection Act and that later she was discharged. The only factual question at issue is whether her protected activity was causally connected to the discharge. Plaintiff was not entitled to rely upon the mere temporal relationship between the two events but, instead, had to respond to defendant’s motion for summary disposition with facts to “show something more than merely a coincidence in time between protected activity and adverse employment action.” *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 286; 696 NW2d 646 (2005).

A close review of plaintiff’s response to the motion for summary disposition below, as well as her brief filed on appeal, shows that she came forward with no other facts. That is especially telling because defendant’s briefs and oral argument on the motion below clearly highlighted that the lack of this evidence was the reason that summary disposition was warranted. Similarly, the trial judge’s questions to plaintiff’s counsel reiterated that this was the issue upon which the decision would rest. Because plaintiff nonetheless failed to “set forth specific facts showing that there [was] a genuine issue for trial” on the causation element of her claim, summary disposition was properly granted. MCR 2.116(G)(4). Accordingly, we should affirm.

The majority opinion goes to great lengths in culling through the record to come up with facts by which it reasons that a genuine issue was created as to the causal connection. However, that approach is inappropriate on appellate review. *Derderian v Genesys Healthcare Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (This Court “will not search the record for

factual support for [a party's] claims.”) The trial court properly determined the matter below on the basis of the facts presented, and we should not retrospectively reverse that decision on the basis of an inappropriate review of a record that was not before the trial court.

/s/ Richard A. Bandstra