

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL DEBANO-GRIFFIN,

Plaintiff-Appellee,

v

LAKE COUNTY and LAKE COUNTY
BOARD OF COMMISSIONERS,

Defendants-Appellants.

UNPUBLISHED
December 16, 2010

No. 282921
Lake Circuit Court
LC No. 05-006469-CZ

ON REMAND

Before: ZAHRA, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

This case is before this Court on remand from the Michigan Supreme Court. Defendants Lake County and Lake County Board of Commissioners appeal from the trial court's denial of their motion for summary disposition in this action under the Whistleblowers' Protection Act (WPA).¹ In its previous opinion, this Court concluded that plaintiff Cheryl Debanogriffin failed to establish that she was engaged in protected activity.² Accordingly, this Court reversed and remanded the case to the trial court for entry of an order granting defendants' motion for summary disposition.³ On appeal, the Supreme Court reversed this Court's decision, holding that Debanogriffin's was engaged in protected activity when she reported a "suspected violation of a law."⁴ The Supreme Court also remanded the case for consideration of the issues not addressed by this Court during our initial review of the case.⁵ Pursuant to the Supreme Court's

¹ MCL 15.361 *et seq.*

² *Debanogriffin v Lake County*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2009 (Docket No. 282921), slip op pp 4.

³ *Id.*

⁴ *Debanogriffin v Lake County*, 486 Mich 938 (2010).

⁵ *Id.*

remand order, we now address whether Debano-Griffin established a causal connection between her complaints and the elimination of her position.⁶ We reverse and remand.

I. FACTS

Debano-Griffin brought this WPA action alleging that defendants eliminated her position as director of Lake County's 911 department because she reported an improper transfer of county funds.⁷ Defendants moved for summary disposition under MCR 2.116(C)(10), arguing, among other things, that Debano-Griffin could not establish a causal connection between her complaints about the handling of funds and her subsequent layoff. Defendants cited Debano-Griffin's deposition testimony, in which she asserted her belief that the two events were causally connected but offered no supporting evidence. In response, Debano-Griffin argued that the protected activity must be *one of* the reasons for the adverse employment action, but it does not have to be the *only* reason.⁸ Debano-Griffin argued that defendants' representatives' references to budget constraints were just a pretext, which shifted the burden to defendants to disprove the contention. The trial court denied defendants' motion for summary disposition. The case proceeded to trial, and the jury returned a verdict in favor of Debano-Griffin.

Defendants appealed, challenging the trial court's denial of their motion for summary disposition. In a 2-1 decision, this Court reversed and remanded for entry of judgment in favor of defendants. The majority concluded that Debano-Griffin failed to show a genuine issue of material fact on the question whether she was engaged in a protected activity under the WPA. Having decided the appeal on that basis, consideration of the causation issue was unnecessary. However, as the Supreme Court has instructed on remand, we now consider the causation issue.

II. CAUSAL CONNECTION

A. STANDARD OF REVIEW

Defendants argue that the trial court erred in denying their motion for summary disposition because Debano-Griffin offered no evidence of causation beyond a coincidence in the timing of events and her unsupported belief that defendants eliminated her position because of her reporting activities. Whether Debano-Griffin has established a prima facie case under the WPA is a question of law that this Court reviews de novo.⁹

⁶ See *Debano-Griffin*, unpub op at 4 (finding it unnecessary to address the causation issue at that time).

⁷ The background facts were detailed in this Court's previous opinion, *id.* at 1-2, and need not be reiterated here.

⁸ See M Civ JI 107.03.

⁹ *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

B. LEGAL STANDARDS

To establish a prima facie case under the WPA, Debanog-Griffin must show that (1) she was engaged in a protected activity as set forth in the act, (2) defendants discharged her, and (3) a causal connection existed between the protected activity and the discharge.¹⁰ As stated, because the Supreme Court has determined that Debanog-Griffin has shown that she was engaged in a protected activity, only the causation element is at issue on remand.

To establish that an adverse employment action was motivated by the employee's engagement in protected activity, the WPA requires more than showing a sequential link in the chain of events between the protected activity and the employment action. A plaintiff must "demonstrate that the adverse employment action was in some manner influenced by the protected activity."¹¹ A plaintiff must show more than merely a temporal connection between events: "[A] temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed."¹²

Although the WPA is a "remedial statute" that "must be liberally construed in favor of the persons it was intended to benefit[,]"¹³ liberal construction of the WPA "does not transform mere speculation into a genuine issue of material fact."¹⁴ A jury may not be permitted to guess.¹⁵

With respect to the causation element, this Court has held that summary disposition is appropriate where the causation element of a plaintiff's WPA claim is predicated solely on a coincidence in the timing of events.¹⁶ In *Taylor v Modern Engineering, Inc*, the defendant was an automotive engineering firm that had hired the plaintiff to make wooden models.¹⁷ Over the course of the ten years that the plaintiff worked for the defendant, he spent less of his time in that capacity because computer-aided design and manufacturing decreased the need for handmade models.¹⁸ The defendant terminated the plaintiff's employment in February 1999, stating as its

¹⁰ *Ernsting v Ave Maria College*, 274 Mich App 506, 510-511; 736 NW2d 574 (2007).

¹¹ *West v GMC*, 469 Mich 177, 185; 665 NW2d 468 (2003).

¹² *Id.* at 186.

¹³ *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999).

¹⁴ *West*, 469 Mich at 188 n 15.

¹⁵ *Skinner v Square D Co*, 445 Mich 153, 166; 516 NW2d 475 (1994).

¹⁶ *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 662; 653 NW2d 625 (2002).

¹⁷ *Id.* at 656.

¹⁸ *Id.*

reason that the plaintiff's skills were no longer needed.¹⁹ The plaintiff alleged that he was fired because he had reported safety concerns about conditions in the plant.²⁰ Specifically, in January 1999, he had told one of the defendant's representatives that he intended to report his concerns to a governmental agency.²¹ In mid-February 1999, the plaintiff told his supervisor that he had contacted the Department of Labor about filing a complaint.²²

This Court affirmed the trial court's grant of summary disposition in favor of the employer because "the short time between [the] plaintiff's participation in protected activity and the termination of [the] plaintiff's employment, without more, is insufficient to establish that the stated reason was a mere pretext."²³ The *Taylor* panel explained: "The lack of evidence other than the timing of [the] plaintiff's termination in relation to his participation in protected activity fails to create a genuine issue of material fact that the termination was retaliatory. Rather, [the] plaintiff's reliance solely on the timing of his termination merely serves to encourage speculation."²⁴

If the plaintiff successfully proves a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for its decision to discharge the plaintiff.²⁵ If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext.²⁶

C. APPLYING THE STANDARDS

We conclude that Debanog-Griffin offered no evidence to create a genuine issue of material fact on the causation element of her WPA claim. And even assuming that Debanog-Griffin established her prima facie case, defendants have offered a legitimate, budgetary reason for firing her. And she has failed to offer evidence that this business reason was merely a pretext.

The fact that Debanog-Griffin's position was eliminated from the 2005 budget after she reported the improper transfer of funds is evidence only of a temporal connection between

¹⁹ *Id.* at 656-657.

²⁰ *Id.* at 657.

²¹ *Id.*

²² *Id.* at 658.

²³ *Id.* at 662.

²⁴ *Id.*

²⁵ *Shaw v Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009); *Roulston v Tendercare, Inc.*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000).

²⁶ *Shaw*, 283 Mich App at 8, citing *Roulston*, 239 Mich App at 280-281.

events. This sequence of events, standing alone, “does not demonstrate a causal connection between the protected activity and any adverse employment action[.]”²⁷ DeBano-Griffin was required to offer some evidence from which a jury could infer that her reporting activities influenced defendants’ decision to eliminate her position.²⁸ Because she failed to offer any such evidence, defendants were entitled to summary disposition.

We reverse the trial court’s decision denying defendants’ motion for summary disposition and remand for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ William C. Whitbeck

²⁷ *West*, 469 Mich at 186. See also *Shively v Battle Creek Public Schools*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2005 (Docket No. 249716) (affirming summary disposition in favor of the defendant on the causation element because the plaintiff “failed to show evidence of such intent other than his own subjective belief and one teacher’s comment that [the defendant] was in ‘damage control’ after plaintiff’s report” of workplace safety violations); *Upton v Phoenix Composite Solutions, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2010 (Docket No. 292044) (affirming summary disposition because “there is no evidence other than timing that Upton’s protected activity triggered any unwarranted adverse employment action”). Compare with *Shaw*, 283 Mich App at 15-16 (concluding that question of fact existed where, “in addition to the temporal connection,” the plaintiff was told that he was “in trouble” and that the defendant would “go after [him]” because he testified in a discrimination suit against the defendant, and where the plaintiff was subjected to “unprecedented” disciplinary action); *Vandyke v Leelanau Co*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2010 (Docket No. 286775) (July 26, 2010, Docket No. 140882) (concluding that a question of fact existed where, in addition to temporal proximity, the plaintiff’s actions were discussed at the termination meeting and her superior expressed his displeasure at her reporting activities).

²⁸ *West*, 469 Mich at 185.

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M. J. KELLY, J. (*dissenting*).

Respectfully, and for the reasons I set forth in my previous dissent with regard to the issue of causation, I again must dissent.

Although we place into every opinion the standard of review under which we are bound to examine the various issues that are presented to us, it here bears repeating—hopefully in a non-rote manner—what that standard means. This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Nevertheless, we must do so by reference to the arguments and evidence actually proffered by the parties before the trial court. *Id.* at 380-381. Further, we must review the parties’ evidence in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Applying those standards to the evidence, in my view, demonstrates that Debanog-Griffin plainly established a question of fact on the issue of causation.

Lake County and the Board contended, and the majority has held, that the only evidence that Debanog-Griffin presented to support her theory that her position was eliminated in retaliation for her reporting a suspected violation of law was the fact that her position was eliminated after she raised the accounting irregularities. It is well-settled that a plaintiff may not establish the causation element of a Whistleblowers’ Protection Act (WPA) claim solely by showing that the adverse employment action occurred after the plaintiff engaged in protected activity under the WPA. *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (stating that “a temporal relationship, standing alone, does not demonstrate a causal

connection between the protected activity and any adverse employment action.”). If that had been all the evidence that Debano-Griffin had presented to the trial court in opposition to the motion, summary disposition would have been appropriate. But it was not. Debano-Griffin did not rely *solely* on the temporal relationship between her reports and the ultimate decision to eliminate her position. At the summary disposition phase, Debano-Griffin presented evidence that, if believed, established that the Board had already determined to retain her position for the next year shortly before she began to raise concerns about the ambulance service and the transfer of millage funds. There was also evidence that shortly after she raised her concerns and informed the Board that she had reported the accounting irregularity, the Board took two relevant actions: it eliminated her position and it returned the funds that Debano-Griffin had alleged were improperly transferred. From the evidence that Debano-Griffin’s position was funded, a reasonable jury could conclude that the Board had no intention of eliminating her position before she reported her concerns about the ambulances and transfer. Likewise, because the decision to eliminate Debano-Griffin’s position followed closely after her reports and was linked with the Board’s decision to reverse the transfer of funds, a reasonable jury could conclude (and apparently did) that the Board’s decisions to reverse the transfer and eliminate Debano-Griffin’s position were related and that the decision to eliminate her position was motivated by a desire to retaliate against her for publicly challenging the transfer. The majority, inexplicably, simply ignores this evidence.

Further, I would not consider any alternate bases for overturning the jury’s verdict in this case. Lake County and the Board did not properly raise the issue of notice before the trial court. Accordingly, I would not consider it. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (explaining that Michigan follows a raise or waive rule for appellate review). In addition, although Lake County and the Board arguably made a limited burden-shifting argument in their motion for summary disposition, on appeal to this Court, they did not present a proper argument that the trial court erred when it denied their motion because they presented evidence that there was a legitimate business reason for the decision and Debano-Griffin failed to rebut that evidence. Indeed, they did not even address the evidence of pretext actually presented by Debano-Griffin in opposition to their motion for summary disposition. Consequently, I conclude that they abandoned any claim of error as to the burden-shifting approach. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, having reviewed the evidence of pretext actually proffered in opposition to Lake County and the Board’s motion for summary disposition, I conclude that Debano-Griffin presented evidence sufficient to establish a question of fact on the issue of pretext.

Because I believe Debano-Griffin presented sufficient evidence to survive summary disposition, I conclude that the trial court did not err when it declined to grant Lake County and the Board’s motion. MCR 2.116(C)(10). I would affirm.

/s/ Michael J. Kelly