STATE OF MICHIGAN

COURT OF APPEALS

GINA STEFFANI,

Plaintiff-Appellant,

v

LENAWEE COUNTY SHERIFF and LENAWEE COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED
March 29, 2011

No. 295569
Lenawee Circuit Court
LC No. 08-003074-CZ

Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals the circuit court's order that granted summary disposition to defendants on plaintiff's claims asserted under the Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq.*, and the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq.* For the reasons set forth below, we affirm.

Plaintiff challenges the trial court's ruling that she failed to establish a genuine issue of material fact regarding whether defendants' proffered reason for refusing to employ her as a dispatcher was merely pretextual for unlawful retaliation or discrimination. We review de novo a trial court's ruling on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31.

MCL 15.362 of the WPA provides:

> 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.

"To establish a prima facie case under this statute, a plaintiff must show that (1) the plaintiff was engaged in a protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003) (internal footnote omitted). If the plaintiff establishes a prima facie case, the burden then shifts to the defendants to show a legitimate reason for the adverse employment action. *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). Once the defendants do so, the burden shifts back to the plaintiff to establish that the defendants' proffered reason is a mere pretext for unlawful retaliation. *Id.*

Trial courts also employ a burden-shifting approach when analyzing a PWDCRA claim pursuant to a motion for summary disposition. "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001). If the defendant does so, the burden shifts back to the plaintiff to demonstrate that the evidence is sufficient to permit a reasonable fact-finder to conclude that the defendant's proffered legitimate reason is merely pretextual for unlawful discrimination. *Id.* at 465-466.

Defendants' asserted legitimate reason for refusing to hire plaintiff was that she was unable to perform the job duties of a dispatcher based on Dr. Mark Rottenberg's independent medication examination ("IME"). Plaintiff contends that this reason is merely pretextual and that she was denied the dispatcher job, in part, because of her reports to the Michigan Department of Agriculture ("MDA"). Plaintiff argues that Dr. Rottenberg's examination could not have been the true reason for defendants' failure to hire her because it occurred after Undersheriff Gail Dotson had told several people that plaintiff was not returning to the Sheriff's Department following her medical leave. Plaintiff identifies Chris Van Dyke, Ralph Morgan, and Rick Arnold as the individuals to whom Dotson spoke regarding the matter. Plaintiff failed to present any evidence that Dotson made such statements to Van Dyke or Arnold. The excerpts of their deposition testimony included in the lower court record contain nothing regarding this issue. Moreover, Morgan testified that Dotson told him not to communicate with plaintiff because she was no longer working at the Lenawee County Sheriff's Department and would not be returning from medical leave. The record does not indicate when Dotson made this statement. Plaintiff claimed that she informed Sheriff Lawrence Richardson during the summer of 2007 that she could not return as an animal control officer. No evidence shows that Dotson made the statement to Morgan before it was known that plaintiff was unable to return to her animal control position. Further, no evidence shows that Dotson was referring to plaintiff's employment in any capacity other than as animal control officer.

Plaintiff also argues that Richardson's and Dotson's anger regarding her contacting the MDA demonstrates that the failure to hire her because of her alleged carpal tunnel syndrome was merely pretextual. Even assuming that Richardson and Dotson were angry because plaintiff contacted the MDA, this fact would not support plaintiff's argument. The evidence shows that

Dotson was not involved in hiring for the dispatch position and that Richardson did not discuss with her the prospect of plaintiff working as a dispatcher. Moreover, Richardson discussed with plaintiff an opportunity for her to work as an intake officer, but plaintiff was not receptive to the idea and never followed-up with Richardson about that job. She thereafter contacted Richardson regarding a dispatcher job. Richardson's willingness to consider plaintiff for the intake position tends to show that his refusal to hire her as a dispatcher was not retaliatory for her communications with the MDA. Further, Richardson and Dotson presented unrebutted testimony that they were concerned about plaintiff's contacts with the MDA only because she should have followed the chain of command and informed her supervisor at the Sheriff's Department before doing so.

Further, plaintiff contends that the IME was "a joke" and that the diagnosis of carpal tunnel syndrome was "cooked up" to justify Richardson's failure to hire her. Plaintiff suggests that Richardson and Dr. Rottenberg colluded to conjure up such an excuse. No evidence supports this theory. Rather, the evidence shows that Richardson and his labor attorney determined that an IME was prudent to ensure that plaintiff was able to perform the duties of a dispatcher. Richardson was not familiar with Dr. Rottenberg, had no previous dealings with him, and obtained Dr. Rottenberg's name from his attorney. While plaintiff maintains that she is capable of performing the job duties, the dispatch manager averred that the activity level of the position varies from day to day, but oftentimes requires constant typing, which Dr. Rottenberg opined plaintiff could not perform. Further, though plaintiff presented a letter from a doctor indicating that she was able to physically tolerate the dispatcher duties, she did not present such evidence until at least August 12, 2008, the date appearing on the letter. Richardson notified plaintiff of his decision not to hire her nearly three months earlier, on May 15, 2008. Accordingly, plaintiff failed to present evidence that established a genuine issue of material fact regarding whether defendants' reason for failing to hire her was merely pretextual. As such, the trial court properly granted summary disposition for defendants on plaintiff's WPA and PWDCRA claims.[1]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Pat M. Donofrio

[1] Our holding renders it unnecessary to address plaintiff's remaining issues on appeal, which relate to defendants' alternative bases for summary disposition that the trial court did not address.