STATE OF MICHIGAN

COURT OF APPEALS

TODD F. FUHR, Plaintiff-Appellant,	UNPUBLISHED April 16, 2013
v	No. 309877 Kent Circuit Court
TRINITY HEALTH CORP and TRINITY HEALTH-MICHIGAN, d/b/a SAINT MARY'S HEALTH CARE, Defendants-Appellees.	LC No. 10-011075-CD

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition to defendants in this action under the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*. We reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

Plaintiff was hired by St. Mary's Hospital (the hospital), a subsidiary of Trinity Health, in 2007. Plaintiff was promoted to the newly-created position of Surgical Services Informatics Manager. This job was created to address problems with inconsistent accounting of the hospital's inventory which had a negative impact on the institution's fiscal health. His job duties included responsibility for controlling the hospital's surgical inventory and for supervising a staff of subordinates.

On numerous occasions between the time he was hired and April, 2010, plaintiff's subordinates complained to plaintiff's supervisor, Vicki Garrett, that plaintiff acted unprofessionally and demonstrated favoritism. During the same time period, the hospital's inventory continued to fluctuate. Plaintiff testified at his deposition that the inventory numbers were periodically "bad," and that they fluctuated from month to month. However, plaintiff attributed the fluctuations to the hospital switching over to a new computer inventory system, and said that during that time he was not given "any extra help, any extra staffing, no opportunities to key and to transfer the data over" to the new system. Plaintiff's two annual performance reviews were positive, indicating that, on the whole, plaintiff either met or exceeded expectations and made no mention of the inventory issues.

Despite the positive performance reviews, the hospital hired a "coach" to work with plaintiff in December, 2009 on the interpersonal issues about which his subordinates had complained to Garrett. Three months later, at the beginning of April, 2010, Steve Pirog, the hospital's CFO, approached Amy Moored, an employee in the hospital's finance department, and asked if she would be interested in assuming plaintiff's job "if there was a change in staffing." Moored testified at her deposition that in the first week of April, 2010, Dan Green, the Hospital's Director of Finance and Budget, told her that a decision had been made to fire plaintiff. Specifically, Moored testified that Green told her "[i]t looks like he's going to be let go soon." On April 8, 2010, the Hospital's CEO, Phil McCorkle, sent an email to Tom Karel, the hospital's vice president. The email stated, in relevant part:

> Steve [Pirog] said that [plaintiff] . . . is on the way out and that Amy Moored from finance will be assigned to get the OR inventory corrected.

Karel similarly averred that the decision to terminate plaintiff was made in the first week of April, 2010. There was no testimony that plaintiff had been warned, threatened, or otherwise advised of an impending termination.

It was during this same time period that plaintiff testified that he became aware of potential significant wrongdoing by one of the hospital's vendors relative to the inventory and billing for restocking. Plaintiff testified at his deposition that two hospital employees had reported to him that one of the vendors had taken surgical inventory from the hospital. Although the inventory was owned by the vendor and not the hospital, the concern was that if the materials were restocked, the hospital would be billed multiple times for the same item. The suspected overbilling was reported to Garrett. On April 15, 2010, plaintiff called the U.S. Attorney's office, and spoke to Assistant U.S. Attorney Ray Beckering about the overbilling issue. On April 16, 2010, plaintiff also reported the overbilling issue to Mark Iverson, the hospital's Integrity Officer.

On May 10, 2010, plaintiff was terminated in a meeting with Garrett and Karel. According to Garrett and Karel, Garrett told plaintiff he was being terminated, and then left the room, while Karel continued the discussion with plaintiff. Karel testified that he never gave plaintiff a reason for his termination, but instead told plaintiff that:

> [T]he purpose of the meeting was to communicate a decision and not to debate those decisions, that concerns about your technical performance and the areas of your performance that related to your lack of effectiveness to create an effective team have all been shared with you, but that's not the purpose of our conversation today.

Following the meeting, plaintiff sent Iverson an email in which he stated that he was never given a reason for his termination. At his deposition, however, plaintiff testified that Garrett told him at the meeting at which he was terminated that he was being terminated for his call to the U.S. Attorney. Specifically, plaintiff testified:

> She said "Todd, we are going to have a conversation regarding your status or – regarding your employment status with St. Mary's." And I started laughing.

> And I go, "This is about the inventory issue that we've been talking about, the surgical implants over the last 30 days, isn't it?" And then, she went off on, yes, I told you, you know, because I had reported it to the U.S. Attorney, I told you not to go outside the department and talk about this and I said I didn't feel comfortable sitting on that information and being in a responsible position because I'm a manager. I go, "I had no alternative and I felt it was important that I report it to Mark Iverson. I did everything that's in the handbook that we're supposed to do." I said "Where did I go wrong?" "You went wrong by going to the U.S. Attorney, talking with Liz and Mark, and not being part of our team in the surgery department, and causing distrust with me."

On August 9, 2010, plaintiff filed a one-count complaint, alleging that his termination violated the WPA. The complaint alleged that plaintiff was terminated for reporting the overbilling issue to the U.S. Attorney's office. Defendants filed a motion for summary disposition under MCR 2.116(C)(10) on January 26, 2012. Defendants' summary disposition motion argued that substantial evidence existed that the decision to terminate plaintiff preceded his call to the U.S. Attorney, and therefore plaintiff could not establish that he was terminated because of his whistle blowing activities. Plaintiff filed his reply to defendants' motion on February 27, 2012, and argued that he had raised sufficient evidence to overcome a summary disposition motion and the case should proceed to trial.

On March 30, 2012, the trial court issued a written opinion granting summary disposition to defendants. The trial court held that plaintiff had not established a causal connection between his reporting and his termination because "the [d]efendants have set forth ample evidence to show that the plan to discharge [plaintiff] was well underway prior to [plaintiff] calling the U.S. Attorney." The trial court wrote:

> If it is true that Garrett did tell [plaintiff] that he was being terminated for calling the U.S. Attorney, why wouldn't he tell Iverson that in the email? Why would he say the exact opposite, that he wasn't given an explanation?
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> The only logical explanation is that Garrett did not make any such statements when she terminated [plaintiff]. Answering these questions does not invade the jury's duty to make findings of fact or weigh witnesses' credibility when [plaintiff's] testimony is "blatantly contradicted by the record, so that no reasonable jury could believe it."
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> Further supporting this conclusion . . . is the fact that [plaintiff's] Complaint lacks any mention of Garrett telling him that he was being terminated for calling the US Attorney. Unquestionably, this is [plaintiff's] most significant allegation regarding his claim. Yet, there is no mention of it in his Complaint. The Complaint's silence as to this allegation is deafening.
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> * * *

> [R]easonable minds could not differ regarding whether [plaintiff's] call to the US attorney was one of the reasons for his discharge. The evidence regarding his inevitable termination is overwhelming. But, more importantly, documentary evidence and his own Complaint blatantly contradict his testimony that his "protected activity" was the reason for his termination. [Citations omitted.]

Plaintiff appealed by right.

II. STANDARD OF REVIEW

An appellate court reviews "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 120.]

III. ANALYSIS

Under the WPA, an employer may not discharge or otherwise discriminate against an employee "because the employee . . . reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule . . . to a public body." MCL 15.362. The WPA is analogous to other civil rights statutes.[1] Indeed, the Supreme Court recently clarified that when a plaintiff has no direct evidence that he was terminated because of activity protected by the WPA, the *McDonnell Douglas* burden-shifting framework applies to WPA claims. *Debano-Griffin v Lake County*, ___ Mich ___; ___ NW2d ___ (Docket No. 143841, issued February 8, 2013) (slip op, p 6). Specifically, the Court explained:

> Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link

[1] *Anzaldua v Band*, 216 Mich App 561, 580; 550 NW2d 544 (1996) (citations omitted) ("The WPA bears substantial similarities to Michigan civil rights statutes under which the right to a jury trial is retained. Actions under the WPA are analyzed using the 'shifting burdens' framework utilized in retaliatory discharge actions under the CRA. We also note that the WPA is similar to Michigan's civil rights statutes in that all three acts may be broadly characterized as civil rights acts, all three appear directed at protecting employees from wrongful treatment by employers, and actions brought under each of the three acts involve similar factual questions of employer motivation.")

> exists between the whistleblowing act and the employer's adverse employment action. A plaintiff may "'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation].'" Once a plaintiff establishes a prima facie case, "a presumption of [retaliation] arises" because an employer's adverse action is "more likely than not based on the consideration of impermissible factors"—for example, here, plaintiff's protected activity under the WPA—if the employer cannot otherwise justify the adverse employment action.
>
> 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. "[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*. (slip op, pp 6-7) (citations omitted, emphasis in original).]

However, the "*McDonnell Douglas* approach is *not* applicable in cases involving *direct* evidence of discrimination." *Hazle v Ford Motor Co*, 464 Mich 456, 467; 628 NW2d 515 (2001) (emphasis in original). In such cases, "a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas* framework, and the case should proceed as an ordinary civil matter." *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539-40; 620 NW2d 836 (2001). See also *Debano-Griffin*, ___ Mich ___ (slip op, p 6).

When ruling on a motion for summary disposition, "[a] court may not weigh the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005) (emphasis in original, citations omitted). Nor may a trial court make a determination with regard to the parties' credibility in ruling on a motion for summary disposition. *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 625; 739 NW2d 132 (2007). Additionally, a trial court must construe all facts in favor of the nonmoving party, which in this case is plaintiff. *Maiden*, 461 Mich at 420.

At his deposition, plaintiff testified, under oath, that Garrett told him he was being terminated for his call to the U.S. Attorney. The trial court, when granting summary disposition to defendants, noted that this testimony conflicted with other evidence developed during discovery. The trial court noted that plaintiff's email to Iverson indicated that plaintiff was not given a reason for his termination, that plaintiff's complaint made no mention of Garrett's statement, and that both Garrett and Karel testified that plaintiff was not given a reason for his termination at the termination meeting. Subsequently the court declined to find that any direct testimony existed on causation and analyzed the case on the indirect evidence standard.

However, plaintiff's testimony regarding what Garrett said at the meeting is direct evidence of impermissible discrimination under the WPA because, were plaintiff's testimony believed by a jury, it would "require[] the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions" in firing plaintiff. *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009). Moreover, the statements ascribed to Garrett by plaintiff were

not hearsay, and would therefore be admissible at trial as admissions by a party-opponent. MRE 801(d)(2)(A) (party's statements admissible when offered "against a party and is. . . the party's own statement, in either an individual or a representative capacity . . ."). The fact that a party makes conflicting statements about alleged admissions even within the context of the same deposition does not render those statements inadmissible. Nor is there any requirement that an admission be corroborated by a writing or otherwise to be admissible. See MRE 801(d)(2)(A).

The analysis of this case should be same as in *Moon v Michigan Reproductive & IVF Center, P.C.*, 294 Mich App 582; 810 NW2d 919 (2011). In *Moon*, the plaintiff, a single woman, filed suit under the Michigan Civil Rights Act (CRA) alleging disparate treatment following an in vitro fertilization clinic's refusal to provide her services because she was single. *Id*. at 584. The trial court granted summary disposition to the clinic. *Id*. at 587. This court reversed, noting that the plaintiff "proffered direct evidence of discrimination, specifically, the email messages she received" from a clinic doctor, which explicitly said that he "would not be providing insemination services to single individuals." *Id*. at 594. This Court concluded:

> As [the plaintiff] presented *direct evidence* of discrimination, she was not required to "present a rebuttable prima facie case ... from which a factfinder could infer" discriminatory animus. Further, it was irrelevant at the summary disposition phase whether [the defendant] had rebutted Moon's discrimination claim by articulating "a legitimate, nondiscriminatory reason for its" actions. Rather, the credibility of [the defendant's] claimed motive for denying IVF treatment to Moon (fear of financial liability for the child conceived) is a question for the fact-finder. And, "'[n]either this Court nor the trial court can make factual findings or weigh credibility in deciding a motion for summary disposition.'" [*Id*. at 595 (citations omitted, emphasis in original).]

The same result is warranted in the instant case. Plaintiff produced direct evidence of discrimination based on his whistleblowing activities; accordingly, he is not required to make a prima facie case, "and the case should proceed as an ordinary civil matter." *DeBrow*, 463 Mich at 539-40.

We are not unsympathetic to the dissent's concerns about plaintiff's credibility. Indeed, it is possible, perhaps even probable, that a jury would not find plaintiff's testimony credible in light of the conflicting evidence that he was given no reason for his termination. Nonetheless, we disagree with the dissent that the trial court should be affirmed. It is the jury's role to determine issues of credibility, *Taylor v Mobley*, 279 Mich App 309, 314; 750 NW2d 234 (2008), not the trial court on a motion for summary disposition. *Hines*, 265 Mich App at 437; *White*, 275 Mich App at 625, nor this Court on appeal. By raising inconsistent versions of what occurred in the termination meeting, plaintiff has elevated his credibility to a significant issue in the case. This is all the more reason why summary disposition was improperly granted: credibility issues are for the jury. Further, summary disposition is not appropriate simply because some evidence conflicts, *Hines*, 265 Mich App at 437, even if the conflict arises solely out of plaintiff's own testimony. Accordingly, for the foregoing reasons, we disagree with the dissent the trial court erred when it granted defendants' summary disposition motion and must be reversed.

Defendants also argue that Trinity Health is not a proper party and should be dismissed from the action because "[p]laintiff does not allege and cannot show that it was his employer." Defendants also made this argument in the lower court, but the lower court declined to address it. "This Court will not address an issue that was not decided below unless it is one of law for which all the necessary facts were presented." *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997). Here, not only was this issue not decided by the lower court, but the record is inadequate for a meaningful review. Indeed, aside from a passing reference to Karel's affidavit, in which Karel averred that "[a]t all times, St. Mary's was [plaintiff's] employer" and that "[plaintiff] was never employed by Trinity Health Corporation," neither party produced evidence that would show the level of control Trinity Health had over Saint Mary's. See *Maki v Copper Range Co*, 121 Mich App, 518, 525; 328 NW2d 430 (1985). Accordingly, we need not address this issue.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause

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HOEKSTRA, J. (*dissenting*).

Because I conclude that plaintiff's self-serving deposition testimony is blatantly contradicted by the record so that no reasonable jury could believe it, I would affirm the trial court's grant of summary disposition in favor of defendants. Accordingly, I respectfully dissent from the portion of the majority's opinion reversing the trial court's grant of summary disposition.

In *Scott v Harris*, 550 US 372, 380; 127 S Ct 1769; 167 L Ed 2d 686 (2007), the United States Supreme Court, considering summary disposition under FR Civ P 56(c), which is parallel to MCR 2.116(C)(10), held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary disposition." Under those circumstances, a "genuine" issue of material fact does not exist. *Id.*

I would find that in this case plaintiff failed to demonstrate a genuine issue of material fact because the only direct evidence of discrimination was plaintiff's self-serving deposition testimony that Garrett told him he was being terminated because of his call to the U.S. Attorney. This evidence does not create a genuine issue of material fact because it is blatantly contradicted by the record so that no reasonable jury could believe it. The record demonstrates that Amy Moored was approached about her interest in plaintiff's position and informed that plaintiff would be "let go soon" during the first week of April 2010. Moreover, an email dated April 8, 2010 from the hospital's CEO to the hospital's vice president stated that plaintiff "is on the way out," and that Moored would take over plaintiff's job, and the hospital's vice president submitted an affidavit stating that the decision to terminate plaintiff was made during the first week of

April 2010. Plaintiff did not contact the U.S. Attorney until April 15, 2010. Plaintiff was terminated on May 10, 2010, and following the termination meeting, plaintiff sent an email stating that he was not given a reason for his termination. Plaintiff did not claim he was fired for contacting the U.S. Attorney until he was deposed.

Under these circumstances, I would conclude that no reasonable jury could believe plaintiff's testimony, and I would affirm the trial court's grant of summary disposition in favor of defendants.

/s/ Joel P. Hoekstra