

STATE OF MICHIGAN
COURT OF APPEALS

J. SILVA GONCALVES,

Plaintiff-Appellant,

v

COMMUNITY SUPPORT AND TREATMENT
SERVICES, WASHTENAW COUNTY HEALTH
ORGANIZATION and WASHTENAW
COUNTY,

Defendants-Appellees.

UNPUBLISHED
February 28, 2006

No. 264450
Washtenaw Circuit Court
LC No. 03-001166-CZ

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I do not agree that plaintiff's retaliation claim was properly dismissed.

Preliminarily, I disagree with the assertion that only the CSTS director, Sabourin, was involved in the decision to end plaintiff's employment. The record supports that both plaintiff's immediate supervisor, Koster, and Sabourin (both females), were involved in terminating plaintiff's employment. Although Koster herself testified that she did not make the ultimate decision to discharge plaintiff, Sabourin's testimony is clear that Koster recommended to Sabourin that Sabourin discharge him, and that Koster's recommendation was a significant factor in Sabourin's determination to discharge plaintiff:

Q. At some point after that [the August 5, 2003 meeting between plaintiff, Koster and Sabourin], Miss Koster gives you her second recommendation, this time supporting termination, correct?

A. Yes.

* * *

Q. Miss Koster's input regarding Silva was a significant determining factor concerning his discharge, correct?

A. Yes.

Under the CRA, the proper analysis is whether the allegedly discriminatory comment or conduct “was made by an agent of the employer **involved in the decision to terminate plaintiff’s employment.**” *Krohn v Sedgwick James, Inc*, 244 Mich App 289, 300; 624 NW2d 212 (2001). I conclude that there was evidence to support that Koster was involved in the decision to terminate plaintiff.

The record establishes that Koster began employment with CSTS several weeks after plaintiff did, in late March 2003. Plaintiff testified that between that time and mid-August 2003, when he was discharged, Koster asked him or remarked to him two or three times that men of plaintiff’s culture (plaintiff is Brazilian) have trouble taking orders from women. Plaintiff also testified that Koster would leave newspaper articles about Brazil on plaintiff’s desk, and that one such article had a note on it from Koster stating “wouldn’t you like to be here?” Plaintiff testified that Koster also remarked to him “we don’t do things like that here.”

In regard to plaintiff’s retaliation claim, defendants only challenge plaintiff’s ability to establish one of the four elements required to establish a prima facie case—a causal connection between his protected activity (reporting Koster’s remarks and conduct) and the adverse employment action. The record is clear that Koster learned of plaintiff’s reporting her allegedly discriminatory remarks regarding his nationality and gender only days before her recommending to Sabourin to discharge plaintiff; thus plaintiff showed a close temporal proximity. Unlike the majority, I do not believe this case is similar to *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997), in which the plaintiff knew her discharge was imminent before she engaged in the protected activity. *Id.* at 622. In *Shallal*, a case brought under the Whistleblowers Act, there was evidence that the decision to terminate the plaintiff’s employment was made before she threatened to report Quinn, the CSS president, for violations of agency policy. There is no such evidence here.

In this case, Koster’s testimony supports that before August 2003 her intent was to extend or continue plaintiff’s probationary period, not to recommend his discharge, and that she recommended plaintiff be discharged within days of learning that he had reported her remarks to superiors. A reasonable jury could conclude that it was the fact of plaintiff’s reporting Koster’s remarks that caused Koster to decide to recommend to Sabourin that plaintiff’s employment end.¹

I would reverse the dismissal of plaintiff’s retaliation claim. In other respects, I concur.

/s/ Helene N. White

¹ The record contains other evidence supporting plaintiff’s retaliation claim. After a union representative reported Koster’s remarks to Sabourin, Sabourin did not investigate plaintiff’s claims or request an independent investigation, but rather referred him to the Human Resources Department. However, within one week of referring him there, Sabourin decided to discharge plaintiff, and her decision was significantly based on Koster’s recommendation that he be discharged.