

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT HARTMAN,

Plaintiff-Appellant,

v

LAUTREC, LTD.,

Defendant-Appellee.

UNPUBLISHED

October 19, 2006

Nos. 270110; 270426

Oakland Circuit Court

LC No. 05-067275-CD

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition in plaintiff's worker's compensation retaliation action brought under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, and from the court's judgment in favor of defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was employed by defendant as one of two full-time maintenance workers at a manufactured home community. Plaintiff injured his back on the job on August 21, 2002. He was restricted from working and he received worker's compensation payments from October 24, 2002, through February 25, 2003. Plaintiff's physician, Dr. Richter, released plaintiff to return to work on February 25, 2003, with restrictions including maximum lifting of 12 pounds and no repeat bending, lifting, twisting, climbing, or crawling. In March 2003, Richter increased the lifting restriction to 18 pounds. Plaintiff testified that defendant accommodated his restrictions in that if there was any heavy lifting that was needed, two coworkers would help him; for instance, they would help him pick up dryers or refrigerators or move drywall.

On May 3, 2003, following an independent medical evaluation (IME) obtained by AIG, defendant's third-party workers' compensation insurer, the IME physician reported that plaintiff had "reached maximum medical improvement" and was "able to return to his normal occupational duties without restrictions." Accordingly, on the same day, AIG filed a Notice of Dispute with the Bureau of Workers' Disability Compensation. On May 5, 2003, plaintiff obtained a note from Dr. Richter indicating that plaintiff was still to work under restrictions including no lifting more than 30 pounds and no lifting below the knee until plaintiff's next office visit on July 7, 2003.

On May 12, 2003, plaintiff's employment was terminated. Plaintiff's immediate supervisor, Gordon Gross, testified that his regional manager, Curt Schewe, instructed him to immediately terminate plaintiff's employment on the ground of his lifting restriction. Plaintiff testified that Gross told him "that [Gross] was told that they did not want to pay for my medical bills anymore so that they were going to have to let me go." When asked what exactly it was that Gross said, plaintiff testified that he did not remember exactly, but that "he said they did not want to pay for me anymore" and that Schewe thought plaintiff was faking his injury. Plaintiff further testified that there was nothing that he would change about his answers to interrogatories, in which he had previously stated that "Gordon Gross told me when he talked to Kurt [sic] he said that I was costing them too much money and that I was faking my injury, and to let me go."

Schewe testified that the decision to terminate plaintiff was made solely on the basis that, in light of the continuing restrictions imposed by his personal physician, plaintiff could simply not perform the work that he was hired to do, and that defendant could not afford to hire a third maintenance employee. Although defendant was able to accommodate plaintiff during the winter months with tasks such as snowplowing, much more strenuous physical labor was required during the spring and summer seasons. Although Richter's evaluation conflicted with that of the IME physician, defendant could not disregard the restrictions imposed by Richter.

On appeal from the trial court's grant of summary disposition in favor of defendant, plaintiff contends that his testimony that Gross said that "they did not want to pay for my medical bills anymore" constitutes "direct evidence" of retaliatory discrimination under § 301(11) such that summary disposition was inappropriate.

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). In evaluating a motion for summary disposition brought under this subsection, a trial court considers the 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. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The nonmoving party "may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Shepherd Montessori Center Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind, supra* at 238; *Maiden, supra* at 119-121; see also MCR 2.116(G)(6).

The WDCA prevents retaliation against workers who file claims for workers' compensation benefits. MCL 418.301(11) provides:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

To establish retaliation under this subsection, a plaintiff must show that: “(1) he asserted his right for worker’s compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant’s stated reason for its actions was a pretext, and (4) defendant’s true reasons for its actions were in retaliation for plaintiff’s having filed a worker’s compensation claim.” *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999). The plaintiff bears the burden of showing that a causal connection existed between the filing of a worker's compensation claim and the adverse employment action. *Id.*

Although there is no binding precedent on point, plaintiff argues that where there is direct evidence of discrimination within the meaning of § 301(11), the *Chiles, supra*, test is inapplicable, and the case must proceed to trial. As plaintiff correctly notes, the *Chiles, supra*, test is based on the *McDonnell Douglas*¹ “burden-shifting” approach that applies to discrimination cases brought under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, when there is no direct evidence of discrimination. However, a CRA plaintiff may be able to establish discrimination directly rather than indirectly. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). In such a case, “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 (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001) (citations omitted); see also *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Once a plaintiff submits direct evidence that, if believed, would require the conclusion that unlawful discrimination was a motivating factor, the defendant cannot avoid trial by merely articulating a nondiscriminatory reason for the employment decision. *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997). However, when a motion for summary disposition in a direct-evidence discrimination case is properly supported, the motion may be granted. *Harrison, supra* at 606 n 5.

We conclude that summary disposition was appropriately granted under either the *Chiles, supra*, burden-shifting test or the “direct evidence” approach that is applicable to CRA cases, because plaintiff failed to come forward with evidence sufficient to establish a genuine issue of material fact with respect to the animus for his termination.

Although plaintiff initially testified that Gross referred to payment of his “medical bills” as a basis for his termination, plaintiff subsequently clarified that he did not remember what Gross said, other than that “they did not want to pay for me anymore” and that he was faking his injury. Moreover, the reference to payment of “medical bills” conflicts with all of plaintiff’s other testimony and answers to interrogatories with respect to what it was that Gross told him about his termination. Indeed, plaintiff’s testimony that his superiors “did not want to pay for me anymore” is entirely consistent with both his interrogatory answer and with the testimony of Gross and Schewe that plaintiff was terminated because of his restrictions.

Furthermore, plaintiff has failed to present evidence that his claim for workers’ compensation benefits was causally related to his termination. Plaintiff readily admits that

¹ *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817, 36 LEd2d 668 (1973).

defendant accommodated him after his return to work following his injury. The termination did not occur until nearly nine months after the injury occurred and more than two months after plaintiff's final workers' compensation payment was received. Indeed, it was only *after* the IME released plaintiff to return to his normal occupational duties without restrictions, ostensibly *ending* any entitlement to compensation benefits, that plaintiff was terminated.

Moreover, there is simply no basis in fact for plaintiff's assertion that his termination was related to the payment of his medical bills. The uncontroverted affidavit of defendant's Director of Finance indicates that defendant in fact never "paid" any part of plaintiff's worker's compensation claim, including deductibles, contributions, and benefits, and that whether plaintiff received worker's compensation benefits had no pecuniary effect on defendant. Thus, there is no genuine issue of material fact regarding Gross's alleged assertion that "they did not want to pay for my medical bills anymore."

Accordingly, applying either an "indirect evidence" or a "direct evidence" analysis, plaintiff has failed to set forth a triable issue of fact. Under the *Chiles, supra*, burden-shifting test, plaintiff failed to satisfy his burden of demonstrating that the evidence, even when construed in his favor, was sufficient to permit a reasonable factfinder to conclude that defendant's proffered reason for his termination was pretextual. See *Hazle, supra* at 465-466. On the other hand, if the "direct evidence" approach applies, plaintiff has failed to set forth a genuine issue of material fact regarding whether any discriminatory animus arising from his filing of a worker's compensation claim was more likely than not a "substantial" or "motivating" factor in the decision to terminate him, or whether defendant would have made the same decision even if the alleged impermissible consideration had not played a role in the decision. See *Sniecinski, supra* at 133.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens