

STATE OF MICHIGAN
COURT OF APPEALS

STEVE THOMAS,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

January 16, 2007

No. 264585

Jackson Circuit Court

LC No. 01-003768-NZ

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

In this sexual harassment and retaliation claim, plaintiff Steve Thomas appeals as of right the trial court's judgment of no cause of action entered after a bench trial. We affirm.

I. Facts

In July 1997, defendant Department of Corrections hired plaintiff as the hospital administrator at Duane Water's Hospital. In December 1997, Gerald DeVoss, the regional hospital administrator, met with plaintiff to discuss concerns about plaintiff's performance. After other performance issues arose, DeVoss again discussed with plaintiff his performance deficiencies. In early 1998, one of plaintiff's subordinates filed a gender and race discrimination claim against him. An investigation resulted in a report that plaintiff had difficulty communicating, but DeVoss was appropriately dealing with plaintiff's deficiencies.

In May 1998, Mark Fleming, a physical therapy aide and subordinate of plaintiff, answered a prisoner medical complaint ("kite") using profane language. DeVoss questioned plaintiff about whether he had verbally counseled Fleming. Plaintiff answered that he had not. In July 1998, DeVoss initiated a disciplinary investigation against Fleming for inhumane treatment relating to this incident.

In August 1998, plaintiff sent a memorandum to defendant's Equal Opportunity Officer, in which plaintiff complained about DeVoss as a supervisor. Although plaintiff used the terms "victim," "abuse," "harassment," and "hostile work environment," plaintiff did not assert that DeVoss sexually harassed him. Later that month, Fleming filed a sexual harassment complaint against DeVoss. In September 1998, plaintiff met with the investigator of plaintiff's complaint against DeVoss. During this meeting, plaintiff never mentioned that DeVoss sexually harassed him.

In September 1998, in conjunction with the Fleming kite investigation, the union steward asked plaintiff whether he had verbally counseled Fleming about the kite incident. Believing that plaintiff responded contrary to the way he had previously responded to him, DeVoss requested an investigation into whether plaintiff had violated a work rule that required him to give truthful and accurate reports. In November 1998, plaintiff completed a questionnaire relating to this investigation. In response to the question, “What knowledge do you have of an investigation initiated by Mr. DeVoss into inappropriate responses to kites from prisoners?”, plaintiff wrote a lengthy response in which he emphasized his opinion that DeVoss was “obsessed” with Fleming’s behavior and work performance. Plaintiff further asserted his belief that DeVoss’s investigation into Fleming’s answer to the prisoner kite was “a huge overreaction.” Plaintiff suggested what he thought would have been an appropriate response and asserted that his approach would have been better for improving hospital morale.

Plaintiff forwarded this questionnaire to the investigator of Fleming’s sexual harassment claim. In a memorandum accompanying the questionnaire, plaintiff asserted that DeVoss was upset because plaintiff’s actions made it more difficult for DeVoss to more severely punish Fleming. He stated that DeVoss had “retaliatory tendencies.” He further stated that Fleming did not deserve “the severity of punishment Mr. DeVoss was intending for him and I do not deserve an investigation such as this.”

In December 1998, plaintiff requested a meeting with Deputy Director William Overton. In a memorandum to Overton, plaintiff stated that DeVoss’s “micromanaging, condescending management style and continued regional presence in the hospital” was a problem. In January 1999, plaintiff met with Overton. At no point did plaintiff ever tell Overton that DeVoss sexually harassed him or Fleming.

After the investigation into plaintiff’s work violation was complete, it was determined that he had violated the work rule, and a 5-day suspension was recommended. In February 1999, plaintiff filed for a medical leave of absence related to stress. In a letter to defendant’s director, plaintiff asserted that DeVoss caused him and other employees to suffer stress. He stated that DeVoss retaliated against him since he “filed harassment charges against him.” Eventually plaintiff exhausted his medical leave rights, never returned to work, and his employment was terminated.

Subsequently, plaintiff filed a sexual harassment and retaliation lawsuit against defendant pursuant to the Elliot-Larson Civil Rights Act, MCL 37.2102 *et seq.* He claimed that DeVoss sexually harassed him and created a hostile work environment. He also claimed that DeVoss retaliated against him for engaging in the protected activity of (1) informing defendant that DeVoss sexually harassed him and (2) participating in the investigation of Fleming’s sexual harassment claim against DeVoss.

The case proceeded to a 3-week bench trial. The trial court rendered its findings and conclusions in a 64-page opinion. The trial court found that the conduct plaintiff complained of was not sexual in nature and did not create a sexually hostile work environment. In regard to his retaliation claim, the trial court found that plaintiff did not adequately inform defendant that DeVoss sexually harassed him. The trial court also found that there was no causal relationship between the protected activity and the adverse employment action. Accordingly the trial court

concluded that plaintiff failed to establish the elements of retaliation by a preponderance of the evidence. The trial court entered a judgment of no cause of action.

After the judgment was entered, plaintiff filed a motion to augment the record contending that the trial court had not reviewed all the exhibits plaintiff had submitted. At the hearing, plaintiff's counsel asserted her belief that the exhibits were filed with the court, but not received by the judge. The trial court stated that it had received all the exhibits, and remembered seeing the exhibits at issue.

Plaintiff appeals as of right contending that (1) the trial court failed to make adequate findings and conclusions on his retaliation claim, (2) erred in denying his motion to augment the record, and (3) erred in finding no cause of action in his retaliation claim.

II. Analysis

Plaintiff first contends that the trial court failed to make adequate findings of fact and conclusions of law on his retaliation claim. We disagree. MCR 2.517(A)(2) provides, "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." Findings are sufficient if it appears that the trial court was aware of the issues in the case, the court correctly applied the law, and where appellate review would not be facilitated by requiring further explanation. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

Initially, we note that plaintiff's retaliation claim is twofold. Plaintiff alleged that he suffered retaliation because he informed defendant that DeVoss sexually harassed him. He also alleged that he suffered retaliation because he participated in the investigation of Fleming's sexual harassment claim. The trial court's findings of fact and conclusions of law, which are 64 pages long, adequately address both of these claims.

Regarding findings of fact, the trial court was not required, as plaintiff suggests, to recount every piece of evidence. The trial court noted that it considered some evidence more credible than other evidence. It is clear that the trial court's findings exclude the evidence that it did not find credible. The trial court's findings of fact are sufficient to satisfy the requirements of MCR 2.517(A). The trial court also cited applicable law and clearly concluded that plaintiff failed to prove retaliation by a preponderance of the evidence. The trial court stated that it found DeVoss's testimony about why he became critical of plaintiff's performance to be credible and supported by evidence. The trial court also concluded that plaintiff did not adequately inform defendant about being sexually harassed. The trial court's findings of fact and conclusions of law demonstrate that it was aware of the issues in the case and correctly applied the law. Our review would not be facilitated by requiring further explanation. Therefore, we conclude that the trial court satisfied the requirements of MCR 2.517(A).

Plaintiff also contends that the trial court erred in refusing to allow plaintiff to augment or amend the record, after the verdict was reached, to add exhibits that plaintiff's counsel believed

were filed with the trial court, but not reviewed by the judge. Plaintiff actually filed a motion, pursuant to MCR 2.517(B)¹, requesting that the trial court “amend its findings or make additional findings and amend the judgment accordingly.” MCR 2.517(B) states in relevant part:

On motion of a party made within 21 days after entry of the judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly.

Plaintiff asserted that a clerical error prevented the trial court from reviewing certain exhibits. At oral argument, plaintiff’s counsel asserted her belief that, although the exhibits were filed with the trial court, they were never presented to the judge. The trial court, however, stated without a doubt that he had all of the exhibits at issue and recalled looking at them. We conclude that the trial court did not abuse its discretion in denying this motion.

Plaintiff finally contends that the trial court erred in concluding that he failed to establish retaliation by a preponderance of the evidence. We disagree. “We review the trial court’s findings of fact in a bench trial for clear error and conduct a review de novo of the court’s conclusions of law.” *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

To establish a prima facie case of retaliation, a plaintiff must show (1) that he engaged in a protected activity; (2) that the defendant knew of the plaintiff’s involvement in the protected activity; (3) that the defendant’s actions adversely affected the plaintiff’s employment; and (4) that the adverse employment action was causally connected to the protected activity. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646, amended 473 Mich 1205 (2005). MCL 37.2701(a) prohibits retaliation against a person who “opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.”

Regarding plaintiff’s claim that DeVoss retaliated against him for informing defendant that DeVoss sexually harassed him, the trial court found that plaintiff did not adequately inform defendant that he had been sexually harassed. Plaintiff argues that the trial court erred in this finding because there was evidence that he complained about DeVoss’s abuse and treatment in a manner that “ ‘raise the specter’ of discrimination complaints.” Plaintiff cites a November 20, 1998, memorandum that he sent to the investigator of Fleming’s sexual harassment claim. Attached to this memorandum was a questionnaire that plaintiff completed in regard to the investigation into his violation of a work rule, which arose from Fleming’s use of profanity on a prisoner kite. In the memorandum, plaintiff indicated that the charge against him substantiated his concerns about DeVoss’s “retaliatory tendencies.” He also indicated that defendant did not appear concerned about protecting him from retaliation. However, nowhere in this memorandum did plaintiff state that he was being sexually harassed. Plaintiff cites no evidence demonstrating

¹ Plaintiff also cited and MCR 2.610-2.612, which concern motions for judgment notwithstanding the verdict, new trial and amendment of judgments, and relief from judgment. However, plaintiff failed to specify which of these court rules applied and failed to present any argument specific to any of these rules.

that he informed defendant that DeVoss sexually harassed him. Therefore, we conclude that plaintiff has failed to demonstrate that the trial court clearly erred in finding that plaintiff did not inform defendant that DeVoss sexually harassed him.

Regarding both of plaintiff's retaliation claims, even if plaintiff did demonstrate by a preponderance of the evidence that he engaged in protected activity, the trial court also determined that plaintiff failed to satisfy the fourth element of retaliation because he could not show a causal connection between the protected activity and the adverse employment action. "To prevail, plaintiff had to show that his employer took adverse employment action *because of* plaintiff's protected activity," not merely that he was disciplined after the protected activity occurred. *West v Gen'l Motors Corp*, 469 Mich 177, 185; 665 NW2d 468 (2003). The evidence demonstrates that DeVoss began addressing plaintiff's performance deficiencies shortly after plaintiff started working for defendant and months before plaintiff engaged in the alleged protected activity. Plaintiff's superiors other than DeVoss also requested an investigation into plaintiff's performance. Additionally, the record demonstrates that plaintiff made conflicting reports about how he handled Fleming's kite incident and strongly disagreed with DeVoss's method of dealing with that incident. This supports the trial court's conclusion that DeVoss's request for an investigation into whether plaintiff violated a work rule was legitimate. Finally, while the record shows that plaintiff was going to be disciplined for the work rule violation, plaintiff never was disciplined because he voluntarily went on sick leave and never returned. Therefore, we conclude that the trial court did not err in concluding that plaintiff also failed to demonstrate that the adverse employment action was causally connected to the alleged protected activity.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly