

STATE OF MICHIGAN
COURT OF APPEALS

RODICA SILVIA BIRIS,

Plaintiff-Appellant,

v

INGHAM COUNTY MEDICAL CARE
FACILITY, INGHAM COUNTY DEPARTMENT
OF HUMAN SERVICES BOARD, and FRED
FRYE,

Defendants-Appellees.

UNPUBLISHED
May 9, 2013

No. 310375
Ingham Circuit Court
LC No. 11-000743-CD

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of defendants. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff began working for defendant Ingham County Medical Care Facility (the facility), which is a skilled nursing facility operated by defendant Ingham County Department of Human Services Board, in May 2005. While employed at the facility, plaintiff obtained her certified nurse aid (CNA) certification. CNA's at the facility are responsible for the daily care of nursing home residents, including feeding, bathing, and assisting the residents.

On April 17, 2011, the daughter of a resident at the facility reported to Julie Pudvay, the facility's Director of Nursing, that her mother, EM, was abused by CNA Ronda Vermillion. As a result of the report, the facility complied with state and federal regulations that require a facility to self report allegations of abuse, neglect, or injuries of unknown origin within 24 hours to the state, and then follow up with a five day report following an investigation. As part of the investigation, the facility interviewed 50 staff members, including plaintiff, as well as 72 residents, including EM's roommate. After plaintiff's interview with her supervisor, Sue Overly,

Overly asked plaintiff to prepare an incident report describing what she had stated to Overly.¹ Pudvay's 5-day investigation report described the facility's investigation of the report involving Vermillion. Pudvay concluded that Vermillion did not commit willful or intentional abuse.²

On Saturday, April 30, 2011, while transporting a resident in a wheelchair, plaintiff suffered an "episode." Witnesses indicated that plaintiff appeared to be "passing out" and falling against the wheelchair and that she needed to be assisted to a chair. One witness testified that plaintiff was "lethargic" and "would not answer any of my questions." Another witness testified that plaintiff's eyes were rolled back in her head and that she was not alert. Plaintiff described her condition as "catatonic." An "Unusual Occurrence Report" was prepared regarding the episode by the person in charge at the time of the occurrence. The report described the nature of the occurrence as "Panic attack . . . this is episodic with staff member. This has happened before."

The following work day, Monday, May 2, defendant Fred Frye, the facility's Human Resources Director, reviewed the report and met with plaintiff. According to Frye, given the nature of plaintiff's work with elderly patients, he became concerned about whether it would be safe for plaintiff to work with patients in light of her "passing out."³ Frye requested that plaintiff not return to work until she could provide physician certification that she could safely perform the duties of her job. The following day,⁴ plaintiff provided a note from her psychiatrist stating that he could not "guarantee" that plaintiff would not have another panic attack.⁵ The note did not address plaintiff's fitness to return to work. Frye offered plaintiff the opportunity to take leave from work under the Family Medical Leave Act (FMLA) until she could obtain the necessary certification so that she did not accrue points against her attendance. When plaintiff expressed that she did not want to take FMLA leave,⁶ Frye offered to send plaintiff to the WorkHealth Occupational Clinic to undergo a fitness-for-duty examination. Frye indicated that if WorkHealth indicated that plaintiff was fit for work, then plaintiff could return to work. Frye further indicated that if WorkHealth did not certify that plaintiff was fit to return to work, then

¹ Plaintiff had stated that she had witnessed Vermillion be rough and mean with residents and that plaintiff had told this to EM's daughter.

² The State of Michigan later conducted its own unannounced two-day investigation of the complaint on May 5 and 6. The state also cleared Vermillion of abuse.

³ Frye indicated that he had no knowledge of plaintiff's involvement in the investigation regarding Vermillion.

⁴ Plaintiff, who had apparently met with an attorney on May 2, recorded the meeting on May 3.

⁵ Plaintiff claimed that Frye had requested a physician certification that "guaranteed" that she would never again have another panic attack. Frye denied making such a request.

⁶ The record reveals that plaintiff had taken FMLA leave on numerous occasions in the past for various reasons.

plaintiff could take FMLA leave or go back to her own physician for a recommendation regarding her fitness to work.

Plaintiff was seen the same day at WorkHealth by Physician Assistant David Walker. Walker noted that plaintiff reported five previous panic attacks and that she had been referred to a psychiatrist in the last month. Walker opined, however, that plaintiff's self-described catatonic state on April 30 was not typical of a mere panic attack.⁷ Walker was concerned about the amount of Xanax medication that plaintiff was taking because the drug can cause central nervous system side effects similar to those plaintiff was experiencing including undue sedation, confusion, and disorientation. Walker stated in his May 3 report that he did not feel comfortable allowing plaintiff to return to work at the present time and declined to release her to go back to work until her medication regime was stabilized.

Frye met with plaintiff and her union steward on May 4 to discuss the results of Walker's examination.⁸ Frye encouraged plaintiff to take FMLA leave until she could obtain documentation from her doctor that was fit to return to work, but plaintiff refused. Defendants had no further contact with plaintiff until receiving a May 10 letter from plaintiff's counsel requesting clarification of the facility's position regarding plaintiff's employment. In response, defendants' counsel indicated that WorkHealth had determined that plaintiff was not fit for duty and that plaintiff still had not provided certification from her own physician that she was fit to return to work. Defendants further indicated that the facility was attempting to engage in the interactive process with plaintiff as required by the Americans with Disabilities Act⁹ and encouraged plaintiff's counsel to have plaintiff contact the facility to discuss getting her back to work.

⁷ Walker's report described plaintiff's self-reported condition:

Ms. Biris at times does feel lightheaded, dizzy, and as if she may pass out. At other times she describes feeling as if her legs and arms (along a well demarcated line) are completely numb. She states at that times she cannot move her extremities! She further states during those times she is not able to speak, she describes herself to be "catatonic", and that she cannot recognize people around her that she should know! She states she "sees people who she should know, but doesn't know who they are!" She goes on to state she has in the past and recently noted these symptoms to escalate and get progressively worse. She was unable to "talk or recognize some of the co-workers who were trying to attend to her." While at work prior to the above episodes, because she was feeling poorly she took two extra Xanax tablets. . . . She states at times if she felt particularly anxious or felt she was going to have a "panic attack" she would take an additional 1 or 2 Xanax tablets.

⁸ Plaintiff secretly recorded this meeting as well.

⁹ 42 USC 12101, *et seq.*

On May 13, Frye sent a letter to plaintiff advising that the facility had arranged for an independent medical examination (IME) with a neuropsychiatrist, Dr. Stehouwer,¹⁰ and that the facility would pay for the IME. Frye reiterated that the facility was seeking a medical opinion that plaintiff was medically fit to perform the essential functions of her job without being a danger to herself or residents. The facility also telephoned plaintiff on four different occasions and left voice messages regarding the appointment for the IME. Plaintiff did not respond to any of the communications and did not attend the IME.

On May 17, 2011, plaintiff's counsel sent correspondence to defendants' counsel that asserted that the facility's action in taking plaintiff off work pending fitness for duty certification was a pretext for retaliation against plaintiff for her participation in the Vermillion investigation in violation of the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.* Plaintiff's counsel asserted, without documentation, that plaintiff was capable of performing her job, that she had been experiencing panic attacks for five years, and that her condition had not significantly changed. Counsel alleged that plaintiff had been constructively discharged from her employment.

Plaintiff thereafter filed the present action alleging that she was terminated from her employment for participating in the investigation of the complaint regarding Vermillion. Plaintiff alleged that she was constructively terminated from her employment with defendant Ingham County Medical Care Facility (the facility) in violation of the WPA (Count I), and/or in violation of public policy (Count II), MCL 333.21771, and that she had been subjected to intentional infliction of emotional distress (Count III).¹¹

Defendants filed a motion for summary disposition in which they asserted that plaintiff failed to set forth a prima facie case under the WPA because plaintiff did not suffer an adverse employment action and could not prove constructive discharge, and because plaintiff could not demonstrate the required causal link between her alleged protected activity and her alleged adverse employment action. Defendants further asserted that they articulated a legitimate non-discriminatory reason for requesting a fitness for duty evaluation and that plaintiff cannot show pretext. Lastly, defendants maintained that plaintiff's public policy claim is barred by the WPA.

Following a hearing, the trial court granted defendants' motion for summary disposition after finding that plaintiff had not established a prima facie case as under the WPA because there was no proof of a causal connection between plaintiff's protected activity in participating in the Vermillion investigation and an alleged adverse employment action. The court stated in relevant part:

For the Court, the important one is was there a causal connection between the protected activity and the first employment action. And the Court's can't find any causal connection between that. She simply participated in the investigation.

¹⁰ The facility had no prior relationship with Dr. Stehouwer.

¹¹ On appeal, plaintiff challenges only the dismissal of Counts I and II.

It's undisputed she had an episode that jeopardized a patient's safety. And I think in a medical care facility, that's a primary concern.

As I indicated to Plaintiff's attorney, even if it's true that she had all these severe incidents previously, and the employer didn't take any action, the fact that they decided to take action here, was it a reasonable action. And the Court can't conclude that it was unreasonable. They simply sent her out for a work-fitness evaluation. They said she couldn't work, asked her to go to get documentation from her psychiatrist. . . . And he couldn't, of course, guarantee she wouldn't have any other episodes. . . .

[The facility] sends a letter saying they would like to have an independent medical evaluation on the 13th, I believe. And Ms. Biris does not go, it's undisputed that she chose not to go to the evaluation

Now, the Court's more persuaded by Plaintiff's argument that if they, in fact, were trying to discharge her or retaliate against her, why would they want to send her for another evaluation at this time. They had asked her to go to WorkHealth and found her unfit. They asked her: Go get something from your psychiatrist. He really wasn't [able] to provide anything at that point to refute what WorkHealth had said. . . .

So at that point I think the employer acted reasonably in requesting an independent evaluation from a neuropsychologist.

The court further found that, even if plaintiff had established a prima facie case, defendants had a legitimate business reason for requesting that plaintiff submit to an IME. The court also found that the WPA provides the exclusive remedy and that MCL 333.2177(1) is not applicable in this case.

II. WHISTLEBLOWERS' PROTECTION ACT

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition on her WPA claim. We review de novo the decision of the trial court on the motion for summary disposition. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008).

The Whistleblowers' Protection Act provides in pertinent part that

[a]n employer shall not discharge . . . an employee . . . because 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[.]. [MCL 15.362.]

To establish a prima facie case under the WPA, the plaintiff must establish that he or she (1) was engaged in a protected activity, (2) was discharged or discriminated against, and (3) the discharge or discrimination was causally connected to the protected activity. *Debano-Griffin v Lake County*, 493 Mich 167, 175; ___ NW2d ___ (2012); *West v Gen Motors Corp*, 469 Mich

177, 183-184; 665 NW2d 468 (2003). However, the only issue that we must decide in this case is causation. If the plaintiff has established a prima facie case, the burden shifts to the defendant to establish a legitimate business reason for the discharge. *Shaw v City of Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009). If the defendant establishes a legitimate business reason for the discharge, the burden shifts back to the plaintiff to show that the reason was merely a pretext. *Id.*

The trial court assumed, without deciding, that plaintiff was engaged in protected activity under the WPA when she cooperated in the investigation of the complaint against Vermillion. The trial court did not decide whether plaintiff was constructively discharged when defendants refused to allow plaintiff to return to work without fitness for duty certification because the court found that there was no genuine issue of fact concerning whether the report prepared by plaintiff at the request of her supervisor was causally related to defendants' actions in requiring plaintiff to obtain a fitness for duty certification before returning to work. A plaintiff must show that "his employer took adverse employment action *because of* plaintiff's protected activity *West*, 469 Mich at 185 (emphasis in original). A plaintiff may establish causation by circumstantial evidence. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). However, "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164.

Plaintiff suggests that the temporal relationship between her participation in the investigation and defendants' refusal to allow her to return to work without a fitness for duty certification creates a reasonable inference that defendants' refusal to allow her to return to work without such certification was causally related to her participation in the investigation. She contends that she had experienced panic attacks at work in the past and had not been required to submit medical documentation regarding her fitness to work. A close temporal relationship between the protected activity and an adverse job action, combined with the plaintiff's positive employment history, may demonstrate causality. *Henry v City of Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999). However, a temporal relationship, with more, does not demonstrate a causal relationship. *West*, 469 Mich at 186.

Here, plaintiff suffered an episode while caring for a resident that witnesses described as a loss of consciousness and that plaintiff herself described as catatonic. An unusual occurrence report was generated as a result of the episode. Although Frye had never required plaintiff to provide medical documentation regarding her fitness for duty on previous occasions when she had suffered from panic attacks at work,¹² on this occasion Frye determined that plaintiff's loss of consciousness posed a safety risk to both plaintiff and the residents. Frye informed plaintiff that she could return to work as soon as she was able to secure medical certification regarding her fitness for duty. When plaintiff's psychiatrist failed to provide such documentation, Frye sent plaintiff to WorkHealth for an examination. WorkHealth declared plaintiff unfit for duty. Frye then offered plaintiff the opportunity to return to her own physician to obtain the necessary medical certification. When plaintiff failed to do so, defendants arranged for plaintiff to obtain

¹² Although plaintiff apparently lost consciousness at work in March 2010, Frye was unaware that plaintiff had lost consciousness of that occasion.

an IME from a neuropsychiatrist. Plaintiff did not attend the IME. Plaintiff failed to present any evidence from which a reasonable trier of fact could conclude that retaliation for protected activity, rather than concern for resident safety, caused defendants to prohibit plaintiff from returning to work until she could be examined by a health care provider who would declare her medically fit to return to work.¹³ The trial court properly granted summary disposition in favor of defendants under the WPA.

III. MCL 333.21771

Plaintiff argues that the trial court erred by granting summary disposition of her claim of wrongful termination in violation of public policy. Plaintiff sought to establish that defendants wrongfully discharged her for executing a duty required by law. Specifically, plaintiff argued that defendants constructively discharged her because she participated in the Vermillion investigation. MCL 333.21771 addresses mistreatment of nursing home residents by their caregivers and requires nursing home employees to report acts of abuse, mistreatment, or harmful neglect to a patient to the nursing home administrator or nursing director. MCL 333.21771(1) and (2). MCL 333.21771(6) prohibits employers from firing an employee for reporting such an act. Even assuming that MCL 333.21711 would apply in this case, however, a public policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue. *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 127; 724 NW2d 718 (2006). The trial court properly determined that the WPA was plaintiff's exclusive remedy and properly granted summary disposition of plaintiff's public policy claim on that basis.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

¹³ Similarly, even assuming that plaintiff had established a prima facie case under the WPA, the trial court properly noted that Frye's concern for the safety of both the residents and plaintiff demonstrates a legitimate business reason for requiring plaintiff to establish that she was medically fit to return to work.