STATE OF MICHIGAN

COURT OF APPEALS

NANCY SNIDER, Plaintiff-Appellant,	UNPUBLISHED September 2, 2014
v	No. 315148 Wayne Circuit Court
ALDI, INC., Defendant-Appellee.	LC No. 11-009116-CD

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

The Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, provides that "[a] person shall not discharge 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 . . . herself . . . of a right afforded by this act." MCL 418.301(13). Plaintiff Nancy Snider filed a complaint against defendant Aldi, Inc., alleging that Aldi violated the WDCA when it terminated plaintiff's employment as a shift manager in retaliation for exercising a right under the WDCA relative to an alleged work-related injury. The trial court granted Aldi's motion for summary disposition pursuant to MCR 2.116(C)(10). The court found that plaintiff failed to present any evidence showing that Aldi's proffered reason for discharging her, i.e., falsification in dating an accident report, was a pretext for unlawful retaliation under the WDCA. We conclude that plaintiff failed to present documentary evidence sufficient to create a genuine issue of material fact with respect to whether Aldi terminated her employment in retaliation for seeking benefits or exercising rights under the WDCA. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff began her employment with Aldi in 2005, initially working as a store cashier. In 2008, plaintiff was promoted to shift manager, and she was employed in that position until being fired on August 1, 2009. An Aldi's district manager, who was the individual that discharged plaintiff, testified that plaintiff was an average cashier with superior customer-service skills, but her performance as a shift manager was unsatisfactory. During her entire stretch of employment with Aldi, plaintiff received six written disciplinary warnings for various performance failures and policy violations, including a violation of cash control policies and failure to record meat temperatures. In an evaluation prepared by the store's manager regarding plaintiff's job performance as a shift manager, it was indicated that plaintiff had to improve her skills in

holding employees accountable after delegating tasks to them, that plaintiff needed to better remember and focus on her duties and priorities as a shift manager, and that she had a tendency to be distracted and undirected. The store's manager trainee complained that plaintiff was not completing her required nightly close-up duties.

With this backdrop, on July 23, 2009, plaintiff and a co-worker were straightening and cleaning up the store after the store had closed when plaintiff heard a loud boom that turned out to be a can of pop falling from a shelf and exploding. Plaintiff elaborated in her deposition testimony as follows:

> *Q.* And you claim a can of orange pop spilled on the floor and you walked through the puddle and slipped?
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> *A.* I didn't walk through it. I heard a pop, and when I turned to see what the noise was, that's when I slipped.
>
> *Q.* So you're saying the pop came at you?
>
> *A.* It was spraying all over.
>
> *Q.* But you didn't fall, correct?
>
> *A.* No, I caught myself.
>
> *Q.* And you alleged that your head snapped back when you slipped?
>
> *A.* Yes, it did.[1]

Plaintiff testified that after she slipped, she felt a sharp pain in her back and neck, which pain she rated at a four on a pain scale of zero to ten, with ten being the most severe pain. Plaintiff and her co-worker cleaned up the spilled pop, and plaintiff then completed her shift and went home. At the time of the slip, plaintiff did not fill out an accident report, given that she did not view the incident as having constituted a true accident and because she had been aware that there were no accident-report forms available in the store. Plaintiff did not seek any medical care, as conceded in an answer to the requests to admit.

The next day, July 24, 2009, plaintiff informed the manager trainee by phone that she was unable to work that day because of severe back and neck pain attributable to the slip and near-fall the previous night.[2] Plaintiff and the manager trainee, who was running the store while the

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[1] In responses to requests to admit, plaintiff repeatedly claimed that she "slipped on the spilled pop and injured herself."

[2] The manager trainee had called plaintiff at home for an explanation regarding why plaintiff had failed to complete her store closing duties the night before. With respect to July 24th, plaintiff testified that her pain level had reached an eight.

store manager was on vacation, both testified that the trainee asked plaintiff whether she had filled out an accident report, with plaintiff responding in the negative. Plaintiff testified that she informed the manager trainee that there were no accident-report forms in the store. The manager trainee testified that she told plaintiff that it was necessary to fill out an accident report that day, and the trainee further testified that she had no recollection of plaintiff ever saying anything about the alleged lack of accident-report forms.[3] According to the requests to admit answered by plaintiff, the manager trainee never inquired about whether plaintiff needed or wanted medical treatment for her injury and plaintiff herself "did not believe she could seek treatment unless her manager sent her to the clinic or an accident report form was completed."

Plaintiff was not scheduled to work on July 25, 2009, but she did return to the store on July 26th and worked her shift despite having ongoing back and neck pain. Plaintiff testified that she did not fill out an accident-report form that day because "[t]here weren't any," and she had looked "[i]n the file cabinets . . . [and] everywhere."

As described by the district manager and manager trainee, on July 27, 2009, they had a "final conference" with plaintiff to discuss plaintiff's poor performance and her habitual failure to complete the duties assigned to shift managers. Plaintiff testified that she generally understood that a "final conference," in Aldi's parlance, was intended as a last warning on a problem or issue, potentially leading to further discipline up to termination. According to the district manager and the manager trainee, the three discussed plaintiff's performance problems at the conference, with plaintiff indicating that her deficient performance stemmed from the need for additional training as a shift manager.[4] There was ultimately an agreement to provide

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[3] In a shift manager's instructional pamphlet, which was executed by plaintiff prior to the slip, acknowledging her receipt and her understanding of the pamphlet and the information therein, the following job duties were listed:

> Thoroughly completes the proper accident forms for employee and customer accidents. Must report every accident to the divisional office within 24 hours.

Plaintiff testified that she understood these duties. There is no dispute that plaintiff never contacted the divisional office about the alleged accident, let alone within 24 hours of its occurrence.

[4] Plaintiff characterized the meeting somewhat differently, claiming that they discussed the fact that she was "not strong in some areas," that she expressed a desire to learn about her duties as a shift manager, and that the district manager acknowledged that she "had not been trained." Plaintiff asserted that she "never received the official 30-day training that you're supposed to" receive from Aldi. Plaintiff testified that the district manager and manager trainee did not speak to her about any alleged difficulties with her ability to balance her job duties or to stay focused on tasks. Plaintiff's view of the meeting was that its main purpose concerned her need for training. Despite this testimony, plaintiff, at a different point in her deposition, appeared to agree with statements in the district manager's termination summary that the three discussed plaintiff's

plaintiff with 30 days of training at another Aldi's location. The district manager wrote in his termination summary that "[i]t was . . . made clear to [plaintiff] that this would be her last opportunity to demonstrate improvement[,] and if she was unable to do so then she would either be demoted to a cashier or terminated from her position at ALDI."[5] The district manager testified in his deposition that he "assumed [plaintiff] would be successful after that point, based on her attitude and the relationship [he] had with her[.]" There was no discussion about plaintiff's accident and injury or the alleged lack of accident-report forms at the July 27th conference. Plaintiff testified that she searched for forms, employee or customer related,[6] on July 27th, but still could not find any in the store. She did not make any attempts to procure more forms or to contact Aldi's divisional office about the lack of forms, as that was the manager trainee's obligation according to plaintiff and not plaintiff's responsibility.[7]

Plaintiff testified that on July 28 and 29, 2009, she worked and continued to look for accident-report forms, but could not locate any in the store. Although not entirely clear from the record, it appears that plaintiff was not scheduled to work on July 30th. Plaintiff testified that her pain worsened with each passing day. With respect to July 31, 2009, plaintiff's complaint alleged that she worked a 4:00 to 10:00 p.m. shift and that "[t]here were still no accident reports in the store." In her brief on appeal, plaintiff states that she worked on July 31st, "but was unable to complete any accident report forms that day because she still could not locate them in the store." In a response to the requests to admit, plaintiff stated that she "checked each day she worked from July 24 – July 31, 2009[,] and there were no accident forms in the store." Plaintiff testified that she closed the store on the night of July 31st, being the last to leave the premises, and that she was the first employee to arrive at the store on the morning of Saturday, August 1, 2009, at which time she located a stack of accident-report forms. When questioned how the forms magically got there when she was the last person to leave the store on July 31st, at which time she could not locate any forms, and the first person to arrive at the store on August 1st, plaintiff testified that "[s]omeone could have brought them there or maybe it came on a truck." Contradicting her complaint, brief, and the answer to the admission requests, plaintiff then testified that she in fact had not checked for the forms during her shift on July 31st, claiming that she had been mistaken when answering the requests to admit.

"poor job performance and the reasons for her inability to perform to the ALDI standard" and that plaintiff "felt that she could improve with *more* training." (Emphasis added.)

[5] The summary further provided that plaintiff assured the district manager and the manager trainee that she would improve and that she "understood the consequences if she did not improve." The summary additionally indicated that the district manager, with some hesitation, approved plaintiff's sudden request for a week's vacation prior to the start of training.

[6] Plaintiff testified about a prior accident in which she injured her thumb and used a "customer" accident form to report the accident, as there were no employee-related accident forms.

[7] In an answer to the requests to admit, plaintiff indicated that she "did not have the ability to obtain the forms from other stores or the division offices." Plaintiff also claimed in a response to the admission requests that she told the district manager, the manager trainee, and the store's manager "that she could not find accident reports prior to August 1, 2009, prior to termination." Aldi presented documentary evidence to the contrary, including the deposition testimony of the district manager.

As indicated, after plaintiff arrived at the store on August 1st, she found a stack of accident-report forms and, in between performing her job duties, she worked on filling one out in the store manager's office, leaving it on the manager's desk. In the accident report, plaintiff indicated that the accident occurred on July 23, 2009, which was consistent with her claim, but she dated the report July 26, 2009, in two places. It is also evident that she had initially dated the report July 24, 2009, before changing it to July 26th; she had not worked on July 24th. There is no dispute that plaintiff filled out the report on August 1, 2009. In an answer to the requests to admit, plaintiff stated that she explained to the district manager "on August 1, 2009[,] that she completed the report with the date she originally intended to complete the report, but could not because there were none in the store." Plaintiff testified in her deposition that she dated the accident report July 26, 2009, "[b]ecause that's the date that I was going to, that's when I wanted to fill out the accident report but there weren't any." The district manager was at the store on August 1, 2009, and met with plaintiff several times in the store manager's office with respect to the accident report and date discrepancy. He was visiting the store that day as part of a routine store check and stumbled across plaintiff's accident report sitting on the store manager's desk.

In the termination summary signed by the district manager about two months after the termination, he asserted:

> On 8/1/2009, I was performing a routine Saturday store visit and found an accident report partially completed by [plaintiff]. It stated that on 7/23/2009, [plaintiff] allegedly slipped on some spilled pop (she did not fall) which caused her to allegedly have pain in her neck and back. The accident data portion of the report was signed by [plaintiff] and dated for 7/24/2009 (this was written over 7/26/2009); the medical release portion was signed by [plaintiff] and dated for 7/26/2009. I observed video from 8/1/2009 that showed [plaintiff] fill out the report the morning of 8/1/2009. I sat [plaintiff] down to ask her what had happened and why she back dated the report, which is a violation of company policy. [Plaintiff] stated that she had slipped on some spilled pop and had pain in her neck and back. [Plaintiff] also stated she called off of her shift the day after the incident. I asked [plaintiff] why she did not fill out a report and seek treatment then. [Plaintiff] stated that she did not think she needed to seek treatment for what happened.
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> . . .
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> [Plaintiff] has had previous injuries as well as injuries to cashiers on her shift and is aware of all procedures regarding how to handle an injury including seeking treatment if necessary. [Plaintiff] at no time sought out treatment for her injury and worked the following days . . . and exhibited no signs of injury nor did she say anything to [the] . . . store manager[], . . . manager trainee[][8], or myself.

[8] As noted earlier, the manager trainee did in fact testify to speaking with plaintiff the day after the alleged slip and near-fall and discussing the accident and plaintiff's back and neck pain.

> Because of these factors, I was suspicious as to why [plaintiff] had waited to fill out the accident report until after [the final conference on July 27, 2009] . . . .
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> On 8/1/2009, I sat [plaintiff] down with [the] . . . store manager[] present and asked her if she knowingly falsified the accident report stating it was filled out prior to the disciplinary conversation [the manager trainee] and I had with her. [Plaintiff] stated that she filled out the report and dated it that way because that is when she was supposed to have filled it out. I also questioned her as to why she continued to work without seeking medical attention which is required for all stated injuries due to accident. [Plaintiff] said that she thought she would be fine and would not need medical attention. I came to the conclusion that [plaintiff] had knowingly falsified the accident report to avoid or delay having to partake in the 30 day training period that could ultimately result in her termination from ALDI. I notified [plaintiff] that she would be terminated for falsification of Company documents and falsification of a work-related injury in accordance with ALDI Employee Handbook, page 16, line #2.[9]

The district manager testified that he did not recall plaintiff ever claiming that accident-report forms had been unavailable. He further testified that when he confronted plaintiff about backdating the accident report, she became visibly upset and quite nervous. The district manager additionally testified that even had there been no accident-report forms available, plaintiff was still obligated to date the report August 1, 2009, and that she could and should have pursued readily-available, known avenues to obtain an accident-report form if one could not be found in the store. He also testified that the validity of plaintiff's injuries had nothing to do with the termination decision, which was based on plaintiff's falsification of the accident report and her perceived dishonesty in explaining the matter. The district manager stated that the termination decision was his to make and that the store manager was not in agreement with discharging plaintiff.

In an affidavit executed by a director of operations for Aldi, he averred that the district manager had spoken to him on August 1, 2009, about the falsification of the accident report and his belief that plaintiff had been dishonest with him when asked about backdating the report. The director averred that he communicated to the district manager his agreement with the district manager's yet-to-be-implemented decision to terminate plaintiff under the circumstances. In answers to the requests to admit, plaintiff stated that she was informed by the district manager that she "was being terminated for falsifying a company document by putting the wrong date on the accident report" and that the district manager's real "motivation for terminating . . . [p]laintiff was because of her at-work injury."

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[9] The handbook clause provided that an employee was subject to discipline, up to and including termination, for "[f]alsification of Company documents" and "[f]alsification of work-related injuries." In another memo prepared by the district manager dated August 1, 2009, the date of termination, he indicated that plaintiff was terminated for "falsification of a Company document[.]"

The district manager testified that when plaintiff told him about the injury on August 1, 2009, he asked her if she needed to go to the medical clinic utilized by Aldi for any work-related injuries, which was open that Saturday. And while he could not specifically recall her answer, he assumed it must have been "no," as he would have immediately allowed her to go visit the clinic had she indicated a desire to do so and would have found someone to cover the remainder of her shift. When asked whether she and the district manager spoke on August 1, 2009, about plaintiff going for medical care, plaintiff testified:

> We talked about it. I was supposed to go to the clinic. He told me where the location was and told me he thought they were open on Saturday and all that stuff. When I got off work, that's where I was supposed to be going.

She testified that she did not go to the clinic because she eventually was fired that day. It is evident that the conversation about plaintiff possibly going to the medical clinic occurred on August 1st but prior to the decision, or implementation of the decision, to terminate plaintiff's employment. Plaintiff eventually ended up visiting her own doctor on August 5, 2009, who diagnosed her with severe lumbar strain, necessitating pain medications and physical therapy. In plaintiff's brief on appeal, she states, absent citation to the record but without dispute from Aldi, that she received medical treatment for her work-related injuries through the summer of 2010 and "was cleared to return to full-time, unrestricted employment in 2010." In a footnote in her appellate brief, plaintiff asserts that she "filed a claim for worker's compensation benefits with Aldi, but it was promptly denied," and that worker's compensation litigation was currently pending.[10]

On July 29, 2011, plaintiff filed her complaint in the trial court, alleging a single count sounding in retaliatory discharge under the WDCA. Plaintiff alleged that she was terminated "in retaliation for having claimed a benefit under the WDCA," while also alleging that she was discharged "in retaliation for filing a WDCA claim."[11]

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[10] In Aldi's appellate brief, it states that the district manager "filed a claim for [p]laintiff under Aldi's worker's compensation plan after the termination meeting, despite his belief regarding her dishonesty; he did not take any action to try to deny her worker's compensation benefits." The record citation given in support of this statement merely alluded to WDCA proceedings in general, absent any reference whatsoever to the district manager, let alone his actions in relationship to the filing of a WDCA claim.

[11] In plaintiff's appellate brief, she claims that she "asserted her rights to worker's compensation benefits when she reported the incident to [the manager trainee] and attempted to complete an accident report right after the incident," which she could not accomplish given the lack of accident-report forms. Plaintiff also claims that she asserted her WDCA rights again on August 1, 2009, when she was finally able to fill out an accident report. Plaintiff states that the district manager "knew that she was asserting her rights to worker's compensation benefits because he reviewed the accident report the same day [p]laintiff prepared it and terminated [p]laintiff four hours later on the day it was submitted."

Aldi filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Aldi argued that the documentary evidence showed that the district manager's decision to terminate plaintiff was based on the backdating of the accident report, which was a legitimate, nonretaliatory reason to discharge her. Aldi maintained that plaintiff failed to submit any evidence whatsoever disputing the reason given by the district manager for firing plaintiff and that plaintiff's own testimony conceded the lack of evidence establishing that the proffered ground for termination was merely a pretext for unlawful retaliation. Plaintiff testified that she did not know the specific grounds upon which the district manager based his termination decision, that she did not know what he was thinking in the process of determining that the accident report had been falsified, and that she did not "have any evidence" that the termination decision was related to anything other than the district manager's sincere belief that plaintiff had falsified the accident report. Aldi also pointed to testimony by plaintiff that she had suffered two previous work-related injuries while employed by Aldi absent any negative or adverse consequences. And plaintiff was unaware of any other Aldi employees who faced retaliation when having suffered a work-related injury or having filed a WDCA claim.

In further support of its motion for summary disposition, Aldi argued that just the mere suspicion of dishonesty constitutes a legitimate, nonretaliatory basis for termination, that Aldi's voluntarily-provided generous disability benefits defied the underlying rationale of plaintiff's case, and that the close temporal connection between the termination and plaintiff reporting her accident to the district manager could not alone support a denial of summary disposition.

Plaintiff's arguments in opposition to Aldi's motion for summary disposition are discussed in the analysis section of this opinion to the extent that the arguments are repeated on appeal. The trial court granted Aldi's motion for summary disposition, finding that plaintiff failed to present any evidence showing that Aldi's proffered reason for discharging her was a pretext for unlawful retaliation under the WDCA. An order granting the motion was entered on February 22, 2013. Plaintiff appeals as of right.

II. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY DISPOSITION PRINCIPLES

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). We likewise review de novo an issue of statutory construction. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). With respect to the well-established principles governing the analysis of a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), stated:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect

> to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

B. RETALIATION CLAIM UNDER THE WDCA – ANALYTICAL FRAMEWORK

The primary goal of the WDCA is to promptly deliver disability benefits to an employee who is injured while acting within the scope of his or her employment. *Cuddington*, 298 Mich App at 272. The WDCA did not initially provide for a cause of action based on retaliatory discharge, but pursuant to "1981 PA 200, the Legislature codified a cause of action for retaliatory discharge by amending the WDCA and adding MCL 418.301(11), which was later reclassified as MCL 418.301(13)" with the enactment of 2011 PA 266. *Cuddington*, 298 Mich App at 272. To establish a prima facie case of retaliatory discharge for filing a claim under or exercising a right afforded by the WDCA, a plaintiff employee must present evidence: (1) that the plaintiff filed a WDCA claim for benefits or exercised a right afforded by the WDCA; (2) that the employer knew that the plaintiff engaged in this protected conduct; (3) that the employer discharged the plaintiff; and (4) that the discharge and plaintiff's claim for benefits or exercise of rights were causally connected. See *id.* at 275. The *Cuddington* panel elaborated:

> The last element, causation, is usually difficult to prove. Under some circumstances, a plaintiff may be able to produce direct evidence of retaliatory animus. In employment discrimination cases, our Supreme Court has defined "direct evidence" as evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. In the retaliation context, direct evidence of retaliation establishes without resort to an inference that an employer's decision to take an adverse employment action was at least in part retaliatory.
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> Rarely will an employer openly admit having fired a worker in retaliation for exercising a right of employment. . . . When a plaintiff presents circumstantial rather than direct evidence of an employer's retaliatory motive, we examine the claim under the *McDonnell Douglas/Burdine* burden-shifting framework.[12]
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> Under the *McDonnell Douglas/Burdine* analysis, when a plaintiff asserting a claim for retaliatory discharge under MCL 418.301(13) circumstantially

[12] This is a reference to *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), and *Texas Dep't of Community Affairs v Burdine*, 450 US 248; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

> establishes a rebuttable prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for its adverse employment action. If the defendant produces a legitimate, nondiscriminatory reason for its action, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that retaliation was a motivating factor for the adverse action taken by the employer toward the plaintiff. A plaintiff can establish that the employer's proffered reasons for the adverse employment action qualify as pretextual by demonstrating that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. [*Cuddington*, 298 Mich App at 275-277 (citations, quotation marks, and alteration brackets omitted).]

C. DISCUSSION

Aldi does not argue that plaintiff did not engage in protected conduct prior to termination for purposes of MCL 418.301(13), e.g., exercising a right afforded by the WDCA; therefore, we shall proceed on the assumption that plaintiff engaged in the necessary protected conduct, thereby establishing the first element of a prima facie case. *Cuddington*, 298 Mich App at 273. Additionally, there was evidence showing that Aldi knew that plaintiff had engaged in this assumed protected conduct and that Aldi thereafter terminated plaintiff, establishing the second and third elements of a prima facie case. *Id.* The problem with plaintiff's case concerns the fourth element, which requires evidence of a causal connection between the protected conduct and the termination of plaintiff's employment. *Id.* There was no direct evidence that plaintiff was terminated because of her work-related injury, and plaintiff's own testimony seemed to establish that point. Despite Aldi's argument to the contrary, we are not prepared to conclude that there was no *circumstantial* evidence of a retaliatory motive based solely on plaintiff's layperson testimony that she did not "have any evidence" that the termination decision was related to anything other than the district manager's sincere belief that plaintiff had falsified the accident report. Concluding otherwise would be attributing more to the testimony than is reasonable for purposes of summary disposition. Plaintiff may have simply viewed the term "evidence" as meaning *direct* evidence in the context used by defense counsel in fairly aggressive questioning during plaintiff's deposition, failing to appreciate the nature and legal significance of *circumstantial* evidence.

Examining the issue of circumstantial evidence relative to the causal connection requirement, we employ the *McDonnell Douglas/Burdine* burden-shifting framework. *Cuddington*, 298 Mich App at 276. We first conclude that Aldi articulated a legitimate, nonretaliatory reason for the discharge, i.e., falsification of the accident report. Aldi's handbook provided that an employee was subject to discipline, up to and including termination, for "[f]alsification of Company documents," and backdating the accident report certainly qualified as falsifying a company document. Plaintiff does not dispute that Aldi offered and articulated a legitimate, nonretaliatory reason for the discharge. Rather, plaintiff argues that there was documentary evidence sufficient to create an issue of fact concerning whether retaliation was a motivating factor in the termination decision or, in other words, whether the articulated reason was merely a pretext for unlawful retaliation.

Plaintiff's burden, upon Aldi's articulation of a legitimate, nondiscriminatory reason for the termination, was to demonstrate that the evidence, when construed in her favor, was sufficient to permit a juror to conclude that retaliation was a motivating factor in Aldi's decision to terminate her employment. *Cuddington*, 298 Mich App at 277. We hold that plaintiff failed to meet this burden. "A plaintiff can establish that the employer's proffered reasons for the adverse employment action qualify as pretextual by demonstrating that the reasons (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision." *Id.* Here, the falsification of the accident report had a basis in fact. There can be no dispute that plaintiff backdated the accident report; she admitted to doing so. Backdating the accident report constituted falsification of the document. Plaintiff argues that she did not have a fraudulent intent in backdating the report. Even if so, the document was nonetheless falsified. And, moreover, the absence of a fraudulent intent did not mean that Aldi therefore terminated her because of the alleged work-related injury. There was also evidence suggesting a fraudulent intent.

Further, the falsification of the accident report was sufficient to justify the termination decision, whether under Aldi's internal operating rules or under general business standards, especially considering the substantial problems with plaintiff's job performance and the associated "final conference" that transpired a few days before termination. Further, we cannot conclude that there existed sufficient, if any, circumstantial evidence that document falsification was not the actual factor motivating the district manager's decision to fire plaintiff. "'Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation' when retaliation is claimed." *Debano-Griffin v Lake Co*, 493 Mich 167, 177; 828 NW2d 634 (2013) (citation omitted). As indicated by the district manager, even assuming that the real reason that plaintiff delayed filling out an accident report was the lack of available forms, it did not excuse or justify surreptitiously backdating the accident report.

In *Debano-Griffin*, the plaintiff's job was eliminated, allegedly because of county budget problems, and the plaintiff filed a claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, asserting that she was terminated as a result of complaints against certain actions of the county board of commissioners. Our Supreme Court held that the "plaintiff presented evidence that showed more than a temporal relationship between the protected activity and defendants' adverse employment action." *Debano-Griffin*, 493 Mich at 171. The Court found that the plaintiff, in attempting to show a causal connection, did not rely solely on evidence of a coincidence in time or temporal relationship. *Id.* at 177. Rather, the plaintiff also provided evidence that during a 12-day period when she made various complaints to the board, her "position went from fully funded to nonexistent." *Id.* The Court observed:

> From this, a rational juror could infer that the board had already decided to fund plaintiff's position until she publicly voiced her complaints. This is especially so because one reasonable conclusion is that the county's financial situation could not have deteriorated in 12 days to the point that it had to consider extreme cost-saving measures at that particular time. [*Id*. (citation omitted).]

Here, plaintiff attempts to analogize *Debano-Griffin* by arguing that when she first informed the manager trainee about the accident, no adverse action was taken against her, yet when plaintiff formally submitted the accident report nine days later, she was immediately

discharged. This argument fails to recognize that, as opposed to the situation in *Debano-Griffin* where the alleged basis for termination, inadequate funding levels, had likely not changed significantly since before the plaintiff voiced complaints to the board, the basis here for termination was a specific event that did not arise and could not have arisen until plaintiff actually submitted the falsified accident report. Had Aldi's motivation been to retaliate against plaintiff for reporting a work-related accident, Aldi would likely have set the wheels of termination in motion on July 24, 2009, when plaintiff first reported the accident. The lack of evidence showing such maneuvering reflected that Aldi terminated plaintiff for the very reason given, she falsified the accident report.

Plaintiff next argues that the nine-day delay between the first reporting of the accident and the termination proves that there was no temporal connection or relationship; therefore, plaintiff could not be said to have relied exclusively on a temporal connection to show pretext. This argument leaves us bewildered. The lack of a temporal relationship is not a favorable fact that benefits a plaintiff in showing a causal connection. Rather, a temporal relationship supports a finding of causation, but it cannot be the sole basis to establish a causal connection.

In further support of pretext, plaintiff argues that the district manager never disputed that the accident and injury occurred and had just offered her shift manager training in a different store; however, he nonetheless terminated plaintiff after submitting the accident report. Once again, this argument fails to take into consideration that the submission and falsification of the accident report did not occur until the day of termination and not before the offer of additional training. We find the argument unavailing.

Plaintiff next launches into a claim of destruction of evidence, asserting that the district manager had viewed store video of the actual accident on July 23, 2009, and then kept or destroyed it in an effort to forestall a WDCA claim for benefits, yet he maintained the August 1st video of plaintiff filling out the accident form in the manager's office. Plaintiff argues that the destruction of the video provided circumstantial evidence of pretext, as it reflected that the district manager was motivated to fire plaintiff on the basis of retaliation. According to his testimony, the district manager believed that he had viewed store video from July 23, 2009, in an effort to observe the alleged accident, although he could not recall when he watched the video. The district manager testified that he simply could not remember what he was able to see in the video; however, had there been anything of relevance on the video he would have maintained it. He made no claim that the video discredited plaintiff's account of the accident. The district manager stated that as far as he knew, a video could no longer be produced from the digital computer equipment used to surveil the store, as "the hard drive for that computer has since been gone." But he later stated, "I guess if you were a forensic computer person, you can go on the hard drive and pull it up. I am not sure there is a possibility in this day and age. . . . I don't have anything in my pockets or in my stuff."

This testimony does not establish that the district manager destroyed or concealed the video in an attempt to forestall a WDCA claim; it does not even establish that a video was no longer available or could no longer be produced. And plaintiff makes no claim in her appellate brief that a discovery request for the video was even made. Accordingly, we reject plaintiff's argument.

Plaintiff additionally argues that pretext was established in light of the fact that plaintiff was not terminated in regard to the incidents that resulted in the six disciplinary warnings, yet she was immediately terminated for writing the wrong date on the accident report. We disagree. The falsification of a company document was expressly punishable by termination under Aldi's policies and rules, and plaintiff does not refer us to any company policy and rules that called for termination in regard to the six infractions. Moreover, plaintiff was indeed punished for the six infractions by receiving the disciplinary warnings, and she had neared the point of termination given her record. Plaintiff fails to appreciate that the termination due to falsification was the culmination of a poor track record at the store.

Plaintiff next argues that pretext was shown by the district manager's conflicting positions or observations that, on one hand, plaintiff indicated a desire for training and that, on the other hand, she backdated the accident report to avoid said training. This argument merely alludes to the district manager's thoughts about plaintiff's motivation in backdating the accident report, and it fails entirely to undermine the basic fact that the report was falsified. Regardless, simply because the district manager acknowledged an expressed desire on plaintiff's part for more training did not mean that the district manager believed that the desire was genuine, nor did it preclude him from questioning that desire at a later date.

Plaintiff further argues that pretext was established on the basis that Aldi provided reasons for termination that changed throughout the course of the litigation and that differed from those given when plaintiff was actually terminated. We conclude that although there may have been slight variations in the articulation of the reason(s) for termination, the substance or heart of the reason, falsification of the accident report, was consistent from the point of termination to the conclusion of the litigation.

Finally, plaintiff argues that Aldi's assertion that her termination was based on an honest belief that she engaged in dishonesty was proof of pretext, given that there was evidence contradicting such a belief. Plaintiff contends that the district manager was aware that plaintiff had previously reported the accident to the manager trainee; therefore, he could not have honestly believed that she intended to defraud the company by backdating the report. Again, this argument misses the point that it was the falsification of the document that ultimately caused the demise of plaintiff's employment with Aldi.

Affirmed. Having fully prevailed on appeal, Aldi is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot