

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KEVIN LUDWIG,

Plaintiff-Appellant,

v

IPC PRINT SERVICES, INC.,

Defendant-Appellee.

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UNPUBLISHED  
February 13, 2007

No. 272057  
Berrien Circuit Court  
LC No. 05-003022-CD

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

I. Introduction

Plaintiff appeals as of right the trial court's July 10, 2006, order granting IPC Print Services, Inc.'s (IPC's), motion for summary disposition. On appeal, plaintiff argues that he presented evidence that established a genuine issue of material fact regarding whether IPC religiously discriminated against him in its' employment decisions in violation of the Elliot Larson Civil Rights Act (ELCRA) or whether IPC wrongfully fired him in retaliation for taking part in a protected activity in violation of the ELCRA and Whistleblower's Protection Act (WPA) (Plaintiff's Brief on Appeal).

II. Facts and Proceedings

Plaintiff started working at IPC in August 1989. Plaintiff moved up the company ladder and received several raises, culminating in being promoted to a lead press operator in 2001. As lead press operator, plaintiff worked the four-star shift, working 12 hours every Thursday, Friday and Saturday, as well as every other Wednesday.

In 2003, plaintiff began attending bible study classes and became interested in the Seventh Day Adventist religion, which amongst other things, believes that an individual should not perform any work for personal gain on the Sabbath, which ran from sunset on Friday to sunset on Saturday. Although plaintiff did not contact the Seventh Day Adventist Church until

early 2004 and did not start attending services at the church until mid-2004, plaintiff sent IPC a letter on May 13, 2003, requesting the Sabbath off.<sup>1</sup> Plaintiff put in a bid to work the four-star shift that would require him to work 12 hours every Sunday, Monday and Tuesday, as well as every other Wednesday. Plaintiff did not get that shift. Instead, it was given to Harold Lear (Lear), who had more seniority than plaintiff. Thus, plaintiff had to use vacation days to avoid working on Saturday.

In August 2004, IPC changed its shift structure as follows; in relevant part, first shift would work from 7:00 a.m. to 3:00 p.m. Monday through Friday, second shift would work from 3:00 p.m. to 11:00 p.m. Monday through Friday, and third shift would work from 11:00 p.m. to 7:00 a.m. Sunday through Friday. Even though plaintiff admitted that neither the first nor third shift interfered with the Sabbath, plaintiff only bid on the first shift, stating that he did not bid on the third shift because it was too “stressful.” Plaintiff was not placed on first shift and took issue with the fact that Chris Garvison (Garvison), who had less seniority than plaintiff, was awarded first shift. Plaintiff was told that Garvison was awarded the first shift because Garvison was a better machine operator, and plaintiff admitted that Garvison had more press operator experience and a higher efficiency rating. Print supervisor, Jeff Messersmith (Messersmith), stated that Garvison “is almost universally viewed as IPC’s best press operator,” and much more qualified than plaintiff. Right before Garvison was awarded the first shift, he had given IPC notice of his intent to leave the company. Garvison decided to continue to work for IPC upon being awarded first shift.

Plaintiff was placed on second shift, which he admitted was an improvement from his prior four-star shift because it allowed him to go to church on Saturdays. Plaintiff never had to work on Saturday again, and admitted that he was only required to work overtime on Saturday on one occasion, and on that occasion IPC honored his request to work the required overtime on Sunday instead of Saturday. Thus, plaintiff’s only problem with working second shift was the four hours (7:00 p.m. to 11:00 p.m.) on Friday night that interfered with the Sabbath. On April 18, 2005, plaintiff asked Messersmith if he could leave work at 7:00 p.m. on Fridays and make up the time on Sundays. Messersmith denied plaintiff’s request, but offered the alternative suggestions of changing from second shift to third shift (without taking a pay cut) like fellow Seventh Day Adventist John Foster (Foster), or asking another employee if they would switch hours or shifts with plaintiff. Plaintiff was not interested in either of the alternative suggestions, stating that he did not want to work third shift because it was the worst shift to work.

Due to market changes, IPC had a significant economic downturn causing it to close several plants and reduce its total employees from 1100 to fewer than 400. As a result of IPC’s economic downturn, IPC made efforts to streamline its processes, eliminate waste and become more efficient. One of IPC’s first moves was promoting Messersmith to print manager in January 2005, giving Messersmith the specific goal to “change [the] culture of the press room”

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<sup>1</sup> The Seventh Day Adventist Church also sent a letter to IPC on plaintiff’s behalf on May 3, 2004. Although plaintiff has yet to be baptized as a Seventh Day Adventist, the Seventh Day Adventist Church opines that plaintiff’s beliefs in the religion are sincere and that he is 95 percent toward meeting his baptismal requirements.

because “operator complacency” had been a major factor in IPC’s recent economic downturn. As newly appointed print manager, Messersmith immediately evaluated all 38 press operators. Plaintiff was one of the operators whose performance stood out as unacceptable,<sup>2</sup> and as a result was placed on a performance improvement plan (PIP) on February 4, 2005.<sup>3</sup> Plaintiff’s PIP stated that his current efficiency level was 50 percent, plaintiff’s goal was to “reach and maintain 100% efficiency,” and noted that plaintiff would periodically meet with management to discuss his progress. Other operators, who were not Seventh Day Adventists, were also placed on PIPs on February 4, 2005. On November 2, 2005, four additional operators were also placed on PIPs.

From February 4, 2005 to February 17, 2005, plaintiff’s efficiency went up 20 percent, and Messersmith went out of his way to praise plaintiff for his improvement. Shortly thereafter, plaintiff’s efficiency started to drop again. On March 16, 2005, plaintiff met with management to discuss methods that could help improve his efficiency. It was suggested that plaintiff reduce his “getting ready time,” cut down on his internet time, and reduce the amount of smoke breaks that he took. Plaintiff was given a revised goal of reaching 70 percent efficiency by October. Plaintiff admitted that this was a reasonable goal and that IPC has a legitimate business interest in having its employees achieve and maintain a high level of efficiency. Plaintiff testified in his deposition as follows:

Q Okay. You would at least agree with me, wouldn’t you, that IPC has a legitimate business interest in an operator’s machine efficiency? You would agree with that, wouldn’t you?

A In all aspects of it, the quality, the efficiency, paper waste.

Q And Machine efficiency?

A Yeah, that’s one out of the three things. Yes.

Q So IPC has a legitimate business interest in an operator’s machine efficiency; correct?

A Yes

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<sup>2</sup> Messersmith noted that during plaintiff’s last performance evaluation (November 15, 2004), plaintiff had been told to increase his efficiency. However, plaintiff’s efficiency level had actually dropped from 74 percent to 50 percent in the time between his last performance evaluation and Messersmith’s January 2005 evaluation, making plaintiff the least efficient operator at IPC.

<sup>3</sup> Plaintiff believes that he was only placed on a PIP because of his prior accommodation requests and his January 19, 2005, request to view his personnel file, which was honored on February 1, 2005.

Q Okay. So 70 percent is a reasonable goal?

A I believe so.

Plaintiff failed to meet his goal. As a result of this failure, on October 21, 2005, IPC warned plaintiff that he needed to take immediate action to improve his efficiency and would be terminated if he could not do so. IPC told plaintiff that his efficiency must be above 60 percent by the following week and must continue to increase at least two percent every week until reaching 76 percent, and thereafter must stay above 70 percent at all times. For the week ending November 13, 2004, plaintiff's stated revised goal was 64 percent, yet plaintiff's efficiency for that week was only 59 percent.

On November 14, 2005, plaintiff was terminated for failing to meet his modified PIP goal and for overall substandard performance. Plaintiff's year to date efficiency at the time he was fired was 57 percent, which was the lowest amongst all operators. Plaintiff admitted that his machine efficiency was unacceptable.

Q For an entire month, taking into account the peaks and the valleys, is 54 percent an acceptable number?

A No. It should be higher than that.

\* \* \*

Q But you would agree with me that 56 percent is not getting the job done?

A If all the numbers are accurate, no. That'd be on the low side.

On June 30, 2005, plaintiff filed a complaint alleging that IPC violated the ELCRA by failing to accommodate plaintiff's Seventh Day Adventist beliefs by making him work on the Sabbath. Plaintiff's complaint also alleged that IPC violated the ELCRA by discriminating against plaintiff in the terms, conditions and privileges of his employment because he was a Seventh Day Adventist, and violated the ELCRA and WPA by retaliating against plaintiff by placing him on a PIP and eventually firing him because he raised complaints concerning the ELCRA and requested to view his personnel file.<sup>4</sup>

On May 22, 2006, IPC filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). IPC argued that plaintiff's failure to accommodate claims should be dismissed pursuant to MCR 2.116(C)(8) because the ELCRA does not impose an affirmative duty upon employers to make reasonable accommodations. IPC further argued that plaintiff's religious discrimination claim under the ELCRA should be dismissed pursuant to MCR

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<sup>4</sup> Plaintiff's amended complaint, which was filed after plaintiff was fired on November 14, 2005, added that IPC violated the ELCRA and WPA by retaliating against plaintiff by firing him for filing an ELCRA claim.

2.116(C)(10) because plaintiff did not establish an adverse employment action other than being discharged, did not establish that he was qualified for his position, did not establish that he was treated differently than similarly situated employees, and did not establish that IPC's legitimate reasons for taking its challenged actions were pretextual and that its real reasons were discriminatory. Finally, IPC argued that plaintiff's retaliation claims under the ELCRA and WPA should be dismissed pursuant to MCR 2.116(C)(10) because plaintiff did not establish a causal connection between his request for his personnel file and the filing of his ELCRA claim with IPC's challenged actions of placing plaintiff on a PIP and discharging him for failing to meet those PIP goals. IPC further argued that even if it were found that plaintiff established a causal connection, plaintiff failed to establish that IPC's articulated reasons for taking its challenged actions were pretextual.

On June 12, 2006, plaintiff filed his answer to IPC's motion for summary disposition. Plaintiff argued that IPC's motion should be denied because, as to his discrimination claim, he established genuine issues of material fact regarding whether he had a genuine belief as a Seventh Day Adventist, that he was subjected to adverse employment actions because of his religious beliefs, that he was qualified for his job, and that similarly situated employees who were not Seventh Day Adventists were treated more favorably by IPC. Plaintiff further argued that he established retaliation claims under the ELCRA and WPA by establishing that he was put on an unreasonable PIP and subsequently discharged because he exercised his statutory right to request his personnel file and/or because he filed a claim under the ELCRA. Finally, plaintiff argued that IPC failed to rebut his claims by establishing a legitimate, non-discriminatory reason for placing him on a PIP and subsequently terminating him. Accordingly, plaintiff requested that IPC's motion for summary disposition be denied.

On June 19, 2006, the trial court heard the parties' arguments regarding IPC's motion for summary disposition. The trial court found that plaintiff did not make out a prima facie case for discrimination or retaliation because no evidence was presented that plaintiff was treated differently from similarly situated employees, and that even if plaintiff had established that he was treated differently, IPC articulated legitimate nondiscriminatory reasons for its actions, and no evidence was presented to suggest that IPC's reasons were pretextual. The trial court entered a formal order to this effect on July 10, 2006, granting IPC's motion for summary disposition under MCR 2.116(C)(8) regarding plaintiff's failure to accommodate claims,<sup>5</sup> and granting IPC's motion for summary disposition under MCR 2.116(C)(10) regarding plaintiff's remaining claims of discrimination and retaliation. Plaintiff appeals as of right.

### III. Standard of Review

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When deciding a motion

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<sup>5</sup> Plaintiff does not argue that the trial court erred when it granted IPC's motion for summary disposition in regard to his failure to accommodate claims.

for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

#### IV. Analysis

##### A. Discrimination Claim

We agree with the trial court that plaintiff failed to establish a prima facie case of religious discrimination under the ELCRA. Under the ELCRA,<sup>6</sup> an employer may not fail or refuse to fire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion. MCL 37.2202(1)(a). Absent direct evidence of discrimination,<sup>7</sup> a plaintiff must proceed under the shifting burdens of proof articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 462-464; 628 NW2d 515 (2001). To establish a prima facie case of discrimination under *McDonnell Douglas*, a plaintiff must prove that: (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 463. “Circumstances give rise to an inference of discrimination when the plaintiff ‘was treated differently than persons of a different class for the same or similar conduct.’” *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999) (citations omitted). Upon a showing of a prima facie case of discrimination, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for its action against the plaintiff. *Hazle, supra* at 464. Once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext. *Id.* at 464-466. A plaintiff can do so by showing that the reason has no basis in fact, by showing that it was not the actual factor motivating the decision, or by showing that the factors proffered were jointly insufficient to justify the decision. *Feick v Monroe County*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

Here, plaintiff failed to establish a prima facie case of discrimination because he did not present any evidence that established that he was treated differently than persons of a different class for the same or similar conduct. *Hazle, supra* at 463; *Wilcoxon, supra* at 361.<sup>8</sup> The

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<sup>6</sup> A claim for violation of the ELCRA may be brought within three years from the date of injury. MCL 600.5805(10); *Magee v Daimler Chrysler Corp*, 472 Mich 108, 113; 693 NW2d 166 (2005).

<sup>7</sup> Plaintiff does not allege that there is direct evidence of discrimination.

<sup>8</sup> Though plaintiff argues that IPC took numerous adverse actions against him, we will only  
(continued...)

evidence presented established that plaintiff was put on a PIP because he had an unacceptable level of machine efficiency, which he had previously been told to improve. Furthermore, other IPC operators, who were not Seventh Day Adventists, were also put on PIPs for having similar efficiency levels as plaintiff. Plaintiff, whose year to date machine efficiency was the lowest amongst all operators, was terminated for failing to meet the goals set forth in his modified PIP, while the operators who met their stated goals continued to work at IPC. Finally, plaintiff did not provide any evidence that any of the other Seventh Day Adventist employees at IPC, which includes Foster, were put on a PIP or terminated. In fact, the evidence presented establishes that Foster is still an IPC employee. Thus, plaintiff failed to establish that he was treated differently than persons of a different class for the same or similar conduct.

Moreover, IPC articulated a valid nondiscriminatory reason for plaintiff's termination by establishing that plaintiff failed to subsequently meet a reasonable PIP. Plaintiff has not met his burden of showing that IPC's proffered reasons were mere pretext. In fact, plaintiff admitted that his efficiency level was unacceptable, that IPC had a legitimate business interest in his level of efficiency, that his modified PIP goal of a 70 per cent efficiency level was reasonable, that he failed to meet his modified PIP goal and that his post modified PIP efficiency level was unacceptable. Thus, even if we were to conclude that plaintiff established a prima facie case of discrimination under the ELCRA, we must still conclude that the trial court did not err when it granted IPC's motion for summary disposition in regard to plaintiff's ELCRA discrimination claim. *Hazle, supra* at 463-466; *Wilcoxon, supra* at 361; *Feick, supra* at 343.

## B. Retaliation Claim

We also agree with the trial court that plaintiff failed to establish a claim of retaliatory discharge in violation of the ELCRA. The ELCRA prohibits an employer from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding or hearing under the act. MCL 37.2701(a). To establish a prima facie case of retaliation, a plaintiff must show: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg v Macomb Co Community Mental Health Services*, 472

(...continued)

address plaintiff's discrimination and retaliation claims in regards to IPC's termination of plaintiff's employment. IPC's denial of plaintiff's shift requests, putting plaintiff on a PIP, and conducting various tape recorded meetings with him are not considered adverse employment actions. *Pena v. Ingham County Road Com'n*, 255 Mich App 299, 311-314; 660 NW2d 351 (2003) (holding that for an employment action to be considered adverse, the action must typically consist of "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation"). See also, *Agnew v BASF Corp*, 286 F 3d 307 (CA 6, 2002) (holding that an employer's requirement that an employee comply with a PIP does not constitute an adverse employment action), and *Jones v City of Jackson*, 335 F Supp 2d 865, 870 (WD Tenn, 2003) (holding that denial of a shift request is not an adverse employment action).

Mich 263, 273; 696 NW2d 646 (2005) (citations omitted). To satisfy the causal connection requirement, the plaintiff must show that his or her participation in a protected activity was a “significant factor” in the employer’s adverse employment actions, not merely a causal link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). As is the case with a discrimination claim, if the plaintiff establishes a prima facie case, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for its action against the plaintiff, and once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext. *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000).

In this case, it is undisputed that plaintiff filed a lawsuit against defendant based on a violation of the ELCRA. Therefore, defendant was clearly aware that plaintiff engaged in a protected activity. It is equally clear that plaintiff’s termination from employment was an adverse employment decision. Therefore, the only remaining question is whether plaintiff created a question of material fact regarding whether there was a causal connection between the protected activity and the adverse employment decision. Here, the only evidence plaintiff relies on to establish a causal connection is timing, i.e., the fact that plaintiff was fired shortly after he filed an ELCRA claim. A plaintiff “must show something more than merely a coincidence in time between protected activity and adverse employment action.” *Garg, supra* at 286. Moreover, even assuming that the mere timing of IPC’s termination of plaintiff is sufficient to establish a causal connection, as previously discussed, IPC clearly cited a legitimate nonretaliatory reason for plaintiff’s termination and plaintiff failed to present substantive evidence from which a jury could infer that IPC’s cited reasons for plaintiff’s termination were mere pretext. Therefore, the trial court did not err when it granted IPC’s motion for summary disposition in regard to plaintiff’s ELCRA retaliation claim.<sup>9</sup>

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray

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<sup>9</sup> A plaintiff has substantially the same burden of proof under the WPA as he does under the retaliation provisions of the ELCRA, and thus, analysis under the WPA warrants “parallel treatment.” *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 610, 617; 566 NW2d 571 (1997). Thus, for the same reasons that we have upheld the dismissal of plaintiff’s ELCRA retaliation claim, we likewise conclude that the trial court properly granted IPC’s motion for summary disposition in regard to plaintiff’s WPA retaliation claim. *Id.*