

STATE OF MICHIGAN  
COURT OF APPEALS

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PHIL FORNER,

Plaintiff-Appellant,

v

ROBINSON TOWNSHIP BOARD,

Defendant-Appellee.

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UNPUBLISHED

August 18, 2009

No. 287384

Ottawa Circuit Court

LC No. 07-059371-CD

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

In this action alleging a violation of the whistleblowers' protection act (WPA), MCL 15.361 *et seq.*, plaintiff Phil Forner appeals as of right a circuit court order granting defendant Robinson Township Board summary disposition. We affirm.

I. Underlying Facts and Proceedings

In 1999, Robinson Township (the Township) hired Forner to perform mechanical inspections. Forner worked under the supervision of William Easterling, the Township's building official. In 2003, Forner began assisting Easterling with building code inspections and plan reviews. On January 18, 2005, a flood damaged approximately 46 homes located in the Limberlost and VanLopik subdivisions. Forner inspected the damaged structures and issued numerous construction code correction notices. Many of the notices suspended the residents' occupancy permits.

In March 2005, the Township Board of Trustees (the Board) conducted public meetings during which contractors and residents registered complaints about Forner. One complaint alleged that Forner's ownership of a heating and cooling service that performed work in the flood-damaged neighborhoods created a conflict of interest when Forner inspected jobs completed by other competing companies. During the March 21, 2005 meeting, the Board directed Forner "to fax violations to builders and to opt for better communication and clearer instructions on what needs to be done," and advised that it would review the new procedure in six months. On March 25, 2005, Forner emailed Bernice Berens, the Township supervisor, expressing "substantial concerns about how the public discussions ... were allowed to occur and continue at [sic] nauseam with regards to the unsubstantiated verbal complaints lodged against the mechanical inspection services I provide to Robinson Township." Forner further asserted in the email,

I trust that how the previous meetings were conducted was because of your inexperience as Supervisor and or a desire to do what you thought was best at the time for the citizens of Robinson Township. I truly hope that there is not some other reason for this that is not directly related to the proper performance of my inspection duties (like someone's personal agenda, wanting to replace me with PCI and or because of your daughter and son-in-law not wanting to install the minimum size attic access opening as required by code in their house last year) or that less than proper inspection services is [sic] being sought.

Forner sent a copy of the email to the Board members and the Township attorney.

On April 18, 2005, the Board approved a separation agreement with Easterling, and Forner agreed to assume Easterling's building official duties on an interim basis. At the Board's meeting on May 11, 2005, Forner presented a proposal for his continued operation of the Township's building department on a permanent basis. But on May 16, 2005, the Board voted to "place a help wanted ad for a Building Official" and solicit bids "from outside inspection companies." The Board's minutes reveal that Board members expressed a "consensus" that Forner would remain as the building official "in the interim." Forner continued to perform mechanical inspections.

Several applicants for the building official position appeared at the Board's June 9, 2005 meeting, including Forner. The Board's minutes recount that "[o]ur acting Building Official Phil Forner previously submitted a plan to officiate the Building Dept. part-time and do the inspections." Forner also presented a plan "as an outside contractor." The Board opted to use a third-party inspection service rather than an "in-house building dep[artment]." The minutes of a June 15, 2005 Board meeting document that Forner and Doug Hopkins, the owner of Imperial Municipal Services, presented proposals to officiate the Township's building department. On June 20, 2005, Forner and Hopkins again discussed their proposals with the Board, which voted to "set a time to start contract negotiations with Imperial Municipal Services" and agreed to pay Forner for "work done as building official to date and as needed."

At a special meeting on June 28, 2005, the Board directed Ron Bultje, the Township's attorney, to draft a contract between the Township and Imperial. On July 13, 2005, the Board authorized Berens and the Township clerk to sign the contract with Imperial. The minutes of the closed session of the Board's July 13, 2005 meeting recount that "Bernice Berens indicated that as of today, Phil Forner is no longer the Building Inspector for the Township, other than wrapping up some pending applications outside the flood area. She indicated that otherwise, Imperial Municipal Services would take over effective immediately." The parties agree that after July 13, 2005, Forner continued to perform mechanical inspections, but no longer performed any building inspections on new building permits or on open building permits within the flood area.

In July and August 2005, Forner notified Hopkins that several residents of the flood area had returned to their homes, despite their lack of occupancy certificates. Forner further advised Hopkins regarding new code violations involving these homes and others in the neighborhood.

Hopkins took no action, and on September 14, 2005 Forner submitted an appeal to the Robinson Township Construction Board of Appeals, contending that Hopkins had failed to properly enforce the Michigan Residential Code (MRC).<sup>1</sup>

In a July 29, 2005 letter to the Grand Haven Tribune, Forner expressed disappointment concerning Berens's decision "to reassign my building inspection duties by orchestrating the contracting of a [sic] out-of-town inspection company[.]" Forner further asserted, "I guess re-assignment or worse is what happens to a township building inspector who does not follow Supervisor Berens' instructions to stay off Limberlost and VanLopik and instead uniformly enforces the state building code by performing requested inspections for those who are trying to legally re-occupy and issues correction notices to those who are obviously violating the code."

About two weeks later, Forner sent a letter to the Board requesting that it "reconsider and reverse" its decision to relieve him of building inspection duties. The letter asserted,

. . . I don't think the Township should discriminate against me and reassign me because I refused to abide by Supervisor Berens' directive to not go on VanLopik or Limberlost; which I construed as unlawful pursuant to Section 23 of the Stille-DeRosette-Hale Single State Construction Code Act, being MCL 125.1523. Nor should I be discriminated against and reassigned because I made it clear that I was going to follow the law in the flood-damaged areas and was going to report anyone who wasn't.

Forner's letter demanded "a public apology from Supervisor Berens," and a "formal resolution unanimously adopted by the Township Board affirming my handling of the flood-damaged area along with actual demonstrated enforcement of or compliance with all applicable portions of the state building codes and the Township Zoning Ordinance." Forner sent copies of the letter to Bultje and three newspapers.

At a special meeting on September 15, 2005, the Board discussed multiple complaints concerning Forner and voted to schedule a "disciplinary/termination hearing." On September 30, 2005, Bultje sent Forner a "Notice of Disciplinary Hearing," reciting the Township's concern that "to the extent you inspect work which you attempted to obtain for yourself or your company but were unsuccessful, and even to the extent you simply inspect work performed by your competitors, there may be a conflict of interest which would be inappropriate pursuant to Section 7.16 of the Robinson Township Personnel Policies and Procedures Manual[.]" Bultje

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<sup>1</sup> Forner ultimately appealed the Township's asserted failure to enforce various codes to the Construction Code Commission's Bureau of Construction Codes, and to this Court. This Court held that Forner lacked standing to pursue his claim against the Township. *Forner v Robinson Twp*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2007 (Docket No. 269127). Forner filed an unrelated appeal with the Township's Construction Board of Appeals in November 2005, and that claim eventually reached this Court. This Court again held that Forner lacked standing to raise his claims. *Forner v Robinson Twp Bldg Dep't*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2009 (Docket No 282007).

additionally informed Forner that Berens did not plan to issue a public apology, and that the Board would not approve a resolution affirming Forner's work. The letter concluded, "The Township is concerned that the relationship between you and the Township Board has therefore been tainted to the point that it may no longer be viable, since by the terms of your letter there will not be an 'acceptable resolution.'"

On October 7, 2005, six days before the scheduled disciplinary hearing, Forner filed suit against the Board in the United States District Court for the Western District of Michigan, alleging claims under 42 USC 1983 and the WPA. At the conclusion of the October 13, 2005 disciplinary hearing, the Board terminated Forner as the Township's mechanical inspector.

On August 8, 2007, the United States District Court granted the Board summary judgment with respect to Forner's § 1983 claim, and dismissed the WPA count without prejudice. On September 7, 2007, Forner filed this action against the Board in the Ottawa Circuit Court, alleging that two Township actions regarding his employment had violated the WPA: the Board's determination "not to permanently promote Plaintiff as its chief enforcing agency and instead restrict[ing] Plaintiff from doing building inspections in the area affected by the 2005 Flood," and its decision to fire him as the Township's mechanical inspector. According to the complaint, Forner's reports of violations or suspected violations of the Construction Code Act and the MRC motivated the Board's decisions.

In December 2007, the Board moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). With respect to subrule (C)(7), the Board maintained that the statute of limitations had expired on Forner's claims involving the Board's failure to hire him as its building official and the elimination of his building inspection duties. The Board also insisted that all of Forner's complaint allegations were dismissible under subrule (C)(10) because (1) Forner failed to present evidence of causation, (2) Forner did not engage in a protected activity under the WPA, and (3) legitimate business reasons supported its employment decisions.

On February 14, 2008, the circuit court entered an opinion and order granting summary disposition under both subrules (C)(7), in part, and (C)(10). After Forner moved for reconsideration, the court ruled that it had prematurely decided the (C)(10) portion of the Board's motion without affording Forner adequate time to complete discovery. The court permitted Forner 28 days to review requested discovery materials, and ordered that the parties could submit supplemental briefs and exhibits "not exceed[ing] 15 pages in length." In May 2008, the Board filed a renewed motion for summary disposition, and in June 2008 Forner responded with a brief and exhibits totaling approximately 300 pages. The circuit court determined that Forner failed to identify any documents that weighed against summary disposition and reaffirmed its prior ruling.

## II. Summary Disposition Standard of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion for summary disposition brought under MCR 2.116(C)(7) does not test the merits of a claim, but rather certain defenses that may eliminate the need for a trial. *DMI Design & Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 208; 418 NW2d 386 (1987). Although neither party need file supportive material, we will consider any submitted, admissible evidence supporting or opposing the plaintiff's claims.

*Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006). “[T]he plaintiff’s well-pleaded factual allegations, affidavits, and other admissible documentary evidence are accepted as true and construed in the plaintiff’s favor, unless contradicted by documentation submitted by the movant.” *Id.* If no material facts remain in dispute, this Court’s analysis under subrule (C)(7) parallels that employed under (C)(10). *Id.* at 111-112.

“Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion invoking subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh, supra* at 621. “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.” *West, supra* at 183.

### III. Summary Disposition Analysis

#### A. Statute of Limitations

Forner first contends that the circuit court erred by granting partial summary disposition on the basis of the statute of limitations. Forner avers that the circuit court’s calculation of the statute of limitations with respect to the Board’s restriction of his inspection duties failed to take into account that 28 USC 1367(d) affords an additional 30 days of tolling after a federal court’s dismissal of a supplemental state action. The Board concurs that the tolling provision in § 1367(d) would have defeated its motion for partial summary disposition, but asserts that partial summary disposition was nevertheless appropriate because Forner’s work restriction claim accrued on June 20, 2005, not July 13, 2005, and that an extra 30 days of tolling would not render this claim timely.

The WPA mandates that a person claiming a violation of the act must bring a civil action within 90 days after the occurrence of the alleged violation. MCL 15.363(1). The circuit court determined that Forner’s WPA claim involving retaliatory work restrictions accrued on July 13, 2005, when the Board ordered him to refrain from performing any inspections in the flood area and eliminated all of his building inspection duties. The circuit court acknowledged that Forner timely filed his WPA claim in federal court 85 days later, on October 7, 2005. When the federal court dismissed Forner’s WPA claim on August 8, 2007, 30 days passed before Forner filed his complaint in the circuit court. The circuit court calculated that irrespective of any tolling while the case pended in federal court, 115 days elapsed between the July 13, 2005 Board decision and Forner’s filing of this complaint in state court, rendering untimely his retaliatory work restriction

claim. But the parties now agree that if Forner's claim accrued on July 13, 2005, the 30-day tolling allowance contained in § 1367(d) would require a finding that he timely filed the claim.<sup>2</sup>

The WPA limitation period accrues with the occurrence of the alleged violation of the act. *Joliet v Pitoniak*, 475 Mich 30, 40; 715 NWd 60 (2006). The Board suggests that the alleged violation of the act in fact occurred at the June 20, 2005 meeting, when the Board rejected Forner's application to provide building inspection services and decided to negotiate with Imperial. However, Forner's complaint does not allege a WPA violation solely on the basis of the Board's decision to enter into a contract with Imperial. Forner asserts that the Board violated the WPA when it "chose not to permanently promote" him to the building official position *and* when it "instead restricted Plaintiff from doing building inspections" in flood area and elsewhere. The minutes of the Board's closed session on July 13, 2005 document that Berens announced that "*as of today* Phil Forner is no longer the Building Inspector for the Township[.]" (Emphasis added). Because the Board did not allegedly violate the WPA until it actually stripped Forner of all building inspection duties, we agree with the circuit court that Forner's retaliatory work restriction claim accrued on July 13, 2005. And because § 1367(d) plainly affords Forner an additional 30-day tolling period in which to refile his state law claims, the circuit court incorrectly granted summary disposition in part premised on subrule (C)(7).

## B. Merits of Forner's WPA Claims

### 1. Forner's Supplemental Brief

Forner initially challenges the circuit court's decision to review only the first 15 pages of his supplemental brief in opposition to the Board's renewed motion for summary disposition. However, Forner does not identify any specific argument or exhibit in his supplemental brief that would have created a factual dispute or shown legal error by the circuit court in granting the Board summary disposition. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Moreover, after our de novo review of Forner's submissions, we detect no information that would have altered the circuit court's substantive summary disposition analysis.

### 2. Adverse Employment Action

Forner next insists that because the circuit court fundamentally misconstrued his claim about the restriction of his building inspection duties, it erroneously concluded that the Board's

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<sup>2</sup> Forner raised this issue in the circuit court in a motion for reconsideration filed after the court granted summary disposition for the second time. The circuit court refused to consider it because it presented "a new legal theory" and the Board had no opportunity to respond. Despite Forner's failure to preserve this question, we elect to review it because it involves a legal question and all relevant facts are readily available. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004).

July 13, 2005 decision did not constitute an adverse employment action. In the opinion and order granting summary disposition, the circuit court reasoned,

[P]laintiff understood that he was to perform the duties of the building official on an interim basis and only until the Board had sufficient time to hire a new building official to replace Mr. Easterling. Therefore, the transfer of the duties of the building official from the plaintiff to Mr. Hopkins did not constitute “adverse employment action” as contemplated by the WPA. Since the transfer decision did not constitute adverse employment action, we need not and do no[t] reach the issues of causation, legitimate business reason, or pretext.

We agree with Forner that the circuit court misconstrued Forner’s allegations relating to the Board’s July 13, 2005 decision. The complaint asserted that on July 13, 2005, the Board directed that Forner perform no further building inspections. Forner had previously conducted building inspections under Easterling, despite that Forner did not hold the building official position. In an affidavit, Forner asserted that the Board’s action “took away approximately half of my inspection income.”

“Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as ‘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.’” *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003) (citations omitted). Here, record evidence establishes that Forner regularly performed building inspections before July 13, 2005, and that the Board’s decision to relieve him of these responsibilities significantly diminished his duties and occasioned a material reduction in benefits. At a minimum, a question of fact exists regarding whether Forner endured an adverse employment action when the Board directed that he perform no further building inspections except under limited circumstances. Consequently, the circuit court erred by granting summary disposition under subrule (C)(10) on the ground that Forner had not suffered any adverse employment actions arising from the Board’s July 13, 2005 decisions.

### 3. Legitimate Business Reasons

Forner next challenges the circuit court’s conclusion that the Board had legitimate business reasons to eliminate his building inspection duties and to fire him as the Township’s mechanical inspector.<sup>3</sup> Forner suggests that because the Board could have hired his company to perform building inspections or retained him as an independent contractor, it lacked a legitimate business reason to strip him of his building inspection duties. Forner also asserts that the Board failed to prove that a conflict of interest existed or that his relationship with the Board had been

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<sup>3</sup> The circuit court addressed whether legitimate business reasons existed for restricting Forner’s building inspection duties, despite that it had granted partial summary disposition of this claim under subrule (C)(7).

irretrievably tainted, and thus failed to prove legitimate purposes for its adverse employment decisions.

To establish a prima facie case under the WPA, a plaintiff must demonstrate that (1) he engaged in a protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). The circuit court ruled that Forner had engaged in a protected activity by reporting building code violations to a public authority, and that he had established causation by submitting an affidavit in which Easterling attested that at some unidentified time before April 13, 2005, Berens had expressed a desire to “get rid” of Forner because he had “enforced the MRC” when inspecting a home built by Berens’ daughter and son-in-law. We assume without deciding that Forner established a prima facie case under the WPA.

When considering WPA claims, we employ the burden-shifting analysis applicable to retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq.* *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If the plaintiff successfully demonstrates a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for its adverse employment action. *Id.* If the defendant produces evidence establishing the existence of a legitimate reason for its actions, the plaintiff may submit evidence supporting that the legitimate reasons offered by the defendant constituted merely a pretext. *Id.*

After Easterling retired as the Township’s building official, the Board considered several alternative methods for replacing Easterling. Ultimately, the Board elected to retain an outside agency to perform Township building inspections. The Board’s decision to consolidate all building inspection activities under the auspices of one central entity qualifies as a legitimate business reason for terminating Forner’s at-will, independent contractor building inspection responsibilities.

Forner claims that the Board’s decision to divest him of his building inspection duties lacks legitimacy because the Board could have contracted with Imperial and still retained him as an additional building inspector. This argument ignores that consistent with the WPA, an employer can fire an at-will employee for any reason or no reason, as long as the employer’s decision is not motivated by a retaliatory purpose. That the Board elected to outsource Forner’s inspection duties as part of its building department reorganization does not give rise to an inference that the Board had an improper motive. See *Carson v Bethlehem Steel Corp*, 82 F3d 157, 159 (CA 7, 1996) (“The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discriminatory].”).

The business reasons identified for Forner’s termination as the Township’s mechanical inspector also qualify as legitimate. Bultje’s notice of the disciplinary hearing informed Forner about the Board’s concern that Forner had a conflict of interest when he inspected mechanical work performed by his competitors. Standing alone, this ground sufficed to satisfy the Board’s burden of producing reasonable justification for its termination decision. The notice further apprised Forner that because the Board had rejected the demands in Forner’s August 15, 2005 letter, “the relationship between you and the Township Board has been tainted to the point that it may no longer be viable, since by the terms of your letter there will not be an ‘acceptable

resolution.” This ground additionally constitutes a legitimate, nondiscriminatory basis for termination.

Forner contends that his promise to forego working in the Township as a heating and cooling contractor gave rise to a material question of fact regarding the legitimacy of the Board’s decision to fire him. But this argument reveals a misapprehension of the shifting burden of proof applicable in WPA cases. “Once a defendant presents a legitimate nondiscriminatory reason rebutting a plaintiff’s prima facie case of discrimination, even if it is in the context of a motion for summary judgment, the plaintiff must put forth factual allegations to raise a triable issue of fact as to whether the proffered reasons were a mere pretext.” *Clark v Uniroyal Corp*, 119 Mich App 820, 825-826; 327 NW2d 372 (1982). “The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.” *Texas Dep’t of Community Affairs v Burdine*, 450 US 248, 254; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Because the Board put forth legitimate and nondiscriminatory reasons, these reasons satisfied the Board’s burden of production. Consequently, we reject Forner’s incorrect contention that the Board failed to produce legitimate business reasons for its decisions to restrict his building inspection duties and to fire him as its mechanical inspector.

#### 4. Pretext

Having found that the Board offered legitimate business reasons for its decisions, we now consider whether Forner has proffered evidence that creates a question of fact whether the reasons amounted to mere pretexts. Forner submits that his concession at the disciplinary meeting that “he was fine with the Board not choosing to do any of his August 15, 2005 suggestions,” and his offer not to compete for heating and cooling business in the Township, obviated the reasons advanced by the Board for his termination. According to Forner, because the Board nevertheless terminated him, the reasons it had advanced for its decision constituted pretexts. Forner additionally asserts that the Board’s actions were pretextual because Hopkins, members of the community, and a minority of the Board considered him cooperative, professional and well-qualified.

When an employer produces evidence demonstrating the existence of a legitimate business reason for an employee’s discharge, the employee must have an opportunity to prove that the legitimate reason offered was not the true reason, but only a pretext. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). “A plaintiff can prove pretext either directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Id.* The plaintiff bears the burden of casting doubt on the employer’s articulated reasons for an adverse employment decision. *Taylor, supra* at 659-660.

The evidence of pretext recited by Forner lacks any relationship to the Board’s stated reasons for relieving him of his building inspection duties and terminating him as the Township’s mechanical inspector. That Forner possessed building inspection skills does not discredit the Board’s decision to hire Imperial instead of him, or tend to demonstrate that the selection of Imperial qualified as retaliatory. Similarly, Forner’s competence does not serve to rebut that his repeated public criticisms of Board members established a legitimate, nonretaliatory basis for firing him. Forner’s letters to the editor and his emails to the Board include scurrilous and

inflammatory accusations of personal misconduct against Board members. In light of Forner's public misconduct, the Board had adequate grounds to terminate his position as the Township's mechanical inspector. Forner simply produced no evidence suggesting that the Board's preferred reasons for his discharge were weak or inconsistent with the facts. Because no evidence of pretext exists sufficient to create a genuine issue of material fact regarding the credibility of the Board's articulated reasons for Forner's termination, we conclude that the circuit court appropriately granted summary disposition of the entirety of the complaint pursuant to subule (C)(10).

Affirmed.

/s/ Donald S. Owens  
/s/ Michael J. Talbot  
/s/ Elizabeth L. Gleicher