

STATE OF MICHIGAN
COURT OF APPEALS

DONNA POPE,

Plaintiff-Appellee,

v

BRINKS HOME SECURITY COMPANY, INC.,

Defendant-Appellant,

and

MARK FALKIEWICZ,

Defendant.

UNPUBLISHED

March 1, 2011

No. 294600

Wayne Circuit Court

LC No. 07-707289-CD

DONNA POPE,

Plaintiff-Appellee,

v

BRINKS HOME SECURITY COMPANY, INC.,

Defendant,

and

MARK FALKIEWICZ,

Defendant-Appellant.

No. 294609

Wayne Circuit Court

LC No. 07-707289-CD

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial on plaintiff's claim brought under the Whistleblowers' Protection Act (WPA), MCL 15.361, *et seq.*, defendants appeal as of right the orders denying their motions

for judgment notwithstanding the verdict, a new trial, or remittitur. Because plaintiff has failed to establish a prima facie violation of the WPA, the trial court erred when it denied defendants' motion for JNOV, we reverse.

Defendant, Brinks Home Security Company, Inc., employed plaintiff, Donna Pope, as a security sales consultant (SSC) from March 2004 to January 23, 2007. Plaintiff testified that her pay was strictly commissions paid after installation of a system. Defendant, Mark Falkiewicz, was employed as a regional sales manager responsible for ten offices including plaintiff's office in Madison Heights, Michigan. As an SSC, plaintiff's job was to sell alarm systems and defendant paid her commissions based on her sales. Plaintiff testified that when she made a sale she called the National Service Center in Dallas and provided her name, employee number, and password. She said when the customer agreed to an installation date the customer signed a contract with white, canary, gold, and pink copies.

Plaintiff testified that the pink copies were her way of tracking her jobs and without them she had no way to match her installations and commissions. Plaintiff testified that she thought it was best to turn in pink copies on installed jobs for each pay period all at once because that made them easier to track. She said pinks were supposed to be turned in and admitted she was supposed to make copies of her pinks for her own records, but she did not always keep up with her copies, kept the pinks, or turned them in late. However, she stated that she came in before the commission report was sent to Dallas and went through each pink with the office coordinator. Plaintiff testified that reconciling her commissions was like taking a calculus test every two weeks.

Plaintiff testified that despite her diligent efforts, she noticed mistakes in her commissions. She explained that she could find some mistakes by checking Brinks's reports, but some sold and installed jobs never appeared on the report. Plaintiff testified that she was able to find some missing commissions before her paychecks were issued and she tried to catch and fix mistakes before they had to be corrected on the next paycheck. Plaintiff testified that she believed some of her commissions errantly went into a generic account, and it was her understanding that the generic account was supposed to be only for systems installed after an SSC left the company or for systems sold by managers and technicians. Plaintiff alleged that Brinks fraudulently paid managers bonuses from that account.

Falkiewicz testified that the SSCs turned in their sales for the pay period by a certain date, and the office coordinator printed up a report stating each SSC's installed sales, which were tracked daily via an activity log. He explained further that the coordinator would attach the report to the pink copies of the SSC's sales documents, if the SSC turned them in to the office. Falkiewicz testified that if the SSC did not turn in the pinks the coordinator had to use the activity log to determine what installations the SSC had that pay period. He said errors were possible if a customer was moving, a name was inputted incorrectly, or a customer was taking over a system that existed in the home and it was listed under the previous SSC's name. Falkiewicz testified that, just about every month, each SSC had an issue with his or her pay.

Falkiewicz stated that plaintiff complained she was not getting commissions for some sales. He said he was not positive that all mistakes had been remedied, but every SSC could look at the commission report each pay period to audit his or her commissions. He testified that, if the SSC audited the report, errors tended to be rare or minor like a missed service plan sale.

Falkiewicz admitted there were errors, but they were generally rectified the next pay period if brought to the office coordinator's attention. He recalled a SSC being paid for a sale made nine months earlier. Falkiewicz testified that plaintiff sometimes did not come in to audit her report before the report was sent, so mistakes were not caught until after she was paid.

Falkiewicz admitted that Brinks uses a generic account to keep track of sales made by general managers and technicians because they did not receive commissions and SSCs who had left the company before the installation. Falkiewicz said the generic account was not a slush fund and there was no benefit to the general manager or sales manager. He testified that assigning installations to the generic account was actually to the manager's detriment because it was not counted in the overall closing percentage and general managers received bonuses based on the branch's performance. Falkiewicz testified that plaintiff complained that a sale she made showed up in the generic account but said he would have expected it to be rectified once discovered.

Falkiewicz testified that he did not discourage SSCs from reporting errors. He testified that, if a SSC complained to him, he looked at the facts and checked the activity log to see if it was obvious and if not he asked the office coordinator to research it. Falkiewicz testified that the company's policy was no retribution for complaints, and the ethics code said employees should report ethics violations to their supervisor and then they could go to Brinks general counsel.

Falkiewicz testified that technical manager Richard Beckman called him on January 17, 2007 because office coordinator Lisa Gallu was concerned about her desk being disturbed at night and specifically was upset that someone had gone through her personal planner. Falkiewicz said he asked Beckman to review the security video of the office for the previous night and forward a copy to Falkiewicz. Falkiewicz stated he received a copy, probably on January 18, 2007, while still out of state, reviewed it, and forwarded a copy to human resources. Falkiewicz stated that he asked plaintiff to meet him on January 22, 2007 because he was flying in for the day and wanted to meet her face-to-face. He testified that he also talked to Gallu who said she felt her privacy was violated.

Falkiewicz testified that the video showed plaintiff arrived at the offices at 7:00 p.m. on January 16, 2007, keyed in her code, and turned two lights on. He admitted that he had asked her to stop in that day to drop off her pinks because Gallu had called him to complain. While the video was shown to the jury, Falkiewicz's testified that plaintiff looked through papers on Gallu's desk. Falkiewicz testified that Gallu kept stacks of pink sales copies on her desk with a commission statement on top stating what installations the SSC was being paid for that month. He admitted the information was kept in the open and it was not unusual for SSCs to stand at that desk and go through paperwork related to their job. Nothing was missing from the desk but Falkiewicz said he would have expected plaintiff to see her own pile. The video showed plaintiff taking something from the desk and walking to the scheduling board but he had no reason to believe it was not related to her employment. However, the video showed plaintiff looking through Gallu's personal daytime planner, which was left in the open. Plaintiff took an envelope out of the planner and opened it. Falkiewicz testified that Gallu told him it was a financial statement. Plaintiff then went into the general manager's office and did not turn on the light. Falkiewicz explained that proprietary information was kept there, including employee personnel files with social security numbers. Plaintiff also visited the cubicle of another SSC, James

Scoco, three times, the last for ten minutes. Falkiewicz stated the video did not show what she did in the cubicle and, to his knowledge, she took nothing.

Falkiewicz said he wanted to give plaintiff an opportunity to explain, but she refused, which made him more suspicious. He testified that she did not want to view the tape and was very defensive when he asked her to explain her actions. Falkiewicz said plaintiff offered to turn in her keys and never visit the office at night. Falkiewicz said he told her he was going to talk to human resources and not make the decision himself. He testified that, on his way to the airport, he called human resources vice-president Stacy Rapier and together they came to the conclusion that it was a “terminable offense.” Falkiewicz said he asked himself whether he could feel good about sending her in someone’s home and felt a reprimand was not appropriate. Falkiewicz told plaintiff the next day over the telephone that her employment was terminated. Falkiewicz said plaintiff was fired because of all the activities she did in the office that evening, put together, and the amount of time she spent as shown on security video. He denied that plaintiff told him she was going to the attorney general or any governmental agency to lodge a complaint against defendants.

Rapier testified that plaintiff violated the ethics policy because of the amount of time she spent going through things that were not hers including the day planner and ten minutes in the cubicle. She testified that she concluded that plaintiff needed to be fired based on the episode in its entirety, her unwillingness to view the video, and her denial that her conduct was inappropriate. Rapier said they considered a lesser penalty but felt strongly that integrity was how someone behaved when no one was watching and the violations were severe. Rapier testified that she did not learn plaintiff complained to Falkiewicz regarding her commissions until this lawsuit, and plaintiff never brought any concerns to human resources. Rapier also testified that she had never heard that plaintiff threatened to lodge a complaint with the EEOC or attorney general, and in fact the first time she heard the allegation was in this lawsuit.

Plaintiff testified that she did watch the video with Falkiewicz on January 22, 2007 and he asked her to explain what she was doing. She stated that she told him she was tired of Brinks stealing her money, discriminating against her, and allowing people to cheat, so she was going to the EEOC and the attorney general to share her complaints. Plaintiff testified that Falkiewicz said he was tired of her complaining, she complained more than his wife, and she was going to be out of a job anyway. Plaintiff stated that he told her he was going to fire her because she was threatening him. Plaintiff said she did not believe Falkiewicz and did not contact human resources about his threat to fire her. Plaintiff testified that she did not take any steps toward filing a complaint with the EEOC or the attorney general because, after consulting with her family, she felt it best to hire an attorney.

At the close of testimony, a single issue was submitted to the jury, whether defendants’ termination of plaintiff constituted a violation of the WPA, MCL 15.361. Stating that the attorney general’s office was a public body for reporting wages and commissions issues that could bring criminal charges and force injunctions, the trial court held that it was a jury issue whether plaintiff was going to report the commission issues to the attorney general. After the trial court denied defendants renewed motion for a directed verdict following the close of the evidence, the matter went to the jury. The jury found for plaintiff. Defendants moved for JNOV and a new trial. The trial court denied the JNOV motion, holding that there was sufficient

evidence to support the verdict. Defendant sought a new trial or remittitur which the trial court also denied. Defendants now appeal as of right.

Defendants argue an appeal that the trial court erred when it denied their motion for JNOV because plaintiff failed to establish the requisite elements of her WPA claim. Defendants specifically assert that plaintiff failed to establish by clear and convincing evidence that she was about to report a violation of law to a public body. Plaintiff responds that the trial court correctly ruled when it denied defendants' motion for JNOV because plaintiff established all the requisite elements of her WPA claim by both direct and circumstantial evidence. This Court reviews de novo the trial court's denial of a motion for judgment notwithstanding the verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). When a party moves for judgment notwithstanding the verdict, the reviewing court should view the evidence and all legitimate inferences in the light most favorable to the non-moving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). The motion should be granted only if the evidence failed to state a claim as a matter of law. *Id.* If reasonable jurors could have reached different conclusions, the court should not substitute its judgment for the jury's. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

MCL 15.362 prohibits an employer from, among other things, discharging an employee because the employee "reports or is about to report" a violation or suspected violation of the law. MCL 15.362 provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body
.....

To establish a prima facie case under the WPA, "a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

To establish she was engaged in protected activity, plaintiff must prove she reported or was about to report a violation or suspected violation of a law or regulation to a public body. *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007); *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007). Pursuant to MCL 15.363(4), a plaintiff is required to prove by clear and convincing evidence that she about to report the alleged violations. MCL 15.363(4) states as follows:

An employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body.

Clear and convincing evidence is defined as

evidence that produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue Evidence may be uncontroverted, and yet not be ‘clear and convincing’ Conversely, evidence may be ‘clear and convincing’ despite the fact that it has been contradicted. [*Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000) (internal quotations and citations omitted).]

Defendants point out that the clear and convincing evidence standard is the most demanding standard in civil cases, requiring a firm belief that the allegations are true. See *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995); *Kefgen*, 241 Mich App at 625. However, according to *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604; 566 NW2d 571 (1997), while a plaintiff must establish by clear and convincing evidence that she was about to report a violation, “[a] plaintiff should not be required to say ‘magic words’ in order to reap the protections of the statute. It should be sufficient that plaintiff actually threatened to report her employer.” *Id.* at 616.

In the present case, the entirety of plaintiff’s evidence that she was “about to report” a violation was her testimony that she told Falkiewicz at the January 22, 2007 meeting that she was going to report commission stealing and other alleged unethical behavior to the EEOC and attorney general. Falkiewicz denies that plaintiff told him that she was going to make a complaint with either the EEOC or the attorney general. Plaintiff testified that she requested the meeting with Falkiewicz because she was fed up with defendants’ practices. Falkiewicz testified that he called plaintiff into his office to ask her to explain her actions on the video after he returned to Michigan. The day after their in-person meeting, Falkiewicz told her she was fired. Plaintiff testified that she did not take any steps toward filing a complaint with a public body because, after her conversation with Falkiewicz and consultation with her family, she decided it was best to hire an attorney. Plaintiff made no report subsequent to her termination to either the EEOC or the attorney general.

In *Shallal*, 455 Mich at 611-621, the Court examined what constituted being “about to report” a violation. The Court found it sufficient that the employee threatened to report if the employer did not straighten up, discussed the violations with her supervisor and coworkers, and noted in her calendar times that she had discussions with others regarding the need to report. *Id.* at 620-621. In *Shallal*, there was no dispute that the plaintiff actually expressly threatened her supervisor that she would report his drinking on the job and misappropriation of funds if he did not “straighten up” when she made the following statement to him during a meeting:

[I]t’s all your fault. This agency is going down the drain because you’re the one that has no interest, has no commitment. You’re so busy drinking and misusing money that you don’t care.

And if you don’t straighten up . . . I will report [you] to the department, to the board, anybody, everybody. [*Id.* at 613-614.]

The Court stated, “[p]laintiff’s conditional threat to her employer was credible evidence that she had finally decided that she was going to report him.” *Id.* at 616.

In *Lynd v Adapt, Inc*, 200 Mich App 305; 503 NW2d 766 (1993), this Court found that the plaintiff made several attempts to remedy the violations at issue by reporting them to supervisors as well as the board of directors. It was undisputed that the plaintiff also contacted her state representative to ask whom she should contact to report the violations. Even though the plaintiff was then discharged, the plaintiff still filed her complaint with the Department of Social Services. That she actually followed through with filing her complaint was some evidence of her pre-termination decision to report and statement that she was “about to report.” This Court found that the plaintiff had presented enough evidence to support her assertion that she was “about to report” when she was terminated. *Id.*

In *Lynd*, we can see an obvious continuum of reporting behavior where the plaintiff complained to coworkers, then more than one supervisor, then persons of higher authority, namely the board of directors. When those parties did not aid the plaintiff, she sought advice in furtherance of her reporting behavior, i.e. contacting her state representative to ask for assistance in identifying exactly to whom she should report her complaint. Though the plaintiff was ultimately terminated, the plaintiff still filed her complaint with the Department of Social Services. Again, the fact that the plaintiff actually followed through with the filing of her complaint was corroborating evidence of her pre-termination decision to report and statement that she was “about to report.” Providing evidence of the gradual crescendo of her course of actions lends credibility to and corroborates the plaintiff’s statement that she was “about to report” when she was terminated. *Lynd*, 200 Mich App at 305.

In the present case, although plaintiff likewise complained about the commission issues to coworkers and her supervisor, that is where the similarities between the instant case and *Lynd* end. Here, there is no continuum of reporting behavior. Though plaintiff had the opportunity to, she never complained to other supervisors, upper management in Texas, or human resources. Plaintiff here had clear avenues to report including taking them to human resources staff or using the hotline number posted on an ethics poster in the office. Rapiert testified that the principles of ethics poster provided outlets for reporting violations, including a 1-800-hotline that, at the time of plaintiff’s employment, went directly to Brinks’s general counsel in Virginia and could be used anonymously. Plaintiff could have utilized the 1-800 ethics hotline to immediately and anonymously, if she chose, directly contact Brink’s general counsel about her issues. There is no evidence that plaintiff inquired of anyone to whom she should report the violations to, either inside or outside of Brinks. In fact, other than stating to Falkiewicz that she was going to complain, there is no evidence in the record that she actually took any other steps at all. Plaintiff provided no third-party testimony bolstering her statement that she was about to report. And ultimately, plaintiff did not file complaints with either the attorney general or the EEOC as she stated she was going to, unlike the plaintiff in *Lynd* who followed through and filed her complaint with the Department of Social Services consistent with her verbal threat to report. *Lynd*, 200 Mich App at 305. Unlike the record in *Lynd*, the record here does not provide a series of events consistent with reporting behavior that taken in their entirety would provide some corroborating evidence that plaintiff was actually about to report a violation.

In *Shallal*, there was no issue with regard to whether the plaintiff actually made the statement to her superior that she would report him to “the department, to the board, anybody,

everybody.” *Shallal*, 455 Mich at 614. Here, whether plaintiff actually made the threat to Falkiewicz is at issue by virtue of Falkiewicz’s denial and Rapier’s testimony that she spoke with Falkiewicz shortly after his discussion with plaintiff and that she had never heard that plaintiff threatened to lodge a complaint with the EEOC or attorney general, and in fact the first time she heard the allegation was when plaintiff filed her lawsuit. All the evidence plaintiff has presented on the issue is her own testimony that she told Falkiewicz that she was going to report defendants to the EEOC and the attorney general. Unlike the plaintiff in *Lynd*, plaintiff does not provide any corroborating evidence to support her factual assertion that she was actually about to report. *Lynd*, 200 Mich App at 305.

The legislature was clear in its directive that under the WPA, a plaintiff is required to prove by “clear and convincing evidence” that she was actually going to report alleged violations. MCL 15.363(4); *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). Although plaintiff stated that she had threatened to report to a public body, Falkiewicz denied that this statement was ever made. While plaintiff’s own testimony is certainly enough to create a question of fact for the jury with regard to whether she made the threat to Falkiewicz and was about to report, it is not enough to meet the requisite clear and convincing standard in MCL 15.363(4). Also importantly, plaintiff testified that after the conversation with Falkiewicz, “I thought it best and after consulting with my family, based on this situation . . . I thought it best that I hire an attorney.” It is not sufficient that defendants thought plaintiff was going to report alleged violations of law if she was not actually about to report. See *Chandler*, 456 Mich at 399. Her statement alone, without more, is simply not sufficient to establish “in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established” *Kefgen*, 241 Mich App at 625.

We conclude that plaintiff’s single, unsubstantiated, uncorroborated statement does not meet the clear and convincing standard under the WPA. As such plaintiff has failed to establish a prima facie violation of the WPA and the trial court erred when it denied defendants’ motion for JNOV on that basis. Because of our conclusion on this issue, we need not address defendants’ additional bases for reversal.

Reversed. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219(A).

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio