

STATE OF MICHIGAN
COURT OF APPEALS

RONALD L. VANDERLAAN, M.D.,
Plaintiff-Appellant,

UNPUBLISHED
January 31, 2012

v

MICHIGAN MEDICAL, P.C., ROBERT
WOLYN, M.D., and ALLYN R. LEBSTER,

No. 300660
Kent Circuit Court
LC No. 07-013018-CD

Defendants-Appellees.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

In this action brought under the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, plaintiff Ronald L. Vanderlaan, M.D., appeals as of right the trial court's order granting summary disposition in favor of defendants Michigan Medical, P.C. (MMPC), Robert Wolyn, M.D., and Allyn R. Lebster pursuant to MCR 2.116(C)(10). We affirm.

I

This case arises from the termination of plaintiff's employment by his employer, MMPC. Wolyn was one of the partners in plaintiff's former practice group with MMPC and also the site leader for part of the time period at issue in this case. When plaintiff was terminated, Lebster was MMPC's chief operating officer and oversaw compliance issues at MMPC. Janet Miller was the practice manager for plaintiff's office. Dr. Duane Berkompas was another partner in plaintiff's office.

In the fall of 2007, MMPC began an investigation into allegedly inappropriate conduct involving plaintiff at two office parties; the investigation uncovered no violations of MMPC policy. Also during this time period, plaintiff's coworkers noticed that plaintiff began having drastic mood swings and behavioral issues and that plaintiff was acting irrationally. Around the same time, plaintiff expressed concerns to Wolyn and Lebster about compliance issues with MMPC's cardiac pacemaker clinic. Specifically, plaintiff believed that MMPC violated federal law by billing pacemaker work done by vendors without MMPC supervision or involvement.

On November 6, 2007, MMPC's board of directors sent plaintiff a letter demanding that he see a specific psychiatrist and receive a drug test by the end of the day on November 9, 2007. The letter informed plaintiff that he was suspended with salary and benefits pending compliance

with the psychiatric evaluation and drug test. The same day, plaintiff requested a personal meeting with MMPC's board of directors and stated that he would not meet with the psychiatrist until he spoke with the board. On November 10, 2007, Ted Inman, MMPC's chief executive officer, sent plaintiff a letter stating that MMPC intended to terminate plaintiff's employment in 30 days, unless plaintiff complied with the board's demand for the psychiatric evaluation and drug test. On November 29, 2007, plaintiff sent a letter to the Inspector General of the United States that expressed his concern about the compliance issues. On December 6, 2007, plaintiff's attorney sent MMPC a letter stating that plaintiff had been "subjected to, threatened with, and otherwise discriminated against with respect to his privileges of employment, compensation, ability to practice medicine, as well as the terms, conditions and locations of his cardiology practice, because of suspected violations of Medicare regulations and law that he has reported." On December 11, 2007, plaintiff received a formal letter of termination for his "failure and refusal to comply with the Board's directives issued . . . on November 6, 2007." The next day, plaintiff sued defendants, alleging that he was terminated in violation of the WPA for engaging in protected activity.

II

On appeal, plaintiff argues that the trial court erroneously granted summary disposition for defendants because there were genuine issues of material fact with respect to his WPA claim and the trial court misapplied WPA case law. We disagree.

"Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo." *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). We review a trial court's decision on a motion for summary disposition de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint. The movant must specifically identify issues to which it believes no genuine issue as to any material fact exists." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). "In opposition to the motion, the nonmoving party may not rest upon mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial." *Id.* "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*, 469 Mich at 183. "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." *Id.* The trial "court is not permitted to assess credibility, or to determine facts on a motion for summary [disposition]." *Oade v Jackson Nat'l Life Ins Co of Mich*, 465 Mich 244, 265; 632 NW2d 126 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

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, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

The WPA is a remedial statute and, therefore, is “liberally construed, favoring the persons the Legislature intended to benefit.” *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). Claims under the WPA are analyzed under a burden-shifting approach, where “the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge.” *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000). “To establish a prima facie violation of the WPA, a plaintiff must show that (1) the plaintiff was engaged in a protected activity as defined by the WPA, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge.” *Manzo*, 261 Mich App at 712; see also *Shallal*, 455 Mich at 610. “A protected activity under the act consists of ‘(1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation.’” *Manzo*, 261 Mich App at 712-713, quoting *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). “If the plaintiff succeeds [in establishing a prima facie case], the burden shifts to the defendant to articulate a legitimate business reason for the discharge.” *Roulston*, 239 Mich App at 281. If the defendant produces evidence demonstrating a legitimate business reason for the discharge, the “plaintiff must have an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.” *Id.* “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.* “In order for plaintiff's claim to survive the motion for summary disposition, plaintiff must demonstrate that the evidence in the case . . . is sufficient to permit a reasonable trier of fact to conclude that [plaintiff's protected activity] was a motivating factor in the adverse action taken by the employer.” *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 660; 653 NW2d 625 (2002) (quotation omitted).

In the present case, there is no dispute that plaintiff was discharged. Further, for purposes of the summary disposition motion, defendants conceded that plaintiff engaged in a protected activity. Thus, the question in this case is whether there was a causal connection between plaintiff's engagement in a protected activity and his termination.

We conclude that plaintiff failed to offer sufficient evidence establishing a causal connection between his termination and his engagement in a protected activity. Plaintiff has presented no evidence, other than temporal proximity, connecting his protected activity to his termination. A short time period between plaintiff engaging in protected activity and the termination of plaintiff's employment, without more, is insufficient to establish a causal connection between the termination and the protected activity. See *West*, 469 Mich at 186. While plaintiff, at various times before his termination, mentioned the compliance issue, we find that the evidence supports only that his primary concerns involved the investigation into his behavior at the two office parties and compensation for his employees. Plaintiff has not presented any evidence illustrating that, before the board expressed its intention of terminating him, defendants had notice that he was about to report the compliance issues to a public body. Indeed, the evidence illustrates that, when plaintiff expressed his concerns to Leebster, Leebster

assigned a subordinate, Shirley Santo, to follow up with plaintiff; however, plaintiff refused to cooperate and told Santo, “I think we should drop this particular line of investigation.”¹ Furthermore, throughout the process leading to plaintiff’s termination, it was clear that the basis for MMPC’s concern was plaintiff’s erratic behavior and inability to work with Wolyn, Berkompas, and Miller. Throughout the entire process, MMPC made it clear that they believed plaintiff needed an evaluation because of his hostile and disruptive interactions with his coworkers. The record is replete with evidence that supports MMPC’s conclusion that plaintiff was disrupting his coworkers. MMPC expressed a clear rationale for plaintiff’s termination: he failed to submit to their required psychiatric evaluation and drug test. This was a basis for termination under paragraph 8(f) of plaintiff’s employment agreement for refusal to comply with the board’s requirements. MMPC even informed plaintiff, after notifying him that he would be terminated in 30 days if he did not comply, that he could be reinstated if he complied “with these directives in a timely manner.” Plaintiff, inexplicably, refused to do so.

Importantly, “[t]he fact that a plaintiff engages in a ‘protected activity’ under the Whistleblowers’ Protection Act does not immunize him from an otherwise legitimate, or unrelated, adverse job action.” *Id.* at 187. An employee cannot rely on inferences that are “nothing more than pure conjecture and speculation” to create a fact issue sufficient to defeat a motion for summary disposition. *Id.* at 188. Here, plaintiff has failed to provide any factual basis for his belief that he was terminated due to reporting or being about to report a violation of the law and engaging in a protected activity.² Therefore, the trial court’s decision to grant summary disposition under MCR 2.116(C)(10) was proper because there was no dispute regarding the facts “upon which reasonable minds might differ.” See *id.* at 183.

We also conclude that, even if plaintiff could succeed in establishing a prima facie case, plaintiff could not demonstrate that the legitimate business reason provided by defendants for the discharge—plaintiff’s failure to submit to the psychiatric evaluation and drug test—was a

¹ Plaintiff presents this Court with a quotation from his deposition testimony in which he states that the chairman of MMPC’s board of directors, John MacKeigan, told him to “drop the pacemaker issue.” However, this portion of plaintiff’s deposition was neither filed nor an exhibit in the trial court. “On appeal, only discovery materials that were filed or made exhibits are part of the record on appeal.” MCR 2.302(H)(3). Therefore, this testimony is not properly before this Court, and we do not consider it. See MCR 2.302(H)(3); *Spiek v Mich Dep’t of Transp*, 456 Mich 331, 338 n 10; 572 NW2d 201 (1998).

² To the extent plaintiff argues he has a viable claim under the WPA because his lawyers’ December 6, 2007, letter establishes that his employer knew, prior to terminating him, about his reporting of suspected violations of Medicare regulations, such argument fails under *Shallal*, 455 Mich at 621-622, because plaintiff cannot use the WPA as a shield against being fired. By November 10, 2007, nineteen days before writing a letter to the Inspector General, plaintiff knew that he would be terminated if he refused to undergo drug testing and psychological evaluation within thirty days. Plaintiff fails to persuade us why the principles set forth in *Shallal* do not apply to the circumstances occurring after plaintiff became aware of his employer’s ultimatum if he failed or refused to undergo the drug testing and psychological evaluation directives.

pretext. Plaintiff has failed to present any evidence demonstrating that his involvement in a protected activity was a “motivating factor” for his discharge. See *Taylor*, 252 Mich App at 660. And, there is no evidence to suggest that defendant’s legitimate business reason was a pretext. Therefore, even if a prima facie case were established, the trial court’s decision to grant summary disposition would still be correct, albeit for a different reason. See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

Finally, we do not agree with plaintiff’s contention that the trial court erred in its application of WPA case law. The trial court properly applied the WPA case law previously discussed. Consequently, plaintiff has demonstrated no error requiring reversal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering