

STATE OF MICHIGAN
COURT OF APPEALS

DELORES RANKIN-CROSBY,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED

May 27, 2014

No. 313191

Muskegon Circuit Court

LC No. 11-047844-CZ

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right the trial court's entry of judgment in favor of plaintiff and the order awarding plaintiff attorney fees, costs, and interest. Defendant also appeals the trial court's earlier order denying defendant's motion for summary disposition and the court's opinion and order denying defendant's motion for judgment notwithstanding the verdict (JNOV). We affirm the trial court's denial of defendant's motions for summary disposition and JNOV, but reverse in part the court's order granting plaintiff attorney fees.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as an administrative assistant at the Muskegon Correctional Facility (MCF). She was also MCF's discriminatory harassment coordinator. At a weekly staff meeting in August 2010, MCF Warden Michael Curley allegedly became upset with Deputy Warden Sharon Walker and stated to Walker, "Kiss my ass, I want this shit done." Plaintiff sent e-mails about the incident to defendant's equal employment office (EEO), including an e-mail dated August 23, 2010. Defendant investigated plaintiff's report and informed Curley that he was the target of an investigation. Curley and others then informed some MCF staff members of the upcoming investigation. Subsequently, when defendant's investigator spoke with MCF staff members, everyone except plaintiff denied hearing Curley make the alleged statement.

Thereafter, defendant investigated plaintiff for submitting a false report about Curley. Defendant's investigator concluded that there was "no evidence" that Curley made the alleged statement, and further concluded there was evidence that plaintiff fabricated her allegation against Curley. On November 30, 2010, defendant discharged plaintiff for making a false report.

Plaintiff sued defendant for retaliatory termination under the Elliot-Larsen Civil Rights Act, MCL 37.2101 (CRA). Plaintiff asserted that her August 23, 2010, e-mail was a harassment

complaint under the CRA, and that defendant fired her in retaliation for submitting the complaint. Defendant moved for summary disposition, which the trial court denied.

A jury trial commenced in June 2012. At trial, plaintiff testified that she had “[n]o doubt at all” that Curley made the statement that she alleged. Walker, Curley, and other witnesses denied that Curley made the alleged statement. The jury found that plaintiff’s August 23, 2010, e-mail was protected activity, that defendant knew about plaintiff’s protected activity, and that plaintiff suffered an adverse employment action that was causally connected to her protected activity. The jury awarded plaintiff damages in the amount of \$224,406.

II. DENIAL OF SUMMARY DISPOSITION

On appeal, defendant first argues that the trial court should have granted its motion for summary disposition on the ground that plaintiff failed to establish a prima facie case of retaliation under the CRA. We disagree.

“We review the denial of a motion for summary disposition de novo. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the case. The moving party is entitled to a grant of summary disposition if the party demonstrates that no genuine issue of material fact exists.” *McGrath v Allstate Ins Co*, 290 Mich App 434, 438 n 1; 802 NW2d 619 (2010) (citation omitted). “A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ.” *Nuculovic v Hill*, 287 Mich App 58, 61-62; 783 NW2d 124 (2010).

The CRA prohibits an employer from discriminating “against an individual with respect to employment . . . because of religion, race, color, national origin, age, sex, height, weight, or marital status.” MCL 37.2202(1)(a). The CRA’s anti-retaliation provision, MCL 37.2701(a), provides that a person may not “[r]etaliat[e] or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.” See also *Barrett v Kirtland Community College*, 245 Mich App 306, 312; 628 NW2d 63 (2001).

This Court has interpreted the retaliation provision of the CRA, MCL 37.2701(a), to require that a plaintiff prove a prima facie case by showing:

(1) that the plaintiff 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. [*Id.* at 315 (quotation and citation omitted).]

“An employee need not specifically cite the CRA when making a charge under the act. However, the employee must do more than generally assert unfair treatment.” *Id.* at 318-319. “The employee’s charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA.” *Id.* at 319.

Defendant contends that plaintiff was not engaged in a protected activity that was known by defendant. According to defendant, Curley’s alleged statement was race and gender neutral,

and thus, plaintiff's August 23, 2010, e-mail was not a claim of unlawful discrimination pursuant to the CRA. Defendant also contends that plaintiff's August 23, 2010, e-mail did not constitute "fil[ing] a complaint" under the CRA, MCL 37.2701(a). We disagree with both contentions.

It was uncontroverted that plaintiff directed her August 23, 2010, e-mail to defendant's EEO and discriminatory harassment coordinator. The subject line of plaintiff's e-mail stated "Discriminatory Harassment." The body of plaintiff's e-mail stated that plaintiff was "bringing this matter to your attention" in her role as the MCF discriminatory harassment coordinator. Throughout defendant's investigation, plaintiff maintained that she sent the e-mail in her capacity as MCF's discriminatory harassment coordinator. Moreover, although defendant contends that plaintiff's August 23, 2010, e-mail did not constitute filing a complaint under the CRA, MCL 37.2701(a), the record before the trial court at the time of defendant's motion for summary disposition indicated that defendant's EEO head and defendant's investigator both considered the e-mail to be a complaint.

Viewing this evidence in a light most favorable to plaintiff and drawing all reasonable inferences in her favor, *Nuculovic*, 287 Mich App at 61-62, we conclude that there was a genuine factual issue regarding whether plaintiff's e-mail conveyed to defendant that she was "raising the specter of a claim of unlawful discrimination pursuant to the CRA." *Barrett*, 245 Mich App at 319. Accordingly, the trial court properly denied defendant's motion for summary disposition under MCR 2.116(C)(10). *Nuculovic*, 287 Mich App at 61-62.

III. DENIAL OF JNOV

Defendant next argues that the trial court erred by denying its motion for JNOV because, even if plaintiff established a prima facie case for retaliation, defendant articulated a legitimate reason for discharging plaintiff. Defendant did not present this specific argument to the trial court in the motion for JNOV.¹ Accordingly, the argument is unpreserved, and we review the trial court's decision for "plain error affecting substantial rights." *Local Emergency Fire Assistance Loan Bd v Blackwell*, 299 Mich App 727, 738; 832 NW2d 401 (2013). We find no plain error.

[R]etaliatory discharge actions under the CRA involve a burden-shifting framework. See *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000). Under this approach, the plaintiff must "present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff" was subjected to unlawful retaliation. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836

¹ In its brief on appeal, defendant asserts that "the trial court err[ed] in allowing the retaliation claim to proceed to trial and then upholding it after trial." This assertion suggests that defendant is challenging the trial court's denial of summary disposition, as well as the trial court's denial of defendant's motion for JNOV. To the extent defendant is challenging the denial of summary disposition on this ground, we conclude that plaintiff raised a genuine issue as to whether her protected activity was a motivating factor in her termination and, thus, the trial court properly denied defendant's motion for summary disposition under MCR 2.116(C)(10).

(2001) (emphasis in original). If the plaintiff establishes a prima facie case of retaliation, “the burden shifts to the defendant to articulate a legitimate business reason for” the adverse employment action. *Roulston*, 239 Mich App at 281. If the defendant produces evidence establishing the existence of a legitimate reason for the adverse employment action, “the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant’s reasons were not the true reasons, but a mere pretext for” the adverse employment action. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134; 666 NW2d 186 (2003). “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.” *Roulston*, 239 Mich App at 281.

In this case, defendant asserts that plaintiff was discharged for a legitimate reason, i.e., for making a false report. However, the evidence at trial was sufficient for the jury to infer that defendant’s reason was a pretext. Plaintiff testified that she was certain that Curley made the alleged statement to Walker. She maintained at trial that Curley and the witnesses to his alleged statement colluded and lied during defendant’s investigation. The trial testimony indicated that in breach of defendant’s investigative protocol, Curley and various witnesses had prior notice of defendant’s investigation and that they discussed plaintiff’s allegation before their respective investigation interviews. Thus, defendant has not shown plain error with regard to the denial of the JNOV.

IV. ATTORNEY FEES

Defendant argues that the trial court erred by awarding certain attorney fees under MCL 37.2802 for work performed by summer associate law students. We agree, in part.

“We review for an abuse of discretion a trial court’s award of attorney fees and costs. An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (citation omitted). This Court reviews de novo issues regarding the proper interpretation of a statute or court rule. See *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *State Treasurer v Snyder*, 294 Mich App 641, 645; 823 NW2d 284 (2011). “The primary goal of statutory interpretation is to ascertain and give effect to the legislative intent that may reasonably be inferred from the statutory language itself. If the plain and ordinary meaning of the statutory language is clear, then judicial construction is neither necessary nor permitted.” *State Treasurer*, 294 Mich App at 645 (internal citation and quotation omitted). “[T]he rules of statutory interpretation apply to both court rules and statutes.” *Brausch v Brausch*, 283 Mich App 339, 352; 770 NW2d 77 (2009).

The trial court granted plaintiff’s motion for attorney fees, costs, and interest pursuant to the remedies section of the CRA, MCL 37.2802. In addition to awarding plaintiff costs and interest, the trial court awarded \$133,508 in attorney fees: \$92,208 for work performed by her two attorneys; \$25,212.50 for work performed by a senior paralegal; and \$16,087.50 in attorney fees for work performed by “Paralegal/summer associates,” which was the term the trial court used for work performed by a legal assistant and two summer associate law students. On appeal, defendant asserts that “this Court should reduce the award of attorney fees by \$41,300.00 for the work done by Paralegal/Summer Associates.” However, a \$41,300 reduction in attorney fees

would be a combination of the trial court's award of \$25,212.50 for work performed by the senior paralegal and \$16,087.50 for work performed by "Paralegal/summer associates." Defendant's argument on appeal focuses on plaintiff's award of fees for work performed by summer associate law students. Thus, it appears that defendant is only challenging the trial court's \$16,087.50 award for work performed by the legal assistant and the summer associate law students.

The attorney fee provision of the CRA, MCL 37.2802, provides that "[a] court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." See also *Meyer v City of Centerline*, 242 Mich App 560, 575-576; 619 NW2d 182 (2000). "A party must be a 'financially successful or prevailing party' to be entitled to an award of fees and costs under MCL 37.2802." *Id.* at 576 (citations omitted). The party seeking fees "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1991), rev'd on other grounds by *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999).

MCL 37.2802 does not define "attorney fees" or indicate whether or under what circumstances an award of attorney fees may include work performed by paralegals, assistants, summer associates, interns, *et cetera*. MCR 2.626, however, provides a general provision regarding what may be included in an award of attorney fees:

An award of attorney fees may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan.

Article 1, Section 6 of the Bylaws of the State Bar of Michigan provides:

Any person currently employed or retained by a lawyer, law office, governmental agency or other entity engaged in the practice of law, in a capacity or function which involves the performance under the direction and supervision of an attorney of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts such that, absent that legal assistant, the attorney would perform the task, and which work is not primarily clerical or secretarial in nature, and:

- (a) who has graduated from an ABA approved program of study for legal assistance and has a baccalaureate degree; or
- (b) has received a baccalaureate degree in any field, plus not less than two years of in-house training as a legal assistant; or
- (c) who has received an associate degree in the legal assistant field, plus not less than two years of in-house training as a legal assistant; or

(d) who has received an associate degree in any field and who has graduated from an ABA approved program of study for legal assistants, plus not less than two years of in-house training as a legal assistant; or

(e) who has a minimum of four (4) years of in-house training as a legal assistant;

may upon submitting proof thereof at the time of application and annually thereafter become a Legal Assistant Affiliate Member of the State Bar of Michigan. [Bylaws of the State Bar of Michigan, Article 1, Section 6, <<http://www.michbar.org/generalinfo/bylaws.cfm#1>> (accessed February 28, 2014).]

See also *BJ's & Sons Const Co, Inc v Van Sickle*, 266 Mich App 400, 411; 700 NW2d 432 (2005).

Statutes and court rules that relate to the same subject should be read harmoniously where their plain language does not conflict. See *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 165; 665 NW2d 452 (2003); *Brausch*, 283 Mich App at 352. MCL 37.2802 and MCR 2.626 relate to the same subject—a trial court's award of attorney fees—and the plain language of MCL 37.2802 and MCR 2.626 do not conflict. MCL 37.2802 simply states that a trial court, "in rendering a judgment in an action brought pursuant to" the CRA, "may award all or a portion of the costs of litigation, *including reasonable attorney fees . . .*, to the complainant in the action if the court determines that the award is appropriate" (emphasis added). Nothing in the plain language of MCL 37.2802 conflicts with MCR 2.626's provision that "[a]n award of attorney fees may include an award" for work performed by "any legal assistant who" meets the criteria set forth in Article 1, Section 6 of the Bylaws of the State Bar of Michigan. Thus, when reviewing a trial court's award of "reasonable attorney fees" under the fee provision of the CRA, we read MCL 37.2802 in harmony with MCR 2.626.

In this case, plaintiff provided the senior paralegal's qualifications, which met the criteria of Article 1, Section 6 of the Bylaws of the State Bar of Michigan. MCR 2.626; *BJ's & Sons Const Co, Inc*, 266 Mich App at 411. In its response to plaintiff's motion for attorney fees, defendant did not argue that the senior paralegal's work failed to satisfy the requirements of MCR 2.626. Similarly, on appeal, defendant does not argue that the senior paralegal failed to meet the bylaws criteria or that the work she performed did not otherwise satisfy the requirements of MCR 2.626. In sum, the record before us indicates that the senior paralegal's work performed satisfied the requirements of MCR 2.626. *Meyer*, 242 Mich App at 575.

Regarding the work performed by the legal assistant and the two summer associate law students, however, plaintiff did not provide those individuals' qualifications. Rather, plaintiff's brief in support of her motion for attorney fees merely stated those individuals' hourly pay rates. Nothing in the record before us indicates that those individuals satisfied the criteria set forth in the Bylaws of the State Bar of Michigan, in accordance with MCR 2.626. Plaintiff, as the party seeking fees, had "the burden of establishing entitlement to an award" of attorney fees. *Howard*, 192 Mich App at 437. Plaintiff failed to meet her burden with respect to the work performed by the legal assistant and the summer associate law students. Accordingly, their work should not

have been included in the attorney fee award. We reverse the trial court's order granting plaintiff attorney fees to the extent that the court awarded plaintiff \$16,087.50 for the work performed by the legal assistant and the two summer associate law students.

V. CONCLUSION

Affirmed in part, reversed in part, and remanded for entry of a revised order on attorney fees consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell