

STATE OF MICHIGAN
COURT OF APPEALS

AZELARABE BENNANI,

Plaintiff-Appellant,

v

DEPARTMENT OF MANAGEMENT &
BUDGET,

Defendant-Appellee.

UNPUBLISHED

August 3, 2006

No. 259538

Ingham Circuit Court

LC No. 03-001658-NO

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

SMOLENSKI, P.J. (*concurring in part and dissenting in part*).

I concur fully with the majority's conclusion that the trial court erred when it dismissed plaintiff's PWDCRA claim on the basis that plaintiff's opposition to the allegedly discriminatory conduct was unreasonable. However, on de novo review, see *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005), I conclude that plaintiff presented sufficient evidence to create a question of fact on whether he engaged in conduct protected by the PWDCRA and whether defendant terminated his employment based on that conduct. Likewise, although defendant stated several legitimate reasons for plaintiff's termination, plaintiff presented sufficient evidence from which a reasonable finder of fact could conclude that the actual motivation was plaintiff's engagement in the protected activity. Because I would reverse and remand on that basis, rather than the more limited basis stated by the majority, I must respectfully dissent in part from the majority's opinion.

Defendant hired plaintiff in March 2000 as an Information Technology Manager in the Michigan Administrative Information Network Department. Plaintiff was informed in July 2000 that his performance was not satisfactory, and he was discharged in September 2000. As part of his duties, plaintiff was required to supervise programmer analyst Amy Geiger, who was hired several months before plaintiff. Geiger had multiple sclerosis, and defendant contends that his discharge resulted from his opposition to defendant's alleged discrimination against Geiger based on her condition in violation of MCL 37.1602(a).

Section 602 of the PWDCRA provides as follows:

A person or 2 or more persons shall not do the following:

(a) Retaliate 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. [MCL 37.1602.]

To establish a prima facie case of retaliation under this section of the PWDCRA, 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.” *Aho v Dep’t of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004). This Court construes the retaliation provision of the PWDCRA in accord with the retaliation provision of the Civil Rights Act (CRA). *Mitan v Neiman Marcus*, 240 Mich App 679, 681-682; 613 NW2d 415 (2000). This Court may also look to federal law for guidance in interpreting the PWDCRA. *Bachman v Swan Harbour Ass’n*, 252 Mich App 400, 417; 653 NW2d 415 (2002).

Once the plaintiff has established a prima facie case, “the burden shifts to the defendant to articulate a legitimate business reason” for the adverse employment action. *Aho, supra*, at 289, quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If the defendant is able to articulate a non-retaliatory reason for the adverse employment action, the plaintiff must prove that the business reason articulated by the defendant for the adverse employment action is merely pretext. *Id.* However, where the plaintiff presents direct evidence that the adverse employment action was motivated by plaintiff’s engagement in protected activity, the plaintiff can go forward as in any other civil case without recourse to the burden shifting approach. See *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001) (interpreting the CRA).

In order to meet the first element of a retaliation claim under MCL 37.1602(a), the plaintiff must demonstrate either (1) that he or she opposed a violation of the PWDCRA or (2) that he or she made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding, or hearing under the PWDCRA. *Bachman, supra* at 435. “Thus, if a person satisfies the requirements under either of these two prongs of MCL 37.1602(a), then the person is said to be engaging in a ‘protected activity.’” *Id.* Furthermore, where the plaintiff claims that he or she engaged in a protected activity by opposing a violation of the PWDCRA, in order to establish the second element of a prima facie case, the plaintiff must present evidence that he or she gave sufficient notice to the defendant to apprise the defendant that he or she objected to a violation of the PWDCRA. *Id.*

At his deposition, plaintiff testified that he came to believe by August 2000 that various managers were planning to fire Geiger based on her multiple sclerosis. Plaintiff explained that in May 2000, he and Geiger had been involved in a discussion with Nandita Jain, the production support section manager, when Geiger became upset and raised her voice to Jain. Plaintiff characterized the outburst as “very mild” and stated that after the meeting he told her that she should not have lost her temper. Several days after this incident, plaintiff said he was called to attend a meeting with Linda Pigue, who was the client service director, Jain and Jane Paxton, the functional testing section manager. At the meeting, Pigue asked plaintiff about the incident with Geiger. Plaintiff stated that, after he explained what happened, Pigue told him that he should have taken stronger action against Geiger. Plaintiff testified that the discussion then turned to Geiger’s personal life. He stated that Paxton noted that Geiger had MS, at which point Jain

reminded Pigue that Geiger was a probationary employee. Plaintiff testified that Pigue “was very pleased and said, excellent, excellent. Once they get the status, it’s impossible to get rid of them.” Plaintiff testified that he was shocked that these managers were discussing Geiger’s disability and discussing getting rid of Geiger over such a minor incident.

On the day after the meeting with Pigue, Jain and Paxton, plaintiff met with his immediate supervisor, Gaffney and James DeForest, defendant’s labor relations officer. At her deposition, Pigue testified that she scheduled the meeting so that DeForest could provide guidance to plaintiff on issuing corrective action against Geiger. Plaintiff testified that he expressed his “disgust” to DeForest that managers had discussed Geiger’s disability, which he stated was “very illegal and very discriminatory.”¹ Plaintiff stated that he was told to reprimand Geiger at this meeting. Plaintiff then sent DeForest an e-mail wherein he stated that he gave Geiger an informal counseling session, to which DeForest replied, “[i]t looks like you addressed the situation.” Plaintiff also testified that, afterwards, he was told by Pigue and Gaffney that he had to monitor Geiger closely from that time on. He stated that he believed that Geiger was being singled out in a “very aggressive manner” and that too much emphasis was placed on monitoring Geiger.

In August 2000, plaintiff stated that Gaffney again brought up Geiger’s personal problems including her disability and stated that Geiger would have to “look for something else.” Plaintiff testified that this reminded him of the earlier meeting where Geiger’s disability was discussed and he stated that he became convinced that Gaffney and the other managers were determined to fire Geiger based on her disability. He also testified that he expressed his feelings to Gaffney and told her that he was not happy with it.

After this August meeting, plaintiff received a poor evaluation. Plaintiff responded to this evaluation by sending Gaffney a memo on September 1, 2000, wherein he indicated that Gaffney’s criticisms were “spurious” and that he believed that she was setting him up for termination based in part on his “refusal to acquiesce in your scheme to fire Amy Geiger on account of her disability.” He further stated,

As I have indicated to you in the past, Amy Geiger’s performance is satisfactory for her job position and length of service. . . . I have refused and will continue to refuse in the future to state otherwise in documentation which you hope to use to fire Amy Geiger. I am informed that terminating an employee because of a disability is against state and federal disability law. I will play no part in this and insist that you cease as well

Thereafter, Gaffney ordered plaintiff to give Geiger a “needs improvement” rating on her evaluation and extend her probation. Plaintiff responded on September 14, 2000, by sending an e-mail wherein he again refused to issue a less than satisfactory evaluation, noting that, “[t]o do

¹ At his deposition, DeForest testified that he recalled that the issue of Geiger’s disability did come up at this meeting.

so would not only be dishonest, but it would also subject me to damages under the Michigan Persons with Disabilities Act.”

The evidence described above was sufficient to create a fact question on whether plaintiff was engaged in protected activity and whether plaintiff had given defendant sufficient notice to apprise defendant that he objected to a violation of the PWDCRA. Although defendant presented some evidence that the adverse employment evaluations taken against Geiger were based on legitimate concerns with her work progress, based on the above evidence, a reasonable finder of fact could conclude that plaintiff had a reasonable good faith belief that the actions were based on Geiger’s disability. See *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312-1313 (CA 6, 1989) (“A person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful; he or she must only have a good faith belief that the practice is unlawful.”). Likewise, plaintiff’s opposition was not so unreasonable and disruptive that it should not be considered protected activity. See *id.* at 1312 (noting that not all types of opposition to discrimination are protected). There is no record evidence that plaintiff engaged in disruptive practices when opposing the other managers efforts to discipline and evaluate Geiger. Rather, the record evidence reveals that plaintiff appropriately expressed his disagreement with the allegedly discriminatory activity through verbal discussions, e-mails and a memo. In addition, plaintiff’s testimony and documentary evidence establish that he adequately appraised defendant that he opposed this apparent violation of the PWDCRA. Consequently, the first two elements of plaintiff’s prima facie case were met.

Plaintiff also presented evidence from which a reasonable finder of fact could conclude that he was terminated based on his refusal to issue an adverse employment evaluation to Geiger based on her disability. Plaintiff was terminated from employment on September 20, 2000, just six days after his final refusal to issue an adverse employment evaluation to Geiger. This timing may serve as circumstantial evidence that plaintiff was terminated for refusing to give Geiger an adverse employment evaluation based on her disability. See *Aho, supra* at 291 (“[T]he timing between protected activity and the adverse action may in some cases constitute circumstantial evidence pointing to a causal nexus . . .”). Furthermore, at his termination, plaintiff was presented with a document labeled “Notice of Charges.” Although the document listed several reasons for plaintiff’s termination, it also stated that plaintiff failed “to follow specific instructions for employee evaluation” and failed “to consult Human Resources as to actual liability under the Michigan Persons with Disabilities Act.” When viewed in the light most favorable to plaintiff, see *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), this document and the timing are sufficient to establish a causal connection between plaintiff’s purported protected activity and his termination. Furthermore, this document is direct evidence that plaintiff’s engagement in protected activity was a motivating factor in defendant’s decision to terminate his employment. Therefore, plaintiff need not demonstrate that the other reasons proffered were merely pretexts. *Hazle, supra* at 462-463.

Plaintiff presented sufficient evidence to create a question of fact on whether he engaged in conduct protected by the PWDCRA and whether defendant terminated his employment based on that conduct. Therefore, I would reverse the trial court’s grant of summary disposition in favor of defendant and remand for trial on the merits.

/s/ Michael R. Smolenski