Daniel Faber
Attorney At Law

Thomas J. Skopayko v. Longford Homes Of New Mexico, Inc.

THOMAS J. SKOPAYKO,

Plaintiff-Appellant,

vs.

LONGFORD HOMES OF NEW MEXICO, INC.,

Defendant-Appellee.

No. 23,458
New Mexico Court of Appeals
February 25, 2003, FILED

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Robert H. Scott, District Judge

COUNSEL

Daniel M. Faber, Albuquerque, New Mexico for Plaintiff-Appellant.

Benjamin Silva, Jr., Silva, Rieder & Maestas, P.A., Albuquerque, New Mexico, for Defendant-Appellee.

JUDGES

MICHAEL D. BUSTAMANTE, Judge, A. JOSEPH ALARID, Judge, CYNTHIA A. FRY, Judge, concur

AUTHOR: BUSTAMANTE

MEMORANDUM OPINION

Plaintiff appeals from the dismissal of his claims against Defendant. We proposed to reverse in part and affirm in part in a notice of proposed summary disposition. Defendant responded with a timely memorandum in opposition to our proposal to reverse the dismissal of Plaintiff's retaliatory discharge claim. Plaintiff did not file a memorandum in opposition to our proposal to affirm the dismissal of Plaintiff's prima facie tort claim. Remaining unpersuaded, we reverse in part and affirm in part in accordance with our notice of proposed disposition.

In his memorandum in opposition, Defendant contends that it was entitled to summary judgment on Plaintiff's retaliatory discharge claim. We disagree. "Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992); *accord* Rule 1-056(C) NMRA 2003. The court must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories, and admissions in a light

most favorable to a trial on the merits. *See Carrillo v. Rostro*, 114 N.M. 607, 615, 845 P.2d 130, 138 (1992). As set forth in our notice of proposed disposition, we hold that Plaintiff introduced sufficient evidence to establish a prima facie case on every element of his retaliatory discharge claim and that Defendant failed to negate Plaintiff's prima facie case. See *Blauwkamp v. University of N.M. Hosp.*, 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App. 1992) (movant is entitled to summary judgment if it can show that "the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim" (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

To establish a claim for retaliatory discharge, Plaintiff must prove that: (1) he was "discharged because he performed an act that public policy has authorized or encouraged," (2) the employer either "knew or suspected" that Plaintiff's "action involved a protected activity," and (3) "there was a causal connection between the employee's protected actions and the employer's act of discharging him." *Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶ 23, 124 N.M. 591, 953 P.2d 1089; *see Shovelin v. Central N.M. Elec. Coop., Inc.*, 115 N.M. 293, 303, 850 P.2d 996, 1006 (1993).

Plaintiff Performed an Act That Public Policy Has Authorized or Encouraged

Plaintiff established a prima facie case that he performed an act that public policy has authorized or encouraged based upon the following: Defendant admitted that it had improperly built a retaining wall behind the homes of Plaintiff's fiancée, Heather Neil, and others; evidence indicates, and Defendant has conceded for the purposes of this appeal, that Defendant's subcontractor built the retaining wall in violation of the City of Albuquerque Building Code; the improperly constructed retaining wall presented a potential danger to the home of Plaintiff's fiancée and other surrounding homes; and, Plaintiff contends that he reported the problems with the retaining wall to the City of Albuquerque. This evidence is sufficient to establish Plaintiff's prima facie case that he acted in a way the public policy would authorize or encourage. *See Weidler*, 1998-NMCA-021, ¶ 18 ("if there is a statute prohibiting certain actions, we view that as a statement of public policy which may be used to support the common-law [retaliatory discharge] cause of action"); *Gutierrez v. Sundancer Indian Jewelry, Inc.*, 117 N.M. 41, 48, 868 P.2d 1266, 1273 (Ct. App. 1993) (recognizing public policy interest in reporting unsafe working conditions and protecting an employee who files a claim based on such conditions).

We are unpersuaded by Defendant's citation to numerous cases, both in-state and out-of-state, to support its contention that Plaintiff did not act in a way to establish a "clear mandate of public policy." *Shovelin*, 115 N.M. at 303, 850 P.2d at 1006. The cases cited by Defendant involve retaliatory terminations in response to actions by employees that served to protect and protest interests that were purely personal or specific to the company, *e.g., Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985) (holding that discharge for invoking company grievance procedure did not violate public policy); *Garrity v. Overland Sheepskin Co.*, 1996-NMSC-032, ¶ 13, 121 N.M. 710, 917 P.2d 1382 (holding that discharge for reporting that store manage was allegedly taking drugs did not state a claim for retaliatory discharge); *Francis v. Memorial General Hosp.*, 104 N.M. 698, 701, 726 P.2d 852, 855 (1986) (rejecting employee's claim that discharge for refusal to follow employer's policy regarding floating violate public policy); or to protest statutory violations that inured to the benefit of the employees, not the public at large. *E.g., Jeffers v. Butler*, 762 F. Supp. 308, 310 (D.N.M. 1990) (holding that termination for reporting employer's alleged failure to make mandated social security and income tax deductions did not identify a clearly mandated public policy for purposes of wrongful discharge); *Maxwell v. Ross Hyden Motors, Inc.*, 104 N.M. 470, 474, 722 P.2d 1192, 1196 (Ct. App. 1986) (holding that Unemployment Compensation Law does not establish public policy prohibiting discharge without just cause). We hold that the code

violations presented by the defective wall established more than a "purely private and proprietary interest."

We also reject Defendant's contention that Plaintiff's actions did not constitute the type of "whistle blowing" protected by the tort of retaliatory discharge. Even if Defendant was already aware of the problem, Plaintiff's allegations that he orally complained to the City to apprize the City of the problem are sufficient to establish a prima facie case of the requisite protected activity. We are unaware of any requirement that a complaint be officially logged or documented before an employee can be acting in furtherance of public policy. *See Chavez v. Manville Products Corp.*, 108 N.M. 643, 647-48, 777 P.2d 371-375-76 (1989) (reversing summary judgment in favor of employer and holding that whether an employee was discharged because he made an internal protest of the unauthorized use of his name in his employer's lobbying efforts, in violation of public policy, was a matter for the jury); *Weidler*, 1998-NMCA-021, ¶¶ 7, 11 (upholding jury verdict based upon employee's actions of making telephone call to OSHA and making verbal complaints to his employer after he was laid off.)

Defendant Knew or Suspected of Plaintiff's Activities Prior to Termination

Plaintiff established a prima facie case that Defendant knew or suspected Plaintiff's actions involved a protected activity. Plaintiff introduced evidence that he was told by a supervisor of Defendant to "keep my woman's mouth shut about the situation." He introduced evidence that Defendant knew of the building problem, knew that Ms. Neil had complained about the problem, and knew of the relationship between Plaintiff and Ms. Neil. Even though Anderson stated that he did not know that Plaintiff had complained until after he was terminated, and Plaintiff's immediate supervisor, Kleist, stated that he did not recall Plaintiff telling him he had reported the was, this merely renders Kleist's knowledge to be a question of fact. Defendant states that Anderson said he had no knowledge of Plaintiff's complaint and that Plaintiff himself testified that he had no evidence that Defendant knew he had spoken to a City official on the day he was reprimanded. However, Plaintiff only stated that he did not know whether Defendant knew of Neil's written complaint to the City; he also stated his belief that Defendant knew of Plaintiff's verbal complaints to the City. We hold that this evidence is sufficient to establish a prima facie case of Defendant's knowledge of Plaintiff's reporting activities even if Anderson, not Kleist, terminated Plaintiff. *See Weidler*, 1998-NMCA-021, ¶ 34-35 (holding that supervisor's knowledge of the employee's complaint would be imputed to the company even though the supervisor could only recommend, but not authorize, the employee's termination). Plaintiff's testimony is sufficient evidence that Defendant was aware of or at least suspected the protected activity. *Id.* ¶ 25 (recognizing that proof of actual knowledge is not required as long as there is some evidence that the employer was aware of or at least suspected the protected activity.)

Defendant seeks to distinguish *Weidler* based on the extensive evidence presented in that case establishing the employer's knowledge of the employee's reporting activities. We disagree however because in *Weidler* this Court was affirming a jury verdict in favor of the employee. Therefore, the opinion contains a summary of all the evidence introduced at trial, not just the evidence required to establish a prima facie case of knowledge. *Id.* ¶¶ 29-37 (reviewing jury verdict based upon sufficiency of the evidence). We are also not persuaded that *Lihosit v. I&W, Inc.,* 121 N.M. 455, 913 P.2d 262 (Ct. App. 1996), supports Defendant's position because in that case there was no evidence that anyone employed by the defendant ever knew that the employee refused to work additional hours because the employee claimed that if he returned to work he would violate the New Mexico hours of service regulations. *Id.* At 457, 913 P.2d at 264 (observing that there was no dispute that the independent agency did not tell anyone associated with the employer that the employee refused to return to work because he was too tired or because it would violate legal hour

restrictions).

The Causal Connection Between Plaintiff's Protected Actions and His Termination

Plaintiff introduced evidence sufficient to establish the third essential element of his retaliatory discharge claim–a causal connection between his protected actions and his termination. *See Weidler*, 1998-NMCA-021, ¶ 29. The following evidence established Plaintiff's prima facie case: Plaintiff verbally complained to City officials; Plaintiff delivered the written complaint of Neil to the City of Albuquerque; on the same day Plaintiff delivered Neil's written complaint to the City, Plaintiff was given a written reprimand that his work was incomplete and houses were sitting too long before completion; Plaintiff claims to have finished the allegedly incomplete work; Plaintiff alleged that he had never been reprimanded in the past; and, Anderson testified that no other employee had been fired for being behind schedule.

Defendant's memorandum in opposition persuasively argues that a finding that Plaintiff was terminated for cause is supported by the record. However, at the summary judgment stage, it is only necessary that the record be sufficient to support a finding in favor of the non-movant. *See Carrillo*, 114 N.M. at 615, 845 P.2d at 138 (noting that at the summary judgment stage, the court must resolve all reasonable inferences in favor of the nonmovant and must view the pleadings, affidavits, depositions, answers to interrogatories and admissions in a light most favorable to a trial on the merits.). Even though Defendant has considerable evidence suggesting a legitimate business reason for terminating Plaintiff, it is not enough to defeat Plaintiff's claim at the summary judgment stage. *See Chavez*, 108 N.M. at 648, 777 P.2d at 376 (holding that even though the employer had considerable evidence suggesting a legitimate business reason for discharging the plaintiff, it was not for the trial court to determine whether the plaintiff or the employer was correctly stating the facts; instead, it must be determined by the trier of fact who can weigh "credibility and resolve contradictory testimony"). Although some of Plaintiff's evidence is circumstantial, "it is not to be expected in cases of this type that a plaintiff would necessarily discover documentary or other direct evidence in support of his claim." *Chavez*, 108 N.M. at 648, 777 P.2d at 376.

For the reasons set forth above and those contained in our notice of proposed disposition, we reverse the court's dismissal of Plaintiff's retaliatory discharge claim and remand for trial of this issue. For the same reasons, we reverse the court's dismissal of Plaintiff's claim for punitive damages and instruct the trial court to allow Plaintiff to present evidence supporting a punitive damages award when presenting his retaliatory discharge claim. *See Aken v. Plains Elec. Generation & Transmission Coop., Inc.*, 2002-NMSC-021, ¶ 21, 132 N.M. 401, 49 P.3d 662; *Rhein v. ADT Automotive, Inc.*, 1996-NMSC-066, ¶ 29, 122 N.M. 646, 930 P.2d 783. In accordance with our proposed disposition, we affirm dismissal of Plaintiff's prima facie tort claim and Plaintiff's claim for punitive damages arising out of the alleged prima facie tort and we do not decide whether the affidavits of Plaintiff and Heather Neil were properly struck.

IT IS SO ORDERED.
MICHAEL D. BUSTAMANTE, Judge
A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge

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