71328-1

71328-1

No. 71328-1

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

In the Matter of

MITCH MICHKOWSKI

MITCH MICHKOWSKI, a single man,

Plaintiff - Appellant,

v.

SNOHOMISH COUNTY,

Defendant - Defendant.

REPLY BRIEF OF APPELLANT

Rodney R. Moody, WSBA # 17416
Attorney for Appellant
2820 Oakes Ave., Ste. D
Everett, WA 98201
(425) 740-2940

ORIGINAL

TABLE OF CONTENTS

TABLE OF CASES

Summary Judgment Standard

As pointed out in Appellants opening brief Michkowski is not required to produce evidence beyond that required to make a prima facie case, nor introduce direct or "smoking gun" evidence Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 89, 272 P.3d 865, review denied 174 Wn.2d 1016 (2012). Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden. Id at 89. Michkowski is only required to meet a burden of production to create

an issue of fact, but is not required to resolve that issue on summary judgment. Id at 89. It is for this reason that summary judgment in favor of employers is often inappropriate in employment discrimination cases. Id at 89.

Michkowski is merely required to present sufficient evidence which would permit a reasonable trier of fact to conclude that the party charged with engaging in retaliatory behavior was aware that the employee engaged in protected activity. Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185, 1197 (9th Cir. 2003). In this case it is not disputed that evidence has been established that Michkowski engaged in protected activity by continuously informing his supervisor, Judge Bui, of his concerns regarding safety related issues. CP 76. He drafted a memorandum which he brought to her attention specifically addressing safety related issues. CP 141-142. These safety related issues were subsequently determined by the Washington State Department of Labor and Industries to constitute a "serious violation" for which the Defendants were actually fined. CP 58-67. None of this is denied by the Defendants. Michkowski's reported concerns rose to a sufficient level that an independent State agency fined the Defendants for the safety-related breach. CP 58-64.

The sole argument in support of summary judgment made by the Defendants is that no causal connection can be established between Michkowski's protected activity and the decision to terminate his employment because the six judges who voted to terminate Michkowski's employment allegedly lacked any knowledge of his protected activity actions. Defendants confuse Michkowski's burden of production by in effect wrongfully arguing without specifically stating that Michkowski must meet a burden of persuasion.

In support of the argument that the employee must show the decision-maker possessed actual knowledge Defendants cite three cases; Hinds v. Sprint/United Management Co., 523 F.3d 1187 (10th Cir. 2008); Luckie v. Ameritech Corp., 389 F.3d 708,715,(7th Cir. 2004); and Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185 (9th Cir. 2003). In Appellant's Opening Brief the factual distinction between this case and Raad were outlined. No response or counter argument was made by the Defendants to this argument. Similarly, Michkowski demonstrated the distinguishing factual features between this case and the facts of the Luckie decision which were also ignored by Defendant.

Briefly, in Raad two school principals in separate locations who each independently declined to hire the Plaintiff were not aware of the

plaintiff's prior complaints of racial discrimination. There was no evidence demonstrating these two principles had discussions with their fellow principals or school administrative staff regarding this particular employee or engaged in direct discussions with the employee herself. The two principals lacked any actual knowledge of her discriminatory complaints. In Luckie the employee who had made the relevant complaints acknowledged she had not discussed her allegations with her supervisor who terminated her. The undisputed testimony was that the person to whom she had made the complaints had never met or spoken with her immediate supervisor. In both of these cases the lack of a causal connection was evident and acknowledged.

The Hinds decision is also distinguishable. In Hinds it was neither alleged nor established that the party to whom a Power Point presentation was forwarded addressing the plaintiff's allegations was in any way connected with the decision to discharge the employee. Id at 1204. The Court found this to be significant.

In the present case Judge Bui *did* directly participate in the decision to terminate Michkowski. CP 450. Even if she chose to abstain in the actual vote there is no dispute that she was physically present and participated in the discussions regarding the termination of Michkowski's employment. It is also undisputed that she personally

had knowledge of Michkowski's protected activities. The Appellant in the Opening Brief argued that Judge Bui had both a duty and responsibility to bring these safety concerns to the attention of her fellow Judges. This was not denied by Defendants in the Response Brief.

In essence, Defendants argue that because Judge Bui failed in her responsibility to bring the Court Administrators serious safety concerns to their attention they should avoid liability because they simply did not know of Michkowski's safety memorandum or concerns.

A reasonable trier of fact is permitted to consider all circumstantial evidence and the reasonable inferences which can be drawn therefrom. Rice, Supra at 89. A reasonable trier of fact could determine that when Judge Bui who did possess knowledge of Michkowski's protected activities and had a duty to bring his safety concerns to the attention of her fellow Judges and was present and participated in the discussions regarding the termination of Michkowski that she did in fact communicate this information to her fellow Judges as it was her responsibility to do. This is particularly true given the baseless and pretextual nature of the claimed basis justifying his termination.

Pretext

Defendants have completely failed to address the concept of pretext. "Generally, when an employee produces his or her prima facie case plus evidence of pretext a trier of fact must determine the true reason for the action because the record contains reasonable but competing inferences of both discrimination and nondiscrimination." Rice, Supra at 90; Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 150, 94 P.3d 930 (2004). In the Brief of Respondent two full pages are spent claiming that it is not material that Michkowski believed he performed well. This argument contains not a single citation to any authority in support. Respondent's brief page 23–25. As noted in Cordoba v. Dillard's Inc., 419 F.3d 1169, 1184 (2005), a case cited by Defendants, a "pretext" is "a purpose or motive alleged. . . in order to cloak [ones] real intention." Id. at 1184. Michkowski's demonstration the proffered reasons for his termination are factually questionable and therefore pretextual are relevant precisely because this demonstrates the true basis for his termination was a retaliatory motive.

A reasonable jury could certainly find that given the lack of factual veracity concerning the claimed basis for termination that this in fact covers the true retaliatory motivation of the Defendant's decision to terminate Michkowski's employment.