APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
No. 16-2612
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DURADE ZEBARI,
Plaintiff-Appellant,
v.
CVS CAREMARK CORPORATION; WOODWARD DETROIT CVS, LLC,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: KEITH, COOK, and THAPAR, Circuit Judges.

Durade Zebari, a Michigan litigant proceeding pro se, appeals the district court's judgment in favor of CVS Caremark Corporation and Woodward Detroit CVS, LLC (collectively "CVS") in this action brought under the Michigan Whistleblowers' Protection Act ("WPA"), Mich. Comp. Laws § 15.361 *et seq*. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Zebari began working for CVS in 2003. In March 2013, Zebari became the pharmacy manager of CVS Store No. 8031 located in Livonia, Michigan. On February 26, 2014, Zebari discovered that the pharmacy was missing 70 tablets of methadone. In accordance with federal and state law as well as CVS's policies, Zebari submitted an Initial Notification of Suspected Controlled Substance Theft or Potentially Significant Loss ("Initial Notification") to the Drug Enforcement Agency ("DEA") and to the Michigan Board of Pharmacy. Approximately one month later, on March 21, 2014, pharmacist Tammy Tran informed Zebari that 100 tablets of amphetamine (Adderall) were unaccounted for. At Zebari's direction, Tran notified Pharmacy Supervisor Jennifer Iwick and submitted an Initial Notification. According to Zebari, when Iwick came to the pharmacy, she asked what was going on and told him that "this is going to bring lots of eyes to the store if we can't find it."

Iwick informed Regional Loss Prevention Manager Michael McDonald that Store No. 8031 had two suspected losses of controlled substances over the past few weeks. Shortly thereafter, Bianca

Konja, a CVS pharmacist who had recently worked at Store No. 8031, notified Iwick that one of the controlled substances safes at that store did not lock and could be opened without entering a combination. Iwick reported this information to McDonald, who went to the store to inspect the safes and investigate the missing controlled substances. McDonald asked Zebari to try to open one of the safes without entering a combination. According to Zebari, when the safe opened, "it was a complete shock for me because I did not know that." As part of his investigation, McDonald interviewed the pharmacy staff at Store No. 8031 and also spoke with pharmacists who had recently worked at that store. While Zebari asserted that he was not aware that the safe was malfunctioning until McDonald asked him to open it without entering a combination, three other pharmacists reported that they were aware that the safe did not lock and that Zebari was also aware because they had discussed the fact with him or had seen him open the safe without entering a combination.

During the course of McDonald's investigation, Andrew Thompson, a pharmacy technician at Store No. 8031, stopped coming to work and was terminated. McDonald later learned that Thompson was working at an affiliated company. On May 1, 2014, McDonald interviewed Thompson, who admitted stealing controlled substances from Store No. 8031. McDonald filed a police report, and Thompson's placement was terminated.

McDonald reported the results of his investigation to Regional Manager Gregory Cassin and others. After reviewing the investigation materials provided by McDonald, Cassin concluded that Zebari knew that the controlled substances safe was not locking properly and had not taken steps to repair it. According to Cassin, because Zebari was the pharmacy manager and therefore solely responsible for the operations of the pharmacy at Store No. 8031, Cassin made the decision to terminate Zebari's employment for failure to ensure that controlled substances were secured in compliance with federal and state law. On May 30, 2014, District Manager Alex Johnson and Iwick met with Zebari and terminated his employment, presenting him with a counseling form which stated that, "[a]s the Pharmacy manager, Durade failed to take appropriate action to ensure the CII safe was functional which could have prevented signif[ic]ant loss incurred during a recent internal theft case." The other pharmacists who admitted knowing that the safe was malfunctioning received written warnings requiring them to complete training on DEA and regulatory policies.

Zebari subsequently filed a complaint pursuant to the WPA, alleging that CVS wrongfully terminated his employment because he reported a violation or suspected violation of law. CVS removed the action from the Wayne County Circuit Court to the district court based on diversity jurisdiction. *See* 28 U.S.C. §§ 1332, 1441.

After discovery closed, Zebari filed a motion to amend his complaint to conform to the evidence pursuant to Federal Rule of Civil Procedure 15(b). The district court conducted a hearing and denied Zebari's motion to amend.

CVS filed a motion for summary judgment on Zebari's WPA claim. After a hearing, the district court granted CVS's motion, concluding that Zebari failed to demonstrate a causal connection between his submission of the Initial Notifications and his discharge and therefore failed to establish a prima facie case under the WPA. The district court further determined that Zebari waived any public policy claim by failing to advance that theory of liability in his complaint. Zebari filed a motion for reconsideration of the district court's order granting summary judgment and a notice of appeal. The district court subsequently denied Zebari's motion for reconsideration.

On appeal, Zebari contends that the district court erred in granting CVS's motion for summary judgment and in denying him leave to amend his complaint to assert a public policy claim. Zebari has filed a motion to take judicial notice and a motion to strike CVS's response to his motion to take judicial notice.

Summary Judgment

We review the district court's decision to grant summary judgment de novo. *Watson v. Cartee*, 817 F.3d 299, 302 (6th Cir. 2016). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence and draw all reasonable inferences in favor of the non-movant and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The WPA provides that "[a]n employer shall not discharge . . . an employee . . . 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 . . . to a public body." Mich. Comp. Laws § 15.362. To establish a prima facie case under the WPA, the plaintiff must show: (1) that he was engaged in protected activity as defined by the WPA; (2) that he suffered an adverse employment action; and (3) that a causal connection exists between the protected activity and the adverse employment action. *Whitman v. City of Burton*, 831 N.W.2d 223, 229 (Mich. 2013).

The district court determined that Zebari satisfied the first two elements—the submission of the Initial Notifications to the DEA and Michigan Board of Pharmacy constituted protected activity under the WPA, and his termination constituted an adverse employment action. The district court went on to conclude that Zebari failed to demonstrate a causal connection between the submission of the Initial Notifications and his termination. To demonstrate the requisite causal link, Zebari "had to show that his employer took adverse action *because of* [his] protected activity"—that is, "the adverse employment action was in some manner influenced by the protected activity." *West v. Gen. Motors Corp.*, 665 N.W.2d 468, 472 (Mich. 2003).

As evidence of a causal link, Zebari relies in part on Iwick's statement that the second instance of missing controlled substances was "going to bring lots of eyes to the store if we can't find it." According to Zebari, Iwick "did not directly tell me not to report it," but "[s]he wasn't happy with the reporting." Even if we draw the inference that Iwick's comment reflected her displeasure with the submission of an Initial Notification, rather than her displeasure with the unexplained loss of controlled substances and concern for locating them, Zebari failed to link Iwick's displeasure with Cassin's decision to terminate his employment. Iwick testified that she was not involved in the decision to terminate Zebari's employment. That decision was made by Cassin. According to Cassin, at the time he made the termination decision, he had no knowledge that Zebari had submitted or had had another pharmacist submit an Initial Notification. The information provided to Cassin, including the written statements from employees and McDonald's investigation report, did not mention the Initial Notifications. Zebari has identified no record evidence that contravenes these facts, and thus there is no genuine dispute that Cassin made the decision to terminate Zebari and had no knowledge of his protected activity. Furthermore, CVS presented evidence that Zebari was the only pharmacist in his region who submitted an Initial Notification in 2014 and was later involuntarily terminated and that 49 other pharmacists in his region submitted one or more Initial Notifications in 2014 and remained employed by CVS as of January 5, 2016. For these reasons, Zebari has failed to demonstrate the causal connection necessary to make out a prima facie case under the WPA.

Zebari's other arguments challenge the legitimacy of CVS's stated reason for his termination, including that the pharmacists who admittedly knew that the safe was not locking were not terminated, that those pharmacists changed their stories, and that a CVS executive said in an email that his termination "sounds off." But these arguments go to the issue of pretext, which is irrelevant given that Zebari has failed to demonstrate a causal connection in the first place. *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 629 (6th Cir. 2013). Accordingly, the district court properly granted CVS's motion for summary judgment on Zebari's WPA claim.

Amended Complaint

After discovery closed, Zebari filed a motion to amend his complaint to conform to the evidence pursuant to Rule 15(b). We review the district court's denial of Zebari's motion for abuse of discretion. *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 831 (6th Cir. 2000). In support of his motion, Zebari asserted that "the Amended Complaint effectuates justice and better informs the Court and trier-of-fact of the supporting evidence behind Plaintiff's Whistleblower action." At the hearing on the motion, the district court characterized the proposed amendments as "evidentiary." Zebari's counsel agreed, stating that the amended complaint "is simply much more polished and detailed." The district court denied Zebari's motion on the basis that "a more polished and detailed complaint at this time I think would be unproductive and prejudicial. Defendant would have to answer it, and it would delay proceedings." The district court did not abuse its discretion in denying Zebari's motion on this basis.

At the hearing on CVS's motion for summary judgment, Zebari's counsel purported to raise a claim for discharge in violation of public policy. In its order granting CVS's motion, the district court pointed out that Zebari's complaint did not mention a violation of public policy and that his motion to amend his complaint did not seek to add a public policy claim. The district court concluded that Zebari waived a public policy claim by failing to advance that theory of liability in his complaint. A plaintiff may not raise a new legal claim for the first time in response to a motion for summary judgment. *Tucker v. Union of Needletrades, Indus. & Textile Emps.*, 407 F.3d 784, 788 (6th Cir. 2005). Therefore, the district court properly rejected Zebari's attempt to raise a public policy claim at that late stage.

Zebari moved for reconsideration of the district court's order granting CVS's motion for summary judgment, asserting in part that he should be allowed to file an amended complaint explicitly raising a public policy claim. The district court denied Zebari's motion. Zebari did not file a notice of appeal or an amended notice of appeal to seek review of the denial of his motion for reconsideration. *See* Fed. R. App. P. 3(c)(1)(B), 4(a)(4)(B)(ii). Zebari's motion for reconsideration is therefore beyond the scope of this appeal. *See Gruener v. Ohio Cas. Ins. Co.*, 510 F.3d 661, 665-66 (6th Cir. 2008).

<u>Motion to Take Judicial Notice and Motion to Strike</u>

Zebari's motion to take judicial notice consists of text images, including text messages, deposition excerpts, and emails, accompanied by his explanations for why these materials are relevant to his case. As CVS points out, Zebari's motion does not "state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it." Fed. R. App. P. 27(a)(2)(A). Zebari presumably seeks judicial notice pursuant to Federal Rule of Evidence 201, which provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "This standard applies to appellate courts taking judicial notice of facts supported by documents not included in the record on appeal." *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012). However, "[j]udicial notice is only appropriate if 'the matter [is] beyond reasonable controversy.'" *Id.* (second alteration in original) (quoting Fed. R. Evid. 201(b) advisory committee's note). Zebari's motion fails to explain how the submitted materials satisfy this standard. Indeed, CVS disputes the facts or factual inferences that Zebari asks this court to draw from the materials. Accordingly, we deny Zebari's motion.

Zebari moves this court to strike CVS's response to his motion to take judicial notice, arguing that CVS's response was untimely. Zebari served his motion to take judicial notice by mail on April 5, 2017. CVS had ten days to respond to

Zebari's motion. *See* Fed. R. App. P. 27(a)(3)(A). Because the tenth day fell on Saturday, April 15, the response period continued until Monday, April 17. *See* Fed. R. App. P. 26(a)(1)(C). Three days were added for service by mail, making CVS's response due on Thursday, April 20. *See* Fed. R. App. P. 26(c) & advisory committee's note to 2009 amendment. CVS's response filed on Wednesday, April 19, was therefore timely.

For these reasons, we **DENY** Zebari's pending motions and **AFFIRM** the district court's judgment in favor of CVS.

No. 16-2612
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DURADE ZEBARI,
Plaintiff-Appellant,

v.

CVS CAREMARK CORPORATION; WOODWARD DETROIT CVS, LLC,
Defendants-Appellees.

BEFORE: KEITH, COOK, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DURADE ZEBARI,
Plaintiff,
v.
CVS CAREMARK CORP. and
WOODWARD DETROIT CVS, L.L.C.,
Defendants.
___________________________________/

CASE NO. 2:14-cv-13613
HON. MARIANNE O. BATTANI

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Court on Defendants CVS Caremark Corporation's and Woodward Detroit CVS, LLC's, Motion for Summary Judgment. (Doc. 47). Plaintiff, Durade Zebari, initiated the present suit claiming violation of Michigan's Whistleblowers' Protection Act based on Defendants' alleged wrongful termination of Plaintiff's employment. Defendants submit that summary judgment is appropriate because Plaintiff has failed to establish a *prima facie* case and because the decision to discharge him was based on legitimate reasons and not on Plaintiff's intent to report a violation of law. For the following reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment.

II. STATEMENT OF FACTS

Plaintiff, Durade Zebari, began working for the Defendants, CVS Caremark Corp. and Woodward Detroit CVS, LLC (collectively, "CVS"), as a shift supervisor in 2003. (Doc. 47, Ex. 1, p. 61). Plaintiff enrolled in pharmacy school and, upon his graduation in 2010, became a Pharmacist-in-Charge for CVS. (Id. at pp. 62-63, 67-68). In March 2013, Plaintiff transferred to CVS Store No. 8031, located in Livonia, Michigan. (Id. at p. 63). In 2014, Plaintiff's job title changed to Pharmacy Manager, though he reports his job responsibilities remained unchanged. (Id. at pp. 67-68). As a Pharmacy Manager/Pharmacist-in-Charge, Plaintiff was responsible for ensuring compliance with state and federal regulatory requirements, as well as for the management, oversight, and operation of all aspects of the pharmacy, including pharmacy professional practice and loss prevention. (Doc. 47, Ex. 3; Ex. 7 ¶ 4). Additionally, Plaintiff managed the pharmacy staff and was responsible for their compliance with state and federal laws and regulations. (Doc. 47, Ex. 3; Ex. 7 ¶ 4).

In accordance with federal and state law, pharmacies are required to store Schedule II controlled substances in locked narcotics safes. See 21 C.F.R. § 1301.75; Mich. Admin. Code r. 338.3143. In the event of theft or significant loss of a controlled substance, federal regulations require pharmacies to file a report with the Drug Enforcement Agency (DEA) in writing within one business day of the discovery. 21 C.F.R. § 1301.76. Likewise, Michigan law requires thefts or losses to be reported to the State Board of

Pharmacy (BOP). Mich. Admin. Code r. 338.3141. In compliance with these regulations, CVS requires its pharmacists on duty to report any suspected theft or loss within twenty-four hours by filling out and submitting to the DEA and BOP an Initial Notification of Suspected Controlled Substance Theft or Potentially Significant Loss Form ("Initial Notification"). (Doc. 47, Ex. 10 ¶ 3). Pharmacists must also inform their supervisor of a suspected theft or loss. (Id.). Nicole Harrington, Senior Director of Pharmacy Services for CVS and its affiliates, stated in a declaration that a pharmacist who fails to comply with these reporting procedures is subject to disciplinary action, up to and including termination. (Id. at ¶ 4).

On February 26, 2014, Plaintiff discovered that the pharmacy was missing seventy tablets of methadone, a Schedule II controlled substance. (Doc. 47, Ex. 1, p. 88). In accordance with the state and federal reporting regulations, Plaintiff completed an Initial Notification and submitted it to the DEA and BOP. (Doc. 47, Ex. 4). In the Initial Notification, Plaintiff wrote, "We did an inventory. We did drug usage report check for the last five months. We checked all invoices from the last five months. Might be a miscount or the bottle was thrown in the trash by mistake." (Id.).

Shortly thereafter, on March 24, 2014, pharmacist Tammy Tran discovered that 100 tablets of amphetamine (Adderall) were missing and reported the loss to Plaintiff. (Doc. 47, Ex. 1, pp.118-19). Ms. Tran, at Plaintiff's request, filed an Initial Notification and informed Pharmacy Supervisor Jennifer Iwick of the suspected loss. (Id.). In the

Initial Notification, Ms. Tran described her discovery and reported that the Adderall remained missing even after a search. (Doc. 47, Ex. 10-A). Ms. Iwick came to the store the same day and searched for the missing drugs to no avail. (Doc. 47, Ex. 1, p. 119). Plaintiff testified that Ms. Iwick remarked to him that reporting another drug loss within a short period of time would "bring lots of eyes" to the store. (Id. at pp. 94, 119).

Within two days of this second discovery, Ms. Iwick received a call from Bianca Konja, a CVS pharmacist who had recently worked at Store No. 8031. (Doc. 47, Ex. 7 ¶ 7). Ms. Konja informed Ms. Iwick that one of the controlled substance safes at Store No. 8031 did not lock and could be opened without entering the combination. (Id.). Ms. Iwick reports that she immediately contacted Regional Loss Prevention Manager Michael McDonald regarding this matter. (Id. at ¶ 8). On March 26, 2014, Mr. McDonald visited Store No. 8031and confirmed that the safe did not lock. (Doc. 47, Ex. 11, ¶ 5). Plaintiff was on duty at this time, and Mr. McDonald demonstrated to him that the safe could be opened without entering the combination. (Doc. 47, Ex. 1, pp. 168-69). Plaintiff denied that he was aware of the safe's defect and called the CVS Fix Line to repair the safe that day. (Doc. 47, Ex. 1, p. 169; Ex. 2, pp. 51-52; Ex. 11 ¶ 6).

Once the malfunctioning safe was discovered and repaired, Mr. McDonald began an investigation into the missing drugs in an attempt to identify the possibility of theft. (Doc. 47, Ex. 11 ¶ 7). As part of the investigation, Mr. McDonald interviewed Plaintiff, as well as pharmacists Bianca Konja, Tammy Tran, and Jim Greggs, all of whom submitted written statements. (See id. at ¶ 8 and Attached Exhibits A through D). Plaintiff claimed that he was unaware that the safe was malfunctioning until Mr. McDonald's visit (id. at Attached Exhibit D), while Ms. Konja, Ms. Tran, and Mr. Greggs stated that they had been aware of the malfunctioning safe and that they had discussed the fact with Plaintiff (id. at Attached Exhibits A through C). During the course of Mr. McDonald's investigation, a Pharmacy Technician named Andrew Thompson stopped coming to work, and his employment was consequently terminated on April 16, 2014. (Id. at ¶ 13). Later in April, Mr. McDonald learned that Mr. Thompson was working at another company affiliated with CVS Caremark. (Id. at ¶ 16). Mr. McDonald met with Mr. Thompson on May 1, 2014, at which point Thompson admitted to stealing a number of medications from Store No. 8031, including hydrocodone, Adderall, and alprazolam. (Id.). An Initial Notification regarding the hydrocodone and alprazolam was filed with the DEA and BOP on May 12, 2014. (Doc. 47, Ex. 10-B). Although this Initial Notification bears the Plaintiff's name as the submitting pharmacist, he denies being the actual submitter. (Doc. 53, p. 6).

Gregory Cassin, Regional Manager for CVS, reviewed the investigation materials and concluded that Plaintiff was aware that the safe was not locking but took no precautions to have the safe repaired. (Doc. 47, Ex. 8, pp. 8, 19-20). According to Mr. Cassin, because Plaintiff was the Pharmacy Manager and solely responsible for the operations of the pharmacy, he made the decision to terminate

Plaintiff's employment for failure to ensure that controlled substances were secured in compliance with federal and state law. (Doc. 47, Ex. 9 ¶ 5). A Counseling Form prepared on May 27, 2014, indicates that Plaintiff was being terminated for his failure "to take appropriate action to ensure the CII safe was functional which could have prevented significant loss . . . ." (Doc. 47, Ex. 6). The other staff pharmacists who admitted to knowing the safe was malfunctioning, Ms. Konja, Ms. Tran, and Mr. Greggs, were also disciplined with written warnings requiring them to re-train in DEA regulatory policies. (Doc. 47, Ex. 7 ¶ 11 and Attached Exhibit D).

Plaintiff initiated the present suit on August 15, 2014, in Wayne County Circuit Court, and Defendants removed it to this Court on September 18, 2014. The complaint advances a claim for violation of the Michigan Whistleblowers' Protection Act, alleging that his employment was terminated as a result of his engaging in protected activity.

III. STANDARD OF REVIEW

Summary judgment is appropriately rendered "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Redding v. St. Eward, 241 F.3d 530, 532 (6th Cir. 2001). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

State Farm Fire & Cas. Co. v. McGowan, 421 F.3d 433, 436 (6th Cir. 2005) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Where the movant establishes the lack of a genuine issue of material fact, the burden of demonstrating the existence of such an issue shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). That is, the party opposing a motion for summary judgment must make an affirmative showing with proper evidence and must "designate specific facts in affidavits, depositions, or other factual material showing 'evidence on which the jury could reasonably find for the plaintiff.'" Brown v. Scott, 329 F. Supp. 2d 905, 910 (6th Cir. 2004). In order to fulfill this burden, the nonmoving party need only demonstrate the minimal standard that a jury could ostensibly find in his favor. Anderson, 477 U.S. at 248; McLean v. 988011 Ontario, Ltd., 224 F.3d 797, 800 (6th Cir. 2000). However, mere allegations or denials in the non-movant's pleadings will not satisfy this burden, nor will a mere scintilla of evidence supporting the non-moving party. Anderson, 477 U.S. at 248, 251.

IV. DISCUSSION

A. Michigan Whistleblowers' Protection Act Claim

non-movant's pleadings will not satisfy this burden, nor will a mere scintilla of evidence supporting the non-moving party. Anderson, 477 U.S. at 248, 251. This case involves the interpretation and the application of Michigan Whistleblowers' Protection Act ("WPA"), which was enacted to "provide protection to employees who report a violation or suspected violation of state, local, or federal law . . . ." Preamble, 1980 Mich. Pub. Acts 469. This statute provides that:

> 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 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.

Mich. Comp. Laws § 15.362. In order to establish a *prima facie* claim under the WPA, a plaintiff must establish three elements: (i) that he was engaged in protected activity as defined by the WPA; (ii) that he suffered an adverse employment action; and (iii) that a causal connection exists between the protected activity and the discharge. Whitman v. City of Burton, 831 N.W.2d 223, 229 (Mich. 2013); Shallal v.

Catholic Soc. Servs. Of Wayne Cty., 566 N.W.2d 571, 574 (Mich. 1997). If a plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant employer to establish a legitimate business reason for terminating him. Kuhn v. ashtenaw Cty., 709 F.3d 612, 629 (6th Cir. 2013). The burden then shifts back to the plaintiff to establish that the defendant's proffered reason was mere pretext designed to mask the true reason for the termination. Id.

1. Protected Activity

A person engages in protected activity when he: (i) reports a violation or a suspected violation of law or regulation to a public body, (ii) is about to report such a violation to a public body, or (3) is asked by a public body to participate in an investigation. Kuhn, 709 F.3d at 629 (citing Chandler v. Dowell Schlumberger Inc., 572 N.W.2d 210, 212 (Mich. 1998)). A plaintiff must also show that the defendant received "objective notice of [his] report or a threat to report." Id. (quoting Roberson v. Occupational Health Ctrs. of Am., Inc., 559 N.W.2d 86, 88 (Mich. Ct. App. 1996)). To have engaged in a protected activity, the plaintiff must have reasonably believed that a violation of law, regulation, or rule had occurred. Shimkus v. Hickner, 417 F. Supp. 2d 884, 907 (E.D. Mich. 2006). Plaintiff contends that he engaged in protected activity when: (i) he personally filed and requested Tran to file the Initial Notifications submitted on February 26, 2014, and March 24, 2014, respectively, and (ii) he intended to report the malfunctioning safe to the DEA and BOP after Mr. McDonald made him aware it was defective. (Doc. 1 ¶16; Doc. 53, p. 6).

The Initial Notifications reported missing controlled substances and were submitted to public bodies, the DEA and BOP. Defendants contend that submitting the Initial Notifications cannot be considered protected activity for two reasons. First, Defendants argue, the February 26 Initial Notification did not report a suspected violation of law, as it attributed the drug loss to a miscount or a bottle mistakenly being thrown in the trash. (See Doc. 47, Ex. 4). The Court disagrees. By not directly suggesting the possibility of a theft or other violation of law, Plaintiff was not foreclosing it as a potential suspicion. The fact that Plaintiff notified the DEA and BOP of an unexplained loss under investigation is sufficient to constitute protected activity. Second, Defendants maintain that Plaintiff was not engaged in protected activity when the second Initial Notification was submitted on March 24 because it was submitted by Ms. Tran and not by Plaintiff. Further, Defendants argue that Ms. Tran did not submit the form on Plaintiff's behalf because CVS expects the pharmacist on duty – in this case, Ms. Tran – to complete the Initial Notification. Nevertheless, Plaintiff stated that after searching for the drugs, he mentioned to Ms. Iwick that they would have to report the loss and directed Ms. Tran to complete an Initial Notification. (Doc. 47, Ex. 1 p. 94). Construing the facts in the light most favorable to Plaintiff, a reasonable juror could find that although the Initial Notification bears Ms. Tran's name, it was submitted at Plaintiff's request and that he was therefore engaged in protected activity.

Moreover, because Ms. Iwick was aware that Plaintiff directed Ms. Tran to make the report, a jury could find that Defendants received objective notice of Plaintiff's reports. (See Doc. 47, Ex. 4).

With respect to the malfunctioning safe, Plaintiff does not contend in his response brief that he was engaged in protected activity because he was about to report the safe. However, to the extent that this theory is advanced in the complaint (see Doc. 1 ¶ 16), Plaintiff has failed to present evidence supporting either that he was about to make a report prior to his termination or that Defendants were aware of his intent to make a report. Indeed, Plaintiff's own testimony directly contradicts such claims. When asked during deposition when he formed the intent to contact the BOP to report the malfunctioning safe, Plaintiff responded that he made the decision to do so in the second half of 2014, after his termination. (Doc. 47, Ex. 1, pp. 108-09). When asked whether he ever told anyone at CVS of his intent to report the broken safe to the DEA, Plaintiff stated that he did not. (Doc. 47, Ex. 2, pp. 42-43). Finally, Mr. Cassin's declaration confirms that he was unaware of any intention on Plaintiff's part to report the safe to the DEA or BOP when he made the decision to discharge him. (Doc. 47, Ex. 9 ¶ 8). Therefore, with respect to reporting the malfunctioning safe, Plaintiff has failed to demonstrate that he was engaged in protected activity or that Defendants received objective notice of a threat to report. See Kuhn, 709 F.3d at 629; see also Roberson, N.W.2d at 88.

2. Adverse Action

To satisfy the second element of a *prima facie* case, Plaintiff must show that he has suffered an adverse employment action. The WPA prevents an employer from discharging, threatening, or discriminating against an employee regarding the compensation, terms, conditions, location, or privilege of employment when engaged in protected activity. Mich. Comp. Laws § 15.362. Plaintiff has alleged two separate adverse employment actions: (i) his termination and (ii) Ms. Iwick's veiled threat that making an Initial Notification would "bring a lot of eyes" to the store.

It is beyond dispute that Plaintiff's termination constitutes an adverse employment action. With respect to Ms. Iwick's alleged threat, the Court need not determine whether this comment may be reasonably construed as an adverse employment action. Any claim based on this statement is barred by the 90-day statute of limitations applicable to the WPA. See Mich. Comp. Laws § 15.363. Because Ms. Iwick's alleged threat was made on March 24, 2014, any claim premised on this alleged adverse employment action must have been filed by June 23, 2014. The present action was not filed until August 15, 2014. Therefore, although Plaintiff's termination is an adverse employment action satisfying the second element of a *prima facie* case, Ms. Iwick's comment is not.

3. Causal Connection

As discussed above, the only protected activity in the present case was Plaintiff's filing of the Initial Notifications. Likewise, the only adverse employment action at issue is Plaintiff's termination.

Therefore, to satisfy the third prong and establish a *prima facie* case, Plaintiff must show a causal connection between his filing the Initial Notifications and his termination. See Whitman, 831 N.W.2d at 230; Shallal, 566 N.W.2d at 574. In order to satisfy the causation element, an employer must receive some form of objective notice or report of the whistleblower's intent to report before retaliatory activity occurs. Kaufman & Payton, P.C. v. Nikkila, 503 N.W.2d 728, 732-33 (Mich. Ct. App. 1993). "Temporal proximity alone does not demonstrate a causal connection between the protected activity and any adverse employment action." Kuhn, 709 F.3d at 629.

With respect to evidence of a causal connection between his filing the Initial Notifications and his ultimate termination, Plaintiff turns again to Ms. Iwick's alleged threat that reporting the missing drugs would "bring a lot of eyes" to the store. Plaintiff reiterates that this statement was delivered in a threatening tone, thereby indicating displeasure with Plaintiff for reporting the missing drugs. The Initial Notifications were submitted on February 26, 2014, and March 24, 2014, and Plaintiff was discharged shortly thereafter on May 30, 2014. Plaintiff relies on Henry v. City of Detroit, in which a former police commander brought action under the WPA against the city alleging that his retirement was forced in retaliation for testimony he had provided at a civil trial. 594 N.W.2d 107, 112-13 (Mich. Ct. App. 1999). The court found that the temporal proximity between the time of his testimony and the time of his forced retirement, coupled with evidence of the chief of police's displeasure with the protected activity, established a causal nexus. Id.

Even drawing the inference that Ms. Iwick's comment reflected her displeasure with Plaintiff for filing the Initial Notifications, he has still failed to link this displeasure to Mr. Cassin's decision to terminate his employment. It is undisputed that Mr. Cassin was responsible for making the decision to discharge Plaintiff. (Doc. 47, Ex. 9 ¶ 5 ("I made the decision to terminate his employment due to his failure to ensure that controlled substances were secured in compliance with federal and state law.")). Defendants have presented Mr. Cassin's sworn statement that at the time he made the decision to terminate Plaintiff's employment, he was unaware that Plaintiff had filed either of the Initial Notifications. (Id. at ¶ 7). Additionally, Defendants emphasize that of the fortynine other CVS pharmacists in Region 41 who submitted Initial Notifications sometime in 2014, all of them continued to be employed as pharmacists as of January 5, 2016. (Doc. 47, Ex. 10 ¶¶ 10- 11). According to Defendants, this fact illustrates that, far from discouraging its employees from filing Initial Notifications, CVS *requires* its pharmacists to do so. If a pharmacist fails to comply with these reporting requirements, he or she is subject to disciplinary action, including termination, because of the grave sanctions that could be imposed on CVS, such as criminal penalties, monetary fines, and suspension of its license. (Doc. 47, Ex. 10 ¶ 4).

Plaintiff fails to rebut Mr. Cassin's statement that he was unaware of Plaintiff's submission of the Initial Notifications at the time he made the decision to discharge. There is no evidence that would permit the Court to draw the inference that Plaintiff's submission of Initial Notifications or Ms. Iwick's disapproval had any impact on Mr. Cassin's decision. Plaintiff also relies on the fact that no other pharmacist who has submitted an Initial Notification has been discharged, presumably as evidence that he was singled out for discrimination. However, he offers no explanation for why these other forty-nine pharmacists were not likewise discriminated against for engaging in the same protected activity. As for Plaintiff's reliance on Henry, that case is distinguishable because the plaintiff demonstrated that the police chief, the very person with the authority to make employment decisions, was angry about the plaintiff's testimony. 594 N.W.2d at 112-13.

In further attempt to establish a causal connection, Plaintiff claims that it is suspicious for CVS to have chosen to investigate a report of missing drugs for the first time only after Plaintiff insisted that an Initial Notification be submitted. Plaintiff maintains that Store No. 8031 "was notorious for years as a problematic store that was not only underperforming monetary expectations but was also missing thousands of drugs." (Doc. 53, p. 9 (emphasis omitted)). In support of this statement, Plaintiff cites to deposition testimony from Rony Foumia, a former CVS pharmacist, pharmacy supervisor, and district manager. (Doc. 53, Ex. 11, p. 4). First, Plaintiff cites generally to Mr. Foumia's 113-page deposition without providing any specific page numbers, thus leaving the Court to comb through this testimony. Second, Mr. Foumia left Store No. 8031 in 2009 or 2010 (Doc. 53, Ex. 11, p. 13) and left CVS's employ completely in June 2013 (id. at p. 72). Therefore, his testimony is not relevant because he lacks the requisite personal knowledge regarding the events of this case that transpired in 2014, approximately four years after he left Store No. 8031. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602. Finally, even if Store No. 8031 was poorly managed for years, the Court does not agree that this renders CVS's investigation suspect.

Next, Plaintiff claims that Mr. Thompson, the individual who had been stealing the missing drugs, was not discharged but rather was transferred to another CVS pharmacy. The record flatly contradicts this statement. During the course of Mr. McDonald's investigation, Mr. Thompson stopped reporting to work and was consequently terminated. (Doc. 47, Ex. 11 ¶ 13). Although Mr. Thompson was later found to be working at an affiliated company, Caremark, he had not yet admitted to stealing the drugs. (See id. at ¶ 16). After the interview during which Mr. Thompson admitted to stealing the drugs, Mr. McDonald filed a police report. (Id. at ¶ 18). Although Plaintiff claims that Mr. Thompson was never prosecuted and has since absconded, these facts have absolutely no relevance to the present claim.

Finally, Plaintiff asserts that during their depositions, Ms. Konja and Ms. Tran both recanted their earlier statements that Plaintiff knew the safe was malfunctioning. Further, Plaintiff argues that a former manager at Store No. 8031 knew the safe was broken and yet was not discharged. These arguments attempt to undermine Defendants' stated reason for discharging Plaintiff and are therefore relevant to the matter of pretext but not to establishing a causal connection. For these reasons, the Court finds that Plaintiff has failed to demonstrate a causal connection between his filing of the Initial Notifications and his discharge. Accordingly, he has not set forth a *prima facie* case, and summary judgement is appropriately granted in favor of Defendants.

B. Public Policy Claim

During oral argument, Plaintiff's counsel purported to have pleaded in the complaint not only a claim arising under the WPA but also a claim based on an actionable violation of public policy. Specifically, he alleged that the grounds underlying Plaintiff's discharge are so contrary to public policy as to be actionable, consistent with the Michigan Supreme Court's holding in Suchodolski v. Michigan Consol Gas Co., 316 N.W.2d 710 (Mich. 1982). An examination of the complaint reveals no mention of a violation of public policy whatsoever. Nor did Plaintiff seek in his motion to amend his complaint to add such pleadings. (Doc. 44). This public policy theory was therefore advanced for the first time in one woefully unclear, undeveloped paragraph in his response brief. (Doc. 53, p. 6). Because Plaintiff failed to advance this theory of liability in the complaint, it has been waived, and the Court will not address it. See, e.g., Mitchell v. McNeil, 487 F.3d 374, 379 (6th Cir. 2007) ("Plaintiffs, however, did not raise this claim below, much less plead it in their complaint, and accordingly it has been waived."). Accordingly, granting summary judgment in favor of Defendants is also appropriate on these grounds.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Date: October 27, 2016

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Number: 16-2612
Case Name: Durade Zebari v. CVS Caremark Corporation, et al
Name: Durade Zebari
Address: 2060 Woodrow Wilson BLVD
City: West Bloomfield State: Michigan Zip Code: 48324

PRO SE APPELLANT'S BRIEF

United States Court of Appeals For The Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

STATEMENT OF FACTS

In reaching its decision, the district court relied almost exclusively on the Defendant Motion for Summary Judgment (RE 47) views and analysis, and did not view the facts in the light most favorable to the Plaintiff (non moving party). "The evidence and all reasonable inferences must be constructed in the light most favorable to the non-moving party. Matsushita Elec. Indus. CO. Ltd v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)". (Court Granting Summary Judgment, RE 60, Page ID # 6). In fact, the court cited (RE 47) 19 times in the Statement of Facts section of the Court Order Granting Summary Judgment, while there was no mention of Plaintiff declaration on Exhibit 7 of Plaintiff's response to Defendant's Motion for summary judgment (Court Granting Summary Judgment, RE 60, Page ID # 1-5). Therefore, there were many factual mistakes and misrepresentation of the truth.

1- Plaintiff Work History with CVS and Loss of Employment Record: Plaintiff started working for CVS in 2003 as a Shift Supervisor, then a Pharmacy Intern between 2006 and 2010, then a Pharmacist in Charge at two different locations. In March 2013, Plaintiff was asked to transfer to the busiest 24 hour pharmacy in the district, CVS # 8031 in Livonia. That pharmacy at CVS # 8031 was performing very poorly on CVS performance measuring reports at first, but became top of the district within few months of Plaintiff's transfer. In 2014, CVS changed Plaintiff's job title from Pharmacist in Charge to Pharmacy Manager. Plaintiff was also a preceptor for both Wayne State and University of Michigan pharmacy students (Plaintiff Response to Summary Judgment, RE 53, Ex 7 Page ID# 1-3; Motion for Summary Judgment, RE 47, Page ID # 2). Notably, CVS claimed that they lost Plaintiff's entire employment history file when it was requested during discovery, which was full of outstanding reviews and promotions and clear of disciplinary actions (Plaintiff Response to Summary Judgment, RE 53, Ex 7 Page ID # 2).

2- Missing Control Substances: On February 26, 2014, while Plaintiff was auditing the Narcotics' dispensing book, he discovered that the pharmacy was missing 70 tablets of methadone, a schedule II control substance[1], and filled an Initial Notification with the DEA and Board of Pharmacy. On Friday March 21, 2014, Plaintiff and midnight pharmacist Ms. Tran discovered another missing 100 tablets of Adderall, another schedule II control substance, on the Narcotic's dispensing book. Plaintiff notified Pharmacy Supervisor for CVS # 8031 (Ms. Iwick) and informed her that he is going to report the missing tablets to authorities. In response, Ms. Iwick went to the pharmacy and told the Plaintiff that a second

[1] CVS # 8031 did not carry schedule I control substances like marijuana, schedule II narcotic control substances like Methadone and Adderall were stored in three safes, schedule III through V control substances like hydrocodone products and Alprazelom were scattered throughout the inventory.

In 2014, CVS added another safe for Hydrocodone products (like Noroc and Vicoden), which was reclassified by the DEA to schedule II on October 6, 2014. Pharmacy kept a dispensing log book of schedule II control substance only, where shipments were added to the count and dispensing amounts were deducted. And that's how the shortages were discovered. CVS did not have a log of Hydrocodone products till 2014.

reporting of control substances in a short period of time "going to bring lots of eyes" to the pharmacy. Plaintiff filed a report anyways. There was no suspect of theft at that point, and the losses were attributed to miscount or the bottle was thrown in the trash by a mistake (Plaintiff Response to Summary Judgment, RE 53, Page ID # 4-7; Motion for Summary Judgment, RE 47, Page ID # 4 & Ex 11-A & Ex 5).

3- Mr. McDonald's Audit: On the same day of filing the second Initial Notification, March 21, 2014, the Regional Loss Prevention Manager Mr. McDonald went to CVS # 8031 and conducted unannounced Loss Prevention audit. The pharmacy scored 97.14%; which was a higher score compared with the previous two years (Plaintiff Response to Summary Judgment, RE 53 Ex 6). Question 47 on the audit stated "Are the controlled Drug Safes locked when not in use? Is the combination secured and the key in the pharmacist possession? Is access to controlled drug safes limited to Pharmacists only?" In response to this question, Mr. McDonald answered YES.

4- Mr. McDonald's; the Malfunctioned Safe: Mr. McDonald visited the pharmacy again five days later on March 26, 2014 and asked the Plaintiff if he was aware that one of the safes could be opened without using the combination. The Plaintiff was completely unaware and denied any knowledge of that. Plaintiff informed Mr. McDonald that he opens that safe each time as he was told by the previous Pharmacist in Charge when he started working at that location -by entering the code, hearing the buzz, lifting up the handle and pulling the door open. Following the conversation, Plaintiff called the Fix Line that day and the malfunctioning keypad on the safe was fixed. (Plaintiff Response to Summary Judgment, RE 53, Ex 7 Page ID # 8-9; Motion for Summary Judgment, RE 47, Page ID # 5).

5- Mr. McDonald's; Employees Interviews: Mr. McDonald interviewed five pharmacists including Plaintiff and 14 pharmacy technicians (Motion for Summary Judgment, RE 47, Ex 12 Page ID #3). However, the only statements presented by CVS throughout the case were by four pharmacists: Plaintiff, Ms. Konja, Ms. Tran, and Mr. Greggs; and by one technician: Mr. Thompson (Motion for Summary Judgment, RE 47, Ex 6 & Ex 12).

6- Mr. McDonald Interviewing Plaintiff: On April 14, 2014, Mr. McDonald confronted Plaintiff and stated that three pharmacists (Ms. Konja, Ms. Tran, and Mr. Greggs) admitted knowledge of the malfunctioned keypad on the safe and indicated that Plaintiff was also aware of the malfunctioning. For the second time, Plaintiff denied any previous knowledge of the malfunctioning of the keypad and requested that Mr. McDonald examine the video of the camera that was directed at the safe to see if Plaintiff was entering the combination every time he opens the safe, and to question the pharmacists that Plaintiff overlaps with (scheduled to work with), not the pharmacists that he only sees during shift exchange for few minutes (Motion for Summary Judgment, RE 47, Page ID # 5 & Ex 6; Plaintiff Response to Summary Judgment, RE 53, Page ID # 9).

7- Stolen Control Substances: Plaintiff informed Mr. McDonald sometime in April, that an anonymous lady called the pharmacy accusing a technician, Mr.

Thompson, of stealing control substances (Plaintiff Response to Summary Judgment, RE 53, Ex 7 Page ID # 10). Mr. McDonald allegedly obtained a written statement from Mr. Thompson on May 01, 2014, in which Mr. Thompson confessed to stealing around 20,000 tablets of control substances from that pharmacy by pocketing them, not by accessing the malfunctioned safe, over a year period (Motion for Summary Judgment, RE 47, Ex 12-F). Mr. Thompson became a fugitive of law thereafter (Plaintiff Motion to Amend, RE 44, Page ID # 2-3). The vast majority of the allegedly stolen tablets, Hydrocodone products and Alprazolam, were stored on pharmacy shelves not in a safe[2]. Mr. Thompson accomplished his thefts during midnight shifts, under supervision of midnight pharmacists Ms. Tran and Mr. Greggs, when only he and a pharmacist were at the pharmacy and no other pharmacists or technicians around (Plaintiff Response to Summary Judgment, RE 53, Ex 7 Page ID # 3). That location had a similar theft from a different technician in 2009, no pharmacist was terminated. (Plaintiff Response to Summary Judgment, RE 53, Ex 11 Page ID 13-16, 72, 73).

8- Plaintiff Employment Termination: on May 30, 2014 Ms. Iwick met with the Plaintiff, and handed him a

[2] Only 300 tablets of the 20,000 tablets Mr. Thompson allegedly confessed to stealing were stored in a safe, which was the Adderall. Adderall was not stored in the broken safe, and he did not confess to accessing any of the safes but to stealing by pocketing the drugs. Narcotic dispensing book showed that only 100 tablets of Adderall were missing not 300 tablets.

CVS did not have dispensing books for the Hydrocodone or Alprazolam at the time of thefts in 2013.

counseling form in the presence of the district manager Alex Johnson, stating:
"As the Pharmacy manager, Durade Failed to take the appropriate action to ensure the CII safe was functional which could have prevented a significant loss incurred during a recent internal theft case." (Motion for Summary Judgment, RE 47, Ex 8-C).

After discussion between the three, Ms. Iwick and Mr. Johnson signed the form while the Plaintiff initialed his refusal to sign on the form. Plaintiff felt that the safe issue was only a pretext for retaliation; since he was the only pharmacist who was terminated, while the other pharmacists who admitted knowledge of the malfunctioned safe only received write ups. Furthermore, Mr. McDonald and Ms. Iwick admitted that they didn't look at the video recording when Plaintiff specifically requested from them to do so. The video recording of the camera directed on the safe would have clearly showed that Plaintiff used to enter the combination every time he accesses the safe because he was not aware of the malfunctioned keypad.

9- Employees Showing Support to Plaintiff: Shortly after termination, Plaintiff received calls and texts from current and former CVS employees expressing their support. Some employees indicated that the safe been malfunctioned for many years, and there was two major thefts happened few years ago at that location, no one was terminated for the safe or the thefts. That was the first time Plaintiff becomes aware of the safe and theft history.

10- Plaintiff reaching Out to CVS: Plaintiff filed an internal complaint with CVS Ethics Line on June 02, 2014 regarding the termination, but no remedies were provided by CVS (Plaintiff Response to Summary Judgment, RE 53, Ex 7 Page ID # 12 & Ex 2).

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City: West Bloomfield State: Michigan Zip Code: 48324

PRO SE APPELLANT'S REPLY BRIEF

United States Court of Appeals For The Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

III. The termination decision was pretextual, and it was orchestrated and carried out by Ms. Iwick and Mr. McDonald.

A. CVS cannot support their claim that the termination decision has basis in facts with proper evidences:

CVS explained the reasons for terminating Plaintiff in the counseling form handed to him by Ms. Iwick on May 30, 2014:

> "As the Pharmacy manager, Durade Failed to take the appropriate action to ensure the CII safe was functional which could have prevented a significant loss incurred during a recent internal theft case."(Motion for Summary Judgment, RE 47, EX 8-C).

As for the part regarding the link between the malfunctioned safe and significant loss: CVS contradicted that part during oral argument:

> "The court: And did he acknowledge that his taking was because – not because. But was made easier because the lock did not work on the safe?
> Ms. Raisty: He did not, your Honor. There were a number of different narcotics safes at this store and different drugs were stored in each one. <u>And the drugs that he admitted to stealing were actually not stored in the safe that was not locking.</u> (Motion for Summary Judgment Hearing, R 66, Page ID # 1468).......

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IV. Plaintiff could still meet his burden of establishing a causal connection despite Ms. Cassin alleged involvement in the termination decision, which also does not shift the pretextual liability away from CVS

Despite CVS repeated arguments throughout their brief that Mr. Cassin took the termination decision not Ms. Iwick and without being aware of the protected activities (CVS Brief at 10-11, 17, 24-25, 29), Plaintiff could refute that and show in more than one way that CVS is still liable even if their allegations are true.

A. Mr. Cassin was not the decision maker

While CVS acknowledged that the termination document had Ms. Iwick name and signature on it and not Mr. Cassin, CVS failed to point out to any document that support CVS allegation that Mr. Cassin was the decision maker other than his own testimony (CVS Brief at 16-17). No reasonable jury could conclude that a Regional Manager (Mr. Cassin) works for a big corporate (CVS), where everything is documented and tracked, would terminate a Pharmacy Manager (Plaintiff) without having not even one document or email with his name on it.

B. If Mr. Cassin was involved in the decision making, then the evidences he allegedly

reviewed suggest he was aware of the protected activity

1. CVS decision maker (allegedly Mr. Cassin) decision to terminate Plaintiff was pretextual based on the facts and evidences he/she reviewed but chose to ignore:

Plaintiff does not question CVS decision maker "business judgment," but rather debates the honesty of the termination decision and the animosity towards Plaintiff. CVS decision maker used Mr. McDonald's investigation as a mere "rubber-stamp" for his own animus towards Plaintiff. She/he failed to conduct their own "honest" investigation, even though many of the evidences they allegedly examined should have signaled them to doubt the legitimacy and honesty of Mr. McDonald's investigation. Plaintiff discussed those evidences thoroughly in his brief (Plaintiff Brief at 21-25). An examining to CVS brief reveled that they avoided discussing those evidences especially the lack of video recording.

2. Even though Mr. McDonald did not name any pharmacist, he informed Mr. Cassin in the two emails sent on April 22, 2014 and May 01, 2014 that there were two recent protected activities by the pharmacists "On 3-24-2014 it was reported to me, by Jennifer Iwick, RX supervisor for district 4106, that Store 8031 had recently identified that they were short two different C2 drugs during counts conducted by the Pharmacists." (Motion for Summary Judgment, RE 47, EX 12-E & EX 12-G). CVS #8031 had four assigned full time pharmacists (Plaintiff, Ms. Konja, Ms. Tran and Mr. Greggs). A reasonable

jury could conclude that Mr. Cassin deduced that Plaintiff was behind at least one of the two discoveries which followed by the reporting (protected activities) based on the 6th Circuit following analysis:
"Given that there were only five female relief corrections officers working the third shift at the time, two of whom were Bishop and Henry, a reasonable jury could conclude that Lt. Richardson deduced that Bishop and Henry were among those officers who were behind the complaint." *Bishop v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS*, No. 10-3399, (6th Cir. July 9, 2013).

Furthermore, CVS admitted that Ms. Iwick, who was aware of the protected activities, delivered the termination document to Plaintiff and her name was on it not Mr. Cassin (CVS Brief at 17 footnote 12); which infer that they must have had a discussion about it. Adding to that the fact that Mr. Cassin discussed the termination decision with Ms. Anderson, who was aware of the safe being malfunctioned for years before Plaintiff worked at that location (Argument II-C), a reasonable jury could conclude that at least one of Ms. Iwick or Ms. Anderson shared her information with Mr. Cassin.

C. CVS/ Mr. Cassin should be held liable for Ms. Iwick and Mr. McDonald animus

CVS and Mr. Cassin are still liable under Cat's Paw theory of Liability for Ms. Iwick and Mr. McDonalds' animus, even if Mr. Cassin took the termination decision and he wasn't aware of the protected activities, which both were refuted earlier. There are evidences of causal nexus between the ultimate decision maker's (allegedly Mr. Cassin) decision to terminate Plaintiff and Ms. Iwick/Mr. McDonalds' animus. CVS argument that the decision maker must be aware of the protected activity to establish a causal connection (CVS Brief at 17) is incorrect when there are evidences that the direct supervisor and biased intermediate employee's actions are "causal factor" of the ultimate employment action.

The Sixth Circuit Court quoted the Supreme Court decision in *Staub v. Proctor Hospital*
"The *Staub* court defined cat's paw liability as follows "if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and that if that act is a proximate cause of the ultimate employment action, then the employer is liable under the [Act]." Id. At 1194 (emphasis in original)." *CHATTMAN v. TOHO TENAX AMERICA, INC.*, No. 10-5306, p15 (6th Cir. July 13, 2012).

1. Ms. Iwick and Mr. McDonalds' intent:

Ms. Iwick and Mr. McDonald intent was to retaliate against Plaintiff for refusing to cover-up when Mr. Iwick made her statement to dissuade him from reporting. Also, to use Plaintiff as a scapegoat if the DEA to investigate CVS #8031 into the missing controls, repeated similar major internal thefts, and a broken safe for many years. That intent was discussed in details in Argument II-A & III-B, also in Opening Brief.

2. Proximate Causation:
This could be easily established since CVS claimed that Mr. Cassin used the information provided to him by Mr. McDonald as a ground for termination. (Motion for Summary Judgment, RE 47 Page ID # 569). Mr. Cassin did not conduct his own investigation, nor interviewed Plaintiff's witnesses or examined video recording as requested by Plaintiff. The Sixth Circuit Court quoted the Supreme Court decision in *Staub v. Proctor Hospital "Cat's* paw liability attaches when the biased intermediate employee's actions are "a causal factor of the ultimate employment action." *Staub, 131 S. Ct. at 1193." CHATTMAN v. TOHO TENAX AMERICA, INC.*, No. 10-5306 (6th Cir. July 13, 2012).

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C.This termination "sounded off" to a CVS executive

CVS attempted to undermine the fact that a high ranked CVS Compliance Operation official sent the email below during internal investigation to <u>CVS Human Recourse director</u> Ms. Erika Anderson by briefly mentioning it in their footnote (CVS Brief at 28 footnotes # 17).

> " Erika. This is an investigation update request for case 2014-6-43364. <u>The termination in this case sounds off. I will need</u>

> to know how the RLPM[3] knew about the safe not locking for a few years and why no other employees were disciplined prior to that time if he knew about the issue. Will the termination of the Reporter in this case stand? Additionally, please confirm that the safe has been repaired. Please provide me with your findings within the next 5 business days." (Plaintiff Response to Summary Judgment, RE 53, Ex 17).

This email was not breaking news to Ms. Anderson, but was demanding answers during internal investigation; which means that the HR director was well aware that Mr. McDonald knew about the safe being malfunctioned for years before Plaintiff was transferred to that location at #8031, and he was just using it as a pretext. CVS argued that there are no direct evidences that Plaintiff was discharged in violation of the WPA (CVS Brief at 14). The facts that the HR director had knowledge that the termination reason was pretextual, and she discussed the termination with the alleged decision maker Mr. Cassin (see page 4 above), are direct evidences against CVS since Ms. Anderson was involved in the termination decision, and she had to approve the termination herself since she was the HR director. CVS did not present Ms. Anderson reply which would have even more affirmed the direct evidences. These facts also represent indirect evidences of causal connection and pretext.

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[3] RLPM: Regional Loss Prevention Manager (Mr. McDonald).