STATE OF MICHIGAN

COURT OF APPEALS

PHILIP KELLER,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS,

Defendant-Appellee.

UNPUBLISHED
March 24, 1998

No. 199285
Kent Circuit Court
LC No. 95-001019

Before: White, P.J., and Cavanagh and Reilly, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of defendant's partial motion for summary disposition, dismissing his claim under the Whistle Blowers' Protection Act (WPA), MCL 15.361 *et seq*.; MSA 17.428(1) *et seq*., and the circuit court's order dismissing his constructive discharge claim. We vacate and remand for further proceedings.

I

Plaintiff began employment with defendant's police department as an emergency communications officer in November 1981. Emergency dispatchers, including plaintiff, worked in the emergency communications dispatch center, in a room in the basement of the Hall of Justice which had no windows. In December 1986, defendant issued an administrative policy that prohibited smoking in City buildings except in designated areas. In February 1987, the Grand Rapids Police Department issued General Order 87-2, also prohibiting smoking in public places except in designated smoking areas. Signs prohibiting smoking were posted in the emergency communications dispatch center. The facts viewed in a light most favorable to plaintiff are that plaintiff sent a memorandum to the supervisor of his immediate supervisors, Ralph Gould, the Emergency Communications Director for defendant's police department, reiterating previous complaints he had made about smoking in the dispatch center and requesting that management enforce the no-smoking regulations as required by the Michigan Clean Indoor Air Act, MCL 333.12603; MSA 14.15(12603) (Clean Air Act). Plaintiff's memorandum concluded by saying: "It is also hoped that other action on my part will not be necessary to remidy [sic] the situation."

Plaintiff thereafter filed a "Citizens Incident Information" report with the Grand Rapids Police Department, stating that he had made every effort to have management enforce the no-smoking rule in the communications center, and that fire dispatchers continued to smoke there, violating the purpose and spirit of the rule designed to protect the health of city employees working in communications. Plaintiff sent another memorandum to Gould, noting that when he arrived for work after the day shift, the air at his work station was smoky and he found thirty-one cigarette butts in his trash can, along with cigarette packs. Plaintiff testified at deposition that after he sent the two memoranda and filed the police report, Gould told him that he had enough documentation from him and that if he got any more documentation, he would consider disciplining plaintiff for it. Plaintiff alleged that Gould thereafter harassed him in a number of ways, including giving him below average evaluations, singling plaintiff out for additional training for conduct engaged in by all employees, subjecting plaintiff to excessive scrutiny, and, ultimately constructively discharging him.[1]

Plaintiff filed his complaint, in propria persona, on March 15, 1995,[2] alleging that by causing him to resign, defendant constructively discharged him in violation of the WPA because of his reports to appropriate authorities of violations of the Clean Indoor Air Act.

Defendant filed a motion for summary disposition, arguing that an employee's employer does not qualify as a "public body" under the WPA, MCL 15.362; MSA 17.428, and that in order to be protected under the WPA plaintiff had to report the violation to a higher authority than his employer, specifically a state or local agency empowered to enforce the Clean Air Act. Defendant argued that although plaintiff's employer was a law enforcement agency, it had no power to enforce the Clean Air Act.

The circuit court dismissed plaintiff's WPA claim on the basis that plaintiff did not report the alleged violation to an authority higher than his employer. The circuit court by separate order later dismissed plaintiff's constructive discharge claim and complaint on the basis that plaintiff did not exhaust his administrative or collective bargaining remedies before filing suit.

II

A

The WPA was enacted in 1981 and encourages employees to assist in law enforcement and protects those employees who engage in whistleblowing activities. *Dolan v Continental Airlines,* 454 Mich 373, 378; 563 NW2d 23 (1997). It does so with an eye towards promoting public health and safety. *Id.* To establish a prima facie case under the WPA, a plaintiff must prove that he or she reported or was about to report a violation or a suspected violation of a law, regulation, or rule to a public body. *Id.* at 379. Remedial statutes such as the WPA are to be liberally construed in favor of the persons intended to be benefited. *Dudewicz v Norris-Schmid, Inc,* 443 Mich 68, 77; 503 NW2d 645 (1993).

Section 2 of the WPA provides:

> 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 . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a 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 . . . [MCL 15.362; MSA 17.428(2).]

The term "public body" is defined as

> (d) "Public body" means all of the following:
>
> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
>
> (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.
>
> (v) **A law enforcement agency or any member or employee of a law enforcement agency.**
>
> (vi) The judiciary and any member or employee of the judiciary. [MCL 15.361(d)(v); MSA 17.428(1)(d)(v). [Emphasis added.]

B

The issue whether the WPA protects employees who report violations or suspected violations of a law to their employers, where their employers are public bodies as defined in the WPA, was addressed in one of three consolidated cases decided during the pendency of this appeal, *Phinney v Adelman*, 222 Mich App 513; 564 NW2d 532 (1997).[3] In *Phinney*, the plaintiff was employed by the University of Michigan's Institute of Gerontology (IOG) as a senior research associate. The plaintiff brought suit against Perlmutter, a research scientist at the IOG, alleging that Perlmutter defrauded her of her research; against Adelman, the director of the IOG; and against the University's Board of Regents, alleging that Adelman and the Board retaliated against her for reporting Perlmutter's misconduct. The plaintiff had reported her allegations to a number of University of Michigan employees, including a personnel officer, a faculty member at the IOG, and Adelman, and had not made reports outside the University. The jury awarded plaintiff damages against Perlmutter for fraud and against Adelman for retaliatory discrimination. *Id.* at 520.

This Court rejected Adelman's argument on appeal that the plaintiff's reports had to be made to a "higher authority" than her employer, noting that the University of Michigan constitutes a "public body" under the WPA. *Id*. at 555. This Court further noted that the plaintiff's allegations triggered a University of Michigan police investigation and that it was not the plaintiff's job function to report violations or suspected violations of law to her employer, distinguishing the case from *Dickson v Oakland Univ*, 171 Mich App 68, 71; 429 NW2d 640 (1988), which we discuss *infra*. *Id.*

C

In the instant case, the circuit court relied on *Dickson* and *Dudewicz, supra,* in granting defendant's motion for summary disposition. In *Dickson, supra,* the plaintiff was employed as a police officer with the Oakland University Department of Public Safety. The plaintiff alleged that he made various arrests on the campus, including five persons for driving while intoxicated. After the plaintiff was assaulted by a student, he prepared a complaint seeking an arrest warrant for assault and battery, but the defendants refused to request a warrant. 171 Mich App at 69. In addressing the defendant's argument that the WPA was "designed to protect employees who report suspected wrongdoing by their employer to a higher authority from retaliatory discharge," this Court noted:

> A House legislative analysis made prior to the passage of the act supports that view and states:
>
> > Violations of law by corporations or by governments and by the men and women who have the power to manage them are among the greatest threats to the public welfare. . . .
> >
> > Because these institutions are large and impersonal, and because they are regulated by complex and, to most people, unfamiliar statutes and rules, specific violations of the law by them often go unnoticed by the public which is the victim. The people best placed to observe and report violations are the employees of government and business, but employees are naturally reluctant to inform on an employer or a colleague. . . .
> >
> > * * *
> >
> > House Bill 589 would create a new act to forbid employers, both public and private, to take reprisals against employees who had given information to authorities concerning possible violations of the law or who were about to give such information. [House Legislative Analysis, HB 5088, 5089, February 5, 1981.]
>
> The instant case is readily distinguishable. Plaintiff reported the wrongdoing of students and others to his employer pursuant to his job function. Nothing in the complaint indicates that the employer was in violation of the law or that plaintiff was fired for

> reporting the employer's violation of the law to a higher authority. In essence, the complaint indicates that plaintiff's superiors suggested he exercise restraint in arresting individuals and also indicates that the university exercised its discretion in determining not to pursue an assault and battery warrant. We do not believe the act covers the instant facts. [*Dickson, supra* at 71.]

The issue in *Dudewicz, supra*, was whether the WPA was intended to protect employees who are fired for reporting violations of the law *by fellow employees*. 443 Mich at 74. Emphasis added. The plaintiff in *Dudewicz* was a parts manager for an automobile dealership. After a service manager assaulted him, he reported the incident to the new car sales manager and also filed criminal charges with the Midland County Prosecutor. *Id.* at 70-71. The plaintiff testified that the dealership owner told him to either drop the criminal charges or be fired and that he was later terminated. The circuit court granted the defendant a directed verdict on the plaintiff's WPA claim. On appeal, the Michigan Supreme Court concluded that the WPA's protection is not limited to employee reports of violations by employers, noting that "the *Dickson* Court erred in limiting the applicability of the WPA to employee reports of violations of law by employers." *Id.* at 77. In a footnote, the *Dudewicz* Court stated:

> In any event, *Dickson* is clearly distinguishable on its facts. Forgetting for a moment who broke the law, the plaintiff in *Dickson* reported the violation only to his employer, not to a public body within the meaning of the WPA. On *these* facts, the panel correctly found that the WPA was inapplicable. While its ruling was correct, the panel made an unfortunate comment in dicta stating that the purpose of the WPA was to protect only those employees who reported violations of law by their employers. It is this comment that is erroneous. [*Dudewicz, supra* at 77, n 4.]

The circuit court's opinion and order dismissing plaintiff's WPA claim in the instant case stated in pertinent part:

> In Dickson, the Court of Appeals held that the Whistleblowers Protection Act (WPA) does not apply to an employee who claims that he or she was discharged for complaining to his or her public employer about that employer's supposed violation of the law, that the Act creates a cause of action only for such reports to some higher authority. In Dudewicz, the Supreme Court held that the WPA also applies to discharges supposedly resulting from complaints about fellow employees.
>
> Contrary to plaintiff's assertion, the Supreme Court did not criticize in Dudewicz the holding in Dickson that a discharged employee must be able to establish retaliation for having complained to some governmental authority higher than the employer. The Supreme Court did, admittedly, find some fault with the Dickson opinion, but only with some dictum that the WPA does not protect employees who complain about co-workers. However, the holding in Dickson that the only actionable complaints are those to a higher authority was found to be "correct." Id., at 77, fn 4. Since the employer in Dickson is a publicly-funded university, MCLA 390.151, et seq.; MSA 15. 1852(151), et seq., i.e., is a "public body" as defined by the WPA, MCLA 15.361(d)(iv); MSA

> 17.428(1)(d)(iv), for the Supreme Court to say in Dudewicz that Dickson was correct because the plaintiff reported a violation of law only to his employer, "not to a public body within the meaning of the WPA," is to say, because the plaintiff's employer was otherwise a public body within the meaning of the WPA, that a complaint must be made to a higher authority to invoke the protection of the WPA. That is the only explanation for what the Supreme Court said.
>
> Even if Dudewicz did not approve of the holding in Dickson, as distinct from its dictum, the Supreme Court clearly did not overturn that holding. It only rejected the dictum that an employee discharged for reporting misconduct by a fellow employee is not protected by the WPA. Accordingly, even if Dudewicz did not confirm Dickson, this Court must obey Dickson because that decision was not overturned. This Court must honor decisions by the Court of Appeals, even when the Supreme Court has explicitly withheld its approval of those decisions, unless and until specifically overruled by the Supreme Court. Maciejewski v Breitenbeck, 162 Mich App 410, 415 (1987).

In reaching its decision, the circuit court in the instant case was constrained to follow *Dickson, supra*, and did not have the benefit of *Phinney, supra*.[4] Under *Phinney, supra,* the circuit court was in error in dismissing the complaint solely because plaintiff's citizen's police complaint was made to his own employer and not "some higher authority." We therefore vacate the order granting summary disposition of this claim and remand plaintiff's WPA claim for further proceedings.[5]

III

Plaintiff next argues that the circuit court erred in dismissing his constructive discharge claim on the basis that he did not exhaust the grievance remedies under the collective bargaining agreement.[6] Plaintiff argues that his claims are independent from the collective bargaining agreement and that the exhaustion of remedies doctrine therefore does not apply, and also argues that the collective bargaining agreement itself gives him the right to either file a grievance and go through the grievance process, or file a lawsuit. Plaintiff also argues that when he approached the Union regarding Gould's alleged harassment, he was told that Gould was not violating any specific term of the contract and the matter was thus not subject to grievance.[7]

Defendant argues that all of plaintiff's complaints concern his working conditions and he was thus obligated to exhaust his remedies under the collective bargaining agreement before filing suit in circuit court.

It is the public policy of this state to enforce collectively bargained for methods of resolving disputes which arise under a collective bargaining agreement. *Tuttle v Bloomfield Hills Schools,* 156 Mich App 527, 530; 402 NW2d 54 (1986). It is generally held that an action for wrongful discharge may not be maintained where the right of action is derived from a collective bargaining agreement, unless the plaintiff has first exhausted the grievance procedures established by such agreement. See *Annotation: Exhaustion of Grievance Procedures or of Remedies Provided in Collective Bargaining Agreement as Condition of Employee's Resort to Civil Courts for Assertedly*

Wrongful Discharge, 72 ALR2d 1439. Absent an express provision excluding a particular grievance from arbitration or the most forceful evidence of a purpose to exclude the claim, the matter should go to arbitration. *Mollett v Taylor*, 197 Mich App 328, 341; 494 NW2d 832 (1992).

In *Mollett,* this Court held that a constructive discharge of a public employee based on considerations other than those that give rise to a statutorily created and separate cause of action is to be treated no differently than an actual discharge that would require recourse to the civil service commission or collective bargaining agreement, *id.* at 337, and rejected the plaintiff's argument that the grievance procedure did not apply to his constructive discharge claim. *Id.* at 340-341. On the other hand, where a plaintiff does not seek to vindicate rights under the collective bargaining agreement, but, rather, seeks to assert a statutory right, the plaintiff need not exhaust the grievance remedies under the collective bargaining agreement. *Tuttle, supra* at 531.

In the instant case, plaintiff filed his complaint in pro per. That complaint consisted of one count, alleging a violation of the WPA and that plaintiff had been constructively discharged. When defendant filed its motion for summary disposition of the WPA claim, plaintiff responded to the statutory argument and also asserted that the complaint alleged a separate claim for constructive discharge. Recognizing that the complaint was filed in pro per and could fairly be read as asserting a separate constructive discharge claim, the circuit court granted partial summary disposition dismissing the WPA claim and allowed further time to address the constructive discharge claim. When the constructive discharge claim was later addressed, the WPA claim had already been dismissed and the constructive discharge claim was considered as a separate and distinct claim. The court concluded that the independent claim was subject to exhaustion requirements.

The circuit court correctly determined that plaintiff's constructive discharge claim is to be treated as any other discharge claim. *Mollett, supra.* To the extent that claim is simply an adjunct to his wrongful discharge claim, asserting rights that derive from the statute and not the contract, i.e., the right not be constructively discharged in retaliation for the exercise of rights protected by the act, no exhaustion is required. *Tuttle, supra.* However, to the extent plaintiff seeks to vindicate a separate contractual right to continued employment absent just cause and asserts that this contractual right was violated by Gould's unjustified harassment, without regard to the WPA, plaintiff was obliged to comply with the collective bargaining agreement between the City of Grand Rapids and the Police Officers Labor Council, Police Officers/Sergeant Unit.

Article 1, § 8 of the collective bargaining agreement provides:

> Pursuant to and in accordance with all applicable provisions of [the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*; MSA 17.455(1) *et seq.*] Act 379 of the Public Acts of 1965, Management recognizes the Union as the exclusive collective bargaining representative for those employees in the defined bargaining unit for the purpose of collective bargaining with respect to rate of pay, wages, hours of employment **and other conditions of employment**. [Emphasis added.]

Article 10 of the collective bargaining agreement addresses discharge and discipline and provides in pertinent part:

> Section 5. Management shall not discipline or discharge any employee except for just cause.

Article 8 addresses the grievance procedure and provides in pertinent part:

> Section 1. Grievance
>
> A. A grievance is any dispute, controversy, or difference between (a) the parties, or (b) Management and an employee or employees, on any issue with respect to, on account of, or concerning the meaning, interpretation or application of this Agreement or any terms or provisions thereof.

Article 8, § 4 addresses the processing of grievances, including those involving discharge.

Article 8, § 3 of the collective bargaining agreement is entitled "Election of Remedies" and states in part:

> A. Appeals involving discharge, demotion, reduction in classification or compensation, or suspension may be filed with the Civil Service Board in accordance with Civil Service Board rules. It is expressly agreed that such appeals shall be an election of remedies and a waiver of any right possessed by both the employee and the union to contest such matter in the arbitration forum provided herein.
>
> B. It is further expressly agreed that if any proceedings involving any matter which is or might be alleged as a grievance are instituted in any administrative action before a government board or agency, or in any court, whether by an employee or by the Union, then such administrative or judicial proceedings shall be the sole remedy, and grounds for a grievance under this Agreement shall no longer exist.

We agree with the circuit court that these provisions do not provide plaintiff with the option to forgo administrative and contractual remedies on a strictly contractual discharge claim. See *Mollett, supra*. *Grand Rapids v Grand Rapids Lodge No 97, Fraternal Order of Police*, 415 Mich 628; 330 NW2d 52 (1982), relied on by plaintiff, addressed the issue whether once an employee submits the subject matter of the grievance to adjudication in a court of law the grievance must terminate, and not the issue whether an employee has the general right under this collective bargaining agreement to file a suit in circuit court in lieu of filing a grievance challenging a discharge without just cause.

Under the circumstance that neither the parties nor the trial court addressed the scope of the constructive discharge claim in the context of a valid WPA claim, or the application of the collective bargaining agreement's provisions to the constructive discharge claim in the context of a valid WPA

claim (because the WPA claim had already been dismissed), we remand for further proceedings consistent with this opinion.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

[1] Plaintiff left his job on July 14, 1994, after Gould ordered that one of plaintiff's supervisors give plaintiff the additional duty of updating certain manuals, while plaintiff was the only call taker and responsible for taking all emergency (911), non-emergency and inter-departmental calls. When plaintiff learned on that day from a supervisor that he had been written up for not completing the task, plaintiff went to Gould's office, and then left the job. Plaintiff testified at deposition that he felt "harassed out of his job," and that this incident was the final straw.

[2] Defendant did not seek summary disposition on the basis that plaintiff's WPA claim is barred by the statute of limitations, although its answer asserted the statute of limitations as an affirmative defense.

[3] Plaintiff cites this case in a supplemental authority brief filed with this Court on August 29, 1997.

[4] *Phinney* is binding authority under AO 1996-4.

[5] We reject defendant's argument that plaintiff was not protected under the WPA because he did not complain to one of the specific agencies charged with enforcing the Clean Indoor Air Act. Defendant cites no authority in support of its argument and it is contrary to the WPA's broad definition of "public body" at MCL 15.361(d)(v); MSA 17.428(1)(d)(v). In this regard, we note that plaintiff's citizens police complaint was made outside the chain of supervising authority in his employment. We see no Legislative intent to remove from the statute's protection employees who report violations to the wrong agency but who are nevertheless retaliated against because the employer is nevertheless made aware of the report.

[6] The exhaustion defense was raised only as to the remaining constructive discharge claim, and not the statutory WPA claim. In this regard, we note that in *Tuttle v Bloomfield Hills Schools*, 156 Mich App 527, 528; 402 NW2d 54 (1986), this Court addressed the question whether a union employee must first use and exhaust the grievance remedies provided for under the collective bargaining agreement when contesting disciplinary actions taken by his employer in alleged retaliation for whistleblowing activities. The plaintiff sued his employer under the WPA, alleging that he was suspended and threatened with discharge as a result of his reporting possible illegal activities of certain

school board employees to the president of the Bloomfield Hills Board of Education. The defendant filed a motion for summary disposition, arguing that the plaintiff was a union member and subject to a collective bargaining agreement that contained mandatory and exclusive dispute resolution procedures, and the plaintiff was thus required to exhaust grievance remedies before filing suit.

This Court held that the plaintiff had the right to proceed directly with the civil action against his employer, noting that the WPA provides that an employee may proceed against the employer in a civil action, MCL 15.363; MSA 17.428(3), and that the plaintiff was not seeking to resolve a dispute that had arisen under the collective bargaining agreement:

> . . . plaintiff does not seek to resolve a dispute that has arisen under the collective bargaining agreement. Rather, plaintiff seeks to assert a statutory right that has been guaranteed to employees in this state. [*Id.* at 531.]

[7] Plaintiff submitted an affidavit below so stating.