# STATE OF MICHIGAN

# COURT OF APPEALS

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CHERYL DEBANO-GRIFFIN,

Plaintiff-Appellee,

v

LAKE COUNTY and LAKE COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellants.

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UNPUBLISHED
October 15, 2009

No. 282921
Lake Circuit Court
LC No. 05-006469-CZ

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ

PER CURIAM.

Defendants appeal as of right the trial court's denial of their motion for partial summary disposition on plaintiff's claim under the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq*. We reverse and remand.

Plaintiff was hired as Director of the Lake County 911 department in October 1998. In 2004, she began expressing concerns regarding several instances when there was a shortage of ambulances in the county to respond to emergencies. The County had a contract with Life EMS, Inc. to provide ambulance service. Life EMS would sometimes handle out-of-county transfers, thereby leaving the county without a standby ambulance. On occasion, it was necessary to obtain additional ambulance service from other providers. Plaintiff complained to the Lake County Board of Commissioners (Board) that these were safety violations.

Plaintiff also raised concerns related to a transfer of funds from one county account to another county account. On September 28, 2004, $50,000 was transferred out of the ambulance fund and into the 911 fund. The money was slated to be used for a mapping project but plaintiff believed the transfer was not necessary because she had obtained a grant in the amount of $57,000 to be used for the mapping project. On November 12, 2004, the County Treasurer and the Board transferred the money back to the ambulance fund as authorized. Plaintiff brought the transfer to the attention of the Emergency Telephone System Committee (ETSC) and informed the Board that she had done so in October 2004.

Plaintiff testified that she attended a budget meeting on October 29, 2004, and that funding for her position was in the proposed budget. She further testified that shortly after the money had been returned to the ambulance fund she saw another proposed budget that did not include funding for her position. The Board voted to adopt the budget plan that did not include

funding for plaintiff's position and instead combined her duties with another post. Plaintiff questioned why her position had been eliminated from the proposed budget for 2005 and was told that it was budget related. One of the Board members testified that it was his decision to combine plaintiff's position with another county position and that the purpose of the consolidation was strictly a budget action. The Board member also testified that one other position was consolidated and that other positions were cut back in order to save the county money. Following the elimination of her position, plaintiff filed suit.

Defendants argue on appeal that the trial court erred in denying their motion for summary disposition because plaintiff failed to establish the prima facie elements of her claim. Defendants specifically argue that plaintiff was not engaged in a protected activity and that she failed to prove a causal connection between some protected activity and the elimination of her position. We review the decision of a trial court pertaining to a motion for summary disposition de novo. *Associated Builders & Contractors v Consumer & Industry Services Director*, 472 Mich 117, 123; 693 NW2d 374 (2005). In addition, whether a prima facie case under the WPA has been established is a question of law also reviewed de novo. *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

Defendants brought their motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the allegations of the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). All factual allegations supporting the claim, as well as any reasonable inferences or conclusions that can be drawn from the facts are accepted as true. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 583-584; 640 NW2d 321 (2002). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a public body. MCL 15.362. To establish a prima facie case under the WPA, a plaintiff must prove that (1) she was engaged in a protected activity, (2) she suffered an adverse employment action, (3) and there was a causal connection between the protected activity and the adverse employment action. *West*, *supra* at 183-184.

Defendants first argue that plaintiff failed to meet her burden of establishing even the prima facie elements of a WPA case because she was not engaged in protected activity under the statute. "A person is engaged in 'protected activity' under the [WPA] where the person (1) reports a violation or a suspected violation of a law or regulation to a public body, (2) is about to report such a violation to a public body, or (3) is asked by a public body to participate in an investigation." *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002).

In order to determine whether plaintiff was engaged in a protected activity it is necessary to examine the statute. When interpreting a statute, the primary goal is to give effect to the intent of the Legislature by construing the language of the statute. *Pusakulich v Ironwood*, 247 Mich

App 80, 82; 635 NW2d 323 (2001). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006). Where the plain and ordinary meaning of statutory language is clear, judicial construction is normally neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005); *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).

MCL 15.362 provides in part as follows:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . 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.

We hold that the word "suspected" in the statute modifies only the word "violation" and not the word "law." To interpret the WPA as allowing a whistleblower to report a suspected violation of a suspected law, rule, or regulation unduly expands the parameters of WPA. Significantly, the Legislature has specifically required that plaintiff produce at a minimum evidence of a suspected violation of "a law or regulation or rule *promulgated* pursuant to law of this state." As noted in the dissent, the "Legislature's reference to a violation of a law or regulation or rule that has been 'promulgated' indicates that the Legislature only intended to protect persons who report or are about to report activities that are violations or suspected violations of *existing* laws, regulations or rules." (Emphasis in original.) Therefore, the WPA does not protect an employee who reports or is about to report a suspected violation of a suspected law.

We disagree with the interpretation of the WPA embraced by our dissenting colleague. In short, our dissenting colleague believes that the clear language of the WPA should be ignored so that the act does not require an employee to have knowledge of the law before reporting suspected wrongful activity. Our dissenting colleague concludes that the act should be broadly construed to benefit all employees who in good faith report or are about to report any activities of their employer to a public body. We agree that certain employees should benefit from application of the WPA. Nonetheless, the purpose of the WPA is the protection of the public, not the protection of employment. The act provides protection to certain employees only as a means to achieve the ultimate and very noble end of public protection. This point has been made clear by our Supreme Court: "The underlying *purpose of the act is the protection of the public.* The act meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Dolan v Continental Airlines*, 454 Mich 373, 378-379; 563 NW2d 23 (1997) (Emphasis added. Footnotes omitted.). *Id*. The public does not benefit from giving WPA protection to those who report activities or suspected activities that they subjectively believe violate nonexistent laws, rules or regulations. Thus, the interpretation of the WPA adopted by our dissenting colleague does not promote the purpose of the WPA.

Plaintiff argues that she did report a violation or suspected violation of an actual law when she complained about the transfer of funds from the ambulance account into another county account. In her deposition, plaintiff stated that she complained that Life EMS was violating the governing rules for ambulances by not providing immediate police, fire, and

ambulance service. Plaintiff had also complained that Life EMS was not using ambulances located in Lake County. However, she was unable to point to where the identified "governing rules" could be found (admitting that she did not know if they were state or federal laws). She explained that she had learned of these governing rules "over the last several years" from "other 911 directors." Further, plaintiff admitted that there was no law that required the ambulances to be in Lake County or to respond to calls for a specified percentage of occasions.

In her response to defendants' motion for summary disposition, plaintiff failed to identify a single statute, rule, or regulation that defendants' activities of "missing ambulances" and "misappropriation of funds" allegedly violated. On appeal, plaintiff makes reference to various statutes that may have been implicated. However, plaintiff raises these statutes for the first time on appeal, and our review is limited to the documentary evidence submitted by the parties at the time of the motion. *Veenstra, supra* at 164.

Because plaintiff had only a subjective belief that defendants' activities or suspected activities violated unspecified "governing rules" (which may indeed have just been the suggestions of 911 directors she had been in contact with on how to make sure ambulance service was efficiently provided), and because she could not identify what law, rule, or regulation had been violated by the movement of funds from the ambulance account to another county account, she failed to establish the prima facie elements of a claim under the WPA. Therefore, the trial court should have granted defendants' motion for partial summary disposition.[1]

Because we conclude that plaintiff failed to establish that she was engaged in protected activity, we need not address whether she establish a causal connection between her complaints and the elimination of her position.

Reversed and remanded for entry of an order granting defendants' motion on plaintiff's WPA claim. Plaintiff's claims pursuant to the Open Meetings Act, MCL 15.261 *et seq*., and the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., which were subject to a bench trial, are not affected by this decision. We do not retain jurisdiction.

/s/ Brian K. Zahra

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[1] Plaintiff argues that defendants should be precluded from appealing the trial court's decision on the motion for summary disposition because the matter went to trial and resulted in a judgment in plaintiff's favor. However, a party aggrieved by a trial court's ruling on summary disposition may "proceed to final judgment and raise errors of the court . . . in an appeal taken from final judgment." MCR 2.116(J)(2)(c). See *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 315; 760 NW2d 699 (2008) (stating that "a party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders").