

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UNPUBLISHED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.

M. J. KELLY, J. (*dissenting*).

I conclude that plaintiff Cheryl Debano-Griffin presented evidence from which a reasonable trier of fact could conclude that she was engaged in an activity protected under the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq.* and that her termination was causally related to her engagement in the protected activity. For this reason, the trial court did not err when it denied defendants Lake County and Lake County Board of Commissioners' (the Board) motion for summary disposition. Because I would affirm on this basis, I must respectfully dissent.

I. Summary Disposition

A. Standard of Review

On appeal, Lake County and the Board argue that they were entitled to summary disposition of Debanog-Griffin's WPA claim because Debanog-Griffin failed to present evidence that she was engaged in protected activity and that her termination was causally related to her engagement in protected activity. For that reason, Lake County and the Board ask this Court to reverse the judgment in Debanog-Griffin's favor and remand for entry of summary disposition in their favor. This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 378; 761 NW2d 353 (2008). In addition, this Court reviews *de novo* questions of law, such as the proper interpretation of a statute or court rule and the application of legal doctrines. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

## B. Protected Activity under the WPA

In order to establish a *prima facie* case under the WPA, a plaintiff must show that “(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action.” *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). “An employee is engaged in protected activity under the Whistleblowers’ Protection Act who has reported, or is about to report, a suspected violation of law to a public body.” *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997); see also *Chandler v Dowell Schlumberger, Inc.*, 456 Mich 395, 399; 572 NW2d 210 (1998).

Lake County and the Board argue that the trial court should have granted summary disposition in their favor because Debano-Griffin did not present any evidence that she was engaged in a protected activity. Specifically, they argue that, in order to survive summary disposition, Debano-Griffin had to present evidence that she reported an actual or suspected violation of an *actual* law. In other words, Lake County and the Board argue that, as a matter of law, a plaintiff is not engaged in protected activity if the plaintiff merely suspects the existence of a law, suspects that it might have been violated, and then reports the *suspected* violation of the *suspected* law.

In relevant part, the WPA prohibits an employer from discharging, threatening, or otherwise discriminating against an employee regarding the employee’s terms and conditions 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. In this case, the key provision of this statute is the reference to “a violation or suspected violation of a law or regulation or rule promulgated pursuant to law . . .” *Id.*

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. From this, one might be tempted to conclude that the WPA only protects persons who knowingly report actual or suspected violations of *actual* laws, regulations or rules—in other words, the employee’s reporting activities must relate to an existing and identifiable law, regulation or rule. Under this reading, a plaintiff would have to prove that he or she knew about the existence of a law, regulation, or rule, and then reported activities that he or she knew or suspected violated that law, regulation or rule. However, it must be emphasized that the statute does not just protect employees who report an actual violation of a law, regulation or rule; the statute explicitly protects persons who report “a suspected violation” of a law, regulation or rule. MCL 15.362. The prepositional phrase “of a law or regulation or rule promulgated pursuant to law” modifies the type of violation—it does not alter the fact that the violation of the promulgated law need only be suspected. Because the phrase “a suspected violation” clearly refers to what *the employee* suspects, the most natural reading of the WPA is that the Legislature intentionally extended protection to employees based on the employees’ subjective beliefs about both the relevant facts and law—stated differently, an employee is still protected even if he or she turns out to be mistaken about whether the reported activities actually violated a promulgated

law, regulation or rule. And concomitantly, the employee would be protected even if it turns out that the employee was mistaken about whether there was a promulgated law, regulation or rule that applied to the facts that he or she reported.

Even if MCL 15.362 could plausibly be read to require a plaintiff to show that there is an actual law underlying his or her report, I would not adopt that construction. There are a dizzying array of laws, regulations and rules promulgated by a multiplicity of governmental units at every level within the United States; and few, if any, employees will know about these laws or their specific provisions.<sup>1</sup> Instead, the majority of employees will have some vague—and in many cases incorrect—understanding about the laws applicable to their situation. Because the WPA is a remedial statute, it must be liberally construed in favor of the persons the Legislature intended to benefit. *Chandler*, 456 Mich at 406. The purpose of the WPA is to protect the public by promoting the reporting of potentially illegal activity within businesses and government by those who are most likely to be aware of it—the employees. See *Shallal*, 455 Mich at 612 (noting that the WPA prohibits employer reprisals against whistleblower employees “for the purpose of encouraging employees to report violations.”); see also *Dolan v Continental Airlines*, 454 Mich 373, 378-379; 563 NW2d 23 (1997). The WPA protects the public by protecting employees who report suspected violations of law. By limiting the protection afforded by the WPA to only those employees who report violations or suspected violations of specific laws, regulations or rules that are actually known to the employee, the majority severely limits the scope of the protection afforded to employees under the WPA. Thus, the majority’s construction actually defeats the remedial purposes of the statute by discouraging employees from reporting a suspected violation of law where the employee is uncertain whether there is a specific law covering the conduct at issue. Indeed, under such an interpretation, an employee would have to consult with a lawyer before reporting a violation or suspected violation in order to ensure that he or she is reporting activities that plausibly implicate a violation of an *actual* law—and even then there would be no guarantee that the lawyer correctly assessed the situation. Because that understanding of MCL 15.362 is at odds with the most natural reading of the statute and at odds with its remedial purpose, I reject that construction. *Chandler*, 456 Mich at 406. Debano-Griffin did not have to show that she knew about a specific existing law and reported a violation or suspected violation of that law in order to establish that she was engaged in a protected activity.

I also do not share Lake County and the Board’s fear that an interpretation that permits suits based on a “suspected violation of a suspected law” will result in a multitude of frivolous WPA suits. Although the Legislature has extended the protection afforded by the WPA to an employee based on the employee’s subjective understanding about the law, the report must nevertheless be made in a good faith belief that an actual law has been violated. See *Shallal*, 455 Mich at 621-622 (explaining that a plaintiff who reported a violation of law in order to shield

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<sup>1</sup> Indeed, the reality is that a creative lawyer can probably find some law, regulation or rule after the fact, which was plausibly implicated by the employee’s report. However, forcing plaintiffs to engage in such revisionist history during the summary disposition phase would serve no useful purpose. Instead, the focus should be on whether the employee had a good faith belief that he or she was reporting a violation or suspected violation of a law, regulation or rule at the time the employee made the report. See *Shallal*, 455 Mich at 621-622.

herself from termination would not be entitled to the protection of the WPA). Hence, if Debano-Griffin had made the reports for some purpose unrelated to protecting the public, such as part of a “turf war” with other county employees, she would not be entitled to the protection of the WPA. See *id.* at 621 (noting that, in order for a report to be in good faith, the employee must make the report out of a desire to inform the public on matters of public concern and not personal vindictiveness). Likewise, if the facts reported were so clearly innocuous that no reasonable jury could conclude that Debano-Griffin held a good faith belief that the reported activities violated an actual law, the trial court would have been warranted in dismissing the WPA claim. Thus—to use an example proffered by Lake County and the Board—the trial court in this case could properly have concluded that Debano-Griffin was not engaged in a protected activity had her WPA claim been premised solely on a report that Lake County unlawfully permitted people to park red cars in its parking lot. Similarly, had Debano-Griffin’s WPA claim been premised solely on a report which did not on its face implicate a law, regulation or rule, the trial court would also have been justified in concluding that she had not established that she was engaged in a protected activity. See MCR 2.116(C)(8). But none of these concerns are present in this case. Here, Debano-Griffin presented evidence from which a reasonable jury could conclude that she reported the allegedly inappropriate use of ambulances and the inappropriate transfer of funds in a good faith belief that those actions amounted to a violation of an existing law, regulation or rule or, in the case of the transfer, that it was done with the intent to ultimately use the funds in a manner prohibited by law.<sup>2</sup> Consequently, I would conclude that the trial court did not err when it declined to dismiss Debano-Griffin’s WPA claim on this basis.

### C. Causation

Lake County and the Board also argue that the trial court should have dismissed Debano-Griffin’s WPA claim because she failed to present evidence sufficient to establish a question of fact as to whether her termination was causally related to her engagement in a protected activity. Specifically, Lake County and the Board contend that the only evidence that Debano-Griffin presented to support her theory that her position was eliminated in retaliation for her reporting a suspected violation of law was the fact that her position was eliminated after she raised the accounting irregularities. Because timing alone is inadequate to establish a question of fact on causation, Lake County and the Board conclude that the trial court erred when it declined to grant its motion for summary disposition under MCR 2.116(C)(10).

A plaintiff may not establish the causation element of a WPA claim solely by showing that the adverse employment action occurred after the plaintiff engaged in protected activity under the WPA. *West*, 469 Mich at 186 (stating that “a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse

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<sup>2</sup> I note that nothing within the WPA requires an employee to report only completed illegal acts. An employee who reports on a conspiracy or attempt to violate a law, regulation or rule is engaged in protected activity within the meaning of MCL 15.362. See MCL 750.92 (prohibiting any person from taking any act towards the commission of an offense prohibited by law); MCL 750.157a (making it illegal to conspire to commit an offense prohibited by law or to commit a legal act in an illegal manner).

employment action.”). However, Debano-Griffin did not rely solely on the temporal proximity of her reports and the ultimate decision to eliminate her position. At the summary disposition phase,<sup>3</sup> Debano-Griffin presented evidence that, if believed, established that the Board had already determined to retain her position for the next year shortly before she began to raise concerns about the ambulance service and the transfer of funds. There was also evidence that shortly after she raised her concerns and informed the Board that she had reported the accounting irregularity, the Board took two relevant actions: it eliminated her position and it returned the funds that Debano-Griffin had alleged were improperly transferred. From the evidence that Debano-Griffin’s position was funded, a reasonable jury could conclude that the Board had no intention of eliminating her position before she reported her concerns about the ambulances and transfer. Likewise, because the decision to eliminate Debano-Griffin’s position followed closely after her reports and was closely linked with the Board’s decision to reverse the transfer of funds, a reasonable jury could conclude that the Board’s decisions to reverse the transfer and eliminate Debano-Griffin’s position were related and that the decision to eliminate her position was motivated by a desire to retaliate against Debano-Griffin for publicly challenging the transfer. Because Debano-Griffin presented sufficient evidence to establish a question of fact for the jury on the issue of causation, the trial court did not err when it declined to grant Lake County and the Board’s motion for summary disposition on this basis. MCR 2.116(C)(10).

#### D. Notice

Lake County and the Board finally argue that the trial court should have granted their motion for summary disposition because Debano-Griffin failed to give them the required notice that she reported a violation or suspected violation of law. See *Roberson v Occupational Health Ctrs of America, Inc*, 220 Mich App 322, 326; 559 NW2d 86 (1996). However, Lake County and the Board did not properly raise this argument before the trial court in their motion for summary disposition. In civil cases, a party who fails to properly raise an issue before the trial court waives any claim of error with regard to that issue on appeal. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (explaining that Michigan follows a raise or waive rule for appellate review). Even if this issue had been properly raised, I would conclude that there was no error warranting relief. There was ample evidence that Debano-Griffin reported her belief to various Lake County agencies, including members of the Board, that the inadequate ambulance service and transfer of funds were unlawful.

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<sup>3</sup> On appeal, Debano-Griffin argues that, because her WPA claim proceeded to trial, this Court should decline to address the sufficiency of her evidence at the summary disposition phase. However, it is well settled that, after the final judgment or order, a party may challenge any order leading up to the final judgment or order. *People v Torres*, 452 Mich 43, 57 n 14; 549 NW2d 540 (1996). This includes motions for summary disposition. See, e.g., *Janczyk v Davis*, 125 Mich App 683; 337 NW2d 272 (1983). Further, when reviewing a trial court’s decision on a motion for summary disposition, this Court is limited to the evidence actually before the trial court on the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996). Therefore, this Court must review Lake County and the Board’s claims of error with regard to the motion for summary disposition by reviewing the evidence raised by the parties during the motion for summary disposition.

For these reasons, I would affirm.

/s/ Michael J. Kelly