STATE OF MICHIGAN

COURT OF APPEALS

PINO COLONE, M.D.,

Plaintiff-Appellee,

v

PATRICK R. WARDELL, HURLEY MEDICAL CENTER BOARD OF HOSPITAL MANAGERS, UNIVERSITY OF MICHIGAN, and UNIVERSITY HOSPITAL,

Defendants,

and

REGENTS OF UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
October 7, 2010

No. 287601
Genesee Circuit Court
LC No. 07-086428-CZ

PINO COLONE, M.D.,

Plaintiff-Appellee,

v

PATRICK R. WARDELL and HURLEY HOSPITAL BOARD OF MANAGERS, a/k/a HURLEY MEDICAL CENTER,

Defendants-Appellants,

and

UNIVERSITY OF MICHIGAN BOARD OF REGENTS and UNIVERSITY HOSPITAL,

Defendants.

No. 287625
Genesee Circuit Court
LC No. 07-086428-CZ

PINO COLONE, M.D.,

Plaintiff-Appellee,

v

No. 289111
Genesee Circuit Court
LC No. 07-086428-CZ

PATRICK WARDELL and FLINT BOARD OF HOSPITAL MANAGERS, d/b/a HURLEY MEDICAL CENTER,

Defendants-Appellants,

and

REGENTS OF UNIVERSITY OF MICHIGAN, a/k/a UNIVERSITY OF MICHIGAN, a/k/a UNIVERSITY HOSPITAL,

Defendant.

Before: HOEKSTRA, P.J., and BECKERING and SHAPIRO, JJ.

BECKERING, J. (*dissenting*).

I write separately because I respectfully disagree with the majority's conclusion that defendants were entitled to summary disposition of plaintiff's claims under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*., Elliot-Larson Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and First Amendment. I would affirm the trial court's orders denying defendants' motions for summary disposition.

I. PLAINTIFF'S WPA AND ELCRA CLAIMS

On appeal, defendants argue that the trial court erred in denying their motions for summary disposition of plaintiff's WPA and ELCRA claims. I would hold that the trial court properly denied defendants' motions because material questions of fact exist as to whether plaintiff established a prima facie case under either the WPA or the ELCRA. See MCR 2.116(G)(6) and *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (stating that in reviewing a motion under MCR 2.116(C)(10), this Court must consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party, and that summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact).

Plaintiff brought his whistleblower claim under MCL 15.362, which states:

> 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 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, 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.

As stated by the majority, "[t]o establish a prima facie case under this statute, 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).

Similarly, the ELCRA prohibits an employer from retaliating or discriminating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding or hearing under the act. MCL 37.2701(a). To establish a prima facie case of retaliation under the ELCRA, a plaintiff must establish "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *DeFlaviis v Lord & Taylor Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). Analysis under the ELCRA and WPA warrant "parallel treatment." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 610, 617; 566 NW2d 571 (1997).

Defendants contend that plaintiff failed to create a genuine issue of material fact with regard to whether he suffered from an adverse employment action. After receiving the May 2007, letter from defendant Patrick Wardell requesting that plaintiff no longer be assigned to Hurley Medical Center (HMC), Dr. William Barsan reassigned plaintiff from HMC to Foote Hospital. Plaintiff admits that the reassignment involved the same or very similar title, job duties, benefits, and pay as his assignment at HMC. Plaintiff testified that one of the primary reasons he declined the reassignment was that his commute to work would have been approximately 30 miles longer each way, although he has not presented any evidence indicating that he felt pressured to decline the reassignment because of the distance. Plaintiff also considered his removal from HMC to be an affront to his professional reputation. He testified that he found it difficult to explain to his acquaintances and colleagues why he was no longer working at HMC and was forced to offer very vague explanations for his departure, such as "personal reasons." He further testified that shortly before the reassignment, he was asked to be a candidate for president of the Genesee County Medical Society, but ultimately had to decline the candidacy because he was unsure about where he would be employed in the future.

In *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 311-312; 660 NW2d 351 (2003),[1] this Court stated:

> [W]e [have] defined an adverse employment action as an employment decision that is materially adverse in that it is more than [a] mere inconvenience or an alteration of job responsibilities and that there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another [are] not controlling.
>
> Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. In determining the existence of an adverse employment action, courts must keep in mind the fact that work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. [Internal quotation marks and citations omitted.]

Viewing the facts in the light most favorable to plaintiff, a material question of fact exists regarding whether he suffered from an adverse employment action. Plaintiff concedes that he suffered no material change in title, job duties, benefits, or pay. But he has presented at least some evidence suggesting that his reassignment was otherwise materially adverse to him. The *Pena* Court acknowledged that there are factors to be considered "unique to [each] particular situation" in determining whether an adverse employment action has occurred. *Id*. at 312. Although plaintiff was not discharged, it is arguable that a seasoned physician's abrupt removal from a hospital presents a unique set of facts and, in some circumstances, could constitute a materially adverse employment action. Plaintiff asserts that he was denied the honor of serving as the local medical society president and his professional reputation was damaged as a result of defendants' actions. On the other hand, it is undisputed that after plaintiff resigned from U of M, he immediately accepted a comparable position at another hospital, with a higher salary and the same if not better benefits. Thus, whether plaintiff suffered any material damage to his professional reputation or material loss of professional opportunity is a question of fact.

In regard to the increased commuting time required if plaintiff had accepted the transfer to Foote Hospital, the WPA specifically 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 . . . ." MCL 15.362 (emphasis added).

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[1] Plaintiff's assertion in his brief on appeal that the rules articulated in *Pena* are no longer good law is without merit. *Pena* has not been overruled and is frequently relied upon by courts of this state.

Defendants argue that the change of location in this case was nothing but a "mere inconvenience" and was not materially adverse to plaintiff. See *Pena*, 255 Mich App at 311. A commute increase of approximately 30 miles each way would certainly have been a change for the worse for plaintiff. Whether such change rises to the level of being materially adverse, given the other alleged consequences of plaintiff's release from HMC, presents a material question of fact.

Defendants next argue, and the majority agrees, that plaintiff cannot establish that he was engaged in a protected activity. According to defendants, plaintiff was removed from HMC entirely as a result of his April 27, 2007, mass e-mail, and sending the e-mail did not constitute protected activity because the e-mail contained no reference to a violation or alleged violation of law. See MCL 15.362 and MCL 37.2701(a). Plaintiff admits that he was removed from HMC as a result of the e-mail, but claims that sending the e-mail constituted protected activity because it referenced his prior complaints regarding sexual harassment and safety violations in the emergency department.

As stated by the majority, plaintiff's April 27, 2007, mass e-mail contained the following pertinent language:

> I have concerns regarding the position of flow manager, which is item number 6. Since our meeting it has been rumored that Steve Nokovich is getting or being considered for this position. I have serious concerns about this. He is not a good nurse, he is lazy and neither works well nor communicates effectively with others. Over the past year I have provided you, nursing management, Dwayne Parker and Bill Smith with multiple examples of his ineptitude. Additionally, recently, as you and nursing management are also aware, he and others on third shift are fabricating issues to distract from their incompetence, for example, last week Carol told me that someone filled out an incident report 3 days prior, stating that I did not inform the charge nurse of a transfer of a patient on May 11, 2006.
>
> It would be a great disservice to the position and to this department if he or any of the other individuals in question, who continue to be the cancers and the impediments to patient satisfaction, were to assume this role.

I agree with defendants and the majority that plaintiff's references in the e-mail to Stephen Nokovich's and other staff members' allegedly improper conduct were, in large part, very vague and, on their face, focused on the general ineptitude or incompetence of Nokovich and the nursing staff. But, viewing the facts in the light most favorable to plaintiff, it is reasonable to conclude that the e-mail made reference to at least some of plaintiff's complaints of sexual harassment and safety violations over the previous year. In May 2006, plaintiff reported the photography incident involving Nokovich and at least two other nurses to a group of physicians at a physicians' retreat. Later that month, plaintiff sent an e-mail to Dr. Mike Jaggi and Carol Fechik regarding the incident when Nokovich allegedly abandoned a patient during an intubation procedure. In October 2006, plaintiff filed a complaint regarding the same incident with the Michigan Department of Community Health (MDCH). Also in October, plaintiff and three female nurses met with HMC's general counsel and complained of unprofessional conduct, including alleged sexual harassment, in the emergency department. Plaintiff then complained of

similar conduct to Dr. Jaggi. It is unclear in the record whether any of the complained-of conduct involved Nokovich. In April 2007, plaintiff filed an incident report alleging that Nokovich failed to administer medications as ordered. Later that month, before plaintiff sent his mass e-mail, he filed another report alleging that Nokovich failed to notify him of the arrival of a trauma patient and had lied about informing him. Whether plaintiff referenced any or all of these prior complaints in his April 27, 2007, mass e-mail and was thus engaged in a protected activity under the ELCRA or WPA in sending the e-mail, are genuine questions of material fact that should be left to the finder of fact.

Defendants further argue that plaintiff cannot establish a causal connection between a protected activity and adverse employment action and that even if he could establish a prima facie case of retaliation, they had a legitimate, non-discriminatory reason for removing him from HMC—the sending of the inflammatory mass e-mail against HMC and U of M protocol. Again, I agree with the trial court that these issues present questions of fact for the finder of fact. If the factfinder concludes that plaintiff's mass e-mail referenced any prior, protected complaints he had made, that he was therefore engaged in protected activity under the ELCRA, the WPA, or both in sending the e-mail, and that his subsequent transfer from HMC constituted an adverse employment action, whether a causal connection existed between the two is for the factfinder to determine. Likewise, whether sending the e-mail against defendants' protocol—the same e-mail plaintiff claims was protected—constituted a legitimate business reason for removing him, which was not pretextual, is a question of fact.

I would affirm the trial court's denial of defendants' motions for summary disposition of plaintiff's retaliation claims.

II. PLAINTIFF'S FIRST AMENDMENT CLAIM

HMC and Wardell argue that the trial court erred in denying their motion for summary disposition of plaintiff's First Amendment claim. Again, I would hold that the trial court properly denied their motion because a material question of fact exists as to whether plaintiff made his complaints pursuant to his official duties and not as a citizen for purposes of the First Amendment.

In his second amended complaint, plaintiff asserted that he was engaged in activity protected by the First Amendment when he reported incidents of sexual harassment and safety violations in the emergency department. Plaintiff alleged that he had a right to petition government agencies to correct those conditions and HMC and Wardell retaliated against him for doing so. To establish a First Amendment violation, an employee must establish, as a threshold matter, that he or she "spoke as a citizen on a matter of public concern." *Garcetti v Ceballos*, 547 US 410, 418; 126 S Ct 1951; 164 L Ed 2d 689 (2006).[2] As stated by the majority, "when

[2] Although there is a split in federal authority, I agree with the federal circuit courts of appeals that have concluded that this threshold question presents a mixed question of law and fact, particularly considering that it is a fact-intensive inquiry. See, e.g., *Posey v Lake Pend Oreille*

public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id*. at 421.

HMC and Wardell have not disputed that plaintiff spoke on a matter of public concern in complaining about alleged sexual harassment and safety violations in the emergency department. Rather, they assert that he made such complaints pursuant to his official duties and not as a citizen for purposes of the First Amendment. See *id*. Plaintiff reported the alleged sexual harassment and safety violations to HMC. The U of M Standard Practice Guide "encourages" employees who believe they have witnessed sexual harassment to report it to the university, and U of M's Agreement for the Provision of Emergency Medicine Services with HMC requires physicians to supervise HMC nurses and other health providers "consistent with [HMC] policies and procedures and the prevailing standard of care." Given these two provisions and the court's broad conclusion in *Davis v Cook Co*, 534 F3d 650 (CA 7, 2008)—a case cited by defendants and the majority—regarding the scope of an employee's official duties, it is arguable that plaintiff made his complaints pursuant to his official duties and responsibilities as an emergency department physician. But, viewing the facts in the light most favorable to plaintiff, it is also arguable that he went beyond his official duties in so complaining. U of M's practice guide only encouraged employees to report alleged incidents of sexual harassment to the university as a matter of general policy, and there is no record evidence that plaintiff was otherwise required to make such reports to U of M or HMC. When plaintiff and the three female nurses reported alleged incidents of sexual harassment to HMC, they made general complaints regarding sexually inappropriate behavior in the department, but plaintiff asserts that he also advocated on behalf of the individual nurses allegedly suffering harassment, including Jamie Wardlaw, his girlfriend. Whether plaintiff's sexual harassment reports were part of his official responsibilities or duties is a question of material fact. Further, while plaintiff's complaints of Nokovich's alleged safety violations to HMC likely fell within the scope of his official duties as a physician supervisor of the emergency department nurses, it is noteworthy that plaintiff not only complained of Nokovich's actions to HMC, but also to the MDCH, which was outside his normal chain of command. The trial court concluded that there was no evidence plaintiff was required "to take his complaints to the level that he did." Whether plaintiff's complaint to the MDCH was beyond the scope of his official duties presents a material question of fact. See, e.g., *Reinhardt v Albuquerque Pub Sch Bd of Ed*, 595 F3d 1126, 1135-1137 (CA 10, 2010); *Carter v Inc Village of Ocean Beach*, 693 F Supp 2d 203, 211 (ED NY, 2010); *Wright v City of Salisbury*, 656 F Supp 2d 1013, 1026-1027 (ED Mo, 2009), and the cases cited therein. But see *Omokehinde v Detroit Bd of Ed*, 563 F Supp 2d 717, 728 (ED Mich, 2008).

Sch Dist No 84, 546 F3d 1121, 1129 (CA 9, 2008); *Davis v Cook Co*, 534 F3d 650, 653 (CA 7, 2008); *Reilly v Atlantic City*, 532 F3d 216, 227 (CA 3, 2008).

Whether plaintiff made his complaints pursuant to his official duties and not as a citizen for purposes of the First Amendment is a question of fact for the factfinder. Therefore, I would hold that the trial court properly denied HMC and Wardell's motion for summary disposition of plaintiff's First Amendment claim.

I would affirm the trial court's denial of defendants' motions for summary disposition.

/s/ Jane M. Beckering