STATE OF MICHIGAN

COURT OF APPEALS

JANINE IRWIN,

Plaintiff-Appellant,

v

CIENA HEALTH CARE MANAGEMENT, INC., d/b/a GOLDEN OAKS MEDICAL CARE FACILITY,

Defendant-Appellee.

UNPUBLISHED
December 7, 2010

No. 294239
Oakland Circuit Court
LC No. 2008-093145-CD

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant. In her lawsuit, plaintiff claimed she was wrongfully terminated from her employment as a licensed practical nurse ("LPN"), with one count based on her discharge being a violation of the Whistleblower Protection Act ("WPA"), MCL 15.361 *et seq.*, and another count based on the discharge being a violation of public policy.[1] We affirm in part and reverse in part.

A. SUMMARY DISPOSITION ON THE PUBLIC POLICY CLAIM

Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) on plaintiff's violation of public policy claim. We agree, but because summary disposition was proper under MCR 2.116(C)(10), the decision will not be reversed. A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(8) is reviewed de novo. *Adair v Mich*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Adair*, 470 Mich at 119. The motion should be granted only when the claim is "so

[1] Plaintiff agreed at the trial court to dismiss the WPA claim, so only the public policy claim is reviewed on appeal.

clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotations and citations omitted).

"[I]n the absence of a contract providing to the contrary, employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever." *McNeil v Charlevoix County*, 484 Mich 69, 79; 772 NW2d 18 (2009). However, an employer is not free to discharge an employee when that discharge would be contrary to public policy. *Id.* A claim for termination of employment in violation of public policy must be based on an "objective legal source" establishing public policy. *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008). Such "[a] cause of action for wrongful discharge may be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 452; 750 NW2d 615 (2008), quoting Suchodolski v Mich Consol Gas Co, 412 Mich 692, 695; 316 NW2d 710 (1982).. Thus, if the pleadings support a finding that plaintiff was discharged because she refused to violate the law during the course of her employment, she would have stated a valid claim.

Because we must confine our review to the pleadings alone and accept plaintiff's factual allegations in her complaint as true, the following facts are established: (1) plaintiff was an employee of defendant; (2) on June 14, 2008, a registered nurse ordered plaintiff to administer insulin to a patient; (3) plaintiff did not believe that any physician order existed that authorized the administering of the insulin; (4) plaintiff refused to follow the order because of this lack of a legitimate physician order; (5) and plaintiff was reprimanded, suspended, and later discharged because of her refusal to follow the nurse's order.

Plaintiff's complaint alleges that she was discharged because she refused to participate in actions that represented a "clear violation of the standard of care" she owed the patient. However, construing this claim in a light most favorable to plaintiff, results in the issue becoming whether plaintiff was asked to violate the law when she was asked to administer the insulin.[2] Under the Public Health Code, "prescribing is limited to a prescriber." MCL 333.17708(3). And a "prescriber," in turn, is

> a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a licensed optometrist certified under part 174 to administer and prescribe therapeutic pharmaceutical agents, a licensed veterinarian, or another licensed

[2] We note that not viewing this claim in this manner will result in plaintiff losing because concepts such as the "standard of care" are not based on an "objective legal source," instead it is defined as "the skill and care ordinarily possessed and exercised by practitioners of the same profession in the same or similar communities." *Cox v Bd of Hosp Managers of Flint*, 467 Mich 1, 22; 651 NW2d 356 (2002); see also *Gonzales v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007) (reinforcing the idea that standard of care is not derived from an objective legal source because expert testimony is *required* to establish the applicable standard of care).

> health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery. [MCL 333.17708(2).]

It is clear that plaintiff, an LPN, and the nurse supervisor, a registered nurse, did not qualify as a "prescriber" under the Public Health Code. Thus, looking at the facts as provided in the pleadings in a light most favorable to plaintiff, we conclude that plaintiff did state a valid wrongful termination public policy claim when she alleged her employment was terminated because she refused to violate the law during the course of her employment.

The trial court's opinion and order stated the following with respect to plaintiff's public policy violation claim:

> The Court also agrees that Plaintiff's public policy theory fails to state a claim. The problem here is not that Plaintiff's allegations do not describe a policy violation but rather that the policy violation is based on the Whistleblower Protection Act. Moreover, Plaintiff has not identified any other legal source for the public policy she claims to have been violated in this case. In this context, Plaintiff's remedy is solely under the Whistleblower Protection Act, and she cannot simultaneously pursue a common law public policy claim. See *Vagts v Perry Drug Stores*, 204 Mich App 481[; 516 NW2d 102] (1994). Therefore, summary disposition of this count is appropriate as well.

The trial court was incorrect when it stated that the public policy claim was based on the WPA. The only reference to the WPA in plaintiff's complaint involved Count II. And that count was based on the allegation that plaintiff was discharged because she "was about to report to an authority the fact that the defendant was not complying with the standard of care that it was required to render to the patients." Clearly, this allegation of being fired for being about to report to another authority is distinct and separate from the first allegation of being fired for failing to follow an order that was contrary to the law. Thus, the trial court's rationale for granting summary disposition was erroneous. The trial court's reliance on *Vagts v Perry Drug Stores*, 204 Mich App 481; 516 NW2d 102 (1994), was misplaced. The *Vagts* Court stated,

> [A] "public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation *for the conduct at issue*." In other words, where a statute confers upon a victim of retaliation the right to sue, that person may not also assert a claim of discharge in violation of public policy . . . . [*Vagts*, 204 Mich App at 485 (citations omitted; emphasis added).]

This Court recently restated this principle as "where there exists a statute explicitly proscribing *a particular adverse employment action*, that statute is the exclusive remedy, and no other 'public policy' claim can be maintained." *Kimmelman*, 278 Mich App at 573 (emphasis added). *Vagts* and *Kimmelman* simply stand for the proposition that if a statute *would* allow a plaintiff to recover for wrongful termination, then the plaintiff is limited to that statue as the sole remedy. Here, the WPA would *not* allow plaintiff to recover for being discharged for refusing to follow an order that was contrary to the law. The WPA only protects employees from being discriminated against because the employee either reported or was about to report the employer

to a "public body." MCL 15.362. Because the WPA does not address an employer discharging an employee for refusing to break the law, plaintiff was not barred from pursuing a public policy claim. Accordingly, the trial court erred when it ruled that plaintiff was limited to the WPA for recovery.

However, the trial court also granted defendant's motion for summary disposition based on the fact that plaintiff's employer was Northern Oak Management Company, L.L.C. – and not defendant – "as indicated in the letter describing the terms and conditions of Plaintiff's employment." Although the trial court did not refer to which subrule it was relying upon when it granted summary disposition on this aspect, because the court relied on evidence outside the pleadings in making its ruling, the motion is considered being granted under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [A defendant] is entitled to judgment as a matter of law if the claim suffers a deficiency that cannot be overcome." *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997) (citations omitted).

Here, there is no dispute that the proper defendant should be Northern Oak, and not defendant. Northern Oak hired plaintiff and was responsible for the personnel decisions at the facility. Plaintiff even admitted this error when she sought to "substitute Northern Oak Management Company in place of Ciena Healthcare Management" in the trial court. Because this is a deficiency that plaintiff cannot overcome, defendant was entitled to judgment as a matter of law, and summary disposition under MCR 2.116(C)(10) was warranted. Accordingly, because the trial court did not err when it granted summary disposition for this reason, any error introduced because of also granting the motion on MCR 2.116(C)(8) grounds does not require reversal.

B. AMENDING THE COMPLAINT

Plaintiff argues that the trial court abused its discretion when it denied her motion to amend the complaint. We agree. A trial court's decision regarding a party's motion to amend its pleadings is reviewed for an abuse of discretion. *Wormsbacher v Philip R. Seaver Title Co Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.118(A) sets forth the requirements for amendment of pleadings. Specifically, MCR 2.118(A)(2) provides that "[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." "Because a court should freely grant leave to amend a complaint when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons." *Wormsbacher*, 284 Mich App at 8, citing *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Some reasons that justify denying leave to amend include "undue delay, bad faith or dilatory motive, repeated failure to cure

deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility." *Wormsbacher*, 284 Mich App at 8.

Here, the trial court concluded that allowing plaintiff to name a new defendant would be futile since, regardless of the named defendant, plaintiff failed to state a claim on which relief could have been granted. As discussed is Part A, *supra*, the trial court erred when it determined that plaintiff failed to state a public policy claim on which relief could be granted. Thus, because the trial court's decision was based on an erroneous application of law, the court abused its discretion when it denied plaintiff's motion to amend the complaint. See *Donkers v Kovach*, 277 Mich App 366, 368-369; 745 NW2d 154 (2007) (stating that an error of law can lead a trial court to abuse its discretion).

We note that defendant's reliance on *Miller*, *supra*, at the trial court is misplaced. The *Miller* Court held that, in that particular instance, allowing the plaintiff to amend the complaint would have been futile. *Miller*, 477 Mich at 107-108. However, the dispositive fact in *Miller* was that the request to amend the complaint, by substituting a new party, came *after* the statute of limitations had lapsed. *Id.* Because pleadings do not relate back to their original date of filing when new parties are substituted or added, the Court found adding the new party would be futile. *Id.* at 106-108. In the instant case, the statute of limitations had not lapsed with respect to the public policy claim[3] when plaintiff moved to amend the complaint. Thus, there was no "particularized reason" to refuse plaintiff's request to amend the complaint, and the trial court abused its discretion when it denied plaintiff's request.

Affirmed in part, reversed in part, and remanded for further proceeding consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

[3] Plaintiff consented to dismiss the WPA claim and acknowledged that the status of limitations had expired with respect to that claim.