

STATE OF MICHIGAN
COURT OF APPEALS

JANE MORTIMER,

Plaintiff-Appellant,

v

ALPENA COUNTY PROBATE COURT and
COUNTY OF ALPENA

Defendants-Appellees.

UNPUBLISHED

August 14, 2012

No. 304863

Alpena Circuit Court

LC No. 08-002309-CD

Before: TALBOT, P.J., AND WILDER AND RIORDAN, JJ.

PER CURIAM.

Plaintiff, Jane Mortimer, appeals as of right the trial court's order granting summary disposition to defendants, Alpena County Probate Court (Probate Court) and County of Alpena (Alpena County), in this Whistleblowers' Protection Act (WPA) action, MCL 15.361 *et seq.* We affirm the trial court's order granting summary disposition to defendants.

I. FACTUAL BACKGROUND

This case arises out of Mortimer's employment with the Probate Court and subsequent termination. Mortimer was an at-will employee who worked for the Probate Court for over 30 years as probate register. She reported directly to the probate judge, who was Judge Thomas J. LaCross as of January 1, 2007. A dispute arose between Mortimer and Judge LaCross regarding his appointment of standby guardians for legally incapacitated adults. According to Mortimer, she became aware that Judge LaCross appointed a standby guardian in an October 2007 case, and she approached him to ask for clarification regarding the legal authority supporting his behavior. Mortimer claims that she and Judge LaCross checked the Probate Code, did not find any authority justifying the appointment of standby guardians, and Judge LaCross said he would continue to do it and research the issue further. Mortimer alleged that she approached Judge LaCross about the appointment of the standby guardian in this case a second time and his response remained the same.

In April 29, 2008, Mortimer claims that Judge LaCross appointed a standby guardian in a different case, she again told him that this was impermissible, and Judge LaCross simply said he was doing it.¹ Mortimer felt that Judge LaCross was upset by this conversation and reached his limit with the topic. Mortimer only spoke of her complaints to Judge LaCross, not other judges or the State Court Administrator Office. Judge LaCross testified that he believed the appointment of standby guardians was permissible and continued the practice even after Mortimer was terminated. He also testified that he did not remember any specific conversations with Mortimer about the issue, although he did not deny that such conversations may have occurred.

In addition to their disagreement about the legality of appointing standby guardians, Judge LaCross and Mortimer experienced other problems in their working relationship. An incident occurred where the deputy probate register was left alone in the office and not knowing what to do about a certain problem she called a probate register in a different county for help. After learning of this incident, Judge LaCross concluded that Mortimer had not properly trained the deputy probate register and was not being responsive to his expressed concerns. A formal complaint about Mortimer was also submitted, concerning allegations that she was improperly directing Probate Court business to her husband, a local attorney. In response to the complaint, Judge LaCross entered an administrative order prohibiting Mortimer from handling pleadings in cases involving her husband. Despite the order, Mortimer continued to have perfunctory contact with these cases, including telephone conversations, providing forms, and accessing files. Further tension developed when Judge LaCross placed an advertisement in the Alpena News classified section soliciting comments about the Probate Court. Several responses were submitted anonymously and were highly critical of Mortimer, describing her as abrasive, condescending, abusive, rude, nasty, unprofessional, difficult, disrespectful, and uncooperative. After receiving these responses, Judge LaCross began to reflect upon the role of the Probate Court and realized that Mortimer was not behaving as a true public servant.

In the Spring of 2008, Judge LaCross spoke with Jeffrey Thornton, the Alpena County Coordinator, and communicated his concerns about Mortimer's activities and demeanor in the Probate Court. On May 19, 2008, Judge LaCross met with Mortimer and informed her that she would no longer be the probate register. When Mortimer asked for an explanation, Judge LaCross did not provide one. Judge LaCross informed her that she had a choice to resign or be fired, she was on paid administrative leave beginning that day, and that was her last day of work. Since Mortimer did not resign, Judge LaCross sent her a letter dated June 23, 2008, informing her that her position as probate register was terminated effective June 21, 2008.

Mortimer filed a complaint against the Probate Court and Alpena County, alleging a violation of the WPA and breach of contract.² After an appeal and remand by this Court

¹ Mortimer testified that there was another case in which she told Judge LaCross that it was inappropriate to appoint a standby guardian, although she could not remember the name or date of the case.

² A stipulated order was eventually entered dismissing the breach of contract claim.

regarding the 90 day statute of limitation, defendants filed a motion for summary disposition asserting that there was no genuine issue of material fact regarding the WPA claim. The trial court agreed, stating that Mortimer did not actually “report” Judge LaCross’s behavior because she was only disagreeing about a legal issue and Judge LaCross was already aware of his behavior. The trial court further stated that Mortimer did not report the alleged violation to an outside entity, Judge LaCross’s behavior was in open court, and that the Legislature did not intend for the resulting flood of lawsuits that would arise if courts applied the WPA when employers and employees disagree about legal interpretations. Hence, the trial court granted defendants’ motion for summary disposition. Mortimer now appeals.

II. ANALYSIS

A. Standard of Review

“Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to de novo review.” *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is also reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition “tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Protected Activity

The WPA, MCL 15.362, states:

[a]n 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.

Generally a whistleblower is someone “who, on his own initiative, takes it upon himself to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation.” *Henry v Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999). The purpose of the WPA is to protect the public, *Dolan v Contl Airlines/Contl Exp*, 454 Mich 373, 378; 563 NW2d 23 (1997), and “to alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses[.]” *Shallal v Catholic Soc Servs of Wayne Co*, 455 Mich 604, 612; 566 NW2d 571 (1997) (internal quotations and citations omitted). “The act prohibits future

employer reprisals against whistleblowing employees for the purpose of encouraging employees to report violations.” *Id.*

To establish a prima facie case under the WPA, a plaintiff must demonstrate 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 adverse employment decision.” *Anzaldua v Neogen Corp*, 292 Mich App 626, 630-631; 808 NW2d 804 (2011); see also MCL 15.362. If a plaintiff is able to establish the prima facie case, the burden then shifts to the defendant to “articulate a legitimate business reason for the plaintiff’s discharge.” *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If the defendant is able to produce “evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.” *Id.*

Protected activity “under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation.” *Ernsting v Ave Maria Coll*, 274 Mich App 506, 510; 736 NW2d 574 (2007); see also *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). MCL 15.361(d)(vi) defines public body as “[t]he judiciary and any member or employee of the judiciary[.]” which includes the Probate Court. Additionally, an employee working for a public body does not have to report the suspected legal violation to an outside public body. See *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007) (stating that “[t]here is no condition in the statute that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA.”).

When applying these principles and definitions to this case, we find that Mortimer did not engage in a protected activity pursuant to the WPA. While Mortimer insists that the appointment of standby guardians is illegal, she does not deny that Judge LaCross was interpreting the law differently. In fact, she testified that Judge LaCross looked in the Probate Code to justify his decision, believing that his interpretation was correct. He also continued to appoint standby guardians because he felt that nothing in the Probate Code prohibited this behavior. Even if Judge LaCross was mistaken in his interpretation of the law, an incorrect legal interpretation of the law is not itself a violation of the law. Rather than a blanket exception for legal employers, the trial court’s decision merely reflects the correct understanding that in order for the WPA to apply, there must be a suspected violation of the law, not a mere disagreement about the application of the law.

Furthermore, we agree with the trial court that *Meuwissen v Dep’t of Interior*, 234 F3d 9 (Fed Cir 2000), is persuasive. “Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues.” *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999). The plaintiff in *Meuwissen* was an administrative judge who released an opinion disagreeing with the former administrative judge’s interpretation of the White Earth Reservation Land Settlement Act of 1985 (WELSA), and his temporary appointment was then terminated. *Meuwissen*, 234 F3d at 10-11. In reviewing the plaintiff’s WPA claim, the court held that although the plaintiff may have believed he was reporting that the “prior decision was based on an erroneous interpretation of WELSA,” this did

not constitute a violation of any law, rule, or regulation pursuant to the WPA. *Meuwissen*, 234 F3d at 14. Likewise in this case, Mortimer's disagreement with Judge LaCross about the interpretation of the Probate Code was not a violation of the law pursuant to the WPA.

III. CONCLUSION

Since Mortimer failed to demonstrate a genuine issue of material fact regarding engaging in a protected activity, the first prong of a prima facie WPA case has not been met. Therefore, we affirm the trial court's order granting summary disposition to defendants.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan