STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER WATKINS, Plaintiff-Appellant,	UNPUBLISHED August 28, 2012
v	No. 304911 Kent Circuit Court
METRON INTEGRATED HEALTH SYSTEMS, MIKO ENTERPRISES, INC., METRON OF FOREST HILLS, and CASCADE CARE CENTER, INC., Defendant-Appellees.	LC No. 09-009596-NZ

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case arises from an employment action in which plaintiff alleges she was terminated from employment with defendant. Plaintiff's lawsuit listed five counts: Violation of the Michigan Whistleblowers' Protection Act (WPA),"Violation of the Bullard Plawescki (sic) Employee Right to Know Act", wrongful termination, defamation and intentional infliction of emotional distress. Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was an at-will employee of Metron of Forest Hills ("Metron"), a private nursing home. Plaintiff had been "written up" on several occasions prior to being terminated. One such instance occurred on April 29, 2009, when plaintiff's supervisor, Laura Christian, gave her a disciplinary notice for improperly transferring a resident without using a Hoyer pad. On the section of the notice for employee comments, plaintiff wrote that there were no Hoyer pads available. Plaintiff then made a copy of her disciplinary notice and gave the original notice back to Christian. On May 13, 2009, the Michigan Department of Health and Human Services (DHHS) surveyed Metron and requested documents relating to a sampling of residents, including the resident who plaintiff improperly transferred. Metron gave those records, including plaintiff's notice containing her notation regarding the alleged shortage of Hoyer pads, to the DHHS. On June 16, 2009, plaintiff's work duties required her to obtain and record the weekly weights of certain residents, but plaintiff neglected to record these weights in the weight book. Thereafter, on June 18, 2009, Metron fired defendant, citing her April 29, 2009, failure to use a Hoyer pad and her June 16, 2009, failure to record the weekly weights of her assigned residents. Plaintiff subsequently sued defendants as outlined above and defendants then moved for

summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition and dismissed the plaintiff's claims regarding the WPA and wrongful termination and Plaintiff stipulated to dismissing the remaining claims.

Plaintiff argues that the trial court erred by ordering this dismissal. We disagree. "We review de novo the decision of the trial court on the motion for summary disposition." *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the case. The moving party is entitled to a grant of summary disposition if the party demonstrates that no genuine issue of material fact exists." *McGrath v Allstate Ins Co*, 290 Mich App 434, 438 n 1; 802 NW2d 619 (2010) (citation omitted).

Plaintiff first argues that the trial court erred by granting summary disposition of her WPA claim. The WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee, or a person acting on behalf of the employee, reports or is about to report . . . 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 . . . or because an employee is requested by a public body to participate in an investigation . . . [MCL 15.362.]

"To establish a prima facie case under the WPA, plaintiff must show that (1) she was engaged in a protected activity as defined by the act, (2) the defendants discharged her, and (3) a causal connection existed between the protected activity and the discharge." *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000). "'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." *Id.* One is deemed to have reported a violation under the WPA when one "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).

In this case, plaintiff argued that she engaged in "protected activity" by noting on her disciplinary notice the shortage of Hoyer pads and then giving her notice to Metron. Defendant, not plaintiff, then gave her notice to a public body, i.e., the DHHS. Plaintiff acknowledged that she never gave the DHHS her notice or otherwise attempted to notify the DHHS about Metron's alleged shortage of Hoyer pads, but merely reported the alleged shortage to Metron. While plaintiff argued in her motion for reconsideration that Metron constituted a "public body" under the WPA because it was primarily funded through Medicare and Medicaid payments, plaintiff never raised this argument until after the trial court had granted summary disposition. Moreover, plaintiff did not present any evidence to support that Metron was in fact primarily funded

through Medicare or Medicaid. Accordingly, we find that the trial court did not err by finding that plaintiff did not report the alleged shortage to a "public body" by giving her notice to Metron. *Roulston*, 239 Mich App at 279; MCL 15.361. We also find that no question of material fact existed as to whether Metron reported the alleged shortage of Hoyer pads to the DHHS on her behalf. While plaintiff claimed that she made her notation after Christian indicated that Metron would report the incident to the DHHS, plaintiff also acknowledged that she did not know what Metron did with her notice or how it ended up on file with the DHHS. The record indicated that Metron only gave the DHHS plaintiff's disciplinary notice when the DHHS requested records pursuant to its survey of Metron. Accordingly, we find that plaintiff did not present sufficient evidence to create a material question of fact for trial regarding whether she, or Metron acting on her behalf, took the initiative to report the alleged violation to the DHHS and, thus, she failed to establish a prima facie case under the WPA and summary disposition of her WPA claim was proper. *Roulston*, at 279, 281-282.

Plaintiff next argues that the trial court erred by granting summary disposition of her claim of wrongful termination in violation of public policy. Employment at will is "terminable at any time and for any – or no – reason, unless that termination was contrary to public policy." *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572-573; 753 NW2d 265 (2008). "[T]he proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) (emphasis in original) (citation omitted). "Consistently with this principle that the courts may only derive public policy from objective sources, our Supreme Court's enumerated 'public policies' in the context of wrongful termination all entail an employee exercising a right guaranteed by law, executing a duty required by law, or refraining from violating the law." *Kimmelman*, 278 Mich App at 573.

> [I]f a statute provides a remedy for a violation of a right, and no common-law counterpart right exists, the statutory remedy is typically the exclusive remedy. Moreover, an employee has no common-law right to avoid termination when he or she reports an employer's violation of the law. In other words, a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue. [*Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 127; 724 NW2d 718 (2006) (citation omitted).]

The trial court found that although plaintiff could not make a prima facie case under the WPA, the WPA was nevertheless plaintiff's exclusive remedy and granted summary disposition of plaintiff's wrongful termination claim on that basis. We agree with the trial court's grant of summary disposition, but not its basis. See *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998) (this Court may affirm a trial court's decision if the trial court reached the correct outcome, albeit for a different reason). In *Driver v Hanley (After Remand)*, 226 Mich App 558, 560; 575 NW2d 31 (1997), we addressed a similar situation wherein the plaintiff sued its employer for violation of the WPA and violation of public policy against retaliatory, or wrongful, discharge. The trial court in *Driver* granted the defendants' motion for summary disposition of the plaintiff's WPA claim based on its finding that the plaintiff did not report the alleged violation to a "public body." *Id*. at 561. This Court affirmed the trial court's dismissal of the plaintiff's WPA claim, but found that such a ruling prevented the

WPA from being the plaintiff's exclusive remedy: "In this case, the circuit court determined that the WPA was not applicable to the facts regarding plaintiff's discharge. Because the WPA provided no remedy at all, it could not have provided plaintiff's exclusive remedy." *Id*. at 566. In this case, we similarly find that the trial court's finding that plaintiff did not report the alleged violation to a "public body" under the WPA precludes the WPA from being her exclusive remedy and summary disposition is improper on that basis. *Id*.

However, we nevertheless find that summary disposition of plaintiff's public policy/wrongful termination claim is appropriate in this case because plaintiff failed to establish that her claim "derived from an objective source." *Kimmelman*, 278 Mich App at 576. In this case, plaintiff sought to establish that Metron wrongfully discharged her for executing a duty required by law. *Id*. 573. Specifically, plaintiff argued that Metron discharged her because she reported the shortage of Hoyer pads as required by MCL 333.21771(6). MCL 333.21771 addresses mistreatment of nursing home residents by their caregivers and requires nursing home employees to report acts of abuse, mistreatment, or harmful neglect. MCL 333.21771(1) and (2). MCL 333.21771(6) prohibits employers from firing an employee for reporting such an act. However, it is clear that any alleged shortage of Hoyer pads did not constitute an act of abuse, mistreatment, or harmful neglect against a resident as contemplated under MCL 333.21771. Thus, plaintiff did not establish that she was fired for executing a duty required by law. *Kimmelman*, 278 Mich App at 573. Accordingly, plaintiff fails to establish that her public policy/wrongful discharge claim derived from an objective source and, thus, summary disposition is appropriate on this basis. *Id*.

We note that plaintiff also argues that the trial court's discovery rulings constituted an abuse of discretion that hindered her ability to present her prima facie case. However, we need not address this issue as plaintiff failed to properly present this issue for appeal because she did not include it in her statement of the questions presented. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 146; 807 NW2d 866 (2011). Moreover, we find this argument to be without merit, as plaintiff has not properly articulated "what material facts . . . [were] likely to be found by additional discovery." *Vanvorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004).

Affirmed.

/s/ Jane E. Markey
/s/ Amy Ronayne Krause