S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CHRISTOPHER TRUEL, Plaintiff-Appellant,	UNPUBLISHED December 4, 2012
V CITY OF DEARBORN, MICHAEL CELESKI, JOSEPH DOULETTE, and JEFFERY GEISINGER, Defendants-Appellees.	No. 305643 Wayne Circuit Court LC No. 08-116508-CD

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff appeals of right an order denying his motion for leave to amend his complaint in this Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., case and granting summary disposition in favor of defendants under MCR 2.116(C)(7) on statute of limitations grounds. We affirm.

I. BASIC FACTS

On August 12, 2003, plaintiff, a police officer for the city of Dearborn, shot and killed an armed robbery suspect during a high-speed chase. After an investigation, plaintiff was cleared of any wrong doing related to the shooting. Plaintiff took three weeks off after the incident for emotional reasons.

On February 15, 2004, plaintiff was dispatched to a bar fight. Plaintiff's investigation of the fight revealed that many other Dearborn police officers, including Dearborn Police Chief Michael Celeski and Officer Joseph Doulette, were involved in the fight. Plaintiff claims that he was subjected to retaliation and harassment as a result of investigating the bar fight.

On July 3, 2008, plaintiff filed a complaint against defendants alleging violations of the WPA.

On February 11, 2011, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), alleging that the WPA has a 90-day statute of limitations and that plaintiff's latest allegation of a possible violation of the act occurred on March 12, 2008, which was more than 90 days before he filed his complaint.

On June 7, 2011, plaintiff responded to defendants' motion by alleging that defendants retaliated against plaintiff within the 90-day period before the July 3, 2008, filing of his complaint and that the retaliations continued after he filed his complaint. Plaintiff then moved for leave to amend his original complaint. Plaintiff's proposed amended complaint included two new allegations of retaliation. First, plaintiff alleged that beginning on June 3, 2008, Doulette[1] "attempted to influence the payroll status of Plaintiff to force Plaintiff to use accumulated sick time which would result in financial harm to Plaintiff while he was disabled from the Police Department." Second, plaintiff alleged that on November 29, 2008, while plaintiff was on sick leave,[2] the Dearborn Law Department served plaintiff with a subpoena to appear in court regarding a criminal case he had handled as a police officer. Plaintiff maintained that "[i]ssuing a subpoena with the private address of an officer is against the policies of the City because it permits others outside the Police Department to have access to police officers' domicile."

On July 6, 2011, the circuit court held a hearing on plaintiff's motion for leave to amend his complaint and defendants' motion for summary disposition. Plaintiff argued that Doulette's act of attempting to influence plaintiff's payroll status was a retaliatory act that occurred within the statute of limitations of this case, while defendants argued that the amendment of plaintiff's complaint was futile because Doulette's mere attempt to change plaintiff's payroll status was not materially adverse to plaintiff and thus was not a discriminatory act under the statute. The circuit court held:

> I kind of looked at this pay issue here and really one of the requirements is that there be . . . a significant Adverse Employment Action, and I really don't think it rises to that level. So, I'm accordingly going to deny the motion to amend. I'm going to go ahead and grant the Motion for Summary Disposition and that's my decision in the matter.

II. ANALYSIS

On appeal, plaintiff argues that the circuit court erred in denying his motion for leave to amend his complaint to include allegations of discrimination under the WPA. We disagree.

We review a trial court's denial of a motion to amend a complaint for an abuse of discretion. *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Ewald v Ewald*, 292 Mich App 706, 725; 810 NW2d 396 (2011).

Although, generally, the amendment of a complaint is a matter of right rather than grace, *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398

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[1] Doulette at this time was now a Commander in the Dearborn Police Department.

[2] Plaintiff's doctor had ordered plaintiff to refrain from working "due to depression and anxiety related to post traumatic stress directly stemming" from both the shooting incident and the perceived retaliatory actions.

(2006), nevertheless, a plaintiff may amend his complaint only by leave of the court or by written consent of the defendant. MCR 2.118(A)(2), Reasons that justify denial of leave to amend include "undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). "An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *PT Today, Inc*, 270 Mich App at 143 (citations omitted). The question presented here is whether plaintiff's proposed amended complaint was legally insufficient on its face.

The WPA provides, in relevant part, that

> [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 . . . reports . . . a violation or a suspected violation of a law . . . to a public body . . . 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. [MCL 15.362.]

A prima facie case under the WPA requires the following: "(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).

An "adverse employment action" is "an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities[;] there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions . . . are not controlling." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003) (brackets, quotations, and citations omitted). "Materially adverse employment actions are akin to 'termination of 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.'" *Chen v Wayne State Univ*, 284 Mich App 172, 202; 771 NW2d 820 (2009), quoting *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 363; 597 NW2d 250 (1999). In addition, "[w]here [coworkers'] harassment is sufficiently severe, a supervisor's failure to take action to respond can constitute a materially adverse change in the conditions of employment." *Meyer v Center Line*, 242 Mich App 560, 571; 619 NW2d 182 (2000). To show causation, a plaintiff must "demonstrate that the adverse employment action was in some manner influenced by the protected activity." *West v Gen Motors Corp*, 469 Mich 177, 185; 665 NW2d 468 (2003).

Plaintiff's first new allegation of discrimination in his proposed amended complaint is that Commander Doulette "attempted to influence the payroll status of Plaintiff to force Plaintiff to use accumulated sick time which would result in financial harm to Plaintiff while he was disabled from the Police Department." There is nothing in this allegation that would approach the materially adverse employment actions of the termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or

significantly diminished material responsibilities. *Chen*, 284 Mich App at 202. In addition, plaintiff's payroll status was not actually changed and plaintiff received full pay without using any sick time. While it is arguably possible to consider this allegation of discrimination as a continuation of a series of harassing acts against plaintiff which defendants failed to stop, fitting within *Meyer*'s holding, we conclude from the record and applicable precedent that Doulette's alleged attempt to influence plaintiff's payroll status was a mere inconvenience and that plaintiff's claim of discrimination was based on his subjective impressions regarding that act. As such, the claim was insufficient to establish an adverse employment action.

Plaintiff's second new allegation of discrimination is that the Dearborn Law Department disclosed plaintiff's private address by sending a subpoena to plaintiff's home. There is nothing in the record to support that the attorneys in the Dearborn Law Department had any knowledge of plaintiff's cooperation in the investigations into the bar fight. And where there is no evidence that the decision-maker knew of the protected activity at the time of the adverse employment action, the plaintiff fails to show causation. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257-258; 503 NW2d 728 (1993).

Because both of plaintiff's new allegations of discrimination fail to establish a prima facie case under the WPA, the proposed amended complaint is legally insufficient on its face. *Anzaldua*, 292 Mich App at 630-631; *PT Today, Inc*, 270 Mich App at 143. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend his complaint. *Miller*, 477 Mich at 105; *Tierney*, 257 Mich App at 687.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder