

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Sharee Miller,

Plaintiff,

v.

Case No. 15-14164

Anthony Stewart, *et al.*,

Sean F. Cox

United States District Court Judge

Defendants.

ORDER

**ADOPTING 12/13/16 REPORT AND RECOMMENDATION
AND DENYING DEFENDANTS' PARTIAL MOTION TO DISMISS**

Plaintiff filed this action against three defendants employed by the Michigan Department of Corrections (“MDOC”), claiming retaliation under the First Amendment and a claim under Michigan’s Whistleblower’s Protection Act (“WBPA”). This Court referred this action to Magistrate Judge Stephanie Dawkins Davis for pretrial proceedings.

Thereafter, Defendants filed a Partial Motion to Dismiss (D.E. No. 13), brought pursuant to Fed. R. Civ. P. 12(b)(6). In that motion, Defendants stated that they “do not dispute the facts as laid out in the Complaint, *with one exception.*” (*Id.* at 2) (emphasis added). Defendants then directed the magistrate judge to matters outside the pleadings (ie., an MDOC policy) to support Defendants’ argument that Plaintiff cannot be considered an “employee” for purposes of the WBPA.

In a Report and Recommendation issued on December 13, 2016 (“the R&R”), Magistrate Judge Dawkins Davis concluded that “ground for dismissal is premature and ill-suited to a

judgment based on failure to state a claim.” (R&R at 5). She concluded that, as to this issue,¹ “the Court need not decide whether plaintiff was an employee because defendants rely on matters outside the pleadings for its argument that plaintiff was not an employee.” (*Id.* at 6). She also noted that “Defendants have not even argued that the allegations in the complaint are insufficient.” (*Id.* at 7). She recommends that the Court deny the motion.

Pursuant to Fed. R. Civ. P. 72(b), a party objecting to the recommended disposition of a matter by a Magistrate Judge must file objections to the R&R within fourteen (14) days after being served with a copy of the R&R.

On December 27, 2016, Defendants filed an objection to the R&R. On January 10, 2017, Plaintiff filed a response to Defendants’ objection.

Defendants’ sole objection concerns the magistrate judge’s conclusion that this issue should not be resolved in a motion to dismiss. Defendants then make arguments not presented to the magistrate judge in connection with their motion.

Having reviewed the R&R and Defendants’ objection to it, this Court concurs with the magistrate judge’s conclusion that the issue is not one that should be decided on a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6).

Accordingly, the Court **ADOPTS** the magistrate judge’s December 13, 2016 R&R. **IT IS FURTHER ORDERED** that Defendants’ Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: March 8, 2017

¹The motion and R&R also addressed other issues. But because the sole objection to the R&R relates to this issue, the Court keeps its focus there.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 8, 2017, by electronic and/or ordinary mail.

S/Jennifer McCoy _____

Case Manager