STATE OF MICHIGAN

COURT OF APPEALS

RICHARD L. WURTZ,

Plaintiff-Appellant,

v

BEECHER METROPOLITAN DISTRICT, LEO MCCLAIN, JACQUELIN CORLEW and SHEILA THORN,

Defendants-Appellees.

FOR PUBLICATION
October 2, 2012

No. 301752
Genesee Circuit Court
LC No. 10-092901-CL

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

K. F. KELLY, J. (*dissenting*).

I respectfully dissent. Plaintiff, whose written contract of employment was completely fulfilled, never suffered an "adverse employment action" as an employee under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*. The majority has not only re-written plaintiff's contract, but it has also added language to the WPA to create a new cause of action for pre- or post-employment conduct where one simply does not exist. The WPA requires the existence of an employment relationship. By plaintiff's own admission, defendants scrupulously adhered to the terms of his contract. Plaintiff now seeks damages because defendants abided by the terms of his employment contract. Such a position is illogical and lacks any support in our jurisprudence. Absent a contractual obligation or legal duty to consider an extension or renewal of an employment contract, a cause of action under the WPA is unavailing where a contract employee finishes a fixed term contract. Because plaintiff did not suffer an adverse employment action and because no amount of additional discovery would have assisted plaintiff in developing his case, I would affirm the trial court.

I. BASIC FACTS

Plaintiff was the district administrator for defendant Beecher Metropolitan District. The district has twelve employees and 5 elected board members. Plaintiff was the only non-union employee; all other employees were covered by collective bargaining agreements during the relevant years. The three individual defendants, McClain, Corlew, and Thorn, were district board members. Plaintiff readily admits that his relationship with the three individual board members was very poor, dating well before he engaged in any whistleblowing activities. He did not "get along" with Thorn even before she was elected to the board and believed she wanted

"[him] gone" as the administrator from the day she was elected. Plaintiff's relationship with McClain deteriorated in 2004 and plaintiff would not have been surprised to learn that McClain wanted him removed as the administrator. Initially, plaintiff had a good working relationship with Corlew, but that only lasted until 2007 when they had a "personal disagreement."

Plaintiff was employed pursuant to a written contract of employment from February 1, 2000 to February 1, 2010. The contract provided that he could only be terminated for cause. He typically worked from approximately 8:00 am to noon for the district and would then go to work at his private law firm. In 2008 he earned $79,332 in addition to retirement contribution benefits, life insurance, sick and personal days, car allowance and health insurance. The contract did *not* contain a renewal clause. Plaintiff does not contest that he was employed for the full term of his contract and received his full salary and benefits. He further concedes that the district was under no obligation to continue his contract beyond February 1, 2010:

> Q. Exhibit 1 that I have marked, the Employment Agreement, that contract does not provide by its expressed terms for you to be employed by the township after February 1, 2010, does it?
>
> A. No.
>
> Q. Paragraph 8 provides that any modifications or alterations to that Agreement shall be of force and effect only when in writing and executed by both parties. Were there ever such written modifications?
>
> A. Not that I recall.
>
> Q. Under the expressed terms of this contract, sir, Beecher Metropolitan District did not have any obligation to employ you beyond February 1 of 2010, did they?
>
> A. There is no provision in this contract for that.

In January 2009, the district's accountants informed the district that it needed to increase revenues, decrease expenses or both.[1] On January 30, 2009, plaintiff wrote the board offering to terminate his employment contract and become a "contract"[2] employee. Of particular note, in order to become a "contract" employee, plaintiff understood that he would have to cease to be employed by the district for a minimum period of 30 days from the termination of his employment to the beginning of any period of "contract" employment – in other words, become a former employee. In closing plaintiff stated:

[1] During the entire length of plaintiff's employment, the district continued to lose money.

[2] A contract employee is a retiree who, after being separated for a minimum 30 days, returns to the same position as previously held but under different terms and conditions, including no longer receiving retirement contributions.

> Due to the complexity and time needed, this process would need to be commenced very shortly in order for the full benefit for Beecher to accrue. Further, there is no sense in me pursuing this without an indication that the Board is generally in favor or not in favor of the general framework described above. Therefore, please individually advise as soon as possible whether or not to pursue this. Once I know the Board's feelings, I could have my proposal available for the February Board meeting.
>
> * * *
>
> Finally, I'd like to emphasize no matter what your decision is, it has been a pleasure to have worked here. I thank you! Also, it would be arrogant to imply this is a "take it or leave it" offer. While I really believe the outline is fair and produces both short term and long term benefit to BMD, I would be open to certain modifications in an effort to show good faith.

On March 11, 2009, the board declined to have plaintiff draw up a new contract with its labor attorney, thus leaving plaintiff's written contract in full force and effect.

Two months later plaintiff began his whistle blowing reporting.[3]

II. STANDARDS OF REVIEW

"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 this case, the trial court reviewed defendant's motion for summary disposition under MCR 2.116(C)(10). "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 genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010).

We also review de novo questions of statutory interpretation. *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision." *Id.* Therefore, "[i]f the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Id*. This Court interprets and applies statutes to give effect to the plain meaning of their text. *Ligons*

[3] The case at bar is eerily reminiscent of *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604; 566 NW2d 571 (1997). "The primary motivation of an employee pursuing a whistleblower claim 'must be a desire to inform the public on matters of public concern, and not personal vindictiveness.'" *Id.* at 621.

v Crittenton Hosp, 490 Mich 61, 70; 803 NW2d 271 (2011); *McManamon v Redford Charter Twp*, 273 Mich App 131, 135-136; 730 NW2d 757 (2006). "We cannot read requirements into a statute that the Legislature did not put there." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 423; 565 NW2d 844 (1997).

III. ANALYSIS

To resolve the issue presented in this case, we must first look to the actual language of the WPA. In order for plaintiff to have suffered an adverse employment action, he must have first enjoyed the status of an "employee." MCL 15.362 of the WPA provides:

> An 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. [Emphasis added.]

For purposes of the WPA, an "employee" is specifically defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." MCL 15.361. By its plain language, the protections of the WPA do *not* extend to pre-employment negotiations or refusal to hire. Nor does it extend to cover former employees who seek reemployment. It only applies to an *employee* regarding the *employee's* compensation, terms, conditions, location, or privileges of employment. Thus, on its face, plaintiff's cause of action fails as a matter of law because his complaints are only directed at the district's refusal or failure to negotiate a new contract with a different termination date. Refusing to rehire or renew employment past the termination date of a written employment contract is simply not within the plain language of the WPA. Plaintiff, whose contract was fulfilled and terminated by its express terms, no longer falls within the definition of "employee", which the majority seeks to expand. "The 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).

A prima facie case under the WPA requires a plaintiff has to show that: 1) he was engaged in a protected activity; 2) he suffered an adverse employment action; and, 3) there was a causal connection between the protected activity and the adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183–184; 665 NW2d 468 (2003). Here, the trial court concluded that plaintiff failed to meet the second prong of this three-part test. Contrary to the majority, I believe the trial court properly concluded that plaintiff failed to establish that he suffered an adverse employment action. Plaintiff was no longer an employee when his contract expired; therefore, it follows that he could not have suffered an adverse employment action.

Plaintiff was employed pursuant to a ten year written employment contract. It could only be modified by mutual agreement in writing. By the express terms of his employment contract, plaintiff's employment ceased on February 1, 2010. Any adverse employment action, therefore, must be considered in terms of the four corners of plaintiff's employment contract. It is uncontested that no action, adverse or otherwise, was taken under the terms and conditions of the contract, none.

Despite the fact that the employment contract did not contain a renewal clause, plaintiff argues that he had a continued "employment relationship" and that the WPA does not limit claims to the length of an employment contract. In so doing, plaintiff likens himself to an at-will employee. The majority agrees, holding that "[w]ere we to hold that non-renewal of a contract cannot, under any circumstances, qualify as an adverse employment action because a contracted employee has no expectation of further employment past the expiration of his contract, we would carve an arbitrary distinction between contracted and at-will employees (who have no expectation of further employment from day to day)." The distinction between an at-will employee and a contract employee is not arbitrary; they are radically different.

Here, there was a written contract of employment. When interpreting a contract, the examining court must ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Id*. A contract is unambiguous when it fairly admits of one interpretation. *Meagher v Wayne State Univ*., 222 Mich App 700, 721–722, 565 NW2d 401 (1997). "A court may not rewrite clear and unambiguous language under the guise of interpretation. Rather, courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010) (internal quotation and citation omitted). The intent of the parties is determined from the four corners of the contract. *Rogers v Great Northern Life Ins Co*, 284 Mich 660, 666; 279 NW 906 (1938). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924).

In stark contrast to a contract of employment, 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). Unlike an at-will employer, who must take affirmative steps to alter the course of an at-will employee's status, the employment relationship for one under a contract of employment simply expires, requiring no action on behalf of the employer. An at-will employment arrangement, therefore, is necessarily of uncertain duration; terminating an at-will employee necessarily affects the compensation, terms, conditions, location, or privileges of employment. But, here, the written employment contract is very specific as to the terms of employment including its duration which had been agreed to in writing by both parties.

If we were to accept plaintiff's theory that he had a continued "employment relationship," we would have to accept that his employment would have continued past the expiration of his contract, regardless of the express terms of the contract; in other words, rendering the termination date and modification clause nugatory. We would also have to accept that implied in

every written contract, there is an obligation or duty to the parties to renew or continue the employment if desired by the employee. This has no support whatsoever in our jurisprudence and in fact the premise is widely rejected. *Scholz v Montgomery Ward & Co, Inc,* 437 Mich 83, 93; 468 NW2d 845 (1991) (an implied contract is not actionable when there is an express contract covering the same subject matter.) In this case, the employment contract covered the topic of the duration of the employment. It also required that any modifications had to be mutually agreed upon in writing.[4] Even plaintiff concedes that under the contract, defendants had no obligation to employ him beyond its terms but that it merely *should* have been extended because, in his opinion, he was "an exemplary employee." However, once plaintiff's contract of employment terminated on its own terms, plaintiff was no longer an employee; instead, he was merely a *candidate* for future employment. He only had a unilateral hope of being reemployed as a contract employee – nothing more than a "woulda, coulda, shoulda" claim. This is particularly true in light of the fact that he would have to be completely separated from the district for at least 30 days because of conditions imposed by the Municipal Employee Retirement System. Plaintiff's general expectation that he could enter into a new contract in subsequent years was not supported by the express terms of his employment contract or any legal duty or obligation. There was nothing in the employment contract providing for a term of employment (or potential extension of a term of employment) greater than the term specifically set forth therein. There was no obligation for continuous employment; in fact, the contract expressly limited the term of employment. Where plaintiff's employment contract provided for a finite term of employment, the right to employment must arise from the contract and only the contract.

Both plaintiff and the majority treat the situation as a "failure to renew" when, in fact, plaintiff's employment contract did not contain a renewal clause and defendants were under no duty to renew. The use of the phrase "failure to renew" is meaningless in this case; there cannot be a failure to act unless there is first an obligation, duty or contractual requirement to act. Plaintiff's contract simply terminated on its own and a new contract was never entered into, despite the unilateral hope of plaintiff. In this case, plaintiff's employment concluded by its own terms and no adverse action was taken.

In order to support the contention that this case is about a "failure to renew" or some legal obligation to "continue" employment, the majority mistakenly conflates the WPA with the Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq*. While our Courts may have assigned the identical definition of "adverse employment action" to both the WPA and CRA, the two statutes combat entirely different evils and comparing the CRA to the WPA to determine whether plaintiff was an employee is misguided. The CRA explicitly covers pre-employment conduct whereas the WPA does not. The CRA specifically provides:

> The opportunity ***to obtain employment***, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational

[4] This illustrates the absurdity of plaintiff's position: in reality he is complaining that because of his whistleblowing, defendants scrupulously adhered to the terms of his contract.

> facilities ***without discrimination*** because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, ***is recognized and declared to be a civil right***. [MCL 37.2102 (emphasis added).]

By its very terms, the CRA allows a plaintiff to bring an action for discrimination based on an employer's pre-employment conduct. No such right exists with the WPA. Instead, the WPA is aimed at alleviating "'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses,'" by encouraging ***employees***, who are the group best positioned to report violations of the law, to report violations by reducing their fear of retribution through prohibiting ***employer*** reprisals against whistle blowing employees. *Shallal*, 455 Mich at 612, quoting *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 75; 503 NW2d 645 (1993), overruled in part on other grounds *Brown v Detroit Mayor*, 478 Mich 589; 734 NW2d 514 (2007). Thus, a plaintiff bringing an action under the WPA must be an employee while no such requirement exists under the CRA.

In the context of the CRA, an "adverse employment action" may be the failure to hire or renew a contract, which occurred in *Leibowitz v Cornell University*, 584 F 3d 487 (CA 2 2009), relied upon by the majority. However, I am concerned by the majority's use of federal law in this case. To the extent the majority relies on federal court decisions, this Court is not bound to follow federal case law interpreting a federal law, even when similar in language to our state law. *36th Dist Court v AFSCME Local 917*, 295 Mich App 502, 511; 815 NW2d 494 (2012). Our Supreme Court has cautioned:

> While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis. [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005).]

Moreover, even if *Leibowitz* was applicable, it is distinguishable from the case at bar. The contract in *Leibowitz* contained a renewal clause. The action was not brought under the WPA nor a similar New York statute; rather it sought damages alleging, *inter alia*, gender and age discrimination under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., and the Age Discrimination in Employment Act, 29 USC 621 *et seq*. In an action under Michigan's CRA, pre-employment conduct is actionable, but it is not actionable under the WPA where "employee" is specifically defined. Merely because the "adverse employment action" is treated the same in the CRA as the WPA, it does not follow that actions specifically prohibited by the CRA are somehow merged into the WPA. If the legislature intended to include pre-employment or failure to rehire conduct as actionable under WPA – as it has done in the CRA – it would have. "A court may not engraft on a statutory provision a term that the Legislature might have added to a statute but did not." *People v Kern*, 288 Mich App 513, 522; 794 NW2d 362 (2010). It is simply not within this Court's province to do so. As our Supreme Court stated in *Johnson v Recca*, 492 Mich169; ___ NW2d ____ (Docket No. 143088, decided July 30, 2012), slip op pp 15-16 this type of policy argument

> is directed at the wrong branch of government. This Court only has the constitutional authority to exercise the "judicial power." Const 1963, art 6, § 1. "[O]ur judicial role 'precludes imposing different policy choices than those selected by the Legislature . . . .'" *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002), quoting *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). "Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts . . . have no concern." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157; 189 NW 1006 (1922) (quotation marks and citation omitted). "It is to be assumed that the legislature . . . had full knowledge of the provisions . . . and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what we may think might well have been incorporated." *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934)."

Plaintiff's claim fails as a matter of law where no adverse employment action was taken during his ten years of employment.

IV. CONCLUSION

Plaintiff's claim that defendants' failure to rehire him is not cognizable under the WPA. The majority has used creative law to support a policy-driven conclusion. Regardless of the public policy considerations, this Court is bound by the clear and unambiguous language of the WPA, which requires the existence of an employment relationship and an adverse action within the context of that employment relationship. The trial court correctly granted summary disposition in defendants' favor and I would affirm.

/s/ Kirsten Frank Kelly