# STATE OF MICHIGAN

# COURT OF APPEALS

TRUDY CICCARELLI,

Plaintiff-Appellee,

v

PLASTIC SURGERY AFFILIATES, P.C., and HASHIM ALANI, M.D.,

Defendants-Appellants.

UNPUBLISHED
March 27, 2001

No. 219780
Oakland Circuit Court
LC No. 97-000144-CZ

Before: Doctoroff, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiff, conforming to a jury verdict rendered in this wrongful discharge action. The jury determined that defendants: (1) failed to properly compensate plaintiff for overtime hours, in violation of the Fair Labor Standards Act (FLSA),[1] 29 USC § 201 *et seq*.; (2) wrongfully discharged plaintiff in retaliation for filing a complaint with the United States Department of Labor (USDL), in violation of well-established Michigan public policy; and (3) without good cause, discharged plaintiff from her just-cause employment status. We affirm in part, reverse in part, vacate in part, and remand.

Defendants first contend that plaintiff's implied cause of action for discharge in violation of public policy was precluded by the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq*.; MSA 17.428(1) *et seq*., on the theory that the WPA provides the exclusive remedy for a discharge in retaliation for reporting violations of the FLSA. However, defendants did not assert this defense until almost four months after trial, when they attempted to file a nonconforming reply brief in support of their own post-trial motion for judgment notwithstanding the verdict, new trial, to amend the judgment or, in the alternative, remittitur. Defendants would have this Court excuse their failure to plead this defense, and not deem it to be waived pursuant to MCR 2.111(F), on the theories that the trial court lacked subject matter jurisdiction over plaintiff's claims, or that the exclusivity of the remedy in the WPA requires a determination that plaintiff

[1] The FSLA provides concurrent federal and state jurisdiction over civil actions to recover damages for violations of, among other things, its provisions regarding payment for overtime. 29 USC §§ 207(a)(1) and 216(b).

failed to state a claim on which relief could be granted. See *Campbell v St John Hospital*, 434 Mich 608, 615-616; 455 NW2d 695 (1990).

Defendants' assertion that the trial court lacked jurisdiction over plaintiff's claim misapprehends the concept of subject matter jurisdiction. As the Supreme Court has repeatedly explained,

> "[j]urisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial." [*Bowie v Arder*, 441 Mich 23, 39, 490 NW2d 568 (1992), quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254, 283 NW 45 (1938).]

This is not a case where a statutory provision expressly divests the circuit court of jurisdiction over plaintiff's class of claim and vests it with another tribunal. Compare *Harris v Vernier*, 242 Mich App 306, 312-313; 617 NW2d 764 (2000). Here, notwithstanding the particular facts of the case, the trial court clearly had subject matter jurisdiction to adjudicate implied causes of action for discharge in violation of public policy. See Const 1963, art 6, § 13; MCL 600.605; MSA 27A.605; *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982).

As for failing to state a claim on which relief can be granted, we first note that a *sine qua non* of any preclusion by the WPA would be the applicability of the express remedy of the WPA. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). Further, in order for the express remedy of the WPA to apply, a whistleblower's "report, or attempted report, must be made to a 'public body.'" *Id.* at 74, n 3. That is, § 2 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. [MCL 15.362; MSA 17.428(2).]

"[W]hen a statute specifically defines a given term, that definition alone controls." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Hence, despite the fact that the USDL may appear to be a "public body" in the general sense of the word, because it is

not a "public body" within the definition given by MCL 15.361(d); MSA 17.428(1)(d),[2] the WPA would be inapplicable to a discharge in retaliation for making a report to the USDL of an employer's violations of the FLSA. Although defendants advance factual alternatives that would bring this case within the WPA, when deciding whether plaintiff pleaded a claim on which relief could be granted, we accept all well-pleaded allegations as true and draw all inferences in

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[2] MCL 15.361(d); MSA 17.428(1)(d) provides:

> "Public body" means all of the following:
>
> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
>
> (ii) An agency, board, commission, council, member, or employee of the legislative branch of state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.
>
> (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body.
>
> (v) A law enforcement agency or any member or employee of a law enforcement agency.
>
> (vi) The judiciary and any member or employee of the judiciary.

Except with regard to law enforcement agencies (and their members) and the judiciary (and its members), the definition of "public body" is expressly limited to bodies of *state* government or its political subdivisions. Further, under the rule of statutory construction known as *noscitur a sociis* (known by its associates), the law enforcement and judicial categories would also be limited to those of state or local government. See *The Herald Co v Bay City*, 463 Mich 111, 129-130, n 10; 614 NW2d 873 (2000). Moreover, even if *noscitur a sociis* were not dispositive of this potential ambiguity, the USDL would not qualify as a public body under the judicial or law enforcement prongs of the WPA by any definition of those terms known to Michigan law. Clearly, the USDL is not a public body within the meaning of the WPA. Accord, *Driver v Hanley (After Remand)*, 226 Mich App 558, 562-566; 575 NW2d 31 (1997).

plaintiff's favor. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). We hold that plaintiff did not fail to state a claim on which relief could be granted in this regard.

We also note that, had defendants raised this defense in a timely manner, plaintiff could have easily pleaded a violation of the WPA in the alternative. Hence, allowing defendants to belatedly raise this defense would be unfairly prejudicial to plaintiff. See *Meridian Mutual Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 647-648; 620 NW2d 310 (2000). For this same reason, it would be unfairly prejudicial to plaintiff to now allow defendants to raise the defense that the FSLA, itself, provided her exclusive remedy. Consequently, we hold that defendants, by not pleading them, waived any defense that either the WPA or the FSLA provided plaintiff's exclusive remedy. MCR 2.111(F); *Campbell, supra* at 615-616.

We next address defendants' contention that there was insufficient evidence of a causal link between plaintiff's filing of a complaint with the USDL and her discharge to sustain her claim for wrongful discharge in violation of public policy. Our review of the record reveals that the timing of plaintiff's discharge was highly coincidental with her complaint to the USDL. Moreover, defendants' own separation from employment form indicates that plaintiff's discharge was predicated, in part, on information that plaintiff provided to her coworkers, which was then passed along to defendants. Plaintiff testified that, while on vacation, she told one of these coworkers that she had complained to the USDL. When viewed in the light most favorable to plaintiff, the circumstantial evidence was strong enough to create an issue of fact for the jury regarding whether defendants' discharge of plaintiff was causally related to her complaint to the USDL. See *Snell v UACC Midwest, Inc*, 194 Mich App 511, 514; 487 NW2d 772 (1992).

Defendants also argue that they are entitled to a new trial because the trial court abused its discretion in ruling that defendants could not call three of their four proposed witnesses, as a discovery sanction for defendants' failure to file a witness list. It is within a trial court's discretion to bar witnesses as a sanction for not filing a witness list; however, the exercise of such discretion requires the careful consideration of all of the circumstances in order to determine what sanction is just and proper. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). Although it does not appear that the testimony of these witnesses would have surprised plaintiff or worked any hardship on her, inasmuch as plaintiff attended their depositions, we are also mindful that defendants, despite having access to those same depositions, have failed to identify for the trial court, or for this Court, any testimony that would have altered the outcome of the case had they been given the chance to present it. Consequently, defendants have not established that a failure to reverse on this ground would be inconsistent with substantial justice. MCR 2.613(A); *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

We next address defendants' assertions that the trial court erred by not directing a verdict, or granting JNOV, on plaintiff's claim for wrongful discharge from just-cause employment.

> It is a settled tenet of Michigan law that employment contracts for an indefinite term produce a presumption of employment at will absent distinguishing features to the contrary. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). To overcome this presumption,

> evidence may be produced that proves the existence of an express contract for a definite term or an express provision in a contract that forbids termination absent just cause. Proof of a promise of job security implied in fact, such as employment for a particular term or a promise to terminate only for just cause, may also overcome the presumption. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991). Furthermore, company policies and procedures may become an enforceable part of an employment relationship if such policies and procedures instill legitimate expectations of job security in employees. *Rood v General Dynamics Corp*, 444 Mich 107, 117-118; 507 NW2d 591 (1993). [*Dolan v Continental Airlines*, 454 Mich 373, 383-384; 563 NW2d 23 (1997).]

Plaintiffs' only basis for claiming to have had just-cause employment stems from two provisions in defendants' employee handbook, one of which establishes a probationary period for new hires, and a second that sets out a policy regarding discipline and lists infractions that will warrant oral counseling actions, or written conference actions, and states that a given number of such infractions within a specific period of time will warrant termination. However, what is conspicuously lacking from the handbook is any indication that these disciplinary policies are "all-inclusive." That is, as the Supreme Court has repeatedly pointed out, "'a nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge, clearly reserves the right of an employer to discharge an employee at will.'" *Dolan*, *supra* at 388, quoting *Rood*, *supra* at 142. Consequently, the court should have directed a verdict for defendants, or granted JNOV, on this claim. Moreover, our decision in this regard renders moot the balance of defendants' arguments on appeal.

In sum, we affirm the judgment for plaintiff with regard to the awards for her FLSA claim and her public policy wrongful discharge claim. We reverse the judgment for plaintiff with regard to her claim for wrongful termination from just-cause employment. We vacate that portion of the judgment awarding statutory interest calculated on the previous awards, and we remand to the trial court to reassess interests and costs.

Affirmed in part, reversed in part, vacated in part and remanded for such other proceedings as are deemed necessary, consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra