STATE OF MICHIGAN

COURT OF APPEALS

STACY CAIN,

Plaintiff-Appellant,

v

EASTERN MICHIGAN UNIVERSITY and EASTERN MICHIGAN UNIVERSITY CHIEF OF POLICE,

Defendants-Appellees.

UNPUBLISHED
December 9, 2003

No. 240672
Washtenaw Circuit Court
LC No. 01-000079-CZ

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In this Whistleblower's Protection Act (WPA) claim, plaintiff Stacy Cain appeals by right from the trial court's dismissal of her claim under MCR 2.116(C)(8) and MCR 2.116(C)(10). We affirm, although for different reasons than those stated by the trial court. See *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

Plaintiff was terminated from her position as a sergeant in defendant Eastern Michigan University's Department of Public Safety after it was alleged that she indiscriminately gave out her university-issued private personal identification number (PIN) to her subordinates to use for long distance calling at defendants' expense. Plaintiff claims that she was fired not for her own misconduct but for reporting other officers' use of the PIN.

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.]

To establish a prima facie claim of retaliation under the WPA, a plaintiff must, by a preponderance of the evidence, show that "(1) he was engaged in a protected activity as defined by the act (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998), citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997); *Phinney v Perlmutter*, 222 Mich App 513, 557; 564 NW2d 532 (1997), citing *Hopkins v Midland*, 158 Mich App 361, 378; 404 NW2d 744 (1987).

A plaintiff will either be a "type 1" or a "type 2" whistleblower. *Henry v Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999). Type 1 whistleblowers are those who reported a violation, while type 2 whistleblowers are those who were asked to participate in an investigation. *Id.* Plaintiff claims she was a type 1 whistleblower.

If the plaintiff establishes a prima facie claim, then "the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse action." *Phinney*, *supra* at 563, citing *Hopkins*, *supra* at 378. If the defendant proffers a legitimate reason, then the plaintiff must show that the defendant's reason is a pretext. *Id.* The plaintiff can do so "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*, quoting *Hopkins*, *supra* at 380.

Relying on *Dickson v Oakland Univ*, 171 Mich App 68; 429 NW2d 640 (1988), and *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), the trial court held that plaintiff's report of the officers' PIN use was not protected activity under the WPA because she made the report to her own employer. We disagree. In *Dickson*, the plaintiff was a DPS officer at Oakland University. *Dickson*, *supra* at 69. Pursuant to his job function, the plaintiff reported various instances of students' criminal conduct to his superiors in the department. *Id.* His superiors refused to act on the reports and instructed the plaintiff to be more lenient toward the students. *Id.* In that context, this Court held that the plaintiff had not reported wrongful conduct to a public body because he was merely doing his job. *Id.* at 71. Contrary to the case at hand, Dickson did not allege or report that his co-workers or his employer were violating the law. Here, plaintiff reported that her coworkers violated a department regulation, a type of report that is specifically protected by the WPA. See *Dudewicz, supra*. Additionally, plaintiff's report was made to a public body as defined by the WPA. See *Phinney*, *supra* at 555 (holding that the University of Michigan was a public body under MCL 15.361(d)(iv) and that when the plaintiff reported a violation of law to the university, the protections of the WPA were invoked); *Dudewicz, supra* at 76, n 4.

However, we affirm the trial court's result. Plaintiff presented no evidence that could lead a reasonable jury to believe that defendants retaliated against her for reporting the officers' PIN usage. The fact that defendants fired her after learning that she indiscriminately gave her PIN out supports defendants' assertion that she was fired for her own misconduct. Therefore, we conclude that no reasonable jury could conclude that defendants retaliated against plaintiff for exposing her colleagues, and therefore plaintiff failed to establish a causal connection between her report and her termination.

Furthermore, plaintiff failed to rebut defendants' proffered reason for her termination. Plaintiff claims she was treated more harshly than the other officers, but defendants explained

this was because she was the officers' superior, and as such, her conduct was more egregious. However, she produced nothing more than a bare assertion to persuade the trial court that it was her revelation of her subordinates' conduct, rather than hers, that motivated her termination or that defendants' explanation was unworthy of credence. *Phinney*, *supra* at 563, citing *Hopkins*, *supra* at 380.

Plaintiff next argues that the trial court's holding violated her equal protection rights. Notwithstanding the fact that our resolution of plaintiff's WPA claim makes her equal protection claim moot, we disagree. The Equal Protection Clause forbids only intentional discrimination. *Harville v State Plumbing & Heating*, 218 Mich App 302, 308; 553 NW2d 377 (1996), citing *Purkett v Elem*, 514 US 765; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Plaintiff has not alleged that the trial court's ruling was an intentional effort to discriminate against her or that the trial court purposefully ruled the way it did because of the adverse impact the ruling would have on her. Rather, the trial court's holding was merely an erroneous interpretation of the law.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski