STATE OF MICHIGAN

COURT OF APPEALS

KATHY PODZIKOWSKI, Plaintiff-Appellant,	UNPUBLISHED July 26, 2011
v	No. 296083 Montmorency Circuit Court
TOWNSHIP OF ALBERT, Defendant-Appellee.	LC No. 08-002050-NZ

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this action under the Whistleblowers' Protection Act (WPA), MCL 15.361, et seq. Because plaintiff failed to demonstrate the existence of a material question of fact regarding whether the activities she engaged in qualified as "protected activity" under the WPA, we affirm.

The trial court set out the substantive facts as follows:

> Plaintiff was hired by the township in 2002 as [Township Zoning Administrator and Enforcement Officer,] an at-will employee. In the summer of 2006, in the course of her employment, she responded to citizen complaints by repeatedly notifying Bertha Abbott, then a private citizen, that she was violating the township's noise ordinance (barking dogs). In October of 2006 the plaintiff wrote a citation alleging Abbott's continuing violation of the noise ordinance. In January 2007 the plaintiff testified in a court hearing concerning the merits of the citation. Abbott was found to be responsible, was assessed a $350 fine, and was ordered to bring her property into compliance with the ordinance. In October or November of 2007 the plaintiff reported to the township attorney her belief that Abbott remained out of the compliance, but it turned out that by then Abbott had recently resolved that concern. Although that marked the end of the noise ordinance issue, plaintiff and Abbot[t] continued to have a conflicted relationship.
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> In September 2007, Abbott was appointed to fill [the Township Supervisor] vacancy on the township board, and as a result became plaintiff's work supervisor. In February 2008, at the urging of the township attorney (pertaining to a matter totally unrelated to the earlier ordinance violation issue),

> the five member township board passed policy directives concerning civil infraction enforcement. The board requested the plaintiff receive, review and sign the policy directives. Plaintiff's refusal to sign was cited by several board members as one of the reasons supporting their decision to terminate her employment.
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> Plaintiff was discharged by unanimous vote of the Albert Township board in May 2008. All five members testified at their depositions that the vote to terminate was based on issues of insubordination or poor performance and was not related to the earlier ordinance enforcement action against Abbott. Plaintiff notes that she had never previously been formally disciplined, while the defendant points out receipt of complaints from the public about plaintiff's "confrontational attitude."

Further relevant substantive facts are as follows. The record reflects that during early 2008, plaintiff became involved in a dispute between two neighbors, DeBlair and Johnson, with regard to the placement of a fence between their two properties. Abbott and another board member received complaints from Johnson alleging that plaintiff was favoring DeBlair unfairly in the dispute. There were also allegations that plaintiff was sharing information with the neighbors that was actually causing more problems between the neighbors. Abbott contacted the township attorney, Bryan E. Graham, seeking his counsel in connection with the fence dispute. Graham responded to Abbott with a detailed message in hopes of answering Abbott's question. On February 1, 2008, Graham notified the township board via email that after he had responded to Abbott's question, plaintiff sent him a fax noting different facts than those provided to him previously. Graham advised the township board in the email that he needed direction in how to proceed with future zoning questions pointing out that his client was the township itself and not individual township officials. Graham stated that his advice "is always dependent upon an accurate and complete statement of the underlying facts" and especially considering the township's limited resources, specifically advised, "I strongly suggest that the township develop an internal mechanism dealing with how zoning questions are posed. Otherwise, there will continue to be confusion concerning the legal advice the township is receiving."

In response, on February 19, 2008, the township board approved new policy directives concerning civil infraction enforcement outlining the duties of the zoning administrator. One specific directive stated that, "All correspondence to the township attorney, involving the zoning administration office shall be made by or under the approval of the supervisor." Abbott testified that the township board gave plaintiff the opportunity to comment on the policy directives before they were approved at the February 19, 2008 meeting. There is no evidence on the record that the new policy directives were in any way related to the earlier ordinance violation issues. Abbott and Aarons presented the directives to plaintiff on February 21, 2008. At the township board's request, plaintiff was to review and sign the policy directives indicating that she had received them. According to Abbott and Aarons, plaintiff initially refused to sign the policy directives. Abbott and Aarons approached plaintiff approximately two weeks later and asked plaintiff once again to sign the policy directives. Plaintiff admitted in her brief on appeal that she did not sign the enforcement policy directives. Soon thereafter, plaintiff contacted Graham without receiving supervisor approval in direct violation of the policy directives. Plaintiff had a history of unilaterally contacting Graham incurring a cost to the township, and when asked to

comply with the new policy directives approved by the township board, plaintiff refused. She then violated the directives. Shortly thereafter plaintiff's employment was terminated.

On July 31, 2008, plaintiff filed her complaint and jury demand alleging that defendant violated the WPA when it terminated her employment. In her complaint, plaintiff alleges as follows:

> 40. That in actuality a reason that the Defendant, acting through the leadership of Bert Abbott, decided to terminate the Plaintiff . . ., and irrevocably change the terms and conditions of her employment, was because the Plaintiff reported violation and or suspected violation of numerous law and testified in Hearings in support of the same against her supervisor Bert Abbott.
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> 41. That the change in terms and conditions of the Plaintiff's employment because she reported and testified regarding a suspected violation of laws and/or regulation and/or ordinances to a public body is violative of the provisions of the Michigan Whistleblower[s'] Protection Act, MCL[] 15.361[.]
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> 42. That as a direct and proximate result of the Defendant's wrongful conduct, harassment and the change in the terms and conditions of her employment, Plaintiff has suffered damages including but not limited to loss of physical well being, anxiety, stress and stress related symptoms, depression, and related loss of income, income opportunities, and benefits, humiliation, emotional distress, attorney fees and associated expenses.

On October 9, 2009, defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that plaintiff's complaint should be dismissed because "no genuine issue of material fact exists to support [plaintiff's] claim that she engage in 'protected activity' as defined by the WPA." Plaintiff responded on November 2, 2009 arguing that her case was an "exceptionally strong case of illegal retaliation/termination in violation of the WPA." Plaintiff argued that she was engaged in a protected activity when: "She made repeated reports regarding Abbott's numerous violations to any number of public bodies. She testified in open session against Abbott on a number of occasions. She testified in Court against Abbott. She issued Abbott [t]ickets. There is no doubt that she engaged in protected activity." Plaintiff also alleged that she was subsequently discharged and that there was a causal connection between the protected activity and the discharge. For these reasons, plaintiff asserted that she was "unequivocally protected by the WPA."

The trial court entertained oral argument on the motion on November 20, 2009. At the close of the argument, the trial court invited optional supplemental briefing by the parties limited specifically to the following question: "whether or not this is legislation which is intended to provide protection essentially for a development after the fact. . . . Because to me that's what this really turn[s] on [is] whether or not such a development, an after-the-fact development, would result in it being protected activity." Subsequently, on November 24, 2009, the trial court issued an "Order Regarding Summary Disposition" memorializing its oral request for additional authority.

The trial court issued its opinion and order on December 14, 2009 granting summary disposition in defendant's favor. The trial court held as follows:

> Having reviewed the evidence identified by these parties in a light most favorable to the plaintiff, and having drawn all reasonable inferences therefrom, the court concludes that there is no genuine issue of material fact such as would warrant trial of this cause.
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> The actions of plaintiff prior to appointment of Abbott as township supervisor did not constitute "protected activity." The conduct occurred in the normal course of plaintiff's employment as a zoning enforcement official, and cannot be honestly characterized as "whistle-blowing," for the object of the act is to encourage workplace whistleblowers to report unlawful acts without fear of retaliation. Prior to Abbott's appointment as township supervisor there was no reason for her to fear retaliation.

It is from this order that plaintiff now appeals as of right.

Plaintiff argues that her issuance of citations, reports of wrongdoing, testimony in open court and complaints to township lawyers regarding the conduct of Abbott, both before and after Abbott became her supervisor, was protected activity under the plain language of the WPA and the trial court's ruling to the contrary must be reversed. Defendant responds that plaintiff was not a whistleblower because she merely enforced a local ordinance against a private person, and that enforcement does not give rise to a perpetual whistleblower's action. Defendant also asserts that plaintiff's activities furthered none of the goals of the WPA and does not merit its protection.

We review the grant of a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. Parties opposing a properly supported motion for summary disposition must present more than mere conjecture and speculation. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

"Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo." *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). We analyze WPA claims under a burden shifting scheme, where the plaintiff must first establish a prima facie case of retaliatory discharge. *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). "If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate business reason for the discharge." *Id*. at 281. If the defendant carries such a burden, then the plaintiff must prove that the proffered reason was only a pretext for the discharge. *Id*.

The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body. MCL 15.362; MCL 15.363; *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 610; 566

NW2d 571 (1997). The WPA prohibits an employer from discharging, threatening, or otherwise discriminating against an employee who reports a violation of a federal or state statute or regulation to a public body. MCL 15.362. To establish a prima face case under the WPA, "a plaintiff must show that (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 discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

Specifically, 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.

The plain language of the WPA was intended to benefit only those employees engaged in protected activity as defined under the act. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998). The Legislature chose to protect employees who report or are about to report a violation. *Id*. at 399, 405-406.

The underlying purpose of the WPA is protection of the public. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378; 563 NW2d 23 (1997). The statute "meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id*. The WPA is a remedial statute, and must be liberally construed to favor the persons that the Legislature intended to benefit. *Chandler*, 456 Mich at 406.

"The primary motivation of an employee pursuing a whistleblower claim 'must have been a desire to inform the public on matters of public concern . . . .'" *Shallal*, 455 Mich at 621 (citation omitted). The WPA's "main purpose is to alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses." *Id*. at 612 (quotation marks and citation omitted). To effectuate the goal, and thus promote the health and safety of the public, the WPA is aimed at "removing barriers that may interfere with employee efforts to report violations or suspected violations of the law." *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 584; 649 NW2d 754 (2002). The WPA encourages employees, who are the group best positioned to report violations of the law, to report violations by reducing their fear of retribution through prohibiting future employer reprisals against whistle blowing employees. *Shallal*, 455 Mich at 612.

In July 2006, after receiving complaints from Abbott's neighbor, plaintiff issued Abbott, then a private citizen, a notice of violation regarding noise levels and the fact that the presence of 26 sled dogs on her property was too many dogs to have without a kennel license. Throughout

July 2006, the neighbor complaints continued and on July 21, 2006 plaintiff filed a complaint with the sheriff's office alleging a violation of the kennel ordinance and on July 25, 2006 with the health department. Abbott then applied for a kennel license. Plaintiff provided the township board with her records in response to Abbott's special use permit application documenting the barking complaints and that the property at issue was not zoned for a kennel on July 25, 2006. At a public hearing on the matter on August 10, 2006, plaintiff testified that Abbott was in violation of the noise ordinance. After receiving an additional complaint, on October 13, 2006, plaintiff advised Abbott in writing that she was in violation of the noise ordinance and must abate the noise issue. Ten days later, on October 23, 2006, plaintiff issued Abbott a citation. A public hearing was held on January 19, 2007, at which plaintiff once again testified that Abbott was in violation of the noise ordinance. Throughout this time, Abbott did not believe she was out of compliance and in several letters to the township board explained that she was not out of compliance with the noise ordinance. Abbott also demanded that plaintiff be taken off her case. Abbott was found responsible for violating the noise ordinance and was charged fines and fees in the amount of $350. The noise issue was ultimately abated because Abbott no longer kept the dogs on her property.

It does not appear to be contested that plaintiff's reporting activities with regard to Abbott's ordinance violations constituted reports to a public body because plaintiff, through the issuance of citations and her own public testimony reported the violations to the township board. Plaintiff also filed complaints with the sheriff's office and the state health department. The fact that the one of the public bodies to which plaintiff reported was also the employee's employer is not fatal to maintaining the cause of action. See *Brown v Mayor of Detroit*, 478 Mich 589, 594-595; 734 NW2d 514 (2007). "There is no condition in the [WPA] that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA." *Id*. at 594. Furthermore, our Supreme Court has determined that there is no limiting language found in the WPA that requires that the reporting employee be acting outside the regular scope of his employment. *Id*. at 594-595.

The key question in this case remains. It is whether plaintiff's reporting of the noise violations and lack of a kennel license constituted "protected activity" as defined under the act. *Chandler*, 456 Mich at 406. The primary reasoning of the trial court in determining that it was not protected activity did not focus on plaintiff's job responsibilities, but on the conclusion that a zoning administrator and enforcement officer issuing a series of noise violation citations did not fit the purposes of protected activity under the WPA, i.e., to bring about remediation of a matter of public concern. We agree with the trial court's fact-based and thoughtful analysis.

Again, the WPA's "main purpose is to alleviate the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses." *Shallal*, 455 Mich at 612 (quotation marks and citation omitted). And,

> In order to effectuate the purpose of the WPA, our courts have ruled that, when considering a retaliation claim under the act, a critical inquiry is whether the employee acted in good faith and with "'a desire to inform the public on matters of public concern . . . .'" *Whitman v City of Burton*, ___ Mich App ___, ___; ___ NW2d ___ (2011) (Docket No 294703, slip op p 5.), quoting *Shallal*, 455 Mich at

621, quoting *Wolcott v Champion Intl Corp*, 691 F Supp 1052, 1065 (WD Mich, 1987).

Under the facts presented, even when viewed in the light most favorable to plaintiff, we cannot conclude that plaintiff's activities fall within the realm of "protected activity" because she did not pursue the matter to inform the public on a matter of public concern. *Whitman*, slip op p 5.

The record reflects that plaintiff responded to noise violation complaints and in so doing learned about the kennel license violation. Plaintiff adeptly responded to additional neighbor complaints and attempted to bring Abbott into compliance when Abbott did not abate the nuisance. In her efforts to bring Abbott into compliance with township ordinances, plaintiff engaged in various reporting activities including: issuing warnings, citations, reporting violations to the township board, the sheriff's office, and the state health department, and also twice testifying at hearings related to the issues. Plaintiff's reporting efforts had a narrow focus and were aimed solely at directing Abbott, a private citizen, to come into compliance with applicable township ordinances—no more, no less. Even when liberally construing this remedial statute, *Chandler*, 456 Mich at 406, plaintiff's goal was not one envisioned by the WPA. Plaintiff's campaign to bring Abbott, a private citizen, into compliance with applicable township ordinances was not an attempt to combat public corruption or criminally irresponsible behavior of a government or business entity. By virtue of her reporting, plaintiff was simply attempting to bring an unresponsive township landowner into compliance with applicable ordinances. *Shallal*, 455 Mich at 612. In sum, plaintiff's reporting was not for the purpose underlying the WPA for the simple reason that she did not pursue the matter to inform the public on an issue of public concern. *Whitman*, slip op p 5. With the reporting at issue, there was no public concern in the sense of corruption or illegality in a branch or unit of government, a business, public or private, or an employer, public or private. Therefore, we must conclude that plaintiff was not engaged in protected activity at the time of reporting. For these reasons, the trial court did not err in granting defendant's motion for summary disposition.

In conclusion, we agree with the trial court that plaintiff failed to establish a prima facie case under the WPA because she did not demonstrate the existence of a material question of fact related to whether the activities she engaged in qualified as "protected activity" under the WPA. We decline to address the element of causal connection between her alleged protected activities and the contested employment action because the issue was not fully briefed and presented to the trial court.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio