STATE OF MICHIGAN

COURT OF APPEALS

JOHN PERLES, Plaintiff-Appellant,	UNPUBLISHED December 22, 2020
v SPARTANNASH COMPANY, also known as SPARTANNASH ASSOCIATES LLC, Defendant-Appellee.	No. 350869 Kent Circuit Court LC No. 18-000125-CZ

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). On appeal, plaintiff argues that the trial court erred by accepting defendant's argument that plaintiff's exclusive remedy was provided by the Food Safety Modernization Act (FSMA), 21 USC 301 *et seq*., and that plaintiff therefore could not bring a retaliation claim premised on a violation of public policy. We agree with the trial court, and affirm.

This case arises out of the termination of plaintiff's employment with defendant. Plaintiff managed one of defendant's grocery warehouses in Grand Rapids, Michigan. After an audit was conducted by a third party, plaintiff came to believe that a pest control company hired by defendant had been forging documents and failing to adequately protect the grocery warehouse. Shortly thereafter, a rodent problem developed inside the warehouse. Plaintiff blamed the pest control company for the infestation, and by extension, believed that defendant was violating the FSMA. Other employees of defendant opined that a lack of sanitation at the warehouse was to blame, which fell somewhat on plaintiff's shoulders. Plaintiff's employment was eventually terminated.

Plaintiff filed suit, alleging that defendant terminated his employment in violation of public policy for raising issues concerning the FSMA.[1] Defendant filed a motion for summary

[1] Plaintiff also initially claimed that his termination violated the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. However, he later agreed to dismiss that claim.

disposition, which the trial court initially denied. However, defendant renewed this motion after the case was assigned to a different judge following the first judge's retirement. The trial court treated that second motion as a motion for reconsideration, allowing the parties to submit briefs and provide arguments. Following a hearing, the trial court granted defendant's motion for summary disposition. This appeal followed.

Plaintiff's sole argument on appeal is that the trial court erred by granting defendant's motion for summary disposition . We disagree.

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When reviewing a motion brought pursuant to MCR 2.116(C)(10), this Court "must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). This Court's "task is to review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial." *Id*. A genuine issue of material fact exists when the record, "giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997). However, the court may not "assess credibility" or "determine facts on a motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Generally, "either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982).

> However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty. [*Id*.]

The Michigan Supreme Court provided three exceptions to the at-will employment rule where termination may be actionable: "(a) a statute specifically prohibits the discharge, (b) the employee is discharged for refusing to violate the law, or (c) the employee is discharged for exercising a well-established statutory right." *Lewandowski v Nuclear Mgt*, 272 Mich App 120, 127; 724 NW2d 718 (2006)127, citing *Suchodolski*, 412 Mich at 695-696. "The first prong involves an express cause of action, while the second and third prongs involve implied causes of action." *Lewandowski*, 272 Mich App at 127. Notably, in *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 78; 305 NW2d 645 (1993), disapproved of on other grounds by *Brown v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007), the Court explained that "if a statute provides a remedy for a violation of a right, and no common-law counterpart right exists, the statutory remedy is typically the exclusive remedy."

Moreover, in *Lewandowski*, 272 Mich App at 127, this Court stated that "a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue." In that case, the trial court granted the defendant employer's motion for

summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) because the plaintiff could not sustain a claim pursuant to the WPA. *Id*. at 122. The plaintiff then moved to amend his complaint to add a public-policy claim. *Id*. at 122-123. The trial court denied the motion on the ground that the amendment would be futile. *Id*. at 123. On appeal, this Court agreed that the requested amendment to the plaintiff's complaint would be futile because there was a statutory prohibition against retaliatory discharge under the WPA that applied to the case, and therefore plaintiff could not also maintain a claim as a matter of public policy.[2] *Id*. at 127-128. Or, in other words, the plaintiff could not maintain a cause of action under the second and third prongs from *Suchodolski* on the basis of a statutory violation that implicated the first prong.

Notwithstanding, plaintiff argues that the holding in *Dudewicz* only precludes a public-policy cause of action under the first prong enumerated in *Suchodolski*, and that a statutory violation creating a cause of action under the first prong of *Suchodolski* may also support a claim under the second and third prongs. In support of this contention, plaintiff relies on a footnote in *Edelberg v Leco Corp*, 236 Mich App 177, 180 n 2; 599 NW2d 785 (1999), which provided the following:

> A public policy claim under the first prong is sustainable only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. [*Dudewicz*, 443 Mich at 79-80]. Although the parties have not raised the issue, we note that plaintiff is precluded from arguing, under the first prong, that his employment was terminated in retaliation for his exercising his rights under the worker's compensation statute, because that statute prohibits retaliatory action against an employee "because of the exercise by the employee on behalf of himself or others of a right afforded by this act." MCL 418.301(11); MSA 17.237(301)(11).

Coincidently, the plaintiff in *Lewandowski* relied on the same footnote, and the *Lewandoswki* Court rejected the argument. *Lewandowski*, 272 Mich App at 128. This Court determined that, because the footnote addressed an issue not raised by either party, it was merely nonbinding dicta. *Lewandowski*, 272 Mich at 128. We further explained:

> The *Edelberg* Court properly addressed the plaintiff's rather convoluted argument with respect to the third prong of *Suchodolski* as presented, but noted in the footnote that the plaintiff's claim would not have survived under *Dudewicz*; its casual reference to "the first prong" did not indicate that a cause of action could survive under the second and third prongs when it failed to survive under the first prong. [*Id*. at 128-129.]

We also thought it pertinent to note that, in *Dudewicz*, after determining that a specific statutory prohibition against a retaliatory discharge rendered a public-policy claim unviable, the Supreme Court did not then consider such a claim under the other prongs of *Suchodolski*. *Id*. at 129. Finally, we noted that, as is also true in this case, the plaintiff failed to "cite any case in which a public-policy wrongful discharge claim was found inapplicable because of an express statutory

[2] See 42 USC 5851.

prohibition against discharge, but a public-policy wrongful discharge claim was then found viable under the second or third prong of *Suchodolski*." *Id*. See also *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008) (stating that when "there exists a statute explicitly proscribing a particular adverse employment action, that statute is the exclusive remedy, and no other 'public policy' claim for wrongful discharge can be maintained").

In this case, plaintiff's public-policy claim is based on the prohibition against retaliatory discharge contained in the FSMA. 21 USC 399d(a) provides:

> No entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)—
>
> (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this chapter or any order, rule, regulation, standard, or ban under this chapter, or any order, rule, regulation, standard, or ban under this chapter;1
>
> (2) testified or is about to testify in a proceeding concerning such violation;
>
> (3) assisted or participated or is about to assist or participate in such a proceeding; or
>
> (4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this chapter, or any order, rule, regulation, standard, or ban under this chapter.

The process for filing a complaint is outlined in 21 USC 399d(b). The individual must file his or her complaint with the Secretary of Labor within 180 days after the date of the violation. 21 USC 399d(b). Notably, plaintiff has acknowledged that he could have brought a claim pursuant to the FSMA; however, he chose to bring a public-policy claim instead. With that in mind, plaintiff's claim is precluded by this Court's holdings in *Lewandowski* and *Kimmelman*.

Plaintiff suggests that the language in *Lewandowski* involving the preclusion of a public-policy claim in circumstances in which there is an applicable statute prohibiting retaliatory dismissal was merely dicta. This is false. "Dictum is a judicial comment that is not necessary to the decision in the case." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246 (2014). Therefore, "dictum does not constitute binding authority." *Id*. However, in *Lewandowski*, 272 Mich App at 126, one of the plaintiff's claims on appeal was that the trial court erred by denying his request to amend his complaint to add a public-policy claim. This Court addressed this argument, determining that the trial court properly concluded that the amendment would be futile on the basis of the Michigan Supreme Court's holding in *Dudewicz* and that the plaintiff's

arguments to the contrary were unavailing. *Id*. at 127-129. Accordingly, these statements were not dictum, and they constitute binding authority. See *Pew*, 307 Mich App at 334 (stating that "if a court intentionally addresses and decides an issue that is germane to the controversy in the case, the statement is not dictum even if the issue was not decisive"). See also MCR 7.215(C)(2).

Plaintiff also contends that *Lewandowski* violated the "first out rule" by failing to follow the holdings of previous cases. As discussed above, the holding in *Lewandowski* was not new or contrary to previous decisions. This Court followed and applied the Michigan Supreme Court's holding in *Dudewicz*. See *Lewandowski*, 272 Mich App at 127-129. Moreover, this Court issued similar statements in *Kimmelman*, 278 Mich App at 573. We also note that plaintiff cites several cases purporting to support his contention that a plaintiff may bring a public-policy claim when there is also an applicable statutory prohibition against retaliatory dismissal. However, these cases are unavailing as they do not address the specific argument at issue in this case.[3]

Plaintiff also contends that the nonexclusive language in the FSMA shows that plaintiff is permitted to bring a public-policy claim in state court in addition to a claim directly implicating the retaliation provisions of the FSMA. 21 USC 399d(c)(1) states that "[n]othing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law." As acknowledged by plaintiff in the trial court, the language of the statute does not override established Michigan law. As a result, plaintiff cannot now change his position on appeal. See *Grant v AAA Mich/Wis, Inc (On Remand)*, 272 Mich App 142, 147; 724 NW2d 498 (2006) (stating that "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal"). Moreover, plaintiff essentially seeks to use this provision, not to safeguard a cause of action he might otherwise have, but to create in himself a cause of action that, for the reasons outlined above, was never viable.

Finally, plaintiff argues that the Restatement of Employment Law recognizes that federal statutes may establish the basis for a public-policy discharge case. The Restatement provides:

> An employer that discharges an employee because the employee engages in activity protected by a well-established public policy . . . is subject to liability in tort for wrongful discharge in violation of public policy, unless the statute or other law forming the basis of the applicable public policy precludes tort liability or

[3] For example, plaintiff relies heavily on *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519; 854 NW2d 152 (2014), for the premise that, under certain circumstances, a plaintiff may have a viable wrongful retaliation claim pursuant to more than one of the three exceptions to the at-will employment rule. This is certainly true, but in *Landin*, the plaintiff overcame summary disposition because he had a viable claim that he was discharged in violation of both a statute and a well-established policy right. *Landin*, 305 Mich App at 532-533. In that case, the plaintiff had not merely alleged a statutory violation on the part of his employer that implicated the first prong from *Suchodolski*, he had also alleged a general claim of malpractice. *Id*. at 533. Contrarily, plaintiff's claim in this case was premised on the FSMA and the FSMA alone.

> otherwise makes judicial recognition of a tort claim inappropriate. [Restatement Employment Law § 5.01.]

First, similar to plaintiff's nonexclusive-language argument, the restatement does not override Michigan caselaw. Second, as pointed out by defendant, the restatement specifically allows for the preclusion of such a claim on the basis of the statute or "other law forming the basis of the applicable public policy." Nothing in the above language indicates that a retaliation claim specifically prescribed by statute, when not brought properly, might be brought in another form as a matter of public policy. As a result, this argument is without merit. The trial court properly determined that the FSMA provided plaintiff's exclusive remedy for wrongful discharge, and its grant of summary disposition was proper. See *Shallal*, 455 Mich at 609.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Deborah A. Servitto