STATE OF MICHIGAN

COURT OF APPEALS

BRIAN BERG,

Plaintiff-Appellant,

v

TITTABAWASEE TOWNSHIP and POLICE CHIEF DENNIS GREEN, individually,

Defendants-Appellees.

UNPUBLISHED
December 21, 2021

No. 355404
Saginaw Circuit Court
LC No. 20-042173-CD-1

Before: MARKEY, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff was employed by defendant Tittabawassee Township (the township) as a police officer and detective from 2008 to 2018. Plaintiff initially held a part-time position with the township's police department, but in April 2018, plaintiff accepted a full-time position. In 2017 and 2018, plaintiff was involved in the investigation of a Catholic priest, Father Robert DeLand. In October 2018, plaintiff's employment was terminated.

In May 2020, plaintiff filed suit against defendants, alleging wrongful termination in violation of Michigan's public policy, wrongful termination in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and violation of the Elliott-Larson Civil Rights Act (ELCRA). Specifically, plaintiff alleged that he had been fired for refusing to cease his

investigation of Father DeLand[1] despite pressure, and eventually orders, from defendant Police Chief Dennis Green (Chief Green) to do so.

Defendants answered, denying that plaintiff was terminated (or that he had otherwise suffered an adverse employment action) in retaliation for pursuing the DeLand investigation. Defendants then moved for summary disposition under MCR 2.116(C)(8), arguing that plaintiff's WPA claim was barred by the applicable statute of limitations, that his public-policy claim was duplicative of his WPA claim, and that his ELCRA claim was meritless because plaintiff had demonstrated neither membership in a protected class nor engagement in a protected activity. Defendants also argued that the public-policy claim was barred by governmental immunity.

Plaintiff responded to defendants' motion and voluntarily dismissed his WPA claim. However, he argued that his public-policy claim was not duplicative of his WPA claim, that it also was not barred by governmental immunity, and that he had pleaded a prima facie ELCRA claim. Plaintiff also argued that, if the trial court found that any of his claims were legally deficient, he should be permitted to amend his complaint.

The trial court held a hearing on defendants' motion. Defendants argued that plaintiff's claim was, in essence, a "whistleblower claim," that plaintiff's claims were therefore governed by the WPA, and that because plaintiff had admitted that he had no viable claim under the WPA, the remaining claims should be dismissed. Defendants also argued that, in any event, the public-policy claim was barred by governmental immunity, the township being entitled to immunity as a governmental agency and Chief Green being entitled to absolute immunity by virtue of his high-level position. Defendant reiterated that plaintiff's ELCRA claim was not viable because plaintiff had failed to allege either membership in a protected class or participation in protected activity. Plaintiff responded that defendants' motion was premature, because he had clearly pleaded the elements of viable public-policy and ELCRA claims. Plaintiff also argued that his public-policy claim was distinct from a claim under the WPA, because he had been asked by his employer to violate the law governing police officers' investigation of crimes. Plaintiff also asserted that he had pleaded in avoidance of governmental immunity. Finally, plaintiff argued that his claim for retaliation under the ELCRA did not require a showing that plaintiff was a member of a protected class, and that plaintiff had adequately pleaded that he had engaged in protected activity by participating in a sexual abuse investigation.

Following the motion hearing, the trial court issued a written opinion and order granting defendants' motion and dismissing plaintiff's case. Regarding the public-policy claim, the trial court held that it arose of out of circumstances that gave rise to a claim for relief under the WPA, and that the WPA therefore provided the exclusive remedy for plaintiff's claim. Moreover, the trial court held, the township was entitled to governmental immunity on that claim. Regarding Chief Green, the trial court stated that it "lacks sufficient factual information at the pleading stage to determine whether he should be considered an official, subject to absolute immunity under MCL 691.1407(5), or an employee, subject to qualified immunity under MCL 691.1407(2), (3)."

[1] Father DeLand was arrested in 2018. He ultimately pleaded guilty to several charges, including criminal sexual conduct.

It therefore held that a "finding of government[al] immunity as it applies to Chief Green would be premature."

Regarding plaintiff's ELCRA claim, the trial court held that plaintiff's allegations that he had participated in a criminal investigation into sexual abuse did not constitute participation in a protected activity, noting that "the complaint fails to contain any factual allegations to show that the alleged sexual misconduct Plaintiff was investigating violated a civil right protected by the [EL]CRA." The trial court also concluded that granting plaintiff leave to amend his complaint would be futile.

This appeal followed.

II. PUBLIC-POLICY WRONGFUL TERMINATION CLAIM

Plaintiff argues that the trial court erred by holding that his public-policy wrongful termination claim was preempted by the WPA, and by holding that the township was entitled to governmental immunity with respect to that claim. We disagree.

We review de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(8). See *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.[2] *Id*. Summary disposition is appropriate if the plaintiff has failed to state a claim on which relief can be granted, such that no factual development could possibly justify recovery. *Id*. at 129-130. In reviewing a trial court's grant of summary disposition to a defendant under this standard, we "accept as true all well-pleaded facts" in the plaintiff's complaint. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993) (citation omitted). We review de novo as a question of law the applicability of governmental immunity. *Wood v Detroit*, 323 Mich App 416, 419; 917 NW2d 709 (2018). We also review de novo the application and interpretation of statutes. *Id*.

A. PREEMPTION BY THE WPA

The WPA generally protects plaintiffs who report or are about to report violations or suspected violations of law by employers and coworkers, or those that participate in investigations held by public bodies. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 403; 572 NW2d 210 (1998). Under MCL 15.362:

> 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 . . . reports or is about to report,

[2] Plaintiff stated several times before the trial court, and states on appeal, that defendants' motion was "premature." To the extent he argues that this alleged prematurity is a reason to reverse the trial court, we note that a motion under MCR 2.116(C)(8) is decided by reference to the pleadings alone. *Klawiter v Reurink*, 196 Mich App 263, 265; 492 NW2d 801 (1992). The fact that discovery was not complete was therefore immaterial. *Id*. ("The motion tests the legal basis of the complaint, not whether it can be factually supported.").

> 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 WPA thus "provides protection for two types of 'whistleblowers': (1) those who report, or about to report, violations of law, regulation, or rule to a public body, and (2) those who are requested by a public body to participate in an investigation held by that public body or in a court action." *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999). A "type 1 whistleblower" is someone "who, on his own initiative, takes it upon himself to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the public body." *Id*. at 410. "Type 2 whistleblowers" are those who "participate in a previously initiated investigation or hearing at the behest of a public body." *Id*. "If a plaintiff falls under either category, then that plaintiff is engaged in a 'protected activity' for purposes of presenting a prima facie [WPA] case." *Id*.

In addition to the WPA, there exists in Michigan a common-law claim for wrongful termination against public policy. Termination of at-will employment is typically proscribed by public policy in Michigan in three situations: "(1) 'adverse treatment of employees who act in accordance with a statutory right or duty,' (2) an employee's 'failure or refusal to violate a law in the course of employment,' or (3) an 'employee's exercise of a right conferred by a well-established legislative enactment.' " *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008), quoting *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982). However, where a statute already exists that prohibits a particular adverse employment action, the statute provides the exclusive remedy, and claims under Michigan public policy cannot be maintained. *Kimmelman*, 278 Mich App at 573.

"The remedies provided by the WPA are exclusive and not cumulative. Thus, when a plaintiff alleges discharge in retaliation for engaging in activity protected by the WPA, [t]he WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 25; 891 NW2d 528 (2016) (quotation marks and citation omitted; second alteration in original). However, "if the WPA does not apply, it provides no remedy and there is no preemption." See *Pace v Edel-Harrelson*, 499 Mich 1, 10 & n 19 (2016), quoting *Anzaldua v Neogen Corp*, 292 Mich App 626, 631 (2011). In other words, if the factual basis for a plaintiff's public-policy claim would not, if proven, entitle him to recover under the WPA, a public-policy claim based on that conduct is not preempted by the WPA. *Rivera v SVRC Industries, Inc*, ___ Mich ___, ___; ___ NW2d ___ (2021), slip op at 2.

In this case, plaintiff alleged that he was fired by defendants for refusing to cease his investigation into Father DeLand. He maintains that, by doing so, he was refusing to violate the law or circumvent his job duties. However, we conclude, under the circumstances of this case, that this conduct, if proven, would entitle plaintiff to recover under the WPA. *McNeill-Marks*, 316 Mich App at 25. Having abandoned his WPA claim, plaintiff no longer argues that that he reported (or was about to report) a violation or suspected violation of the law; rather, he acknowledges that he investigated Father DeLand after *receiving* reports about suspected criminal activity.

Consequently, plaintiff could not be a "type 1" whistleblower under the WPA. *Henry*, 234 Mich App at 409. However, a "township," "law enforcement agency," or "any other body which is created by state or local authority or which is primarily funded by or through state or local authority," as well as any members or employees thereof, is a "public body" under the WPA. See MCL 15.361(d)(*iii*), (*iv*), (*v*). Plaintiff alleged in his complaint that he informed Chief Green that he "was initiating an investigation and meeting with prosecutors of the Saginaw County Prosecutor's Office." Plaintiff further alleged that "it was decided that there would be a joint investigation and undercover operation of which Plaintiff would be heavily involved in [sic]," that this "investigation continued over the next several months," and that plaintiff was "advised that this was a highly classified, confidential investigation." If proven, these allegations would demonstrate that plaintiff was a participant in an "investigation, hearing, or inquiry held by that public body," MCL 15.362, either by participating in an investigation by the Saginaw County Prosecutor's Office[3] or by participating in his own self-initiated investigation as an employee of a law enforcement agency, thus qualifying plaintiff as a "type 2" whistleblower under the WPA. The factual basis for plaintiff's complaint would therefore, if proven, support recovery under the WPA. Consequently, the WPA provides plaintiff's exclusive remedy. *Rivera*, ___ Mich at ___, slip op at 2.[4]

Plaintiff argues that his public-policy claim was based on his refusal to violate not only his employment agreement and oath taken as a police officer (to faithfully perform his duties), but certain laws and regulations governing the conduct of police officers. He cites to township regulations that require the township police department to "see to the prosecution of all violations of ordinances of the township and the laws of the state" and others that require "the police chief

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[3] Although neither party has argued that the Saginaw County Prosecutor's is *not* a public body, we note that this Court has held that an agency with statutory authority to "conduct civil and criminal investigations" is a "law enforcement agency within the meaning of the WPA." *Ernsting v Ave Maria College*, 274 Mich App 506, 519; 736 NW2d 574 (2007).

[4] This case is distinguishable from *Rivera v SVRC Indus, Inc*, 327 Mich App 446; 934 NW2d 286 (2019), aff'd in part and rev'd in part by *Rivera*, ___ Mich at ___. In that case, the plaintiff alleged that she was terminated in retaliation for either reporting or being about to report another employee's violation of the law, as well as for refusing to conceal that employee's violation of the law when her employer allegedly asked her not to call the police. *Rivera*, 327 Mich App at 467. This Court held that "a refusal to conceal unlawful conduct from a public body is not distinguishable from reporting or being about to report that conduct to a public body." *Id*. Our Supreme Court held, as stated, that because the plaintiff's conduct as alleged did not support a finding that she had reported or was about to report a violation of the law, the WPA was not implicated and did not preempt her public-policy claim. *Rivera* involved a "type 1" whistleblower who *also* alleged that she was asked to conceal criminal activity she had witnessed and to not inform law enforcement. *Rivera*, 327 Mich App at 463, citing *Henry*, 234 Mich App at 410. In this case, by contrast, plaintiff does not allege that he was asked to conceal or not report criminal activity of which he had knowledge; rather, his claim is based on the allegation that he was asked to cease further investigation into a report of suspected criminal activity. As discussed above, this conduct, if true, would support recovery under the WPA as a "type 2" whistleblower. *Rivera*, ___ Mich at ___, slip op at 2; see also *Henry*, 234 Mich App at 410.

and all officers of the township police department" to "cooperate" with numerous other law enforcement agencies "for the purpose of prevention and discovery of crimes and the apprehension of criminals." He also cites to MCL 752.11, which provides that "any public official, appointed or elected, who is responsible for enforcing or upholding any law of this state and who wil[l]fully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor." In short, however, none of these specific ordinances or statutes, or any provisions of plaintiff's employment agreement, specifically forbid or criminalize ceasing a criminal investigation into a report of criminal activity, especially when ordered to do so by a superior officer; nor does our interpretation of a police officer's oath, regardless of plaintiff's personal understanding of that oath. Consequently, even if plaintiff's allegations were proven, he would not have established that he was terminated for refusing to violate the law. The factual basis for plaintiff's claim, however labeled, relates to plaintiff's participation in an investigation by a public body, and his exclusive remedy therefore would lie under the WPA. *Rivera,* ___ Mich at ___, slip op at 2. Accordingly, the trial court did not err by granting defendants' motion for summary disposition on plaintiff's public-policy wrongful termination claim. *Beaudrie,* 465 Mich at 129.

B. GOVERNMENTAL IMMUNITY

Plaintiff also argues that the trial court erred by concluding that the township was entitled to governmental immunity on plaintiff's public-policy claim. We disagree. Because we affirm the trial court on the ground that the WPA preempts plaintiff's public-policy wrongful termination claim, we need not address this argument at length. However, we note that a claim for wrongful termination in violation of public policy sounds in tort, not contract. See *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 246-247; 531 NW2d 144 (1995). "A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Mack v Detroit*, 467 Mich 186, 197–198; 649 NW2d 47 (2002), citing MCL 691.1407(1). The township is a governmental agency, and the hiring, supervising, and firing of employees is a governmental function. See *Galli v Kirkeby*, 398 Mich 527, 537; 248 NW2d 149 (1976). Plaintiff failed to plead in avoidance of governmental immunity, and the trial court did not err by concluding that his public-policy claim against the township was barred.[5]

III. ELCRA CLAIM

Plaintiff also argues that the trial court erred when it granted defendants' motion for summary disposition on his ELCRA retaliation claim. We disagree. Again, we review de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(8). See *Beaudrie v Henderson*, 465 Mich at 129. We review de novo issues of statutory interpretation. *Wood v Detroit*, 323 Mich App at 419.

The ELCRA was modeled after Title VII of the federal Civil Rights Act, 42 USC 2000e *et seq*. *White v Dep't of Transportation*, ___ Mich App ___, ____; ___ NW2d ___ (2000), slip op at 5. The purpose of the ELCRA's antidiscrimination provisions is to protect people "from

[5] Because the trial court did not reach a conclusion regarding Chief Green's entitlement to governmental immunity, we also decline to address it.

discrimination in employment, housing, and public accommodations." *Cotton v Banks*, 310 Mich App 104, 129; 872 NW2d 1 (2015). The purpose of the ELCRA's antiretaliation provision is to "allow employees to report discrimination without a reasonably based fear of retribution." *White*, ___ Mich App at ___, slip op at 11. To that end, the ELCRA prohibits employers from discriminating against employees based on their membership in protected classes, and also from retaliating against employees for certain conduct. Specifically, the antiretaliation provision of the ELCRA states, in relevant part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701].

' "[T]o establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." ' *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 161; 934 NW2d 665 (2019), quoting *Rymal v Baergen*, 262 Mich App 274, 300; 686 NW2d 241 (2004) (quotation marks and citation omitted). A violation of the ELCRA may be proven by either circumstantial or direct evidence. See *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 537; 620 NW2d 836 (2001).

Because the ELCRA is based on Title VII, federal courts' analyses of Title VII is persuasive, and Michigan courts often interpret ELCRA provisions using Title VII caselaw. See *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 311 n 3; 660 NW2d 351 (2003). Regarding whether a plaintiff has engaged in "protected activity" under Title VII, the United States Court of Appeals for the Sixth Circuit has stated that "there are two types of protected activity: participation in a proceeding with the Equal Employment Opportunity Commission (EEOC) and opposition to an apparent Title VII violation" such as "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices." See *Wasek v Arrow Energy Services*, 682 F 3d 463, 469 (6th Cir, 2012) (quotation marks and citation omitted).

Here, it is undisputed that plaintiff did not report any unlawful workplace practices, such as discrimination or sexual harassment, to anyone; nor was plaintiff a participant in a proceeding before the EEOC or any employment or labor agencies in Michigan. Rather, plaintiff argued before the trial court, and argues on appeal, that his criminal investigation into Father DeLand was an "investigation" under the ELCRA, because the crimes of which Father DeLand was accused could themselves have been interpreted as violating the civil rights of his victims. While creative, plaintiff has not provided legal support for this novel theory. The fact remains that plaintiff was not investigating Father DeLand for violations of the ELCRA. Plaintiff did not allege that he, or other investigators into the criminal complaints against Father DeLand, ever planned on filing a lawsuit under the ELCRA, or that the crimes of which Father DeLand was accused involved "discrimination in employment, housing, and public accommodations," *Cotton v Banks*, 310 Mich App at 129, or that those crimes themselves constituted unlawful retaliation against their victims in violation of the ELCRA, *Wasek*, 682 F 3d at 469.

On appeal, plaintiff argues with respect to protected activity, that "Father Deland [sic] sexually assaulting a minor is a violation of the act" and "[s]exual assault counts as sex-based discrimination." In support of this argument, plaintiff cites *Radtke v Everett*, 442 Mich 368, 395; 501 NW2d 155 (1993). In *Radtke*, our Supreme Court noted that a single extremely traumatic experience *in the workplace*, such as rape and violent sexual assault, may create a hostile work environment. *Id.* at 168. *Radtke* does not stand for the proposition that a police officer's criminal investigation into a claim of criminal conduct, even if that conduct involves sexual assault, is an investigation under the ELCRA. And, in any event, plaintiff made no allegations regarding a hostile work environment or other violations of the ELCRA in his complaint. In his reply brief on appeal, plaintiff raises the issue of "hate crimes" as an example of criminal conduct that is also prohibited by the ELCRA—however, plaintiff did not allege that any such hate crime was committed here. Further, although plaintiff states that defendants did not refute his claim that he was investigating a denial of public accommodations, no such allegation appears in plaintiff's complaint.

Although the ELCRA, as a remedial statute, is to be construed broadly, *White*, ___ Mich App at ___, slip op at 11, plaintiff's interpretation sweeps too broadly still. The mere fact that it was possible for plaintiff's investigation to have revealed conduct by Father DeLand that, hypothetically, could have supported a claim under the ELCRA does not, without more, place that investigation "under the act." MCL 37.2701; see also *Jackson v Genessee Co Rd Comm'n*, 999 F 3d 333, 348 (2021) (noting that the plaintiff's mere participation in informal investigations of racial discrimination did not constitute participation in an investigation under the ELCRA, absent a formal charge or investigation into a potential violation of the act); see also *White*, ___ Mich App at ___, slip op at 11 (noting that the purpose of the ELCRA, as it relates to retaliation, is to allow employees to report discrimination without fear of retribution). Accepting plaintiff's well-pleaded facts as true, the trial court did not err by concluding that plaintiff had failed to plead that he was engaged in a protected activity by investigating Father DeLand for possible criminal charges. *El-Khalil*, 504 Mich at 161. Therefore, the trial court correctly granted defendants' motion with regard to plaintiff's ELCRA claim. *Beaudrie*, 465 Mich at 129.

IV. DENIAL OF LEAVE TO AMEND

Plaintiff also argues that, if this Court finds that the trial court did not err by granting defendants' motion, we should find that it erred by denying him leave to amend his complaint. We disagree. We review for an abuse of discretion a trial court's decision to deny leave to amend pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

> If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile. MCR 2.116(I)(5). MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." [*Id.* at 658.]

A motion to amend should ordinarily be granted, unless "particularized reasons" for denial, including futility, exist. *Id.* (citation omitted).

In this case, the trial court held that granting plaintiff leave to amend his complaint would be futile. We agree. Regarding the public-policy claim, we agree with the trial court that the factual basis of that claim, regardless of whether it is labeled "participation in an investigation" or "refusal to violate the law," places that claim under the purview of the WPA; amendment to add additional allegations would not alter this conclusion. Further, at least with regard to the township, governmental immunity would still apply. Regarding the ELCRA claim, plaintiff has offered no legal support for his claim that a criminal investigation of this type is protected activity under the ELCRA, and has not demonstrated that any additional allegations would alter this conclusion. See *Hakari v Ski Brule, Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998) (holding that the trial court did not abuse its discretion in denying the plaintiff's motion to amend when "the language and intent" of the statute at issue was "not amenable to the expansive statutory construction proposed by plaintiff"). The trial court therefore did not abuse its discretion by denying plaintiff leave to amend his complaint. *Id.* at 654.

Affirmed.

/s/ Jane E. Markey
/s/ Jane M. Beckering
/s/ Mark T. Boonstra