

STATE OF MICHIGAN
IN THE SUPREME COURT

LINDA RIVERA,

Plaintiff-Appellee,

v.

SVRC INDUSTRIES, INC,

Defendant-Appellant.

Supreme Court Case No. _____
Court of Appeals Case No. 341516
Circuit Court Case No. 16-031756-NZ

PLAINTIFF-APPELLEE'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF GROUNDS FOR APPLICATION

This case calls for the Court to interpret the term “report” as set forth in the Whistleblowers’ Protection Act, specifically MCL 15.362, which the Court of Appeals erroneously defined. As this Honorable Court had an opportunity to rule on this legal question in *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 502 Mich 851; 912 NW2d 181 (2018), there appeared to be several members of this Court that thought this Court should take up this issue. This case, decided by the Court of Appeals, in the aftermath of *McNeill-Marks* demonstrates the jurisprudential significance of this question, as the Court of Appeals is likely to continue to define “report” in an improper manner. Trial courts require guidance on how to define “report” and apply that definition to factual circumstances.

The Court of Appeals opinion in this case is also clearly erroneous. Like many courts before, it added extra-statutory requirements to a plaintiff’s prima facie showing of a protected activity, violating the well-known rules of statutory construction. The opinion further conflicts with another decision of the Court of Appeals, specifically a previously published, precedential opinion that defined the term “report” under the WPA. The Court of Appeals failed to follow the Michigan Court Rules and call for a special conflict panel; instead, it ignored the precedent and applied its favored definition.

Because of this case raises a question of law that is of major significant to the state’s jurisprudence as well as the Court of Appeals opinion being clearly erroneous, causing material injustice and conflicting with another Court of Appeals’ decision, Plaintiff respectfully requests that this Honorable Court grant her application to leave to appeal, reverse the Court of Appeals’ opinion, and reinstate the trial court’s denial of summary disposition.

STATEMENT IDENTIFYING JUDGMENT

Plaintiff-Appellee seeks leave to appeal the Court of Appeals' opinion of April 4, 2019 in *Linda Rivera v SVRC Industries, Inc.*, Court of Appeals Docket No. 341516, attached as **Exhibit**

4. The judgment reversed the Saginaw County Circuit Court's denial of summary disposition to SVRC Industries, Inc., **Exhibit 1**.

STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals erred in violating MCR 7.215(C) and (J)?
- II. Whether the Court of Appeals erred in adding extra-statutory requirements to the definition of protected activity under the Whistleblowers' Protection Act?
- III. Whether the Court of Appeals erred in failing to find Plaintiff made a "report" under the Whistleblowers' Protection Act?
- IV. Whether the Court of Appeals erred in failing to find Plaintiff was "about to report" under the Whistleblowers' Protection Act?
- V. Whether the Court of Appeals erred in failing to find a factual question regarding the remaining elements of her WPA claim?
- VI. Whether the Court of Appeals erred in finding the Whistleblowers' Protection Act was Plaintiff's exclusive remedy when, at the same time, found that the Act did not apply to the facts of the case?
- VII. Whether the Court of Appeals erred in failing to find a factual question regarding whether Plaintiff stated a claim of retaliation in violation of Michigan public policy?

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STATEMENT OF FACTS

I. PROCEDURAL FACTS

On December 14, 2016, Plaintiff filed the instant cause of action alleging: (1) retaliation in violation of the Whistleblowers' Protection Act; and (2) retaliation in violation of Michigan public policy. On October 23, 2017, Defendant filed a motion for summary disposition. On November 6, 2017, Plaintiff filed her response and, on November 9, 2017, Defendant filed a reply. The motion came before the trial court for oral arguments on November 12, 2017. On November 22, 2017, the trial court issued its Opinion and Order of the Court Denying Defendant, SVRC Industries, Inc., Motion for Summary Disposition. (**Exhibit 1 – 11/22/17 Opinion**).

On December 13, 2017, Defendant filed an application for leave to appeal with the Court of Appeals. On January 3, 2018, Plaintiff filed an answer to Defendant's application. On February 1, 2018, a three-judge panel of the Court of Appeals, ruled on Defendant's application. (**Exhibit 2 – 02/01/18 Order**). Judge Meter, however, noted that he would have denied the application for leave to appeal. (**Ex. 2**). On March 29, 2018, Defendant filed its appeal brief and on May 3, 2018, Plaintiff filed her brief. On February 12, 2019, the Court of Appeals held oral arguments and the case was submitted on case call. On February 14, 2019, the three-judge panel ordered on its own motion for the parties to provide supplemental briefing addressing the following questions:

[W]hether plaintiff's communications with Mr. Mair constituted a "report" of a violation or suspected violation of law within the meaning of MCL 15.362.

(**Exhibit 3 – 02/14/19 Order**). On April 4, 2019, the Court of Appeals issued an opinion remanding the case for the entry of summary disposition in favor of Defendant. (**Exhibit 4 – 04/04/19 Order**). On April 25, 2019, Plaintiff filed a motion for reconsideration and, on May 9,

2019, Defendant filed an answer. On May 17, 2019, the Court of Appeals entered an order denying the motion for reconsideration.

Plaintiff now applies to this Honorable Court for leave to appeal.

II. SUBSTANTIVE FACTS

Plaintiff's termination arose out of a series of events beginning on September 15, 2016. Defendant's employee, at the time, L.S., allegedly engaged in insubordinate, intimidating, and aggressive behavior towards Defendant's plant manager, Eve Flynn. Ms. Flynn was a subordinate of Plaintiff's. Ms. Flynn notified Plaintiff of L.S.'s alleged behavior and Plaintiff then reported the same to Dean Emerson, Defendant's Chief Executive Officer.

After being instructed by Mr. Emerson, Plaintiff was told to discipline Mr. Summerfield with a three-day unpaid suspension. The facts surrounding L.S.'s behavior, which resulted in the discipline recommended by Mr. Emerson, is suspicious since L.S.'s behavior involved a report by him to the Michigan State Police concerning defective equipment being utilized by Defendant. In explaining the incident between Ms. Flynn and L.S., L.S. provided the following testimony at deposition. The situation involved a truck, which had just returned from undergoing a MDOT inspection. L.S. testified:

While we were chugging out there, I says, "So Kevin, is the speedometer working?" He says, "Are you kidding?" Okay. So I guess that's a no. When I got out there I was a little hot under the collar and I told Eve [Flynn], I said, "Wait a minute here, why does this thing does not have a speedometer that works? That's a safety issue."

So I walked away from her saying I'm going to call the State Police and find out what's going on here, if it's a safety violation or not. So I walked away from her, not standing next to her, walked away from her and went by a dumpster, called the State Police. The state policeman told me, he says, "it's not a safety issue but it should have been written on the MDOT inspection," which it never was, or if it was, it was just blown off. And Kevin said he's never seen that thing work in five years, so And that's when she told me somewhere along the line that I walked away from the job. I just got away from her is all I did.

(Exhibit 5 – Summerfield Deposition at 10). L.S. further testified:

- Q. Okay. At any point during the discussion you had with Eve [Flynn] did she ever say you were being insubordinate or anything like that?
- A. Oh, yeah. Yeah, she told me that too.
- Q. Did she explain why or anything like that?
- A. No, she was saying, “Oh, my God, are we ever going to get the semi back or not?” She was more worried about the truck than about us, you know.
- Q. Okay.
- A. I mean, a good boss would make sure that everything’s up to snuff.
- Q. Okay. What happened after that, if anything?
- A. I just went to work. Then when I came back, they were ready to call me in and instructed me that I had three days off with no pay.

(Ex. 5 at 11).

Importantly, it appears that Defendant disciplined L.S. over making a police report.² Significantly, L.S. is engaging in what would appear to be protected activity under the Whistleblowers’ Protection Act. As will be shown, it is only after L.S. is disciplined that he engages in the offensive statements. However, he is never returned to work from that point onward. L.S. admitted to making the following statements within his testimony:

So I sit down and he [Gregory Mair, an attorney with O’Neill, Wallace and Doyle, P.C.] just told me, “I’m a fact finder here.” I says, “What?” I had no time to get ready like I have right now, write out stuff. It was like you come in, you sit down, start answering questions. It’s like, “What? What?” I says, “What is this? An inquisition? You already know what’s going on.” And then towards the end of our conversation I said, “I’m just crazy, I can’t help it. I have PTSD.”

And that’s when they says, “Oh, here. Here’s some papers for you to sign, some FMLA.” I said, “What? What’s that mean?” “Well, family medical leave. Okay. And then you’ll probably have that for a couple weeks.”

I says, “Okay.” And I always thought that FMLA was to secure your job after you’ve – you’ve left for a little while and then come back. But then I received that letter on the 3rd of October. So I kind of thought, “Hmm, oh, well.”

² It should be noted that it was Mr. Emerson who had instructed Plaintiff and Ms. Flynn as to what the penalty would be. Note, L.S. provides the same written statement concerning what occurred to him as a result of reporting to the State Police and it was made Exhibit 2 at his deposition. Exhibits 1 and 2 to Mr. Emerson’s deposition are attached as (Exhibit 6).

(Ex. 5 at 15-16).

Significantly, Defendant did not terminate L.S. because of his threatening behavior, but only because of the fact that he had received counseling three (3) times within a one-year time frame. (Ex. 6). As such, Defendant did not terminate him over the threatening statements that are set forth below. Instead, it is clear that one of the reasons that Defendant terminated L.S. was that he was allegedly insubordinate for calling the Michigan State Police, and otherwise protected activity. Defendant also terminated Plaintiff at the same time it had terminated L.S., creating an inference of retaliatory motive.

Below are L.S.'s statements made to the Plaintiff and Ms. Flynn as testified to by L.S.:

Yeah, I was walking out the door and told them, I says, "If and when" – "If and when there's a revolution in this country, I'm going to be one of the first ones pulling the trigger." That means I'm one of the first ones ready to do anything that needs to be done for this country and I don't discriminate. It could be man, woman, child. It makes no difference.

* * *

If you're against the country in a revolution, if it's even the government, they're done. They are done. Because if this country goes the way I think it's going to go, you're not going to stand a snowball's chance in Hades because your economy's going to crash, sultan injustice, you name it, it'll happen. And once that happens, you're going to have martial law. And if you've ever been in a country with martial law like I have, like in Korea, if you weren't off the streets by midnight, they had the legal right to shoot you dead. So martial law can happen in this country. It doesn't take much. One disaster.

(Ex. 5 at 28-29).

- Q. When you came back to SVRC and you met with Deb Snyder –
 A. Yep.
 Q. -- and the lawyer, did you do anything else after that meeting or did you leave?
 A. I just grabbed my trash and packed it up and away I went. That's when I forgot about my crowbar and my load bar. So I had to call back to talk to Dean [Emerson] and he says, "Can you come in?" Okay. "Yep, I'll be right in."
 Q. You were asked to leave afterwards?
 A. Oh, yeah, once the first – you mean when I picked up my load bar and all

that?

Q. Yeah.

A. Out the door he says, "Good luck." I said, Okay." Packed my stuff, threw it in the truck and away I went.

(Ex. 5 at 31).

During this entire course of events, Plaintiff did request to be allowed to file a police report with regard to this case. There are various text messages between Deb Snyder and Plaintiff, which demonstrates a clear attempt on the part of Defendant's representatives, specifically Ms. Snyder and Mr. Dean, to dissuade Plaintiff from filing a police report. Furthermore, instead of answering Plaintiff's question in her text messages as to why Defendant did not want her to file a police report, Defendant redirected the conversation, never answering the question, and specifically chastising Plaintiff for consulting the chairman of the board, Sylvester Payne, her then boyfriend, regarding the situation at hand. The following is a reproduction of the text messages:

September 15, 2016:

Deb Snyder: Trying to call attorney.

Deb Snyder: Talked w dean/talked with attorney/will fill u in tomorrow/document. Thx

Plaintiff: Deb- I was advised we should immediately make out a police report!

Plaintiff: He is a hostile employee and that was a threat!

Deb Snyder: Dean talked w the attorney and he said no police report. The attorney will be at SVRC at 830 Wednesday morn to talk w [L.S.]

Plaintiff: Uhhhh Deb . . . I don't feel comfortable not file police report. I prefer [t]he authorities having a record of this incident. WEDNESDAY is a long time away to look over my shoulder wondering if he is lurking in the parking lot. He is an ex-marine.

Plaintiff: Eve confirmed [L.S.] has a key. All job coaches have a key to the building.

Plaintiff: Can I ask why the attorney said no police report?? I called Sylvester and told him about the [L.S.] situation and I asked him why a threat would not be documented with the police ASAP. He said he didn't know why either??

Deb Snyder: Linda, Sylvester is not an employee of SVRC, he is a board member. Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Lets talk when you get to work in the morning.

Plaintiff: Sylvester is my significant other. I am upset bcuz an ex-marine just threatened me. I am a[n] employee too!! I am discussing my personal experience. [L.S.] looked right at me and said those things. So SVRC doesn't care about threats coming from a disgruntled angry employee that are directed at his supervisor and the director that told him about his 3 day suspension. It happened at work, but you are saying I should file a PPO personally, and nothing with SVRC even though it took place at work. . . . Wow. That's all I can say.

(Exhibit 7 – Text Messages).

Subsequent to September 15, 2016, Defendant required Plaintiff to meet with Gregory Mair, a licensed attorney with the law firm of O'Neill, Wallace & Doyle, P.C. (**Exhibit 8 – Rivera Affidavit**). During said meeting, Plaintiff reported to Mr. Mair the circumstances surrounding the L.S. incident and specifically indicated that she believed a police report should be filed. (**Ex. 8**). Mr. Mair, however, told Plaintiff that she should not file a police report. (**Ex. 8**).

Without warning and on October 3, 2016, Defendant made the decision to terminate Plaintiff's employment; however, after the fact, Defendant pushed the termination date back to October 4, 2016, since Plaintiff was not present at work on October 3, 2016. The date Defendant decided to terminate Plaintiff's employment corresponds directly with Defendant's decision to terminate L.S.'s employment.

Defendant maintains that the reason for Plaintiff's termination was economically driven. However, there is no record evidence that Defendant has produced that supports its claim was

based in fact. Defendant relies solely on alleged oral testimony of individuals with no foundation, claiming that there was an economic downturn. Further, an economic reduction in force, is not proven by simply claiming that there was an economic downturn. Even so, these statements are not supported by Defendant's own records that it supplied. In fact, the records show that in October 2016, there was no deficit. Furthermore, the company was always in and out of deficits on a monthly basis, depending on the amount of contributions that it received. Defendant is a not-for-profit corporation and, as such, it will always be operating in the red.

Plaintiff provided convincing testimony that she had no understanding of any budgetary or economic problems:

I was told things were going well. I was told that a lot of their focus was on their farmers market that they were starting. I was told there was going to be some people's – there was going to be a big move from the facility at Vets Memorial Parkway and that when those positions and people were moved over to the farmers market that there was a strong chance that I would be the person that would be looking over the facility at Vets Memorial Parkway.

(Exhibit 9 – Rivera Deposition at 26).

To more fully illustrate Plaintiff's position in this regard, the following should be considered:

(1) No documents have been provided to suggest that the Board authorized a reduction in force based on a bona fide economic reason. No such documents exist and according to Mr. Payne, the Board would always have been made aware or have received the right to approve or disapprove of such economic layoffs. In this case, no such approval was requested from the Board. See **(Exhibit 10 – Payne Deposition at 24-25)**.

(2) In Interrogatory Answers, the Plaintiff requested specifically the documentary evidence supporting a bona fide reduction in force. Defendant simply referred Plaintiff to deposition testimony. Accordingly, no such documents were provided which would support

such a claim. (**Exhibit 11 – Def.s’ Answers to Interrogatories**).

(3) The documents that were provided show that SVRC was not in a deficit situation in October 2016 when Plaintiff was terminated. (**Exhibit 12 – October 2015/2016 Profit & Loss**).

(4) No documentation exists in the form of memos, meeting minutes of the Board of Directors, or otherwise that a reduction in force based on economic circumstances was either approved by the Board or was needed.

(5) Defendant’s decision to terminate both actors (Mr. Summerfield and Plaintiff) occurs within a short period of time of their reports, which both involve persons engaging in protected activity.

(6) Defendant decided to terminate Mr. Summerfield and Plaintiff on the same date.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In making this determination, the Court reviews the entire record to determine whether the moving party was entitled to summary disposition. *Id.* This Honorable Court has described the standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10), stating as follows:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue grading any material fact, the moving party is entitled to judgment as a matter of law.

Maiden, 461 Mich at 120. A “court may not make factual findings or weigh credibility,” *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999), or resolve factual disputes when considering a summary disposition motion, *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). Moreover, a “court must carefully avoid making findings of fact under the guise of determining that no issues of material fact exist.” *Partrich v Muscat*, 84 Mich App 724, 730-731; 270 NW2d 506 (1978).

II. THAT THE COURT OF APPEALS ERRED IN VIOLATING MCR 7.215(C) & (J)

The Court of Appeals erred in failing to find Plaintiff was a type 1 whistleblower, because it applied a definition of “report” different from the one it was bound to follow. In finding that Plaintiff did not engage in protected activity under the Whistleblowers’ Protection Act, the Court of Appeals defined the term “report” as used in the WPA, MCL 15.362, by adopting the dicta of Justice ZAHRA in a case where the majority defined application for leave to appeal,³ stating:

As Justice ZAHRA noted in his dissent from the Court’s denial of leave in *McNeill-Marks*, see *McNeill-Marks v MidMichigan Center-Gratiot*, 502 Mich 851, __; 912 NW2d 181 (2018)(ZAHRA, J., dissenting), the term “report” is not defined in the WPA. Therefore, a court may consult a dictionary to determine the plain and ordinary meaning of the term. *Epps v 4 Quarters Restoration, LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015). Although “report” has many definitions, we conclude that the definitions most applicable in the context of the WPA are “to make a charge against” or “to make known the presence, absence, condition, etc.” of something. See *Random House Webster’s College Dictionary* (2d ed), p 1120. These definitions comport with *Henry*[*v Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999)]’s characterization of a type 1 whistleblower.⁴ In other words,

³ The statements made by Justice ZAHRA in his dissent should not even be considered dicta as the *McNeill-Marks* case was not actually considered by the Supreme Court. It is curious as to why the Court of Appeals would adopt such language as if it had precedential value as “dicta,” which by definition it does not, especially since there was a Court of Appeals directly on point that defined “report.” See *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54; 832 NW2d 433 (2013).

⁴ The Court of Appeals in *Henry* characterized a “type 1 whistleblower” as one “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.” 234 Mich App at 410; 594 NW2d 107. The Court be mindful, however, of how old the *Henry* case is and where the development of WPA case law as at the time the decision was rendered. The oft-quoted passage refers to the “employer’s wrongful conduct,”

under the WPA, a plaintiff “reports” a violation of the law when he or she “makes a charge” of illegality against a person or entity, or “makes known” to a public body pertinent information related to illegality.

Rivera v SVRC Industries, Inc., -- NW2d --; 2019 WL 1494653, at *7. Regardless of what one thinks of the accuracy of the definition, this holding violates MCR 7.215(C) and (J).

MCR 7.215(C)(2) provides that “[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.” At the same time, MCR 7.215(J)(1) provides:

A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

Accordingly, if there was a case that defined the term “report” in MCL 15.362 published on or after November 1, 1990, the Court of Appeals was obligated to follow that definition in this case.

Curiously, the Court of Appeals cited to *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54; 832 NW2d 433 (2013), in Section III.B of its opinion. As noted above, the Court further cited to Justice ZAHRA’s dissent in *McNeill-Marks*, which in turn discusses *Hays*, in Section III.C of its opinion.⁵ In *Hays*, the Court of Appeals defined the term “report” as follows:

As a matter of statutory interpretation, the definition of “report” is a question of law we review de novo. While the WPA does not define the term “report,” courts may consult dictionary definitions when giving undefined statutory terms their plain and ordinary meaning. Accordingly, *Random House Webster’s College Dictionary* (2005) defines “report” as “a detailed account of an event, situation, etc., [usually] based on observation or inquiry.”

300 Mich App at 60; 832 NW2d 433. The *Hays* Court followed the Supreme Court’s opinion in

which represents a misinterpretation of MCL 15.362 that the violation of law had to be committed by the employer. This limitation has since been repudiated. See, e.g., *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 575; 753 NW2d 265 (2008) (“There is absolutely nothing, express or implied, in the plain wording of the statute that limits its applicability to violations of law by the employer or to investigations involving the employer.”); see also *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 74-75; 503 NW2d 645 (1993). Plaintiff submits that following a characterization of a whistleblower that is based on an incorrect reading of MCL 15.362 is further error.

⁵ Plaintiff further pointed on it in her motion for reconsideration, the Court of Appeals’ failure to follow the definition of “report” set forth in the published *Hays* opinion. With such facts present, it is difficult to conclude that the Court of Appeals’ violation of MCR 7.215 was inadvertent.

People v Holley, 480 Mich 222; 747 NW2d 856 (2008). In *Holley*, the Supreme Court analyzed the statutory language of MCL 750.483a(1)(b). The statute prohibits a person from preventing or attempting to prevent “through the unlawful use of physical force another person from reporting a crime committed or attempted by another person.” The *Hays* Court defined the term “report” in MCL 15.362 in the exact same manner as the *Holley* Court had defined the term in MCL 750.483a(1)(b). Compare *Hays*, 300 Mich App at 60; 832 NW2d 433, with *Holley*, 480 Mich at 228; 747 NW2d 856. Notwithstanding the Court of Appeals’ citation to *Hays*, it failed to apply the definition of “report,” a question of law, from the published 2013 opinion.

By failing to apply the definition of “report” from *Hays*, the Court of Appeals, in this case, violated the doctrine of stare decisis and MCR 7.215(J)(1). Regardless of what one thinks the definition of “report” should be in the context of MCL 15.362, the Court of Appeals was not free to disregard the binding precedent of *Hays*. If members of the *Rivera* panel disagreed with the definition set forth in *Hays*, they could not ignore it. On the contrary, the Court of Appeals was required to follow *Hays* and note that it was doing so only because required to do so while further explaining its disagreement with *Hays*. See MCR 7.215(J)(2). Then Chief Judge MURRAY would have had to take a poll of the judges of the Court of Appeals to determine whether a special conflict panel was warranted. MCR 7.215(J)(3)(a). Without taking these steps, the Court of Appeals was bound to apply the *Hays* definition and committed reversible error by doing so.

III. THAT THE COURT OF APPEALS ERRED IN ADDING EXTRA-STATUTORY REQUIREMENTS TO THE DEFINITION OF PROTECTED ACTIVITY UNDER THE WHISTLEBLOWERS’ PROTECTION ACT

In Section III.A of the Court of Appeals opinion, the Court articulates what it considered to be the “WPA Legal Principles.” *Rivera*, 2019 WL 1494653, at *2-*4. In reciting the “legal

principles,” the Court of Appeals reiterated a frequently cited characterization of the “types” of whistleblowers found in *Henry*, 234 Mich App at 410; 594 NW2d 107. The *Rivera* Court stated:

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.” [*Henry*, 234 Mich App at 410; 594 NW2d 107]. “Type 2 whistleblowers” are those who “participate in a previously initiated investigation or hearing at the behest of a public body.” *Id.*

Rivera, 2019 WL 1494653, at *3. In Section III.C, the Court of Appeals, however, converts the mere characterization set forth in *Henry* into a substantive requirement that must be satisfied in order for an employee to engage in protected activity. The Court did this in complete disregard to the rules of statutory construction. In concluding that Plaintiff’s actions were not a “report” for purposes of the WPA, the Court of Appeals reasoned:

First, plaintiff did not “on [her] own initiative, take it upon [herself] to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light.” *Henry*, 234 Mich App at 410. Rather, plaintiff spoke with Mair at defendant’s request. In other words, when she spoke with Mair, plaintiff was not an “initiator” and did not “take it upon [herself]” to communicate with Mair. *Id.*

* * *

. . . [T]he information that plaintiff conveyed to Mair was the same as that which she had already directly communicated to defendant, and that information was already known to Mair by virtue of plaintiff’s earlier communications with defendant itself.⁶ As a consequence, the information was no longer “as yet hidden,” *id.*, at the time of the communication with Mair. We conclude, in this context, plaintiff’s communications with Mair did not constitute “reporting” under the WPA.

Rivera, 2019 WL 1494653, at *6. In so reasoning, the Court of Appeals added several extra-

⁶ This reasoning assumes that the employer truthfully and accurately shared the information Plaintiff had given to the employer. Apart from making an assumption in favor of the Defendant, this type of reasoning is not only completely divorced from the statutory language, but also fails to fulfill the purpose of the statute. An employee might report additional facts or present the same facts in a new context to the public body that makes the information appear differently. An employee may have no knowledge of a co-worker or complete stranger giving information to a public body. There are several reasons the Legislature might want to encourage redundancy of reporting, such as ensuring employees feel safe making a report regardless of what another person has reported or attempting to make sure the public body obtains all the information from all sources available.

statutory requirements to satisfy a plaintiff's prima facie burden, including, but not limited to: (1) the employee must act on his or her own initiative; (2) the employee must act to bring a hidden or unknown violation to light; and (3) the employee must report information not already known to the public body. See *id.* One, however, cannot find these requirements in the plain language of the statute and imposing them violates the rules of statutory construction.

This Honorable Court summarized the rules of statutory construction in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002), as follows:

An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.

Id. at 63; 642 NW2d 663. A court may not read anything into an unambiguous statute, because "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *In re Certified Question*, 468 Mich 109, 113; 659 NW2d 597 (2003). Michigan courts have repeatedly found the language of MCL 15.362 to be clear and unambiguous. See *Brown v Mayor of Detroit*, 478 Mich 589, 594; 734 NW2d 514 (2007); *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013); *Shaw v Ecorse*, 283 Mich App 1, 12; 770 NW2d 31 (2009).

Turning to the clear and unambiguous language of the statute, MCL 15.362 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 the 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. . . .

This language does not contain the requirements imposed on it by the Court of Appeals in this case. There is no language requiring the employee to act on his or her own initiative as set forth in *Henry* and *Rivera*. In fact, such a requirement is at odds with the statutory language that a person “acting on behalf of the employee” may make the report. Likewise, there is no statutory requirement that the plaintiff-employee act to bring forward a hidden violation to light. Nor is there a requirement that the public body be unaware of the actual or suspected violation. Additionally, there is no limitation as to whether the public body is independent from the employer or acts as an agent. The Court of Appeals applying the “characterization” from *Henry* as a substantive requirement violates the rules of statutory construction by reading into the clear and unambiguous language words that simply are not present.

The Court of Appeals’ violation of the rules of statutory construction further contradicts Justice ZAHRA’s admonition in footnote 31 of his dissenting opinion in *McNeill-Marks*, 502 Mich 851; 912 NW2d at 188 n31 (ZAHRA, J., dissenting). Specifically referring to the language from *Henry*, Justice ZAHRA wrote:

Michigan WPA jurisprudence often characterizes the whistleblower employee as either a “type 1” or “type 2” whistleblower depending on the alleged protected activity. These distinctions may be helpful shorthand, but courts must always return to the express language under MCL 15.362.

Id. In making this statement, Justice ZAHRA relied upon an opinion of the Supreme Court, which he authored, in *Wurtz v Beecher Metro Dist*, 495 Mich 242; 848 NW2d 121 (2014). In *Wurtz*, Justice ZAHRA made a similar point when discussing the term “adverse employment action”:

While the term “adverse employment action” may be helpful shorthand for the different ways that an employer could retaliate or discriminate against an employee, this case illustrates how such haphazard, telephone-game jurisprudence can lead courts far afield of the statutory language. . . . So we take this opportunity to return to the express language of the WPA when it comes to the necessary showing for a prima facie case under the statute.

Id. at 251 n14; 848 NW2d 121. Although the characterizations from *Henry* may be “helpful shorthand,” the characterizations are neither a substitute for nor superior to the express statutory language. Justice ZAHRA prudently advised Michigan courts to return to the language of the statute in determining the necessary showing for a prima facie case under the statute. The Court of Appeals, in this case, failed to heed that advice and violated the rules of statutory construction.

The error of reading into MCL 15.362 extra-statutory requirement is a common one, which has been repeatedly rejected in Michigan jurisprudence over the last several decades. For instance, in *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993), the defendant argued that the Act protected “only those employees who are fired for reporting their employers’ violations of law.” *Id.* at 74; 503 NW2d 645. This Court noted:

A plain reading of this provision reveals that protection is not limited to employee reports of violations by employers. On its face, the provision only seems to apply to the discharge of an employee who “reports . . . a violation or a suspected violation of law. . . .” [MCL 15.362].

Dudewicz, 443 Mich at 74-75; 503 NW2d 645. In *Terzano v Wayne County*, 216 Mich App 522; 549 NW2d 606 (1996), the Court of Appeals went further, stating:

The legislative analysis of the house bill that became the WPA is consistent with the Supreme Court’s reading of the broadly worded statute. . . . [T]he analysis found no express intention to limit the protection of the WPA to circumstances where the reported violation of law was committed by a particular entity. House Legislative Analysis, HB 5088, 5089 (February 5, 1981). Instead, the analysis envisions protections for employees who do their “civic duty” and “volunteer their assistance to law enforcement authorities.” *Id.* Accordingly, when the text of the WPA is analyzed in conjunction with its legislative analysis, there is no express support for defendants’ proposed limitation on the scope of the statute.

216 Mich App at 528; 549 NW2d 606; see also *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 575; 753 NW2d 265 (2008). In *Trepanier v National Amusements, Inc*, 250 Mich App 578; 649 NW2d 754 (2002), the Court of Appeals again rejected a proposed

limitation:

It is apparent that the plain language of the WPA does not limit protected activity to that which has a close connection to the work environment or to the employer's business practices. . . . Therefore, we decline to interpret the WPA so as to create a limitation that is not apparent in the unambiguous language of the statute.

250 Mich App at 286; 649 NW2d 754. In *Brown v Mayor of Detroit*, this Court rejected the notion "that an employee must report wrongdoing to an outside agency or higher authority to be protected by the WPA." 478 Mich at 594; 734 NW2d 514. In *Whitman*, this Court rejected a primary motivation requirement, stating:

[W]e hold that, with regard to the question whether an employee has engaged in conduct protected by the act, there is no "primary motivation" or "desire to inform the public" requirement contained within the WPA. Because there is no statutory basis for imposing a motivation requirement, we will not judicially impose one. To do so would violation the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous.

493 Mich at 313; 831 NW2d 223. When the same case came back to this Court three years later, the Court rejected another attempt by the Court of Appeals to adopt a judicially imposed requirement:

[W]e VACATE those parts of the Court of Appeals opinion holding that a plaintiff's actions or conduct, as an objective matter, must advance the public interest to entitle a plaintiff to the protection of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* . . .

Whitman v City of Burton, 499 Mich 861; 873 NW2d 593 (2016). Earlier this year, the Court of Appeals rejected "any sort of intent element on the employee's part as a prerequisite for bringing a claim." *Mosher v City of Kalamazoo*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 17, 2019; 2019 WL 254526 (Docket No. 342978).

The Court of appeals erred in adopting the "characterization" of a "type 1 whistleblower," taken from *Henry*, as substantive elements of the definition of protected activity

under the WPA and violated the rules of statutory construction. The Court of Appeals' actions in this case are but one attempt to judicially impose limitations upon the WPA that are not contained within the unambiguous, express language of the statute. More troubling, however, is that the Court of Appeals violation of the rules of statutory construction and attempt to judicially impose limiting language onto the WPA, like prior attempts before it, has usurped the role of the Legislature. As this Honorable Court has observed:

[A] court is not free to rewrite a statute because the end result may be subjectively unpalatable and that the object of judicial statutory construction is not to determine whether there are valid *alternative* policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature *actually* made.

People v Harris, 499 Mich 332, 354 n47; 885 NW2d 832 (2016)(quoting *People v McIntire*, 461 Mich 147, 157; 599 NW2d 102 (1999))(italics in original). Similarly, this Court has held:

Our task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

Mayor of City of Lansing v Mich Public Service Com'n, 470 Mich 154, 161; 680 NW2d 840 (2004). Because the Court of Appeals violated the rules of statutory construction and improperly imposed extra-statutory requirements onto Plaintiff's prima facie showing, the Court of Appeals committed reversible error.

IV. THAT THE COURT OF APPEALS ERRED IN FAILING TO FIND PLAINTIFF MADE A "REPORT" UNDER THE WHISTLEBLOWERS' PROTECTION ACT

Unlike the Court of Appeals, this Honorable Court is not bound by a prior decision purporting to define "report" as used under the WPA. "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *In re Casey Estate*, 306 Mich

App 252, 256-257; 856 NW2d 556 (2014). To accomplish this task, one must “begin with the statute’s language.” *Id.* This Court has instructed:

When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. Further, we give undefined statutory terms their plain and ordinary meanings. In those situations, we may consult dictionary definitions.

Koontz v Ameritech Services, Inc, 466 Mich 304, 312; 645 NW2d 34 (2002). At the same time, “recourse to the dictionary is unnecessary when the legislative intent may be readily discerned from reading the statute itself.” *ADVO-Systems, Inc v Dep’t of Treasury*, 186 Mich App 419, 423-424; 465 NW2d 349 (1990). Although there may be more than one dictionary definition of a term, that fact does not render the statute ambiguous; instead, when faced with multiple definitions, the courts must look to the context in which the word is used in the statute before determining the correct definition to apply. *In re Casey*, 306 Mich App at 260 n3; 856 NW2d 556.⁷

Additionally, in reviewing the different definitions proffered by Court of Appeals panels and Justice ZAHRA in *McNeill-Marks*, it is important to remember that the WPA is a remedial statute, which is “to be liberally construed, favoring the persons the Legislature intended to

⁷ One should keep in mind Judge SHAPIRO’s warning: “While it is proper that we consult both legal and lay dictionaries in the execution of that responsibility, we should not construe a particular definition in a particular edition of a particular dictionary as the definitive interpretation of the meaning of a statute or even of a particular word in that statute. Indeed, once recourse to any aid—including a dictionary—outside the bare legislative text, is deemed required, the statutory language cannot fairly be viewed as plain and unambiguous on its face and so must be interpreted in accordance with all the rules of statutory construction rather than only the one that allows consultation of a dictionary. Otherwise, we risk the possibility that a court may simply justify its own policy preferences by reference to a selected definition in a selected edition of a selected dictionary, followed by a claim that no further analysis of legislative intent is needed or even permitted. In the absence of legislative designation of a particular dictionary’s use, it cannot be said that one dictionary is the best, alone conclusive, determiner of legislative intent, which, as always, is the indisputable touchstone of statutory interpretation.” *In re Casey Estate*, 306 Mich App at 265; 856 NW2d 556 (SHAPIRO, J., concurring).

benefit.” *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 611; 566 NW2d 571 (1997). This Honorable Court has previously provided guidance regarding situations involving choosing amongst multiple and varying definitions of statutory words. In *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002), this Court was required to define the term “motor vehicle” contained within “motor vehicle exception” set forth in the Governmental Tort Liability Act, MCL 691.1405, and determine whether a forklift fell within the definition. 466 Mich at 614-618; 647 NW2d 508. Finding that the statute did not provide a definition of “motor vehicle,” the Supreme Court reasoned:

It is possible to find varying dictionary definitions of the term “motor vehicle.” For example, the *Random House Webster’s College Dictionary* (2001) defines “motor vehicle” as “an automobile, truck, bus, or similar motor-driving conveyance,” a definition that does not include a forklift. In our view, this definition appropriately reflects the commonly understood meaning of the term. *The American Heritage Dictionary* (2d College ed.), on the other hand, defines “motor vehicle” as “self-propelled, wheeled conveyance that does not run on rails,” a definition, which would arguably include a forklift. Given these divergent definitions, we must choose one that most closely effectuates the Legislature’s intent. Fortunately, our jurisprudence under the governmental tort liability act provides an answer regarding which definition should be selected. As previously noted, it is a basic principle of our state’s jurisprudence that the immunity conferred upon governmental agencies and subdivisions is to be construed broadly and that the statutory exceptions are to be narrowly construed. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). Thus, this Court must apply a narrow definition to the undefined term “motor vehicle.”

466 Mich at 617-618; 647 NW2d 508. By logical corollary, when faced with varying and divergent definitions of a term contained within a liberally construed statute, a court should choose the broader definition. Since the WPA is a liberally construed statute, courts should adopt a broad definition of the term “report.”

Regardless of the definition chosen, Plaintiff submits that her actions in reporting L.S.’s criminal behavior to Mr. Mair, a licensed attorney, constituted protected activity under the

various definitions of “report” under the WPA. As noted previously, the Court of Appeals in *Hays* defined “report” as “a detailed account of an event, situation, etc., [usually] based on observation or inquiry.” 300 Mich App at 60; 832 NW2d 443. Plaintiff provided testimony that she presented to Mr. Mair the actions and circumstances surrounding the incident involving L.S., his odd threat, and further indicated that a police report should be filed. (Ex. 8). Plaintiff provided a detailed account of a series of events which she suspected constituted an illegality. See MCL 750.543m(1)(prohibiting the making of a terrorist threat); MCL 750.81 (prohibiting assault or assault and battery). Plaintiff provided this report to a public body.⁸ Plaintiff respectfully submits that Plaintiff’s behavior and speech constituted a protected activity under the definition of “report” set forth in *Hays*.

As noted previously, the *Rivera* panel defined “report” as “‘to make a charge against’ or ‘to make known the presence, absence, condition, etc.’ of something.” *Rivera*, 2019 WL 1494653, at *7 (quoting *Random House Webster’s College Dictionary* (2d ed.), p. 1120). Once stripped of the extra-statutory requirements imposed by the *Rivera* panel, the *Rivera* definition appears quite similar to the *Hays* definition. “Making known the condition of something” and “providing a detail account of something” are synonymous. Plaintiff also made a charge against L.S. to Mr. Mair as evidenced by Plaintiff’s insistence on filing a police report. Logically, one

⁸ It appears that Judge BOONSTRA, for the *Rivera* panel, held that Plaintiff’s communication with attorney Mair was not a “report,” because Mair was acting as a private attorney and an agent for the Defendant, while at the same time Justice ZAHRA would have found that the plaintiff’s communication with attorney Gay was not a “report,” because Gay was acting as a private attorney and an agent of the plaintiff. *Rivera*, 2019 WL 1494653, at *7; *McNeill-Marks*, 912 NW2d at 190-194 (ZAHRA, J., dissenting). Plaintiff submits that such limitations are an implicit attempt to overturn the Court of Appeals’ holding in *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 316 Mich App 1; 891 NW2d 528 (2016). There is no statutory limitation that a “public body” that meets the definition of MCL 15.361(d) is only a “public body” at certain times or when taking certain actions. The limitations supported by the *Rivera* panel and Justice ZAHRA appear to limit the finding that a licensed attorney is a member of a public body by virtue of his or her membership in the State Bar, MCL 15.361(d)(iv), to only those members of the State Bar that are working as an employee of State or a political subdivision of the State. But this limitation would eliminate the need to find that a member of the State Bar is a “public body,” because a public attorney would fall under the definition of a “public body” as an employee of the executive branch, legislative branch, the judiciary, or a local government. See MCL 15.361(d)(i)-(iii), (vi).

would not want to file a police report, unless one thought a crime had been committed. When the characterization of a type 1 whistleblower from *Henry* is not used as a substantive requirement, Plaintiff's actions and speech fall within the definition of "report" as set forth in *Rivera*.

In his *McNeill-Marks* dissent, Justice ZAHRA noted the polysemous nature of the term "report." *McNeil-Marks*, 502 Mich 851; 912 NW2d at 187 (ZAHRA, J., dissenting). Reviewing the several definitions of "report," Justice ZAHRA found the "most pertinent" definitions to include "to denounce to a person in authority" or "to make a charge of misconduct against." *Id.* (ZAHRA, J., dissenting). Plaintiff would submit that her detailing the events surrounding L.S.'s threat and the insistence that Defendant file a police report would satisfy the definition of making a charge of misconduct against another, specifically L.S. As such, Plaintiff's actions and speech would further satisfy the definition of "report" proffered by Justice ZAHRA. The other definition used by Justice ZAHRA creates a difficulty by requiring that the denunciation be made to a "person in authority." In light of the Supreme Court's request for supplemental briefing in *McNeill-Marks v. MidMichigan Medical Center-Gratiot*, 500 Mich 1031; 897 NW2d 176 (2017), Plaintiff anticipates that one may argue that Mr. Mair was not "an individual with the authority to address the alleged violation of law." However, a requirement that the public body must have "authority to address the alleged violation of law" is not contained within the definition of a "public body."^{9,10} Regardless of how the Court views the wisdom of defining "public body" so

⁹ In fact, MCL 15.361(d) mentions no qualities of a "public body" other than state and local governments, employees of those government, and law enforcement agencies, which may include some federal government employees.

¹⁰ Requiring a public body to have authority to remedy the situation would further appear immaterial as "[t]he WPA does not require that the public body receive, act upon, or acknowledge receipt of the report." *Sheiko v Underground RR*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 16, 2008; 2008 WL 7488019 (Docket No. 277766)(CAVANAGH, J., dissenting).

broadly,¹¹ it is not justification to limit the individuals or entities that constitute “public bodies” where the Legislature has not limited the statutory text. Under the rules of statutory construction, one cannot read into the plain text of the statute various requirements simply by finding one definition from one dictionary that comports with a member of the judiciary’s policy preferences. This is the danger in resorting to dictionary definitions Judge SHAPIRO warned of:

[W]e risk the possibility that a court may simply justify its own policy preferences by reference to a selected definition in a selected edition of a selected dictionary, followed by a claim that no further analysis of legislative intent is needed or even permitted.

In re Casey Estate, 306 Mich App at 265; 856 NW2d 556 (SHAPIRO, J., concurring); *see also* note 7, *supra*.

Selecting one specific definition from a specific dictionary not only risks the potential that the judiciary may substitute its policy preferences for the Legislature’s preferences; it also runs afoul the requirement that words be “construed and understood according to the common and approved usage of the language.” MCL 8.3a. The definitions set forth in *Hays* and *Rivera* (once separated from the judicially imposed requirements) comport with the common understanding of the term “report.” The definitions utilized by those two panels of the Court of Appeals comport with definitions from other dictionaries. Albeit in a different context, the Court of Appeals has turned to Black’s Law Dictionary to define “report”:

According to Black’s Law Dictionary (6th ed), p 1300, the verb “report” means “[t]o give an account of, to relate, to tell, to convey or disseminate information.” Similarly, the noun “report” is “[a]n official or formal statement of facts or proceedings.” *Id.*

State Farm Mut Ins Co v Moore, unpublished opinion per curiam of the Court of Appeals, issued Feb. 28, 1997; 1997 WL 33353317 (Docket No. 190964). In *Autodie, LLC v City of Grand*

¹¹ *See, e.g.*, Justice ZAHRA’s Statement to the Legislature, *McNeill-Marks*, 502 Mich 851; 912 NW2d at 194-195 (ZAHRA, J., dissenting).

Rapids, 305 Mich App 423; 852 NW2d 650 (2014), the Court of Appeals was called upon to define the term “report” in MCL 211.154. *Id.* at 434; 852 NW2d 650. The Court set forth several definitions:

The verb “report” has many definitions, several of which fit this context: “to relate, as the results of one’s observation or investigation,” “to give a formal account or statement of,” “to make known the presence, absence, condition, etc., of” and “to relate, tell.”

Id. Likewise, another dictionary, *Webster’s II New Riverside University Dictionary* (1984), p 997, defines “report” as:

n. 1. A usu. detailed account. 2. A formal account of the proceedings or transactions of a group. 3. An account of a judicial decision or court case. 4. Common talk: RUMOR. 5. Reputation: repute . . . 6. An explosive noise. . .

* * *

vt. 1. To make or present an account of, often officially, formally, or periodically. 2. To relate or tell about: PRESENT. . . . 3. To write or supply an account or summation of for publication or broadcast. 4. To submit or relate the results of consideration regarding. . . . 5. To carry back and repeat to another. 6. To complain about or denounce. . . .

A common theme throughout the definitions is that one must give an account or supply information about a situation or circumstances to another. Plaintiff respectfully submits that a definition similar to that notion should be adopted by the Supreme Court and applied to the facts of this case.

There are several policy reasons to adopt such a definition of “report.” One must remember the protection being afforded by the WPA is to *employees*, who are unlikely to be lawyers or those otherwise sophisticated in employment law. Less broad definitions will give birth to series of questions members of the State Bar and judiciary are likely to struggle with. For instance, if the definition includes a requirement that the report be made to a person with authority to take action in response, one will ask what kind of authority and how much authority

along with what kind of response, to totally remediate the illegality or merely to take some action in response.¹² If the definition includes that one “denounce” another, one might ask what language is strong enough to amount to a “denunciation” as opposed to mere “gossip,” whether there are magic words one must use, and whether the entity who receives the denunciation must be of a certain type. In light of the likelihood that trained judges and attorney would not be able to agree on answers to such questions, one must question whether an anxious employee wishing to bring forward information about an illegality would venture such a risk that he or she may have not reported the illegality to the right party or used the right words and, because of mistake, faces lawful retaliation. Such an easy mistake could lead to such an employee’s ruin. Opting for a more narrow definition would have the reverse effect of discouraging employees from blowing the whistle precisely because of the uncertainty that such a definition lead to. This Court has said the following regarding the statutory purpose animating the WPA:

The WPA was first enacted by the Michigan Legislature in 1980 to “provide protection to employees who report a violation or suspected violation of state, local, or federal law. . . .” The WPA furthers this objective by removing barriers that may interfere with employee efforts to report those violations or suspected violations, thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of the law.

Whitman, 493 Mich at 312; 831 NW2d 223. Applying to narrow of a definition, especially one that will give rise to interpretative ambiguities, will place a barrier of uncertainty which will interfere with employee’s efforts to report violations or suspected violations of law to the statutorily defined public bodies.

Regardless of the definitions followed, whether it is the definition from *Hays*, *Rivera*, or the *McNeill-Marks* dissent, Plaintiff’s actions and speech to Mr. Mair constituted a “report” of

¹² Consider for example a report to a county’s 9-1-1 central dispatch, a governmental entity that would fall under the definition of a “public body.” Central dispatch would not have authority to bring a criminal to justice, only to call upon further aid from a police department or sheriff’s office.

“suspected violation of law” to a “public body.” Plaintiff respectfully submits that the Court of Appeals erred in failing to find that Plaintiff’s actions and speech did not constitute a “report” as it misconstrued the definition of “report” and added extra-statutory requirements. Such an error requires reversal and Plaintiff urges this Court to adopt a broad definition of “report” in keeping with the requirement that the statute be broadly construed and so as to make it easy to understand for employees and lower courts how to interpret the statute and what constitutes protected activity.

V. THAT THE COURT OF APPEALS ERRED IN FAILING TO FIND PLAINTIFF WAS “ABOUT TO REPORT” UNDER THE WHISTLEBLOWERS’ PROTECTION ACT

As noted previously, the WPA also protects employees who “is about to report” a violation or suspected violation of law. MCL 15.362. “The face of the statute, however, does not explain what constitutes ‘about to’ report, thereby lending itself to more than one interpretation.” *Shallal*, 455 Mich at 611-612; 566 NW2d 571. In *Shallal*, this Court reviewed both legislative analysis and a dictionary:

Legislative analysis indicates that the “about to” report language was added to the bill to protect conscientious employees who intended to, but were discharged in retaliation before they could, report. House Legislative Analysis, HB 5088, 5089, February 5, 1981. *Webster’s* defines “about” as “on the verge of” when followed by an infinitive, such as “to leave,” or in this case, “to report.” *Random House Webster’s College Dictionary*, 1995, p 4.

Shallal, 455 Mich at 612; 566 NW2d 571. An employee proceeding under the “about to” report provision must prove that he or she was about to report by clear and convincing evidence. MCL 15.363(4). “The employee’s proof, however, need not consist of a concrete action to satisfy the ‘about to’ report element.” *Shallal*, 455 Mich at 615; 566 NW2d 571.

In this case, the Court of Appeals contrasted the facts of two cases involving the “about to” report provisions. First, the Court of Appeals summarized *Shallal*. In *Shallal*, the plaintiff

discussed the need to report the president for drinking on the job and misusing agency funds with both her supervisor and other staff members. *Id.* at 606; 566 NW2d 571. The plaintiff further discussed her concerns with an honorary Board Member, who in turn suggested the plaintiff report the president's violations to the Board and to accrediting bodies, including the Department of Social Services. *Id.* The plaintiff did not, however, take any action out of fear of retaliation. *Id.* at 606-607; 556 NW2d 571. During a meeting with the president, the plaintiff said she would report the president's alcohol abuse and misuse of funds if he failed to "straighten up." *Id.* at 607-608; 556 NW2d 571. Five days later, the defendant terminated the plaintiff's employment. *Id.* This Court found that the plaintiff produced sufficient evidence of being about to report:

Plaintiff made an *express* threat to her employer that she would report him if he did not shape up. This clearly evidences an intent to report, and thus satisfies that "about to report" language of the Whistleblowers' Protection Act. . . . Confronting a supervisor with a threat of a report serves to promote the public policy of whistleblower statutes. Certainly such a threat should demonstrate that the employee has an actual intent to report the violation.

Id. at 619; 566 NW2d 571.

Next, the Court of Appeals reviewed the facts of *Hays*. In this case, the plaintiff discussed a client's use of marijuana with both her supervisor and coworkers, but never vocalized any intent to report the client's drug use. 300 Mich App at 63; 832 NW2d 433. Although the plaintiff called the Bay Area Narcotics Enforcement Team, a law enforcement agency, the plaintiff only about the potential consequences of knowing about illegal drug use and not reporting; the plaintiff did not report the client's drug use. *Id.* at 57, 63; 832 NW2d 433. Ultimately, there was no evidence that the plaintiff informed anyone that she actually intended on reporting the client's behavior to a public body. *Id.* at 674; 832 NW2d 433. Because she could not show that she shared her intentions, there was no evidence that the defendant received objective notice that the plaintiff was about to report. *Id.*

The Court of Appeals in this case erred by finding that the facts were more akin to *Hays* than to that of *Shallal*. *Rivera*, 2019 WL 1494653, at *6. The facts of this case demonstrate, at the very least, a factual question regarding whether Defendant had notice of Plaintiff's intent to report L.S. to the police. Plaintiff specifically reported to her supervisor that she "was advised we should immediately make out a police report!" (Ex. 7). This statement, in turn, demonstrated to Defendant, in particular Ms. Snyder, that Plaintiff had spoken with another individual about filing a police report. After Plaintiff's supervisor responded that an attorney "said no police report," Plaintiff noted that she did not "feel comfortable not fil[ing a] police report." (Ex. 7). In other words, Plaintiff indicated to Defendant she would only feel comfortable once a report had been made. Plaintiff further reported that she "prefer [t]he authorities having a record of this incident." (Ex. 7). Plaintiff then asked "why the attorney said no police report?" and noted that she discussed the issue with Mr. Payne, Chairman of Defendant's Board and asked "why a threat would not be documented with the police ASAP." (Ex. 7). Plaintiff's supervisor ignored Plaintiff's questions and reiterated that filing a police report "is not what was advised by our attorney." (Ex. 7). When Plaintiff subsequently met with the attorney, she again indicated to Defendant that she believed a police report should be filed. (Ex. 8).

These facts are in stark contrast to *Hays*, where there was no evidence of any kind that the employee-plaintiff had an intent to report. On the contrary, the facts show that Plaintiff is more like the *Shallal* plaintiff, who had discussed reporting with her supervisor and subsequently threatened to report. In the instant case, Plaintiff made known her conviction that a police report should be made on multiple occasions, that she had been advised to file a report, and continued to believe a report should be made regardless of what Defendant or its attorney told her. Based on

this evidence, Plaintiff submits that a reasonable juror could find that Plaintiff was about to report L.S.'s criminal behavior to a public body, i.e., a law enforcement agency. Because the Court of Appeals erred in analyzing the record evidence regarding whether Plaintiff had sufficiently conveyed her intent to make a police report, Plaintiff submits that it committed reversible error.

VI. THE COURT OF APPEALS ERRED IN FAILING TO FIND A FACTUAL QUESTION REGARDING THE REMAINING ELEMENTS OF HER WPA CLAIM

A reading of the Court of Appeals' opinion as it related to the prima facie element of causation shows that its analysis was significantly influenced by its view of whether Plaintiff reported or was about to report under the WPA. *Rivera*, 2019 WL 1494653, at *7. The Court of Appeals analyzed the issue of causation, assuming that Plaintiff had established protected activity. *Id.* However, in doing so, the Court repeatedly showed how its analysis was shaped by its view of Plaintiff's protected activity. For instance, the Court referred to Plaintiff's protected activity in italics as "her *communication with Mair.*" *Id.* It characterized Plaintiff's protected activity as "her reaction to the incident with LS." *Id.* It further referred to her protected activity as "reporting," presumably using the quotation marks to depreciate it as, in its view, not actually activity worthy of protection. Plaintiff submits that the Court of Appeals erred in failing to properly analyze the evidence of causation and in failing to even analyze several piece of evidence Plaintiff pointed to.

First, there are two pieces of suspicious timing that provide evidence of causation. There was a temporal gap of eighteen days or less between Plaintiff's protected activity and her termination. "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the

evidence would enable a reasonable fact-finder to infer that action had a discriminatory or retaliatory basis.” *Rymal v. Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004).¹³ The short period of time between Plaintiff’s protected activity and her termination raises an inference of causation. Likewise, Defendant made the decision to terminate Plaintiff and L.S. on the same day. The timing of these two decisions is important, because L.S. has also engaged in activity protected under the WPA by reporting a suspected violation of law, Defendant’s failure to keep its vehicles in good repair, to the Michigan State Police. This piece of evidence should raise inferences of causation on two bases. First, the timing of the two events suspiciously coincide. Second, two employees that engaged in protected activity were subjected to similar retaliation, termination, which demonstrates a pattern of retaliation.

Another piece of evidence not mentioned in the Court of Appeals opinion, is Defendant’s reaction to Plaintiff’s protected activity. Both Ms. Snyder and Mr. Mair attempted to persuade Plaintiff that a police report was not necessary. In other words, Defendant actively tried to dissuade Plaintiff from engaging in further protected activity. Notwithstanding Plaintiff’s insistence that a police report be made, Defendant continued to dissuade Plaintiff. This reaction was certainly negative. A negative reaction or expression of displeasure towards a protected activity has been found to be evidence of causation when combined with other evidence. See *West v Gen Motors Corp*, 469 Mich 177, 186-187; 665 NW2d 468 (2003); *Henry*, 234 Mich App at 414; 594 NW2d 107.

Plaintiff also pointed out that Defendant’s changed its view of Plaintiff from before she

¹³ Plaintiff acknowledges that “a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action.” *Debano-Griffin v Lake County*, 493 Mich 167, 177; 828 NW2d 634 (2013). Plaintiff does not rely solely on coincidental timing. However, it should be noted that the federal courts in retaliation cases brought under similar statutes find a proximity of three months sufficient to establish a factual question regarding causation. See, e.g., *Bryson v Regis Corp*, 498 F3d 561, 571 (CA 6, 2007); *Clark v Walgreen Co*, 424 F App’x 467, 473 (CA 6, 2011). It should be further noted that “suspicious timing is a strong indicator of pretext when accompanied by some other, independent evidence.” *DeBoer v Musashi Auto Parts*, 124 F App’x 387, 394 (CA 6, 2005).

engaged in protected activity to afterwards. As testified to by Plaintiff and prior to engaged in protected activity, Defendant had informed her that she would likely take over a position supervising employees at one of Defendant's locations. After engaging in protected activity, Defendant apparently viewed her as expendable, allegedly eliminating her position and terminating her employment. Courts have found that where "an employer treats an employee differently after she asserts her rights . . . than before she had done so, a retaliatory motive may be inferred for purposes of the prima facie case." *Lamer v Metaldyne Co LLC*, 240 F App'x 22, 30 (CA 6, 2007).

Plaintiff submits that it was error of the Court of Appeals to conclude that the only evidence of causation Plaintiff offered was temporal proximity. The several pieces of evidence discussed immediately above, ignored by the Court of Appeals, are sufficient to raise a factual question regarding the causation element. Once a plaintiff has presented a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 134; 666 NW2d 186 (2003). "The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason." *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001). If the defendant articulates such a legitimate business reason, the burden shifts back to the plaintiff to show that the defendant's proffered reason was not the true reason, "but was only a pretext for the discharge." *Aho v Dep't of Corrections*, 263 Mich App 281, 289; 688 NW2d 104 (2004). A plaintiff may show pretext by demonstrating that the proffered reason: (1) has no basis in fact; (2) did not actually motivate the decision; or (3) was too insufficient to justify the decision. *Meagher v Wayne State University*, 222 Mich App 700, 711-712; 565 NW2d 401

(1997).

Plaintiff submits that there are several pieces of evidence that would call into question Defendant's motivation and whether Defendant's proffered reason had any basis in fact. Plaintiff contends that a review of the following evidence is sufficient to give rise to a factual question regarding Plaintiff's claim of retaliation in violation of the WPA:

(1) Defendant failed to provide any documents or other evidence that the Board had authorized a reduction in force based on a bona fide economic reason. No such documents exist. Mr. Payne, Chairman of the Board, testified that the Board would always have been made aware or have given the chance to approve or disapprove of economic layoffs. (**Ex. 10 at 24-25**). In this case, no such layoff was requested from or approved by the Board. (**Ex. 10 at 24-25**).

(2) In discovery requests, Plaintiff requested Defendant provide the documentary evidence supporting a bona fide reduction in force. (**Ex. 11**). Defendant simply referred Plaintiff to deposition testimony. (**Ex. 11**). As such, no documents were provided that actually support Defendant's claim.

(3) The documents that were provided show that Defendant was not operating in a deficit in October 2016, when Defendant terminated Plaintiff's employment. (**Ex. 12**).

(4) Plaintiff testified that she was told, contrary to Defendant's allegations, "things were going well." (**Ex. 9 at 26**). Defendant's behaviors were inconsistent with a planned reduction in force as Plaintiff again testified that she was being told that she would likely supervise one of Defendant's facilities after the farmer's market project was completed. (**Ex. 9 at 26**).

(5) Defendant's decision to terminate both whistleblowers, L.S. and Plaintiff, occurs within a short period of time of their protected activity.

(6) Defendant's decision to terminate L.S. and Plaintiff on the same date.

Plaintiff submits that these pieces of evidence demonstrate that Defendant did not and cannot show reasonable reliance on any particularized facts that it engaged in a bona fide economic reduction in force. See *Braithwaite v Timken Co*, 258 F3d 488, 494 (CA 6, 2001). Because there are factual questions regarding Defendant's motivation, Plaintiff requests this Honorable Court reverse the Court of Appeals decision and reinstate the trial court's denial of summary disposition.

VII. THAT THE COURT OF APPEALS ERRED IN FINDING THE WHISTLEBLOWERS' PROTECTION ACT WAS PLAINTIFF'S EXCLUSIVE REMEDY WHEN, AT THE SAME TIME, FOUND THAT THE ACT DID NOT APPLY TO THE FACTS OF THE CASE

In Section III.D of its opinion, the Court of Appeals analyzed Plaintiff's claim of retaliation in violation of Michigan public policy. Oddly, the Court determined that the trial court erred in denying Defendant summary disposition, holding that Plaintiff's public policy claim was preempted by the Whistleblowers' Protection Act. "As a general rule, remedies provided by a statute for the violation of a right having no common-law counterpart are exclusive rather than cumulative." *Driver v Hanley*, 226 Mich App 558, 566; 575 NW2d 31 (1997). In fact, the WPA provides the exclusive 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." *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). At the same time, the Court of Appeals has repeatedly recognized when the WPA does not apply to the facts of a case, it cannot act as an exclusive remedy. "[I]f the WPA does not apply, it provides no remedy and there is no preemption." *Id.*¹⁴

¹⁴ See also *Driver*, 226 Mich App at 566; 575 NW2d 31 ("In this case, the circuit court determined that the WPA was not applicable to the facts regarding plaintiff's discharge. Because the WPA provided no remedy at all, it could not have provided plaintiff's exclusive remedy."); *Dolan v Contental Airlines*, 208 Mich App 316, 321; 526 NW2d

In reversing the trial court, the Court of Appeals reasoned as follows:

Plaintiff's "public policy" claim that she was terminated because she "attempted to report" LS's conduct to the police or "refused to conceal" LS's alleged violations of the Anti-Terrorism Act arises from the same activity as do her claims under the WPA. See MCL 15.362; see also *McNeill-Marks*, 316 Mich App at 25. Indeed, 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 because there is "no logical distinction between the refusal to conceal and the report by which that refusal manifested itself; rather, the two are flip sides of the same coin." *Id.* at 26. Accordingly, the trial court erred by denying summary disposition on plaintiff's claim for retaliation in violation of public policy because they were duplicative of her claims under the WPA. MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

Rivera, 2019 WL 1494653, at *8. The Court of Appeals appears to be suggesting that Plaintiff's claim that she refused to conceal a violation of the law would be indistinguishable from making a report to a public body. If that is the case, the Court of Appeals' reasoning calls into question the validity of its reasoning in dismissing Plaintiff's claim under the WPA. But in light of the Court's holding that Plaintiff did not state a claim under the WPA, the WPA cannot provide an exclusive remedy as it provides no remedy at all. The Court of Appeals erred by finding that Plaintiff's public policy claim was preempted by the WPA when it simultaneously held that the WPA did not apply.

VIII. THAT THE COURT OF APPEALS ERRED IN FAILING TO FIND A FACTUAL QUESTION REGARDING WHETHER PLAINTIFF STATED A CLAIM OF RETALIATION IN VIOLATION OF MICHIGAN PUBLIC POLICY

Michigan law generally presumes that employment relationships are terminable at the will of either party. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). The Supreme Court has recognized an exception to the at-will employment doctrine "based on the principle that some grounds for discharging an employee are so contrary to public policy as

922 (1995)("Given that the WPA affords no protection under the circumstances, plaintiff's public policy tort claim is not preempted by the WPA."), *aff'd in part & rev'd in part*, *Dolan v Continental Airlines/Continental Exp*, 454 Mich 373; 563 NW2d 23 (1997).

to be actionable.” *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). This Honorable Court has found three grounds that may serve as an exception to the doctrine:

(1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty . . . , (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment . . . , and (3) where the reason for the discharge was the employee’s exercise of a right conferred by a well-established legislative enactment. . . .

Landin v HealthSource Saginaw, Inc, 305 Mich App 519, 524; 854 NW2d 152 (2014).¹⁵ To establish a prima facie case of retaliation in violation of public policy, a plaintiff must show that: (1) she engaged in a protected activity; (2) this was known by the defendant; (3) the defendant took an employment action adverse to plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Id.* at 533; 854 NW2d 152.

In this case, Plaintiff made a type 2 public policy claim, alleging that the reason for her discharge was the failure or refusal to violate the law. Such a “claim does not depend upon a showing of a directive or request by the employer.” *Morrison v B Braun Medical Inc*, 663 F3d 251, 257 (CA 6, 2011). In *Pratt v Brown Mach Co, a Div of John Brown, Inc*, 855 F2d 1225 (CA 6, 1988), the plaintiff alleged that he was discharged after he refused to stop pursuing an investigation into the identity of the person who had been making obscene and harassing telephone calls to he and his family. *Id.* at 1236. The Court looked to two sources of Michigan public policy, the compounding statute, MCL 750.149, and the aiding and abetting statute, MCL 767.39. Reading the two statutes together, the Court found that Michigan public policy prohibited:

[A]n employer . . . [from] impos[ing] as a condition of employment an agreement,

¹⁵ The Supreme Court did not phrase these grounds “as if it was an exhaustive list.” *Kimmelman*, 278 Mich App at 573; 753 NW2d 265.

express[] or implied, by an employee with knowledge of the commission of a crime to compound or conceal or not prosecute or not give evidence concerning the commission of the crime.

Id. (alterations in original). Here, Plaintiff failed or refused to conceal L.S.'s violations of the penal code. *See* MCL 750.543m(1)(prohibiting the making of a terrorist threat); MCL 750.81 (prohibiting assault or assault and battery).

Defendant's desire to keep information about L.S.'s behavior amongst the management-level staff is evidenced by Plaintiff's text conversation with Ms. Snyder and her report to Mr. Mair. In the first conversation, Ms. Snyder repeatedly states that Defendant's attorney said not to file a police report. Notwithstanding that direction, Plaintiff repeats her desire and her concern that a police report be filed. Plaintiff further failed to conceal L.S.'s criminal behavior from the Board of Directors, specifically Mr. Payne, her significant other. As the trial court correctly noted:

The plaintiff told her boyfriend, Sylvester Payne, a Board Member of SVRC, about the incident that took place, which Ms. Snyder sternly told the plaintiff that she should not have done that. The plaintiff told other people, who are not considered public bodies, as well as a person who is currently considered a public body, about the incident that occurred. Because the plaintiff did tell others and wanted something to be done about the situation, her claim for public policy has been met.

(Ex. 1 at 5). Because the Whistleblowers' Protection Act would only preempt Plaintiff's public policy claim as it related to Plaintiff's refusal conceal L.S.'s criminal behavior from Mr. Mair, a licensed attorney, or the police, Plaintiff's refusal to conceal L.S.'s criminal behavior from others, specifically Mr. Payne is protected by Michigan public policy. Plaintiff's refusal and/or failure to conceal L.S.'s criminal behavior establishes that she engaged in a protected activity. Since the remaining elements have been discussed above, Plaintiff would incorporate the same arguments regarding causation and pretext set forth in the Whistleblowers' Protection Act

analysis.

RELIEF SOUGHT

Plaintiff respectfully requests that this Honorable Court grants its application, reverse the Court of Appeals' decision below, and reinstate the trial court's denial of summary disposition in favor of Plaintiff.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: June 28, 2019

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RIVERA

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

CLERK OF COURT
SAGINAW COUNTY, MICHIGAN

LINDA RIVERA,

Plaintiff,

v

SVRC INDUSTRIES, INC.,

Defendant.

Case No. ~~10~~-031756-NZ
Hon. Patrick J. McGraw

A TRUE COPY
Michael J. Hanley, Clerk

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OPINION AND ORDER OF THE COURT DENYING DEFENDANT, SVRC INDUSTRIES INC., MOTION FOR SUMMARY DISPOSITION

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, THIS 22 DAY OF Nov, 2017.

PRESENT: THE HONORABLE PATRICK J. MCGRAW, CIRCUIT COURT JUDGE.

Status

This matter is presently before the Court on Defendant, SVRC Industries Inc., Motion for Summary Disposition pursuant to *MCR 2.116(C)(10)*. The parties submitted briefs; the Court

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heard oral arguments and took the matter under advisement. For the reasons set forth below, the Motion is hereby **DENIED**.

Factual and Procedural History

On October 4, 2015, the plaintiff began working for the defendant as the Director of Industrial Operations in the manufacturing division. The plaintiff's responsibilities as the director were related to the economic and financial health and well-being of SVRC. On September 15, 2016, one of the defendant's employee's, Lyle Summerfield, was allegedly engaging in insubordinate, intimidating, and aggressive behavior towards one of the defendant's plant managers. Plaintiff was notified and relayed this information to the defendant's Chief Executive Officer, Dean Emerson.

The plaintiff was told to discipline Mr. Summerfield with a three day unpaid suspension. Allegedly Mr. Summerfield made some threatening statements and comments to the plaintiff and another employee. After these statements were made, plaintiff contacted Ms. Snyder, one of defendant's employees, regarding the incident by telephone. Plaintiff stated that she thought the company should file a police report. Ms. Snyder told her she would consult with Mr. Emerson and would re-contact her.

Plaintiff then began a text message conversation with Ms. Snyder about SVRC filing a police report. Ms. Snyder indicated that SVRC would not be filing a police report, but that the plaintiff could file one herself if she chose to. The plaintiff then expressed she talked to Sylvester Payne, a Board Member of SVRC, and also the plaintiff's boyfriend, about this incident, which he indicated that SVRC should file a police report. Plaintiff never filed a police report, however, the plaintiff did participate in the investigation of the alleged incident. Mr. Summerfield was then terminated from his employment at SVRC.

On October 4, 2016, the defendant terminated the plaintiff for economic reasons and was placed on permanent lay off. Around fifteen employees were terminated as a result of the economic hardship. However, Plaintiff believes she was terminated because of the incident that took place a few weeks prior. The defendant has filed this motion for summary disposition due to the plaintiff not having a viable cause of action under the Whistle Blower's Protection Act or under a public policy exception.

Law and Analysis

I. Standard of Review

A motion under *MCR 2.116(C)(10)* tests the factual sufficiency of the complaint. If the motion is properly made and supported, an adverse party must, by affidavit or otherwise, "set forth specific facts showing there is a genuine issue for trial." *MCR 2.116(G)(4)*. If the adverse party fails to do so, and if appropriate, the court must grant the summary disposition motion. *Id.* In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in *MCR 2.116(G)(6)*. *Id.* This evidence should be considered in the light most favorable to the nonmoving party.

Brown v Brown, 478 Mich 545, 551-552; 739 NW2d 313, 316 (2007). Where, except for the amount of damages, the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 552. "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817, 824 (1999). Instead, a litigant opposing the motion must present substantively admissible evidence to the trial court before its decision on the motion, which creates a genuine issue of material fact. *Sprague v Farmers Ins Exch*, 251 Mich App 260, 265; 650 NW2d 374, 376 (2002).

II. Whistle Blower's Protection Act

Under Michigan law, 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.¹

A public body can mean any 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, and (vi) the judiciary and any member or employee of the judiciary.²

To establish a prima facie case under this statute, 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.³ "Protected activity" under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation.⁴

¹ MCLA 15.362

² MCLA 15.361

³ *Shaw v. Ecorse*, 283 Mich. App. 1, 8, 770 N.W.2d 31 (2009), (quoting *West v. Gen. Motors Corp.*, 469 Mich. 177, 183-184, 665 N.W.2d 468 (2003)).

⁴ *Roulston v. Tendercare* 239 Mich.App. 270, 279, 608 N.W.2d 525 (2000), (citing MCL 15.362).

Here in this case, the plaintiff told Ms. Snyder that she wanted SVRC to report the incident, but they did not think it was necessary. Even after Ms. Snyder telling her SVRC was not going to file a police report, Plaintiff still thought that the police should know of this incident. Plaintiff stated to Ms. Snyder that she wanted to file a police report because she was scared of what could happen with the situation. The Plaintiff also told her boyfriend, Sylvester Payne, a Board Member of SVRC, about reporting it to the police. Mr. Payne stated in his deposition that a police report should have been made regarding the incident that took place.

Also, the plaintiff told SVRC's attorney, Gregory Mair, about Mr. Summerfields behavior and that a police report should be filed. Gregory Mair is a member at the law firm of O'Neill, Wallace & Doyle, P.C. This law firm is now representing the Defendant in this matter. One of the public bodies that Plaintiff reported to was a member of this firm. "Hence, under the plain language of the WPA, specifically MCL 15.361(d)(iv), [the attorney] qualified as a member of a "public body" for WPA purposes. As a practicing attorney and member of the SBM, [the attorney] was a member of a body "created by" state authority, which, through the regulation of our Supreme Court, is also "primarily funded by or through" state authority."⁵ Since the plaintiff told an attorney, and was about to report the incident to a police officer, she has met the requirements for protected activity.

Next, there must be a causal connection between the protected activity and the adverse employment action. As stating in *West v. General Motors Corporation*, "Although the employment actions about which plaintiff complains occurred after his report to the police, such a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action. Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed."⁶ "A "mere pretext" may be proved (1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision."⁷ In this case, once the issue arose between the plaintiff and Mr. Summerfield, they were both terminated or laid off within one months' time frame. Plaintiff was terminated because of economic reasons. However, Defendant's own board member and chairperson did not know of any financial deficit regarding SVRC.

Therefore, because the plaintiff has met the three requirements under the Whistle Blower's Protection Act, she has satisfied the claim that the plaintiff was discharged for engaging in a protected activity. Concluding that Defendant's motion for summary disposition is denied.

III. Public Policy

"Public policy" proscribing termination of at-will employment is "most often" used in three situations: (1) "adverse treatment of employees who act in accordance with a statutory

⁵ McNeill-Marks v. Mid-Michigan Medical Center—Gratiot, 316 Mich.App. 1, 23, 891 N.W.2d 528 (2016).

⁶ West v. General Motors Corp., 469 Mich. 177, 186, 665 N.W.2d 468 (2003).

⁷ Meagher v. Wayne State University, 222 Mich.App. 700, 711-12, 565 N.W.2d 401 (1997).

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."⁸ The plaintiff told her boyfriend, Sylvester Payne, a Board Member of SVRC, about the incident that took place, which Ms. Snyder sternly told the plaintiff that she should not have done that. The plaintiff told other people, who are not considered public bodies, as well as a person who is currently considered a public body, about the incident that occurred. Because the plaintiff did tell others and wanted something to be done about the situation, her claim for public policy has been met. Therefore, Defendant's Motion for Summary Disposition is denied.

Conclusion

THEREFORE IT IS HEREBY ORDERED that Defendant's Motion for Summary Disposition is DENIED.

IT IS SO ORDERED.



Patrick J. McGraw
Circuit Court Judge

Proof of Service

The undersigned certifies that the foregoing instrument was served upon all interested parties and/or attorney(s) to the above cause at their respective addresses disclosed on the pleadings on 11-22-17

By: U.S. Mail Fax
 Hand delivered E-mail
 Other

Signature Sheryl Alder

⁸ Kimmelman v. Heather Downs Management Ltd. 278 Mich.App. 569, 573, 753 N.W.2d 265 (2008), (quoting Suchodolski v. Michigan Consolidated Gas Co., 412 Mich. 692, 695, 316 N.W.2d 710 (1982)).

Court of Appeals, State of Michigan

ORDER

Linda Rivera v SVRC Industries, Inc.

Docket No. 341516

LC No. 16-031756-NZ

Patrick M. Meter
Presiding Judge

Michael F. Gadola

Brock A. Swartzle
Judges

The Court orders that the motion for immediate consideration is GRANTED. The Court orders that the motion for stay pending appeal is GRANTED, and further proceedings are STAYED pending resolution of this appeal or further order of this Court.

The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

Meter, J., would deny both the motion for stay pending appeal and the application for leave to appeal.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on



FEB - 1 2018

Date

Jerome W. Zimmer Jr.
Chief Clerk



Court of Appeals, State of Michigan

ORDER

Linda Rivera v SVRC Industries Inc

Docket No. 341516

LC No. 16-031756-NZ

Michael J. Kelly
Presiding Judge

Deborah A. Servitto

Mark T. Boonstra
Judges

On the Court's own motion, the Court ORDERS both parties to this appeal to file a supplemental brief within 28 days after the date of this order addressing whether plaintiff's communications with Mr. Mair constituted a "report" of a violation or suspected violation of law within the meaning of MCL 15.362. The parties need not address the status of Mr. Mair as a member of the State Bar of Michigan. Rather, the supplemental briefs should focus only on whether the communications in the context of this case constituted a "report" within the meaning of the statute.

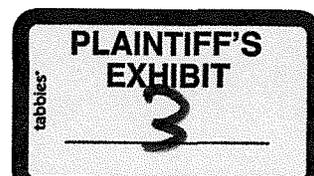


A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 14 2019

Date

Jerome W. Zimmer Jr.
Chief Clerk



2019 WL 1494653
Court of Appeals of Michigan.

Linda RIVERA, Plaintiff-Appellee,
v.
SVRC INDUSTRIES, INC., Defendant-Appellant.

No. 341516
|
April 4, 2019, 9:00 a.m.

Synopsis

Background: Former employee filed suit against employer, claiming that employer had violated the Whistleblowers' Protection Act (WPA) by retaliating against her when she was about to report another employee's conduct to the police and by retaliating against plaintiff when she reported other employee's conduct to employer's attorney, and that employer had unlawfully retaliated against her in violation of Michigan public policy. The Circuit Court, Saginaw County, No. 16-031756-NZ, denied employer's motion for summary disposition. Employer appealed.

Holdings: The Court of Appeals, Boonstra, J., held that:

employee was not "about to report," within meaning of the WPA, incident in which another employee raised possibility of a revolution and alluded to fact that he could operate a firearm and was not afraid to pull the trigger;

employee's discussion of incident with employer's attorney was not a "report" under the WPA;

there was no causal connection between employee's communication with employer's attorney and employee's termination; and

employee's claim for retaliation in violation of public policy was barred by her claim under the WPA.

Reversed and remanded.

Saginaw Circuit Court, LC No. 16-031756-NZ

Before: M. J. Kelly, P.J., and Servitto and Boonstra, JJ.

Opinion

Boonstra, J.

*1 Defendant appeals by leave granted¹ the trial court's denial of its motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in this action alleging that defendant violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and that defendant unlawfully retaliated against plaintiff in violation of Michigan public policy. We reverse and remand for entry of an order granting summary disposition in favor of defendant.

¹ *Rivera v. SVRC Indus., Inc.*, unpublished order of the Court of Appeals, entered February 1, 2018 (Docket No. 341516).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff was employed as the director of industrial operations at defendant SVRC Industries, Inc. from October 2015 to October 2016. On September 15, 2016, plaintiff conducted a disciplinary meeting with an employee, LS, who had presented with insubordination issues. According to plaintiff, LS made several statements during the meeting that plaintiff perceived to be threatening; specifically, he raised the possibility of a "revolution" in this country and alluded to the fact that he could operate a firearm, that he was not afraid to pull the trigger, and that he did not discriminate.

Plaintiff reported LS's statements to defendant's chief operating officer, Debra Snyder. Plaintiff asked Snyder whether she should report the incident to the police, and Snyder stated that she would apprise chief executive officer Dean Emerson of the situation before calling back with further instructions. After consulting with the company's attorney, Gregory Mair, Emerson instructed Snyder not to file a police report on defendant's behalf. Meanwhile, plaintiff sought advice from a friend at a different company, who told her to notify the police and "start a paper trail." Plaintiff then discussed the incident with Sylvester Payne, her "on and off" significant other, who served as the chairman of defendant's board of directors.

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Plaintiff also communicated with Snyder about the incident by text message. In the text messages, plaintiff reasserted her concern and inquired about whether she should contact the police. Snyder informed plaintiff that Mair had advised against filing a police report on defendant's behalf. Plaintiff told Snyder that she had contacted Payne to discuss the incident, and Snyder responded by text message:

Linda, Sylvester is not an employee of SVRC. He is a board member. Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney.

Plaintiff acknowledged that she was never discouraged by Snyder or anyone else from reporting LS's conduct to the police. Regardless, plaintiff never gave any indication that she was going to report the incident to the police, and apparently never took any action to do so.

Emerson instructed Mair to investigate the incident. Mair spoke with plaintiff, as well as other employees who were present at the meeting with LS, between September 22 and September 28, 2016. Defendant terminated LS's employment on October 3, 2016.

*2 On October 4, 2016, plaintiff received notice that she was being permanently laid off from her position with defendant, effective October 6, 2016, for "budgetary and economic reasons." Plaintiff filed suit against defendant, claiming that defendant had violated MCL 15.362 of the WPA in two ways: (1) by retaliating against plaintiff when she was about to report LS's conduct to the police and (2) by retaliating against plaintiff when she reported LS's conduct to Mair. Plaintiff additionally claimed that defendant had unlawfully retaliated against her in violation of Michigan public policy. Defendant filed a motion for summary disposition under MCR 2.116(C)(10), which the trial court denied. This appeal followed. Following oral argument in this Court, we issued an order directing the parties to file supplemental briefs

addressing whether plaintiff's communications with Mr. Mair constituted a "report" of a violation or suspected violation of law within the meaning of MCL 15.362. The parties need not address the status of Mr. Mair as a member of the State Bar of Michigan. Rather, the supplemental briefs should focus only on whether the communications in the context of this case constituted a "report" within the meaning of the statute.

The parties filed supplemental briefs in accordance with that order, and we have additionally considered the arguments presented in those briefs.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 416, 789 N.W.2d 211 (2010). Whether evidence establishes a prima facie case of retaliation under the WPA is a question of law that this Court also reviews de novo. *Roulston v. Tendercare (Mich.), Inc.*, 239 Mich. App. 270, 279, 608 N.W.2d 525 (2000).

Under MCR 2.116(C)(10), summary disposition is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Motions for summary disposition under MCR 2.116(C)(10) test the factual sufficiency of the complaint. *Maiden v. Rozwood*, 461 Mich. 109, 120, 597 N.W.2d 817 (1999). "A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Dextrom*, 287 Mich. App. at 416, 789 N.W.2d 211. When evaluating motions brought under this subrule, a trial court must consider—in the light most favorable to the nonmoving party—the parties' affidavits, pleadings, depositions, admissions, and other documentary evidence. *Id.*, citing MCR 2.116(G)(5). Such evidence is required when judgment is sought under subrule (C)(10). MCR 2.116(G)(3)(b). Motions under subrule (C)(10) "must

specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact.” MCR 2.116(G)(4). The nonmoving party may not rest upon its pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Id.* If the nonmoving party fails to do so, the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich. at 120, 597 N.W.2d 817.

III. ANALYSIS

Plaintiff’s complaint alleged three claims: (1) retaliation in violation of the WPA as a result of plaintiff allegedly being about to report LS’s conduct to the police; (2) retaliation in violation of the WPA as a result of plaintiff allegedly having actually reported LS’s conduct to Mair; and (3) retaliation in violation of Michigan public policy as a result of plaintiff’s alleged attempt to report LS’s conduct to the police and by plaintiff’s alleged refusal to conceal LS’s supposed violation of Michigan’s Anti-Terrorism Act, MCL 750.543a *et seq.* Defendant argues that the trial court should have granted summary disposition in its favor on all of these claims. We agree.

A. WPA LEGAL PRINCIPLES

The WPA protects plaintiffs who report or are about to report violations or suspected violations of law undertaken by employers and coworkers. *Chandler v. Dowell Schlumberger Inc.*, 456 Mich. 395, 403, 572 N.W.2d 210 (1998). Under MCL 15.362:

*3 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, 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 “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 N.W.2d 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, 594 N.W.2d 107. “Type 2 whistleblowers” are those who “participate in a previously initiated investigation or hearing at the behest of a public body.” *Id.* In this case, plaintiff principally argues that she was a type 1 whistleblower, i.e., that she reported or was about to report a violation of the law to a public body.²

² In her supplemental brief on appeal, plaintiff argues for the first time that she also engaged in protected activity by participating in an investigation conducted by Mair (i.e., that she was a Type 2 whistleblower). However, a fair reading of plaintiff’s complaint does not reflect any such claim. Moreover, in opposing defendant’s motion for summary disposition in the trial court, plaintiff made no such argument, and instead effectively disclaimed any such contention (“Plaintiff claims two (2) distinct acts constitute protected activity. First, Plaintiff was about to report a violation of law to the local police department. ... Second, Plaintiff reported Mr. Summerfield’s unlawful behavior to a licensed attorney, Gregory Mair.”) We need not consider an issue that, although it could have been, was not raised before the trial court, but was instead raised for the first time on appeal in a supplemental brief. See *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 444 Mich. 211, 234, 507 N.W.2d 422 (1993). Moreover, in speaking with Mair, plaintiff did not “participate in a *previously-initiated* investigation or hearing at the behest of a public body.” *Henry*, 234 Mich. App.

at 410, 594 N.W.2d 107 (emphasis added). To the contrary, and by her own admission, she participated in an interview at the direction of her *employer*, and did so only *after* she had already communicated her concerns to the employer. We therefore conclude in any event that plaintiff did not engage in protected activity under this prong of the WPA.

The parties do not dispute that plaintiff was an employee or that defendant was an employer under the act. A “public body” refers to any 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.

*4 (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. [MCL 15.361(d)(i) through (vi).]

To survive summary disposition on a claim for retaliation in violation of the WPA, a plaintiff must establish a prima facie case. *McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot*, 316 Mich. App. 1, 16-17, 891 N.W.2d 528 (2016). This Court has outlined three elements a plaintiff must establish in order to carry his or her burden of making out a prima facie case for retaliation under the WPA:

(1) The employee was engaged in one of the protected activities listed in the provision.

(2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.

(3) A causal connection exists between the employee’s protected activity and the employer’s act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz v. Beecher Metro Dist.*, 495 Mich. 242, 250-252, 848 N.W.2d 121 (2014).]

To establish a prima facie case, a plaintiff can rely on either direct or circumstantial evidence of retaliation. *Id.* at 17, 891 N.W.2d 528. Direct evidence of retaliation is evidence that, if believed, requires the conclusion that retaliatory animus was “at least a motivating factor in the employer’s actions.” *Id.* at 18, 891 N.W.2d 528 (citation omitted). Our Supreme Court has stated with regard to circumstantial evidence of retaliation that:

Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer’s unlawful motivations to show that a causal link exists between the whistleblowing act and the employer’s adverse employment action. A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation]. [*Debano-Griffin v. Lake Co.*, 493 Mich. 167, 173, 176, 828 N.W.2d 634 (2013) (quotation marks and citation omitted).]

Consequently, circumstantial evidence of retaliation requires the application of the framework set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). That is, where a plaintiff presents circumstantial evidence of retaliation, the burden then shifts to the defendant to rebut the presumption of a causal connection by articulating a legitimate business reason for its adverse employment action. *McNeill-Marks*, 316 Mich. App. at 18, 891 N.W.2d 528. If the defendant offers such a reason, the burden shifts back to the plaintiff to show that a genuine issue of material fact still exists by showing that “a reasonable factfinder could still conclude that the plaintiff’s protected activity was a motivating factor for the employer’s adverse

action, i.e., that the employer's articulated legitimate reason was a pretext disguising unlawful animus.' " *Id.*, quoting *Debano-Griffin*, 493 Mich. at 176, 828 N.W.2d 634 (quotation marks omitted). This Court has explained:

"A plaintiff can establish that a defendant's articulated legitimate ... reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." [*McNeill-Marks*, 316 Mich. App. at 18, 891 N.W.2d 528, quoting *Feick v. Monroe Co.*, 229 Mich. App. 335, 343, 582 N.W.2d 207 (1998) (ellipsis in original).]

B. PLAINTIFF'S "ABOUT TO REPORT" CLAIM

*5 Defendant argues that the trial court should have granted summary disposition in its favor on plaintiff's "about to report" claim under the WPA because plaintiff presented no evidence that she was about to report LS's conduct to the police. We agree.

An employee may satisfy the first element of the prima facie case analysis by demonstrating that he or she was "about to report" a suspected violation of law to a public body. *Shallal v. Catholic Social Servs. of Wayne Co.*, 455 Mich. 604, 610, 566 N.W.2d 571 (1997). Our Supreme Court has noted that "*Webster's* defines 'about' as 'on the verge of' when followed by an infinitive, such as 'to leave,' or in this case, 'to report.'" *Shallal*, 455 Mich. at 612, 566 N.W.2d 571, quoting *Random House Webster's College Dictionary* (1995) (emphasis added). When pursuing an "about to report" claim under the WPA, a plaintiff bears the burden of proving, by clear and convincing evidence, that he or she was on the verge of reporting a suspected violation of law. *Shallal*, 455 Mich. at 611, 566 N.W.2d 571; MCL 15.363(4). However, the plaintiff's proof "need not consist of a concrete action to satisfy the 'about to report' element." *Shallal*, 455 Mich. at 615, 566 N.W.2d 571.

The law does not require a plaintiff to explicitly state that he or she has decided to report a violation or suspected violation of the law in the immediate future in order to establish that she was "about to" report such activity. *Id.* at 620 n. 9, 566 N.W.2d 571. However, "[a]n employer

is entitled to objective notice of a report or a threat to report by the whistleblower.'" *Roulston*, 239 Mich. App. at 279, 608 N.W.2d 525, quoting *Roberson v. Occupational Health Ctrs. of America, Inc.*, 220 Mich. App. 322, 326, 559 N.W.2d 86 (1996) (quotation marks omitted).

In *Shallal*, 455 Mich. at 621, 566 N.W.2d 571, our Supreme Court held that

[the] plaintiff's express threat to the wrongdoer that she would report him if he did not straighten up, especially coupled with her other actions, was more than ample to conclude that reasonable minds could find that she was "about to report" a suspected violation of the law to the [Department of Social Services].

By "other actions," the Court was referring to the plaintiff having scheduled and attended meetings with her coworkers to discuss the reporting of their agency president's alcohol abuse and misuse of agency funds. *Id.* at 606, 613-614, 566 N.W.2d 571. The Court noted that the plaintiff had made an "express threat to her employer" that she would report him to the board of directors if he did not change, and that "[c]onfronting a supervisor with a threat of a report serves to promote the public policy of whistleblower statutes. Certainly such a threat should demonstrate that the employee has an actual intent to report the violation." *Id.* at 619, 566 N.W.2d 571.

In *Hays v. Lutheran Social Servs. of Mich.*, 300 Mich. App. 54, 62-64, 832 N.W.2d 433 (2013), the plaintiff discussed a client's marijuana use with her supervisor, coworkers, and a Bay Area Narcotics Enforcement Team (BAYANET) official to inquire about the legal ramifications of knowing that someone was using illegal drugs and failing to report it. *Id.* at 57, 832 N.W.2d 433. When the BAYANET official asked if the plaintiff would like to make a report, the plaintiff declined. *Id.* The plaintiff's employment was terminated when the defendant, her employer, discovered that the plaintiff had breached a client confidentiality agreement by disclosing her client's drug use. *Id.* at 57-58, 832 N.W.2d 433. The plaintiff argued that the defendant had violated the WPA, claiming that she was about to

report a violation or suspected violation of law. *Id.* at 62-64, 832 N.W.2d 433. However, this Court held that the plaintiff had failed to satisfy the protected activity element of her prima facie case because her inquiries about potential consequences did not indicate an affirmative intent to *actually* report her client's behavior. *Id.* at 63, 832 N.W.2d 433. Instead, "[h]er conversations demonstrate[d] only that while [the] plaintiff knew about the behavior and had a sufficiently long time to report the behavior, she declined to do so." *Id.* Moreover, the plaintiff in *Hays* never threatened to take further action, such that there was "no evidence that [the] defendant received objective notice that [the] plaintiff was about to report [her client's] behavior to a public body." *Id.* at 63-64, 832 N.W.2d 433.

*6 In this case, plaintiff's conduct is more akin to that of the plaintiff in *Hays* than to that of the plaintiff in *Shallal*, 455 Mich. at 621, 566 N.W.2d 571. Plaintiff did not, either explicitly or implicitly, threaten to report LS's conduct. Rather, while plaintiff's text messages and deposition testimony reveal that she believed that contacting the police was the correct course of action, the record shows only that she discussed with various people the option of filing a police report and conveyed her opinion. It does not demonstrate that, after her consultations, she had determined that filing a police report was still the best course of action or, more significantly, that she was on the verge of contacting law enforcement. See *Shallal*, 455 Mich. at 612, 566 N.W.2d 571. Additionally, there is no evidence that defendant was ever put on notice that plaintiff was about to report LS's conduct. *Roulston*, 239 Mich. App. at 279, 608 N.W.2d 525.

For these reasons, plaintiff has failed to prove that a genuine issue of material fact existed regarding whether she had engaged in a protected activity by being about to report a violation or suspected violation of law. *Shallal*, 455 Mich. at 610, 566 N.W.2d 571. Accordingly, the trial court erred by denying defendant summary disposition on this claim. MCR 2.116(C)(10); *Maiden*, 461 Mich. at 120, 597 N.W.2d 817.

C. PLAINTIFF'S "ACTUAL REPORT" RETALIATION CLAIM

Defendant also argues that the trial court erred by denying summary disposition in its favor on plaintiff's WPA claim premised on her communication with Mair. We agree.

As the trial court noted, practicing attorneys who are members of the State Bar of Michigan are considered members of a "public body" under MCL 15.361(d)(iv). *McNeill-Marks*, 316 Mich. App. at 23, 891 N.W.2d 528. Based on that, the trial court concluded, albeit without further analysis, that when plaintiff discussed LS's conduct with Mair, plaintiff had engaged in protected activity. We conclude that the trial court's analysis did not go deep enough, and that the trial court erred in reaching that conclusion.

Although *McNeill* does hold that a licensed attorney is a member of a "public body" for purposes of the WPA, *id.*, it does not compel the conclusion that plaintiff's conversation with Mair was in this case a "report" of a violation (or suspected violation) of the law. For several reasons, we conclude that it was not. First, plaintiff did not "on [her] own initiative, take it upon [herself] to communicate the employer's wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light." *Henry*, 234 Mich. App. at 410, 594 N.W.2d 107. Rather, plaintiff spoke with Mair at defendant's request.³ In other words, when she spoke with Mair, plaintiff was not an "initiator" and did not "take it upon [herself]" to communicate with Mair. *Id.*⁴

³ Indeed, plaintiff affirmatively stated, both in her complaint and in her affidavit, that defendant had "required" her to meet with Mair.

⁴ Our decision does not rest on the motivation behind plaintiff's communication. See *Whitman v. City of Burton*, 493 Mich. 303, 306, 313, 831 N.W.2d 223 (2013).

Additionally, the trial court appears to have assumed that the nature of plaintiff's discussion with Mair was that of "reporting." We do not agree. Indeed, the information that plaintiff conveyed to Mair was the same as that which she had already directly communicated to defendant, and that information was already known to Mair by virtue of plaintiff's earlier communications with defendant itself.⁵ As a consequence, the information was no longer "as yet hidden," *id.*, at the time of the communication with Mair. We conclude, in this context, that plaintiff's communications with Mair do not constitute "reporting" under the WPA.

5 In her complaint, plaintiff alleged that in meeting with Mair, she “again relayed” the information that she had previously conveyed to defendant. Similarly, in her affidavit, plaintiff described her conversation with Mair as “the same conversation I had with Ms. Snyder in my text messages to her,” as a “reiteration,” and as “again indicating” what she had previously conveyed to defendant directly. In her deposition, plaintiff also acknowledged that she conveyed the same information to Mair that she had earlier conveyed to Snyder.

*7 As Justice ZAHRA noted in his dissent from the Court’s denial of leave in *McNeill-Marks*, see *McNeill-Marks v. MidMichigan Center-Gratiot*, 502 Mich. 851, —, 912 N.W.2d 181 (2018) (ZAHRA, J., dissenting), the term “report” is not defined in the WPA. Therefore, a court may consult a dictionary to determine the plain and ordinary meaning of the term. *Epps v. 4 Quarters Restoration, LLC*, 498 Mich. 518, 529, 872 N.W.2d 412 (2015). Although “report” has many definitions, we conclude that the definitions most applicable in the context of the WPA are “to make a charge against” or “to make known the presence, absence, condition, etc.” of something. See *Random House Webster’s College Dictionary* (2d ed.), p. 1120. These definitions comport with *Henry*’s characterization of a type 1 whistleblower. *Henry*, 234 Mich. App. at 410, 594 N.W.2d 107. In other words, under the WPA, a plaintiff “reports” a violation of the law when he or she “makes a charge” of illegality against a person or entity, or “makes known” to a public body pertinent information related to illegality. Plaintiff in this case did neither in her conversation with Mair. Her discussion with Mair cannot reasonably be seen as “charging” LS with illegal conduct, nor did plaintiff make anything known to Mair that he did not already know by virtue of plaintiff’s earlier communications with defendant. We conclude that plaintiff at most “communicate[d] an illegality⁶ to a person falling under the broad definition of ‘public body’ ” and did not engage in protected activity under the WPA. *McNeill-Marks*, 502 Mich. at —, 912 N.W.2d 181 (ZAHRA, J., dissenting).

6 Again, and while it is not critical to our analysis, plaintiff in this case communicated information about statements that she perceived to be threatening in nature; it is not clear that she communicated information about an “illegality” or even a “suspected illegality.”

Further, although Mair may in general terms have been a member of a “public body” under *McNeill-Marks* by virtue of his profession, he was also acting as defendant’s agent when plaintiff communicated with him. “A lawyer is an agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity.” See 1 Restatement Law Governing Lawyers, 3d, Introductory Note, p. 124. “Fundamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him.” *St. Clair Intermediate Sch. Dist. v. Intermediate Ed. Ass’n/ Mich. Ed. Ass’n*, 458 Mich. 540, 557-558, 581 N.W.2d 707 (1998). Therefore, when plaintiff communicated with Mair at defendant’s direction, she was, in essence, again communicating with Mair’s principal, i.e., defendant. Plaintiff’s communication with Mair cannot reasonably be termed “an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation,” *Henry*, 234 Mich. App. at 410, 594 N.W.2d 107, when (1) plaintiff had already imparted the information directly to defendant, (2) defendant had already shared the information with Mair, and (3) in further speaking with Mair, plaintiff merely repeated the same information to defendant’s agent. Consequently, plaintiff’s communication with Mair was not a “reporting” of information under the WPA.

To conclude otherwise would be to transform what was a non-actionable communication (i.e., plaintiff’s communication with defendant, which is not a “public body” under the WPA) into an actionable one merely because, at defendant’s behest, plaintiff re-conveyed the same information to defendant’s attorney-agent. We cannot endorse such a strained reading of the “reporting” requirement of the protected activity element under the WPA.

The trial court therefore erred by concluding that plaintiff had engaged in protected activity by communicating with Mair. But even if we were to find otherwise, we would hold that the trial court erred by concluding that plaintiff carried the burden of showing a causal connection between her *communication with Mair* and the resulting adverse employment action. As stated earlier, plaintiff has admitted that she told Mair what he, and defendant, already knew. Plaintiff offered no evidence before the trial court establishing a causal connection

between that communication, which was initiated at defendant's request, and her termination. Temporal proximity, without more, is insufficient to prove a causal connection between the protected activity and adverse employment action. *Debano-Griffin*, 493 Mich. at 177, 828 N.W.2d 634. Plaintiff's claims under the WPA are essentially that her reaction to the incident with LS led to defendant's decision to terminate her; however, even if true, she presented no evidence even suggesting that any "reporting" she did to Mair played a role in that decision. Indeed, plaintiff chiefly argued below, and argues on appeal, that defendant's proffered legitimate business reason for her termination was pretextual. But defendant did not even need to offer a legitimate business reason for her termination until plaintiff carried her initial burden with respect to causation. *McNeill-Marks*, 316 Mich. App. at 18, 891 N.W.2d 528. Because there was no evidence of causation, as between her communication with Mair and her termination, plaintiff failed to carry that burden, and therefore no presumption of retaliation arose. Absent a presumption of retaliation, it simply matters not whether defendant's offering of "budgetary and economic reasons" was factually supported. "[A] 'plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" *Debano-Griffin*, 493 Mich. at 180, 828 N.W.2d 634, quoting *Hazle v. Ford Motor Co.*, 464 Mich. 456, 476, 628 N.W.2d 515 (2001).

*8 For all of these reasons, we conclude that the trial court erred by denying summary disposition in favor of defendant on plaintiff's claim under the WPA based on her communication with Mair. MCR 2.116(C)(10); *Maiden*, 461 Mich. at 120, 597 N.W.2d 817.

D. UNLAWFUL RETALIATION IN VIOLATION OF MICHIGAN PUBLIC POLICY

Defendant also argues that the trial court erred when it denied summary disposition in its favor on plaintiff's claim of unlawful retaliation in violation of public policy. Again, we agree. 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 N.W.2d 265 (2008), quoting *Suchodolski v. Mich. Consol. Gas Co.*, 412 Mich. 692, 695-696, 316 N.W.2d 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, 753 N.W.2d 265.

To that end, "[t]he 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*, 316 Mich. App. at 25, 891 N.W.2d 528 (quotation marks and citation omitted; second alteration in original).

Plaintiff's "public policy" claim that she was terminated because she "attempted to report" LS's conduct to the police or "refused to conceal" LS's alleged violations of the Anti-Terrorism Act arises from the same activity as do her claims under the WPA. See MCL 15.362; see also *McNeill-Marks*, 316 Mich. App. at 25, 891 N.W.2d 528. Indeed, 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 because there is "no logical distinction between the refusal to conceal and the report by which that refusal manifested itself; rather, the two are flip sides of the same coin." *Id.* at 26, 891 N.W.2d 528. Accordingly, the trial court erred by denying summary disposition on plaintiff's claim for retaliation in violation of public policy because they were duplicative of her claims under the WPA. MCR 2.116(C) (10); *Maiden*, 461 Mich. at 120, 597 N.W.2d 817.⁷

⁷ We are not persuaded by plaintiff's contention that her public policy claim is broader than her WPA claims because it "could include" a refusal to conceal LS's conduct from Payne or others who are not public bodies. First, not only is there no evidence that plaintiff "refused to conceal" LS's conduct from Payne or others, there is instead evidence that plaintiff actually disclosed that conduct to them. There is, moreover, no evidence in the record that defendant

directed plaintiff not to disclose LS's conduct to (or that plaintiff "refused" to conceal it from) anyone. Finally, Snyder's caution to plaintiff (after she had disclosed information to Payne) to "[p]lease be very careful with sharing confidential information about employees" wholly fails to provide any basis for plaintiff's public policy claim.

*9 We reverse and remand for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

All Citations

--- N.W.2d ----, 2019 WL 1494653, 2019 IER Cases 122,190

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

LINDA RIVERA,
Plaintiff,
-vs-
SVRC INDUSTRIES, INC.,
Defendant.

Case No. 16-031756-NZ-1
Hon. Patrick J. McGraw

_____/

The deposition of LYLE SUMMERFIELD,
taken before me, KELLY BONHEIM, CSR-8167, a Notary
Public acting within the County of Saginaw, State
of Michigan, at 1024 N. Michigan Avenue, Saginaw,
Michigan, on Friday, July 14, 2017.

APPEARANCES:

THE MASTROMARCO FIRM PLC
By: Aaron M. Majorana (P78772)
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(989) 752-1414
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Appearing on behalf of Plaintiff

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Suite 302
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(989) 790-0960
Bmeyer@owdpc.com
Appearing on behalf of Defendant

Also present: Linda Rivera



800.211.DEP
EsquireSo



1 class B license. And the truck just came back
2 supposedly from getting an MDOT inspection.

3 While we were chugging out there, I says,
4 "So Kevin, is the speedometer working?" He says,
5 "Are you kidding?" Okay. So I guess that's a no.
6 When I got out there I was a little hot under the
7 collar and I told Eve, I said, "Wait a minute
8 here, why does this thing does not have a
9 speedometer that works? That's a safety issue."

10 So I walked away from her saying I'm
11 going to call the State Police and find out what's
12 going on here, if it's a safety violation or not.
13 So I walked away from her, not standing next to
14 her, walked away from her and went by a dumpster,
15 called the State Police. The state policeman told
16 me, he says, "It's not a safety issue but it
17 should have been written on the MDOT inspection,"
18 which it never was, or if it was, it was just
19 blown off. And Kevin said he's never seen that
20 thing work in five years, so. . . And that's when
21 she told me somewhere along the line that I walked
22 away from the job. I just got away from her is
23 all I did.

24 Q. Eve Flynn said that to you?

25 A. Yeah.

1 Q. Did Eve Flynn say anything else to you?

2 A. No. No, I just went to work, did what I was
3 supposed to do, get up in the trailer, grab stuff,
4 pile it and . . .

5 Q. Okay. At any point during that discussion you had
6 with Eve did she ever say you were being
7 insubordinate or anything like that?

8 A. Oh, yeah. Yeah, she told me that too.

9 Q. Did she explain why or anything like that?

10 A. No, she was saying, "Oh, my God, are we ever going
11 to get the semi back or not?" She was more
12 worried about the truck than about us, you know.

13 Q. Okay.

14 A. I mean, a good boss would make sure that
15 everything's up to snuff.

16 Q. Okay. What happened after that, if anything?

17 A. I just went to work. Then when I came back, they
18 were ready to call me in and instructed me that I
19 had three days off with no pay.

20 Q. Now hold on a second. You said they called you
21 in. Who are they?

22 A. That would be Linda Rivera and Eve Flynn.

23 Q. Was anybody else the room for --

24 A. No, just the three of us.

25 Q. Okay. All right. And then you said they gave you

1 Q. Okay. So --

2 A. I mean, no one told me anything. They just sent
3 the letter and that was it.

4 Q. Okay. Did anything else happen before you
5 received this letter?

6 A. Oh, yes. Yes.

7 Q. What else happened?

8 A. When I went back to work that Monday, I put my
9 things on the floor and Eve Flynn told me, "Follow
10 me." "Okay." Follow her to -- I don't know what
11 -- a conference room. And Debbie Snyder was there
12 and the quote, "fact finder," another lawyer was
13 there.

14 Q. Do you remember that lawyer's name?

15 A. Nope. Nope, they should have a record of it at
16 SVRC.

17 Q. Okay.

18 A. If they keep their books correctly.

19 Q. Okay.

20 A. So I sit down and he just told me, "I'm a fact
21 finder here." I says "What?" I had no time to
22 get ready like I have right now, write out stuff.
23 It was like you come in, you sit down, start
24 answering questions. It's like, "What? What?" I
25 says, "What is this? An inquisition? You already

1 know what's going on." And then towards the end,
2 of our conversation I said, "I'm just crazy, I
3 can't help it. I have PTSD."

4 And that's when they says, "Oh, here.
5 Here's some papers for you to sign, some FMLA." I
6 said "What? What's that mean?"

7 "Well, family medical leave. Okay. And
8 then you'll probably have that for a couple
9 weeks."

10 I says, "Okay." And I always thought
11 that FMLA was to secure your job after you've --
12 you've left for a little while and then you come
13 back. But then I received that letter on the 3rd
14 of October. So I kind of thought, "Hmm, oh,
15 well."

16 Q. Okay. Anything else happen with SVRC other than
17 what you just talked about?

18 A. No, I had to go back and get my crowbar. I had to
19 go back and get my load bar and I had to call
20 ahead of time because I was not allowed on the
21 premises unless I called and I had to talk to
22 Dean. So I did. And he says come on over. I
23 said, "Okay." Picked my stuff up. He says, Good
24 luck, man." I said, "Okay, see ya."

25 Q. Okay.

1 revolution comment.

2 A. I have no idea if anybody did or not. It would be
3 foolish, if you ask me.

4 Q. Why is that?

5 A. Because, where's freedom of speech at in this
6 country? Do you want to keep putting the gag over
7 my mouth? It's going to say, "United States of
8 America freedom of speech is now illegal."

9 Q. Do you remember, were you looking at Eve or Linda
10 when you made the comment about the revolution?

11 A. Well, I got to look at somebody.

12 Q. Well, I --

13 A. Should I look at the wall? Come on now.

14 Q. I just wondered if you made it as you were walking
15 out the door or if you turned around and looked at
16 somebody?

17 A. Yeah, I was walking out the door and told them, I
18 says, "If and when" -- "If and when there's a
19 revolution in this country, I'm going to be one of
20 the first ones pulling the trigger." That means
21 I'm one of the first ones ready to do anything
22 that needs to be done for this country and I don't
23 discriminate. It could be man, woman, child. It
24 makes no difference.

25 If you're against the country in a

1 revolution, if it's even the government, they're
2 done. They are done. Because if this country
3 goes the way I think it's going to go, you're not
4 going to stand a snowball's chance in Hades
5 because your economy's going to crash, sultan
6 injustice, you name it, it'll happen. And once
7 that happens, you're going to have martial law.
8 And if you've ever been in a country with martial
9 law like I have, like in Korea, if you weren't off
10 the streets by midnight, they had the legal right
11 to shoot you dead. So martial law can happen in
12 this country. It doesn't take much. One
13 disaster.

14 Q. Why did you prepare this statement on July 17,
15 2017? That's the date you wrote it, correct?

16 A. Yeah.

17 Q. Why did you prepare that?

18 A. So I don't forget nothing. When you take the meds
19 I do, you start to forget things.

20 Q. What medications do you take?

21 A. Oh, that's on a need to know basis. That's
22 privacy. That's a medical thing, which I do not
23 have to answer. You have to get a warrant for
24 that, if you would. I'm not going to disclose
25 that. That is my right.

1 Q. Why did you make that statement about the
2 revolution?

3 A. Because I was watching a lot of stuff on YouTube
4 about FEMA, all this stuff that's going on in this
5 country, and it could happen.

6 Q. But why did you make it right when you did?

7 A. I don't know. I just did. I mean, if I saw the
8 stuff on -- you know, on YouTube and all this, and
9 I've been watching it now and it's like they were
10 against Obama, now they're against Trump. It's
11 the same old crap. So I don't know if they're all
12 threatening to freak people out or what, I don't
13 know. But, you know, when you see something and
14 it gets on your mind and if it's in there and you
15 go, "hmm," it's just a thought, you know. Just --
16 I mean, if you want, you can get ahold of
17 unemployment. They have that -- they should have
18 that in their files on me when I made my appeal.

19 MR. MAJORANA: Okay. I don't have any
20 other questions for you.

21 MR. MEYER: You're all set.

22 MR. MAJORANA: Thank you for coming.

23 (Deposition concluded at 12:10 p.m.)

24 * * *

25



Lyle Summerfield
560 Lutzke Rd.
Saginaw MI 48609

919 Veterans

Memorial Parkway

Monday, October 03, 2016

Saginaw, MI

48601-1497

Dear Mr. Summerfield,

989-752-6176

Fax: 989-752-3111

www.svrcindustries.com

Please be advised that the investigation into the allegations of inappropriate workplace conduct exhibited by you on the afternoon of September 15, 2016 has been completed. This matter was brought to my attention through the submission of two (2) separate complaints by SVRC employees who felt that they were threatened, intimidated and harassed by your statements during the meeting on the afternoon of September 15, 2016. In connection with the investigation that was conducted in response to these complaints, it has been determined that you conducted yourself in a manner that violated SVRC policies, including, but not limited to, SVRC's policy 800(3)(a)(iii), (b), (h) and (l) regarding various inappropriate workplace conduct. I have enclosed a copy of that policy for your reference.

As you may recall, you have been counseled on three (3) separate occasions regarding inappropriate behavior in connection with your interaction with your co-workers and consumers. The conduct exhibited by you on the afternoon of September 15, 2016, by your own admission, left your supervisors with feelings of being threatened, intimidated and harassed. Simply put, directing references toward your supervisors relating to "being the first to pull the trigger" and "not discriminating" in connection with that statement is a matter that is taken very seriously by SVRC. Further, the situation caused by you during the afternoon meeting on September 15, 2016 was clearly inappropriate workplace conduct given your references to possible physical workplace violence toward your immediate supervisors. You have previously been notified regarding prior instances of inappropriate conduct on your part and have failed to conduct yourself in a manner consistent with the SVRC policies. Given the circumstances, I am left with no choice but to inform you that SVRC is exercising its right to discharge you from your employment, effective October 3, 2016. Your paid administrative leave ended September 30, 2016 at 4:30pm.

SVRC would ask that you return all property issued to you, which, included keys to SVRC facilities and a key FOB. You may return those items in the self-addressed postage paid envelope included. SVRC will process your final paycheck on October 14, including your accumulated paid time off of 56.5 hours and catastrophic sick bank of 25.5 hours. You will receive payment via direct deposit into your bank account on file. Included in this packet for your use are the 401K Participant Disbursement Election form, and the Unemployment Compensation Notice to employee form.

Regards,

Dean Emerson, CEO
SVRC Industries, Inc.

cc: Deb Snyder, President/COO



599.46 270.56 870.55

Deb Snyder (SVRC)

Mobile

Deb Snyder (SVRC) 9/15/16 3:47 PM

Trying to call attorney

Deb Snyder (SVRC) 9/15/16 3:56 PM

Talked w dean/talked w attorney/will fill u in tomorrow/document. Thx

Me 9/15/16 4:01 PM

Deb- I was advised we should immediately make out a police report!

Me 9/15/16 4:01 PM

He is a hostile employee and that was a threat!

Deb Snyder (SVRC) 9/15/16 4:02 PM

Dean talked w the attorney and he said
 [redacted] t. The attorney will be at
 [redacted] ednesday morn to talk w



+ |Type a message...



8:34 AM 78% LEE
Deb Snyder (SVRC)
Mobile

Deb Snyder (SVRC) 9/15/16 4:02 PM

Dean talked w the attorney and he said no police report. The attorney will be at SVRC at 830 Wednesday morn to talk w lyle

Me 9/15/16 4:21 PM

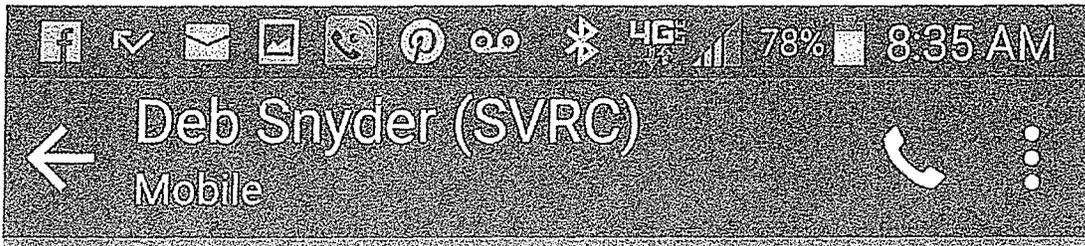
Uhhhh Deb...
I dont feel comfortable not file police report. I prefer he authorities having a record of this incident. WEDNESDAY is a long time away to look over my shoulder wondering if he is lurking in the parking lot. He is an ex-marine.

Me 9/15/16 4:22 PM

Eve confirmed Lyle has a key. All job coaches have a key to the building.

Me 9/15/16 4:27 PM

+ |Type a message... 🗨️ 🗣️



Me 9/15/16 4:27 PM

Can I ask why the attorney said no police report?? I called Sylvester and told him about the Lyle situation and i asked him why a threat would not be documented with the police ASAP. He said he didn't know why either??

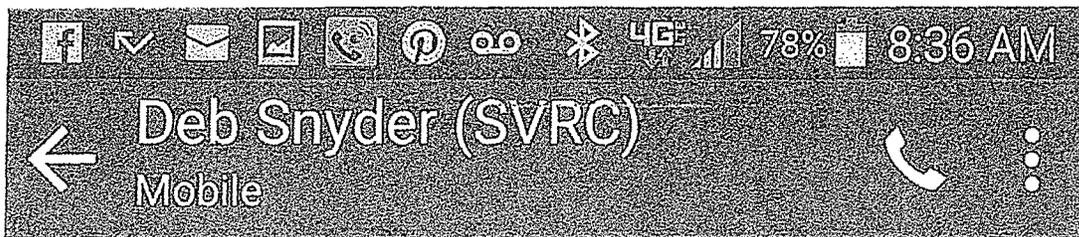
Deb Snyder (SVRC) 9/15/16 4:33 PM

Linda, Sylvester is not an employee of SVRC, he is a board member. Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Lets talk when you get to work in the morning.

Me 9/15/16 5:05 PM

Sylvester is my significant other. I am





Me

9/15/16 5:05 PM

Sylvester is my significant other. I am upset bcuz an ex-marine just threatened me. I am an employee too!! I am discussing my personal experience. Lyle looked right at me and said those things. So SVRC doesn't care about threats coming from a disgruntled angry employee that are directed at his supervisor and the director that told him about his 3 day suspension. It happen at work, but you are saying I should file a PPO personally, and nothing with SVRC even though it took place at work.... Wow. That's all I can say.

Me

9/16/16 7:36 AM

Morning,
My Nexteer meeting was canceled. I have decided to take today off. I'm trying to sleep and get rid of this migraine I have



Type a message...



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

LINDA RIVERA,

Plaintiff,

Case No. 16-031756-NZ-1

Hon. Patrick J. McGraw

v.

SVRC INDUSTRIES, Inc.,

Defendant.

_____/
THE MASTROMARCO FIRM
VICTOR J. MASTROMARCO, JR. (P34564)
KEVIN J. KELLY (P74546)
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1024 N. Michigan Avenue
Saginaw, Michigan 48602
(989) 752-1414

DAVID A. WALLACE (P 24149)
BRETT MEYER (P 24149)
Attorneys for Defendant
300 St. Andrews Road
Suite 302
Saginaw, MI 48638
(989) 790-0960
_____ /

AFFIDAVIT OF LINDA RIVERA

COUNTY OF SAGINAW)
) ss:
STATE OF MICHIGAN)

NOW COMES the AFFIANT, LINDA RIVERA, first being duly sworn,
deposes and states as follows:



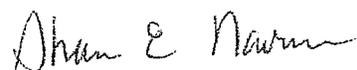
1. That if called upon to testify I can attest to the truth of the matters as asserted herein.
2. That said matters are based on my personal knowledge.
3. That in fact, I was required to meet with and present what occurred to attorney Gregory Mair of the law firm of O'Neill Wallace & Doyle subsequent to my report of the circumstances surrounding Mr. Lyle Summerfield's conduct on September 15, 2016.
4. That I specifically indicated to Mr. Mair that I believed that a Police Report should be filed in the present case.
5. That Attorney Mair specifically indicated to me that I should not file a Police Report.
6. That it was never made clear to me, exactly what Mr. Mair's role was and what he was "investigating," and I was never apprised of the findings of Mr. Mair's alleged "investigation."
7. Additionally, at said meeting with Mr. Mair, I again reiterated that I had spoken to Sylvester Payne concerning the statements made by Lyle Summerfield.
8. This was the same conversation that I had had with Ms. Snyder in my text messages to her.
9. That when I spoke to Ms. Snyder she was hostile towards me for reporting this information to Mr. Sylvester Payne even though Sylvester Payne was the Chairman of the Board of SVRC.
10. That it is my belief that the Defendant did retaliate against me for reporting the actions of Lyle Summerfield and my desire, specifically to file a Police Report. It is also my belief that Defendants did retaliate against me for again indicating to Mr. Mair, that I wanted to file a Police Report, and by reiteration of the information that I had provided such communications to Mr. Sylvester Payne and he had likewise believed that a Police Report should be filed.
11. That at that if called upon to testify I can attest to the truth of the matters as asserted herein on personal knowledge.

That further after hand sayeth not

DATED 11/06/2017


LINDA RIVERA

Subscribed and sworn to before me,
on this 6th day of November, 2017.


SHARON E. NAVARRE, Notary Public
Bay County, MI
My Commission Expires 06/06/2021
Acting in Saginaw County, Michigan

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

LINDA RIVERA,

Plaintiff,

vs.

Case No. 16-031756-NZ-1

Hon. Patrick J. McGraw

SVRC INDUSTRIES, INC.,

Defendant.

The Deposition of LINDA RIVERA,
Taken at 1024 North Michigan Avenue,
Saginaw, Michigan,
Commencing at 10:08 a.m.,
Thursday, March 28, 2017,
Before Kathy M. Baase, CSR-3285.



1 A. No, I have no knowledge of that.

2 Q. All right. It invites you to comment or input or ask
3 Deb Snyder any questions you might have about this
4 layoff; is that true?

5 A. That's true.

6 Q. And did you do that?

7 A. I did via a text to Deb and to Dean.

8 Q. Okay. Did you ever have an understanding of any
9 details that gave rise to budgetary or economic
10 reasons?

11 A. I was told things were going well. I was told that a
12 lot of their focus was on their farmers market that
13 they were starting. I was told there was going to be
14 some people's -- there was going to be a big move from
15 the facility at Vets Memorial Parkway and that when
16 those positions and people were moved over to the
17 farmers market that there was a strong chance that I
18 would be the person that would be looking over the
19 facility at Vets Memorial Parkway.

20 Q. Was that before or after your -- this layoff letter?

21 A. That was before the layoff.

22 Q. All right.

23 A. So I had no indication that there was any -- my job or
24 anyone's job was in jeopardy.

25 Q. Because you're an at-will employee, we can agree that

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

LINDA RIVERA,

Plaintiff,

-vs-

Case No. 16-031756-NZ-I
Hon. Patrick J. McGraw

SVRC INDUSTRIES, INC.,

Defendant.

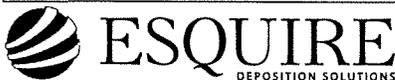
The deposition of SYLVESTER PAYNE,
taken before me, KELLY BONHEIM, CSR-8167, a Notary
Public acting within the County of Saginaw, State
of Michigan, at 1024 N. Michigan Avenue, Saginaw,
Michigan, on Friday, July 14, 2017.

APPEARANCES:

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Suite 302
Saginaw, Michigan 48638
(989) 790-0960
Bmeyer@owdpc.com
Appearing on behalf of Defendant

Also present: Linda Rivera



800.211.DE
EsquireSolutions



1 A. Yes.

2 Q. And that was Ms. Rivera's position, director of
3 industrial operations?

4 A. Would be correct, yes.

5 Q. All right. And the financials for that division
6 had been declining, correct?

7 A. That's correct.

8 Q. Thank you very much, sir.

9 MR. MEYER: I don't have any other
10 questions right now.

11 MR. MAJORANA: I just got one follow-up.

12 RE-EXAMINATION

13 BY MR. MAJORANA:

14 Q. Did you ever -- when you were just testifying
15 about finances of SVRC, did Mr. Emerson ever tell
16 you that he was laying employees off or going to
17 lay employees off?

18 A. No.

19 Q. Okay. Did anybody at SVRC ever tell you that they
20 were intending to lay employees off?

21 A. No.

22 Q. Okay.

23 A. No, the board was -- the board as a whole was
24 never informed of that.

25 Q. Is that something that the board would normally be

1 informed of?

2 A. If they are going to begin to reorganize and --
3 and lay employees off, yes, they are -- they're
4 always informed of that.

5 Q. Okay. When did the finances begin to decline for
6 the industrial division?

7 A. I can't recall. If -- if I'm not mistaken, and
8 again, I was absent a lot of the time because of
9 my -- my receiving treatments and being down with
10 cancer. But from the minutes that I was receiving
11 copies of the minutes at my home, it was even
12 prior to Ms. Rivera coming in that -- that
13 operations was having trouble.

14 Q. Okay.

15 MR. MAJORANA: That's all the questions I
16 have. Thank you.

17 MR. MEYER: Thank you very much, sir.
18 You're all done.

19 THE WITNESS: Thank you.

20 (Deposition concluded at 12:45 p.m.)

21 * * *

22

23

24

25

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

LINDA RIVERA,

Plaintiff,

v

SVRC INDUSTRIES, INC.,

Defendant.

) Case No. 16-031756-NZ-1

) HONORABLE
) PATRICK J. McGRAW

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS ON 6-09-2017

BY:
U.S. MAIL FAX
HAND DELIVERED OVERNIGHT
COURIER
FEDERAL EXPRESS OTHER

SIGNATURE: *Sheryl Ann Hoyer*

VICTOR J. MASTROMARCO, JR. (P 34564)
KEVIN J. KELLY (P 74546)
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DEFENDANT'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES DIRECTED TO DEFENDANT

NOW COMES the Defendant, SVRC INDUSTRIES, INC., by and through its authorized representative, and in answer to Plaintiff's First Set of Interrogatories Directed to Defendant states as follows:

GENERAL OBJECTION: Defendant objects to any reference to Plaintiff being "discharged," "terminated," "fired," etc., contained within these Interrogatories as a misrepresentation of the conclusion of Plaintiff's employment with Defendant.



1. State the name of the person answering these Interrogatories and the relationship of the person to Defendants. Also, please state the name of any person assisting in answering these Interrogatories and the relationship that the assisting person has to Defendants.

ANSWER: Responses have been prepared by counsel.

2. Please state:

- (a) Where Defendant was incorporated; and
- (b) Whether Defendant has any liability insurance or other payment agreement covering any of Plaintiff's claims against Defendant. If so, please state:
 - (i) The name of the issuing insurance company or payment group;
 - (ii) The date the insurance policy or payment agreement was issued;
 - (iii) The name, address, telephone number and job title of the person who issued the policy or payment;
 - (iv) The scope of the insurance policy or payment agreement coverage;
 - (v) The amount of coverage and the claims to which coverage applies;
 - and
 - (vi) The amount of the annual premium.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is not reasonably calculated to lead to the discovery of information which will be relevant and/or admissible at the time of the Trial of this cause, and in fact, seeks information that is expressly inadmissible under MRE 411. Without waiving the aforementioned

objection, and in the spirit of fair and open discovery, Defendant is incorporated in the State of Michigan. A copy of Defendant's declarations page is attached.

3. Is the corporate Defendant named in the heading of Plaintiff's Complaint the correct corporate name of the company which employed Plaintiff? If not, please provide the correct corporate name, address, resident agent, address of resident agent and corporation number.

ANSWER: Yes.

4. Please state the name, address and telephone number of each and every person that Defendant has any reason to believe may have knowledge of the facts of this case or of discoverable material concerning this case. With respect to each such person, please describe any knowledge that Defendant has reason to believe the person may have. Also, please explain why Defendant believes that each such person may have such knowledge concerning this case. Furthermore, if Defendant has conducted any interviews or conversations concerning this case, please state:

- (a) The person interviewed or spoken to;
- (b) The persons conducting the interview or discussion;
- (c) The date of interview or discussion;
- (d) Length of interview or discussion; and
- (e) Description of all matters discussed during interview.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is premature as discovery is in its infancy stages. Defendant further objects on the basis that the instant interrogatory seeks information which is subject to the attorney/client privilege and/or subject to attorney work product doctrine. Without waiving the

aforementioned objection, and in the spirit of fair and open discovery, please refer to the parties' Witness Lists filed in this matter, as well as the individuals who have been deposed and/or given deposition testimony in this matter, as well as the attached documents.

5. Please list the name, address and telephone number of each and every employee who was discharged or who has resigned within the last five (5) years from your employment.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is not reasonable calculated to lead to the discovery of information which will be relevant and/or admissible at the time of the Trial of this cause. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see attached.

6. Please state the reasons for the discharge or resignation of the employees listed in the preceding interrogatory, and the dates of the discharge or resignation.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is not reasonable calculated to lead to the discovery of information which will be relevant and/or admissible at the time of the Trial of this cause. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see attached.

7. If any of the above discharges or resignations were grieved or arbitrated pursuant to a collective bargaining agreement, please indicate the disposition of the grievance or arbitration and the date of disposition.

ANSWER: Not applicable.

8. Please state whether within the last five (5) years Defendant has ever been a party to a wrongful discharge action in which the discharged employee was employed by the Defendant.

ANSWER: Defendant objects to the instant interrogatory on the basis that same seeks information pertaining to other litigated matters which will be inadmissible at the time of the Trial of this cause. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, Defendant was a party to one (1) lawsuit as referenced in the instant interrogatory: *Chaddah v. SVRC Industries, Inc., et. al.* Plaintiff counsel should be well aware of this information on the basis that Plaintiff's attorney represented the Plaintiff in that action.

9. If the answer to the preceding interrogatory is yes, please list the name, address and telephone number of the Plaintiff and the Defendant, the case number and the disposition or current status of the litigation.

ANSWER: See Defendant's answer to interrogatory number 8.

10. Please state whether any employment discrimination charges or case have been filed against the Defendant within the past five (5) years.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is redundant, and on the basis that the instant interrogatory seeks information pertaining to other litigated or adversarial matters which will be inadmissible at the time of the Trial of this cause. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, two charges were filed with the United States Equal Employment Opportunity Commission in 2015. One charge was filed by Michelle Stack and was dismissed by the EEOC. One charge filed by Earl Bott remains pending.

11. If the answer to the preceding interrogatory is yes, please list the name, address and telephone number of the employee who filed the employment discrimination charge or lawsuit and please state the disposition or current status of the charge or lawsuit.

ANSWER: Please see Defendant's answer to interrogatory number 10.

12. Please state the name, address and telephone number of each and every person who participated in any respect in the investigation of any employment infraction that Plaintiff was accused of committing while employed by Defendant. Also, please describe the participation of each such person.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague. Without waiving the aforementioned objection, Defendant is not aware of any such investigations.

13. Please state the name, address and telephone number of each and every person who participated in the decision to discharge Plaintiff. Please describe the participation of each such person including who made the decision.

ANSWER: Plaintiff was issued a notice of permanent layoff for budgetary and economic reasons. Please refer to the deposition testimony of Defendant's employees.

14. Please describe, in detail the reason why Plaintiff was discharged.

ANSWER: Please see Defendant's answer to interrogatory number 13.

15. If there are any witnesses that you will call at trial to support the proposition that Plaintiff's discharge was fair, please list the following with respect to such witnesses;

- (a) Name, address and telephone numbers; and
- (b) Length of service, if any, with Defendant, and expected or anticipated testimony of each witness.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague and does not even attempt to define the term "fair." Additionally, Defendant objects to the instant interrogatory on the basis that same seeks for Defendant to divulge its Trial strategy and seeks information which may be subject to attorney/client privilege and/or the attorney work product doctrine. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's answer to interrogatory number 13. Additionally, Defendant may call any of the individuals who have been or will be deposed in this matter to testify at Trial and/or any other individuals identified on the Witness List of any party or in any document produced or discovery request.

16. Have any other employees been terminated for the same reason as the Plaintiff? If so, please give the names and dates of termination.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague, overbroad and seeks privileged and confidential information relating to other employees. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see the deposition testimony of Defendant's employees.

17. Please describe the incident or series of incidents that first prompted you to think about terminating the Plaintiff. In your answer, please describe exactly what the Plaintiff did or did not do.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, Defendant's employees have already testified at length regarding this issue. Please refer to those transcripts.

18. Was the Plaintiff ever subjected to discipline by Defendant? If so, please state the reason that the Plaintiff was subjected to any disciplinary action while employed by Defendant.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague and seeks a legal conclusion. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, no.

19. If the answer to the preceding interrogatory is yes, please state whether the Plaintiff was informed of the disciplinary charges against the Plaintiff.

ANSWER: Not applicable.

20. If your answer to the preceding interrogatory is yes, please identify the means used to inform the Plaintiff of such charges.

ANSWER: Not applicable.

21. Please state with reference to each individual who brought charges against the Plaintiff:

- (a) Name, address and telephone number;
- (b) The date of the Complaint;
- (c) The nature of the Complaint; and
- (d) The individual's job title and employment history with the Defendant.

ANSWER: Not applicable.

22. Was the Plaintiff given the opportunity to challenge or appeal the disciplinary decision?

ANSWER: Not applicable.

23. If your answer to the preceding interrogatory is yes, please state how the Plaintiff was notified of the opportunity to appeal and describe any appeal that was taken.

ANSWER: Not applicable.

24. Was the Plaintiff ever warned about the type of conduct that would result in discipline and discharge?

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, Plaintiff was not issued any discipline while employed by Defendant.

25. If your answer to the preceding interrogatory is yes, please describe each warning that was given to the Plaintiff, including:

- (a) The date of such warning;
- (b) The name and job title of any individual who delivered such warning;
- (c) Whether such warning was given orally or in writing;
- (d) The manner in which the warning was presented;
- (e) Whether the warning was formal or informal;
- (f) The contents of the warning;
- (g) What specifically was stated, concerning the possibility that the conduct, if continued, could lead to discipline or discharge; and
- (h) If the warning was written, attach a copy of state time and place counsel may examine a copy of the warning.

ANSWER: Please see Defendant's objection and answer to interrogatory number 24.

26. Were you ever aware of off duty conduct by the Plaintiff of which you disapproved? If so, please describe the action exactly, the date on which the action occurred, the time at which the action occurred, the manner by which you became aware of the action.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, no.

27. What, if anything, was the Plaintiff told was the reason for Plaintiff's termination? By whom? When? Please give dates, names, persons' participation, and what was said on each occasion to the Plaintiff and by the Plaintiff.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is harassing and unduly burdensome as Plaintiff counsel has access to his client to be able to hear her version of exactly what was stated and/or provided to her at the time of the issuance of her notice of permanent layoff. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please also refer to the previously taken deposition testimony of Defendant's employees. Further, Plaintiff was informed that the permanent layoff was being issued for economic reasons.

28. Does the Defendant allege or contend that the discipline or discharge of Plaintiff was typical of that imposed on other employees in a similar situation?

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague, overbroad and seeks privileged and confidential information relating to other employees. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, other employees have also been laid off for economic reasons, including Jerry Farnam, Norman Braddock, and Thomas Bill.

29. If your answer to the preceding interrogatory is yes, please state all facts on which you base your allegations or contentions.

ANSWER: Please see Defendant's answer to interrogatory number 28.

30. Please list the total compensation, including benefits, paid to Plaintiff at the time of Plaintiff's discharge. Also, please list the percentage increases per year that have occurred or are expected to occur in the compensation of the position from which

Plaintiff was discharged. The foregoing information should include any bonuses or bonus programs participated in by Plaintiff or Plaintiff's successor.

ANSWER: Defendant objects to the instant interrogatory which calls for speculation. The interrogatory is also vague and unduly burdensome. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, a copy of Plaintiff's personnel file is attached. With regard to Plaintiff's total compensation and benefits at the conclusion of her employment with Defendant, Plaintiff should be well aware of said information.

31. Please state also the percentage raise which has occurred in Plaintiff's position over each of the last five (5) years. Please state also the expected percentage increase in compensation with respect to Plaintiff's job for the next five (5) years.

ANSWER: Defendant objects to the instant interrogatory as overbroad, vague and speculative. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's answer to interrogatory number 30. Upon information and belief, Plaintiff received a two percent (2%) raise in January, 2016.

32. Please describe the promotions which Plaintiff reasonably could have expected to achieve had Plaintiff remained employed by Defendant and performed his work satisfactorily.

ANSWER: Defendant objects to the instant interrogatory on the basis that same calls for speculation. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, Plaintiff's position no longer exists for economic reasons.

33. Please state the name, address, and telephone number of each and every person who participated in any respect in the investigation of any employment infraction that

Plaintiff was accused of committing while employed by Defendant. Also, please describe the participation of each such person.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is redundant and a recitation of interrogatory number 12.

34. Have any alterations, additions, subtractions, extractions or modifications of any kind been made to the personnel file of Plaintiff from the time period of (1) month before and any time after Plaintiff's termination. If the answer to this interrogatory is yes, please state:

- (a) The nature of the change and the name of the individual responsible;
- (b) A description of each and every document; and
- (c) The date the change was made and why the change was made.

ANSWER: Paperwork was added to Plaintiff's personnel file related to her permanent layoff. Please see attached.

35. If Defendant asserts that Plaintiff was an "at will" employee, please list the following with respect to the alleged "at will" status:

- (a) The title, author, description and date of each and every document that supports this position;
- (b) Each and every other fact that supports the proposition that Plaintiff was an "at will" employee, if so, when and how;
- (c) Whether Plaintiff was ever anything other than an "at will" employee, if so, when and how;
- (d) The date, description of statement, person making statement and nature of statement with respect to any statement ever made to Plaintiff if Plaintiff was an "at will" employee; and
- (e) If you do contend Plaintiff was an "at will" employee, please describe what the subject "at will" status meant as far as Plaintiff's job security.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is overbroad, unduly burdensome and seeks a legal conclusion. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Plaintiff's personnel file, attached. In further answer, please refer to the transcripts of depositions taken to date in this case, which include Plaintiff's admission that she was an at-will employee.

36. Identify the duties and job functions Plaintiff performed at the time of Plaintiff's termination.

ANSWER: Please see the attached job description. In further answer, please refer to the deposition testimony of the witnesses who have been deposed to date.

37. Identify all persons who have performed or are currently performing any of the duties or functions of Plaintiff's last position with the company since the date of Plaintiff's termination.

ANSWER: Initially, Chief Operating Officer Debra Snyder assumed some of Plaintiff's former job responsibilities. The remainder were performed by Rose Jurek, Vice-President of Program Management and Eve Flynn, Production Supervisor, who has already been deposed in this case. The race, gender and age of these employees is neither relevant, nor reasonably calculated to lead to the discovery of information which will be relevant and/or admissible at the time of the Trial of this cause, which has been postured by Plaintiff as a purported Whistleblower action. Moreover, Plaintiff is already likely well-aware of this information. Defendant objects on all of these bases.

38. For each person identified in the preceding interrogatory state the following:

- (a) Date of hire;
- (b) Date of birth;

- (c) Date of assumption of duties;
- (d) Current position within the company;
- (e) Race;
- (f) Gender; and
- (g) Age.

ANSWER: Please see Defendant's answer to interrogatory number 37.

39. Who was the Plaintiff's supervisor?

ANSWER: Initially, Dean Emerson was Plaintiff's supervisor. Eventually, Debra Snyder became Plaintiff's supervisor.

40. Do you have a written personnel policy, handbook, or any employee manual? If so, please state when it was created and describe its contents. Please provide a copy.

ANSWER: Please see attached.

41. Was the employee handbook or manual given to the Plaintiff? If so, please state the time, date, and place of the distribution.

ANSWER: Plaintiff was provided access to all of SVRC's policies. Please see attached.

42. Do written documents exist in connection with the creation of the employee handbook or manual? If so, please attach a copy of these documents to your answers to these interrogatories.

ANSWER: Defendant objects to the instant interrogatory on the basis that same seeks information which is privileged and/or subject to attorney work product doctrine.

43. Do persons exist whose duties include writing the employee handbook or manual? If so, please state their name, addresses and positions.

ANSWER: With the assistance of counsel, Debra Snyder, Dean Emerson, and Danielle Petre, Corporate Quality and Human Resources Specialist.

44. Please state the name, address and telephone number of each and every person that Defendant may call as a witness in this case. Also, please summarize the testimony of each such person.

ANSWER: Defendant objects to the instant interrogatory on the basis that same seeks information which is subject to attorney/client privilege and/or attorney work product doctrine. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's Witness List and individuals identified in documents and/or deposition testimony.

45. Please explain in detail the factual and legal basis of each and every defense that Defendant will assert in this case.

ANSWER:

Defendant objects to the instant Interrogatory, which apparently relates to Affirmative Defenses, as same does not comply with the Michigan Court Rules. The Affirmative Defenses that are subject of the instant discovery request have been pled in accordance with MCR 2.111, including, but not limited to, MCR 2.111(F), relating to "Defenses." That Court Rule provides a requirement that defenses be pleaded, stating that a pleader may assert "as many defenses, legal or equitable or both," and further goes on to mandate that defenses *must* be stated in a party's responsive pleadings, either as originally filed, or as amended.

Affirmative Defenses relying upon the Michigan Court Rules, Michigan Law, Michigan Rules of Evidence and/or Michigan Statute, are as stated by way of those legal authorities, and there is nothing in the Michigan Court Rules that allows discovery regarding same since the opposing party has access to the same legal authorities relied thereupon. Affirmative Defenses are not considered pleadings in the sense that they would be subject to discovery and require no response by the Plaintiff in that Affirmative Defenses are to be taken as denied. *See McCracken v. City of Detroit*, 291 Mich. App. 522 (2011). As the Plaintiff is well aware, should any party named as a defendant fail to assert or otherwise preserve said defenses, they would be deemed waived, and therefore they must be preserved by being set forth and served together with the responsive pleadings. For example, the statute of limitations immunity granted by law must be pled. *See McCracken, supra*. Affirmative Defenses are mandated so that the adverse party will not be surprised by potential defenses. *See McCracken, supra*. Plaintiff is not required to answer or respond to Defendant's Affirmative Defenses since Affirmative Defenses only preserve potential defenses and inform the adversarial party of said defenses and new

matter and, therefore, the party has no need nor entitlement to conduct discovery as to the Affirmative Defenses, as stated, but, rather, through general discovery to determine whether said Affirmative Defenses will, ultimately, be at issue in the instant action.

The Affirmative Defenses, to the extent that they prove to be nonviable, or otherwise unsupported by discovery and/or the Jury Trial of this cause, automatically fail, just as the allegation of the Plaintiffs' Complaint may or may not fail subject to discovery, testimony, evidence and by way of Jury Trial. To require a responding party to waive Affirmative Defenses by not pleading them before discovery is conducted is unfairly prejudicial and inconsistent with fairness and the spirit of the Court Rules, and would be otherwise in direct contradiction to a responding party's obligation to set forth any and all potential defenses pursuant to MCR 2.111(F). Moreover, once preliminary discovery has been concluded, and upon further request of the Plaintiff, Defendant will withdraw those Affirmative Defenses that are not supported, but at this time, said request is premature. The instant Interrogatories are beyond the scope of MCR 2.302.

Without waiving the aforementioned objection, and in the spirit of fair and open discovery, Plaintiff was issued a permanent layoff for economic, and budgetary reasons. There is no causal connection between any alleged protected activity and any alleged adverse employment action sustained by Plaintiff. In fact, Plaintiff cannot demonstrate the necessary elements of her claims in this case, nor can she demonstrate that Defendant's legitimate, non-retaliatory reasons for issuing the layoff were pretextual. Further, there is no legal or factual basis in this case for any alleged "public policy" claim.

46. Please list each and every document that Defendant has any reason to believe may contain discoverable material in this case.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is overbroad, unduly burdensome and seeks information which is subject to attorney/client privilege and/or attorney work product doctrine. Additionally, Defendant objects on the basis that numerous documents, including emails, appear to have been destroyed, deleted and/or removed by Plaintiff from her employer-issued computer after receiving her notice of permanent layoff. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, Defendant may seek to admit any document produced by either party throughout the course of this litigation, any deposition exhibit or any other document identified on its Exhibit List at the Trial of this cause.

47. Please list the author, title, date and contents description of each exhibit that Defendant may introduce at trial. Also, please summarize the evidence contained in each such exhibit.

ANSWER: Please see Defendant's answer to interrogatory number 46.

48. Please state whether there have been any unfair labor practice charges filed against Defendant within the last five (5) years. If the answer to this question is yes, please list the caption of the charge, the date of the charge and the names, addresses and telephone numbers of the charging parties.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is redundant and on the basis that same seeks information relating to other adversarial matters which will not be relevant or admissible at the time of the Trial of this cause. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, no.

49. Please list the date, evaluator and evaluation grade with respect to each and every evaluation that Plaintiff ever received while employed by Defendant.

ANSWER: Plaintiff did not receive a formal employment evaluation while she was employed with Defendant.

50. If Defendant contends that the Plaintiff was terminated as the result of an economic decision to reduce staff, please state with specificity and in detail the factual basis for such defense.

ANSWER: Please refer to the testimony of SVRC's employees who were previously deposed in this litigation. Also, please see attached.

51. With regard to the above interrogatory, please set forth the names, titles, addresses, and telephone numbers of the individuals who were involved in the decision to reduce the staff.

ANSWER: Please see Defendant's answer to interrogatory number 50.

52. Please set forth the names, titles, addresses, gender, age, and dates of said termination of any and all individuals who were terminated as the result of an economic decision to reduce staff.

ANSWER: Defendant objects on the basis that the instant interrogatory is overbroad, and does not specify any applicable time frame. Defendant further objects on the basis that the instant interrogatory is vague and not reasonably calculated to lead to the discovery of information which will be relevant or admissible at the time of the Trial of this cause. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's answer to interrogatory number 28.

53. With respect to any such economic reductions, please list the following with respect to each such reduction.

- (a) Title of each and every document that reflects the reduction; and
- (b) Location of each and every document that reflects the reduction.

ANSWER: Defendant objects on the basis that the instant interrogatory is overbroad, and does not specify any applicable time frame. Defendant further objects on the basis that the instant interrogatory is vague and seeks confidential employee information. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's answer to interrogatory number 28.

54. Please set forth the following with regard to any and all meetings regarding the economic decision to reduce staff:

- (a) The dates of all such meetings;
- (b) The names, titles, addresses and telephone numbers of the individuals who attended such meetings;
- (c) In detail, what was said or discussed at such meetings;
- (d) If any notes or minutes were kept of such meetings, the name of the author of said notes or minutes, the date of said notes or minutes, and the location of said notes or minutes.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is vague, overbroad and unduly burdensome. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, SVRC employees previously testified in this matter regarding that decision-making process. Defendants are not aware of any documents as referenced in the instant interrogatory.

55. Please provide the name, title, address, telephone number, age and gender of the individual(s) who replaced Plaintiff or who assumed Plaintiff's job duties.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is not reasonably calculated to lead to the discovery of information which will be relevant or admissible at the time of the Trial of this cause and on the basis that same is redundant and a recitation of interrogatory number 38. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's answer to interrogatory number 38.

56. Please provide the names, titles, addresses, telephone numbers, age, and gender of all individuals hired by Defendant for Plaintiff's position since the Plaintiff's discharge.

ANSWER: Not applicable.

57. Please set forth each and every employment benefit Plaintiff was receiving at the time of his discharge. In listing each benefit, please provide the monthly cost of said benefit.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is redundant and a recitation of interrogatory number 30. Without waiving the aforementioned objection, and in the spirit of fair and open discovery, please see Defendant's answer to interrogatory number 30, as well as the attached documents.

58. Please state whether Defendant obtained written statements in any form from any person regarding any of the events or happenings concerning the allegations in Plaintiff's Complaint, whether before, at the time of, or after the events alleged in the Complaint. If the answer to this interrogatory is yes, please provide the names, addresses and phone numbers of anyone who has submitted a written statement and attach a copy of the written statement to your answers to these interrogatories.

ANSWER: Defendant objects to the instant interrogatory on the basis that same seeks information which is privileged and/or subject to attorney work product doctrine. To the extent documents are not privileged, and without waiving the aforementioned objection, please see attached.

59. Please disclose the name, address and telephone number of all persons who replaced the Plaintiff or assumed Plaintiff's job responsibilities.

ANSWER: Defendant objects to the instant interrogatory on the basis that same is redundant and constitutes no less than the third time this question has been asked in the course of these interrogatories.

60. The Interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorneys obtain further information between the time answers are served and the time of trial.

ANSWER: Defendant objects to this "interrogatory" as improper because it does not seek a response.



BRETT MEYER (P75711)
Attorney for Defendant
300 St. Andrews Road, Suite 302
Saginaw, Michigan 48638

Dated: June 8, 2017

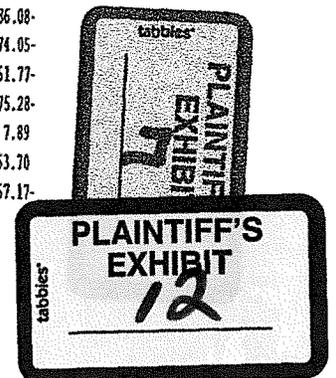
SVRC INDUSTRIES, INC.

PROFIT & LOSS STATEMENT

WORKSHOP / PRODUCTION

For The Period 10/01/2016 To 10/31/2016

	Current		YTD		Current Comp		Current Comp Variance		YTD Comp		YTD Comp Comparat	
	Amount	Ratio	Amount	Ratio	Amount	Ratio	Amount	Percent	Amount	Ratio	Amount	Percent
INCOME												
CONTRIBUTIONS	\$.00	.00	\$ 460.00	.04	\$.00	.00	\$.00	.00	\$.00	.00	\$ 460.00	***. **
RENT/MIISC INCOME	823.00	1.03	2,190.29	.17	133.05	.11	689.95	518.56	310.09	.02	1,880.20	606.34
LES, MFG.	73,923.54	92.89	1,236,149.78	95.66	119,047.23	95.28	(45,123.69)	37.90-	1,492,994.65	97.00	(256,844.87)	17.20-
DELIVERY CHARGES	5,410.00	6.80	57,173.83	4.42	5,760.87	4.61	(350.87)	6.09-	56,938.37	3.70	235.46	.41
U / OTHER MATERIAL ACTIVITY	.00	.00	1,426.32	.11	.00	.00	.00	.00	72.07	.00	1,354.25	***. **
SH COMMISSION	(573.03)	.72-	(5,116.51)	40-	.00	.00	(573.03)	***. **	(11,189.82)	.73-	6,073.11	54.28-
TOTAL INCOME	\$ 79,583.51	100.00	\$ 1,292,283.71	100.00	\$ 124,941.15	100.00	\$ (45,357.64)	36.30-	\$ 1,539,125.36	100.00	\$ (246,811.65)	16.04-
INDIRECT EXPENSES:												
OFF SALARIES	\$ 7,380.46	9.27	\$ 140,972.13	10.91	\$ 14,119.58	11.30	\$ 6,739.12	47.73	\$ 116,394.52	7.56	\$ (24,577.61)	21.12-
LOYEE BENEFITS	769.80	.97	19,650.26	1.52	2,324.70	1.86	1,554.90	66.89	19,923.29	1.29	273.03	1.37
ROLL TAXES	855.75	1.08	10,514.59	.81	1,379.08	1.10	523.33	37.95	10,034.08	.65	(480.51)	4.79-
CHER SUBSTITUTE/TEMP STAFF	.00	.00	5,534.55	.43	.00	.00	.00	.00	.00	.00	(5,534.55)	***. **
A-TOTAL	\$ 9,006.01	11.32	\$ 176,671.53	13.67	\$ 17,823.36	14.27	\$ 8,817.35	49.47	\$ 146,351.89	9.51	\$ (30,319.61)	20.72-
COACH WAGES	\$ (156.00)	.20-	\$ 7,761.52	.60	\$ 552.40	.44	\$ 708.40	128.24	\$ 12,944.60	.84	\$ 5,183.08	40.04
COACH BENEFITS	.00	.00	.00	.00	.00	.00	.00	.00	(5.00)	.00-	(5.00)	100.00-
ROLL TAXES	.00	.00	773.63	.06	107.36	.09	107.36	100.00	1,172.08	.08	398.45	34.00
B-TOTAL	\$ (156.00)	.20-	\$ 8,535.15	.66	\$ 659.76	.53	\$ 815.76	123.64	\$ 14,111.68	.92	\$ 5,576.53	39.52
SERVICES PROGRAM WAGES	4,644.99	5.84	31,507.02	2.44	2,089.92	1.67	(2,555.07)	122.26-	21,332.19	1.39	(10,174.83)	47.70-
HOUSE JANITORIAL WAGES	478.89	.60	5,017.30	.39	457.70	.37	(21.19)	4.63-	3,156.98	.21	(1,860.32)	58.93-
STUDENTS/SPONSORED	.00	.00	21,268.08	1.65	904.88	.72	904.88	100.00	14,168.71	.92	(7,099.37)	50.11-
PROG WAGES	14,916.16	18.78	171,850.99	13.30	14,598.73	11.68	(349.43)	2.39-	135,050.72	8.78	(36,790.27)	27.24-
ROLL TAXES	2,445.35	3.07	26,758.25	2.07	1,934.85	1.55	(510.30)	26.37-	19,658.79	1.28	(7,099.46)	36.11-
-TOTAL	\$ 22,517.19	28.29	\$ 256,401.64	19.84	\$ 19,986.08	16.00	\$ (2,531.11)	12.66-	\$ 193,377.39	12.56	\$ (63,024.25)	32.59-
ANCE - LIABILITY	\$ 129.25	.16	\$ 1,292.51	.10	\$ 126.48	.10	\$ (2.77)	2.19-	\$ 1,264.82	.08	\$ (27.69)	2.19-
ANCE - VEHICLES	493.58	.62	4,935.82	.38	487.50	.39	(6.08)	1.25-	4,875.00	.32	(60.82)	1.25-
ISIGNAL FEES	133.70	.17	25,036.11	1.94	62.75	.05	(70.95)	113.07-	6,781.40	.44	(18,254.71)	269.19-
ISTRATIVE SUPPLIES	172.27	.22	2,636.67	.20	256.37	.21	84.10	32.80	3,178.82	.21	542.15	17.06
M SUPPLIES	.00	.00	2,064.41	.16	224.39	.18	224.39	100.00	1,422.44	.09	(641.97)	45.13-
RE	59.22	.07	532.98	.04	59.71	.05	.49	.82	626.40	.04	93.42	14.91
ONE	264.89	.33	2,219.71	.17	241.24	.19	(23.65)	9.80-	1,823.19	.12	(396.52)	21.75-
/MAINT., M & R NON-MFG.	183.58	.48	1,736.59	.13	186.67	.15	(196.91)	105.49-	1,894.51	.12	157.92	8.34
ING & PUBLIC INFO	60.00	.08	4,755.61	.37	1.32	.00	(58.68)	***. **	978.35	.06	(3,777.26)	386.08-
/WILDRAGE	175.60	.22	1,451.15	.11	59.47	.05	(116.13)	195.27-	833.77	.05	(617.38)	74.05-
ENCES & TRAINING	.00	.00	5,122.11	.40	(20.26)	.02-	(20.26)	100.00-	3,166.25	.21	(1,955.86)	61.77-
INGS & INJURY EXPENSES	.00	.00	490.00	.04	66.00	.05	66.00	100.00	178.00	.01	(312.00)	175.28-
ER SUPPORT & MAINT.	1,229.61	1.55	4,301.35	.33	119.47	.10	(1,110.14)	929.22-	4,669.67	.30	368.32	7.89
SHIP DOORS	80.52	.10	1,105.20	.09	2,443.50	1.96	2,362.98	96.70	3,045.00	.20	1,939.80	63.70
ANOUS EXPENSE	.00	.00	625.56	.05	137.67	.11	137.67	100.00	243.25	.02	(382.31)	157.17-



SVRC INDUSTRIES, INC.

PROFIT & LOSS STATEMENT

WORKSHOP / PRODUCTION

For The Period 10/01/2016 To 10/31/2016

	Current		YTD		Current Comp		Current Comp Variance		YTD Comp		YTD Comp Comparat	
	Amount	Ratio	Amount	Ratio	Amount	Ratio	Amount	Percent	Amount	Ratio	Amount	Percent
WAREHOUSE SUPPLIES	1,847.31	2.32	4,324.69	.33	4.11	.00	(1,843.20)	***.***	2,778.29	.18	(1,546.60)	55.67-
PRODUCTION SUPPLIES	3,510.47	4.41	19,821.10	1.53	3,862.26	3.09	351.79	9.11	12,506.78	.81	(7,314.32)	58.48-
PRODUCTION INVENTORY MATERIAL	33,267.74	41.80	725,826.48	56.17	75,256.03	60.23	41,988.29	55.79	896,464.40	58.25	170,637.92	19.03
VEH. EQUIPMENT MAINTENANCE	555.00	.70	2,011.39	.16	493.90	.40	(61.10)	12.37-	1,851.14	.12	(160.25)	8.66-
SHIPPING/HANDLING EXPENSE	2,119.02	2.66	19,667.68	1.52	819.50	.66	(1,299.52)	158.57-	27,516.30	1.79	7,848.62	28.52
VEHICLE FUEL/DELIVERY EXPENSE	1,251.48	1.57	12,562.99	.97	1,473.20	1.18	221.72	15.05	18,342.95	1.19	5,779.96	31.51
VEHICLE MAINT. & REPAIR	1,337.36	1.68	10,814.72	.84	176.88	.14	(1,160.48)	656.08-	8,492.49	.55	(2,322.23)	27.34-
VEHICLE LICENSES	214.08	.27	2,233.48	.17	215.25	.17	1.17	.54	2,215.80	.14	(17.68)	-.80-
DEPRECIATION	3,820.00	4.80	38,200.00	2.96	3,760.00	2.95	(120.00)	3.24-	37,008.00	2.40	(1,200.00)	3.24-
TOTAL DIRECT EXPENSES	\$ 82,471.88	103.63	\$ 1,335,376.83	103.33	\$ 128,922.61	103.19	\$ 46,450.73	36.03	\$ 1,395,989.98	90.70	\$ 60,613.15	4.34
GROSS OPERATING MARGIN	\$ (2,888.37)	3.63-	\$ (43,093.12)	3.33-	\$ (3,981.46)	3.19-	\$ 1,093.69	27.45-	\$ 143,335.38	9.30	\$ (185,228.50)	110.11-
INDIRECT EXPENSES:												
RENTANCE - BUILDING	\$ 618.30	.78	\$ 6,183.00	.48	\$ 617.50	.49	\$ (.80)	.13-	\$ 6,175.00	.40	\$ (8.00)	.13-
UTILITIES	1,159.81	1.46	15,381.42	1.19	1,519.93	1.22	360.12	23.69	17,170.16	1.12	1,788.74	10.42
USE DISPOSAL	116.00	.15	928.00	.07	232.00	.19	116.00	50.00	1,160.00	.08	232.00	20.00
MT. & REPAIR, BLDG.	481.03	.60	6,734.14	.52	1,225.68	.98	744.65	60.75	5,114.20	.33	(1,619.94)	31.68-
EDITORIAL SUPPLIES, BLDG.	197.40	.25	2,627.48	.20	523.79	.42	326.39	62.31	2,825.74	.18	198.26	7.02
TOTAL INDIRECT EXPENSES	\$ 2,572.54	3.23	\$ 31,854.04	2.46	\$ 4,118.90	3.30	\$ 1,546.36	37.54	\$ 32,445.10	2.11	\$ 591.86	1.82
NET INCOME (OR LOSS)	\$ (5,460.91)	6.86-	\$ (74,947.16)	5.80-	\$ (8,100.36)	6.48-	\$ 2,639.45	32.58-	\$ 110,690.28	7.19	\$ (185,637.44)	167.71-

2019 WL 254526

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Leonard Scott MOSHER, Plaintiff-Appellant,
v.
CITY OF KALAMAZOO, Defendant-Appellee.

No. 342978
|
January 17, 2019

Kalamazoo Circuit Court, LC No. 2017-000206-CZ

Before: Letica, P.J., and Cavanagh and Meter, JJ.

Opinion

Per Curiam.

*1 Plaintiff appeals as of right an order granting summary disposition in favor of defendant with regard to plaintiff's claim of unlawful retaliation under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* We agree with the trial court's conclusion that plaintiff failed to establish a material question of fact as to the existence of a causal connection between plaintiff's protected activity and the adverse employment action taken by defendant. Accordingly, we affirm.

I. FACTUAL BACKGROUND

Plaintiff began working for defendant as a mechanical inspector and plan reviewer on September 27, 2016. Plaintiff was an at-will employee during a six-month probationary period. His job duties included inspecting new construction and remodeling projects to ensure compliance with applicable codes. At the time of his one-month performance evaluation, Robert McNutt—plaintiff's supervisor and defendant's building official—indicated that plaintiff met expectations in all areas and was “making progress as expected at this point.”

Relevant to this appeal, plaintiff was tasked with inspecting a newly constructed residential dwelling at 1812 Elder Street. The property was owned by Habitat for Humanity, and Shaun Wright was the primary mechanical contractor for the project. On the morning of January 6, 2017, plaintiff met with Wright at the Elder Street property to determine whether the heating system was capable of maintaining a temperature of 68 degrees Fahrenheit in each bedroom as required by the Michigan Residential Code.¹ The heat was not turned on when plaintiff arrived at the property, so he agreed to complete the inspection later, after the heating system had been running for several hours. When plaintiff returned around 3:00 p.m., the heating system was blowing 80-degree air from headers in the living room and dining room. Using a digital thermometer, plaintiff measured the temperatures in the bedrooms and determined that the temperature did not rise above 64 degrees in either room. Plaintiff therefore concluded that the heating system did not satisfy the code requirements. After communicating with Tom Tishler from Habitat for Humanity on January 11, 2017, plaintiff noted in defendant's records that the inspection was “disapproved.”

¹ Rule 303.9 of the 2015 Michigan Residential Code provides:

Required heating. Where the winter design temperature in Table R301.2(1) is below 60°F (16°C), every dwelling unit shall be provided with heating facilities capable of maintaining a room temperature of not less than 68°F (20°C) at a point 3 feet (914 mm) above the floor and 2 feet (610 mm) from exterior walls in habitable rooms at the design temperature. The installation of one or more portable space heaters shall not be used to achieve compliance with this section.

When Tishler and Wright followed up with plaintiff in February, plaintiff explained that the heating system did not satisfy the requirements of the Michigan Residential Code. At some point thereafter, Wright contacted McNutt about the issue. McNutt visited the property, observed that the building was warm throughout, and approved the mechanical permit. McNutt later explained that he disagreed with plaintiff's assessment because the code required that the heating facilities be capable of “maintaining” the specified temperature, and it did not appear that plaintiff allowed the building to obtain that temperature before inspecting it.



*2 Despite defendant's standard policy and for unknown reasons, plaintiff did not receive a two-month performance evaluation. By the time of plaintiff's four-month performance evaluation, McNutt reported that plaintiff needed improvement in several areas, including the categories for cooperation with others, open mindedness, judgment, problem solving ability, accuracy, relations with employees, relations with supervisor, internal and external customer service, and exercising self-control. In the comments section, McNutt wrote:

[Plaintiff] struggles with the constructive criticism and the thought that he may not be correct in the interpretation of the codes. He tends to be argumentative when some[]one questions his work. He has a felling [sic] that the contractors are testing him and he feels that he needs to hold them to the most strict letter of the codes when not every situation falls into the strictest letter of the codes. He is disruptive to the rest of the inspection staff when he is trying to convince the other inspectors that he is correct and everyone else is wrong.

Defendant fired plaintiff on March 17, 2017.

Plaintiff initiated this action, alleging that defendant violated the WPA by terminating his employment because he reported a violation of state law, i.e. the Michigan Residential Code, to defendant. Plaintiff alleged that defendant retaliated against him for failing the Elder Street inspection because it learned that Wright planned to appeal the inspection results and defendant did not have a board of appeals in place. Defendant denied a retaliatory motive for plaintiff's termination and, during discovery, it asserted that plaintiff "was terminated due to poor job performance, his incompetent application of the code, and his inability to get along with coworkers, staff and citizens."

McNutt testified that he fired plaintiff because plaintiff became increasingly difficult to work with. McNutt indicated that plaintiff did not follow appropriate

procedures, despite repeated instructions, and was so belligerent that some of defendant's other inspectors refused to speak to plaintiff. McNutt acknowledged that plaintiff made some improvement after his second performance evaluation, but then other inspectors reported plaintiff saying he planned on "going back to rocking the boat" after his six-month probationary period ended. Laura Lam, the former director of Community Planning and Development, testified that she was not surprised by the declining results on plaintiff's four-month performance evaluation because McNutt had already spoken to her about the issues identified in the evaluation. Several other employees recalled instances of plaintiff's negative or disruptive attitude.

Defendant moved for summary disposition, arguing that plaintiff did not engage in activity protected by the WPA and that he could not establish a causal nexus between his report of the code violation at the Elder Street property and his subsequent termination. The trial court agreed and dismissed plaintiff's case. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Kelsey v. Lint*, 322 Mich. App. 364, 370; 912 N.W.2d 862 (2017). A dispositive motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* A trial court deciding a motion for summary disposition under this rule must consider the "pleadings, affidavits, depositions, admissions, and other admissible evidence submitted by the parties in the light most favorable to the nonmoving party." *Robins v. Garg (On Remand)*, 276 Mich. App. 351, 361; 741 N.W.2d 49 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 N.W.2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

III. ANALYSIS

*3 In granting defendant's motion for summary disposition, the trial court opined that the circumstances involved in this case were distinguishable from "classic" WPA activity, noting that plaintiff was performing his job duties and that McNutt, acting as plaintiff's supervisor, disagreed with and overruled plaintiff's decision. Plaintiff first argues that the trial court erred by focusing on what it perceived to be classic WPA activity, rather than the precise mandates of the WPA. We agree.

"To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action." *Whitman v. City of Burton*, 493 Mich. 303, 313; 831 N.W.2d 223 (2013). Among other activities, the WPA protects an employee who "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" MCL 15.362. The unambiguous language of the WPA does not require that the plaintiff report a violation to an outside agency or higher authority. *Brown v. Mayor of Detroit*, 478 Mich. 589, 594; 734 N.W.2d 514 (2007). Consequently, "[i]t does not matter if the public body to which the suspected violations were reported was also the employee's employer." *Id.* at 595. Furthermore, the WPA does not contain limiting language requiring that "the employee be acting outside the regular scope of his employment." *Id.* at 596.

In light of these established principles, the trial court's opinion that plaintiff's case was distinguishable from "classic" whistleblower activity was irrelevant to the viability of plaintiff's cause of action. Plaintiff believed that the Elder Street property did not meet code requirements and reported this determination to defendant by advising McNutt of his decision and marking the results of the inspection as "disapproved" in defendant's records. The mere fact that plaintiff's job required him to inspect properties for code compliance does not alter the fact that he reported "a violation or a suspected violation of a law or regulation or rule ... to a public body,"² MCL 15.362, which is activity that falls within the protections of the WPA without regard to

whether "the reporting is part of the employee's assigned or regular job duties," *Brown*, 478 Mich. at 596.

2 For purposes of the WPA, a public body includes "[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." MCL 15.361(d)(iii) (emphasis added).

Plaintiff also contends that the trial court erred by considering his motivation for reporting the code violation at the Elder Street property. Plaintiff is correct that the statutory language does not incorporate any sort of intent element on the employee's part as a prerequisite for bringing a claim for unlawful retaliation under the WPA. *Whitman*, 493 Mich. at 313. However, we do not construe the trial court's ruling as having been based upon plaintiff's motivation or intent. Rather, the trial court briefly referenced the issue of intent in hypothesizing about how a "classic" WPA claim might arise under similar circumstances.³ Nevertheless, as defendant notes in its appellate brief, the trial court's opinion regarding the nature of plaintiff's report was not the ultimate basis for its ruling. In fact, the court concluded that even if it were to assume that plaintiff engaged in protected activity, plaintiff could not establish the necessary causal relationship between the protected activity and his subsequent discharge.

3 The trial court reasoned that if the circumstances surrounding plaintiff's report had been closer to what the court perceived to be classic whistleblower activity, it would "raise[] questions in terms of not his performance of the job but his performance as a citizen trying to make sure that the law was complied with." The trial court did not otherwise reference plaintiff's motivation in reporting the violation, other than to note that plaintiff was performing his job duties.

*4 Turning to plaintiff's claim of error concerning the trial court's analysis of the causation element, "[a] plaintiff may establish a causal connection through either direct evidence or indirect and circumstantial evidence." *Shaw v. Ecorse*, 283 Mich. App. 1, 14; 770 N.W.2d 31 (2009). When the plaintiff relies on circumstantial evidence, the burden-shifting framework applied to other types of employment discrimination statutes applies. *Debano-Griffin v. Lake Co.*, 493 Mich. 167, 171, 175-176; 828

N.W.2d 634 (2013). “A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful [retaliation].” *Id.* at 176 (quotation marks and citation omitted; emphasis omitted; alteration in original). The burden then shifts to the employer to offer a legitimate reason for the adverse employment action. *Id.*; *Shaw*, 283 Mich. App. at 8. In order to avoid summary disposition, the plaintiff bears the burden of showing “that a reasonable fact-finder could still conclude that the plaintiff’s protected activity was a ‘motivating factor’ for the employer’s adverse action.” *Debano-Griffin*, 493 Mich. at 176. In other words, the plaintiff must establish a triable question of fact as to whether the employer’s proffered reasons were a mere pretext for unlawful retaliation. *Id.* Pretext can be established “directly by persuading the court that a retaliatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” *Roulston v. Tendercare (Mich.), Inc.*, 239 Mich. App. 270, 281; 608 N.W.2d 525 (2000).

Plaintiff maintains that the trial court erred by granting defendant’s motion for summary disposition because he presented sufficient evidence of the causal nexus between his report of a code violation at the Elder Street property and his subsequent termination. According to plaintiff, the close timing between his report, his negative performance evaluation, and his eventual termination were strongly indicative of a causal connection between his protected activity and the adverse employment actions taken by defendant. Plaintiff also emphasizes McNutt’s reaction to the inspection results and the role McNutt played in the relevant events in order to suggest that plaintiff’s termination was intended, in part, to appease Wright and improve relations between defendant and Habitat for Humanity. Lastly, plaintiff contends that defendant provided inconsistent and shifting reasons for terminating his employment, thereby demonstrating that its proffered reasons were pretexts. We disagree.

Plaintiff inspected the Elder Street property on January 6, 2017, and determined that the heating system did not satisfy the code requirements. On January 11, 2017, he formally “disapproved” the mechanical inspection in defendant’s records. On February 13, 2017, plaintiff received his four-month performance evaluation, indicating that he needed improvement in several areas. Plaintiff was fired on March 17, 2017, approximately

eight days after McNutt reversed plaintiff’s denial of the mechanical permit for the Elder Street property.

Although temporal proximity between protected activity and adverse employment action may be evidence of causation, it does not establish the requisite causal nexus in and of itself. *Shaw*, 283 Mich. App. at 15. As the trial court noted in its oral ruling, the record reveals intervening circumstances that negate the inference of causation arising from the timing of these events. While plaintiff’s initial performance evaluation contained positive feedback, that evaluation only covered his first month of employment, during which he was training. He did not begin to independently inspect properties until the period covered by his second evaluation, at which point the deficiencies in his performance and attitude had become apparent. McNutt cited these deficiencies in plaintiff’s second evaluation, and McNutt’s criticisms were largely corroborated by other employees. Furthermore, while the parties focused primarily on the propriety of plaintiff’s inspection of the Elder Street property throughout the lower court proceedings, McNutt described numerous other examples of plaintiff’s unsatisfactory performance and behavior, discussing the same with Lam and following up with an email to defendant’s human resources department after plaintiff’s termination. In light of these intervening circumstances, the timing of the events does not suggest a retaliatory motive.

*5 We are unpersuaded by plaintiff’s arguments concerning the implications of McNutt’s involvement in reversing the Elder Street inspection results. Plaintiff contends that McNutt “vehemently disagreed” with his opinion regarding the code compliance at the Elder Street property, but the record does not support this assertion. McNutt and plaintiff both testified that they discussed plaintiff’s inspection of the Elder Street property, but the record contains little detail about the content of their conversation or McNutt’s initial response. Rather, McNutt testified that he did not know the details of the inspection failure until after he spoke with Wright about it. While it is true that McNutt ultimately reversed plaintiff’s decision, McNutt did not reinspect the property or overrule plaintiff’s decision until after plaintiff received the four-month performance evaluation on February 13, 2017, indicating that he required improvement in areas such as judgment, problem solving, accuracy, and human relations; struggled with

constructive criticism about the correct interpretation of the code; and was generally disruptive to the rest of the inspection staff. In fact, the record does not demonstrate that McNutt was even aware of Wright's dissatisfaction or intent to appeal plaintiff's decision until February 15, 2017, at the earliest, when Wright copied McNutt on an email regarding the situation. Thus, plaintiff's contention that McNutt gave him a poor evaluation and ultimately terminated his employment in order to accommodate Wright and Habitat for Humanity is completely speculative and insufficient to avoid summary disposition. See *id.* ("Speculation or mere conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.") (citation omitted).

Plaintiff also makes much of what he characterizes as defendant's shifting or conflicting reasons for his termination. But, again, his argument is unsupported by the record. Although the reasons articulated by defendant and its representatives varied somewhat, the same general factors were consistently referenced beginning from the time of plaintiff's four-month performance evaluation and continuing throughout the litigation of this

matter. Specifically, those factors included defendant's dissatisfaction with plaintiff's understanding of the code and inspection methods; his inability to cooperate with others, including staff, supervisors, and third parties with whom he interacted in the course of his work; and his disruptive attitude. Defendant presented ample evidence of these factors and each constitutes a legitimate, nonretaliatory reason for terminating plaintiff's employment. Even viewing the evidence in the light most favorable to plaintiff as the nonmoving party, plaintiff did not present sufficient evidence from which reasonable minds could differ as to whether a causal connection exists between plaintiff's report of the code violation and defendant's subsequent termination of plaintiff's employment. Therefore, plaintiff failed to establish a prima facie case under the WPA, and the trial court did not err by granting summary disposition in defendant's favor.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 254526

End of Document

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2008 WL 7488019

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

Stacey SHEIKO, Plaintiff-Appellant,

v.

UNDERGROUND RAILROAD and Valerie Hoffman, Defendants-Appellees.

Docket No. 277766.

Dec. 16, 2008.

Saginaw Circuit Court; LC No. 06-058921-CL.

Before: HOEKSTRA, P.J., and CAVANAGH and ZAHRA, JJ.

Opinion

PER CURIAM.

*1 In this suit alleging violations of the Michigan's Whistle blowers' Protection Act (WPA), plaintiff appeals as of right the circuit court's order granting summary disposition under MCR 2.116(C)(10) (genuine issue of material fact) to defendants. We affirm.

Plaintiff argues that the court erred in granting summary disposition for defendant because it applied an evidentiary standard inconsistent with the WPA.

We review de novo a motion for summary disposition under MCR 2.116(C)(10). *Manzo v. Petrella & Petrella & Assoc., PC*, 261 Mich.App. 705, 711, 683 N.W.2d 699 (2004). Additionally, "[w]hether a plaintiff has established a prima facie case under the WPA is a question of law subject to de novo review." *Id.*

In order to prevail on whistleblower claim, a plaintiff must make a prima facie showing 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, 184-185, 665 N.W.2d 468 (2003). Under the Act, a plaintiff engages in protected activity if she has reported, or is about to report, a suspected illegal activity to a public body. *Shallal v. Catholic Social Services of Wayne Co.*, 455 Mich. 604, 610, 566 N.W.2d 571 (1997).

Here, plaintiff testified that on September 28, 2005 she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General's office via submission of an online complaint form. Plaintiff further stated that a screen "popped up" after she "hit the submission button" which indicated that the complaint "had gone through." Plaintiff alleged that she received a confirmation screen, but she did not retain any documentary proof of the filing. In support of her claim, plaintiff attached an undated copy of the allegedly filed complaint to the Attorney General's office. However, upon defense counsel's request, the consumer affairs division of the Attorney General's office verified that it did not receive an Internet web complaint against defendants on September 28, 2005 or September 29, 2005. Plaintiff also testified that she told defendant Hoffman at a meeting on September 29, 2005 something to the effect that she had made a report to a governing body or governmental body about concerns that there were illegalities in the organization. Hoffman terminated plaintiff on October 19, 2005, less than three weeks later. The termination occurred though plaintiff's evaluation report in May 2005 referred to plaintiff's efforts as "laudable."

Defendants moved for summary disposition arguing that plaintiff had failed to present evidence that she had filed a complaint. After a hearing, the circuit court stated:

[T]he Plaintiff argues that she participated in protected activity when she submitted a two page report to the Attorney General on September 28, 2005. If in fact the Plaintiff had filed an internet complaint with the Attorney General, it would have been assigned a complaint department file number.... There is no internet/web complaint number against the Underground Railroad or Valerie Hoffman by Ms. Sheiko for September 28 or 29, 2005. The Plaintiff must provide facts from which one could reasonably conclude that she was engaged in a protected activity.

*2 This Court concludes that the Plaintiff's claim must fail in that she has failed to provide objective

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proof that such a complaint was filed. Her claim is unsupported other than by her own comments and an anonymous letter that was allegedly sent of which the receiving party has no knowledge, complaint number or website number or any other identifying characteristic indicating that it was received.

As mentioned, the circuit court granted defendants summary disposition pursuant to MCR 2.116(C)(10).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362, 547 N.W.2d 314 (1996); MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362, 547 N.W.2d 314; see also MCR 2.116(G)(3) and (4). “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto, supra* at 362, 547 N.W.2d 314. Generally speaking, where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363, 547 N.W.2d 314. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v. Gen. Motors Corp.*, 469 Mich. 177, 183, 665 N.W.2d 468 (2003). Courts are liberal in finding genuine issues of material fact. *Lash v. Allstate Ins. Co.*, 210 Mich.App. 98, 101, 532 N.W.2d 869 (1995). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v. Rozwood*, 461 Mich. 109, 121, 597 N.W.2d 817 (1999). [*White v. Taylor Distributing Co., Inc.*, 275 Mich.App. 615, 620 n. 2, 739 N.W.2d 132 (2007)].

Defendants' motion for summary disposition challenged whether plaintiff engaged in protected activity. The motion specifically claimed that plaintiff failed to genuinely show that she “reported” or was “about to report” a violation to the Attorney General's office. In support, defendant submitted documentary evidence that the Attorney General had not received a complaint against defendants around the time near plaintiff claimed she had submitted it. The “burden then shifts to [plaintiff] to establish the existence of a genuine issue of disputed fact.” *Quinto, supra* at 362, 547 N.W.2d 314; MCR 2.116(G)(3) and (4). Despite this burden plaintiff cites her deposition testimony that she submitted the report online to the Attorney General. Plaintiff's deposition testimony however merely restates allegations in her complaint that she filed a report. Plaintiff has not gone “beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto, supra*. We conclude that plaintiff did not submit sufficient evidence to rebut defendants' evidence that plaintiff did not report a violation to the Attorney General's office. Here, the evidence submitted by defendants showed that plaintiff's claim, i.e. that she had filed a complaint with the Attorney General, lacked genuineness. Under these circumstances, plaintiff's mere insistence that she had filed a complaint with the Attorney General does not restore genuineness to her claim.

*3 Plaintiff also claims that an issue of fact exists because of computer error or that a different department of the Attorney General's office may have the report or that the Attorney General's office misplaced the report. These allegations, however, are purely speculative; further, plaintiff has the burden of establishing the existence of a material factual dispute. *Quinto, supra*.

Finally, plaintiff argues that the circuit court committed reversible error because it failed to consider her argument that she was “about to” report a violation to a public body. Indeed, it does not appear from the circuit court's opinion that it considered plaintiff's argument. However, plaintiff did not plead in her complaint that she was “about to” report a violation and only raised the matter in opposition to defendant's summary disposition motion. Plaintiff cannot fail to raise a claim in the lower court, and then on appeal argue that the court's failure to consider that claim is reversible error. See *Czymbor's Timber, Inc. v. Saginaw*, 269 Mich.App. 551, 556, 711 N.W.2d 442

(2006) (“A party may not take a position in the trial court and subsequently seek redress in an appellate court based on a position contrary to that taken in the trial court.”) (citation and quotation marks omitted). For this reason, we conclude that the circuit court did not commit error requiring reversal when it declined to consider plaintiff’s argument that she was about to engage in protected activity.

Moreover, although plaintiff did state that she had made a report to a public body, the statement was vague and Hoffman denied that this statement was ever made. MCL 15.363 expressly requires that “[a]n employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body.”

Clear and convincing evidence is defined as evidence that produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.... Evidence may be uncontroverted, and yet not be ‘clear and convincing.... Conversely, evidence may be ‘clear and convincing’ despite the fact that it has been contradicted. [*Kefgen v. Davidson*, 241 Mich.App. 611, 625, 617 N.W.2d 351 (2000) (citations omitted).]

We conclude plaintiff’s single, unsubstantiated, uncorroborated deposition statement does not meet the clear and convincing standard under the WPA.

We affirm.

CAVANAGH, J., (dissenting).

*3 I respectfully dissent. I would reverse the order granting defendants’ motion for summary disposition and remand for further proceedings.

*4 In this WPA claim brought under MCL 15.362, the primary dispute is whether plaintiff established a genuine issue of material fact that she reported suspected illegal activity to a public body, i.e., her engagement in protected activity. See *West v. Gen. Motors Corp.*, 469 Mich. 177,

184-185, 665 N.W.2d 468 (2003); *Shallal v. Catholic Social Services of Wayne Co.*, 455 Mich. 604, 610, 566 N.W.2d 571 (1997). Defendants argued that plaintiff’s self-serving deposition testimony to that effect was insufficient. The trial court agreed, as does the majority opinion of this Court. I disagree and conclude that plaintiff met her burden.

Plaintiff testified in her deposition that on September 28, 2005, she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General’s office via submission of an online complaint form. Plaintiff further testified that a screen “popped up” after she “hit the submission button” which indicated that the complaint “had gone through.” Under the WPA, a plaintiff engages in protected activity if she has reported a suspected illegal activity to a public body. The WPA does not require that the public body receive, act upon, or acknowledge receipt of the report. Here, through sworn testimony, plaintiff indicated that she made such a report. The trial court concluded that plaintiff’s testimony was incredible because it was not supported by “objective proof.” The majority of this Court appears to agree, and concludes that plaintiff’s claim that she filed the complaint “lacks genuineness.”

In reaching these conclusions, both the trial court and the majority of this Court have ignored several well-established rules that govern the review of motions brought under MCR 2.116(C)(10). First, motions brought under MCR 2.116(C)(10) test the factual support of a plaintiff’s claim. *Coblentz v. City of Novi*, 475 Mich. 558, 567, 719 N.W.2d 73 (2006). Second, the court must consider the documentary evidence submitted in the action, including deposition testimony. *Veenstra v. Washtenaw Country Club*, 466 Mich. 155, 164, 645 N.W.2d 643 (2002). Third, the court is not permitted to assess credibility or determine facts on a motion for summary disposition. *Skinner v. Square D Co.*, 445 Mich. 153, 161, 516 N.W.2d 475 (1994). Fourth, all reasonable inferences from the record evidence must be resolved in favor of the nonmoving party. *Veenstra, supra*. And fifth, this Court is liberal in finding a genuine issue of material fact that requires a trial to resolve. *In re Handelsman*, 266 Mich.App. 433, 437, 702 N.W.2d 641 (2005).

In this case, plaintiff testified that she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General’s

office. Thus, the transcript of plaintiff's deposition testimony is the documentary evidence that provides the factual support for her claim that she engaged in protected activity. Whether plaintiff's testimony is worthy of belief- or "genuine"-was not an issue for the trial court to consider and is not an issue for this Court to determine. Again, weighing credibility is not permitted in deciding a motion for summary disposition. *Id.* If someone other than plaintiff would have testified that they saw, knew, or heard that plaintiff filed such a complaint, plaintiff's case would not have been dismissed on this ground. It is only because plaintiff filed her complaint anonymously and without initially advising anyone else of her protected behavior that her claim is unfairly suspect and vulnerable. As a consequence, plaintiff has been wrongfully denied the protection of the WPA-the purpose of which is to protect the public health and safety by encouraging employees to report illegal or suspected illegal activity of their employers-simply because she initially told no one of her efforts and she did not get a "receipt" upon filing her complaint. See *Trepanier v. Nat'l Amusements, Inc.*, 250 Mich.App. 578, 584, 649 N.W.2d 754 (2002).

*5 Further, concluding that plaintiff did not file such a complaint-as the trial court and this Court in essence did-constitutes an impermissible finding of fact. Whether plaintiff's testimony that she filed a complaint with the Attorney General's office is worthy of belief is a matter solely for the fact-finder to determine. See *Burkhardt v. Bailey*, 260 Mich.App. 636, 646-647, 680 N.W.2d 453 (2004). Thus, I would conclude that a genuine issue of material fact exists as to the issue whether plaintiff was engaged in protected activity before she was terminated from her employment.

I would also hold, contrary to the trial court's conclusion, that plaintiff presented sufficient circumstantial evidence to establish a causal relationship between the protected

activity and her termination. "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a ... retaliatory basis." *Rymal v. Baergen*, 262 Mich.App. 274, 303, 686 N.W.2d 241 (2004). Plaintiff testified that she told defendant Valerie Hoffman at a meeting on September 29, 2005, something to the effect that she had made a report to a governmental body about her concerns that there were illegalities in the organization. Again, plaintiff's testimony must be accepted as credible for summary disposition purposes. *Burkhardt, supra* at 646-647, 680 N.W.2d 453. Hoffman terminated plaintiff on October 19, 2005, less than three weeks later. The termination occurred even though plaintiff's evaluation report in May 2005 referred to plaintiff's efforts as "laudable." And plaintiff presented testimony from three witnesses to her work. Plaintiff's work was characterized as "impeccable," "very thorough and effective," "beyond what was required of her," and "timely completed." Viewing these circumstances in a light most favorable to plaintiff, a reasonable fact-finder could conclude that Hoffman terminated plaintiff because plaintiff engaged in the protected activity of reporting a violation or suspected violation of the law to the Attorney General's office.

In summary, plaintiff made a prima facie showing under the WPA that (1) she was engaged in protected activity, (2) she was terminated from her employment, and (3) a causal connection exists between the protected activity and the termination. See *West, supra*. Thus, I would reverse the grant of summary disposition in defendants' favor, and the matter would be remanded for further proceedings.

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UNPUBLISHED OPINION. CHECK
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Court of Appeals of Michigan.

STATE FARM MUTUAL INSURANCE
COMPANY, Plaintiff-Appellee,

v.

Cathy A. MOORE, Defendant-Appellant.

No. 190964.

|
Feb. 28, 1997.Before: CORRIGAN, C.J., and DOCTOROFF and R.R.
LAMB, * JJ.* Circuit judge, sitting on the Court of Appeals by
assignment.

UNPUBLISHED

PER CURIAM.

*1 Defendant Cathy A. Moore appeals by right the order granting summary disposition under MCR 2.116(C)(10) to plaintiff State Farm. We affirm.

Plaintiff contracted to provide defendant uninsured motorist coverage. The policy required defendant to notify the police within twenty-four hours about any hit-and-run accident involving defendant. The policy called for defendant to notify plaintiff within thirty days of such an accident.

Plaintiff sought a declaratory judgment that it owed defendant no duty to provide her uninsured motorist benefits following a hit-and-run accident involving defendant on February 17, 1994. The trial court granted plaintiff's motion for summary disposition after finding no genuine issue of material fact that defendant both failed to report the hit-and-run accident to the police within twenty-four hours of the accident and failed to report the accident to plaintiff within thirty days.

On appeal, defendant contends that the trial erred in concluding that she failed to comply with the conditions of her policy. We disagree. We review the grant of summary disposition de novo. *Pinckney Community Schools v. Continental Casualty*, 213 Mich.App 521, 525; 540 NW2d 748 (1995). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(2),(3); *Patterson v. Kleiman*, 447 Mich. 429, 434, n 6; 526 NW2d 879 (1994). The motion must identify specifically the claims that the movant believes involve no genuine issue of material fact. MCR 2.116(G)(4). The non-movant must demonstrate that, considering all documentary evidence submitted and drawing all inferences in its favor, a record might be developed that will leave open an issue upon which reasonable minds could differ. *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 617-618; 537 NW2d 185 (1995); *Pinckney, supra* at 525. If the proofs show no genuine issue of material fact, the court must render judgment without delay. MCR 2.116(I)(1).

Defendant contends that factual issues exist regarding whether she "reported" the accident to the police and to plaintiff within the time periods specified in the parties' policy. We disagree. An insured must comply strictly with a reasonable time period to provide notice of a claim where the applicable insurance policy explicitly states the time period. *Aldalali v Underwriters at Lloyd's London*, 174 Mich.App 395, 398; 435 NW2d 498 (1989); *Monti v. League Life Ins Co*, 151 Mich.App 789, 799; 391 NW2d 490 (1986). Where a party fails to satisfy a condition precedent to an insurer's duty to provide coverage, the party has no cause of action against the insurer. *Hawkeye Security Ins Co v. Vector Construction Co*, 185 Mich.App 369, 379; 460 NW2d 329 (1990).

Defendant argues that she raised a factual issue whether she "reported" the hit-and-run to the police within twenty-four hours of the accident. The reporting requirement is clear and unambiguous; the provision only may be understood reasonably in one way. *Erickson v. Citizens Ins Co*, 217 Mich.App 52, 54; 550 NW2d 606 (1996); *Michigan Basic Prop Ins Ass'n v Wasarovich*, 214 Mich.App 319, 322; 542 NW2d 367 (1995). When policy language is clear, courts must give terms within the policy their plain meanings and courts cannot create ambiguity where none

exists. *Heniser v. Frankenmuth Mut Ins Co*, 449 Mich. 155, 161; 534 NW2d 502 (1995). Courts may consider dictionary definitions in giving effect to the plain meaning of a word. *Pinckney Community Schools, supra* at 528-529.

*2 The parties' policy requires an insured to "report" a hit-and-run to the police within twenty-four hours of the accident. According to Black's Law Dictionary (6th ed), p 1300, the verb "report" means "[t]o give an account of, to relate, to tell, to convey or disseminate information." Similarly, the noun "report" is "[a]n official or formal statement of facts or proceedings." *Id.* Defendant provided the lower court with no evidence from which it could be reasonably inferred that she "reported" the hit-and-run to the police within twenty-four hours of the accident. Instead, defendant merely asked the police the procedure to report an accident. She produced no evidence that she furnished a detailed account of the accident to the police from which they

prepared an official or formal statement of the facts surrounding the incident. Therefore, defendant failed to comply with a condition precedent to plaintiff's duty to provide uninsured motorist coverage. The trial court properly granted plaintiff's motion and dismissed this action under MCR 2.116(C)(10).

Defendant failed to report the hit-and-run to the police within twenty-four hours of the accident. Accordingly, we need not consider defendant's second argument that a factual issue exists whether she gave notice to plaintiff within thirty days of the accident.

Affirmed.

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