

STATE OF MICHIGAN  
IN THE SUPREME COURT

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LINDA RIVERA,

Plaintiff-Appellee,

v.

SVRC INDUSTRIES, INC,

Defendant-Appellant.

Supreme Court Case No. 159857

Court of Appeals No. 341516

Circuit Court Case No. 16-031756-NZ

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**PLAINTIFF-APPELLEE'S REPLY TO ANSWER TO  
APPLICATION FOR LEAVE TO APPEAL**

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## ARGUMENT

### A. THE COURT OF APPEALS ERRED IN VIOLATING MCR 7.215(C) & (J)

Defendant argues that the Court of Appeals in the instant case did not violate MCR 7.215(C) and (J), because it used the definition of “report” from *Henry v City of Detroit*, 234 Mich App 405; 594 NW2d 107 (1999). The *Henry* Court, however, did not purport to define the statutory term “report.” *See id.* at 409-410; 594 NW2d 107. Instead, the *Henry* Court distinguished between a type 1 and type 2 whistleblowers, by characterizing the two types. *Id.*<sup>1</sup> Justice ZAHRA has noted that the State’s jurisprudence “often characterizes the whistleblower employee as either a ‘type 1’ or ‘type 2’ whistleblower. . . .” *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 502 Mich 851; 912 NW2d 181, 188 n31 (2018)(ZAHRA, J., dissenting). The *Rivera* Court itself referred to the *Henry* Court’s statement as a “characterization of a type 1 whistleblower.” *Rivera v SVRC Industries, Inc.*, -- NW2d --; 2019 WL 1494653, at \*7 (Mich App, 2019). As a matter of logic and in order to comply with MCR 7.215(J), if the *Rivera* Court found *Henry* to have defined “report,” it would have been obligated to apply that definition. It did not do so and adopted its own definition:

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.

*Rivera*, 2019 WL 1494653, at \*7.

As *Henry* does not purport to define the term “report,” the *Rivera* Court was obligated to follow a published opinion of the Court of Appeals issued on or after November 1, 1990. MCR 7.215(J)(1). As noted in Plaintiff’s application, the Court of Appeals previously defined the term

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<sup>1</sup> Again, it should be noted that the *Henry* Court’s characterization of a type 1 whistleblower has been rejected, at least in part, as *Henry* refers to an “employer’s wrongful conduct.” MCL 15.362 does not require that the actual or suspected violation of law reported by the employee relate to an employer’s behavior. *See, e.g., Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 575; 753 NW2d 265 (2008).

“report” in *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54; 832 NW2d 433 (2013), stating:

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.”

*Hays*, 300 Mich App at 60; 832 NW2d 433. Because the Court of Appeals in this case did not follow this definition of “report,” it committed error by violating the rule of stare decision, MCR 7.215(C), and MCR 7.215(J)(1).

**B. THE COURT OF APPEALS ERRED IN ADDING EXTRA-STATUTORY REQUIREMENTS TO THE DEFINITION OF PROTECTED ACTIVITY**

Defendant does not challenge the substance of Plaintiff’s arguments regarding this point, except to state that the *Henry* characterization and the additional requirement imposed upon WPA plaintiffs fall within the term “report.” As noted above, the Court of Appeals in this case did not define “report” by using the *Henry* characterization of a type 1 whistleblower. Using the actual definition of “report” given by the *Rivera* Court and the plain text of the statute, one can see that the *Henry* characterization is not supported by the plain language of the statute. In *Henry*, the Court of Appeals interpreted a “type 1 whistleblower” as:

[O]ne 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 violation.

234 Mich App at 410; 594 NW2d 107. Each portion of the characterization can be compared to the plain language and/or case law to demonstrate that the characterization is misplaced.

The “on his own initiative” language is nowhere present in the statute. The statute states in relevant part, “the employee, or a person acting on behalf of the employee.” MCL 15.362.

There is no requirement that the employee act or make the report, because another person can act on behalf of the employee. If someone else can act for the employee, it could not be a requirement that the employee act upon his own initiative. A co-worker may be frightened to report and suggest to another employee that he make the report; although the second employee acted based upon the first employee's suggestion, there is nothing in the statutory text indicating that the employer could lawfully retaliate against the second employee. The "employer's wrongful conduct" language is also lacking from the statutory text. As noted in footnote 1, *supra*, the courts have rejected the notion that the actual or suspected violation is limited to wrongful behavior engaged in by the employer. See, e.g., *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 575; 753 NW2d 265 (2008); *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 74-75; 503 NW2d 645 (1993). The "as yet hidden" language likewise is not present in the statutory text. There is no textual reason to limit protection to reports of only unknown violations of law. One could foresee two employees learning of an unlawful situation; if both independently reported the violation to the police or some other governmental entity, there would be no statutory basis to deny protection to both employees. At the same time, if protection was limited to those who reported first, such an interpretation could chill reporting, because an employee who unknowingly reported second would be without protection. Those who were unaware of whether the violation had been previously reported would second guess making the report due to the real possibility of permissible retaliation. Lastly, the statute only requires one to report; the statute does not require one to be motivated or intend "to remedy the situation or harm done." See *Whitman v City of Burton*, 493 Mich 303, 313; 831 NW2d 223 (2013).<sup>2</sup>

### **C. THE COURT OF APPEALS ERRED IN FAILING TO FIND PLAINTIFF MADE**

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<sup>2</sup> This is tied to the statutory language surrounding "public body," as likewise there is no textual basis in the definitions of public body to require the public body be able to take a certain kind of action to remedy the suspected or actual legal violation.

## A “REPORT” UNDER THE ACT

Defendant next argues that because Mr. Mair was not Plaintiff’s personal attorney, Plaintiff’s report to Mr. Mair could not qualify as a “report,” because “internal complaints of violations are not covered by the WPA.” Defendant’s reasoning is flawed for at least two reasons. First, in *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 316 Mich App 1; 891 NW2d 528 (2016), the Court of Appeals held that the plaintiff’s attorney was a “public body” for purposes of the statute as he was “a practicing attorney and member of the [State Bar of Michigan].” *Id.* at 23; 891 NW2d 528. If a licensed attorney is a member of a “public body,” then he or she is a public body regardless of who he or she represents. Nevertheless, Defendant points to Rule 1.13 of the Professional Rules of Professional Conduct, noting the distinction between an attorney representing an organization as opposed to its directors, officers, and employees. Its argument does not make sense then that reporting to a supervisor and reporting to an employer’s attorney would be the same thing; the attorney does not represent Defendant’s employees. Second, Defendant relies upon *Pasquale v Allied Waste Services, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Nov. 9, 2004; 2004 WL 2533672 (Docket No. 249110), for the proposition that internal complaints about violations are not covered by the Whistleblowers’ Protection Act. Although the Court of Appeals’ reasoning in *Pasquale* is unclear, the Supreme Court has rejected such an argument. In *Brown v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007), the Supreme Court specifically stated, “It does not matter if the public body to which the suspected violations were reported was also the employee’s employer” and, later further stated, “[T]he WPA does not require that a report be made to an outside agency.” *Id.* at 595; 734 NW2d 514. Internal complaints are covered, so long as the report is made to a public body.

**D. THE COURT OF APPEALS ERRED IN FAILING TO FIND PLAINTIFF WAS ABOUT TO REPORT**

In response to Plaintiff's Application, Defendant limits its analysis of this issue to one sentence, claiming that Plaintiff possessed no evidence she was "about to report" and did not satisfy the "clear and convincing evidence" standard. Plaintiff did present evidence sufficient to raise a genuine issue of material fact. She reported to her supervisor that she "was advised we should immediately make out a police report!" Her employer then knew that Plaintiff had spoken about making a police report to a third person. When Ms. Snyder responded by saying the attorney "said no police report," Plaintiff noted that she did not "feel comfortable not fill[ing a] police report." She further stated that she "prefer [t]he authorities having a record of this incident." She also asked, "why the attorney said no police report?" and noted her discussion with Mr. Payne and asking, "why a threat would not be documented with the police ASAP." When Plaintiff met with Mr. Mair, she again indicated to Defendant that a police report should be filed. Plaintiff submits that such facts contrast with the facts of *Hays* and are sufficient to permit a reasonable person to conclude Defendant was aware of Plaintiff being about to report.

**E. THE COURT OF APPEALS ERRED IN FAILING TO FIND FACTUAL QUESTIONS REGARDING THE REMAINING ELEMENTS OF HER WHISTLEBLOWER CLAIM**

Defendant, like the Court of Appeals, argues that Plaintiff's sole evidence of causation is close temporal proximity. As set forth in her Application, several additional pieces of evidence support the existence of a factual question regarding causation. Plaintiff highlighted: (1) suspicious timing between Plaintiff's report and her termination; (2) the fact that Defendant planned on firing another employee, LS, who also engaged in protected activity, on the same day as Plaintiff; (3) the suspicious timing between LS's protected activity and his termination; (4) Defendant's negative reaction to Plaintiff's protected activity, specifically attempting to dissuade

her from engaging in further protected activity; and (5) the fact that Defendant changed its view of Plaintiff from before versus after engaging in protected activity. Contrary to Defendant's argument, Plaintiff brought forward circumstantial evidence of causation in addition to close temporal proximity. As there is evidence in addition to a close temporal proximity, a question of fact exists regarding the issue of causation.

Likewise, Plaintiff pointed to several pieces of evidence that give rise to a factual question regarding pretext. Plaintiff identified six pieces of evidence: (1) the lack of the Board approval for a reduction-in-force, where there was testimony that the Board would always approve or disapprove proposed reductions-in-force; (2) the failure of Defendant, in response to discovery requests, to identify any documentary evidence supporting the existence of a bona fide reduction-in-force; (3) the existence of documents demonstrating that Defendant was not operating in a deficit at the time Plaintiff's employment ceased; (4) Plaintiff's testimony that she was told "things were going well" and that she would likely become a supervisor of one of Defendant's facilities; (5) Defendant's decision to terminate both whistleblowers, LS and Plaintiff, within a short period of time of engaging in protected activity; and (6) Defendant's decision to terminate both whistleblowers on the same date. Plaintiff continues to submit that these pieces of evidence give rise to a factual question whether Defendant's proffered reason was based in fact and/or actually motivated Defendant's decision. As such, the Court of Appeals erred in failing to find factual questions relating to the remaining elements of Plaintiff's claim.

**F. THE COURT OF APPEALS ERRED IN FINDING PLAINTIFF'S PUBLIC POLICY CLAIM PREEMPTED BY THE WHISTLEBLOWERS' PROTECTION ACT**

Defendant argues that the Whistleblowers' Protection Act can preempt and be the exclusive remedy for a plaintiff, even when a court finds that the Act does not apply to the facts

of the plaintiff's case. This argument and *Rivera* Court's conclusion is contradicted by significant precedent. In *Dudewicz*, *supra*, this Honorable Court explained:

The existence of the specific prohibition against retaliatory discharge in the WPA is determinative of the viability of a public policy claim. . . . A public policy claim is sustainable, then, only where there is also not an applicable statutory prohibition against discharge in retaliation for the conduct at issue.

443 Mich at 80; 503 NW2d 645. The Court of Appeals has likewise held:

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.

*Driver v Hanley*, 226 Mich App 558, 556; 575 NW2d 31 (1997). The Michigan courts have consistently held that where the WPA does not apply, it is not and cannot be the exclusive remedy for a plaintiff. *See, e.g., Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011)("[I]f the WPA does not apply, it provides no remedy and there is no preemption."); *Dolan v Continental Airlines*, 208 Mich App 316, 321; 526 NW2d 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).<sup>3</sup>

The *Rivera* Court's and Defendant's reliance on *McNeill-Marks* is inapposite based on one simple fact. In *McNeill-Marks*, the Court of Appeals found that the plaintiff had a remedy under the WPA, because the activity fell within the protection of the WPA and the public policy claim arose out of the same activity. *McNeill-Marks*, 316 Mich App at 26; 891 NW2d 528.

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<sup>3</sup> *See also Landin v HealthSource Saginaw, Inc*, 305 Mich App 519, 532; 854 NW2d 152 (2014); *Lewandowski v Nuclear Mgt*, 272 Mich App 120, 127-128; 724 NW2d 718 (2006); *Watkins v Metron Integrated Health Systems*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 28, 2012; 2012 WL 3705330 (Docket No. 304911); *Kendal v Integrated Interiors, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 15, 2009; 2009 WL 33241515 (Docket No. 283494); *Hall v Consumers Energy Co*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2006; 2006 WL 1479911 (Docket No. 259634); *Ciccarelli v Plastic Surgery Affiliates, PC*, unpublished opinion per curiam of the Court of Appeals, issued Mar. 27, 2001; 2001 WL 699094 (Docket No. 219780).

Because the *McNeill-Marks* plaintiff had a remedy under WPA, it was her exclusive remedy. Contrary to the facts of *McNeill-Marks*, in this case, the Court of Appeals found that the WPA provided no remedy; if it provided no remedy, under binding precedent of the Supreme Court, it could not have been an exclusive remedy, even if the conduct at issue was the same.<sup>4</sup> For this reason, the Court of Appeals decision must be reverse.<sup>5</sup>

**RELIEF SOUGHT**

Plaintiff respectfully requests that this Honorable Court grant 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: August 21, 2019

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<sup>4</sup> With the significant amount of case law on this issue, it is curious as to why the Court of Appeals would ignore the case law or, at the very least, attempt to distinguish it, which further raises questions about the panel failing to follow MCR 7.215.

<sup>5</sup> It should also be noted that the trial court specifically found that Plaintiff refused to conceal LS's criminal behavior for non-public bodies, which would also fall outside the scope of protection afforded by the WPA.

STATE OF MICHIGAN  
COURT OF APPEALS

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TRUDY CICCARELLI,  
Plaintiff-Appellee,

UNPUBLISHED  
March 27, 2001

v

PLASTIC SURGERY AFFILIATES, P.C., and  
HASHIM ALANI, M.D.,

No. 219780  
Oakland Circuit Court  
LC No. 97-000144-CZ

Defendants-Appellants.

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Before: Doctoroff, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment for plaintiff, conforming to a jury verdict rendered in this wrongful discharge action. The jury determined that defendants: (1) failed to properly compensate plaintiff for overtime hours, in violation of the Fair Labor Standards Act (FLSA),<sup>1</sup> 29 USC § 201 *et seq.*; (2) wrongfully discharged plaintiff in retaliation for filing a complaint with the United States Department of Labor (USDOL), in violation of well-established Michigan public policy; and (3) without good cause, discharged plaintiff from her just-cause employment status. We affirm in part, reverse in part, vacate in part, and remand.

Defendants first contend that plaintiff's implied cause of action for discharge in violation of public policy was precluded by the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, on the theory that the WPA provides the exclusive remedy for a discharge in retaliation for reporting violations of the FLSA. However, defendants did not assert this defense until almost four months after trial, when they attempted to file a nonconforming reply brief in support of their own post-trial motion for judgment notwithstanding the verdict, new trial, to amend the judgment or, in the alternative, remittitur. Defendants would have this Court excuse their failure to plead this defense, and not deem it to be waived pursuant to MCR 2.111(F), on the theories that the trial court lacked subject matter jurisdiction over plaintiff's claims, or that the exclusivity of the remedy in the WPA requires a determination that plaintiff

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<sup>1</sup> The FLSA provides concurrent federal and state jurisdiction over civil actions to recover damages for violations of, among other things, its provisions regarding payment for overtime. 29 USC §§ 207(a)(1) and 216(b).



failed to state a claim on which relief could be granted. See *Campbell v St John Hospital*, 434 Mich 608, 615-616; 455 NW2d 695 (1990).

Defendants' assertion that the trial court lacked jurisdiction over plaintiff's claim misapprehends the concept of subject matter jurisdiction. As the Supreme Court has repeatedly explained,

“[j]urisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.” [*Bowie v Arder*, 441 Mich 23, 39, 490 NW2d 568 (1992), quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254, 283 NW 45 (1938).]

This is not a case where a statutory provision expressly divests the circuit court of jurisdiction over plaintiff's class of claim and vests it with another tribunal. Compare *Harris v Vernier*, 242 Mich App 306, 312-313; 617 NW2d 764 (2000). Here, notwithstanding the particular facts of the case, the trial court clearly had subject matter jurisdiction to adjudicate implied causes of action for discharge in violation of public policy. See Const 1963, art 6, § 13; MCL 600.605; MSA 27A.605; *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982).

As for failing to state a claim on which relief can be granted, we first note that a *sine qua non* of any preclusion by the WPA would be the applicability of the express remedy of the WPA. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). Further, in order for the express remedy of the WPA to apply, a whistleblower's “report, or attempted report, must be made to a ‘public body.’” *Id.* at 74, n 3. That is, § 2 of the WPA provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362; MSA 17.428(2).]

“[W]hen a statute specifically defines a given term, that definition alone controls.” *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). Hence, despite the fact that the USDL may appear to be a “public body” in the general sense of the word, because it is

not a “public body” within the definition given by MCL 15.361(d); MSA 17.428(1)(d),<sup>2</sup> the WPA would be inapplicable to a discharge in retaliation for making a report to the USDL of an employer’s violations of the FLSA. Although defendants advance factual alternatives that would bring this case within the WPA, when deciding whether plaintiff pleaded a claim on which relief could be granted, we accept all well-pleaded allegations as true and draw all inferences in

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<sup>2</sup> MCL 15.361(d); MSA 17.428(1)(d) provides:

“Public body” means all 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.

(vi) The judiciary and any member or employee of the judiciary.

Except with regard to law enforcement agencies (and their members) and the judiciary (and its members), the definition of “public body” is expressly limited to bodies of *state* government or its political subdivisions. Further, under the rule of statutory construction known as *noscitur a sociis* (known by its associates), the law enforcement and judicial categories would also be limited to those of state or local government. See *The Herald Co v Bay City*, 463 Mich 111, 129-130, n 10; 614 NW2d 873 (2000). Moreover, even if *noscitur a sociis* were not dispositive of this potential ambiguity, the USDL would not qualify as a public body under the judicial or law enforcement prongs of the WPA by any definition of those terms known to Michigan law. Clearly, the USDL is not a public body within the meaning of the WPA. Accord, *Driver v Hanley (After Remand)*, 226 Mich App 558, 562-566; 575 NW2d 31 (1997).

plaintiff's favor. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). We hold that plaintiff did not fail to state a claim on which relief could be granted in this regard.

We also note that, had defendants raised this defense in a timely manner, plaintiff could have easily pleaded a violation of the WPA in the alternative. Hence, allowing defendants to belatedly raise this defense would be unfairly prejudicial to plaintiff. See *Meridian Mutual Ins Co v Mason-Dixon Lines, Inc (On Remand)*, 242 Mich App 645, 647-648; 620 NW2d 310 (2000). For this same reason, it would be unfairly prejudicial to plaintiff to now allow defendants to raise the defense that the FSLA, itself, provided her exclusive remedy. Consequently, we hold that defendants, by not pleading them, waived any defense that either the WPA or the FSLA provided plaintiff's exclusive remedy. MCR 2.111(F); *Campbell, supra* at 615-616.

We next address defendants' contention that there was insufficient evidence of a causal link between plaintiff's filing of a complaint with the USDL and her discharge to sustain her claim for wrongful discharge in violation of public policy. Our review of the record reveals that the timing of plaintiff's discharge was highly coincidental with her complaint to the USDL. Moreover, defendants' own separation from employment form indicates that plaintiff's discharge was predicated, in part, on information that plaintiff provided to her coworkers, which was then passed along to defendants. Plaintiff testified that, while on vacation, she told one of these coworkers that she had complained to the USDL. When viewed in the light most favorable to plaintiff, the circumstantial evidence was strong enough to create an issue of fact for the jury regarding whether defendants' discharge of plaintiff was causally related to her complaint to the USDL. See *Snell v UACC Midwest, Inc*, 194 Mich App 511, 514; 487 NW2d 772 (1992).

Defendants also argue that they are entitled to a new trial because the trial court abused its discretion in ruling that defendants could not call three of their four proposed witnesses, as a discovery sanction for defendants' failure to file a witness list. It is within a trial court's discretion to bar witnesses as a sanction for not filing a witness list; however, the exercise of such discretion requires the careful consideration of all of the circumstances in order to determine what sanction is just and proper. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). Although it does not appear that the testimony of these witnesses would have surprised plaintiff or worked any hardship on her, inasmuch as plaintiff attended their depositions, we are also mindful that defendants, despite having access to those same depositions, have failed to identify for the trial court, or for this Court, any testimony that would have altered the outcome of the case had they been given the chance to present it. Consequently, defendants have not established that a failure to reverse on this ground would be inconsistent with substantial justice. MCR 2.613(A); *Morrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

We next address defendants' assertions that the trial court erred by not directing a verdict, or granting JNOV, on plaintiff's claim for wrongful discharge from just-cause employment.

It is a settled tenet of Michigan law that employment contracts for an indefinite term produce a presumption of employment at will absent distinguishing features to the contrary. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). To overcome this presumption,

evidence may be produced that proves the existence of an express contract for a definite term or an express provision in a contract that forbids termination absent just cause. Proof of a promise of job security implied in fact, such as employment for a particular term or a promise to terminate only for just cause, may also overcome the presumption. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991). Furthermore, company policies and procedures may become an enforceable part of an employment relationship if such policies and procedures instill legitimate expectations of job security in employees. *Rood v General Dynamics Corp*, 444 Mich 107, 117-118; 507 NW2d 591 (1993). [*Dolan v Continental Airlines*, 454 Mich 373, 383-384; 563 NW2d 23 (1997).]

Plaintiffs' only basis for claiming to have had just-cause employment stems from two provisions in defendants' employee handbook, one of which establishes a probationary period for new hires, and a second that sets out a policy regarding discipline and lists infractions that will warrant oral counseling actions, or written conference actions, and states that a given number of such infractions within a specific period of time will warrant termination. However, what is conspicuously lacking from the handbook is any indication that these disciplinary policies are "all-inclusive." That is, as the Supreme Court has repeatedly pointed out, "a nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge, clearly reserves the right of an employer to discharge an employee at will." *Dolan, supra* at 388, quoting *Rood, supra* at 142. Consequently, the court should have directed a verdict for defendants, or granted JNOV, on this claim. Moreover, our decision in this regard renders moot the balance of defendants' arguments on appeal.

In sum, we affirm the judgment for plaintiff with regard to the awards for her FLSA claim and her public policy wrongful discharge claim. We reverse the judgment for plaintiff with regard to her claim for wrongful termination from just-cause employment. We vacate that portion of the judgment awarding statutory interest calculated on the previous awards, and we remand to the trial court to reassess interests and costs.

Affirmed in part, reversed in part, vacated in part and remanded for such other proceedings as are deemed necessary, consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Joel P. Hoekstra

STATE OF MICHIGAN  
COURT OF APPEALS

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WARREN HALL,

Plaintiff-Appellant,

v

CONSUMERS ENERGY COMPANY and PMC  
CONSTRUCTORS AND TECHNICAL  
SERVICES, LLC,

Defendants-Appellees.

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UNPUBLISHED  
May 30, 2006

No. 259634  
Charlevoix Circuit Court  
LC No. 03-176019-NZ

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition of his claims for retaliatory discharge in violation of public policy and the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.* We affirm the summary dismissal of plaintiff's claim under the WPA, but reverse and remand as to plaintiff's claim of wrongful discharge in violation of public policy.

Plaintiff worked for defendant PMC Constructors and Technical Services, LLC (PMC) as a carpenter at a nuclear power plant owned by defendant Consumers Energy Company. During his employment, plaintiff allegedly reported numerous regulatory safety violations to PMC management, including three written "condition reports" that PMC was required to forward to the federal Nuclear Regulatory Commission (NRC). PMC eventually laid plaintiff off, citing a lack of work.

After learning that PMC had retained less experienced carpenters, plaintiff filed the instant suit alleging that he was discharged for having raised and reported regulatory violations, in violation of both public policy and the WPA. Although plaintiff timely served PMC's registered agent by mail, the complaint erroneously named a different but similar entity and the agent returned the documents. Plaintiff thereafter filed and served an amended complaint, but after the 90-day limitations period set by the WPA had expired. See MCL 15.363(1). Finding that the WPA constituted the exclusive remedy for plaintiff's claim of retaliatory discharge but was time-barred, the trial court dismissed plaintiff's complaint.

On appeal, plaintiff argues that the trial court erred in granting summary disposition of his claim under the WPA. Because we conclude on review *de novo* that plaintiff was not

engaged in activity protected by the WPA, we disagree.<sup>1</sup> *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999) (a trial court's grant of summary disposition is reviewed de novo).

An employee is engaged in a protected activity under the WPA if he has reported or is about to report a suspected violation of a state or federal law, regulation, or rule to a public body. *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 610; 566 NW2d 571 (1997). A "public body" under the WPA is any body that is created or primarily funded by state or local authority, including a member of that body. See *Manzo v Petrella*, 261 Mich App 705, 713-714; 683 NW2d 699 (2004); see also MCL 15.361(d). Here, plaintiff alleged in his complaint that he was wrongfully discharged for having reported or attempted to report suspected nuclear regulatory violations to the NRC. Such activity involves the report or attempt to report allegedly unlawful conduct to a body created and funded by a federal, rather than state or local, authority. Thus, plaintiff was not engaged in activity protected by the WPA, i.e., the report of suspected unlawful conduct to a "public body," and the act is, therefore, inapplicable under the facts of this case. Summary disposition of plaintiff's claim under the WPA was therefore proper, as the act provides no remedy for his allegation of retaliatory discharge.

However, because the WPA provides no remedy for plaintiff's allegation of retaliatory discharge, the trial court erred in also dismissing plaintiff's claim that his discharge constitutes a violation of public policy. It is well settled that because the WPA represents Michigan's public policy against discharge for reporting suspected violations of law to a public body, any public policy claim of wrongful discharge arising from such activity is preempted by the WPA. See *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 70, 78-79; 503 NW2d 645 (1993) (the remedies provided by the WPA are exclusive, not cumulative). If, however, the WPA does not apply and provides no remedy, neither then can it be plaintiff's exclusive remedy. *Id.* at 80; see also *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997). Thus, where, as here, the WPA provides no remedy at all, it cannot constitute a plaintiff's exclusive remedy. *Driver, supra*. Consequently, the trial court erred in holding that the WPA precluded plaintiff's claim for retaliatory discharge in violation of public policy.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

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<sup>1</sup> Because the WPA is not applicable under the facts of this case, we do not address plaintiff's claim that the "relation back doctrine" operates to bring his amended complaint within the 90-day limitations period set by the act.

STATE OF MICHIGAN  
COURT OF APPEALS

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JAMES KENDALL,

Plaintiff-Appellant,

v

INTEGRATED INTERIORS, INC.,  
INTEGRATED ACOUSTICAL INTERIORS,  
INC., ROBERT PINGSTON, and JANET  
PINGSTON,

Defendants-Appellees.

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UNPUBLISHED

October 15, 2009

No. 283494

Wayne Circuit Court

LC No. 06-625156-NO

Before: Saad, C.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Plaintiff James Kendall filed this action alleging that he was wrongfully terminated from his employment with defendants,<sup>1</sup> contrary to public policy, for refusing to engage in illegal activity. Plaintiff also alleged that defendants violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.*, by knowingly placing false information in his personnel file. The trial court granted defendants’ motion for summary disposition. Plaintiff appeals as of right. We affirm.

I. Underlying Facts and Procedural History

Plaintiff was employed by Integrated, which served as a construction commodities manager for Visteon Corporation (Visteon) pursuant to a “blanket contract” executed in 2003. The contract provided that Integrated would purchase goods and services for Visteon’s plants from vendors and subcontractors and that Visteon would compensate Integrated for these

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<sup>1</sup> The corporate defendants, Integrated Interiors, Inc., and Integrated Acoustical Interiors, Inc., are related corporations. Apparently, plaintiff worked for one corporation but received his paycheck from the other corporation. For purposes of clarity, they are collectively referred to as “Integrated” in this opinion. Defendant Robert Pingston is an owner of the corporate defendants. Plaintiff concedes that defendant Janet Pingston is not a party to this appeal because the claims against her were resolved through case evaluation, MCR 2.403.

purchases at a markup of 2.75 percent. The submitted evidence indicates that Integrated regularly charged Visteon an hourly rate of \$45 for its services, subject to certain exceptions, but these terms were not specified in the blanket contract. The evidence also indicates that Visteon's plant engineers prepared all purchase orders, and that all Integrated's invoices to Visteon were subject to the engineers' approval.

In May 2003, Integrated hired plaintiff as a project manager for Visteon's Rawsonville and Ypsilanti plants. Plaintiff's immediate supervisor was Chris Bilitzke. Defendants contend that plaintiff failed to perform to expectations and, despite being given several chances to improve, did not do so. Plaintiff alleges that Integrated and Visteon's engineers "conspired" to defraud Visteon by submitting fraudulent invoices whereby Visteon was charged for higher amounts than were due under the blanket contract. Plaintiff's allegations of fraud fall into two categories: (1) that Integrated misrepresented amounts it was entitled to be reimbursed for payments to subcontractors, for example, by stating an original contract price in an invoice where the subcontractor gave Visteon a discount or charged Visteon less than the original estimate; and (2) that Integrated misrepresented charges for self-performed work, such as stating construction management charges for work not actually performed. Plaintiff acknowledges that Visteon's plant engineers knowingly approved all invoices, but contends that the engineers "conspired" with Integrated to defraud Visteon.

On September 8, 2008, plaintiff confronted Bilitzke about Integrated's billing practices in a telephone call that he recorded. Bilitzke denied any wrongdoing by Integrated and explained to plaintiff that Visteon's engineers had approved the billing practices to which plaintiff objected. The following day, Bilitzke terminated plaintiff's employment.

Plaintiff subsequently brought this action for wrongful discharge in violation of public policy, alleging that he was discharged for refusing to engage in illegal conduct. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), and the trial court granted defendants' motion. Plaintiff now appeals.

## II. Standard of Review

We review de novo a trial court's resolution of a motion for summary disposition. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). Defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). The trial court did not specify under which subrule it granted defendants' motion. Summary disposition may be granted under MCR 2.116(C)(8) if the nonmoving party "has failed to state a claim on which relief can be granted." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). Review of a motion under MCR 2.116(C)(8) is limited to the pleadings alone. *Id.* The factual allegations in the plaintiff's complaint must be accepted as true and construed in a light most favorable to the nonmoving party. *Id.* Summary disposition is appropriate only if the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), a court "must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party

opposing the motion” to determine if there is a genuine issue of material fact for trial. *Reed, supra* at 537.

### III. Wrongful Termination in Violation of Public Policy

In Michigan, employment is presumptively terminable at the will of either party. *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572; 753 NW2d 265 (2008). Plaintiff does not dispute that he was an at-will employee. Thus, his employment was terminable at will for any reason or no reason, unless termination was prohibited by statute or was contrary to public policy.<sup>2</sup> *Id.* at 572-573. Public policy proscribes termination of employment where the termination decision is motivated by one of three situations: (1) the employee acted in accordance with a statutory right or duty; (2) the employee failed or refused to violate a law in the course of employment; or (3) the employee exercised a right conferred by a well-established legislative enactment. *Id.* at 573. Only the second situation is at issue in this case.

A claim for termination of employment in violation of public policy must be based on an objective legal source establishing public policy. *Id.* Courts may not validate a public policy claim based on the subjective views of individual judges regarding what a policy ought to be. *Id.* The premise of plaintiff’s public policy claim is that Integrated’s billing practices were not authorized by the blanket contract with Visteon. However, because an objective source of public policy is required to establish plaintiff’s claim, plaintiff must demonstrate that Integrated’s billing practices violated established law, not merely that they appeared to be improper under the parties’ contract.

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<sup>2</sup> Defendants argued below that plaintiff’s public policy claim is preempted by the Whistleblowers’ Protection Act (“WPA”), MCL 15.361 *et seq.* The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body. MCL 15.362-15.363; *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). The WPA provides the exclusive remedy for such a retaliatory discharge, and consequently preempts common-law public policy claims arising from the same activity. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 78-79; 503 NW2d 645 (1993), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589, 595 n 2; 734 NW2d 514 (2007). However, if the WPA does not apply, it provides no remedy and thus there is no preemption. *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997).

Plaintiff argues against preemption on appeal. Although defendants contend that plaintiff’s preemption argument is not properly before this Court because it is not included in the statement of questions presented, defendants do not address the substance of the issue in their brief. Further, the trial court did not decide this issue. Because the trial court did not address the issue and defendants do not raise the issue as an alternative ground for affirmance, this issue is not properly before us. We note, however, that plaintiff’s complaint alleges that he was terminated from his employment for refusing to participate in illegal activity, not in retaliation for reporting or planning to report a suspected violation to a public body. Thus, plaintiff’s claim is not within the scope of the WPA and, accordingly, there is no preemption.

Plaintiff relies on various criminal statutes proscribing theft, embezzlement, and larceny as his objective source of public policy. However, the statutes prohibiting embezzlement, MCL 750.174, MCL 750.181, and MCL 750.182, are not applicable to defendants' alleged conduct because each of these statutes requires that a criminal defendant lawfully possess the victim's property before converting it to his own use. Plaintiff does not allege that defendants lawfully acquired Visteon's money or property and then wrongfully converted it to their own use. The larceny statutes cited by plaintiff, MCL 750.356 and MCL 750.360, also do not apply because plaintiff does not allege that Integrated took money or property without Visteon's consent. See *People v Manning*, 38 Mich App 662, 665; 197 NW2d 152 (1972). The criminal statute that most closely applies to defendants' alleged conduct is MCL 750.218, larceny by false pretenses, which provides, in pertinent part:

(1) A person who, with the intent to defraud or cheat makes or uses a false pretense to do 1 or more of the following is guilty of a crime punishable as provided in this section:

\* \* \*

(c) Obtain from a person any money or personal property or the use of any instrument, facility, article, or other valuable thing or service.

The elements of this offense are "(1) a false representation concerning an existing fact, (2) knowledge by the defendant of the falsity of the representation, (3) use of the representation with intent to deceive, and (4) detrimental reliance on the false representation by the victim." *People v Reigle*, 223 Mich App 34, 37-38; 566 NW2d 21 (1997).

In *People v Marks*, 12 Mich App 690, 692; 163 NW2d 506 (1968), this Court held that the crime of larceny by false pretenses was not committed when the defendant charged a client \$600 for a chimney repair with a market value of \$25 because "[a]n essential element of the crime is a fraudulent misrepresentation, and the gross overcharge does not constitute fraudulent misrepresentation." However, in *People v Wilde*, 42 Mich App 514, 518-519; 202 NW2d 542 (1972), this Court distinguished between an overcharge that inflates the value of a service and an overcharge that falsely represents that a service was performed. The Court explained:

The defendant's conduct in *Marks* was considered reprehensible because it involved a misrepresentation of the value of the services rendered. Yet, the *Marks* Court did not find such a misrepresentation sufficient to be fraudulent and violate the statute. The reason underlying this variance can be found in the distinction between opinions and facts. The defendant's misrepresentation of value in *Marks* merely involves an inflated opinion as to the value of his services. Each citizen is capable of protecting himself since he is placed upon notice that the representation is based upon an opinion which is subject to distortion or deceit. As offensive as cases involving people being duped by gross misrepresentations of value may be, the Legislature has failed to make such chicanery a crime. Thus, the label "overcharge" is applied to those cases involving indefensible departures in a person's opinion of the value of his services from the established standard.

Misrepresentations of fact, on the contrary, offer an area for abuses in which the State should enter. Persons relying upon misrepresentations of fact are no longer placed upon notice that the inducement is subject to the speaker's whim or caprice since they are regarded as truths. The confidence placed in alleged facts and the diminished ability of people to protect themselves against fabricated facts require criminal sanctions to diminish the number of frauds. This distinction between misrepresentations of opinion and fact provide the vehicle for distinguishing between "overcharges" and false pretenses. [*Id.* at 518-519.]

The Court held that an inflation of prices for necessary repair work fell within the opinion category, but an estimate for a non-existent repair constituted false pretenses. *Id.* at 519. However, the Court in *Wilde* determined that the offense of false pretenses was not committed because there was no element of reliance by the victim where the insurance carrier discovered the fraudulent act before paying the inflated repair cost, but paid it anyway, because "[t]he subsequent payment of the fraudulent estimate cannot now be said to constitute reliance." *Id.* at 520-521.

In *People v Schieda*, 99 Mich App 420, 422; 297 NW2d 688 (1980), this Court further addressed the question of reliance where the victim had notice that the defendant was fraudulently seeking payment for work not completed. In *Schieda*, the defendant contractor billed the city of Westland for the installation of 13 sewer leads even though he had completed only nine. *Id.* The city's engineering firm submitted an inspection report stating that the project was not completed, but the city paid the defendant's invoice without regard to this report. *Id.* The defendant argued that the element of reliance was not proven because the city received information that the work was incomplete, but paid him anyway. *Id.* A majority of this Court rejected this argument, noting that

neither . . . the superintendent of the Department of Public Services for the city, nor . . . the engineering aide who approved defendant's invoice, nor . . . the city treasurer who paid it, had knowledge that only 9 of the 13 jobs invoiced by defendant had been completed and, further, that all of these agents of the city relied upon defendant's representation that he had completed all 13 jobs in approving payment. This evidence was sufficient to sustain the conviction. [*Id.* at 423-424.]

The Court commented that the engineering aide "may have acted imprudently in approving defendant's invoice without checking the inspection reports," but concluded that his negligence was not a defense. *Id.* at 423.

Judge T. M. Burns dissented from the majority's decision in *Schieda*. Relying on agency principles, he concluded that because the city delegated to the engineering firm the responsibility of inspecting the construction work, the city was charged with the knowledge that the work was unfinished, despite whether the particular individuals who paid the invoice had that knowledge. *Id.* at 425. Consequently, Judge Burns concluded that the reliance element was not satisfied. *Id.* at 426.

These cases establish that a contracting party commits larceny by false pretenses when it factually misrepresents the work completed in order to obtain unearned payment from the other contracting party. In particular, the *Schieda* Court held that the existence of a contract between the defendant and the city did not shield the defendant from criminal liability for misrepresenting his completion of work.

In this case, plaintiff alleges two categories of fraudulent acts: (1) misrepresentations of the amount that Integrated paid to subcontractors for work performed on Visteon's behalf; and (2) misrepresentations of the amounts that Visteon owed Integrated for Integrated's work. Plaintiff's documentary evidence shows that Integrated's invoices for reimbursement of amounts paid to subcontractors stated the original quoted prices by the subcontractors, instead of the actual cost to Integrated after price discounts or adjustments. These documents raise a genuine issue of material fact whether Integrated misrepresented the amounts that it paid to subcontractors when seeking reimbursement from Visteon.

Plaintiff also alleged that Integrated's invoices misrepresented the amounts that Visteon owed Integrated for its work by listing improper charges as management fees or by charging an amount that was higher than the proper amount allowed under the blanket contract. Plaintiff's allegations, accepted as true, involve misrepresentations of fact. However, the question whether the billings were fraudulent depends on the terms of the contract. Plaintiff failed to establish a genuine issue of material fact with regard to this category of challenged billings. Although plaintiff alleges that Integrated's invoices exceeded the amount permitted under the blanket contract, he has failed to identify a contractual breach. It is not apparent from the face of the blanket contract that the billing amounts violated the contract. Plaintiff's reliance on the deposition testimony of Joseph Bleau, whom he merely refers to as a "Visteon representative," does not provide support for plaintiff's argument that the charges were not permitted by the blanket contract. Plaintiff does not identify the nature of Bleau's relationship or association with Visteon, nor is that information apparent from the record. Plaintiff has not provided any foundation for Bleau's qualifications to testify about the blanket contract.

Furthermore, with respect to both categories of allegedly fraudulent billing practices, Integrated's conduct would not constitute larceny by false pretenses unless Visteon relied on the allegedly false representations to its detriment. Here, the submitted evidence indicates that Visteon's engineers knowingly consented to Integrated's methods of calculating its fees for self-performed services. In addition, even if the charges can be considered in excess of Visteon's obligations under the blanket contract, Visteon and Integrated were free to modify or waive the contract through their course of conduct. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003). The Visteon engineers' approval of Integrated's billing practices shows that Visteon knew of and consented to Integrated's billing methods, both for reimbursement of payments to subcontractors and for payments for Integrated's services.

Plaintiff does not dispute defendants' claim that Visteon's engineers had full knowledge of Integrated's billing methods and practices when they approved the invoices. Instead, plaintiff

asserts that Visteon's engineers actively "conspired" with Integrated. According to the majority decision in *Schieda, supra* at 423, this would not preclude a finding of reliance if the individuals responsible for paying Integrated's invoices were unaware of the alleged "conspiracy."<sup>3</sup> However, we agree with Judge Burns's dissenting opinion in *Schieda* with regard to this issue.<sup>3</sup> His opinion is consistent with the doctrine of imputed knowledge, which generally provides that a corporation possesses the sum total of all the knowledge acquired by its officers and agents while acting under and within the scope of their authority. *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 134; 762 NW2d 178 (2009). Although an exception to the doctrine of imputed knowledge exists where an agent acts in his own interests, adversely to his principal, *id.*, plaintiff here failed to present any evidence that the Visteon engineers were acting in their own interests, adversely to Visteon, when approving or consenting to Integrated's billing methods. In sum, plaintiff failed to establish a genuine issue of material fact regarding whether Integrated's billing methods or practices amounted to larceny by false pretenses. This failure of proof in turn defeats plaintiff's claim that he was discharged for refusing to violate the law, because no violation was taking place.

Plaintiff's reliance on the recorded telephone conversation with Bilitzke also fails to provide support for plaintiff's arguments that Bilitzke admitted that Visteon's billing methods and practices were illegal, or that Integrated expected plaintiff to prepare false billings in furtherance of ongoing theft. Plaintiff relies on an isolated statement in which Bilitzke remarked, "It's stealing with their permission." Viewed in the context of the entire conversation, however, it is clear that Bilitzke was responding to plaintiff's characterization of Integrated's practices as "stealing" and explaining that there was no wrongdoing because Visteon's engineers had knowingly approved Integrated's charges. Bilitzke's comments, "we don't steal," "[w]e're putting an honest effort," "we're just getting paid a different way," and "that's how you're interpreting it," all reflect disagreement with plaintiff's perception of the situation.

We also disagree with plaintiff's argument that the trial court erroneously stated that a claim for wrongful discharge in violation of public policy required that plaintiff prove beyond a reasonable doubt that a crime was committed. Plaintiff mischaracterizes the trial court's statements. The court merely held that plaintiff's evidence failed to show that Integrated's conduct could be considered illegal. The court did not state that plaintiff was required to establish a criminal violation beyond a reasonable doubt in order to prevail on a claim for wrongful discharge in violation of public policy.

Plaintiff also argues that the trial court erred in applying *Piasecki v City of Hamtramck*, 249 Mich App 37; 640 NW2d 885 (2001). In *Piasecki*, the plaintiff brought an action for discharge in violation of public policy against the defendant city, alleging that she was dismissed from her position as the defendant's director of income tax after refusing the mayor's request to release information that she believed was protected by a confidentiality provision in a city ordinance. *Id.* at 38-39. The *Piasecki* Court held that the defendant was entitled to summary

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<sup>3</sup> Because *Schieda* was decided before November 1, 1990, it is not binding under MCR 7.215(J)(1).

disposition because the confidentiality provision provided an exception “for official purposes in connection with the administration of the ordinance.” *Id.* at 41-43. The Court concluded that the mayor’s request was authorized by this exception. *Id.* at 42-43.

Defendants argue that under *Piasecki*, a plaintiff’s mere belief that an employer’s instructions are illegal is insufficient to establish an employment public policy claim if the conduct involved is not actually illegal. Plaintiff argues that *Piasecki* should be applied narrowly, barring a public policy claim only if the allegedly illegal conduct is specifically authorized by law. We agree with defendants. In *Kimmelman, supra* at 573, this Court stated:

Our Supreme Court’s enumeration of “public policies” that might forbid termination of at-will employees was not phrased as if it was an exhaustive list. However, as a general matter, “the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of the individual judges.” *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) (emphasis in original), citing *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803).

The requirement that a discharge must be in violation of an objective legal source of public policy negates plaintiff’s argument that a cause of action for discharge in violation of public policy should encompass claims by employees who are discharged for refusing to follow instructions that they merely “reasonably believe” involve illegal activity. There is no objective public policy basis for protecting employees who refuse their employer’s instructions to commit legal acts. Criminal statutes objectively establish public policies, whereas employees’ mistaken beliefs regarding criminality are entirely subjective.

In sum, plaintiff failed to establish a genuine issue of material fact with respect to his claim that he was discharged for refusing to participate in illegal activity. Thus, defendants were entitled to summary disposition under MCR 2.116(C)(10). In light of this decision, it is unnecessary to address plaintiff’s argument regarding Robert Pingston’s individual liability.

#### IV. Bullard-Plawecki Employee Right to Know Act

The trial court also granted defendants summary disposition with respect to plaintiff’s claim under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.* Plaintiff alleged that defendants violated the statute by placing false information in his personnel record and that he was entitled to have the false information expunged.

MCL 423.505 provides:

If there is a disagreement with information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee’s position. The statement shall not exceed 5 sheets of 8½-inch by 11-inch paper and shall be included when the information is divulged to a third party and as long as the original information is a part of the file. If either the employer or employee

knowingly places in the personnel record information which is false, then the employer or employee, whichever is appropriate, shall have remedy through legal action to have that information expunged.

We disagree with defendants' assertion that plaintiff was required to pursue the statutory procedure for submitting a written statement before pursuing expungement. The written-statement procedure applies whenever the employee disagrees with information in the file and an agreement regarding correction of this information is not otherwise reached. It does not apply if an employer knowingly places false information in the file; in that circumstance, the statute authorizes "remedy through legal action." In this case, however, plaintiff failed to provide factual support for his claim that defendants knowingly placed false information in his file. Instead, plaintiff merely observes that there are some discrepancies between Bilitzke's notes and statements regarding various dates, such as when Bilitzke warned plaintiff that he was receiving a final chance to improve his performance. Plaintiff's evidence does not show that false information was knowingly placed in his file. Thus, plaintiff is not entitled to the remedy of expungement.

Affirmed.

/s/ Henry William Saad  
/s/ Peter D. O'Connell  
/s/ Brian K. Zahra

STATE OF MICHIGAN  
COURT OF APPEALS

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WILLIAM M. PASQUALE,

Plaintiff-Appellant,

v

ALLIED WASTE SERVICES, INC, d/b/a GREAT  
LAKES WASTE SERVICES,

Defendant-Appellee.

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UNPUBLISHED  
November 9, 2004

No. 249110  
Oakland Circuit Court  
LC No. 2002-043532-NZ

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

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition in this action alleging age discrimination and retaliatory discharge. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To establish a prima facie case of discrimination, plaintiff must prove by a preponderance of the evidence that (1) he was a member of the protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). If a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. Once the defendant produces such evidence, the burden of proof shifts back to the plaintiff to show that the proffered reasons were a mere pretext for discrimination. *Id.* at 173-174. Disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if the disproof raises a triable issue that discriminatory animus was a motivating factor underlying the adverse employment action. *Id.* at 175.

Plaintiff's sole direct evidence of discriminatory animus is that his district manager asked him his age during lunch and the same manager attempted to convince another individual who was forty-seven years old to remain in defendant's employment because of the limited opportunities for employment outside the company. Isolated or vague remarks made outside the context of the termination are not probative of an employer's discriminatory motive. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 300; 624 NW2d 212 (2001). Here, the remarks do not show any animus. Awareness of an employee's age does not show that age was a factor in a dismissal. Similarly, an observation about difficulties of an older employee finding work is not probative of the speaker's animus.

Plaintiff's poor performance on the job can preclude him from making a prima facie case or rebutting an inference of discrimination. *Lytle, supra*. While plaintiff argues that evidence against him was manufactured because he had not seen it before, plaintiff also concedes that there were areas where his performance was deficient. Plaintiff failed to rebut the reasons given for his termination, and he did not present any evidence that would show that his termination was motivated by discriminatory animus.

A cause of action for retaliatory discharge is based on the principle that some grounds for discharge are so contrary to public policy as to be actionable. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). A public policy claim is sustainable only where there is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). A public policy claim can be found where an employee is discharged because he or she refused to violate the law, or where an employee is discharged for exercising a right conferred by a well-established legislative enactment. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 484; 516 NW2d 102 (1994).

Plaintiff's retaliatory discharge claim is based only on his internal complaints about violations, and thus are not covered by the Whistleblower's Protection Act, MCL 15.361, *et seq*. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373; 563 NW2d 23 (1997). Plaintiff never reported the violations to anyone outside the company. He presented no evidence that could show that his internal complaints were protected by public policy or that he was discharged due to those complaints. The trial court properly granted summary disposition to defendant.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski

STATE OF MICHIGAN  
COURT OF APPEALS

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JENNIFER WATKINS,

Plaintiff-Appellant,

v

METRON INTEGRATED HEALTH SYSTEMS,  
MIKO ENTERPRISES, INC., METRON OF  
FOREST HILLS, and CASCADE CARE  
CENTER, INC.,

Defendant-Appellees.

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UNPUBLISHED

August 28, 2012

No. 304911

Kent Circuit Court

LC No. 09-009596-NZ

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case arises from an employment action in which plaintiff alleges she was terminated from employment with defendant. Plaintiff’s lawsuit listed five counts: Violation of the Michigan Whistleblowers’ Protection Act (WPA), “Violation of the Bullard Plawescki (sic) Employee Right to Know Act”, wrongful termination, defamation and intentional infliction of emotional distress. Plaintiff appeals as of right from the trial court’s order granting defendants’ motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was an at-will employee of Metron of Forest Hills (“Metron”), a private nursing home. Plaintiff had been “written up” on several occasions prior to being terminated. One such instance occurred on April 29, 2009, when plaintiff’s supervisor, Laura Christian, gave her a disciplinary notice for improperly transferring a resident without using a Hoyer pad. On the section of the notice for employee comments, plaintiff wrote that there were no Hoyer pads available. Plaintiff then made a copy of her disciplinary notice and gave the original notice back to Christian. On May 13, 2009, the Michigan Department of Health and Human Services (DHHS) surveyed Metron and requested documents relating to a sampling of residents, including the resident who plaintiff improperly transferred. Metron gave those records, including plaintiff’s notice containing her notation regarding the alleged shortage of Hoyer pads, to the DHHS. On June 16, 2009, plaintiff’s work duties required her to obtain and record the weekly weights of certain residents, but plaintiff neglected to record these weights in the weight book. Thereafter, on June 18, 2009, Metron fired defendant, citing her April 29, 2009, failure to use a Hoyer pad and her June 16, 2009, failure to record the weekly weights of her assigned residents. Plaintiff subsequently sued defendants as outlined above and defendants then moved for

summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition and dismissed the plaintiff's claims regarding the WPA and wrongful termination and Plaintiff stipulated to dismissing the remaining claims.

Plaintiff argues that the trial court erred by ordering this dismissal. We disagree. "We review de novo the decision of the trial court on the motion for summary disposition." *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the case. The moving party is entitled to a grant of summary disposition if the party demonstrates that no genuine issue of material fact exists." *McGrath v Allstate Ins Co*, 290 Mich App 434, 438 n 1; 802 NW2d 619 (2010) (citation omitted).

Plaintiff first argues that the trial court erred by granting summary disposition of her WPA claim. The WPA provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee, or a person acting on behalf of the employee, reports or is about to report . . . 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 . . . or because an employee is requested by a public body to participate in an investigation . . . [MCL 15.362.]

"To establish a prima facie case under the WPA, plaintiff must show that (1) she was engaged in a protected activity as defined by the act, (2) the defendants discharged her, and (3) a causal connection existed between the protected activity and the discharge." *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000). "'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." *Id.* One is deemed to have reported a violation under the WPA when one "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 violation." *Henry v Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999).

In this case, plaintiff argued that she engaged in "protected activity" by noting on her disciplinary notice the shortage of Hoyer pads and then giving her notice to Metron. Defendant, not plaintiff, then gave her notice to a public body, i.e., the DHHS. Plaintiff acknowledged that she never gave the DHHS her notice or otherwise attempted to notify the DHHS about Metron's alleged shortage of Hoyer pads, but merely reported the alleged shortage to Metron. While plaintiff argued in her motion for reconsideration that Metron constituted a "public body" under the WPA because it was primarily funded through Medicare and Medicaid payments, plaintiff never raised this argument until after the trial court had granted summary disposition. Moreover, plaintiff did not present any evidence to support that Metron was in fact primarily funded

through Medicare or Medicaid. Accordingly, we find that the trial court did not err by finding that plaintiff did not report the alleged shortage to a “public body” by giving her notice to Metron. *Roulston*, 239 Mich App at 279; MCL 15.361. We also find that no question of material fact existed as to whether Metron reported the alleged shortage of Hoyer pads to the DHHS on her behalf. While plaintiff claimed that she made her notation after Christian indicated that Metron would report the incident to the DHHS, plaintiff also acknowledged that she did not know what Metron did with her notice or how it ended up on file with the DHHS. The record indicated that Metron only gave the DHHS plaintiff’s disciplinary notice when the DHHS requested records pursuant to its survey of Metron. Accordingly, we find that plaintiff did not present sufficient evidence to create a material question of fact for trial regarding whether she, or Metron acting on her behalf, took the initiative to report the alleged violation to the DHHS and, thus, she failed to establish a prima facie case under the WPA and summary disposition of her WPA claim was proper. *Roulston*, at 279, 281-282.

Plaintiff next argues that the trial court erred by granting summary disposition of her claim of wrongful termination in violation of public policy. Employment at will is “terminable at any time and for any – or no – reason, unless that termination was contrary to public policy.” *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572-573; 753 NW2d 265 (2008). “[T]he proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.” *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) (emphasis in original) (citation omitted). “Consistently with this principle that the courts may only derive public policy from objective sources, our Supreme Court’s enumerated ‘public policies’ in the context of wrongful termination all entail an employee exercising a right guaranteed by law, executing a duty required by law, or refraining from violating the law.” *Kimmelman*, 278 Mich App at 573.

[I]f a statute provides a remedy for a violation of a right, and no common-law counterpart right exists, the statutory remedy is typically the exclusive remedy. Moreover, an employee has no common-law right to avoid termination when he or she reports an employer’s violation of the law. In other words, a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue. [*Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 127; 724 NW2d 718 (2006) (citation omitted).]

The trial court found that although plaintiff could not make a prima facie case under the WPA, the WPA was nevertheless plaintiff’s exclusive remedy and granted summary disposition of plaintiff’s wrongful termination claim on that basis. We agree with the trial court’s grant of summary disposition, but not its basis. See *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998) (this Court may affirm a trial court’s decision if the trial court reached the correct outcome, albeit for a different reason). In *Driver v Hanley (After Remand)*, 226 Mich App 558, 560; 575 NW2d 31 (1997), we addressed a similar situation wherein the plaintiff sued its employer for violation of the WPA and violation of public policy against retaliatory, or wrongful, discharge. The trial court in *Driver* granted the defendants’ motion for summary disposition of the plaintiff’s WPA claim based on its finding that the plaintiff did not report the alleged violation to a “public body.” *Id.* at 561. This Court affirmed the trial court’s dismissal of the plaintiff’s WPA claim, but found that such a ruling prevented the

WPA from being the plaintiff's exclusive remedy: "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." *Id.* at 566. In this case, we similarly find that the trial court's finding that plaintiff did not report the alleged violation to a "public body" under the WPA precludes the WPA from being her exclusive remedy and summary disposition is improper on that basis. *Id.*

However, we nevertheless find that summary disposition of plaintiff's public policy/wrongful termination claim is appropriate in this case because plaintiff failed to establish that her claim "derived from an objective source." *Kimmelman*, 278 Mich App at 576. In this case, plaintiff sought to establish that Metron wrongfully discharged her for executing a duty required by law. *Id.* 573. Specifically, plaintiff argued that Metron discharged her because she reported the shortage of Hoyer pads as required by MCL 333.21771(6). MCL 333.21771 addresses mistreatment of nursing home residents by their caregivers and requires nursing home employees to report acts of abuse, mistreatment, or harmful neglect. MCL 333.21771(1) and (2). MCL 333.21771(6) prohibits employers from firing an employee for reporting such an act. However, it is clear that any alleged shortage of Hoyer pads did not constitute an act of abuse, mistreatment, or harmful neglect against a resident as contemplated under MCL 333.21771. Thus, plaintiff did not establish that she was fired for executing a duty required by law. *Kimmelman*, 278 Mich App at 573. Accordingly, plaintiff fails to establish that her public policy/wrongful discharge claim derived from an objective source and, thus, summary disposition is appropriate on this basis. *Id.*

We note that plaintiff also argues that the trial court's discovery rulings constituted an abuse of discretion that hindered her ability to present her prima facie case. However, we need not address this issue as plaintiff failed to properly present this issue for appeal because she did not include it in her statement of the questions presented. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 146; 807 NW2d 866 (2011). Moreover, we find this argument to be without merit, as plaintiff has not properly articulated "what material facts . . . [were] likely to be found by additional discovery." *Vanvorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004).

Affirmed.

/s/ Jane E. Markey

/s/ Amy Ronayne Krause