

STATE OF MICHIGAN  
IN THE SUPREME COURT

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LINDA RIVERA,	) Supreme Court No. 159857
	) Court of Appeals No. 341516
	) Case No. 16-031756-NZ-1
Plaintiff / Appellant,	)
v	)
	)
SVRC INDUSTRIES, INC.,	)
	)
Defendant / Appellee.	)

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**DEFENDANT/APPELLEE SVRC INDUSTRIES, INC BRIEF IN RESPONSE TO  
PLAINTIFF/APPELLANT'S SUPPLEMENTAL BRIEF**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF QUESTIONS PRESENTED**

- I. WHETHER THE RECORD SUPPORTS PLAINTIFF’S CONTENTION THAT HER COMMUNICATION WITH DEFENDANT’S CHIEF OPERATING OFFICER DEMONSTRATED THAT SHE WAS ‘ABOUT TO REPORT’ A VIOLATION OR A SUSPECTED VIOLATION OF LAW?

Plaintiff / Appellant would answer: “Yes.”  
Defendant / Appellee would answer: “No.”

- II. WHETHER PLAINTIFF’S COMMUNICATIONS WITH DEFENDANT’S COUNSEL CONSTITUTED A ‘REPORT’ PURSUANT TO MCL 15.362 WHERE (A) DEFENDANT’S COUNSEL INITATED CONTACT WITH PLAINTIFF (RATHER THAN PLAINTIFF CONTACTING HIM), AND (B) DEFENDANT’S COUNSEL WAS AWARE OF PLAINTIFF’S ALLEGATIONS PRIOR TO THEIR CONVERSATION?

Plaintiff / Appellant would answer: “Yes.”  
Defendant / Appellee would answer: “No.”

- III. WHETHER THE WHISTLEBLOWERS’ PROTECTION ACT (MCL 15.361 *et. seq.*) IS PLAINTIFF’S EXCLUSIVE REMEDY IN THIS CASE?

Plaintiff / Appellant would answer: “No.”  
Defendant / Appellee would answer: “Yes.”

- IV. WHETHER THE RECORD SUPPORTS PLAINTIFF’S CONTENTION THAT HER PROTECTED ACTIVITY CAUSED HER FIRING, THAT IS, WHETHER PLAINTIFF HAS SUFFICIENT EVIDENCE BEYOND TEMPORAL PROXIMITY OF THE EVENTS TO SHOW CAUSATION?

Plaintiff / Appellant would answer: “Yes.”  
Defendant / Appellee would answer: “No.”

## STATEMENT OF FACTS

Plaintiff/Appellant's ("Plaintiff") supplemental brief sets forth several "facts" and arguments that are not supported by the record that must be distinguished herein.

Plaintiff was employed with SVRC as the Director of Industrial Operations in the manufacturing division. (Plf's Dep Transcript, Def's Appx. Vol 1, at pg. 31b). Her position related to the economic and financial health of SVRC. (Director of Industrial Operations Job Description, Def's Appx., Vol 1 at pg. 118b). Just after one year on the job, Plaintiff was issued a Notice of Permanent Layoff on October 6, 2016 for economic reasons. (Notice of Permanent Layoff, Def's Appx., Vol 1 at pg. 236b). In her supplemental brief, Plaintiff blatantly ignores the fact that there is evidence of the economic downturn at SVRC. During the time of Plaintiff's employment, SVRC suffered a loss of \$150,000.00 in total. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 129b). Relating to that sum, \$110,000 of the operating loss came from Plaintiff's division. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 153b). The loss was related to declining sales and the loss of important service contracts. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 129b-130b). In fact, while Plaintiff was employed overseeing some of the finances, SVRC saw a significant reduction in operating deficits from the year prior. (Sylvester Payne Dep Transcript, Def's Appx., Vol 2 at pgs. 261b-262b). The losses sustained by Plaintiff's division were confirmed by then-chairperson of SVRC's Board of Directors, Sylvester Payne. (Sylvester Payne Dep Transcript, Def's Appx., Vol 2 at pgs. 261b-262b). As a result of this financial condition, Plaintiff, as well as fourteen (14) other employees were placed on layoff status. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pgs. 129b-130b, 132b). Included in the layoffs was the Vice President of Human Resources. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pgs. 133b). While Plaintiff argues close temporal proximity to her alleged protected activity and her layoff, she distinctly ignores the fact, that one day prior to her layoff,

SVRC lost a critical industrial contract. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pgs. 149b). Finally, Plaintiff admitted that her layoff was based on economic reasons when she filed for unemployment benefits citing to "LACK OF WORK" as her reason for separation. (Unemployment Benefits Claim Form, Def's Appx., Vol 2 at pg. 273b).

Weeks prior to her layoff, Plaintiff, along with coworker Eve Flynn, were involved in a disciplinary meeting with then employee, "L.S."<sup>1</sup> (Plf's Dep Transcript, Def's Appx, Vol 1, at pg. 44b)( Debra Snyder Dep Transcript Def's Appx, Vol 1, at pg. 193b). Per the incident report filed by Plaintiff and Ms. Flynn, L.S. was disciplined for insubordination. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 139b).<sup>2</sup> During the disciplinary meeting, L.S. became upset and made comments of an inappropriate nature regarding his knowledge of firearms and that he was willing to use them in the event of a "revolution." (Plf's Complaint, Def's Appx, Vol 1 at pgs. 3b-4b); (L.S. Dep Transcript, Def's Appx, Vol 1 at pg. 293b). L.S.'s employment with SVRC was terminated because of this behavior. (Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 147b).

After the incident, Plaintiff spoke with Debra Snyder, SVRC's President and Chief Operating Officer ("COO") informing her of what happened. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 34b; 36b-38b; 53b; 58b; 74b). Plaintiff did not state her intention to file a police report herself. In fact, she has yet to produce any evidence that she told her employer that she intended to do so or threatened to do so. A text message conversation ensued between Ms. Snyder and Plaintiff. (Text Messages, Def's Appx., Vol 2 at pg. 325b).<sup>3</sup> The text message exchange clearly

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<sup>1</sup> For privacy purposes, the name is abbreviated throughout this brief.

<sup>2</sup> Despite Plaintiff's new allegations, L.S. was not disciplined for engaging in protected activity.

<sup>3</sup> The initial verbal conversation and subsequent text exchange are the only communications with Ms. Snyder. (Plf's Dep Trans, Def's Appx., Vol 1 at pg. 42).

demonstrates that Ms. Snyder communicated to Plaintiff that SVRC would not be filing a police report on the advice of its outside counsel, but that Plaintiff was free to do so if she wished. (Text Messages, Def's Appx., Vol 2 at pg. 328b-329b). Plaintiff testified at her deposition that this is what the text message meant. (Plf's Dep Transcript, Def's Appx., Vol 1 at pgs. 72b; 75b).

Q: Okay. What it really says is that Dean talked to SVRC's lawyer and he advised SVRC not to make a police report, isn't that what that says?

A: Yes.

Q: Not you, SVRC, they're the ones that got the advice, the attorney's not talking to you, is he?

A: No.

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Q: Okay. It doesn't say don't file a police report, does it?

A: No.

(Plf's Dep Transcript, Def's Appx., Vol 1 at pgs. 72b; 75b). Furthermore, she agreed that she was never barred or discouraged from filing a police report. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 75b). The text message exchange not only provides proof that her employer encouraged her to report if she wished to do so, but also shows that Plaintiff did not want to make a report on her own or file. (Text Messages, Def's Appx., Vol 2 at pg. 325b). After she was invited by Ms. Snyder to report for a PPO, Plaintiff again responded with frustration as to why SVRC would not be making a report. (Text Messages, Def's Appx., Vol 2 at pg. 328b-329b).

To this point, Plaintiff acknowledged that at no time after the alleged incident was Plaintiff making independent decisions to report.

Q: All right. Up to this point in time, there was nothing that would prohibit you from calling the police, whether SVRC wanted you to or not, right?

A: I was waiting to get some sort of direction from my supervisor.

(Plf's Dep Trans, Def's Appx., Vol 1 at pg. 76b); See also, (Plf's Dep Trans, Def's Appx., Vol 1 at pgs. 77b; 89b-90b). This is further evidence that she had no intent to make any report regarding the matter.

Plaintiff claims that she also spoke with colleagues, Eve Flynn and Jay Page regarding L.S.'s conduct. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 78b-79b; 62b; 113b) She does not provide any evidence that she informed either of these coworkers that she had any intent to report the incident to a public body, herself. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 78b-79b; 62b; 113b).

Subsequently, an investigation was conducted by outside counsel for SVRC. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 82b). Plaintiff testified that she provided a statement to the attorney, Mr. Mair. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 84b). Her complaint provides that she related the same information about L.S.'s conduct to counsel that she previously related to Ms. Snyder, i.e. the threatening statements made by L.S.. (Plf's Complaint, Def's Appx., Vol 1 at pg. 10b). Plaintiff was aware that the attorney was retained by SVRC and did not represent her. (Plf's Complaint, Def's Appx., Vol 1 at pgs. 56b; 59b-60b 75b). Plaintiff testified that in her discussions with Mr. Mair, she admitted that she wasn't sure what should happen to Lyle. (Plf's Dep Transcript., Def's Appx., Vol 1 at pg. 91b). Again, this is further evidence that she was not intending to report to the police herself.

Eve Flynn and Jay Page also participated in this investigation. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 69). It is undisputed that Mr. Page and Ms. Flynn continued to be employed by SVRC after the investigation. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 69). This evidence drastically calls into question any retaliatory motive by SVRC.

**LAW AND ARGUMENT**

**I. THE RECORD DOES NOT SUPPORT PLAINTIFF’S CONTENTION THAT HER COMMUNICATION WITH DEFENDANT’S CHIEF OPERATING OFFICER DEMONSTRATED THAT SHE WAS ‘ABOUT TO REPORT’ A VIOLATION OR A SUSPECTED VIOLATION OF LAW.**

The “plain language” of the WPA “restricts recovery under the act by requiring a nonreporting employee to establish being ‘about to’ report by offering clear and convincing evidence.” *Shallal v. Catholic Services of Wayne County*, 455 Mich. 604, 611 (1997)(citing MCL 15.363(4) (emphasis added)). “Clear and convincing is the most demanding standard applied in civil cases.” *In re Martin*, 450 Mich 204, 226-27 (1995). The evidence is clear and convincing when it:

Produce[s] in the mind of the trier of fact a firm belief as to 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 hesitating of the truth of the precise facts in issue. Evidence may be uncontroverted, and yet be clear and convincing. Conversely, evidence may be clear and convincing despite the fact that it has been contradicted.

*Id.*, quoting *In re Jobes*, 108 N.J. 394, 407-08 (1987). Plaintiff cannot establish her “about to report” claim by clear and convincing evidence.

“An employee is engaged in protected activity under the Whistleblowers’ Protection Act who has reported, *or is about to report*, a suspected violation of law to a public body.” *Shallal*, supra at 610(emphasis added). This Court 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.’” *Id.* at 612, quoting *Random House Webster’s College Dictionary* (1995) (emphasis added). To establish a claim for “about to report” the “employer is entitled to objective notice of a report or a threat to report by the whistleblower.” *Roulston v Tendercare, Inc.*, 239 Mich App 270, 279 (2000), quoting *Roberson v Occupational Health Ctrs of America, Inc*, 220 Mich App 322, 326 (1996). Finally, this Court explained:

This Court noted that the Whistleblowers' Protection Act's Main purpose is to alleviate 'the inability to combat corruption or criminally irresponsible behavior in the conduct of government or large businesses.' While employees are often in the best position to report violations of law, they are too frequently reluctant to do so for fear of retribution. The act prohibits future employer reprisals against whistleblowing employees **for the purpose of encouraging employees to report violations.**

*Shallal*, 455 Mich at 612, quoting *Dudewicz v Norris-Schmid Inc.*, 443 Mich 68, 75 (1993).

Plaintiff's Complaint alleges that she was laid off in violation of the WPA because she was "about to report" L.S.'s actions to the police. (Plf's Complaint, Def's Appx., Vol 1 at pg. 7b). However, there is no evidence in the record that she was "about to report" anything.<sup>4</sup> Rather, it is more than evident from the evidence set forth in the record that Plaintiff was merely discussing the option of filing the police report and conveying her opinion that SVRC should report. (Text Messages, Def's Appx., Vol 2 at pg. 325b). She did not express an opinion, or provide objective notice that *she* should report and was in fact on the verge of doing so. (Text Messages, Def's Appx., Vol 2 at pg. 325b). When Plaintiff was invited to report by Ms. Snyder, she questioned Ms. Snyder giving more reason to believe that she had no intent to report, herself. (Text Messages, Def's Appx., Vol 2 at pg. 329b-330b). This is true for all her alleged conversations including those with Ms. Snyder, Eve Flynn, Jay Page, and Sylvester Payne. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 78b-79b; 62b; 113b); (Text Messages, Def's Appx., Vol 2 at pg. 325b).

Plaintiff cites to several opinions that all contain one notable fact: *the Plaintiff clearly threatened or warned his/her employer that he/she was going to report.* This is a key distinction that is not present in this case. In *Shallal*, supra, the Court held that Plaintiff satisfied the condition of "about to report" under the Act when she confronted the wrongdoer, President of Defendant

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<sup>4</sup> Plaintiff cites to deposition testimony and conveniently cherry picks pages to support her position. When taking the deposition testimony as a whole, Plaintiff does not have any evidence that she was "about to report" L.S.'s actions.

employer, and warned him “**if you don’t straighten up . . . I will report [you]**’ *coupled with* her other actions.” 455 Mich. At 615. The other actions occurred prior to her termination and included discussions with colleagues about her intentions to report the wrongdoer. *Id.* at 614. In the unpublished opinion, *Fogwell v Klein*, Plaintiff, a dental hygienist, was concerned about her employer’s billing practices. Dkt. No. 223761 (Sept. 25, 2001); (*Fogwell v Klein*, Def’s Appx., Vol 2 at pg. 337b). The Court held that she “engaged in several activities that indicated she was about to report. (*Fogwell v Klein*, Def’s Appx., Vol 2 at pg. 337b). These activities included copying of records, attempts to contact the insurance hotline, and obtaining a complaint form.” (*Fogwell v Klein*, Def’s Appx., Vol 2 at pg. 337b). In addition, **Plaintiff also told her employer that she was taking these steps towards reporting** and voiced her concerns with the billing practices. (*Fogwell v Klein*, Def’s Appx., Vol 2 at pg. 337b). Similarly, in an Eastern District of Michigan Opinion, *Cooney v Bob Evans Farms, Inc*, the Plaintiff, a former Bob Evans employee, threatened her supervisor on two occasions that she would file a Complaint with the Michigan Department of Civil Rights. 645 F Supp 2d 620, 625-27 (ED Mich, 2009).<sup>5</sup> Plaintiff learned that coworkers were smoking marijuana in the parking lot prior to work. *Id.* at 624. After several weeks of contemplating whether to report their actions, the Plaintiff came forward and told coworkers. *Id.* at 625. One coworker relayed the message to the general manager. *Id.* An investigation ensued. *Id.* Plaintiff then reported to the assistant manager. *Id.* After reporting the incident, Plaintiff was suspended. *Id.* at 626. She threatened to report to the Michigan Department of Civil Rights. *Id.* When the investigation was complete, Plaintiff was terminated. *Id.* After her termination she again threatened to file a complaint with the Michigan Department of Civil Rights.

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<sup>5</sup> Federal court decisions are not binding on state courts. 365 Mich 191, 194 (1961) (“But when a federal court, even the Supreme Court, construes a state statute, the courts of that state are not bound by the federal Court’s construction.”)

*Id.* at 627. The Court held that she was “about to report” within the meaning of the WPA **when she threatened the general manager that she was going to file a formal complaint with the Michigan Civil Rights.** *Id.* at 630-631.

Unlike those cases, there is no evidence herein that Plaintiff warned or threatened to report anything within the purview of the WPA. Plaintiff also did not discuss with colleagues her intent to report. Rather, she discussed with colleagues her concerns with L.S.’s conduct and the need for SVRC to make a report. (Plf’s Dep Transcript, Def’s Appx., Vol 1 at pg. 34b; 78b-79b; 62b; 113b). As to Eve Flynn, Plaintiff vaguely mentioned a police report and her intent to discuss with Deb Snyder and Dean Emerson. (Plf’s Dep Transcript, Def’s Appx., Vol 1 at pg. 78b); (Flynn Dep Trans, Plf’s Appx., Vol 1 at pgs. 279a-280a). Clearly, Plaintiff’s discussions with Ms. Snyder show that she was asking why SVRC was not making a police report and her opinion that it should do so on its own behalf. (Plf’s Dep Transcript, Def’s Appx., Vol 1 at pg. 34b; 36b-38b; 58b); (Text Messages, Def’s Appx., Vol 2 at pg. 325b). In response, Plaintiff was advised by Ms. Snyder that she could request a personal protection order (“PPO”), which may require a police report.<sup>6</sup> (Text Messages, Def’s Appx., Vol 2 at pg. 325b). Plaintiff admits that she never contacted law enforcement even after Plaintiff was invited to report by Ms. Snyder. In fact, the text message in response again indicates only her opinion as to why SVRC is not reporting. (“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.”) (Text Messages, Def’s Appx., Vol 2 at pg. 330b-331b). This evidence only bolsters the fact that Plaintiff had no intent to make any report that would otherwise qualify as a protected activity as contemplated by the WPA. Likewise, Plaintiff

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<sup>6</sup> This evidence establishes the purpose of the WPA was fulfilled: “encouraging employees to report violations,” should they so desire.

testified that her discussions with Jay Page were about warning other employees and why she was being told not to make a police report. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 78b-79b).

Plaintiff admitted that she was never told she should not make a police report.<sup>7</sup>

Q: And it says, "Dean talked with the attorney and he said no police report. The attorney will be at SVRC at 8:30 Wednesday morning to talk with Lyle." That's what it says, doesn't it.

A: Yes.

Q: Okay. So it's not Deb telling you to call the police?

A: No.

Q: To not call the police, is it?

A: In her text she says the attorney and he said no police report.

Q: All right. So I don't see anything there that says Linda, don't call the police, it doesn't say that, does it?

A: She is communicating – no, you're right, it does not say those words.

Q: Okay. What it really says is that Dean talked to SVRC's lawyer and he advised SVRC not to make a police report, isn't that what that says?

A: Yes.

(Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 72b).

The instant case, is more akin *Hays v Lutheran Social Servs of Mich*, 300 Mich App 54 (2013). In *Hays*, the Plaintiff, a healthcare provider, called the police to inquire about alleged illegal activity by a client. *Id.* at 57. When asked if she wanted to make a report, she declined to do so. *Id.* She also discussed the client's drug use with her supervisor and coworkers. *Id.* Her employment was terminated when her employer learned that Plaintiff breached a client confidentiality agreement by disclosing a client's drug use. *Id.* at 57-58. The Court held that she did not satisfy the condition "about to report" because there was no evidence of an affirmative

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<sup>7</sup> Plaintiff testified that the text messages constitute the entirety of the conversation where she claims she was told not to make a police report, and now admits she was not told that. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 94b).

intent to *actually* report the client's actions. *Id.* at 63-64. Rather, “[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.* at 63. Moreover, she never threatened to report or take further action, unlike *Shallal*, *supra.* *Id.* at 63-64. The Court explained 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 64.

Here, Plaintiff discussed her opinions with COO Snyder regarding SVRC's intention or lack thereof to file a police report. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 34b; 36b-38b; 58b); (Text Messages, Def's Appx., Vol 2 at pg. 325b). Like *Hays* she was inquiring about the alleged illegal activity. (Text Messages, Def's Appx., Vol 2 at pg. 325b). Despite Ms. Snyder inviting Plaintiff to request a PPO and file a police report, Plaintiff never did so. (Text Messages, Def's Appx., Vol 2 at pg. 328b-329b); (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 84b). Rather, in response, she again conveyed her concern as to why SVRC would not be making out a police report. (Text Messages, Def's Appx., Vol 2 at pgs. 329b-330b). Plaintiff admitted that she was never told not to report. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 75b). Likewise, there is no evidence of an affirmative intent to actually report. Instead, the evidence points to the fact that Plaintiff did not want to make a police report herself. She was not independently making any decisions as to whether to report or not. (Plf's Dep Trans, Def's Appx., Vol 1 at pg. 76b-77b; 89b-90b).

Plaintiff also relies on *Campbell v G4s Secure Solutions*, a Sixth Circuit opinion holding that Plaintiff did not meet the clear and convincing standard that she was “about to report” allegations that two employees were falsifying records. 645 Fed. Appx., 506, 509-510 (2016). Plaintiff alleged in her Complaint that she felt an obligation to report the violations to the State of

Michigan Department of Labor and OSHA. *Id.* She also alleged in her complaint that she threatened to go to the legal authorities. *Id.* However, in her deposition, she admitted that she made no plans to report. *Id.* at 510. She visited the OSHA and MIOSHA websites, however, she did not investigate how to report a violation because her supervisor was going to take care of it. *Id.* In addition, she had not told anyone of her plan to report. *Id.*

Similarly, in this case, Plaintiff was expecting her employer to address the matter. (Plf's Dep Trans, Def's Appx., Vol 1 at pg. 76b-77b; 89b-90b). Plaintiff testified on numerous occasions that she was awaiting direction from her supervisor. (Plf's Dep Trans, Def's Appx., Vol 1 at pg. 76b-77b; 89b-90b). This direction included an invitation to make request a PPO, which may include a police report. (Text Messages, Def's Appx., Vol 2 at pg. 328b-329b). Plaintiff declined to do so. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 84b). Instead, she again voiced her opinion that SVRC should report. (Text Messages, Def's Appx., Vol 2 at pg. 329b-332b). Unlike *Campbell*, Plaintiff herein did not even take the additional steps to go to the legal authorities such as research or making phone calls. She also did not discuss with coworkers her plan to report.

In sum, there is insufficient evidence to support Plaintiff's contention that she was "about to report" to withstand the clear and convincing standard. All evidence supports the fact that she wanted SVRC to make a report. When invited to make a report herself, she not only failed to do so, but also questioned again why her employer was not making a report. Again, this only indicates to her employer that she was *not* intending to report herself. Unlike the cases cited by Plaintiff, she did not take any steps towards reporting or even threaten to report.

**II. PLAINTIFF'S COMMUNICATIONS WITH DEFENDANT'S COUNSEL DOES NOT CONSTITUTE A 'REPORT' PURSUANT TO MCL 15.362 WHERE (A) DEFENDANT'S COUNSEL INITATED CONTACT WITH PLAINTIFF (RATHER THAN PLAINTIFF CONTACTING HIM), AND (B) DEFENDANT'S COUNSEL WAS AWARE OF PLAINTIFF'S ALLEGATIONS PRIOR TO THEIR CONVERSATION.**

The WPA contemplates two types of whistleblowers: (1) the initiator and (2) the participators. *Henry v City of Detroit*, 234 Mich App 405, 410 (1999) (application for leave to appeal to the Supreme Court denied)<sup>8</sup>.

On the basis of the plain language of the WPA, we interpret a type 1 whistleblower to be 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 violation. In other words, we see type 1 whistleblowers as initiators, as opposed to type 2 whistleblowers who participate in a previously initiated investigation or hearing at the behest of a public body.

*Id.* The Act does not define the meaning of “report.” *McNeill-Marks v MidMich. Ctr. – Gratiot*, 502 Mich 851, 187 (2018) (ZAHRA, J., dissenting).<sup>9</sup> Therefore, the Court must employ the rules of statutory construction, including consulting a dictionary to determine the plain and ordinary meaning of “report.” *Quarters Restoration LLC*, 498 Mich 518, 529 (2015). The Court of Appeals, after consulting the dictionary, stated “[W]e 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 v SVRC Industries*, 327 Mich App 446, 463-64 (2019) (citing, *Random House Webster’s College Dictionary* (2000)). Similarly, Justice Zhara in his dissent explained,

Reading the WPA as a whole, the most pertinent definitions of the verb ‘report’ are ‘to denounce to a person in authority’ or ‘to make a charge of misconduct against.’ These definitions comport with the sentence structure of MCL 15.362: the whistleblower employee (subject) must *report* (transitive verb) an illegality (direct object) to a public body (indirect object). Thus, the ordinary meaning of ‘report’ under the WPA requires that the whistleblower employee intend to denounce an illegality or make a charge of misconduct to a ‘public body.’

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<sup>8</sup> Plaintiff attempts to argue that the Court of Appeals improperly relies on *Henry*, however, this case remains good law and is binding on the Court.

<sup>9</sup> Justice Zhara also noted that the Court of Appeals panel in *Henry v Detroit* “properly [gave] meaning to ‘report’ under the WPA. *McNeill-Marks v MidMich. Ctr. – Gratiot*, 502 Mich 851, 188 (2018) (ZAHRA, J., dissenting).<sup>9</sup>

*McNeill-Marks v MidMichigan Medical Center-Gratiot*, 502 Mich 851, 187 (2018)(dissenting). These definitions of “report” comport with the judicial application of the WPA. In *Henry v Detroit*, the Court held that Plaintiff did not “report” within the meaning of the WPA because the plaintiff “took no initiative to communicate the violation of a public body.” 234 Mich App 405, 411 (1999). These definitions correspond to the WPA and its purpose. *Shallal*, supra, 455 Mich at 612 (“encouraging employees to report violations.”) Herein, the Complaint is devoid of any allegations that fail to serve the purpose of the WPA. Plaintiff could not have been retaliated against for reporting to her employer the same information, twice, even if the one individual is broadly considered a “public body.”

In *McNeil- Marks v Mid-Michigan Medical Center-Gratiot*, the Court held that an attorney, as a member of the State Bar of Michigan, qualifies as a member of a “public body” within the meaning of the WPA. 316 Mich App 1, 21 (2016). In *McNeil-Marks*, the plaintiff “reported” to her personal attorney a violation of law, thereby qualifying as a protected activity, within the meaning of the WPA. *Id.* at 22-24. In this case, there is one notable distinction, the attorney *does not* represent the Plaintiff. (Plf’s Complaint, Def’s Appx., Vol 1 at pgs. 56b; 59b-60b 75b). Rather, he was retained by SVRC, plaintiff’s former employer. (Plf’s Complaint, Def’s Appx., Vol 1 at pgs. 56b; 59b-60b 75b). The Michigan Rules of Professional Conduct provides that, “A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.” MRPC 1.13. Therefore, there is no dispute that the attorney for SVRC did not represent Plaintiff, unlike *McNeil-Marks*.

Another notable distinction is that Plaintiff in *McNeil-Marks* took it upon herself to report a violation or suspected violation of a law, rule, or regulation to satisfy the protected activity. 316

Mich App at 22. Herein, Plaintiff was requested by her employer to meet with their attorney in connection with an internal investigation of employee misconduct. (Plf's Dep Trans, Def's Appx., Vol 1 at pg. 82b); (Text Messages, Def's Appx., Vol 2 at pg. 335b.). As an agent of the employer, Mr. Mair was already aware of the same information that she conveyed to him during the interview. Plaintiff herself agrees that she conveyed the same information. (Plf's Complaint, Def's Appx., Vol 1 at pg. 10b). "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. Furthermore, "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 Immediate School Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540 (1998). In this case, when Plaintiff was communicating with her employer's attorney at her employer's request, she was, in effect, communicating with her employer's principal, i.e. her employer. Also, internal complaints of violations are not covered by the WPA. *Pasquale v Allied Waste Services, Inc*, unpublished per curiam opinion of the Court of Appeals, issued Nov. 9, 2004 (Dkt. No. 249110) citing, *Dolan v Continental Airlines/Continental Express*, 454 Mich 373 (1997) (Def's Appx., Vol 2 at pgs. 322b-323b. At most, Plaintiff's discussions with Mr. Mair would constitute an internal complaint pertinent to employee misconduct in violation of the employee handbook, falling well short of an actual or suspected violation of a law, rule, or regulation.

Moreover, at the time Plaintiff met with Mr. Mair, she had no reason to believe he was a "public body" to report to within the meaning of the Act. (Plf's Dep Transcript, Def's Appx., Vol 1 at Pg. 84b). She testified that she did not report to the police or an official of a governmental agency.

Q: You've expressed almost continuously since we've started this deposition your concerns but you never called the police or reported this to any official governmental agency, did you?

A: I did not.

(Plf's Dep Transcript, Def's Appx., Vol 1 at Pg. 84b).

In addition, there is no evidence that Plaintiff was reporting a violation of a law, rule or regulation. It is a necessary corollary that to prove there was a "report" there must also be a violation, or suspected violation, of a law, rule, or regulation to report. In *Pace v Edel-Harrelson*, this Court held that the WPA provides protection to an employee who reports an existing violation of law. 499 Mich 1, 2 (2016). Specifically, "the plain language of MCL 15.362 envisions an act or conduct that has actually occurred or is ongoing. MCL 15.362 contains no language encompassing future, planned, or anticipated acts amounting to a violation or a suspected violation of law." *Id.*

In *Pace*, the employee alleged that her supervisor told her that she (supervisor) was going to use grant money to purchase a stove for her daughter. *Id.* at 3. Plaintiff purportedly told two other supervisors of the statements. *Id.* When she felt that her supervisors were not acting on her reports, she went directly to the executive director who informed Plaintiff that she would look into it. *Id.* The Court held that "there [was] no indication in the record that plaintiff reported to Edel-Harrelsen her belief that [her supervisor] had already purchased the stove. *Id.* at 9. Instead, the record indicates that plaintiff only reported her "incident" with [her supervisor], referring to the conversation pertaining to [her supervisor's] plans to purchase the stove using grant funds in the future. *Id.*

Likewise, herein, Plaintiff merely conveyed the incident with L.S. to Ms. Snyder and to counsel for SVRC. Plaintiff's Complaint does not allege what violation of law, rule, or regulation L.S. committed. (Plf's Complaint, Def's Appx., Vol 1 at pg. 2b). In fact, Plaintiff's deposition

testimony indicates that she was only concerned about future conduct. (Plf's Dep Transcript, Def's Appx., Vol 1 at pgs. 65b; 82b-83b; 92b; 115b) As set forth in *Pace*, a threat of a future violation is not protected activity under the WPA.

Plaintiff compares the instant case to questioning by a police officer. The key distinction there is that such a scenario is a type II whistleblower: One who is asked to participate in an investigation. *Henry*, supra 234 Mich App at 410. Plaintiff's Complaint does not allege that she was retaliated against *for participating in an investigation*. (Plf's Complaint, Def's Appx., Vol 1 at pg. 9b-11b.) Her complaint alleges that she was retaliated against for "reporting." (Plf's Complaint, Def's Appx., Vol 1 at pg. 9b-11b). Moreover, the police officer in the scenario described by Plaintiff is a neutral party, acting on behalf of public. Herein, the attorney meeting with Plaintiff was an attorney for SVRC, which Plaintiff clearly understood. (Plf's Complaint, Def's Appx., Vol 1 at pgs. 56b; 59b-60b 75b); MPRC 1.13. During the interview he had only an ethical obligation to the employer. MPRC 1.13; See also, *St. Clair Immediate School Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540 (1998). Thus, he cannot be held to the same standard as *McNeil-Marks* because he has no obligation to the Plaintiff. MPRC 1.13.

In *Henry v Detroit*, the Court held that Plaintiff was a type II whistleblower because he "reported" during a deposition at the request of a public body.<sup>10</sup> 234 Mich App 405, 412 (1999). Unlike the Plaintiff in *Henry*, Plaintiff was participating in an investigation at the request of her employer, that is not a public body. (Plf's Dep Trans, Def's Appx., Vol 1 at pg. 82b); (Text Messages, Def's Appx., Vol 2 at pg. 335b.). Furthermore, the statements were not part of a

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<sup>10</sup> Plaintiff's Complaint does not allege that she was retaliated against for participating in an investigation under the WPA. (Plf's Complaint, Def's Appx., Vol 1 at pg. 2b).

deposition as in *Henry*. Rather, the interview with Mr. Mair was not governed by the Michigan Court Rules and there was no subpoena for her attendance.

Plaintiff did not “report” within the meaning of the WPA when she communicated to the attorney for SVRC the same information that she conveyed to her supervisor. Importantly, she did not take the initiative and decision to report L.S.’s conduct to a public body. She was asked to speak with Mr. Mair at her attorney’s request. How the conversation comes about is necessary to determine whether a report was made, otherwise every conversation a layperson has with an attorney, as a friend, neighbor, or other like condition could constitute a report. This was not the intended purpose of the WPA.

### **III. THE WHISTLEBLOWERS’ PROTECTION ACT (MCL 15.361 *et. seq.*) IS PLAINTIFF’S EXCLUSIVE REMEDY IN THIS CASE.**

The WPA is “the exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer’s violation of the law.” *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27 (1991). Stated differently, the WPA preempts common-law public policy claims arising from the same activity. *Dudewicz v Norris-Schmid, Inc.*, 443 Mich 68, 70, 78-79 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 595 n.2 (20017). Herein, the gravamen of Plaintiff’s Complaint was that she was retaliated against for reporting and being about to report L.S.’s conduct. See *Shuttleworth*, 191 Mich at 27.

Michigan law is clear that “where there exists a statute specifically proscribing a particular adverse employment action, that statute is the exclusive remedy, and no other ‘public policy’ claim for wrongful discharge can be maintained.” *Kimmelman v. Heather Downs Mgmt. Ltd.*, 278 Mich. App. 569, 573 (2008). Indeed, the *McNeil-Marks* decision, *supra*, dealt with a situation involving a “reporting” claim that a plaintiff also attempted to classify as a “refusal to conceal.”

316 Mich. App. at 25-26. There, this Court affirmed dismissal of the plaintiff's public policy claim, holding that:

[w]e see 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. Because plaintiff's public policy claim arises out of the same activity as her WPA claim, the trial court properly concluded that the latter claim preempts the former.

*Id.* at 26.

Similarly, herein, there is no distinction between a refusal to conceal and the alleged reporting act. "Because plaintiff's public policy claim arises out of the same activity as her WPA claim," the WPA is her exclusive remedy. *Id.* In this case, Plaintiff mistakes not being able to prove a claim under the WPA with having no remedy under the WPA. Rather, the entire basis of her claims are acts protected under the WPA. Simply because she cannot prove the claim does not mean she can pursue a public policy claim in its place.

This Court has held that public policy claims in employment cases include adverse action in response to an employee's "refusal to violate a law in the course of employment" or in response to the employee's "exercise of a right conferred by a well-established legislative enactment. *Suchodolski v Mich Consolidated Gas Co*, 412 Mich 692, 695-96 (1982). Yet, "where a statute confers upon a victim of retaliation the right to sue, that person may not also assert a claim of discharge in violation of public policy under *Suchodolski*." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485 (1994), citing, *Dudewicz v Norris-Schmid Inc*, 443 Mich 68, 78-80 (1993). As the Court of Appeals correctly indicated, "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." Despite this, Plaintiff admitted at her deposition that she was never told not to report. Where a "public policy claim arises out of the 'same activity' as the WPA claim" the WPA preempts the

public policy claim. *McNeil-Marks v MidMich Med Ctr-Gratiot*, 316 Mich App 1, 25 (2016). Therefore, her public policy claim cannot prevail.

**IV. THE RECORD DOES NOT SUPPORT PLAINTIFF’S CONTENTION THAT HER PROTECTED ACTIVITY CAUSED HER FIRING BEYOND CLOSE TEMPORAL PROXIMITY.**

This Court has stated that: “[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation” in claims under the WPA. *West*, 469 Mich. at 186; *see also, Debano-Griffin, supra*, at 177. Plaintiff has brought forth no evidence beyond temporal proximity in this case.

Plaintiff argued for the first time before this Court that “the timing of Plaintiff’s termination coincides with the termination of L.S., who also engaged in activity protected by the Whistleblowers’ Protection Act in that he reported a suspected violation to the Michigan State Police.” (Plf’s Supplemental Brief, Pg. 23-24.). First, this fact has never been proven, nor is it part of the record in this case. Second, Plaintiff’s position is more akin to that of Eve Flynn. Eve Flynn and Plaintiff were present to observe the conduct by L.S. during his disciplinary meeting that this action is based on. (Plf’s Deposition Transcript, Def’s Appx., Vol 1 at pgs. 45b-46b; 49b-50b). Eve Flynn and Plaintiff similarly participated in the investigation conducted by the employer. (Plf’s Dep Transcript, Def’s Appx., Vol 1 at pg. 69). Similarly, Jay Page participated in the investigation. (Plf’s Dep Transcript, Def’s Appx., Vol 1 at pg. 69). It is undisputed that Eve Flynn and Jay Page were not terminated or faced an adverse employment action following their participation. (Plf’s Dep Transcript, Def’s Appx., Vol 1 at pg. 69).

Plaintiff cites to *Campbell v Human Services Dep’t*, for the proposition that “background evidence” can be used to establish a pattern of discrimination. 286 Mich App 230, 235 (2009). However, *Campbell* speaks to whether a jury can consider evidence of discrimination outside the

applicable statute of limitations period as background evidence, *subject to the rules of evidence*. *Id.* at 235-36. Also, *Campbell* involved a Civil Rights act discrimination claim, not retaliation under the WPA. *Id.*

In this case, there is nothing in the record to support Plaintiff's contention that L.S. was a whistleblower. Rather, the evidence is that he was let go following the incident at issue where alleged threats were made involving the use of a gun and the knowledge to use. (Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 147b). This cannot be interpreted as an act of "reporting" or being "about to report" to constitute an action under the WPA.

Any evidence regarding this allegation is inadmissible. "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich. 109, 120-21 (1999). It is irrelevant under MRE 402 because it does not serve to prove whether *Plaintiff* was retaliated against for "reporting" or being "about to report" an alleged violation of a law, rule or regulation. MCLA 15.362. It should also be excluded under MRE 403 as it is unfairly prejudicial to Defendant, confuses the issues, misleads the jury, and will waste time. Finally, it constitutes impermissible character evidence under MRE 404.

Plaintiff also argues that she was told not to file a police report. (Plf's Supplemental Brief, Pg. 24). Yet, she admitted at her deposition that that is not the case. (Plf's Dep Transcript, Def's Appx., Vol 1 at pg. 75b). Also, the text messages do not reflect any such reaction. (Text Messages, Def's Appx., Vol 2 at pg. 325b-335b). To the extent that this reference is in regard to Ms. Snyder's text message relating to Sylvester Payne, Defendant would point out that Ms. Snyder only cautioned the Plaintiff to "be careful" about sharing information with non-employees or non-law

enforcement. (Text Messages, Def's Appx., Vol 2 at pg. 328-29b). Further, any report to Mr. Payne was not protected activity.

Plaintiff also argues that there was a change in likeness after she engaged in protected activity. Again, she does not rely on evidence in the record. Plaintiff also relies on a federal case from the Sixth Circuit that cites to Title VII and Ohio law. *Lamer v Metaldyne Co LLC*, 240 F Appx, 22, 30 (CA 6, 2007). This simply is not the case herein. Rather, the evidence is more than clear that there was a significant financial decline in the year that Plaintiff was employed.

There is a non-retaliatory reason for layoff that does not constitute pretext. To demonstrate that such a reason is pretextual, a plaintiff must show: (1) that the reason had no basis in fact; (2) that if the reason had a basis in fact, it was not an actual factor motivating the decision; or (3) that if the reason was a factor, that it was insufficient to justify the decision. *Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561, 565-566 (1990). As is readily apparent from the facts of this case, Plaintiff cannot point to evidence that would even tend to demonstrate pretext. As stated above, there was a large financial deficit seen in the year that Plaintiff was employed. Out of a \$150,000 loss, a total of \$110,000 of that loss came from Plaintiff's division. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 153b). The loss was related to declining sales and the loss of important service contracts. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pg. 129b-130b). The losses sustained by Plaintiff's division were confirmed by then-chairperson of SVRC's Board of Directors, Sylvester Payne. (Sylvester Payne Dep Transcript, Def's Appx., Vol 2 at pgs. 261b-262b). As a result of the economic decline, fourteen employees were placed on layoff status. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pgs. 129b-130b, 132b). Plaintiff was not the only one. (Dean Emerson Dep Transcript, Def's Appx., Vol 1 at pgs. 129b-130b, 132b). On top of these losses, one day prior to her layoff, SVRC lost a critical industrial contract. (Dean

Emerson Dep Transcript, Def's Appx., Vol 1 at pgs. 149b). Importantly, her position related to the economic and financial health of SVRC. (Director of Industrial Operations Job Description, Def's Appx., Vol 1 at pg. 118b).

**CONCLUSION**

WHEREFORE, for the above-stated reasons, Defendant / Appellee's, SVRC INDUSTRIES, INC., respectfully requests that this Honorable Court DENY Plaintiff / Appellant's Application for Leave to Appeal and AFFIRM the Opinion and Order of the Michigan Court of Appeals.

Respectfully submitted

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