

STATE OF MICHIGAN
IN THE SUPREME COURT

LINDA RIVERA,

Plaintiff-Appellant,

v.

SVRC INDUSTRIES, INC.,

Defendant-Appellee.

MSC No. 159857

COA No. 341516

Trial Ct. No. 16-031756-NZ

Hon. Patrick J. McGraw

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

I. PLAINTIFF WAS “ABOUT TO REPORT” A SUSPECTED VIOLATION OF LAW

Defendant’s argument ignores important evidence in the record and actually demonstrates the existence of a factual question whether Plaintiff was “about to report.” Defendant’s CEO Emerson made an important admission he was aware that Plaintiff wanted to file a police report:

- Q. Okay. Did Deb Snyder ever tell you that Ms. Rivera wanted to file a Police Report?
- A. Yes.
- Q. What did she tell you in regards to that?
- A. Linda felt that a Police Report needed to be filed. . . .

(App’x, No. 12, at 276a)(emphasis added). After CEO Emerson allegedly spoke to Defendant’s attorney, COO Snyder told Plaintiff that the attorney “said no police report.” (App’x, No. 15, at 290a). When Plaintiff heard the attorney “said no police report,” she continued persisting that a police report should be filed. *See, e.g.*, (App’x No. 15, at 290a-292a); (App’x No. 14, at 284a, 287a-288a); (App’x No. 11, at 272a-273a). Defendant’s argument simply ignores this evidence and characterizes the facts in a light most favorable to itself. Defendant’s argument merely shows that there are factual disputes regarding whether Plaintiff was about to report, the conclusion the trial court reached in this matter. Defendant cannot show an absence or insufficiency of evidence regarding Plaintiff being about to report.¹

II. THAT PLAINTIFF’S COMMUNICATION WITH DEFENDANT’S COUNSEL CONSTITUTED A “REPORT” PURSUANT TO MCL 15.362

Defendant raises several arguments, many for the first time; however, Defendant failed to fully address the two questions raised by the Supreme Court in its March 25, 2020 order.

¹ Defendant also attempts to draw a distinction regarding whose name Plaintiff wanted the report to be made, either herself or in SVRC’s name. Defendant does not explain why such a distinction is important. It is not. Under the plain language of MCL 15.362, either an employee “or a person acting on behalf of the employee” can be “about to report.” Whether Plaintiff wanted to call the police herself or wanted someone to do it on her behalf, she wanted to make a report and such reports are protected from retaliation. MCL 15.362.

Regarding whether a report is made when the public body initiated the contact, Defendant does not appear to set forth an argument or responds substantively to Plaintiff's arguments. Although Defendant does cite and quote *Henry v City of Detroit*, 234 Mich App 405; 594 NW2d 107 (1999), it does not make an argument that the employee must initiate the contact with the public body.

Defendant does make one statement relevant to the context in which a report is made, indicating that the context must matter, because, if it did not, every conversation a layperson has with an attorney would constitute a report. To come to this conclusion, Defendant does not look to the statutory language; instead, it looks to the result, implying it will be too easy to engage in protected activity. This is not the proper method for determining the intent of the Legislature. We start with the statutory language and, if unambiguous, assume the Legislature intended the statute's plain meaning. *People v Gardner*, 482 Mich 41, 49; 753 NW2d 78 (2008); *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). This error in reasoning invites the judiciary to apply its own policy preferences. Moreover, this Court has squarely rejected this type of reasoning:

Without noting any ambiguity in the statutory language, the Court of Appeals decided not to apply [the statute] because it did not think that the statutory purpose would be advanced. This mode of analysis contravened the judiciary's limited role of complying with the will of the Legislature as reflected in the plain language of the statutes.

Gilbert v Second Injury Fund, 463 Mich 866; 616 NW2d 161, 161-162 (Mem)(2000). The unambiguous language of MCL 15.362 does not require an employee initiate the conversation with the public body in which the employee makes a "report."

Regarding the second issue of whether Mr. Mair's prior knowledge affects whether Plaintiff made a "report," Defendant makes conclusory statements without argument or rationale.

This mode of argument is insufficient. “[I]t is not the duty of this Court to discover and rationalize the basis for defendant’s claims.” *People v Jurewicz*, 329 Mich App 377; 942 NW2d 116, 125 (2019). Moreover, these conclusions, like the Court of Appeals’, are based upon a factual assumption. Defendant has offered no proof as to what Mr. Mair knew prior to his conversation with Plaintiff. Defendant offered no evidence relating to a prior conversation with Mr. Mair and Defendant did not provide an affidavit or testimony from Mr. Mair regarding his knowledge. The Court of Appeals’ analysis thus violates the standard of review and assumes facts in support of Defendant’s position. *See Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

In addition to the lack of an evidentiary basis to assume Mr. Mair’s prior knowledge, there is no statutory basis that requires the violation of law to be “hidden” from or “unknown” to the public body for the employee to make a “report.” Defendant does not offer one. Regardless of how well or poorly the Legislature wrote MCL 15.362, “a court is not free to rewrite a statute because the end result may be subjectively unpalatable.” *People v Harris*, 499 Mich 332, 354 n47; 885 NW2d 832 (2016). Rather, the judiciary’s job is “to determine from the text of the statute the policy choice the Legislature *actually* made.” *Id.* (italics in original). Here, there is no textual support to require a “report” be of something hidden or unknown. Plaintiff has previously identified several policy reasons the Legislature may have intended in not enacting such a requirement; we cannot weigh and dispute those policy reasons but must follow the statute as written.

Defendant raises two additional arguments outside of the issues the Supreme Court instructed the parties to brief. First, Defendant argues that Plaintiff did not make a “report,” because Mr. Mair as “public body” was also Defendant’s attorney. In making such an argument,

Defendant is attempting to insert the issue of “public body” into “report.” The text of MCL 15.362 shows there are four elements to engaging in protected activity: (1) being an employee as defined by MCL 15.361(a) or a person acting on behalf of an employee; (2) making a report or being about to report; (3) of behavior that constitutes an actual or suspected violation of law; (4) to a “public body as defined by MCL 15.361(d). Defendant’s new and unpreserved argument attempts to merge the third and fourth element into one analysis. This is error. Although Defendant attempts to distinguish the *facts* of *McNeill-Marks v MidMichigan Medical Center-Gratiot*, 316 Mich App 1; 891 NW2d 528 (2016), the *reasoning* of the opinion equally applies and demonstrates Mr. Mair was and is a “public body.” The *McNeill-Marks* Court found the attorney to be a public body based upon his Michigan license to practice law and his membership in good standing in the State Bar of Michigan; it did not look at the status or relationship to his clients. *Id.* at 22-23; 891 NW2d 528. There is no textual basis to suggest that a “public body” is a public body only at certain times or when behaving in certain manners. Any attempt to force such an analysis into the word “report” is error, abusive to the language of the statute, and an improper basis to present the issues of *McNeill-Marks* for reevaluation to this Supreme Court.²

Defendant also raises the unpreserved issue of whether Plaintiff engaged in a “report” based upon whether there was or was not a violation or suspected violation of law. Again, Defendant improperly attempts to push a new issue into the definition of “report.” Courts have viewed the two issues separately. For instance, in *McNeill-Marks*, the Court analyzed whether the conduct violated a personal protection order and whether the plaintiff had a good faith belief

² In addition, Defendant improperly attempts to paint attorneys as mere automaton of their clients, ignoring that attorneys bear responsibilities to the profession and the public in addition to their clients. As this Court has noted, “[T]he law has reposed special stewardship duties on lawyers on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also officers of the court.” *Grievance Adm’r v Fieger*, 476 Mich 231, 243; 719 NW2d 123 (2006). “As members of a profession in which public reliance and trust is so essential and whose members’ integrity must be assured to maintain vital public respect, we as attorneys must recognize the importance of a high standard by which our conduct is measured.” *GAC Commercial Corp v Mahoney Typographers, Inc*, 66 Mich App 186, 191; 238 NW2d 575 (1975).

that the conduct violated said order independent of the other elements of engaging in protected activity. *See* 316 Mich App at 18-21; 891 NW2d 528. Defendant bases its argument on *Pace v Edel-Harrelson*, 499 Mich 1; 878 NW2d 784 (2016). In *Pace*, this Court recognized that the violation or suspected violation of law must be an existing violation, comprised of conduct that has already occurred or is occurring, not something that may or may not occur in the future where, if it did, then a violation would exist. 499 Mich at 7-8; 878 NW2d 784. The violations of law at issue here, assault and making a terrorist threat are not based on some future conduct that may or may not occur. *See, e.g., People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); MCL 750.543m. When one commits an act that puts someone in fear of imminent harm or makes a threat of future terrorist attack, the unlawful action has already occurred. Additionally, Plaintiff did not need to be correct in thinking L.S.’s behavior violated the law; Plaintiff is afforded protection as long as she in good faith report or was about to report conduct she suspected violated the law. *McNeill-Marks*, 316 Mich App at 21; 891 NW2d 528. Because Plaintiff had a good faith belief that L.S. committed a criminal violation, Defendant cannot establish as a matter of law that Plaintiff did not report a violation or suspected violation of law; Plaintiff, however, maintains that such an argument is immaterial to whether she made a “report” and is not preserved for this Court’s review. Because there is no textual basis to add such requirements and as the Court of Appeals ignored binding precedent on the issue, this Honorable Court should reverse the Court of Appeals on the issue of whether Plaintiff made a “report.”

III. THAT WHISTLEBLOWERS’ PROTECTION ACT IS NOT PLAINTIFF’S EXCLUSIVE REMEDY

Defendant’s argument that the WPA is Plaintiff’s exclusive remedy is based upon the conclusion reached in *McNeill-Marks*, *supra*. Although Defendant attempts to make use of the *McNeill-Marks* Court’s conclusion, it overlooks that Court’s reasoning. The Court reasoned as

follows:

Plaintiff alleges that she was discharged for reporting a violation of the law, or being about to report such a violation, to a public body or a member of such a body. Both activities constitute protected activity under the WPA. And contrary to plaintiff's argument on appeal, her public policy claim arises out of the "same activity" as the WPA claim for preemption purposes. Plaintiff argues that, aside from her discharge for reporting Field's conduct to Gay and for being about to report that conduct to the trial court, MMCG also discharged her for refusing to conceal Fields's violation of the PPO. Plaintiff further argues that her refusal to *conceal* the violation is different than the affirmative act of reporting it or being about to report. But plaintiff's refusal to conceal the violation was effectuated by her report to Gay, and there is no record evidence that plaintiff was instructed to conceal such activity before her telephone conversation with Gay.

McNeill-Marks, 316 Mich App at 25-26; 891 NW2d 528. The basis for the conclusion depended on the conduct that "effectuated" the plaintiff's refusal to conceal. The Court reasoned that because the plaintiff's refusal to conceal was effectuated by the same conduct that constitute her protected activity under the WPA, her claim was preempted by the WPA. *See id.* at 24, 26.

In the current case, the Court of Appeals determined that Plaintiff's communications to Mr. Mair was not a "report" and Plaintiff was not "about to report." Where the WPA provides no remedy at all, the WPA cannot be the exclusive remedy. *See Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). In other words, where the conduct that effectuates the refusal to conceal constitutes protected activity under the WPA, the WPA preempts the public policy claim; however, where the conduct that effectuates the refusal to conceal is not protected under the WPA, there is no preemption. The Court of Appeals' conclusion that Plaintiff's refusal to conceal L.S.'s behavior was not protected under the WPA mandates the conclusion that the WPA is not the exclusive remedy.

Defendant further failed to address Plaintiff's argument that the conduct that effectuated her refusal to conceal was broader than the conduct which potentially constituted protected activity under the WPA. Since Plaintiff relies upon additional conduct that effectuates her

refusal to conceal, such as her disclosures of L.S.'s behavior to COO Snyder, her text messages being shared with CEO Emerson, her discussions with the Chairman of the Board of Directors and other employees, and further discussion with a non-employee, are not protected by the WPA, Plaintiff can maintain both her WPA retaliation claim and her public policy claim.

IV. THAT THE RECORD SUPPORTS PLAINTIFF'S CONTENTION THAT HER PROTECTED ACTIVITY CAUSED HER FIRING

Plaintiff has presented record evidence in addition to a close temporal proximity sufficient to establish a factual question regarding the issue of pretext. Regarding each piece of evidence Defendant addresses, Plaintiff will respond in turn. First, Defendant claims that Plaintiff has not previously argued that the timing of Plaintiff's termination coincided with the termination of L.S., who also engaged in activity protected by the WPA. However, Plaintiff specifically requested the trial court consider this piece of evidence. In her response to Defendant's motion for summary disposition, Plaintiff wrote:

Both Plaintiff and [L.S.] engaged in activity that was protected by the Whistleblowers' Protection Act. Both Plaintiff and [L.S.] were terminated within close temporal proximity of their protected activity. Both Plaintiff and [L.S.] were terminated on the same day.

(App'x, No. 10, at 217a). Defendant also claims that such a claim is not part of the record. L.S.'s testimony and the documentary evidence of Plaintiff's termination demonstrate: (1) L.S. was allegedly "insubordinate" when he reported to the Michigan State Police that Defendant had him operating in a truck without a working speedometer, i.e., he engaged in protected activity; (2) Defendant terminated L.S.'s employment on October 3, 2016; and (3) Defendant dated Plaintiff's termination for October 3, 2016, but she did not receive the document until the next day as she was not present at work on October 3, 2016. Defendant's claims to the contrary are meritless.

Defendant next attempts to draw an inference lessening the causal connection by claiming that Plaintiff's "position" was more akin to other employees whom Mr. Mair had interviewed. Defendant's argument, which again goes against the standard of review, ignores the distinguishing feature between Plaintiff and Eve Flynn and Jay Page. Plaintiff persisted in wanting to file a police report where the others did not. This distinction simply draws more attention to Plaintiff's protected activity and the similar treatment Plaintiff received from Defendant as did L.S.

Defendant argues that it did not tell Plaintiff not to file a police report, implying that if this fact did not exist one could not draw from it an inference of causation. This is a fact Defendant disingenuously contests. COO Snyder explicitly told Plaintiff that the attorney "said no police report." (**App'x, No. 15, at 290a**). The testimony Defendant cites for Plaintiff's alleged admission refers to a different text message. In fact, just five pages earlier in her deposition transcript, Plaintiff testified that she was told she could not make a police report in a text from COO Snyder. (**Appellee's Appendix at 70b**). Regardless of how Defendant or the Court of Appeals characterizes the evidence, Plaintiff was told "no police report." Courts have found negative reactions to a plaintiff's protected activity evidence of retaliation. *See West v Gen Motors Corp*, 469 Mich 177, 186-187; 665 NW2d 468 (2003); *Henry*, 234 Mich App at 414; 594 NW2d 107.

Defendant argues against the inference Plaintiff draws from the dissimilar treatment Plaintiff received before she engaged in protected activity versus after she had done so. Prior to engaging in protected activity, Plaintiff was informed she would likely take over supervising employees in a new location, evidencing Defendant's positive view of Plaintiff. In her Application to this Court, Plaintiff cited Plaintiff's testimony on this point. *See (App'x, No. 3,*

at 116a). After Plaintiff engaged in protected activity, Defendant laid off Plaintiff, evidencing Defendant's negative view of Plaintiff as expendable. A reasonable factfinder could draw an inference of causation from such a change in view of Plaintiff. While Plaintiff did cite to a Sixth Circuit case for the proposition that a retaliatory motive may be inferred for purposes of establishing a prima facie case, Defendant does not raise a substantive argument against such an inference. *See Lamer v Metaldyne Co LLC*, 240 F App'x 22, 30 (CA 6, 2007). This Court has recognized that whistleblower statutes are analogous to other antiretaliation provisions of other employment statutes and they should receive the same treatment "under the standards of proof of those analogous statutes." *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 617; 566 NW2d 571 (1997).

Lastly, Defendant seeks to interject the issue of pretext into the discussion of causation, which this Court requested the parties to brief. Plaintiff has already brief numerous reasons demonstrating a factual question regarding the basis and motivation for Plaintiff's termination. These include: (1) Defendant's failure to provide evidence that the Board authorized a reduction in force, where the Board Chairman testified that they would always approve or disapprove of economic layoffs (**App'x, No. 3, at 118-119a**); (2) Defendant failed to produce documentary evidence when Plaintiff requested all documents establishing there was a bona fide reduction in force and merely pointed to deposition testimony (**App'x, No. 3 at 136a-138a**); (3) Documentary evidence shows that Defendant was not operating in a deficit in October 2016 when it terminated Plaintiff (**App'x, No. 3, at 141a-142a**); and (4) Plaintiff was told things were going well and she would likely become supervisor over employees at one of Defendant's facilities after the farmer's market project completed (**App'x, No. 3, at 116a**). Additionally, Defendant does not explain or offer evidence as to how Defendant selected Plaintiff for the

reduction in force. Plaintiff submits that such evidence, combined with the other evidence of causation, is sufficient to establish a factual question regarding Plaintiff's retaliation claims.

RELIEF SOUGHT

For the reasons set forth above and in Plaintiff-Appellant's prior briefing, Plaintiff-Appellant respectfully requests that this Honorable Court grant her application, reverse the Court of Appeals' decision below, and reinstate the trial court's denial of summary disposition in favor of Plaintiff.

Respectfully submitted,
THE MASTROMARCO FIRM

Dated: June 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on **June 10, 2020**, I presented the foregoing papers to the Clerk of the Court for filing and uploading to the Michigan Court of Appeals electronic filing system, which will send notification of such filing to **David A. Wallace & Kailen C. Piper.**

THE MASTROMARCO FIRM

/s/ Kevin J. Kelly
KEVIN J. KELLY (P74546)