

STATE OF MICHIGAN
COURT OF APPEALS

KAREN A. PARENT,

Plaintiff-Appellant,

V

MOUNT CLEMENS GENERAL HOSPITAL,
INC.,

Defendant-Appellee.

UNPUBLISHED

August 7, 2003

No. 235235

Macomb Circuit Court

LC No. 2000-000561-NZ

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Plaintiff was employed as a technician in defendant's histology laboratory where her primary duty was to assist the hospital's pathologists. She was fired for insubordination after she refused to perform a laboratory procedure as instructed. She subsequently commenced this action against defendant alleging that she was wrongly discharged, contrary to public policy, because she refused to perform a procedure that allegedly was not in the best interests of defendant's patients and violated the standard of care. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff now appeals by right. We affirm.

Plaintiff objected to performing a procedure that the parties refer to as the "tray method." Defendant had used this method in the past. Technicians, like plaintiff, prepared trays of multiple gross specimens for analysis by defendant's pathologists. Multiple specimens would be set out on a single tray with identifying information so that the pathologist who was assigned to microscopically examine the specimens could work quickly.

During the course of plaintiff's employment, defendant hired a pathologist's assistant who regularly prepared her specimens for microscopic examination using a different method. The pathologist's assistant would only handle one specimen at a time and would keep the specimens in their separate containers.

On September 30, 1998, the pathologist's assistant was not present at work, so Dr. Watkins was in charge of preparing the specimens for examination. He instructed plaintiff to prepare the specimens using the tray method. Plaintiff refused to do, allegedly because she felt there was a greater chance of the samples becoming mixed up, which could cause a misdiagnosis.

This Court reviews a trial court's decision granting summary disposition de novo. *Spiak v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiff's claim for wrongful discharge is premised upon public policy. In *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982), our Supreme Court recognized that, in some situations, the discharge of an at-will employee may be so contrary to public policy as to be actionable. The Court identified three sources as supporting recognition of an action for wrongful discharge grounded on public policy. One source is explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act pursuant to a statutory right or duty, such as the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* *Suchodolski, supra* at 695 & n 2. A second type of discharge protected by public policy is when an employee is fired for refusing or failing to violate a law in the course of employment. *Id.* at 695. As the third source, the Court noted that appellate courts have recognized that an employer cannot retaliate against and discharge an employee where the reason for the "discharge was the employee's exercise of a right conferred by a well-established legislative enactment." *Id.* at 696. See also *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 484-485; 516 NW2d 102 (1994).

In *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 78-80; 503 NW2d 645 (1993), the Court limited its decision in *Suchodolski*, stating:

As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative. *Pompey v General Motors Corp*, 385 Mich 537, 552-553; 189 NW2d 243 (1971). At common law, there was no right to be free from being fired for reporting an employer's violation of the law. *Covell v Spengler*, 141 Mich App 76, 83; 366 NW2d 76 (1985). The remedies provided by the WPA, therefore, are exclusive and not cumulative. *Shuttlesworth v Riverside Hosp*, 191 Mich App 25, 27; 477 NW2d 453 (1991).

In *Suchodolski v Michigan Consolidated Gas Co, supra*, this Court recognized that there was an exception to the general rule that either party to an employment at will contract could terminate the agreement at any time for any or no reason. The exception is based on the principle that "some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* at 695. We also found that these restrictions on an employer's ability to terminate an employment at will agreement are most often found in explicit legislation. *Id.* The WPA is such legislation. *Id.*

The existence of the specific prohibition against retaliatory discharge in the WPA is determinative of the viability of a public policy claim. In those cases in which Michigan courts have sustained a public policy claim, the statutes

involved did not specifically proscribe retaliatory discharge. Where the statutes involved did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. Compare *Trombetta v Detroit, T & I R Co*, 81 Mich App 489; 265 NW2d 385 (1978) (the public policy claim was sustained where the defendant was discharged for refusing to manipulate and adjust pollution control reports), and *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976) (the claim was sustained where the defendant was discharged for filing a lawful workers' compensation claim), with *Covell v Spengler, supra* (the public policy claim was denied where the defendant also was sued under the WPA and the statute proscribed discharge in retaliation for the employee's complaints to the labor board concerning overtime pay), and *Ohlsen v DST Industries, Inc*, 111 Mich App 580; 314 NW2d 699 (1981) (the claim was denied where the employee also sued under MIOSHA provisions that prohibited discharge in retaliation for the employee's exercise of statutory rights). A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to Dudewicz for reporting his fellow employee's illegal activity, his public policy claim is not sustainable. [Footnote omitted.]

Here, plaintiff argues that an action for wrongful discharge based upon public policy is sustainable in light of MCL 333.20176a and 333.20521 of the Public Health Code, MCL 333.1101 *et seq.* We disagree. Pursuant to MCL 333.20180(1), the Legislature has granted employees protection from retaliatory discharge by incorporating the WPA as a remedy. Therefore, the rule from *Dudewicz, supra*, applies to this case. Because the Legislature has adopted an exclusive remedy for a retaliatory discharge grounded on policy based on the Public Health Code, we may not impose cumulative remedies in this situation.¹

Accordingly, to the extent that the Legislature has protected health care workers under MCL 333.20176a and 333.20521, plaintiff's exclusive remedy for any alleged wrongful discharge predicated on the policies embodied in these statutes is to pursue a claim under the WPA. Plaintiff may not maintain an independent action grounded on public policy arising from the Public Health Code apart from the WPA.²

We also disagree with plaintiff's claim that the statutes governing medical malpractice, see MCL 600.2912 *et seq.*, support her action for wrongful discharge grounded on public policy.

¹ Indeed, it appears that the Legislature incorporated the WPA as a remedy for a retaliatory discharge under the Public Health Code so that health care workers will report suspected abuses to the proper authorities to protect the general public.

² Furthermore, even if an independent action were sustainable as a matter of law, plaintiff here failed to establish a genuine issue of fact regarding whether she reasonably believed that defendant was engaged in malpractice or that she was discharged because of her objections to the tray method.

In order to state a claim for wrongful discharge contrary to public policy, plaintiff must prove the following elements:

First, plaintiff engaged in protected activity. The activity's protection may stem either from a constitutional or statutorily granted right or from an obligation favored by statutory policy. Second, plaintiff was discharged. Third, a causal connection exists between the plaintiff's protected activity and the discharge. See Schlei & Grossman, *Employment Discrimination Law*, ch 15, p 534 (Washington, D.C.: Bureau of National Affairs, 1983). [*Clifford v Cactus Drilling Corp*, 419 Mich 356, 368-369; 353 NW2d 469 (1984) (Williams, C.J., dissenting).]

Even assuming that plaintiff could pursue a public policy wrongful discharge claim predicated on MCL 600.2912a(1), it was incumbent upon her to show that she had a reasonable basis for believing that the use of the tray method constituted malpractice before she refused to perform her duties. See *Dabbs v Cardiopulmonary Management Services*, 188 Cal App 3d 1437, 1444; 234 Cal Rptr 129, 133 (1987). Although plaintiff's expert offered the opinion that the tray method was more error prone than the method he used, he acknowledged that all methods have some risk of error and that he was unable to conclude that using the tray method was malpractice. Indeed, he admitted that for some the tray method might work well. Furthermore, plaintiff admitted that she had never observed any actual errors occur with the tray method. Thus, plaintiff failed to establish a genuine issue of material fact with regard to this issue.

Additionally, plaintiff failed to show that there was a genuine issue of material fact with regard to causation. The evidence plaintiff submitted failed to show that she was fired for refusing to use the tray method to do her job, rather than for insubordination. The evidence showed that other employees and doctors in the laboratory had used different methods and that plaintiff had raised concerns well before she was fired about the tray method, without any consequence. There is no evidence supporting plaintiff's claim that she was fired for pointing out the potential for malpractice with the tray method. Rather, the evidence showed that plaintiff was fired for refusing to do her job as directed. Accordingly, the trial court properly granted summary disposition for defendant.

We affirm.

/s/ Jane E. Markey

/s/ Brian K. Zahra