

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BEULAH MITCHELL,

Plaintiff-Appellant,

V

HIGHLAND PARK BOARD OF EDUCATION,

Defendant-Appellee.

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UNPUBLISHED

April 14, 2005

No. 252747

Wayne Circuit Court

LC No. 03-305228-CL

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10) in favor of defendant, and dismissing plaintiff's complaint in this public policy discharge tort and breach of contract claim. After reviewing the record, we conclude that summary disposition was appropriate for the following reasons: plaintiff was collaterally estopped from asserting her claim in the circuit court; plaintiff's claim under the Whistleblower Protection Act (WPA), MCL 15.362, was time-barred; and finally, because plaintiff did not raise a genuine issue of material fact regarding whether the contract had been reinstated. We affirm.

This action arises out of an employment agreement entered into by the parties resulting in defendant hiring plaintiff to be the Superintendent of Highland Park Schools for a three year term. The contract required plaintiff to obtain and maintain residency in the City of Highland Park within six months after the execution of the contract. Plaintiff was unable to find suitable housing within the allotted time so she asked for, and was granted, two extensions. Before the expiration of the extensions, plaintiff rented an apartment in Highland Park but for various reasons did not complete her move until several months after the expiration of the second extension. However, before plaintiff actually moved into Highland Park, defendant informed plaintiff of its intent to consider terminating her for failing to comply with the contract's residency requirement and then ultimately terminated plaintiff's employment contract.

The parties initially submitted their disagreement to an arbitrator who ruled on August 22, 2002, that defendant did not have just cause to terminate the contract and awarded plaintiff monetary compensation equal to the economic value of the contract from the date of termination throughout the remainder of the contract period. Plaintiff then filed a claim in the circuit court asserting a cause of action under the public policy discharge doctrine alleging that defendant's reason for her discharge, non-residency, was pretextual. Plaintiff also brought a breach of

contract claim. The trial court granted defendant's motion for summary disposition on both counts finding that based on the pleadings, the arguments in court, and case law, summary disposition was appropriate under MCR 2.116(C)(7), (C)(8) and (C)(10). It is from this order that plaintiff appeals as of right.

Plaintiff first argues that the trial court improperly granted defendant's motion for summary disposition on her public policy discharge tort claim. We disagree. The trial court correctly granted defendant's motion for summary disposition on three alternative bases: (1) plaintiff's claim was barred by collateral estoppel; (2) plaintiff's claim was time-barred because it was covered by the WPA, and the statute of limitations had run; and (3) the public policy discharge tort doctrine is available only to at will employees, not to employees like plaintiff who could be fired only for just cause.

We review a trial court's decision on a motion for summary disposition *de novo*. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition on the basis of collateral estoppel or whether the claim is barred by the statute of limitations is granted pursuant to MCR 2.116(C)(7). *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). On review, this Court considers all the documentary evidence submitted by the parties and accepts as true the allegations of the complaint unless they are specifically contradicted by affidavits or documents. *Bryant, supra* at 419. Whether a plaintiff has established a *prima facie* case under the WPA is a question of law that this Court reviews *de novo*. *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

“Collateral estoppel precludes relitigation of issues between the same parties.” *VanVorous, supra* at 479. Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) that there is mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). To be actually litigated, a question must be put at issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). To be necessarily determined in the first action, the issue must have been essential to the resulting judgment. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). To determine whether the parties in the first action had a full and fair opportunity to litigate an issue, a court should consider numerous factors, including whether there is a clear and convincing need for a new determination because of the effect on the interests of the public or nonparties, the unforeseeability that the issue would arise in a later proceeding, or the party against whom estoppel is asserted did not have adequate opportunity or incentive to obtain a full and fair adjudication in the first action. *Monat, supra* at 683-684 n 2. “Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action.” *Id.* at 684, quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 427; 459 NW2d 288 (1990).

Clearly, factual determinations made during arbitration proceedings can support collateral estoppel. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Further, a “discharged employee who alleges that he was wrongly discharged and who voluntarily submits to an arbitration procedure is barred in a lawsuit filed *after* the arbitration decision from seeking a factual finding different from that which was found in the arbitration decision.” *Cole v West*

*Side Auto Credit Union*, 229 Mich App 639, 645; 583 NW2d 226 (1998). However, plaintiff argues that a question of fact essential to the issue was not litigated because its litigation was not within the authority of the arbitrator.

The parties agree that the issue at arbitration was whether defendant had just cause to fire plaintiff. Plaintiff's contract provided for resolution of disputes over just cause termination:

Arbitration. The parties agree to submit *any dispute* over the "just cause" of the termination of the Superintendent under this Agreement to *final and binding arbitration* administered under the rules of and by the American Arbitration Association. The costs of the arbitration administration and the fees of the arbitrator shall be shared equally by the parties. Failure to commence arbitration proceedings within thirty (30) days of termination shall bar any claims arising out of the termination of the Superintendent. (Emphasis added.)

Pursuant to the contract, the arbitrator reviewed the evidence and found defendant fired plaintiff for not meeting the employment agreement's residency requirement, but found that was not just cause for plaintiff's discharge.

Plainly, the issue whether plaintiff was fired for just cause was actually litigated and determined by the arbitrator's valid and final judgment. Because discharge for not meeting a term of a contract is not an exception under the public policy discharge tort doctrine, to succeed on her claim of public policy discharge tort, plaintiff must relitigate the reason she was fired. Plaintiff had a full and fair opportunity to litigate the issue at arbitration. She had incentive to prove she was not fired for just cause but rather based on a pretextual reason, i.e., that she was fired because she objected to and refused to participate in unlawful activities. Despite the opportunity to present facts about her alleged true reason for discharge, plaintiff did not. The parties litigated the issue of whether plaintiff was discharged for just cause at arbitration and the prior proceeding meets all the requirements for collateral estoppel, therefore plaintiff is collaterally estopped from seeking a different factual determination.

Plaintiff next argues that the trial court erred when it granted defendant's motion for summary disposition because plaintiff's claim under the WPA was time-barred. We disagree. To establish a claim under the WPA, a plaintiff must show that (1) he or she was engaged in a protected activity, (2) the defendant discharged him or her, and (3) there is a causal connection between the protected activity and the discharge. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). A "protected activity" under the WPA consists of (1) reporting a violation of a law, regulation or rule to a public body; (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. MCL 15.362; *Chandler, supra* at 399.

Plaintiff alleged in her complaint that she was fired for reporting illegal use of funds and violations of the Open Meeting Act, MCL 15.261 *et seq.* And, defendant clearly qualifies as a public body under the definition provided within the WPA. MCL 15.361(d); also see *Phinney v Perlmutter*, 222 Mich App 513, 554-555; 564 NW2d 532 (1997) (holding that the University of Michigan was a public body under MCL 15.361(d) and that when the plaintiff reported a violation of law to the university, the protections of the WPA were invoked). Because plaintiff alleged she was fired as a result of engaging in a protected activity, although plaintiff did not

explicitly allege her discharge violated the WPA, her complaint stated a prima facie WPA violation. Explicit reference to a statute is not required when pleading an action. MCR 2.111(B)(1); *Johnson v A & M Custom Built Homes of West Bloomfield, LPC*, 261 Mich App 719, 723; 683 NW2d 229 (2004). Actions brought under the WPA must be brought within ninety days after the alleged violation of the act. MCL 15.363(1). Plaintiff was fired on April 30, 2001, but did not file her complaint until February 18, 2003, and therefore, her claim was time-barred.

Plaintiff's public policy tort claim is also precluded because plaintiff stated a claim under the WPA. Where a victim of retaliatory discharge has a statutorily granted right to sue under the WPA, the victim may not also assert a claim of discharge in violation of public policy. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485; 516 NW2d 102 (1994), citing *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 79-80; 503 NW2d 645 (1993). Because the WPA could provide plaintiff relief for reporting defendant's alleged illegal activity, she cannot assert a public policy claim. The trial court properly granted defendant's motion for summary disposition on plaintiff's public policy discharge tort claim because it was encompassed by the WPA.

Plaintiff contends that the trial court erred when it granted defendant's motion for summary disposition because claims under the public policy discharge tort doctrine are only available to at will employees and not just cause employees. Because her cause of action is barred by collateral estoppel and the WPA's statute of limitation, we need not reach the question. See *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982) (at will employees may have a cause of action "based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.")

Plaintiff next argues the trial court erred when it granted defendant's motion for summary disposition on her breach of contract claim. Plaintiff alleged when defendant did notify her in writing that her contract was not renewed, defendant was in breach for not compensating her under the automatically renewed contract. We disagree. "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden, supra* at 120. A motion brought under MCR 2.116(C)(10) is properly granted when, viewed in the light most favorable to the nonmoving party, the evidence submitted fails to establish a genuine issue of material fact. *Id.*

The Michigan School Code provides that "[i]f written notice of nonrenewal of the contract of a superintendent is not given at least 90 days before the termination of the contract, the contract is renewed for an additional 1-year period." MCL 380.1229(1). Our Supreme Court construed the statutory predecessor<sup>1</sup> of MCL 380.1229(1) and stated that the purpose of the statute is to protect administrators from being arbitrarily removed, and written notice allows the employee enough time to seek other employment. *Sanders v Delton Kellogg Schools*, 453 Mich 483, 492; 556 NW2d 467 (1996).

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<sup>1</sup> The statutory predecessor of MCL 380.1229(1) was previously codified at MCL 380.132(2) before it was reenacted in substantially similar form in MCL 380.1229(1) except for changing the time period from 60 to 90 days. *Sanders, supra* at 485 n 1.

Plaintiff asserts that because the arbitrator reversed her discharge, the contract was reinstated and defendant was obliged to give her written notice that her contract had not been renewed within ninety days of its expiration, January 17, 2003. This argument has no merit because defendant clearly gave plaintiff notice of her termination on April 30, 2001. The termination notice fulfilled the purpose of MCL 380.1229(1). Further, when the arbitrator found on August 22, 2002, that plaintiff's discharge was not for just cause he awarded her the full value of her contract including benefits through, and in advance of, the expiration date of the contract, January 17, 2003. But, the arbitrator did not reinstate the contract. Plaintiff presented no facts to create a genuine issue of fact that the contract had been reinstated. The trial court properly granted defendant's motion for summary disposition on this issue.

Affirmed.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Stephen L. Borrello