

STATE OF MICHIGAN
COURT OF APPEALS

JAMES KENDALL,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

UNPUBLISHED

October 15, 2009

No. 283494

Wayne Circuit Court

LC No. 06-625156-NO

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

PER CURIAM.

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

I. Underlying Facts and Procedural History

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

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

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

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

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

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

II. Standard of Review

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

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

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

III. Wrongful Termination in Violation of Public Policy

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Bullard-Plawecki Employee Right to Know Act

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

MCL 423.505 provides:

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

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

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

Affirmed.

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