

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD L. WURTZ,

Plaintiff-Appellant,

v

BEECHER METROPOLITAN DISTRICT, LEO
MCCLAIN, JACQUELIN CORLEW, and
SHEILA THORN,

Defendants-Appellees.

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No. 301752
Genesee Circuit Court
LC No. 10-092901-CL

Advance Sheets Version

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

JANSEN, J.

Plaintiff appeals by right an order granting summary disposition to defendants in this action under the Whistleblowers' Protection Act (WPA).¹ We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This case pertains to the last two years of plaintiff's employment with Beecher Metropolitan District. The district provides water and sewage services to approximately 4,000 residential and commercial customers near Flint. The three individually named defendants, McClain, Corlew, and Thorn, were three of five elected board members for the district at all times relevant to this case.

On February 1, 2000, plaintiff signed an employment contract with the district. The contract provided that the district would employ plaintiff from February 1, 2000, until February 1, 2010, as the district's administrator. The parties do not dispute that plaintiff was employed for the full 10-year period under the contract, nor do the parties dispute that plaintiff received all compensation to which he was entitled under his contract. Rather, plaintiff alleges that he was discriminated against under the WPA when defendants decided to not renew his contract. Plaintiff alleges that, over the course of a two-year period, he engaged in activities that amounted

¹ MCL 15.361 *et seq.*

to whistleblowing under the WPA, and that his contract was not renewed as a consequence of his whistleblowing activity.

A. 2008

In May 2008, plaintiff sent a letter to the Genesee County Prosecutor, the Genesee County Sheriff, and the Mt. Morris Township police chief. The letter alleged that McClain, Corlew, and Thorn had violated the Open Meetings Act (OMA).² Specifically, the letter claimed that plaintiff, in his capacity as administrator, had received a billing statement from an attorney indicating that on April 2, 2008, the attorney had met privately with board members McClain, Corlew, and Thorn. Plaintiff, in his letter, inferred that, because this attorney had no existing arrangement with the district, “a majority of the [board] had met privately . . . [with the attorney] to discuss public business.” The letter noted that the board had later voted to hire the attorney. The letter also claimed that the attorney, along with McClain, Corlew, and Thorn, had “attended a . . . union negotiating session. Neither [plaintiff], nor any other staff, nor the other 2 members of the Board, knew anything in advance about this meeting, which was not scheduled as a special meeting with the appropriate 18-hour notice to the public.” Plaintiff alleged that, because the April 2 meeting and the subsequent union negotiating session were private meetings involving a majority of the board, those meetings violated the OMA.

It is unclear whether the sheriff or police chief responded to the letter, but David Leyton, the Genesee County Prosecutor, did. He wrote that criminal prosecution was but one remedy for OMA violations and that he did not believe that the events described by plaintiff warranted criminal investigation. The prosecutor accordingly did not act on plaintiff’s letter.

B. 2009

In January 2009, plaintiff sent a memorandum to McClain, the board president, proposing an extension and alteration of his employment contract. Plaintiff recommended that the district extend his employment to August 1, 2012, and reduce his salary and benefits, which would save the district about \$33,000. At its February 11, 2009 meeting, the board told plaintiff that he could present the amended contract to the board, but at its March 11, 2009 meeting, a motion to have “[plaintiff] draw up an employment agreement with [the board’s attorney]” failed; McClain, Corlew, and Thorn voted against the motion.

In May 2009, plaintiff expressed disapproval, in a memorandum sent to the board, about the possible expense to taxpayers of the board members’ upcoming trip to San Diego for the American Water Works Association (AWWA) conference. Plaintiff noted that the trip was projected to cost taxpayers \$29,000, which included trips for the board members to Sea World and the San Diego Zoo. Moreover, the board members were apparently planning on driving to San Diego for the conference; plaintiff noted that “if gas mileage is given [for the board members to drive], as previously requested, that amounts to over \$11,000.00, whereas members can fly from Bishop Airport . . . for \$280.00 round trip Another \$4,000.00 could be saved

² MCL 15.261 *et seq.*

for food and lodging for the nearly ten days requested for travelling [by car].” Plaintiff’s memorandum requested that the board pass resolutions detailing the method of compensation for travel, and recommended that the board members be reimbursed only for the price of airfare even if they opted to drive to the AWWA conference.

On July 8, 2009, plaintiff asked the board to hold a special meeting to discuss the possibility of “mutually discontinu[ing]” their relationship, and an attempt at that meeting was held on July 15, 2009. Plaintiff, however, refused to meet with the board because the board had its attorney present for the meeting, and plaintiff interpreted the attorney’s presence as a breach of the “gentlemen’s understanding” that the meeting would be an open dialogue between the board and plaintiff only. Plaintiff indicated that he was “frustrated” with the board, but wanted to continue his employment with the district and expressed his desire to do so.

In August 2009, after the AWWA conference, plaintiff met with members of the Genesee County Sheriff’s Office to discuss his belief that the board members had acted improperly or illegally regarding reimbursements for their trip to the AWWA conference. For example, plaintiff was concerned that the board members had gone to the San Diego Zoo, Sea World, and lavish dinners with family and friends, all at taxpayer expense. Additionally, plaintiff told the sheriff’s office that four of five board members actually flew to San Diego, but had reported that they drove, accordingly receiving an amount of per diem compensation and reimbursement for mileage that they were not entitled to claim.

Following defendant’s meeting with the sheriff’s office, a criminal investigation of the board members ensued. At least one article about the board members’ reimbursements from the AWWA conference appeared in the Flint Journal. Public attendance at board meetings increased, and at those meetings members of the public began openly questioning board members about their travel expenses.

On November 11, 2009, Thorn made a motion to not extend plaintiff’s employment contract beyond its expiration and to begin looking for a new administrator. The motion passed the board three votes to two. McClain, Corlew, and Thorn voted in favor of the motion.

C. 2010

Plaintiff’s last day of employment with the district was January 31, 2010. On January 19, 2010, plaintiff filed a complaint alleging that defendants had violated the WPA by not renewing his employment contract; plaintiff alleged that the board’s decision to not renew his contract was retaliation for his reporting suspected violations of, *inter alia*, the OMA, the Freedom of Information Act,³ and other Michigan statutes.

On October 18, 2010, plaintiff served defendants with a request for production of employment contracts and records. Among other things, plaintiff asked for “the written

³ MCL 15.231 *et seq.*

contracts . . . [of] non-union employees who were employed anytime with the District between 1990 to the present.” Defendants did not produce these documents.

On November 15, 2010, defendants filed a motion for summary disposition under MCR 2.116(C)(10), in which they argued that plaintiff did not suffer an adverse employment action because “there is no evidence that Defendants discharged, threatened, or discriminated against the Plaintiff regarding his compensation, terms, conditions, location or privileges of employment.” In any case, defendants argued, the board had no obligation to renew plaintiff’s contract. Defendants also argued that the board’s decision to not renew plaintiff’s employment contract was made for the first time in March 2009, well before any of the events surrounding the AWWA conference and reimbursements. That decision, according to defendants, was merely “reiterated” in November 2009, when the board formally voted to not renew defendant’s employment.

Concurrent with the time frame of this case, the criminal case against the board members, including McClain, Corlew, and Thorn, related to the AWWA conference expenses and reimbursements, continued. The trial judge dismissed the charges against McClain, and a jury returned verdicts of not guilty in favor of Corlew, Thorn, and the other board members. In its response to defendants’ summary disposition motion, plaintiff argued that summary disposition was premature because at the time he served them with discovery requests, the criminal case against McClain, Corlew, and Thorn was still pending, and “the individual Defendants . . . exercised their 5th Amendment rights” and did not respond to discovery requests. Plaintiff asserted that “[n]ow, the Defendants, after taking the Plaintiff’s deposition, but not allowing their own, [are] refusing to provide the requested information”

The trial court granted defendants’ motion for summary disposition on December 6, 2010. After noting that whether nonrenewal of an employment contract amounts to an adverse employment action under Michigan law appears to be an issue of first impression, the trial court explained:

[I]n this case the contract for the plaintiff did expire in February of ‘10—February 1. And despite the activities that took place earlier in the year of reporting by [plaintiff] to a public body and public officials . . . everything from the [Flint] Journal [newspaper] to the sheriff’s department and the prosecutor, the Board, and I’m surprised it happened, let him stay on to February 1 of ‘10. And so I find there’s no adverse employment action by the District and that summary disposition should be granted and I grant it.

Plaintiff now appeals by right.

II. STANDARD OF REVIEW

“This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the

Court reviews the entire record to determine whether defendant was entitled to summary disposition.”⁴

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.^[5]

“Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo.”⁶

III. ANALYSIS

The elements of a prima facie case under the WPA are well established: “(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action.”⁷

The parties do not dispute that the first element of the prima facie case is satisfied here. In May 2008, plaintiff reported to the local prosecutor and other governmental entities that he suspected that defendants had violated the OMA; in August 2009, plaintiff met with members of the sheriff’s office to report that he believed defendants had acted illegally with regard to the AWWA conference reimbursements. The WPA defines “protected activity” as, among other things, “reporting to a public body a violation of a law, regulation, or rule”⁸ Accordingly, plaintiff’s actions amount to a “protected activity” under the WPA.

Defendants focus their argument on the second element of the prima facie case, arguing that plaintiff was a contractual employee, and the failure to renew his contract was not, and could not be, an adverse employment action because plaintiff had no expectation of employment after the expiration of his contract, the terms of which were fulfilled.

Michigan courts have defined “adverse employment action” in the context of Michigan’s Civil Rights Act (CRA)⁹ and in the WPA context. Those definitions are identical. In both

⁴ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁵ *Id.* at 120.

⁶ *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

⁷ *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

⁸ *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010) (citation omitted).

⁹ MCL 37.2101 *et seq.*

contexts, for an employer's action to amount to an adverse employment action, the action must be "materially adverse," meaning that it must be more than a "mere inconvenience or an alteration of job responsibilities" ¹⁰ This definition of "adverse employment action" initially arose in federal courts, in the context of federal workplace discrimination laws, ¹¹ and was eventually adopted by Michigan courts for purposes of the CRA ¹² and the WPA.

Michigan courts have also suggested that, in the CRA context, the nonrenewal of an employment contract may amount to an adverse employment action, ¹³ although no Michigan case addresses the issue squarely. There are no Michigan cases interpreting the WPA that address the issue at all. "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues. In the context of discrimination cases, federal precedent may be consulted for guidance." ¹⁴ Accordingly, because the WPA's definition of "adverse employment action" derives from the federal courts' interpretation of the same term as used in federal discrimination laws, we turn to the federal courts for guidance regarding whether nonrenewal of a contract may amount to an adverse employment action.

This issue was addressed directly by the United States Court of Appeals for the Second Circuit in *Leibowitz v Cornell University*. ¹⁵ In *Leibowitz*, the plaintiff, a 51-year-old female university professor, accepted an early retirement package after her employer did not offer her an extension of her employment contract. ¹⁶ The plaintiff sued under Title VII of the Civil Rights Act of 1964 (Title VII) ¹⁷ and the Age Discrimination in Employment Act (ADEA). ¹⁸ The trial court granted summary judgment in favor of the defendants, holding that the plaintiff had failed to establish a prima facie case of discrimination because, among other reasons, she was "unable

¹⁰ *Meyer v City of Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000) (CRA context) (citation and quotation marks omitted); *Brown v Detroit Mayor*, 271 Mich App 692, 706; 723 NW2d 464 (2006), aff'd in relevant part, 478 Mich 589 (2007) (WPA context) (citations and quotation marks omitted).

¹¹ See, e.g., *Crady v Liberty Nat'l Bank & Trust Co of Indiana*, 993 F2d 132, 136 (CA 7, 1993).

¹² *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 362-366; 597 NW2d 250 (1999) (adopting *Crady*'s definition of "adverse employment action" for CRA purposes).

¹³ See, e.g., *Barrett v Kirtland Community College*, 245 Mich App 306, 313-324; 628 NW2d 63 (2001) (accepting without analysis that the nonrenewal of a contract was an adverse employment action but determining that the plaintiff was not entitled to relief because she could not establish causation).

¹⁴ *Wilcoxon*, 235 Mich App at 360 n 5 (citations omitted).

¹⁵ *Leibowitz v Cornell Univ*, 584 F3d 487 (CA 2, 2009).

¹⁶ *Id.* at 492-496.

¹⁷ 42 USC 2000e *et seq.*

¹⁸ 29 USC 621 *et seq.*

to produce any evidence that she had or held any right to a tenured position”¹⁹ The appellate court reversed and held that when an employee seeks renewal of his or her employment contract, the nonrenewal of the employment contract may be an adverse employment action for purposes of Title VII and the ADEA.²⁰ The court explicitly rejected the trial court’s reasoning that the nonrenewal was not adverse because the defendants did not terminate the plaintiff’s employment, but rather simply “chose not to renew her appointment”²¹ According to the appellate court, under the trial court’s reasoning “an employee could bring a discrimination lawsuit if an employer refused to hire her based on her age and/or gender, but not if the same employer failed to renew an employment contract for the same discriminatory reasons.”²² The court explained that its decision appeared to be consistent with the view of a majority of the federal circuit courts. The court explained:

[I]n reaching this decision, we join other circuit courts that have, either implicitly or explicitly, held that non-renewal of a contract may constitute an adverse employment action for purposes of the discrimination laws. *See, e.g., Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 320 (3d Cir.2008) (“The failure to renew an employment arrangement, whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII”); *Carter v. Univ. of Toledo*, 349 F.3d 269, 270-71 (6th Cir.2003) (reversing district court’s grant of summary judgment in employer’s favor on plaintiff’s race discrimination claim under Title VII in connection with employer’s failure to renew her contract as a visiting professor); *Minshall v. McGraw Hill Broad. Co.*, 323 F.3d 1273, 1279-82 (10th Cir.2003) (sufficient evidence existed for jury to reasonably conclude that employer unlawfully discriminated against employee based on age under the ADEA in deciding not to renew his contract); *Mateu-Anderegg v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618, 625 (7th Cir.2002) (noting, where teacher claimed non-renewal of contract was discriminatory under Title VII, that “[i]t is undisputed . . . that [plaintiff] suffered an adverse employment action”); *Kassaye v. Bryant Coll.*, 999 F.2d 603, 607 (1st Cir.1993) (noting that “act of refusing to renew appellant’s employment at Bryant College” may provide grounds for discrimination claim).^[23]

We find the federal courts’ reasoning persuasive. Were we to hold that nonrenewal of a contract cannot, under any circumstances, qualify as an adverse employment action under the WPA because a contractual employee has no expectation of further employment past the expiration of his or her contract, we would carve an arbitrary distinction between contractual and

¹⁹ *Leibowitz*, 584 F3d at 497 (citation and quotation marks omitted).

²⁰ *Id.* at 501.

²¹ *Id.* at 499 (citation and quotation marks omitted).

²² *Id.* at 500.

²³ *Id.* at 501 (second and third alterations in original).

at-will employees (who have no expectation of further employment from day to day).²⁴ Accordingly, we decline to hold that, as a matter of law, the failure to renew an employment contract cannot be an adverse employment action under the WPA. The trial court erred by granting summary disposition on that basis.

Whether nonrenewal amounts to an adverse employment action in a particular instance will depend on the circumstances of the particular case. Here, plaintiff was not given sufficient opportunity to develop a record regarding this question. “The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy.”²⁵ “[S]ummary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party.”²⁶ On October 18, 2010, plaintiff submitted a discovery request for documents that may have yielded factual support for his position. Specifically, plaintiff requested that the district produce records regarding whether other contractual employees had their contracts renewed. These records may have provided factual support for plaintiff’s position: if other similarly situated employees had their contracts renewed pro forma, plaintiff’s claim that the decision to not renew his contract was adverse becomes more credible. Defendants did not respond to plaintiff’s request, but instead filed their motion for summary disposition. Accordingly, plaintiff was denied the opportunity to uncover evidence that might have supported his position that the nonrenewal of his contract was an adverse employment action. Similarly, the production of these documents would be relevant to the third prong of the WPA prima facie case: causation. That is, whether other employees’ contracts were renewed pro forma is relevant with regard to whether plaintiff’s contract was not renewed because of his whistleblowing activity.

Defendants argue that the decision to not renew plaintiff’s contract occurred on March 11, 2009, several months before he engaged in protected activity regarding the AWWA conference reimbursements. Accordingly, defendants argue, the decision to not renew his contract could not have been adverse to him because it was made before his whistleblowing activities.²⁷ However, defendants ignore the fact that the first instance of whistleblowing activity occurred in May 2008, over a year before his contract’s nonrenewal, when plaintiff reported suspected OMA violations to the local prosecutor. Moreover, plaintiff denies that the decision to not renew his contract was made on March 11, 2009; he claims that the decision to not renew his contract occurred at the November 11, 2009, board meeting. Summary disposition under MCR

²⁴ See *Franzel v Kerr Mfg Co*, 234 Mich App 600, 606; 600 NW2d 66 (1999) (stating that at-will employees have no reasonable expectation of continued employment).

²⁵ *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006).

²⁶ *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000).

²⁷ Similarly, the timing of defendants’ decision is relevant to the causation element of the WPA prima facie case: if the decision not to renew plaintiff’s contract was made before his whistleblowing activity, the nonrenewal would not be because of his whistleblowing activity.

2.116(C)(10) was therefore premature, as there remains a genuine issue of material fact regarding whether the board's decision occurred in March or November 2009.

Summary disposition was not only premature, but improper. “[S]ummary disposition is inappropriate where questions of motive, intention, or other conditions of the mind are material issues.”²⁸ What motivated defendants’ decision to not renew plaintiff’s contract is central to this case. Moreover, summary disposition was improper because this case requires a credibility determination regarding defendants’ reasons for not renewing plaintiff’s contract.²⁹ Accordingly, because summary disposition was both prematurely and improperly granted, we reverse the trial court’s grant of summary disposition and remand for discovery with regard to whether other employees had their contracts renewed, and with regard to what motivated defendants’ decision to not renew plaintiff’s contract in this case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ William C. Whitbeck

²⁸ *Pemberton v Dharmani*, 207 Mich App 522, 529 n 1; 525 NW2d 497 (1994).

²⁹ *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 128; 776 NW2d 114 (2009) (“It is well settled that where the truth of a material factual assertion of a moving party’s affidavit depends on the affiant’s credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted.”) (quotation marks and citation omitted).