STATE OF MICHIGAN

COURT OF APPEALS

BARBARA J. HAYS, Plaintiff-Appellee/Cross-Appellant, v LUTHERAN SOCIAL SERVICES OF MICHIGAN, Defendant-Appellant/Cross-Appellee.	UNPUBLISHED January 22, 2013 APPROVED FOR PUBLICATION March 19, 2013 9:20 a.m. No. 307414 Midland Circuit Court LC No. 09-006198-CD Advance Sheets Version

Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

In this action brought under the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, defendant, Lutheran Social Services of Michigan, appeals as of right a judgment entered in plaintiff's favor. Plaintiff cross-appeals regarding the trial court's dismissal of her "about to report" claim under the WPA and the partial denial of her motion for attorney fees. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiff was employed as a home-healthcare provider for defendant. During the course of her employment, she encountered Client A, who smoked marijuana in his home and in plaintiff's presence when she was there on assignment by her employer. Plaintiff was informed of Client A's drug use before entering his home, and she discussed it with her supervisor and other coworkers. During one discussion with a coworker about Client A's drug use, plaintiff decided to call 911 and asked to be connected to the Bay Area Narcotics Enforcement Team (BAYANET). When speaking with a BAYANET official, plaintiff inquired about the potential consequences of someone knowing about the drug use of another and not reporting it. At the conclusion of the conversation, when asked by the BAYANET official if she would like to take any further action, plaintiff declined to do so.

As a condition of her employment, plaintiff had signed a client confidentially agreement, consenting to keep information about her clients confidential. Plaintiff was eventually called

into a meeting with her supervisor, at which the supervisor informed her that a complaint had been lodged against plaintiff for making a phone call about Client A. Plaintiff admitted to her supervisor that she called BAYANET. Plaintiff also recalled that her supervisor mentioned another phone call she supposedly made to an insurance company about Client A, although plaintiff denied making that call.

After she was terminated, plaintiff initiated this litigation, claiming that she was terminated in violation of the WPA. While defendant moved for summary disposition on plaintiff's "report" and "about to report" claims, the trial court only granted the motion with respect to the latter claim. After a jury trial, a judgment was awarded in plaintiff's favor in the amount of $77,897.50. The trial court also awarded attorney fees and costs to plaintiff consistently with case evaluation sanctions in the amount of $69,385.55. Defendant now appeals, and plaintiff cross-appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A grant or denial of a motion for summary disposition is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). Statutory interpretation also presents a question of law that we review de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

B. "REPORT" UNDER THE WPA

"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." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). The purpose of the WPA is to protect the public by facilitating employee reporting of illegal activity. *Id*. at 631. It is the plaintiff's burden to establish a prima facie case under the WPA, which requires a showing that "(1) the plaintiff was engaged in a protected activity as defined by the WPA, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). "The determination whether evidence establishes a prima facie case under the WPA is a question of law that this Court reviews de novo." *Roulston v Tendercare (Mich), Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

In regard to the first element of a prima facie case, a plaintiff engages in a protected activity when he or she (1) reports to a public body a violation of the law, a regulation, or a rule, (2) is about to report such a violation to a public body, or (3) is being asked by a public body to participate in an investigation. *Manzo*, 261 Mich App at 712-713; see also *Ernsting v Ave Maria College*, 274 Mich App 506, 510-511; 736 NW2d 574 (2007). On appeal, defendant argues that the trial court erred by denying its motion for summary disposition because plaintiff failed to actually make a report. As a matter of statutory interpretation, the definition of "report" is a question of law we review de novo. See *Hoffman*, 290 Mich App at 39. While the WPA does not define the term "report," courts may consult dictionary definitions when giving undefined statutory terms their plain and ordinary meaning. *Koontz v Ameritech Servs, Inc*, 466 Mich 304,

312; 645 NW2d 34 (2002). Accordingly, *Random House Webster's College Dictionary* (2005) defines "report" as "a detailed account of an event, situation, etc., [usually] based on observation or inquiry."[1]

According to plaintiff's deposition testimony, she asked the BAYANET officer the following question: "If you're in a situation where there's illegal drugs and you happen -- and this person happens to get in trouble, what is your consequence?" Essentially, plaintiff called the BAYANET officer to inquire about her potential liability if Client A's behavior was discovered, not to report any illegal behavior. Plaintiff did not provide any particulars or otherwise convey information that could have assisted the BAYANET officer in actually investigating any wrongdoing. There is no evidence that plaintiff identified herself, Client A, or Client A's location, nor did she provide any sort of detailed account of the situation. She did not even appear to specify the type of "illegal drugs" at issue. Thus, rather than providing a "detailed account of an event, situation, etc.," plaintiff was merely seeking to obtain information and advice.[2] Her lack of behavior that would constitute reporting is underscored by her negative response when the BAYANET officer asked if she wanted to take any further action.

Plaintiff analogizes the instant case to *Whitaker v US Sec Assoc, Inc*, 774 F Supp 2d 860 (ED Mich, 2011). In *Whitaker*, the plaintiff was a security officer at the Detroit Metropolitan Wayne County Airport, and he brought an action under the WPA against the defendant, claiming that the defendant had retaliated against him for internal complaints and an e-mail he sent to the Transportation Security Administration (TSA). *Id*. at 861-865. The e-mail identified gate-related security issues at the airport and indicated that the plaintiff had "some questions on the regulations." *Id*. at 863.

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[1] Similarly, in *People v Holley*, 480 Mich 222, 228; 747 NW2d 856 (2008), our Supreme Court relied on *Random House Webster's College Dictionary* (2001) in defining "report" identically in the context of reporting a crime.

[2] Analogous is *Garrie v James L Gray, Inc*, 912 F2d 808 (CA 5, 1990), a case from the United States Court of Appeals for the Fifth Circuit. *Garrie* involved a plaintiff who was employed as a skipper on a ship owned by the defendant. *Id*. at 809. The plaintiff called the Coast Guard and identified himself, but not his employer, and inquired about whether "the regulation regarding maximum working hours was still in effect," although he declined to file a formal complaint. *Id*. (quotation marks omitted). In rejecting the plaintiff's argument that his behavior constituted a report, the court concluded that the plaintiff had

> merely made an inquiry of the Coast Guard as to whether a particular statute was still in effect. He sought information, but did not provide it. He did not file a complaint, nor did he reveal the name of his employer or the vessel upon which he was employed—information without which the Coast Guard could not investigate or prosecute a violation.

Id. at 812. Likewise in the instant case, plaintiff sought information without providing anything to BAYANET that it could investigate or use to prosecute any potential violation.

The federal district court held that the plaintiff had established a prima facie case under the WPA because the e-mail was a "report." *Id*. at 868, 871. The court explained that the e-mail specifically identified two problems and communicated the plaintiff's intent to learn more about the regulations applicable to the two security concerns. *Id*. at 868-869. The court noted that the TSA and the defendant's own management construed this email as "raising concrete security concerns that warranted further investigation . . . ." *Id*. at 868. Ultimately, the court rejected the defendant's contention that the plaintiff's e-mail "merely posed questions and sought information . . . ." *Id*. at 869.

Whitaker is not similar to the instant case. The plaintiff in *Whitaker* specifically identified the regulatory violations and provided the TSA with sufficient information to further investigate the regulatory violations. Here, in contrast, plaintiff only referred to "illegal drugs" and did not provide the BAYANET officer with any information to further investigate the illegal activity. Thus, plaintiff's reliance on *Whitaker* is misplaced.

Moreover, categorizing plaintiff's behavior as a report under the WPA would not further the purpose of the statute, namely, to protect the public by encouraging reporting of illegal activity. Plaintiff's phone call did not provide law enforcement with the means to investigate Client A's marijuana use or to protect the public from that behavior. Plaintiff's only concern was to obtain information about her hypothetical liability, not to provide law enforcement officials with any concrete facts from which they could actually investigate or enforce the law. Thus, plaintiff failed to establish that she made a report under the WPA and because she failed to establish a prima facie case, defendant was entitled to summary disposition.[3]

C. "ABOUT TO REPORT" UNDER THE WPA

On cross-appeal, plaintiff argues that the trial court improperly dismissed her "about to report" claim and granted summary disposition to defendant. As noted, the WPA extends to employees who are about to report a suspected violation. *Manzo*, 261 Mich App at 712-713. Thus, "[a] plain meaning reading of the act shows that an employee 'about to' report receives the same level of protection as one who has reported to a public body." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 611; 566 NW2d 571 (1997). An "employee seeking protection under the 'about to report' language of the act [must] prove his intent by clear and convincing evidence." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 400; 572 NW2d 210 (1998); see also MCL 15.363(4). The employer also is entitled "to objective notice of a

[3] While plaintiff cites her trial testimony to support her argument that she did make a report, when reviewing a trial court's decision on a motion for summary disposition this Court considers only "what was properly presented to the trial court before its decision on the motion." *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010) (quotation marks and citation omitted). Furthermore, despite plaintiff's opinion at trial that she did make a report, the lack of any specific detail provided to the BAYANET officer about Client A clearly demonstrates that plaintiff was merely making an inquiry, not a report.

report or a threat to report by the whistleblower." *Roulston*, 239 Mich App at 279 (quotation marks and citations omitted).

In the instant case, plaintiff discussed Client A's marijuana use with her supervisor and coworkers and called BAYANET to inquire about any potential liability. Plaintiff argues that these facts establish a prima facie case that she was about to report a violation. In particular, plaintiff relies on her phone call to BAYANET to support her argument that she was about to report Client A's behavior. However, as discussed earlier, that phone call was not a report. Moreover, simply because plaintiff called BAYANET to inquire about her potential liability does not demonstrate that she intended to take any further action and actually report the behavior to a public body. In fact, when the BAYANET officer asked if she would like to take any further action, plaintiff declined the offer. Plaintiff's discussions with coworkers and supervisors about Client A's behavior also fail to demonstrate that she intended to report the behavior. Her conversations demonstrate only that while plaintiff knew about the behavior and had a sufficiently long time to report the behavior, she declined to do so.

There also is no evidence that plaintiff informed anyone that she was about to take further action and report the behavior to a public body. In sharp contrast is *Shallal*, 455 Mich at 613-614, 621, in which the plaintiff told the president of the company that she would report him for misusing funds and abusing alcohol if he did not "straighten up." The plaintiff in *Shallal* also discussed with various individuals the possibility of reporting the president's behavior. *Id*. at 613-614, 620 n 9. Our Supreme Court held that the plaintiff's explicit threat to report the president combined with her other actions satisfied the "about to report" language of the statute. *Id*. at 615, 621. Yet in the instant case, there is no evidence that plaintiff communicated such an explicit threat to report the behavior. There also is no evidence that plaintiff informed others that she intended to actually report the behavior to a public body.

Consequently, there is no evidence that defendant received objective notice that plaintiff was about to report Client A's behavior to a public body. Plaintiff never informed or threatened defendant that she would place a second call to BAYANET or another law enforcement agency. There is nothing in the record to suggest that plaintiff explicitly or implicitly informed defendant that a report of Client A's illegal activity was pending. Therefore, the trial court did not err by granting summary disposition to defendant on plaintiff's "about to report" claim because there is no clear and convincing evidence of her intent to report the behavior.

III. CONCLUSION

Because plaintiff failed to establish a prima facie case for her "report" and "about to report" claims under the WPA, defendant was entitled to summary disposition. We decline to address plaintiff's arguments concerning attorney fees because she is no longer a prevailing party and is not entitled to fees. We reverse the trial court's judgment in favor of plaintiff and the award of fees and costs to plaintiff. We remand this case for proceedings consistent with this opinion and do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Michael J. Riordan