

STATE OF MICHIGAN
COURT OF APPEALS

GARY PURCELL,

Plaintiff-Appellant,

v

TOWNSHIP OF TOMPKINS, TOWNSHIP OF
RIVES, and RICHARD FRIZZLE,

Defendants-Appellees,

and

RIVES TOMPKINS FIRE DEPARTMENT,

Defendant.

UNPUBLISHED

April 26, 2011

No. 295772

Jackson Circuit Court

LC No. 08-001500-CD

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Appellant Gary Purcell appeals as of right from the trial court's opinion granting defendants summary disposition. We affirm.

Plaintiff filed a complaint alleging that, in 2008, he engaged in activity protected by the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.*, and was terminated from his position as a volunteer firefighter. The trial court ruled that to establish a prima facie case, plaintiff had to show that there was an actual law that prohibited the conduct about which he complained. The trial court granted summary disposition because plaintiff could not meet that burden. Plaintiff now argues that regardless of whether an actual law exists, an employee who reports a suspected violation of the law is protected by the WPA. We need not decide this issue, however. Indeed, plaintiff subsequently amended his complaint and in the second amended complaint only alleged that he was terminated in 2008 as the result of engaging in activity protected by the WPA in 1997, not as the result of engaging in activity protected by the WPA in 2008. It is only the 2008 activity that brings into play the debate over the phrase "suspected violation of a law" in MCL 15.362.

"[U]nless otherwise indicated, an amended pleading supersedes the former pleading." MCR 2.118(A)(4). "MCR 2.118(A)(4) requires that the amended pleading be complete unto itself, and not merely a document that is limited to listing the changes from the earlier pleading."

Grzesick v Cepela, 237 Mich App 554, 562; 603 NW2d 809 (1999) (internal citation and quotation marks omitted). The record does not reflect any intention that the second amended complaint would not supersede all previous complaints. Because plaintiff's second amended complaint only alleges that plaintiff was terminated in 2008 as the result of engaging in activity protected by the WPA in 1997, any arguments involving plaintiff's engaging in activity that was protected by the WPA in 2008 have been waived and thus will not be addressed. See *id.* at 562-563.

Plaintiff also indicates that defendant Richard Frizzle, who was the fire chief, and Larry Case, who was the assistant fire chief, testified that their decision to terminate plaintiff, rather than suspend him, was based on the fact that plaintiff was previously suspended in 1997. Plaintiff argues that because his suspension in 1997 was a violation of the WPA, the decision to terminate him rather than suspend him in 2008 was a violation of the WPA. Accordingly, plaintiff argues that the trial court erred when it found that his suspension in 1997 for acts protected by the WPA was not a significant factor in his termination. Plaintiff contends that because Case and Frizzle admitted that their decision to terminate plaintiff, rather than suspend him, was based on the fact that plaintiff was previously suspended in 1997, it is irrelevant that eleven years passed between the time when plaintiff engaged in acts protected by the WPA and when he was terminated from his employment.

“Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo.” *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The trial court granted defendants summary disposition under MCR 2.116(C)(10). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a reviewing court considers the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion, *Coblentz*, 475 Mich at 567-568. “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.” *Id.* at 568 (internal citation and quotation marks omitted).

To establish a prima facie case under [MCL 15.362], a plaintiff must show that (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. [*West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).]

Plaintiff has the initial burden of establishing his prima facie case by a preponderance of the evidence. *Hopkins v City of Midland*, 158 Mich App 361, 378; 404 NW2d 744 (1987). The Court in *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659-660; 653 NW2d 625 (2002), indicated:

When considering claims under the WPA, we apply the burden-shifting analysis used in retaliatory discharge claims under the Civil Rights Act, MCL

37.2101 *et seq.* If the plaintiff has successfully proved a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for the plaintiff's discharge. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge. [Citations omitted.]

MCL 15.363 provides that “[a] person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.” The Court in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 286; 696 NW2d 646 (2005), mod 473 Mich 1205 (2005), found that a plaintiff's retaliatory discrimination claim based on discriminatory acts occurring before the period set forth in the statute of limitations cannot be maintained because it is untimely. Here, plaintiff alleged in his complaint that he was terminated in 2008 because of his 1997 protected activity. Although there is evidence in the record that plaintiff was terminated in 2008 because of his suspension in 1997, according to *Garg*, that discriminatory act was time-barred from consideration by the 90-day limitations period. *Id.* Accordingly, plaintiff has not established a causal connection between his termination in 2008 and the protected activity in 1997. *West*, 469 Mich at 183-184.¹

Additionally, as stated by the Court in *Joliet v Pitoniak*, 475 Mich 30, 44; 715 NW2d 60 (2006), “[i]f an act is not in and of itself discriminatory, i.e., it has a discriminatory effect only because of a prior discriminatory act, it cannot sustain a cause of action.” Here, plaintiff essentially argues that his termination in 2008 had a discriminatory effect only because he was suspended in 1997 for engaging in a protected activity. In the present lawsuit as framed by plaintiff, plaintiff's termination in 2008 was not in and of itself discriminatory but was based on a time-barred past discriminatory act that took place eleven years earlier. The 2008 firing cannot “sustain a cause of action.” *Id.*

We note that in *Garg*, 472 Mich at 270, and *Joliet*, 475 Mich at 31, the claims were related to the Elliot-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.* However, it has been indicated that whistleblower statutes and anti-retaliation provisions of employment discrimination statutes have analogous provisions and thus “warrant parallel treatment” *Shallal v Catholic Social Servs*, 455 Mich 604, 617; 566 NW2d 571 (1997) (internal citation and quotation marks omitted). Accordingly, the holdings in *Garg*, 472 Mich at 286, and *Joliet*, 475 Mich at 44, apply equally to plaintiff's WPA claim.

¹ We acknowledge that in *Campbell v Dep't of Human Services*, 286 Mich App 230, 232; 780 NW2d 586 (2009), the Court held that “acts of discrimination occurring outside an applicable limitations period . . . may, in appropriate cases, be used as ‘background evidence’ to establish a pattern of discrimination” We find this case more analogous to *Garg* than to *Campbell*.

Based on the foregoing, plaintiff did not establish the existence of any genuine issues of material fact related to the causal connection between the protected activity and plaintiff's termination. Accordingly, plaintiff cannot meet his burden of setting forth a prima facie case. *West*, 469 Mich at 183-184. Because plaintiff has not set forth a prima facie case under the WPA, whether there was a legitimate business reason for plaintiff's discharge or whether defendants' legitimate reason was only a pretext for the discharge are not issues that we need to address. See *Taylor*, 252 Mich App at 659-660.²

Although the trial court used alternate reasoning in reaching its decision, we can affirm a trial court's decision if the trial court reached the correct outcome for a different reason. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

² We note that, in light of the record, and even taking into consideration the evidence that plaintiff put forth, we would find no basis to reverse the trial court's ruling even if we were to consider none of plaintiff's arguments waived or moot. Indeed, the evidence supports a finding that plaintiff was fired for insubordination and there is no basis to conclude that his firing was based on retaliation.