

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

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JANICE BUSH,

Plaintiff-Appellant,

v

DETROIT SCHOOL DISTRICT,

Defendant-Appellee.

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UNPUBLISHED

September 19, 2006

No. 268362

Wayne Circuit Court

LC No. 04-422749-CZ

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition of her gender discrimination and retaliatory discharge claims under MCR 2.116(C)(10),<sup>1</sup> and the trial court's previous order granting defendant's motion for partial summary disposition of her claim that defendant violated the procedural protections of MCL 380.471a in terminating her employment. We affirm.

Plaintiff had been employed by defendant as a school principal since 1995. At the close of the 2001-2002 school year, defendant terminated plaintiff's employment. Plaintiff subsequently filed a gender and age discrimination lawsuit against defendant, which the parties settled in August of 2003. As a result of that settlement, plaintiff was appointed as the principal of Yost Elementary School for the 2003-2004 school year. Plaintiff immediately requested a financial audit of the school, asserting that she needed to be kept informed as the school's new administrator. Defendant denied plaintiff's request for a financial audit at that time. Plaintiff apparently also immediately "ruffled feathers" among the Yost Elementary School staff and teachers. Several teachers filed written complaints against plaintiff and appeared at a November 2003 school board meeting to protest plaintiff's abrasive management style. Defendant also received numerous written complaints from the parents of Yost Elementary students who were displeased with plaintiff's performance.

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<sup>1</sup> In that order, the trial court also dismissed plaintiff's claim that defendant breached a prior settlement agreement between the parties. However, plaintiff does not appeal that ruling.

Plaintiff's supervisor, John Harris, counseled plaintiff regarding her need to improve her interpersonal and management skills. However, on March 26, 2004, Harris informed plaintiff that he had recommended that defendant not renew her employment contract for another school year. After allowing plaintiff the opportunity to discuss the reasons for her termination with a designee of the district's chief executive officer (CEO), defendant ultimately notified plaintiff that her contract would be terminated on June 30, 2004. In the meantime, plaintiff had again requested that a financial audit be conducted at Yost Elementary School because fundraising proceeds had allegedly been improperly intermingled with district funds.

Plaintiff filed the present lawsuit in response to her termination. In relevant part, plaintiff asserted that defendant violated the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, by terminating her employment based on her gender and in retaliation for her previously filed discrimination lawsuit. Plaintiff also asserted that defendant terminated her employment in retaliation for her request for a financial audit of the school in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* Plaintiff further argued that this same conduct amounted to termination in violation of public policy. Plaintiff also alleged that defendant failed to follow the procedural protections afforded school administrators under MCL 380.471a. As noted, the trial court dismissed these claims on defendant's motions. This appeal followed.

First, we agree with the trial court that plaintiff failed to establish a prima facie case of gender discrimination. We review a lower court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald, supra* at 332.

Pursuant to the ELCRA, "[a]n employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a). A plaintiff may prove disparate treatment by either direct or indirect evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Absent direct evidence of discrimination, a plaintiff must proceed under the shifting burdens of proof articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001). To establish a prima facie case of discrimination under *McDonnell Douglas*, a plaintiff must prove that: (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position for which he or she applied; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 463. If a plaintiff establishes a prima facie case, "a presumption of discrimination arises." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). Thereafter,

the defendant bears the burden of articulating a legitimate, nondiscriminatory reason for its employment decision. *Hazle, supra* at 464. Once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext. *Id.* at 464-466.

Plaintiff failed to establish that her contract was terminated “under circumstances giving rise to an inference of unlawful discrimination.” *Id.* at 463. According to the chart prepared by plaintiff in relation to this lawsuit, two male principals received the same number of parent complaints as plaintiff, two male principals received only one less complaint, and two female principals actually received more parent complaints. Plaintiff noted that none of the schools managed by those principals had made adequate yearly progress with regard to academic performance. However, defendant showed that those principals all had a much larger student population than plaintiff’s school and, therefore, had a lower percentage of parent complaints. Moreover, plaintiff made no comparison between herself and other principals regarding staff satisfaction. Consequently, this evidence was insufficient to support an inference that plaintiff was treated differently based on her gender.

Even if we were to conclude that these circumstances established a prima facie case of gender discrimination, defendant articulated a valid nondiscriminatory reason for plaintiff’s termination (i.e. plaintiff’s poor performance) and plaintiff has not met her burden of showing that defendant’s proffered reason for termination was mere pretext. Plaintiff received an unusually high percentage of parent complaints regarding her performance and was the subject of significant complaints by her staff. In addition, another principal with complaints from parents and whose school had not met academic progress requirements was similarly terminated the following year. In contrast to this evidence in support of defendant’s proffered reason, plaintiff has presented no substantive evidence that defendant’s reason was merely a pretext. Hence, the trial court properly dismissed this claim.

We also agree with the trial court that plaintiff failed to establish a claim of retaliatory discharge in violation of the ELCRA. Pursuant to MCL 37.2701(a), an employer may not “[r]etaliat[e] or discriminate against a person because the person has opposed a violation of [the ELCRA], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.”

To establish a prima facie case of retaliation, a plaintiff must show:

“(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.” [*Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

In this case, it is undisputed that plaintiff previously filed a lawsuit against defendant based on a violation of the ELCRA, which plaintiff and defendant settled. Therefore, defendant was clearly aware that plaintiff engaged in a protected activity. It is equally clear that plaintiff suffered an adverse employment decision. Therefore, the only remaining question is whether plaintiff created a question of material fact regarding whether there was a causal connection between the protected activity and the adverse employment decision.

Plaintiff relies on statements by Harris wherein Harris allegedly told plaintiff that Ann Smith, plaintiff's immediate supervisor at the time of her previous lawsuit and Harris' immediate supervisor during the school year in question, did not like her. However, even assuming that Smith actually disliked plaintiff and that her animosity towards plaintiff arose from plaintiff's earlier suit, defendant clearly cited a legitimate nonretaliatory reason for plaintiff's termination. As already noted above, plaintiff failed to present substantive evidence from which a jury could infer that this reason was merely a pretext. Therefore, defendant was entitled to summary disposition of this claim as well.

The trial court also properly dismissed plaintiff's claims that defendant violated the WPA. We review whether a plaintiff has presented a prima facie case under the WPA de novo. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 711; 683 NW2d 699 (2004).

MCL 15.362 provides,

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

"Actions under the WPA are analyzed using the 'shifting burdens' framework utilized in retaliatory discharge actions under the [EL]CRA." *Anzaldúa v Band*, 216 Mich App 561, 580; 550 NW2d 544 (1996). To establish a prima facie case under the WPA, a plaintiff must prove that: (1) he or she was engaged in a "protected activity" as defined by the WPA; (2) he or she was terminated or suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). "Protected activity" under the WPA includes reporting a violation or suspected violation of a law or regulation to a public body or being about to make such a report. MCL 15.362; *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998).

Plaintiff claims that her requests for an audit of the school's finances constitute protected activity under the WPA. We disagree.

Plaintiff allegedly discovered that certain staff members at Yost Elementary School were violating district policy by intermingling fundraising proceeds with district funds, failing to obtain the proper permission before engaging in fundraising activities, and failing to properly account for expenditures and profits related to those activities. Plaintiff stated that she verbally reported the suspected violation to Harris, but that he expressed no interest and never responded to her concerns. Plaintiff also sought a financial audit from the Business Practices Department of the district on two separate occasions. Although "the reporting of misconduct in an agency receiving public money is in the public interest," *Phinney v Perlmutter*, 222 Mich App 513, 554;

564 NW2d 532 (1997), we conclude that these reports were insufficient to trigger WPA protection.

In *Phinney, supra* at 520, the plaintiff was a research scientist at the University of Michigan's Institute of Gerontology who accused her immediate supervisor, Perlmutter, of stealing her research. The plaintiff reported this theft to the institute's director who appointed an investigator to review the matter. *Id.* The plaintiff also reported the alleged theft to a university personnel officer and a professor. *Id.* at 554. Plaintiff was later terminated from her position and filed suit for a violation of the WPA. *Id.* at 520. In *Phinney*, this Court found that the plaintiff had reported the violation to a "public body" as required in the WPA because the University of Michigan and its officials fit within the statutory definition of that term. *Id.* at 554-555. This Court further found that the plaintiff's reports to the various officials were necessarily sufficient because it triggered a university police investigation. *Id.* at 555. However, in determining that the plaintiff was protected by the WPA, this Court noted that the plaintiff was not required to report her supervisor's alleged theft as part of her "job function." *Id.*

In relevant part, the definition of "public body" includes a school district. MCL 15.361(d)(iii). Taking plaintiff's allegations as true, she shared her concerns regarding the school's fundraising activities with Harris. Furthermore, it is undisputed that plaintiff sought an official financial audit of the school on two separate occasions. However, unlike the case in *Phinney*, the reporting of such financial irregularities was one of plaintiff's job functions.

In *Heckman v Detroit Chief of Police*, 267 Mich App 480, 482; 705 NW2d 689 (2005), the plaintiff was a financial officer for the police department. He wrote a five-page letter alleging that "gross mismanagement and fraud" was rampant in the department. *Id.* The plaintiff first sent this letter to his immediate supervisor. When he received no response, the plaintiff shared the letter with the newly appointed chief of police and the mayor. *Id.* at 483. When his superiors finally responded to the letter seven months later, the plaintiff was warned to "start looking for a job elsewhere" if he continued to "mak[e] waves." *Id.* The plaintiff filed various claims against various parties, one of which was a violation of the WPA. This Court found that the plaintiff was able to raise a WPA claim because he forwarded his letter to the mayor, a higher authority. *Id.* at 494. However, this Court noted that the plaintiff's report of financial violations to his superiors within the police department was part of the plaintiff's job function, which could not otherwise form the basis of a WPA claim. *Id.* at 495-496, citing *Dudewicz v Norris Schmid, Inc.*, 443 Mich 68; 503 NW2d 645 (1993).

Plaintiff testified at her deposition that it was the job of a school principal to request a school financial audit when one was required. Plaintiff also testified that, as a school principal, her approval was required for all fundraising activities. Apparently, it was also plaintiff's responsibility to sign checks on the school's account because she refused to sign any checks until the school secretary had removed fundraising funds from the district account. When asked if her job responsibilities included "oversee[ing] financial issues, concerns, [and] matters" at the school, plaintiff stated, "One of my responsibilities is to monitor and be sure that staff adhere to district policy . . . ." Plaintiff also stated that it was her responsibility to "seek assistance" when the school's staff failed to adhere to district policies. Under these circumstances, plaintiff was required to seek an audit as part of her "job function." Accordingly, plaintiff was not engaged in protected activity when she requested the audits.

Further, even assuming that plaintiff was engaged in a protected activity, plaintiff failed to present sufficient evidence to establish a causal connection between her requests for an audit and her eventual termination. The fact that she was terminated shortly after her last request, absent more, cannot establish a causal connection. *Garg, supra* at 286; *Taylor v Modern Engineering Inc*, 252 Mich App 655, 662; 653 NW2d 625 (2002). Therefore, the trial court did not err when it dismissed this claim.<sup>2</sup>

Finally, we conclude that defendant did not violate the procedural protections afforded by MCL 380.471a in terminating plaintiff's employment. As a preliminary matter, we note that, contrary to defendant's assertion on appeal, this Court does have jurisdiction to consider this issue. When filing a claim of appeal from a trial court's final order, the party may challenge any interlocutory order or ruling of that court. *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996); *Attorney Gen v Pub Service Comm*, 237 Mich App 27, 39-40; 602 NW2d 207 (1999). Accordingly, we may consider plaintiff's challenge to the court's earlier order of partial dismissal.

Plaintiff contends that defendant's reading of MCL 380.373(6) cannot be correct. Specifically, plaintiff argues that the Detroit School District is the only first-class school district in the state and, therefore, is the only district to which MCL 380.471a applies. Hence, plaintiff further argues, if defendant were not required to abide by MCL 380.471a, that statute would be rendered nugatory. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). We review issues of statutory construction de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

"If possible, we give effect to the Legislature's purpose and intent according to the common and ordinary meaning of the language it used. When ascertaining intent, we read differing statutory provisions to produce an harmonious whole." *Bailey v Oakwood Hosp & Medical Ctr*, 472 Mich 685, 692-693; 698 NW2d 374 (2005). In doing so, this Court must "give[] effect to every word, phrase, and clause in the statute" and "avoid a construction that would render any part of a statute surplusage or nugatory." *People v Williams*, 268 Mich App 416, 425; 707 NW2d 624 (2005). "If statutes can be construed in a manner that avoids conflict, then that construction should control the analysis. . . . 'We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.'" *Id.* at 425-426, quoting *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001).

MCL 380.471a provides:

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<sup>2</sup> Although plaintiff has not challenged the dismissal of her claim that she was terminated in contravention of public policy, see *Suchodolski v Mich Consolidated Gas Co*, 412 Mich 692, 694-696; 316 NW2d 710 (1982), we note that her failure to establish a causal connection between her termination and her requests for audits would be fatal to that claim as well.

(1) This section applies to *a first class school district only* if the question under section 410 is not approved in the first class school district.

(2) The first class school district board . . . may employ assistant superintendents, principals, assistant principals, guidance directors, and other administrators who do not assume tenure in position for a term, not to exceed 3 years, fixed by the board and shall define their duties. . . . Notification of nonrenewal of contract shall be given in writing not less than 90 days before the termination date of the contract of a superintendent of schools, and at least 60 days before the termination date of the contract of other administrators described in this subsection. If notification of nonrenewal is not given as required in this subsection, the contract is renewed for an additional 1-year period.

(3) A notification of nonrenewal of a contract of a person described in this section may be given only for a reason that is not arbitrary or capricious. The board shall not issue a notice of nonrenewal under this section unless the affected person has been provided with not less than 30 days' advance notice that the board is considering the nonrenewal together with a written statement of the reasons the board is considering the nonrenewal. After the issuance of the written statement, but before the nonrenewal statement is issued, the affected person shall be given the opportunity to meet with not less than a majority of the board to discuss the reasons stated in the written statement. The meeting shall be open to the public or a closed session as the affected person elects under section 8 of the open meetings act, 1976 PA 267, MCL 15.268. The failure to provide for a meeting with the board or the finding of a court that the reason for nonrenewal is arbitrary or capricious shall result in the renewal of the affected person's contract for an additional 1-year period. . . .

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(5) *This section is subject to part 5a* [MCL 380.371 *et seq.*]. [Emphases added.]

Under part 5a, once a qualifying school district has a chief executive officer, “each employee of the qualifying school district whose position is not covered by a collective bargaining agreement *is employed at the will of the chief executive officer.*” MCL 380.373(6) (emphasis added). Plaintiff was also designated as an at-will employee in the employment contract she signed on May 26, 2003. Paragraph 3 of that contract, entitled “At Will Employment,” provides that plaintiff “serve[d] at the pleasure of the CEO” and could be terminated in the CEO’s “sole discretion with or without cause, and with or without notice . . . .”

For purposes of this analysis, we accept plaintiff’s assertion that defendant is the only first-class school district in Michigan. However, we disagree with plaintiff’s assertion that the application of MCL 380.373(6) to administrators in the Detroit School District renders MCL 380.471a nugatory. The procedural protections in MCL 380.471a had no effect while the defendant school district was under state control. Pursuant to the plain language of MCL 380.471a, those protections are subject to the school reform act, which suspends those protections during a take-over situation. However, MCL 380.471a was not abolished. Instead, the protections of MCL 380.471a remain in place once the school district returns to the control of

a citizen-elected school board. Therefore, MCL 380.373(6) does not render MCL 380.471a nugatory even if the defendant school district was the only first-class school district in the state. Consequently, plaintiff's claim based on MCL 380.471a must fail.

Affirmed.

/s/ Christopher M. Murray  
/s/ Michael R. Smolenski  
/s/ Deborah A. Servitto