STATE OF MICHIGAN

COURT OF APPEALS

DAVID PAPPENHEIMER,

Plaintiff-Appellee,

v

VILLAGE OF NEW LOTHROP,

Defendant-Appellant,

and

JULIE JENKINS, KAREN MAKSIMCHUK, LAWRENCE COLLINS, EUGENE BIRCHMEIER, JOHN MAKSIMCHUK, and KEN BIRCHMEIER,

Defendants.

UNPUBLISHED
August 12, 2010

No. 292002
Shiawassee Circuit Court
LC No. 07-006219-CL

Before: MARKEY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Defendant Village of New Lothrop (Village) appeals by leave granted the denial of its motion for summary disposition. We reverse and remand.

I. Factual background.

Plaintiff was hired by Village as a police officer in 1978, and worked his way up within the police department. In 1992, he was promoted to chief of police, a title he held until his discharge in 2007. Near the end of plaintiff's tenure as police chief, numerous disputes arose between plaintiff and the members of the Village board. The specific dispute that gave rise to plaintiff's discharge and the present litigation arose after the appointment in February 2007 of defendant Jenkins as the Village's police commissioner. Jenkins was also a board member. Shortly after becoming police commissioner, Jenkins asked plaintiff to provide her with copies of all the Village police officers' daily reports (dailies); with the names, addresses, and phone numbers of all the Village police officers; and with an inventory of the police department. Plaintiff refused to give Jenkins any of the requested information other than the names and addresses of the police officers. He testified that he believed it would have violated Michigan's

Freedom of Information Act[1] (FOIA) to do so. Jenkins testified that plaintiff never raised FOIA as a reason not to comply with her requests.

On April 25th, 2007, the Village board voted to suspend plaintiff for one month without pay. Several individual defendants who were Village board members claimed that they voted to suspend plaintiff because of his refusal to comply with Jenkins' requests for information, as well as his behavior at board meetings.

On July 18th, 2007, the Village board sent plaintiff a letter informing him that it was considering terminating him. At this point, plaintiff began investigating whether it would violate FOIA to give Jenkins the information requested. Plaintiff spoke with Shiawassee County Sheriff Jon Wilson, "somebody at the FBI," the Owosso Post Commander of the Michigan State Police, the police department's insurance representative, and some other police chiefs. Plaintiff testified that Wilson told him that he was not required by FOIA to give this information out, and that it was not Wilson's practice to give the information out. Plaintiff did not testify that Wilson told him it would violate FOIA to give the information. The police chiefs with whom plaintiff spoke also told plaintiff it was not their practice to give out this information, but did not tell plaintiff that it would violate FOIA to do so. The FBI employee, MSP Post Commander, and insurance representative did not give plaintiff any relevant information or advice.

On August 8th, 2007, the Village board met and voted to discharge plaintiff. Jenkins testified that she voted to terminate him because of his refusal to give the information requested, and because of his disrespectful behavior at council meetings. Other individual defendant board members testified similarly.

Plaintiff brought this claim for age discrimination and for violation of the Whistleblowers' Protection Act[2] (WPA). Defendants moved for summary disposition, pointing out that plaintiff had set out no facts in his complaint to support his allegations of violation of the WPA and age discrimination. The trial court held that plaintiff had failed to make a case with respect to the age discrimination claim, and granted summary disposition to all defendants on that count. The trial court further held that the individual defendants were entitled to summary disposition on the WPA action. Plaintiff did not appeal either dismissal. The only remaining claim, then, was the WPA claim against Village. Village sought and was granted leave to appeal the trial court's denial of its motion for summary disposition.

II. Standard of Review

We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Village moved for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). The trial court denied Village's motion

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[1] MCL 15.231 *et seq.*

[2] MCL 15.361 *et seq.*

under MCR 2.116(C)(10), and explicitly declined to address the issue under MCR 2.116(C)(8). No argument was made or addressed regarding MCR 2.116(C)(7). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted[, and] must be granted if no factual development could justify the plaintiff['s] claim for relief." *Spiek*, 456 Mich at 337. A motion under MCR 2.116(C)(10) challenges the factual support of a claim, and should be granted if, after the court reviews the evidence submitted in support of the claim, it finds there is no genuine issue of material fact. *Id.*

III. Discussion

"To establish a prima facie case under [the WPA], a plaintiff must show that (1) [he] was engaged in protected activity as defined by the [WPA], (2) [he] 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).

Here, the second element is not in question. The discussion of the first element may be analyzed as a legal question, as there is no significant dispute about what plaintiff was doing, only whether, as a matter of law, it qualifies as a protected activity under the WPA. The trial court held that "[p]laintiff has come forward with plenty of . . . information . . . to indicate that this is a protected activity." Village, however, argues that plaintiff never reported any conduct he believed to be illegal, but only refused to engage in what he believed to be illegal conduct. Although, as plaintiff points out, at least one commentator has advanced a broad view of what constitutes a whistleblower, including "employees who refuse to carry out illegal instructions" and "employees who voice their concerns regarding their employers' illegal behavior,"[3] this view is not consistent with our law of whistleblowing. Under the WPA, an employer is forbidden to discharge an employee because that employee

> reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule . . . to a public body, . . . 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. [MCL 15.362.]

Plaintiff's pleadings and testimony support a finding that he was asked to do something he believed violated the law, that he refused to comply, and that he was fired for that reason. This is not protected activity under the WPA.

Plaintiff claimed he was reporting what he believed to be illegal activity when he contacted the various law enforcement agencies and the police department's insurance

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[3] Westman, *Whistleblowing: The Law of Retaliatory Discharge* (BNA Books, 1991), quoted in *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 379 n 10; 563 NW2d 23 (1997).

representative. But he also testified that he did not talk to anyone on the board about these conversations. Even accepting that these conversations were reports of what plaintiff believed to be violations of the law, because there was no evidence that any board member had any knowledge of these reports, there can have been no causal relationship between the reports and plaintiff's termination. See *West*, 469 Mich at 187-188.

IV. Conclusion

We agree with Village that the activity for which plaintiff was terminated was not protected activity under the WPA, and that, even assuming plaintiff was reporting suspected violations of the law, there was no evidence supporting a causal relationship between the reporting and plaintiff's termination. The trial court therefore erred in denying Village's motion for summary disposition. In so holding, we need not and do not reach the question of whether Jenkins violated FOIA or any other law in requesting information from plaintiff, nor do we reach the question of whether plaintiff would have violated FOIA or any other law by providing the information. Nor do we hold that plaintiff is without a remedy for his termination, only that if he has a remedy, it is not under the WPA.

The case is reversed and remanded to the trial court for the entry of an order granting Village's motion. Village, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Stephen L. Borrello