STATE OF MICHIGAN

COURT OF APPEALS

PINO COLONE, M.D.,

Plaintiff-Appellee,

v

PATRICK R. WARDELL, HURLEY MEDICAL CENTER BOARD OF HOSPITAL MANAGERS, UNIVERSITY OF MICHIGAN, and UNIVERSITY HOSPITAL,

Defendants,

and

REGENTS OF UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
October 7, 2010

No. 287601
Genesee Circuit Court
LC No. 07-086428-CZ

PINO COLONE, M.D.,

Plaintiff-Appellee,

v

PATRICK R. WARDELL and HURLEY HOSPITAL BOARD OF MANAGERS, a/k/a HURLEY MEDICAL CENTER,

Defendants-Appellants,

and

UNIVERSITY OF MICHIGAN BOARD OF REGENTS and UNIVERSITY HOSPITAL,

Defendants.

No. 287625
Genesee Circuit Court
LC No. 07-086428-CZ

PINO COLONE, M.D.,

Plaintiff-Appellee,

v

No. 289111
Genesee Circuit Court
LC No. 07-086428-CZ

PATRICK WARDELL and FLINT BOARD OF HOSPITAL MANAGERS, d/b/a HURLEY MEDICAL CENTER,

Defendants-Appellants,

and

REGENTS OF UNIVERSITY OF MICHIGAN, a/k/a UNIVERSITY OF MICHIGAN, a/k/a UNIVERSITY HOSPITAL,

Defendant.

Before: HOEKSTRA, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 287601, defendant Regents of the University of Michigan (U of M) appeals by leave granted the trial court's August 20, 2008 order denying its motion for summary disposition of plaintiff's claims under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*. In Docket No. 287625, defendants Board of Hospital Managers of Hurley Medical Center (HMC) and Patrick Wardell appeal by leave granted the same August 20, 2008 order denying their motion for summary disposition of plaintiff's ELCRA claim. In Docket No. 289111, HMC and Wardell appeal by leave granted the trial court's November 5, 2008 order denying their motion for summary disposition of plaintiff's First Amendment claim. We reverse.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff is a physician previously employed by U of M. U of M contracts with HMC to provide physicians for HMC's emergency department. The nurses, physician assistants, and other support staff in the emergency department are employed directly by HMC. Wardell is the president of HMC. Plaintiff was assigned to the HMC emergency department in November 1995 and worked there until May 2007 when he was removed and offered a reassignment to Foote Hospital. U of M removed plaintiff at the request of Wardell, who allegedly made the request in response to a mass e-mail plaintiff sent on April 27, 2007. That e-mail was highly critical of one of HMC's nurses, Stephen Nokovich, as well as other employees, and was sent to 37 people, including physicians employed by U of M, and physician assistants, nurses, and non-emergency department administrators employed directly by HMC. Plaintiff maintains that the e-mail was a protected communication under the ELCRA and WPA, and that defendants retaliated against him for reporting patient safety and sexual harassment issues. Defendants argue that plaintiff's

e-mail was not a protected communication, was inappropriate, and caused intolerable disruption in HMC's emergency department, which required plaintiff's transfer.

At his deposition, plaintiff testified that between 1995 and 2005, he witnessed inappropriate, sexually oriented interaction between staff members at HMC, including "inappropriate language, sexual innuendos, sitting on people's laps, grabbing buttocks, and things along those lines." Plaintiff could not recall whether he filed any complaints regarding the behavior. He testified that in late April or early May 2006, he observed one emergency department nurse photograph another nurse's bare breasts as part of a joke. Both plaintiff and Nokovich were present in the room when the photograph was taken. At a physicians' retreat on May 10, plaintiff complained of a lack of professionalism in the emergency department and of how "attending physician behavior was influencing the activity and behavior in the department," referring to the photography incident as an example.

Later in May, plaintiff sent an e-mail to Dr. Mike Jaggi, the director of emergency medicine at HMC, and Carol Fechik, Nokovich's supervisor, regarding an incident on May 22 when Nokovich allegedly left a room during an intubation procedure. Plaintiff testified that he believed Nokovich left the room in retaliation for plaintiff's statements at the physicians' retreat and maintained in the e-mail that Nokovich's actions were unprofessional and jeopardized patient safety. Nurse Jamie Wardlaw, plaintiff's "on-again-off-again" girlfriend with whom he had a child, was assigned to the patient. Wardlaw wrote a letter to Wardell, and plaintiff wrote a report, stating that Nokovich "walked out" of the room when the patient was to be intubated. Nokovich testified that he did not leave the room until after his duties were complete, and plaintiff admitted that the patient was never left without a nurse and was intubated without incident. In light of plaintiff's e-mail complaint, HMC investigated the incident, but could not wholly substantiate the allegations against Nokovich and took no action against him. In October 2006, plaintiff filed a complaint regarding the same incident with the Michigan Department of Community Health (MDCH). Over the next few months, the MDCH reviewed the matter, but determined that no health code violation could be verified.

Also in October 2006, plaintiff and three female nurses, including Wardlaw, met with HMC's general counsel, William Smith, to complain of unprofessional conduct in the emergency department. This unprofessional conduct was at least partially of a sexual nature, and allegedly involved sexual harassment. Plaintiff complained of similar conduct to Dr. Jaggi. It is unclear whether any of the complained-of conduct involved Nokovich. HMC and U of M investigated the complaints, conducting 38 employee interviews, but ultimately determined that the complaints could not be corroborated.

In March 2007, plaintiff became involved in a dispute with fellow emergency department physician Dr. Michael Roebuck regarding punctuality and signing in and out of their respective shifts. The dispute resulted in accusations being made against each other by e-mail, which were sent to U of M's emergency department chair Dr. William Barsan. In response to a critical e-mail from plaintiff, Dr. Barsan sent an e-mail to both plaintiff and Dr. Roebuck stating that "[e]-mail is not an appropriate venue for airing differences . . . ." The e-mail continued: "This whole discussion started because of issues about professionalism—please remember that and BE a professional. If you can't do this, you shouldn't be working." Dr. Barsan instructed that a face-to-face meeting and mediation should be arranged.

On April 3, 2007, plaintiff filed an incident report alleging that Nokovich failed to administer medications as ordered. Nokovich testified that he could not recall the incident. On April 13, plaintiff filed another report alleging that Nokovich failed to notify him of the arrival of a trauma patient and had lied about informing him. At his deposition, Nokovich described the incident and testified that he did, in fact, inform plaintiff about the patient.

On April 26, Dr. Jaggi sent plaintiff an e-mail summarizing the topics discussed at a recent staff meeting. The e-mail was sent to plaintiff and approximately 30 of his coworkers. The next day, April 27, plaintiff replied to that e-mail with an e-mail message to Dr. Jaggi, all of the employees who received the original e-mail from Dr. Jaggi, and several additional HMC employees who had not received the original e-mail. Plaintiff's e-mail contained the following pertinent language:

> Thanks for the summary of the faculty meeting. I have concerns regarding the position of flow manager, which is item number 6. Since our meeting it has been rumored that Steve Nokovich is getting or being considered for this position. I have serious concerns about this. He is not a good nurse, he is lazy and neither works well nor communicates effectively with others. Over the past year I have provided you, nursing management, Dwayne Parker and Bill Smith with multiple examples of his ineptitude. Additionally, recently, as you and nursing management are also aware, he and others on third shift are fabricating issues to distract from their incompetence, for example, last week Carol told me that someone filled out an incident report 3 days prior, stating that I did not inform the charge nurse of a transfer of a patient on May 11, 2006.
>
> It would be a great disservice to the position and to this department if he or any of the other individuals in question, who continue to be the cancers and the impediments to patient satisfaction, were to assume this role. I would be happy to discuss this further with anyone interested.

Several physicians who were recipients of the e-mail pointed out to plaintiff that a mass e-mail was not the appropriate place to raise complaints about a single employee. Wardell subsequently sent Dr. Barsan a letter dated May 4, 2007, stating, in relevant part:

> As you are aware, recently there was an e-mail communication from one of the University of Michigan physician employees, Dr. Pino Colone, to a large number of Hurley Medical Center staff, which was extremely critical of a Hurley employee. Like most healthcare facilities, Hurley Medical Center has a number of appropriate avenues for concerns of physicians and others to be addressed. The communication did not utilize an appropriate avenue, and also, was widely disseminated.
>
> As you can imagine, this action has led to considerable disruption in our emergency department, which cannot be tolerated. With this in mind, we ask that you no longer assign this physician to staff Hurley Medical Center's emergency department effective immediately.

After receiving the letter from Wardell, Dr. Barsan removed plaintiff from HMC in Flint, Michigan, and offered him a transfer to Foote Hospital in Jackson, Michigan. The reassignment involved the same title, job duties, benefits, and pay as plaintiff's assignment at HMC. At the time of the reassignment, plaintiff lived in Howell, Michigan. His drive to work would have been approximately 30 miles longer to Foote Hospital than to HMC. In addition to the longer commute, plaintiff considered the reassignment an affront to his professional reputation. Plaintiff ultimately declined to accept the transfer to Foote Hospital and resigned from U of M on August 31, 2007. The next day, plaintiff began a new job with St. Mary Mercy Hospital in Livonia, Michigan, which was approximately the same distance from his home as HMC. Plaintiff's employment with St. Mary Mercy Hospital provides similar or better benefits and pays approximately $50,000 more per year than his former employment with U of M.

In June 2007, before plaintiff resigned from U of M, he initiated this action, filing a complaint against defendants alleging conspiracy, a public policy violation, and a WPA claim. In March 2008, plaintiff filed a first amended complaint, adding a claim under the ELCRA. Defendants subsequently moved for summary disposition of plaintiff's claims under MCR 2.116(C)(7) and (C)(10). The trial court granted defendants summary disposition of plaintiff's conspiracy and public policy claims and granted HMC and Wardell summary disposition of plaintiff's WPA claim because they were not plaintiff's employers. The court denied HMC and Wardell summary disposition of plaintiff's ELCRA claim, and denied U of M summary disposition of plaintiff's ELCRA and WPA claims, finding that genuine issues of material fact existed for the finder of fact. The trial court signed a written order to this effect on August 20, 2008.

In the meantime, in July 2008, plaintiff filed a second amended complaint adding a count against HMC and Wardell for violating his First Amendment rights. Plaintiff alleged that he was engaged in activity protected by the First Amendment when he reported sexual harassment and violations of hospital rules and regulations affecting the safety and well-being of patients. According to plaintiff, he had a right to petition government agencies to correct those conditions and defendants retaliated against him for doing so.

HMC and Wardell moved for summary disposition of plaintiff's First Amendment claim under MCR 2.116(C)(10). The trial court denied the motion, finding that plaintiff was not an employee of HMC and there was no evidence he was required "to take his complaints to the level that he did," that plaintiff's complaints involved matters of public concern, and that material questions of fact existed as to whether those complaints were related to an adverse employment consequence. The trial court issued its written order denying HMC and Wardell summary disposition on November 5, 2008.

U of M filed an application for leave to appeal in this Court. HMC and Wardell filed a separate application. This Court granted the applications and consolidated the cases.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion

under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party, and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. MCR 2.116(G)(6); *Maiden*, 461 Mich at 119-120.

III. THE WPA AND ELCRA CLAIMS

Defendants argue that the trial court erred in denying their motions for summary disposition on plaintiff's ELCRA claims because plaintiff failed to establish a prima facie case. Specifically, they claim that plaintiff was unable to show a causal connection between any protected activity and his reassignment to Foote Hospital. In addition, U of M claims that plaintiff's reassignment to Foote Hospital was not an adverse employment action. For the same reasons, U of M argues that the trial court erred in denying its motion for summary disposition on plaintiff's WPA claim. We agree that plaintiff has failed to establish a prima facie case under either the WPA or the ELCRA.

To establish a prima facie case under the WPA, "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). Similarly, to establish a prima facie case of retaliation under the ELCRA, "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." *DeFlaviis v Lord & Taylor Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). We conclude that plaintiff has failed to establish a causal connection between any protected activity and the alleged adverse employment action.[1]

Plaintiff claims that the e-mail he sent on April 27, 2007, to Dr. Jaggi and more than 30 of his coworkers was protected activity.[2] We repeat the language of the e-mail:

> Thanks for the summary of the faculty meeting. I have concerns regarding the position of flow manager, which is item number 6. Since our meeting it has been rumored that Steve Nokovich is getting or being considered for this position.

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[1] We make no conclusion whether plaintiff's reassignment from HMC to Foote Hospital could be considered an adverse employment action.

[2] Plaintiff does not dispute that he was transferred because of his mass e-mail. In fact, he seeks to hold defendants to their statements made in discovery and before the trial court that he was transferred because of the mass e-mail. We note that plaintiff assumes that his mass e-mail was protected activity. He presents us with no argument that, pursuant to case law, the mass e-mail was activity protected under either the WPA or the ELCRA.

> I have serious concerns about this. He is not a good nurse, he is lazy and neither works well nor communicates effectively with others. Over the past year I have provided you, nursing management, Dwayne Parker and Bill Smith with multiple examples of his ineptitude. Additionally, recently, as you and nursing management are also aware, he and others on third shift are fabricating issues to distract from their incompetence, for example, last week Carol told me someone filled out an incident report 3 days prior, stating that I did not inform the charge nurse of a transfer of a patient on May 11, 2006.
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> It would be a great disservice to the position and to this department if he or any of the other individuals in question, who continue to be the cancers and the impediments to patient satisfaction, were to assume this role. I would be happy to discuss this further with anyone interested.

"Activity protected under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation." *Ernsting v Ave Maria College*, 274 Mich App 506, 510; 736 NW2d 574 (2007); see also MCL 15.362. Protected activity under the ELCRA consists of "oppos[ing] a violation of th[e] act, or . . . mak[ing] a charge, fil[ing] a complaint, testif[ying], assist[ing], or participat[ing] in an investigation, proceeding, or hearing under th[e] act." MCL 37.2701(a); see also *Barrett v Kirtland Community College*, 245 Mich App 306, 318; 628 NW2d 63 (2001).

In his mass e-mail, plaintiff responded to a summary, written by Dr. Jaggi, of the topics discussed at a recent faculty meeting. One of the topics discussed at the meeting was the pilot use of a "flow manager" in the emergency department. In his e-mail, plaintiff expressed his concerns regarding the rumors that Nokovich was being considered for the position. Plaintiff's obvious purpose in sending the e-mail was to communicate his perceived incompetence of Nokovich, as well as the third-shift nursing staff generally. The e-mail stated that Nokovich was "lazy," did not work or communicate well with others, and fabricated issues to distract from his incompetence. The reference to plaintiff's prior reports were made in support of the general proposition of the e-mail, that being Nokovich's unsuitability for the position of "flow manager." Thus, although plaintiff made a general reference to his prior complaints regarding Nokovich, the e-mail did not clearly convey that plaintiff was reporting a violation of a law, regulation, or rule, or was either opposing a violation of, or making a change under, the ELCRA. See *Barrett*, 245 Mich App at 318-319 ("An employee need not specifically cite the [ELCRA] when making a charge under the act. However, . . . [t]he employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the [ELCRA]."). Because plaintiff's mass e-mail did not report a violation of the law, nor did it oppose a violation of, or make a charge under, the ELCRA, the sending of the mass e-mail was not protected activity.

Alternatively, plaintiff argues that protected activity he engaged in before he sent the mass e-mail was causally connected to his reassignment to Foote Hospital. Defendants do not dispute that plaintiff engaged in protected activity under the WPA when in October 2006 he filed a complaint with the MDCH that Nokovich abandoned a patient. Defendants also do not dispute that plaintiff engaged in protected activity under the ELCRA when in October 2006 he

complained to officials about inappropriate sexual behavior in the emergency department. However, the mere fact that plaintiff was transferred to Foote Hospital after he engaged in protected activity in October 2006, or even after he complained of sexually offensive behavior at physicians' meetings or after he filed two incident reports in April 2007 regarding Nokovich, does not demonstrate the necessary causal connection. "[A] temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *West*, 469 Mich at 186. "[A p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *Id.*

Plaintiff claims that he has satisfied the "something more" than merely a temporal relationship standard based on the fact that Wardell and Dr. Barsan knew of plaintiff's protected activity before plaintiff was reassigned.

The Supreme Court in *West*, 469 Mich at 186-187, cited *Henry v Detroit*, 234 Mich App 405; 594 NW2d 107 (1999), as an example of when a plaintiff has presented evidence to show more than a coincidence in time between protected activity and the adverse employment action. In *Henry*, four months after the plaintiff, a member of the Detroit Police Department, testified in a lawsuit against the city, he was forced to choose between a demotion or retirement. But the plaintiff presented evidence that, following his testimony, he was told that the chief of police was upset with him and believed that his testimony would cost the city a lot of money. The plaintiff also presented evidence that he was being treated differently by the police chief. This Court concluded that, under the circumstances, it was reasonable to conclude that the plaintiff's choice between a demotion and retirement was the result of his testimony. *Henry*, 234 Mich App at 414.

Unlike in *Henry*, plaintiff has not presented any evidence that his superiors were upset about any of his protected activity. There is no evidence that, after engaging in any protected activity, plaintiff was treated differently than before, that his job duties were altered, or that he was threatened to stop making complaints. Rather, the only consequences of plaintiff's complaints that appear on the record is that several of his complaints were duly investigated and that no action was taken against Nokovich or any other nurse or doctor because of insufficient proof of misconduct. Consequently, under the circumstances of this case, plaintiff has failed to show a causal connection between any protected activity and his reassignment to Foote Hospital.

IV. THE FIRST AMENDMENT CLAIM

HMC and Wardell argue that the trial court erred in denying their motion for summary disposition on plaintiff's First Amendment claim. We agree.

"[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Garcetti v Ceballos*, 547 US 410, 424; 126 S Ct 1951; 164 L Ed 2d 689 (2006). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes,

and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.[3]

After plaintiff sent his mass e-mail, Wardell sent a letter to Dr. Barsan requesting that plaintiff no longer be assigned to HMC's emergency department, because plaintiff had sent an e-mail, which was widely disseminated, that was "extremely critical" of a fellow employee and led to considerable disruption. The evidence fails to create a genuine issue of material fact that Wardell's request that plaintiff be reassigned to another hospital was due to anything but plaintiff's mass e-mail. As already explained, plaintiff fails to show a causal connection between his reassignment to Foote Hospital and any of his prior reports of inappropriate sexual behavior or inept nursing care. Plaintiff sent his mass e-mail in response to the e-mail from Dr. Jaggi summarizing a recent staff meeting, where the position of a "flow manager" was discussed. In his mass e-mail, plaintiff, addressing the rumors that Nokovich was being considered for the "flow manager" position, stated his "serious concerns" about Nokovich. The mass e-mail—which concerned whether Nokovich was competent to serve as the "flow manager"—was made as part of plaintiff's official responsibilities. See *Davis v Cook Co*, 534 F3d 650, 652-654 (CA 7, 2008). Because the speech which led to plaintiff's reassignment to Foote Hospital was made pursuant to his duties, the speech is not constitutionally protected. *Garcetti*, 547 US at 424, 426.

Reversed.

/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro

[3] We reject plaintiff's argument that *Garcetti* and the other cases cited by HMC and Wardell do not apply because he was an independent contractor of HMC, rather than an employee. Federal case law establishes that independent contractors are subject to *Garcetti* in the same way as employees. See, e.g., *Ansell v D'Alesio*, 485 F Supp 2d 80, 84-85 (D Conn, 2007).

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Defendants-Appellants,

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REGENTS OF UNIVERSITY OF MICHIGAN, a/k/a UNIVERSITY OF MICHIGAN, a/k/a UNIVERSITY HOSPITAL,

Defendant.

Before: HOEKSTRA, P.J., and BECKERING and SHAPIRO, JJ.

BECKERING, J. (*dissenting*).

I write separately because I respectfully disagree with the majority's conclusion that defendants were entitled to summary disposition of plaintiff's claims under the Whistleblower Protection Act (WPA), MCL 15.361 *et seq*., Elliot-Larson Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and First Amendment. I would affirm the trial court's orders denying defendants' motions for summary disposition.

I. PLAINTIFF'S WPA AND ELCRA CLAIMS

On appeal, defendants argue that the trial court erred in denying their motions for summary disposition of plaintiff's WPA and ELCRA claims. I would hold that the trial court properly denied defendants' motions because material questions of fact exist as to whether plaintiff established a prima facie case under either the WPA or the ELCRA. See MCR 2.116(G)(6) and *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (stating that in reviewing a motion under MCR 2.116(C)(10), this Court must consider all of the substantively admissible evidence submitted by the parties in the light most favorable to the nonmoving party, and that summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact).

Plaintiff brought his whistleblower claim under MCL 15.362, which states:

> 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.

As stated by the majority, "[t]o establish a prima facie case under this statute, 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).

Similarly, the ELCRA prohibits an employer from retaliating or discriminating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding or hearing under the act. MCL 37.2701(a). To establish a prima facie case of retaliation under the ELCRA, a plaintiff must establish "(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." *DeFlaviis v Lord & Taylor Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). Analysis under the ELCRA and WPA warrant "parallel treatment." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 610, 617; 566 NW2d 571 (1997).

Defendants contend that plaintiff failed to create a genuine issue of material fact with regard to whether he suffered from an adverse employment action. After receiving the May 2007, letter from defendant Patrick Wardell requesting that plaintiff no longer be assigned to Hurley Medical Center (HMC), Dr. William Barsan reassigned plaintiff from HMC to Foote Hospital. Plaintiff admits that the reassignment involved the same or very similar title, job duties, benefits, and pay as his assignment at HMC. Plaintiff testified that one of the primary reasons he declined the reassignment was that his commute to work would have been approximately 30 miles longer each way, although he has not presented any evidence indicating that he felt pressured to decline the reassignment because of the distance. Plaintiff also considered his removal from HMC to be an affront to his professional reputation. He testified that he found it difficult to explain to his acquaintances and colleagues why he was no longer working at HMC and was forced to offer very vague explanations for his departure, such as "personal reasons." He further testified that shortly before the reassignment, he was asked to be a candidate for president of the Genesee County Medical Society, but ultimately had to decline the candidacy because he was unsure about where he would be employed in the future.

In *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 311-312; 660 NW2d 351 (2003),[1] this Court stated:

> [W]e [have] defined an adverse employment action as an employment decision that is materially adverse in that it is more than [a] mere inconvenience or an alteration of job responsibilities and that there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another [are] not controlling.
>
> Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. In determining the existence of an adverse employment action, courts must keep in mind the fact that work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. [Internal quotation marks and citations omitted.]

Viewing the facts in the light most favorable to plaintiff, a material question of fact exists regarding whether he suffered from an adverse employment action. Plaintiff concedes that he suffered no material change in title, job duties, benefits, or pay. But he has presented at least some evidence suggesting that his reassignment was otherwise materially adverse to him. The *Pena* Court acknowledged that there are factors to be considered "unique to [each] particular situation" in determining whether an adverse employment action has occurred. *Id*. at 312. Although plaintiff was not discharged, it is arguable that a seasoned physician's abrupt removal from a hospital presents a unique set of facts and, in some circumstances, could constitute a materially adverse employment action. Plaintiff asserts that he was denied the honor of serving as the local medical society president and his professional reputation was damaged as a result of defendants' actions. On the other hand, it is undisputed that after plaintiff resigned from U of M, he immediately accepted a comparable position at another hospital, with a higher salary and the same if not better benefits. Thus, whether plaintiff suffered any material damage to his professional reputation or material loss of professional opportunity is a question of fact.

In regard to the increased commuting time required if plaintiff had accepted the transfer to Foote Hospital, the WPA specifically provides that an "employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, *location,* or privileges of employment . . . ." MCL 15.362 (emphasis added).

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[1] Plaintiff's assertion in his brief on appeal that the rules articulated in *Pena* are no longer good law is without merit. *Pena* has not been overruled and is frequently relied upon by courts of this state.

Defendants argue that the change of location in this case was nothing but a "mere inconvenience" and was not materially adverse to plaintiff. See *Pena*, 255 Mich App at 311. A commute increase of approximately 30 miles each way would certainly have been a change for the worse for plaintiff. Whether such change rises to the level of being materially adverse, given the other alleged consequences of plaintiff's release from HMC, presents a material question of fact.

Defendants next argue, and the majority agrees, that plaintiff cannot establish that he was engaged in a protected activity. According to defendants, plaintiff was removed from HMC entirely as a result of his April 27, 2007, mass e-mail, and sending the e-mail did not constitute protected activity because the e-mail contained no reference to a violation or alleged violation of law. See MCL 15.362 and MCL 37.2701(a). Plaintiff admits that he was removed from HMC as a result of the e-mail, but claims that sending the e-mail constituted protected activity because it referenced his prior complaints regarding sexual harassment and safety violations in the emergency department.

As stated by the majority, plaintiff's April 27, 2007, mass e-mail contained the following pertinent language:

> I have concerns regarding the position of flow manager, which is item number 6. Since our meeting it has been rumored that Steve Nokovich is getting or being considered for this position. I have serious concerns about this. He is not a good nurse, he is lazy and neither works well nor communicates effectively with others. Over the past year I have provided you, nursing management, Dwayne Parker and Bill Smith with multiple examples of his ineptitude. Additionally, recently, as you and nursing management are also aware, he and others on third shift are fabricating issues to distract from their incompetence, for example, last week Carol told me that someone filled out an incident report 3 days prior, stating that I did not inform the charge nurse of a transfer of a patient on May 11, 2006.
>
> It would be a great disservice to the position and to this department if he or any of the other individuals in question, who continue to be the cancers and the impediments to patient satisfaction, were to assume this role.

I agree with defendants and the majority that plaintiff's references in the e-mail to Stephen Nokovich's and other staff members' allegedly improper conduct were, in large part, very vague and, on their face, focused on the general ineptitude or incompetence of Nokovich and the nursing staff. But, viewing the facts in the light most favorable to plaintiff, it is reasonable to conclude that the e-mail made reference to at least some of plaintiff's complaints of sexual harassment and safety violations over the previous year. In May 2006, plaintiff reported the photography incident involving Nokovich and at least two other nurses to a group of physicians at a physicians' retreat. Later that month, plaintiff sent an e-mail to Dr. Mike Jaggi and Carol Fechik regarding the incident when Nokovich allegedly abandoned a patient during an intubation procedure. In October 2006, plaintiff filed a complaint regarding the same incident with the Michigan Department of Community Health (MDCH). Also in October, plaintiff and three female nurses met with HMC's general counsel and complained of unprofessional conduct, including alleged sexual harassment, in the emergency department. Plaintiff then complained of

similar conduct to Dr. Jaggi. It is unclear in the record whether any of the complained-of conduct involved Nokovich. In April 2007, plaintiff filed an incident report alleging that Nokovich failed to administer medications as ordered. Later that month, before plaintiff sent his mass e-mail, he filed another report alleging that Nokovich failed to notify him of the arrival of a trauma patient and had lied about informing him. Whether plaintiff referenced any or all of these prior complaints in his April 27, 2007, mass e-mail and was thus engaged in a protected activity under the ELCRA or WPA in sending the e-mail, are genuine questions of material fact that should be left to the finder of fact.

Defendants further argue that plaintiff cannot establish a causal connection between a protected activity and adverse employment action and that even if he could establish a prima facie case of retaliation, they had a legitimate, non-discriminatory reason for removing him from HMC—the sending of the inflammatory mass e-mail against HMC and U of M protocol. Again, I agree with the trial court that these issues present questions of fact for the finder of fact. If the factfinder concludes that plaintiff's mass e-mail referenced any prior, protected complaints he had made, that he was therefore engaged in protected activity under the ELCRA, the WPA, or both in sending the e-mail, and that his subsequent transfer from HMC constituted an adverse employment action, whether a causal connection existed between the two is for the factfinder to determine. Likewise, whether sending the e-mail against defendants' protocol—the same e-mail plaintiff claims was protected—constituted a legitimate business reason for removing him, which was not pretextual, is a question of fact.

I would affirm the trial court's denial of defendants' motions for summary disposition of plaintiff's retaliation claims.

II. PLAINTIFF'S FIRST AMENDMENT CLAIM

HMC and Wardell argue that the trial court erred in denying their motion for summary disposition of plaintiff's First Amendment claim. Again, I would hold that the trial court properly denied their motion because a material question of fact exists as to whether plaintiff made his complaints pursuant to his official duties and not as a citizen for purposes of the First Amendment.

In his second amended complaint, plaintiff asserted that he was engaged in activity protected by the First Amendment when he reported incidents of sexual harassment and safety violations in the emergency department. Plaintiff alleged that he had a right to petition government agencies to correct those conditions and HMC and Wardell retaliated against him for doing so. To establish a First Amendment violation, an employee must establish, as a threshold matter, that he or she "spoke as a citizen on a matter of public concern." *Garcetti v Ceballos*, 547 US 410, 418; 126 S Ct 1951; 164 L Ed 2d 689 (2006).[2] As stated by the majority, "when

[2] Although there is a split in federal authority, I agree with the federal circuit courts of appeals that have concluded that this threshold question presents a mixed question of law and fact, particularly considering that it is a fact-intensive inquiry. See, e.g., *Posey v Lake Pend Oreille*

public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id*. at 421.

HMC and Wardell have not disputed that plaintiff spoke on a matter of public concern in complaining about alleged sexual harassment and safety violations in the emergency department. Rather, they assert that he made such complaints pursuant to his official duties and not as a citizen for purposes of the First Amendment. See *id*. Plaintiff reported the alleged sexual harassment and safety violations to HMC. The U of M Standard Practice Guide "encourages" employees who believe they have witnessed sexual harassment to report it to the university, and U of M's Agreement for the Provision of Emergency Medicine Services with HMC requires physicians to supervise HMC nurses and other health providers "consistent with [HMC] policies and procedures and the prevailing standard of care." Given these two provisions and the court's broad conclusion in *Davis v Cook Co*, 534 F3d 650 (CA 7, 2008)—a case cited by defendants and the majority—regarding the scope of an employee's official duties, it is arguable that plaintiff made his complaints pursuant to his official duties and responsibilities as an emergency department physician. But, viewing the facts in the light most favorable to plaintiff, it is also arguable that he went beyond his official duties in so complaining. U of M's practice guide only encouraged employees to report alleged incidents of sexual harassment to the university as a matter of general policy, and there is no record evidence that plaintiff was otherwise required to make such reports to U of M or HMC. When plaintiff and the three female nurses reported alleged incidents of sexual harassment to HMC, they made general complaints regarding sexually inappropriate behavior in the department, but plaintiff asserts that he also advocated on behalf of the individual nurses allegedly suffering harassment, including Jamie Wardlaw, his girlfriend. Whether plaintiff's sexual harassment reports were part of his official responsibilities or duties is a question of material fact. Further, while plaintiff's complaints of Nokovich's alleged safety violations to HMC likely fell within the scope of his official duties as a physician supervisor of the emergency department nurses, it is noteworthy that plaintiff not only complained of Nokovich's actions to HMC, but also to the MDCH, which was outside his normal chain of command. The trial court concluded that there was no evidence plaintiff was required "to take his complaints to the level that he did." Whether plaintiff's complaint to the MDCH was beyond the scope of his official duties presents a material question of fact. See, e.g., *Reinhardt v Albuquerque Pub Sch Bd of Ed*, 595 F3d 1126, 1135-1137 (CA 10, 2010); *Carter v Inc Village of Ocean Beach*, 693 F Supp 2d 203, 211 (ED NY, 2010); *Wright v City of Salisbury*, 656 F Supp 2d 1013, 1026-1027 (ED Mo, 2009), and the cases cited therein. But see *Omokehinde v Detroit Bd of Ed*, 563 F Supp 2d 717, 728 (ED Mich, 2008).

Sch Dist No 84, 546 F3d 1121, 1129 (CA 9, 2008); *Davis v Cook Co*, 534 F3d 650, 653 (CA 7, 2008); *Reilly v Atlantic City*, 532 F3d 216, 227 (CA 3, 2008).

Whether plaintiff made his complaints pursuant to his official duties and not as a citizen for purposes of the First Amendment is a question of fact for the factfinder. Therefore, I would hold that the trial court properly denied HMC and Wardell's motion for summary disposition of plaintiff's First Amendment claim.

I would affirm the trial court's denial of defendants' motions for summary disposition.

/s/ Jane M. Beckering