STATE OF MICHIGAN

COURT OF APPEALS

MARIA WOJNAROSKI,

Plaintiff-Appellant,

v

STANLEY GROT, AMERICAN POLISH CULTURAL CENTER, and AMERICAN POLISH CULTURAL SOCIETY,

Defendants-Appellees.

UNPUBLISHED
February 23, 2006

No. 257899
Oakland Circuit Court
LC No. 2003-054004-NZ

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. Plaintiff also challenges the trial court's order denying her motion to amend her complaint. We affirm.

Plaintiff was employed by defendant American Polish Cultural Center (APCC) as its general manager, beginning in December 1999. She reported to the APCC's president, defendant Stanley Grot, and its board of directors. Plaintiff was informed at a board meeting on September 17, 2003, that her employment was terminated. The minutes of the meeting cite plaintiff's "unsatisfactory past performance" as the reason for her termination. Plaintiff's termination letter stated that she was fired for "several instances of misconduct." At a general meeting on September 28, 2003, in response to a member's question, Grot stated that plaintiff was terminated for "misconduct" and "poor performance." Plaintiff filed this action alleging that Grot's statements at the general meeting regarding her termination were defamatory, and that she was fired in retaliation for informing the board of illegal conduct by Grot, contrary to the Whistleblower's Act (WPA), MCL 15.361 *et seq*. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

A trial court's grant of summary disposition is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 278. When deciding such a motion, a court must consider the submitted admissible evidence in a light most favorable to the nonmoving party to determine whether the evidence establishes a genuine issue of material fact. *Id.* A genuine issue of material fact exists if the record, giving the benefit of reasonable

doubt to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

I. Defamation

The parties agree that Grot stated plaintiff was terminated for "misconduct" and "poor performance."[1] Defamation per se requires that the plaintiff prove:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm . . . or the existence of special harm caused by the publication. [*Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 726; 613 NW2d 378 (2000).]

An accusation of criminal conduct can constitute defamation per se, which does not require a showing of special harm. *Id*. at 727-728.

The nature of the defamation only affects the damages element, which is not decided in a motion for summary disposition. MCR 2.116(C)(10). However, plaintiff testified that she took issue with Grot's "misconduct" comment because, to her, misconduct meant something illegal. We agree with the trial court that the word "misconduct," as used in this case, could not be reasonably construed as implying that plaintiff had engaged in illegal activity and plaintiff presented no evidence to support that the term was intended to be understood in that sense. Plaintiff failed to establish that a genuine issue of material fact existed regarding whether this description of her was defamatory.

We also conclude that plaintiff failed to establish a genuine issue of material fact regarding whether Grot's reference to "poor performance" was defamatory. A statement is privileged if it (1) was made in good faith; (2) related to an interest to be upheld; (3) was a statement limited in scope to this purpose; (4) made at a proper occasion; and (5) was published in a proper manner and to proper parties only. *Prysak v R L Polk Co*, 193 Mich App 1, 15; 483 NW2d 629 (1992). Grot made the statement in his representative capacity, speaking as the APCC's president to members of its organization at a general meeting in response to a question

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[1] Plaintiff contends that Grot also stated that she could get more answers regarding her termination "by going to court." However, plaintiff presented no evidence other than her assertion to establish that Grot said this. Additionally, plaintiff did not identify this statement in either her complaint or her deposition as a statement supporting her defamation claim. In fact, she specifically testified that Grot's statements regarding "misconduct" and "poor performance" were the only basis for her defamation claim. Therefore, summary disposition was properly granted with respect to any alleged statement about "going to court." See *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (a party may not create a factual dispute by submitting an affidavit which contradicts his own sworn testimony) and *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002) (a party may not create a genuine issue of material fact by merely asserting conclusory statements).

with respect to the reason plaintiff was discharged. There is no indication that the statement was made in bad faith. Plaintiff could overcome this qualified privilege only by showing that Grot made the statement with actual malice. *Id*. Malice consists of knowledge of the falsity of the statement or of reckless disregard of the truth. *Id.* General allegations of malice are not sufficient to establish a genuine issue of material fact. *Id*. Here, plaintiff presented no evidence that Grot made the statement knowing that it was false or was made with a reckless disregard for its truth, and her general allegation of malice is insufficient to establish a genuine issue of material fact. The trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's defamation claim.

II. Wrongful Discharge

The WPA provides that "[a]n employer shall not discharge . . . an employee . . . because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation . . . to a public body." MCL 15.362. 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 act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998), citing *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997).

In her complaint, plaintiff alleged that the protected activity was defendants' perception that she was about to make a report "to a law enforcement agency or the like." In *Chandler*, *supra*, our Supreme Court declined to extend the scope of the WPA to one "who is perceived to be a whistleblower, but who has not otherwise engaged in protected activity as defined by the act." *Id.* at 406. Therefore, summary disposition of plaintiff's WPA claim was appropriate under MCR 2.116(C)(8) (failure to state a claim).

Despite her pleadings, plaintiff argued that she could establish a WPA violation because she was "about to" report illegal conduct by Grot. However, plaintiff offered no evidence to support this assertion. Even taking as true plaintiff's assertions that she reported Grot to the APCC's board and to its insurance company, this is not sufficient to establish that she was "about to" make a report to a public body. In *Shallal*, *supra* at 619-621, the Court held that a plaintiff's acts could provide sufficient evidence that the plaintiff was about to report a violation or suspected violation of the law to a public body. The plaintiff in *Shallal* specifically told her supervisor that she was going to report him if he did not "straighten up," and evidence showed that she had discussed reporting her supervisor with her coworkers and an honorary board member. In this case, plaintiff did not provide similar sufficient evidence, and no reasonable inference can be made regarding plaintiff's intent from plaintiff's reporting to the board and insurance company, as plaintiff argues. Additionally, contrary to plaintiff's contention, *Dolan v Continental Airlines/Continental Express*, 454 Mich 373; 563 NW2d 23 (1997), does not stand for the proposition that reporting within an organization or simply refusing to do an illegal act satisfies the protected activity prong of a WPA claim. In *Dolan*, the Court held that the plaintiff's reporting of a third party's suspected violation of the law constituted protected activity. *Id*. at 375-376, 382. The case did not involve an "about to report" situation. Accordingly, we conclude that the trial court properly dismissed plaintiff's WPA claim.

III. Leave to Amend

Plaintiff argues that the trial court erred in denying her motion for leave to amend her complaint to add a claim for wrongful discharge in violation of public policy. A trial court's decision whether to permit a plaintiff to amend a complaint is reviewed for an abuse of discretion. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003). If a trial court grants summary disposition on the basis of failure to state a claim or the lack of a material factual dispute, it "*shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118," unless the amendment would not be justified. MCR 2.116(I)(5). *Id.* An amendment is not justified if it is futile or would prejudice the defendant. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). The trial court ruled that the WPA preempted the public policy claim and that, in any event, the amendment would be prejudicial to defendants. We conclude that although the WPA did not preempt plaintiff's public policy claim in this instance, summary disposition was nonetheless proper because the amendment was prejudicial to defendants.

The WPA "applies to an employee who reports [or is about to report] a violation of a law arising out of a dispute over the handling of company business and occurring during business hours, regardless of whether the criminal actor is the employer or a fellow employee." *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). Where the WPA applies, the remedies provided by the act are exclusive, not cumulative. *Id*. at 78-79. In this case, plaintiff's public policy claim asserted that she was fired for refusing to commit an illegal act in accordance with Grot's instructions. Because this claim does not involve reporting, the WPA does not apply.

However,

> a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. [*Weymers, supra* at 659-660.]

The Court in *Weymers* recognized "that parties ought to be afforded great latitude in amending their pleading before trial," but stated that "that interest must be weighed against the parties' and the public's interest in the speedy resolution of disputes." *Id*. at 660.

Here, the record indicated that discovery closed on July 19, 2004, a month before defendants' motion for summary disposition was decided. Trial was scheduled to begin on September 17, 2004, just ten days after plaintiff filed her motion to amend. Until plaintiff filed the motion, defendants had no indication that plaintiff would seek to add a public policy claim based on being fired for refusing to perform an illegal act. Plaintiff's sole focus regarding her discharge had been on defendant's alleged retaliation for reporting Grot's activities. Under these circumstances, the trial court was justified in denying plaintiff's motion to amend on the basis that it would be prejudicial to defendants.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens