# STATE OF MICHIGAN

# COURT OF APPEALS

ANNETTE HARLAN,

Plaintiff-Appellant,

v

DETROIT PUBLIC SCHOOLS COMMUNITY SCHOOL DISTRICT,

Defendant-Appellee.

UNPUBLISHED
March 18, 2021

No. 353823
Wayne Circuit Court
LC No. 19-005249-CD

Before: O'BRIEN, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

The Detroit Public Schools Community School District terminated Annette Harlan's employment because it believed Harlan improperly or falsely reported that a student had assaulted her. Harlan filed suit under the Whistleblower's Protection Act. The circuit court applied incorrect legal principles and standards of review in summarily dismissing Harlan's action. We vacate that judgment and remand for continued proceedings.

## I. BACKGROUND

Annette Harlan worked for the Detroit Public Schools Community School District (DPSCSD) for 22 years. On November 1, 2018, Harlan was working at the Davis Aerospace and Golightly Career and Technical Center as a teacher's aide in a graphic arts class for students with special educational needs. On the day in question, the certified teacher was absent and a substitute was not called in, leaving Harlan to manage alone. At the end of the final class of the day, Harlan instructed the students to shut down their computers and clean up their work stations. TW, a junior at the school, was upset and would not comply. Harlan began excusing students who had satisfactorily cleaned their stations. TW came to the door and tried to leave. Harlan blocked his path. It was disputed how TW exited. In the moment, Harlan believed that TW used either his hands or shoulder to purposely and aggressively push her out of his way.

TW left the classroom and went outside to catch his bus. Harlan found a security guard, Officer William Lanier, to go after him. Harlan told Officer Lanier that TW had assaulted her. When Officer Lanier caught up to TW, he informed him that Harlan had accused him of assaulting

her. TW said nothing and did not voluntarily follow Lanier. Accordingly, Officer Lanier grabbed TW and brought him to the office. It then became clear that TW was in distress. TW punched a brick wall and used his keys to cut his arms.

Someone had contacted the police in the meantime. DPSCSD Police Officer Charles Asomugha arrived at the scene. Officer Asomugha observed a laceration and scratches on TW's arms. TW was "highly upset" and was "clenching his fists" and "like grimacing." TW stated that he was "tired of this stuff and wanted to harm himself." Harlan informed Officer Asomugha that TW had "shoved her" out of the way so he could exit the classroom, but did not give a detailed account of the touching. Officer Asomugha handcuffed TW, and transported him to "the crisis center" at Children's Hospital because he had threatened to harm himself. The officer asked Harlan if she wanted to press charges; given TW's condition, Harlan did not.

That afternoon, Harlan filled out a discipline referral form. She described the incident as follows:

> At around 3:15 I asked the Graphics class to clean up and shut down the computers. Student refused to comply. Students that comply, I began to dismiss[.] [TW] pushed me and walked out the class.

The next day, the school principal, Neil Morrison, advised Harlan that he had given her the wrong form. He asked her to fill out a second form, entitled "Student's Explanation of the Incident." Harlan explained in the document:

> At around 3:15, I asked the Graphics class to clean up and shut down the computers. [TW] refused to comply with with [sic] what I was asking the class to do. Students that complied, I began to dismiss. At that time, [TW] pushed me and walked out the classroom. I immediately approached security and let him know what happened in the class and he got the student and brought him into the building.

Principal Morrison also spoke to TW's mother that day. She reported that TW had spent the night in the hospital. TW was distraught and asserted that he did not push or assault Harlan. TW described that he only stepped around Harlan. When trying to slip past Harlan, TW explained that "their bodies touched."

There was a surveillance camera in the subject classroom on the wall opposite the doorway. After speaking with TW's mother, Principal Morrison reviewed footage of the event. That video has been presented for this Court's review. At the top of the screen and partially shaded by the date/time stamp bar, one can see the interaction between Harlan and TW in the doorway. Harlan turns sideways in the doorway, and TW turns toward her and moves past her into the hallway. It is clear that TW never touched Harlan with his hands. It is less clear whether TW touched Harlan with his torso or shoulder. However, at a minimum, TW's arm touched Harlan's. Principal Morrison opined from the video that TW's "shoulder bump[ed]" Harlan as he stepped around her. He claimed he observed no "assault or push."

Either later in the day on the day after the incident or the following Monday, Principal Morrison asked Harlan to complete a third report, more fully describing how TW pushed her. Harlan stated:

> At around 3:15, I asked the computer graphics class to clean up and shut down the computer, [TW] refused to comply with what I was asking the class to do. Students that comply, I began to dismiss. At the time, [TW] pushed me and walked out of the classroom. I immediately approached security and let him know what happened in the class and he got the student and brought him into the building.
>
> ([TW] placed his hands on my body and he forcefully move[d] me out of the doorway and walked out of the class.)

Principal Morrison further investigated the incident in the days that followed. He collected a statement from TW on November 5. TW admitted that he did not comply with Harlan's directions to clean up his workspace. TW asserted that he "attempted to slip by" Harlan who was blocking the door "but she got more in the way" and as TW "passed her I touched her." He further claimed, "I didn't want to cause her harm."

Principal Morrison opined that Harlan violated Work Rule K, "Employees may not falsify school records, reports or payrolls." Harlan was placed on leave. A school hearing was held on November 12, 2018. Harlan was represented by her union representative. At the conclusion of the hearing, Principal Morrison continued Harlan's suspension, finding that she had violated Work Rule K and engaged in unprofessional conduct.

A district investigation ensued. Kenya Crockett was the Assistant Director of Employee Relations for DPSCSD at the time. On December 7, 2018, Crockett interviewed Harlan. Crockett reviewed the reports and video footage and determined that Harlan had "overreached" in accusing TW of pushing her. She also reviewed statements from two student witnesses that are not included in the lower court record. During the interview, Crockett played the surveillance footage for Harlan.

> When Ms. Crockett pointed out to Ms. Harlan that Student TW stepped back away from her during their first student teacher interaction, Ms. Harlan agreed. While watching the video, Ms. Crockett pointed out the discrepancy in Ms. Harlan's statements and written reports. Ms. Crockett pointed out where the student snuck out of the classroom around the back of Ms. Harlan to exit and never used his hands. As such, the student could not have pushed her. [Harlan] still insisted the student pushed her. When Ms. Crockett pointed out the hands of the student TW never left his side, Ms. Harlan insisted that "he pushed me with his body and he shouldn't have touched me."

Harlan reiterated that TW intentionally "put his body on" her to "push" her. Crockett opined that "assault was an unreasonable word" to describe what occurred. Crockett "felt sorry for" Harlan and "respected the fact that she was upset that a student had been defiant and had pushed past her boundary and her clearly established boundary," but found that the evidence did not support Harlan's position that TW "had physically pushed her." Crockett recommended a three-day suspension for Harlan. Someone above Crockett rejected her recommendation and indicated that Harlan would be terminated. Crockett "was shocked."

Dr. Nikolai Vitti is the superintendent of DPSCSD. Dr. Vitti described "the high level facts of the incident" as a "student self-harming himself after possibly being told or assumed that he . . . may be facing criminal charges and that the employee after seeing the video and not seeing any evidence that would support the claim that the employee was pushed still claimed that" she was pushed. Upon Vitti's review of the reports and the evidence, Vitti opined that Harlan had a "motive to tell a lie about this student," because "she felt she was wronged by the student, she felt that she was disrespected by the student, and she claimed that the student pushed her and after not having any concrete evidence of such she continued to say that she was pushed and even insinuated that she was assaulted." Harlan's "poor judgment" and "unprofessional conduct" stemmed from Harlan's failure "to reconsider the accusation of a student pushing her" even after reviewing the video footage, "considering the perspectives of other students in the class," and "seeing the impact that the accusation had on the student." This led Dr. Vitti "to question [Harlan's] judgment in the future with children in a classroom."

The report, witness statements, and video were also provided to the DPSCSD Board of Education. Following a closed meeting on January 15, 2019, the board voted to terminate Harlan's employment. This decision was communicated to Harlan by letter on January 18, 2019.

## II. LEGAL PROCEEDINGS

Harlan filed suit, alleging that the DPSCSD terminated her employment "in whole or in part because" she reported a student's violation of law—an assault—to officers of the DPSCSD police department. Harlan described the district's cited reason for terminating her employment as "falsif[ying] records" and claimed it was "simply a pretext." DPSCSD's actions violated the Whistleblower's Protection Act (WPA), MCL 15.362, Harlan contended.

At the close of discovery, the DPSCSD sought summary disposition under MCR 2.116(C)(10). To establish a prima facie case under the WPA, a plaintiff must show that she was engaged in protected activity as defined in the act, was discharged, and there was a causal connection between the activity and the termination. The DPSCSD contended that Harlan could not establish a prima facie case because the WPA did not apply. Specifically, "Harlan's claim is based solely on events surrounding the discipline of a student," and such discipline "is solely within the discretion of the school board or its designee" pursuant to *Lansing Sch Ed Ass'n v Lansing Sch Dist Bd of Ed*, 293 Mich App 506, 518; 810 NW2d 95 (1998). "In a school setting," DPSCSD continued, "school boards or their designees have the sole authority to determine whether an assault occurred." "[I]t was determined" after a full investigation that Harlan "made a false report and the student had not assaulted her." The court could not overturn that decision. And as it was already determined that "the employee knows that the report is false," Harlan was not protected under the WPA, MCL 15.362.

The DPSCSD also contended that Harlan admitted that she did not report a violation of law. Harlan "was not attempting to report a violation of the law, she wanted the guard to retrieve the student so that she could handle the situation, and make sure the student did not ever again engage in this type of behavior," to instigate an internal investigation under the Revised School Code and not to have the violation of law reported outside the school disciplinary action.

Even if Harlan could establish a prima facie case of discrimination, the DPSCSD argued that it stated a legitimate business reason for Harlan's termination and Harlan could not establish that it was pretextual. The DPSCSD contended that it terminated Harlan for insisting that TW had assaulted her even after being confronted with the surveillance footage proving that he had not. Had Harlan admitted her error, the district might have reacted differently. However, Harlan's poor judgment led to TW harming himself. The district's concern about placing Harlan back into a learning environment was a legitimate reason for her termination. And Harlan presented no evidence supporting any inference that the cited reason for Harlan's termination was pretextual.

Harlan challenged the district's interpretation and application of the relevant law. First, Harlan noted that her employer is a public body under the WPA and therefore her reports to the security guard, the principal, and DPSCSD police officer were protected reports under the act. Harlan contended that *Lansing Sch Ed Ass'n* did not stand for the proposition that a court could not review the DPSCSD's determination whether an assault occurred.

> In *Lansing*, . . . the Court rejected a union's request for an injunction to *compel* a school board to expel every student that any teacher claimed had assaulted that teacher because the school board had the right to determine in each case whether an assault had actually occurred. *Lansing*, however, did not hold or even suggest that the school board's power to decide whether an assault occurred also granted it the power to fire any teacher who filed a complaint that she had been assaulted.

"[T]here is no school board-student exception to the WPA," Harlan urged. "In almost every case, an employee will complain to an agency . . . which has the power to determine whether the complaint is valid," but the purpose of the WPA "is to prevent an employer from retaliating against a person who complains about a violation of law even if a public agency has the exclusive power to determine" the merit of that complaint.

Harlan then argued that the evidence presented a question of fact whether she made a false report, precluding summary disposition. In particular, Harlan noted the limited view on the video. She further emphasized that a jury may determine that someone who does not perfectly remember the details of a fast-moving, startling event does not make a false report.

Finally, Harlan contended that the burden-shifting analysis did not apply in this case. That test is used when "the employer offers a seemingly neutral reason for the discharge and the plaintiff's case to the contrary is based exclusively on circumstantial evidence." Here, Harlan presented direct evidence that DPSCSD terminated her employment because of her reports. The only question is whether she knowingly made a false report.

The hearing on DPSCSD's motion for summary disposition was reset numerous times in the spring of 2020. Ultimately, the court decided the motion without a hearing, presumably because of the pandemic. The court employed the burden-shifting analysis to test Harlan's claim. The court determined that Harlan engaged in a protected activity and that she was discharged, meeting the first two prongs of the test. "The remaining issue is whether she can demonstrate a causal connection between her reporting and her discharge." The court continued:

> In the instant case, Plaintiff contends that the video recording is direct evidence that her report was not false, while Defendant contends that the video showed no assault on Plaintiff. Plaintiff misapplies the standards required here. She must show either direct evidence of retaliation, not the assault, or indirect evidence that her discharge was retaliatory.

The court agreed with the DPSCSD that the video did not show direct evidence that TW assaulted her. Accordingly, Harlan had to present indirect evidence that TW assaulted her (to challenge the "legitimate business reason" for her termination) and indirect evidence that the district terminated her employment in retaliation for her report.

Ultimately, the court reviewed the surveillance footage and observed, "there is no evidence in the video recording supporting [Harlan's] contention that the student put his hands on her or pushed her." As Harlan "maintained that she had been assaulted and did not retreat from this position" even after reviewing the video, her reports were not worthy of belief, the court reasoned.

However, the court rejected the DPSCSD's argument that the WPA did not apply. "Notwithstanding a school's obligation to follow the Revised School Code, in a WPA action, courts must still adhere to the standards required for such action."

But ultimately, the court found summary disposition appropriate:

> Finally, in the Court's view, Defendant discharged Plaintiff for a legitimate reason, the reason being that she violated Work Rule K and the WPA for filing a false report. Work Rule K states that employees may not falsify school records, reports, or payrolls. In addition, as indicated above, the WPA provides that "[a]n employer shall not discharge . . . an employee because the employee . . ., reports . . . a violation or a suspected violation of a law or regulation or rule . . . unless the employee knows that the report is false . . . ." MCL 15.362. In this case, it is clear that Plaintiff's three reports are inconsistent, at best, and the video clearly fails to show that TW assaulted, pushed, or "put his hands" on Plaintiff. Hence, Defendant discharged Plaintiff for a legitimate reason and she has not brought forth evidence that the reason for her discharge is a pretext for animus toward her.

Harlan appeals.

## III. ANALYSIS

We review de novo a circuit court's ruling on a motion for summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary

> evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139-140.]

Harlan filed an action for retaliatory discharge in violation of the WPA. Relevant to this appeal, MCL 15.362 governs such actions as follows:

> An 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 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 . . . .

The WPA was enacted to protect "employees who report a violation or suspected violation of state, local, or federal law. . . ." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013) (quotation marks and citation omitted). "The [act] furthers this objective by removing barriers that may interfere with employee efforts to report those violations or suspected violations, thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of the law." *Id*. A plaintiff may establish a prima facie case of retaliatory discharge under the WPA "by showing that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the defendant took an adverse employment action against the plaintiff, and (3) a causal connection exists between the protected activity and the adverse employment action." *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation marks and citation omitted).

The circuit court correctly determined that Harlan was engaged in protected activity. " 'Protected activity' 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." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). Harlan reported an assault, a criminal offense, to a public body, which was also her employer. She then participated in the public body's investigation into the matter.

The DPSCSD also clearly took an adverse employment action against Harlan—it terminated her employment. The court therefore correctly found this element met as well.

Contrary to the court's conclusion, however, Harlan did create a genuine issue of material fact that her termination was connected to a discriminatory animus. The lower court made a critical error by employing the burden-shifting analysis of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), and *Texas Dep't of Community Affairs v Burdine*, 450 US 248; 101 S Ct 1089; 67 L Ed 2d 207 (1981). The burden-shifting analysis only applies when the plaintiff presents *circumstantial* evidence of the defendant's discriminatory intent. *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 275-276; 826 NW2d 519 (2012). Harlan presented *direct* evidence of the DPSCSD's intent.

> In employment discrimination cases, our Supreme Court has defined "direct evidence" as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (quotation marks and citation omitted). In the retaliation context, direct evidence of retaliation establishes without resort to an inference that an employer's decision to take an adverse employment action was at least in part retaliatory. [*Cuddington*, 298 Mich App at 276.]

Harlan reported an "assault." Vitti admitted that Harlan was terminated for her report. This was direct evidence, which if believed, supported that unlawful discrimination was a motivating factor in the termination decision.

The court's second critical error was determining as a matter of law that Harlan knew "that the report [was] false" and therefore was not protected by the WPA. Harlan's knowledge regarding the veracity or falsity of her report is a matter of credibility. Circuit courts may not assess a witness's credibility when resolving a summary disposition motion. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). The video evidence as well as the other evidence must be construed in the light most favorable to the nonmoving party—Harlan. Viewing the video in this case in the light most favorable to Harlan, a jury could conclude that TW made contact with Harlan as he moved through the doorway. This touching would be an assault, meaning that Harlan's report was true.

"Assault" is defined in Michigan

> as "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another . . . ." *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998)." [*People v Meissner*, 294 Mich App 438, 453-454; 812 NW2d 37 (2011).]

Harlan initially reported that TW pushed her with his hands. At her deposition, Harlan testified that TW "pushed into [her], deliberately," that "he pushed his body up against [her] body." TW described that he "touched" Harlan as he exited the classroom. Principal Morrison conceded that his review of the security footage revealed that TW touched Harlan with his shoulder. Our review of the video shows at a minimum that TW's arm touched Harlan's arm as he moved through the door.[1] DPSCSD officials did not believe the touching was forceful enough to merit definition as an "assault." However, the definition of assault does not require force or strength; it includes an intentional, unwanted, "offensive" touching. There is no doubt that a touching occurred. A

[1] This was not a case where the video evidence "clearly contradict[ed] the movant's claims." Only "[w]hen video footage firmly settles a factual issue" will "there [be] no genuine dispute" and will the court be prevented from "indulg[ing] stories clearly contradicted by the footage." *Horton v Pobjecky*, 883 F3d 941, 944 (CA 7, 2018).

jury could find that this touching was intentional, unwanted, and offensive, supporting Harlan's initial report. There is no reason to conclude as a matter of law that Harlan lied.

As argued by Harlan, a jury should decide whether she "falsified" her report. It should not be concluded based on legal acceptance of Superintendent Vitti's claim that Harlan had a "motive" to lie to protect herself after her initial mistake. Indeed, "the plain language of MCL 15.362 controls, and . . . a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity . . . ." *Whitman*, 493 Mich at 306. A jury may accept that in the heat of the moment, Harlan inaccurately perceived the push as including TW's hands. The jury may credit that Harlan felt violated and assaulted at that moment in time. An inaccuracy in a report is not necessarily a deliberate falsehood. Accordingly, summary disposition was inappropriate in this case.

We vacate and remand for continued proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher