STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE PIECKA,

Plaintiff-Appellant,

v

GENESYS REGIONAL MEDICAL CENTER, ASCENSION GENESYS MEDICAL CENTER, ASCENSION GENESYS HOSPITAL, and KATHERINE ROBERTSON-CAIN,

Defendants-Appellees.

UNPUBLISHED
August 19, 2021

No. 356315
Genesee Circuit Court
LC No. 20-113888-CZ

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Michele Piecka alleged that her employer discriminated and retaliated against her, and constructively terminated her employment based on her sex. The circuit court summarily dismissed Piecka's claims raised under the civil rights act, and on reconsideration also dismissed her claim that she had been wrongfully discharged in violation of public policy. For the most part, the circuit court correctly determined that no factual issues exist. However, Piecka did create a genuine issue of material fact that her employer discriminated against her on the basis of sex by giving a similarly situated male employee preferential treatment with regard to seeking additional work hours. We affirm in part, vacate in part and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Michele Piecka began working in a part-time, nonunion position at the hospital in 2014.[1] Katherine Robertson-Cain was the Director of Perioperative Services, covering several

[1] Piecka named her single employer as three separate hospitals in her complaint. It is unclear from the record which name is correct. Accordingly, we refer to this defendant simply as the hospital throughout this opinion.

departments in the hospital. Robertson-Cain and Piecka were close personal friends, and Robertson-Cain recommended Piecka for the position. Piecka briefly held other positions before becoming a clerk in the preadmissions testing (PAT) department. She worked the morning shift and Robert Petrik worked in the afternoon. Their supervisor was Melissa Sparks, and Robertson-Cain supervised Sparks. The PAT also included about 13 to 15 unionized nurses, two other clerks with different job duties, and a receptionist.

Piecka described that beginning in early 2018, Sparks began a campaign of harassment directed at her. Evidence established that Sparks treated everyone, male and female, poorly. However, Piecka noted that Sparks gave Petrik preferential treatment. Petrik was assigned less work, held to a lesser standard, and rewarded with additional hours, including overtime—benefits denied to Piecka. Piecka took these concerns to Robertson-Cain, and believed Robertson-Cain intervened on her behalf as some of the issues abated.

Piecka further described that because of their friendship, Robertson-Cain shared information about potentially illegal actions. Piecka believed that Robertson-Cain violated the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*., on a regular basis by sharing patients' private medical information with her husband and looking at neighbors' and coworkers' medical charts to satisfy her curiosity. On one occasion, Robertson-Cain asked Piecka to look at the surgical information of another employee and on another, asked Piecka to pull an employee's surgical chart and give it to a particular nurse. Piecka questioned Robertson-Cain's motives, but ultimately performed the requested actions. Piecka also alleged that Robertson-Cain covered up two employees' jail time to protect their nursing licenses and jobs, fired two nurses for reporting defective surgical gowns to the state, and covered up employees' spouses accessing their work email accounts. Piecka expressed her concerns to Robertson-Cain but reported her actions to no one else.

Eventually, Piecka and Robertson-Cain had a falling out in their personal life. Sometime after that, Robertson-Cain allegedly told Piecka that her job would be absorbed into a unionized department, thereby dissolving her position. Piecka promptly started looking for a new position, found one, and resigned. She later discovered that Robertson-Cain had lied about the position being dissolved.

Piecka filed suit against the hospital and Robertson-Cain, alleging claims of wrongful discharge in violation of public policy (WDPP), as well as retaliation, retaliatory harassment, and discrimination on the basis of sex in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*. The WDPP claim relied on Piecka's objections to Robertson-Cain's illegal activities, which Piecka alleged led Robertson-Cain to lie about her position being dissolved. The CRA claims were based on the preferential treatment given to Petrik and Piecka's constructive discharge. After discovery, defendants sought summary disposition under MCR 2.116(C)(10), arguing that Piecka could not establish a prima facie case of discrimination, retaliatory discharge, or retaliatory harassment under the CRA. Further, defendants asserted that Piecka had not identified an objective legal source to support her WDPP claim. For all of the claims, defendants contended that Piecka could not prevail as she resigned to take new employment and therefore had not suffered an adverse employment action.

Piecka retorted that Robertson-Cain's lie about the dissolution of her position amounted to a constructive discharge. Further, Piecka insisted that her mistreatment at the hands of Sparks, along with Petrik's receipt of additional regular and overtime hours, were adverse employment actions. Piecka asserted that she had presented sufficient evidence to establish a prima facie case of discrimination, retaliatory discharge, and retaliatory harassment in violation of the CRA. As to her WDPP claim, Piecka posited that *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519; 854 NW2d 152 (2014), supported her claim.

The circuit court summarily dismissed Piecka's claims under the CRA, finding no evidence that the cited adverse employment actions were caused by defendants' discriminatory intent. The court permitted the WDPP claim to proceed, but abbreviated Piecka's damages due to a failure to mitigate.

Both parties filed motions for reconsideration. Piecka cited a factual dispute regarding the reasonableness of her job search after being constructively discharged. Defendants argued that the WDPP claim should have been dismissed as well. The circuit court ultimately agreed with defendants, summarily dismissing Piecka's claims in their entirety. Piecka appeals.

II. STANDARDS OF REVIEW

We review de novo both issues of statutory interpretation and a court's resolution of a summary disposition motion. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016); *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A motion brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The trial court must consider the evidence submitted by both parties "in the light most favorable" to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact," and the moving party is entitled to judgment as a matter of law. *Id*.

We review for an abuse of discretion a court's decision on a motion for reconsideration. *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019). "A trial court abuses its discretion if it chooses an outcome outside the range of principled outcomes." *Id*.

III. CRA CLAIMS

The Elliott-Larsen civil rights act (CRA) prohibits an employer from discriminating against an employee on the basis of sex, MCL 37.2202(1)(a), and from retaliating or discriminating against an employee who reports a CRA violation, MCL 37.2701(a). Piecka raised violations of both provisions and the circuit court summarily dismissed both. We address each in turn.

A. RETALIATION

MCL 37.2701(a) prohibits employers from retaliating or discriminating "against a person because the person has opposed a violation of [the CRA], or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the CRA]." In other words, "an employer is liable if it retaliates against an employee for having engaged in protected activity, e.g., opposing a violation of the [CRA]'s antidiscrimination

provision." *White v Dep't of Transp*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 349407); slip op at 7. A prima facie retaliation claim requires proof that: "(1) that [the plaintiff] 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 Comm Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005) (cleaned up).

A protected activity for purposes of the CRA is "opposing a violation of the [CRA]'s antidiscrimination provision." *White*, ___ Mich App at ___; slip op at 7. Nothing formal is required. "Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely [a]ffect an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs." *McLemore v Detroit Receiving Hosp & Univ Med Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992). Viewing the evidence in the light most favorable to Piecka, she engaged in a protected activity. Piecka notified Robertson-Cain that Petrik received preferential treatment. Even if Piecka did not expressly assert that the preferential treatment was based on sex, her communication sufficiently "rais[ed] the spectre of a discrimination complaint."

Further, defendants clearly were aware of the protected activity. Robertson-Cain, a department director at the hospital, admitted that she knew of Piecka's complaints.

There also remained a factual question whether Piecka suffered a materially adverse employment action. A "materially adverse" employment action for purposes of a CRA retaliation claim is one "that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination' "—an objective test. *White*, ___ Mich App at ___; slip op at 9, quoting *Burlington Northern & Santa Fe R Co v White*, 548 US 53, 68; 126 S Ct 2405; 165 L Ed 2d 345 (2006). The retaliatory employment action " 'is not limited to discriminatory actions that affect the terms and conditions of employment.' " *White*, ___ Mich App at ___; slip op at 10, quoting *Burlington*, 548 US at 64 (emphasis omitted). But an employee must establish more than " 'petty slights, minor annoyances and simple lack of good manners.' " *White*, ___ Mich App at ___, slip op at 10, quoting *Burlington*, 548 US at 68. After all, such minor inconveniences would not dissuade a reasonable person from making a complaint. But, "[a]n objective test does not mean that the ultimate question is for the court; rather, the court must determine if [the] plaintiff has submitted sufficient proofs to establish a question of fact whether or not the action meets the *Burlington* standard. Thus, the decision must be based in the facts of the case, not bright-line or categorial rules as to what actions would or would not deter an employee from objecting to discrimination." *White*, ___ Mich App at ___, slip op at 10.

Piecka's materially adverse employment allegation centered on the difference in work expectations, overtime and assignment difficulty when compared to Petrik. Piecka claimed that Sparks mistreated and harassed her in retaliation for her complaints to Robertson-Cain about this differential treatment. Piecka described that Sparks' mistreatment caused her significant distress. On one occasion, Sparks drove Piecka to tears by berating her for not finishing Petrik's uncompleted work as well as her own work load. On another, Piecka considered cancelling a family vacation because she feared Sparks' reaction. Sparks' behavior clearly might have dissuaded a reasonable employee from reporting a CRA violation.

Piecka also identified as a materially adverse employment action Robertson-Cain's constructive discharge of Piecka's employment by lying about her position being dissolved, in part, out of retaliation for these reports. An employee may claim constructive discharge "when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 471-472; 957 NW2d 377 (2020) (cleaned up). The action must be "deliberate"; intent is required. A constructive discharge is treated the same as an express employment termination under the law. *Champion v Nationwide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996), rev'd in part on other grounds *Hamed v Wayne Co*, 490 Mich 1; 803 NW2d 237 (2011).

The parties disagree about what Robertson-Cain told Piecka. Piecka asserted that Robertson-Cain told her that a main component of her job duties was going to be mechanized and as a result, her position would be moved to another department that only employed union members. Defendants claim that Robertson-Cain only informed Piecka that her job duties would be changed as she would be removed as the middle man for transferring information to PAT nurses. Piecka described that she expressed her concern about her job loss at a department meeting at which this new system was discussed. Ultimately, the conflicting evidence in this regard created a factual dispute that could not be summarily resolved as a matter of law.

However, Piecka could not create a genuine issue of material fact that her protected activity *caused* the adverse employment actions. "To establish causation, the plaintiff must show that his [or her] participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004) (cleaned up). This "can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a discriminatory or retaliatory basis." *Id*. But the "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003).

Piecka's own deposition testimony negated her theory that Sparks mistreated her because she reported Sparks' sexual discrimination. Piecka indicated that Sparks began treating Petrik preferentially about one year before Piecka resigned. However, Sparks' harassment and mistreatment of Piecka began 18 months before her resignation. Accordingly, Sparks' harassment began six months *before* the challenged act of sexual discrimination, and long before Piecka lodged a complaint with Robertson-Cain. Given this sequence of events, Piecka cannot establish that Sparks' behavior was caused by her report of sexual discrimination. Moreover, Piecka asserted that Sparks mistreated all employees in her department, both male and female, union and nonunion. As Sparks treated everyone equally poorly, Piecka cannot establish that Sparks' conduct was triggered by her report.

Piecka also presented no evidence that Robertson-Cain viewed her complaints of sexual discrimination in a negative light such that Robertson-Cain would retaliate and cajole Piecka to resign. Piecka identified only one occasion when she specifically informed Robertson-Cain that she believed Petrik was improperly receiving extra regular and overtime hours while the same was

being denied to Piecka. At that time, the PAT department had fallen behind because Petrik was not properly performing his work duties. Piecka offered to stay late to help catch up. Sparks told Piecka to go home so she would not accrue overtime, but permitted Petrik to complete his regular work assignments with overtime pay. Within minutes of Piecka complaining to Robertson-Cain, Sparks changed her position and allowed Piecka to remain on the clock. Overall, Piecka merely alleged that at some point after learning that Sparks was giving Petrik preferential treatment over Piecka, Robertson-Cain constructively discharged Piecka. Piecka could present no evidence causally connecting the two, and instead her evidence supported a contrary conclusion—that Robertson-Cain believed Piecka's report and disapproved of Sparks' conduct.

Piecka's inability to create a genuine issue of material fact on the issue of causation was fatal to her claim of retaliation under the CRA. The circuit court properly dismissed this claim.

B. DISCRIMINATION

MCL 37.2202(1)(a) provides that "[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 . . . sex . . . ." Where, as here, the employee has no direct evidence of discrimination, the employee must establish a prima facie case through circumstantial evidence using a burden-shifting analysis. See *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132-134; 666 NW2d 186 (2003).

> To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) her failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. [*Id*. at 134.]

Stated differently, "a plaintiff must establish a prima facie case by showing that she was a member of a class entitled to protection under the statute and that, for the same or similar conduct, she was treated differently than a man." *Major v Village of Newberry*, 316 Mich App 527, 548; 892 NW2d 402 (2016) (cleaned up). Once the plaintiff makes the prima facie showing, "the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Sniecinski*, 469 Mich at 134. If the defendant makes this showing, the burden reverts back to the plaintiff to show that the defendant's cited reasons were "mere pretext." *Id*.

There is no dispute that Piecka was a member of a protected class—women—and that she was qualified for her position.

Although Piecka presented adequate evidence that she suffered a materially adverse employment action for the purpose of her CRA retaliation claim, the test is different for CRA discrimination claims. As such, the standard provided in *White*, as discussed above, does not apply. For purposes of a CRA discrimination claim:

> (1) the action must be materially adverse in that it is more than mere inconvenience or an alteration of job responsibilities, and (2) 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.

> [*Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999) (cleaned up).]

Materially adverse employment actions might include termination, demotion as evidenced by lowered pay or a less distinguished title, loss of benefits, or "significantly diminished material responsibilities." *Chen v Wayne State Univ*, 284 Mich App 172, 202; 771 NW2d 820 (2009).

Piecka's constructive discharge caused by Robertson-Cain's misrepresentation that her job would be dissolved is a materially adverse employment action. Defendants' alternate explanation for Robertson-Cain's comments merely creates a factual issue for later resolution. However, Sparks' mistreatment of Piecka does not qualify as a materially adverse employment action under the discrimination standard. Although Piecka described being mistreated by Sparks, she also said that she loved her job and had no intention of leaving but for Robertson-Cain's lie about the dissolution of her position. Thus, by Piecka's own admission, Sparks' alleged mistreatment did not leave her with even "subjective impressions as to the desirability of one position over another."

In relation to the CRA discrimination claim, Piecka also cites the loss of regular and overtime work hours to Petrik, a male, as an adverse employment action. Piecka testified at her deposition that she desired overtime hours and additional regular hours in the PAT department. Piecka cited one occasion where Petrik received extra hours, and she was denied the hours. (As noted, Robertson-Cain quickly remedied that issue.) Piecka more generally described that overtime and additional regular hours were more often offered to Petrik than to her. Piecka admitted that she sometimes had to turn down hours because of her children's schedules, but she emphasized that she had offered to return to work after picking up her children and her requests were denied. Other evidence establishes that on some occasions, Petrik was able to accumulate additional hours by working for other departments, something that Piecka admittedly refused to do. Piecka expressly asserted that she was not contending that Petrik received preferential treatment in being offered those out-of-department hours. And Piecka presented evidence that she was asked to do more work than Petrik within her shift, so that she was essentially making less money for performing more work. Overall, Piecka's evidence supported her claim in this regard and the factual disputes could not be resolved as a matter of law.

Finally, Piecka was required to a create a triable issue that she was treated differently than similarly situated male employees when faced with the materially adverse employment actions. There is no dispute that the only employee potentially similarly situated to Piecka is Petrik, a male. Piecka cannot establish the necessary inference of discrimination in relation to her constructive discharge, however. Robertson-Cain did not warn Petrik that his job might disappear. However, Petrik's job duties were slightly different than Piecka's and the new system being implemented by the hospital would not impact him. Although Petrik filled in to cover Piecka's duties for a brief time after she left, Piecka acknowledged that this was only because Petrik knew her job and required no additional training. And Piecka's position was ultimately filled by another woman.

Further supporting the lack of discriminatory animus in Piecka's "constructive discharge" is "the 'same actor' inference." As our Supreme Court has said, "[i]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." *Town v Mich Bell Tel Co*, 455 Mich 688,

701; 568 NW2d 64 (1997) (cleaned up). Robertson-Cain both hired and allegedly constructively discharged Piecka. Under the same actor inference, it would be illogical to assume that Robertson-Cain hired Piecka knowing that she is female, constructively discharged her after developing an apparent discriminatory bias against women, and then eventually overcame that bias and hired another woman to take Piecka's spot. Accordingly, the circuit court properly dismissed Piecka's CRA discrimination claim based on her constructive discharge.

However, Piecka did create a triable issue of fact that defendants bore a discriminatory bias when allowing Petrik additional regular and overtime hours while denying her the same. As already discussed, Piecka presented evidence that Petrik, who shared her job position and is a man, was provided overtime hours and additional regular works hours that she was not. Defendants contend Petrik was not similarly situated to Piecka because he had different job duties and obtained additional work hours by working in other departments. "The question whether [the identified employees were] similarly situated depends on how they are characterized." *Wilcoxon*, 235 Mich App at 369. Our Supreme Court provided guidance on how to characterize coworkers for this analysis, reasoning that a plaintiff "must prove that . . . all of the relevant aspects of his [or her] employment situation were nearly identical to those of [the identified coworker's] employment situation." *Town*, 455 Mich at 699-700 (quotation marks and citation omitted).

The second half of defendants' argument—that Petrik obtained his extra hours in other departments—has already been addressed. Piecka asserted that her complaint was not based on those hours, but rather hours in the PAT department that were disproportionately given to Petrik. Piecka testified that both she and Petrik sought extra hours in PAT, but only he received those hours.

The first half of defendants' argument—that Petrik was not similarly situated to Piecka because he had different job duties and worked a different shift—is also unavailing. Although Petrik had slightly different job duties and worked the afternoon shift in the PAT, Piecka and Petrik understood each other's jobs and completed tasks assigned to the other. Piecka explained that she and Petrik were the most similarly situated of all of her coworkers. The variation in their duties was only because of their different shifts. Specifically, Piecka spent the morning receiving and distributing faxes to the nurses who were preparing for surgeries, while Petrik, who worked after most doctor offices are closed, contacted PAT patients to remind them of their appointments. Considering the evidence in the light most favorable to Piecka, certain tasks were differently distributed but the essence of Piecka's and Petrik's jobs was the same. Accordingly, Piecka established a prima facie case of sexual discrimination but based only on her claim that Petrik received preferential treatment as to scheduling additional work hours.

The burden then shifted to defendants to offer a legitimate reason for their actions. Defendants completely failed to do so. Instead of presenting a legitimate reason for Piecka being denied overtime hours in favor of Petrik in the PAT department, defendants simply repeated that Petrik only received additional hours outside of the PAT department and had different job duties. But Piecka created triable questions of fact regarding those assertions. Absent the presentation of a legitimate and nondiscriminatory reason for Petrik receiving more hours, the presumption the discrimination remains and summary disposition was improperly granted.

In sum, the circuit court properly granted summary disposition in favor of defendants with respect to Piecka's discrimination claims under the CRA related to her mistreatment by Sparks and her constructive discharge by Robertson-Cain. However, the court improperly dismissed Piecka's discrimination claim as it related to her loss of additional regular work and overtime hours, because she provided sufficient evidence to establish a presumption of discrimination, which was not rebutted by defendants. Therefore, we must vacate the court's judgment in part.

IV. WDPP CLAIM

Piecka challenges the circuit court's decision to summarily dismiss her WDPP claim on reconsideration. Piecka was an at-will employee of the hospital. "Consequently, [her] employment was terminable at any time and for any—or no—reason, unless that termination was contrary to public policy." *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572-573; 753 NW2d 265 (2008). In other words, there is an exception to the general at-will employment rule "based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). "In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002). Indeed, "making social policy is a job for the Legislature, not the courts." *Id*. at 67 (cleaned up).

In *Suchodolski*, 412 Mich at 695-696, the Supreme Court provided a nonexhaustive list "of public policies that might forbid termination of at-will employees." *Landin*, 305 Mich App at 525 (cleaned up). These included:

> (1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty (e.g., the Civil Rights Act, MCL 37.2701; the Whistleblowers' Protection Act, MCL 15.362; the Persons With Disabilities Civil Rights Act, MCL 37.1602), (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment (e.g., refusal to falsify pollution reports; refusal to give false testimony before a legislative committee; refusal to participate in a price-fixing scheme), and (3) where the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment (e.g., retaliation for filing workers' compensation claims). [*Landin*, 305 Mich App at 524.]

These three grounds for a WDPP claim are consistent with our Supreme Court's pronouncement that public policy violations are "[m]ost often . . . found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Suchodolski*, 412 Mich at 695.

Initially, defendants contend that Piecka's WDPP claim is preempted by the WPA. It is true that "[t]he remedies provided by the WPA are exclusive and not cumulative." *McNeil-Marks v MidMich Med Ctr-Gratiot*, 316 Mich App 1, 25; 891 NW2d 528 (2016) (cleaned up). Consequently, "when a plaintiff alleges discharge in retaliation for engaging in activity protected

by the WPA, '[t]he WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity.' " *Id*., quoting *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). In a recent order, however, our Supreme clarified the circumstances under which a WDPP claim is preempted by the WPA. In particular, when a "plaintiff has not demonstrated a question of fact that [the] conduct entitles her to recover under the WPA, her public-policy claim based on this conduct is not preempted by the WPA." *Rivera v SVRC Indus, Inc*, ___ Mich ___; 959 NW2d 704 (2021).

Piecka's claim does not implicate the WPA. "The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule *to a public body*." *Anzaldua*, 292 Mich App at 630 (emphasis added). There is no evidence that Piecka reported or planned to report Robertson-Cain's alleged illegal actions to a public body. Any attempt to bring a claim under the WPA would have been quickly dismissed as completely unsupported. Accordingly, Piecka's WDPP claim is not preempted.

But what exception to the general at-will employment rules could Piecka rely on? The first option requires "explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Landin*, 305 Mich App at 524. Piecka's CRA claims are separate and distinct from her WDPP claim. Piecka alleges that she objected to Robertson-Cain's violations of HIPAA and criminal statutes related to eavesdropping, but she has not identified a specific section of those statutes that explicitly prohibits "the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Id*.

Moreover, while the CRA prohibits retaliating against an employee for reporting alleged discrimination on the basis of sex, Piecka has not identified a similar provision in HIPAA, which would preclude defendants from firing her for objecting to HIPAA violations. Similarly, Piecka has identified no provision of the criminal eavesdropping statutes that bars employers from firing or discriminating against employees who internally report violations. Thus, it is clear that Piecka did not intend to proceed under the first exception outlined in *Suchodolski* and *Landin*.

It is also abundantly clear that Piecka did not intend to proceed under the third exception to the general rule, which applies when "the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment (e.g., retaliation for filing workers' compensation claims)." *Id*. Piecka never contended that she personally exercised "a right conferred by a well-established legislative enactment." *Id*.

The final option for avoiding the general rule regarding termination of at-will employment involves a situation when "the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment . . . ." *Id*. Piecka believed that Robertson-Cain was violating HIPAA and eavesdropping laws in a number of different ways. But Piecka was required to show that Robertson-Cain expected her to violate the law and then terminated her employment for refusing.

Piecka provided two examples of Robertson-Cain requesting her to conduct activities that Piecka believed were illegal under HIPAA. On one occasion, Robertson-Cain asked Piecka to pull the surgical chart of a coworker. In another incident, Robertson-Cain asked Piecka to look up

what surgical procedure one of Robertson-Cain's employees was undergoing so Robertson-Cain could create a work schedule around that employee's needs. Piecka testified that she expressed her legal concerns to Roberson-Cain, but ultimately completed the requested tasks. Accordingly, Piecka could not claim that she was terminated as a result of her failure to break the law upon request.

And although Piecka accused Robertson-Cain of violating eavesdropping statutes, improperly covering up the wrongdoing of other employees, and terminating two employees for making a report to a state agency, Piecka never asserted that Robertson-Cain asked her to participate in those alleged legal violations.

In short, Piecka has made a plethora of allegations that Robertson-Cain violated the law while working for the hospital. Piecka has also presented an abundance of evidence that she believed Robertson-Cain was acting improperly and informed her of such. But Piecka has not provided any evidence that she was asked to participate or assist Robertson-Cain in breaking the law and refused or failed to do so, leading to her termination. Summary disposition was therefore warranted.

Piecka insists that *Landin* supports her claims. However, *Landin* focused on a very particular set of facts that simply are not present in this case. In *Landin*, 305 Mich App at 521-522, an at-will nurse employed by a nonprofit community hospital was fired after he reported suspected malpractice by a coworker. The plaintiff nurse believed his coworker's negligence resulted in the death of a patient. *Id*. at 522. The plaintiff nurse brought suit, alleging a violation of the WPA, and a claim for WDPP for the retaliatory firing. *Id*. The defendant hospital's motion for summary disposition of the public-policy claim was denied on the basis of MCL 333.20176a(1)(a), which prohibited hospitals from firing employees for reporting suspected malpractice. *Landin*, 305 Mich App at 522.

On appeal, this Court affirmed, reasoning that "MCL 333.20176a contains an explicit legislative statement prohibiting discharge or discipline of an employee for specified conduct," which included reporting "the malpractice of a health professional." *Landin*, 305 Mich App at 528-529 (cleaned up). In light of that "explicit legislative statement," this Court concluded that the Legislature intended to further Michigan's public policy to "safeguard the public health and protect the public from incompetence, deception, and fraud . . . by prohibiting retaliation against an employee who reports malpractice." *Id*. at 530. This Court determined that "because the statutory basis for [the] plaintiff [nurse]'s public policy claim could support a public-policy-based wrongful discharge claim, the trial court did not err by denying [the] defendant [hospital]'s motions for summary disposition." *Id*. at 532.

Unlike the plaintiff in *Landin*, Piecka has not identified a single statute providing her similar protection. The crux of the decision in *Landin* involved enforcement of a statute that protected employees who reported instances of medical malpractice. No such statute has been identified here, *Landin* is factually inapposite, and summary disposition was properly granted.

V. DAMAGES

Piecka further challenges the circuit court's limitation of her damages in its original order based on an alleged failure to adequately mitigate her damages. When that order entered, the court had summarily dismissed Piecka's CRA claims and only the WDPP claim remained. The circuit court's analysis was based on law applicable to the WDPP alone, not the CRA. The court must reconsider its limitation of damages under the CRA on remand. In the meantime, we must vacate that portion of the court's order.

We affirm, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher