STATE OF MICHIGAN

COURT OF APPEALS

JAMES HERBERT, Plaintiff-Appellant,	UNPUBLISHED June 27, 2013
v	No. 310020 Wayne Circuit Court
DETROIT POLICE DEPARTMENT, Defendant-Appellee.	LC No. 10-011007-CZ

Before: JANSEN, P.J., and CAVANAGH and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order (1) granting defendant's motion for summary disposition on the grounds that governmental immunity barred his claims of retaliatory discharge and the statute of limitations barred his 42 USC 1983 claim, and (2) dismissing plaintiff's motion for leave to file an amended complaint. We affirm.

On September 23, 2010, plaintiff filed his complaint averring that he had been employed by defendant as a police officer from 1986 until 2010, when he was constructively discharged. Plaintiff averred that he was retaliated against and constructively discharged because (1) he filed a lawsuit against several Detroit police officers arising from his false arrest on a charge of disorderly conduct; (2) he filed a grievance when he was suspended without pay after receiving a ticket for allegedly driving while intoxicated; and (3) he filed an unfair practice charge against defendant with the Michigan Employment Relations Commission. Plaintiff further averred that as a consequence of defendant's harassment and retaliatory behavior (1) he lost his certification through the Michigan Commission on Law Enforcement Standards (MCOLES) which resulted in defendant summarily firing him—a decision that was overturned following resolution of another grievance; (2) he was assigned duties inconsistent with his status as a police officer; and (3) he was subjected to departmental disciplinary charges. Consequently, plaintiff averred, the intolerable working conditions forced his resignation in 2010.

Count I of plaintiff's complaint alleged that, in violation of Michigan public policy, he was constructively discharged by defendant in retaliation for exercising his legal right to sue for false arrest. Count II of plaintiff's complaint alleged that, in violation of Michigan public policy, he was constructively discharged by defendant in retaliation for exercising his legal right to file an unfair labor practice charge against defendant. Count III alleged that, in violation of Michigan public policy, plaintiff was constructively discharged in retaliation for exercising his

right to challenge his improper suspension and discipline. And Count IV asserted that plaintiff's rights under 42 USC 1983 were violated when he was constructively discharged for engaging in protected speech as set forth above.

Subsequently, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). Defendant argued that plaintiff's claims of retaliatory discharge were tort claims; thus, they were barred by governmental immunity. Defendant also argued that plaintiff failed to state a claim under the public policy exception to the employment-at-will doctrine. Further, plaintiff's § 1983 claim was barred by the three-year statute of limitations governing personal injury. Plaintiff appears to have responded to defendant's motion for summary disposition, arguing that his retaliatory discharge claims were contract claims, not tort claims; thus, they were not subject to governmental immunity. Further, plaintiff argued that his § 1983 claim was not barred by the statute of limitations because it was filed within three years of his constructive discharge.

Plaintiff also filed a motion for leave to file an amended complaint that added a Whistleblowers' Protection Act (WPA) claim against defendant. Defendant opposed the motion, arguing that the amendment would be futile because the statute of limitations on claims under the WPA is 90 days; thus, the claim was barred.

Following oral arguments on defendant's motion for summary disposition, the trial court held that Counts I, II, and III of plaintiff's complaint were tort claims and plaintiff failed to plead in avoidance of governmental immunity with regard to those claims; thus, they were barred. Further, the trial court held that Count IV of plaintiff's complaint was barred by the statute of limitations. In light of these rulings, the trial court declined to address plaintiff's motion to amend his complaint. Accordingly, defendant's motion for summary disposition was granted and plaintiff's motion to amend his complaint was apparently dismissed. An order consistent with the ruling was subsequently entered. After plaintiff's motion for reconsideration was denied, this appeal followed.

Plaintiff argues that Counts I, II, and III of his complaint set forth claims of retaliatory discharge in violation of public policy, a specific type of wrongful discharge arising under a theory of implied contract, not tort; therefore, they were not barred by governmental immunity and defendant was not entitled to summary disposition on these claims. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009). When a claim is barred because of immunity granted by law, a motion for summary disposition under MCR 2.116(C)(7) is properly granted. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

"A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Mack v City of Detroit*, 467 Mich 186, 197-198; 649 NW2d 47 (2002), citing MCL 691.1407(1). Governmental immunity is a characteristic of government, therefore "[a] plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008).

In this case, plaintiff appears to argue that governmental immunity does not apply because his claims of retaliatory discharge in violation of public policy arise under a theory of implied contract, not tort. That is, an "implied public policy term" of his employment was that he would not be constructively discharged for exercising his rights. Plaintiff claims that he was an at-will employee. In Michigan, at-will employees generally can be terminated at "any time for any, or no, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). But "an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id*. at 695. Plaintiff relies on this exception in support of his "contract" theory of liability.

However, when an employee is discharged for conduct that is protected by law or other legislative enactment, the prohibition against retaliatory discharge cannot be an "implied public policy term" of an employment contract. That is, when an employee acts in accordance with a statutory right or duty, the public policy prohibiting retaliatory discharge is explicit and provides for the employee's exclusive remedy in tort.[1] *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 127; 724 NW2d 718 (2006); see also *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 78-79; 503 NW2d 645 (1993), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589, 594 n 2; 734 NW2d 514 (2007). When an employee is discharged for refusing to violate a law or for exercising a right conferred by a legislative enactment, the public policy prohibiting retaliatory discharge cannot be an "implied public policy term" of employment. *Suchodolski*, 412 Mich at 695-696. Accordingly, the focus of the analysis must be on the employee's conduct in relation to the "public policy" that allegedly resulted in a claim of retaliatory discharge.

In this case, plaintiff's brief on appeal simply states that his "wrongful discharge claim against DPD is not barred by governmental immunity because the claim arises under a theory of contract, and not of tort." Although in his complaint plaintiff set forth three separate counts of retaliatory discharge, he fails to discuss in any detail his conduct with regard to each claim or the applicable "implied public policy" that supports each claim of retaliatory discharge. The purported "public policy" violated, which forms the basis of an employee's claim, must be based on an objective legal source. *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008). Here, in a cursory manner, plaintiff merely states that all of his claims arise under a theory of contract and relies on the cases of *Mourad v Auto Club Ins Ass'n*, 186 Mich App 715, 727; 465 NW2d 395 (1991) and *Watassek v Mich Dep't of Mental Health*, 143 Mich App 556, 564-565; 372 NW2d 617 (1985), in support of his argument. However, plaintiff's precise argument was specifically rejected by our Supreme Court in *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 246-247; 531 NW2d 144 (1995).

[1] Examples include when an employee acts in accordance with the statutory rights or duties conferred by the Elliott-Larsen Civil Rights Act, MCL 37.2701, the Handicappers' Civil Rights Act, MCL 37.1602, the Occupational Safety and Health Act, MCL 408.1065, and The Whistleblowers' Protection Act, MCL 15.362. See *Suchodolski*, 412 Mich at 695 n 2.

In *Phillips*, the plaintiff brought a claim alleging that she was terminated in retaliation for filing a worker's compensation action which was against public policy because implied in every employment contract is a promise not to convene public policy. *Id*. at 242, 246. Thus, she argued, her action arose in contract, not in tort. *Id*. at 246. However, our Supreme Court held that: "[t]his argument ignores that the source of this right against retaliatory discharge does not stem from any term agreed upon by the contracting parties, but from public policy now expressed in a statute," the Worker's Disability Compensation Act, MCL 418.301(11). *Phillips*, 448 Mich at 246. The Court also held:

> While the contractual relationship was 'at will,' the contractual relationship is not the source of an employee's right to protection against retaliatory discharge for filing a worker's compensation claim. The right stems not from an implied promise by the employer, but from the statute. A cause of action seeking damages from an employer who violates the worker's compensation act is independent of the contract, and sounds in tort, not contract. [*Id*. at 248-249.]

This holding, therefore, reiterates the Supreme Court's holding in *Dudewicz*, 443 Mich at 80, that, when an employee is granted a right against retaliatory discharge, the claim sounds in tort, and a retaliatory discharge claim premised on public policy is not sustainable. *Phillips*, 448 Mich at 248-249.

Similarly, in this case, plaintiff does not claim that the source of his right against retaliatory discharge stems from any term expressly agreed upon by the contracting parties; rather, he concedes that he was an at-will employee. Thus, to have stated a viable claim for retaliatory discharge in violation of an "implied public policy" term of his employment, plaintiff's allegedly protected conduct must not have been within the ambit of a public policy expressed in a statute or implied by law or other legislative enactment. Plaintiff fails to properly brief this issue on appeal by discussing his particular conduct in relation to any objective source of public policy that was purportedly violated by defendant. It is well-established that, "[i]t is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Nevertheless, we have attempted to consider plaintiff's apparent claims, as best we could in light of his deficient arguments.

In Count I of plaintiff's complaint, he alleged that defendant constructively discharged him in retaliation for exercising his legal right to sue fellow employees for false arrest. The WPA, MCL 15.362, prohibits an employer from discharging an employee for reporting to a public body a violation of any law by either an employer or fellow employee. *Dudewicz*, 443 Mich at 649. The judiciary is a "public body" under the WPA. MCL 15.361(d). Thus, the WPA, which specifically prohibits retaliatory discharge for the conduct at issue, provided plaintiff's exclusive remedy. That is, plaintiff's right against retaliatory discharge for filing a lawsuit against fellow employees did not stem from an implied promise by defendant, but from the WPA and an action seeking damages for its violation sounds in tort, not contract. See *Phillips*, 448 Mich at 248-249. Therefore, Count I of plaintiff's complaint failed to state a claim

upon which relief could be granted because the claim was subject to the WPA's exclusive remedy. Thus, defendant's motion for summary disposition should have been granted pursuant to MCR 2.118(C)(8), not (C)(7).[2] Accordingly, we affirm the trial court's dismissal of this claim because it reached the right result, albeit for the wrong reason. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

In Count II of plaintiff's complaint, he alleged that defendant constructively discharged him in retaliation for exercising his legal right to pursue an unfair labor practice charge against defendant. The apparent premise of this claim is that plaintiff filed an unfair labor practice charge against defendant with the Michigan Employment Relations Commission. Although plaintiff does not explain his argument on appeal with regard to this claim, because public labor relations in Michigan are governed by the Public Employment Relations Act (PERA), MCL 423.201 *et seq*., it appears that his unfair labor practice charge was filed pursuant to the PERA, which grants employees certain statutory rights. As discussed above, the WPA prohibits an employer from discharging an employee for reporting to a public body a violation of any law, regulation, or rule promulgated pursuant to law of this state. MCL 15.362. The employment relations commission is within the department of labor, MCL 423.3, and is a "public body" under the WPA. See MCL 15.361(d). Thus, the WPA, which specifically prohibits retaliatory discharge for the conduct at issue, provided plaintiff's exclusive remedy. That is, plaintiff's right against retaliatory discharge for filing an unfair labor practice charge against defendant did not stem from an implied promise by defendant, but from the WPA and an action seeking damages for its violation sounds in tort, not contract. See *Phillips*, 448 Mich at 248-249. Therefore, Count II of plaintiff's complaint failed to state a claim upon which relief could be granted and defendant's motion for summary disposition should have been granted pursuant to MCR 2.118(C)(8), not (C)(7). Accordingly, we affirm the trial court's dismissal of this claim because it reached the right result, albeit for the wrong reason. See *Gleason*, 256 Mich App at 3.

In Count III of plaintiff's complaint, he alleged that defendant constructively discharged him in retaliation for exercising his legal right to challenge his improper suspension and discipline. Again, on appeal, plaintiff does not explain the basis of this claim; however, it appears premised on the fact that plaintiff filed a grievance or grievances against defendant pursuant to the PERA. See *Pontiac Police Officers Ass'n v City of Pontiac*, 397 Mich 674, 677; 246 NW2d 831 (1976). Thus, the WPA provided plaintiff's exclusive remedy. That is, plaintiff's right against retaliatory discharge for filing a grievance against defendant did not stem from an implied promise by defendant, but from the WPA and an action seeking damages for its violation sounds in tort, not contract. See *Phillips*, 448 Mich at 248-249. Therefore, Count III of plaintiff's complaint failed to state a claim upon which relief could be granted and defendant's motion for summary disposition should have been granted pursuant to MCR 2.118(C)(8), not (C)(7). Accordingly, we affirm the trial court's dismissal of this claim because it reached the right result, albeit for the wrong reason. See *Gleason*, 256 Mich App at 3.

[2] The WPA waives governmental immunity; thus, the act is applicable to public employers. *Debano-Griffin v Lake Co*, 493 Mich 167, 183; 828 NW2d 634 (2013).

Next, plaintiff argues that the trial court improperly dismissed his claim under 42 USC 1983 on the ground that it was barred by the statute of limitations. We conclude that the claim was properly dismissed, albeit on different grounds.

Plaintiff's complaint averred that he "engaged in Constitutionally protected speech on a matter of public concern by (a) speaking out on behalf of himself and other improperly-suspended police officers, (b) pursuing the False Arrest Lawsuit, and (c) pursuing the unfair labor practice charge against the DPD." These allegations do not indicate that plaintiff was engaged in speech protected by the First Amendment before he was allegedly discharged. The first step in determining whether a public employer has violated the First Amendment by terminating a public employee for engaging in speech, is ascertaining whether the relevant speech addressed a matter of public concern. See *Connick v Myers*, 461 US 138, 143-146; 103 S Ct 1684; 75 L Ed 2d 708 (1983). It is clear that neither plaintiff "pursuing the False Arrest Lawsuit," nor plaintiff "pursuing the unfair labor practice charge against the DPD," constituted speech on a matter of public concern. Plaintiff's allegation that he spoke "out on behalf of himself and other improperly-suspended police officers" does not provide sufficient information to set forth a First Amendment violation. This allegation also does not indicate what purported protected speech occurred, how it occurred, or when it occurred. Therefore, Count IV of plaintiff's complaint failed to state a claim upon which relief could be granted and defendant's motion for summary disposition should have been granted pursuant to MCR 2.118(C)(8), not (C)(7). Accordingly, we affirm the trial court's dismissal of this claim because it reached the right result, albeit for the wrong reason. See *Gleason*, 256 Mich App at 3.

Finally, plaintiff argues that the trial court's denial of his motion to amend his complaint to add a WPA claim constituted an abuse of discretion. We disagree.

A trial court's denial of leave to amend pleadings is reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). In this case, it appears that the trial court considered plaintiff's motion to amend his complaint moot and, thus, effectively denied the motion. While we disagree with the trial court's handling of plaintiff's motion, we conclude that amendment of plaintiff's complaint to add a WPA claim would have been futile.

Pursuant to MCL 15.363(1), a person alleging a violation of the WPA may bring a civil action "within 90 days after the occurrence of the alleged violation of this act." Plaintiff argues that his purported constructive discharge, which occurred on July 16, 2010, when he resigned, constituted the act which started the 90-day limitation period. However, our Supreme Court rejected that precise argument in *Joliet v Pitoniak*, 475 Mich 30; 715 NW2d 60 (2006), holding that "[w]here the resignation is not itself an unlawful act perpetrated by the employer, it simply is not a 'violation' of the WPA under the plain language of MCL 15.362, which prohibits discharge, threats, or other discrimination by the *employer*." *Id*. at 41. Further, the Court held, "in the context of a constructive discharge it is the *employer's* wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the *employee's* response." *Id*. In this case, plaintiff's proposed amended complaint failed to set forth an unlawful act allegedly perpetrated by defendant in violation of the WPA within the 90 days preceding the filing of his complaint. Accordingly, his amendment would be futile, *Ormsby*, 471 Mich at 53,

and we affirm the trial court's denial of plaintiff's motion, albeit for a different reason. See *Gleason*, 256 Mich App at 3.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Jane E. Markey