STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS R. BURNS,

Plaintiff-Appellant,

v

STANFORD BROTHERS, INC.,

Defendant-Appellee.

UNPUBLISHED
July 25, 2006

No. 259013
Washtenaw Circuit Court
LC No. 04-000350-CL

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's decision granting defendant's motion for summary disposition under MCR 2.116(C)(4) and (C)(8). Because plaintiff alleged no public policy violations independent of those claims arising from violation of specifically identified statutes and was thus required to exhaust administrative remedies before filing an action in the circuit court, we affirm.

Plaintiff was employed as a mechanic at defendant's automobile dealership. During his employment, plaintiff was involved in a car accident with another employee while both were driving customers' vehicles on the worksite. Both parties agree that plaintiff was fired shortly thereafter. Plaintiff claims he was fired because he refused to pay defendant for repairs required on the vehicle he was driving at the time of the accident and characterizes the alleged required payment "as a condition of remaining employed." Defendant, on the other hand, asserts that plaintiff was fired for violating company policies.

Plaintiff thereafter filed a claim for wrongful termination in violation of public policy, citing MCL 750.351 and § 8 (MCL 408.478) of the wages and fringe benefits act (WFBA), MCL 408.471 *et seq*. Defendant moved for summary disposition pursuant to MCR 2.116(C)(4) and (8), arguing that the Michigan Department of Labor had exclusive jurisdiction over the matter and that plaintiff could not maintain a claim for violation of public policy when there is a statutory remedy. The trial court agreed and dismissed plaintiff's public policy claims, but ordered that plaintiff have 30 days to amend his complaint alleging any common law claims that may not be subject to the WFBA. When plaintiff failed to amend his complaint within the required timeframe, the court dismissed plaintiff's complaint with prejudice. This appeal followed.

Appellate review of a motion for summary disposition is de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(4) provides for the summary dismissal of a case where the trial court lacks subject matter jurisdiction. In reviewing a (C)(4) motion, "this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Bock v Gen Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001). "MCR 2.116(C)(8) permits summary disposition when the 'opposing party has failed to state a claim on which relief can be granted.'" *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). In reviewing a (C)(8) motion, the Court "'does not act as a factfinder', but 'accepts as true all well-pleaded facts.'" *Radtke, supra*, 442 Mich at 373, quoting *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984).

Plaintiff first argues on appeal that his claim is not dependent on the statutes he cites in his complaint. Instead, plaintiff argues that he sought common law remedies in bringing his breach of public policy action, so that he need not exhaust the administrative remedies outlined in the WFBA but may instead properly pursue his action in the circuit court. In support of his argument, plaintiff cites to *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). In *Suchodolski*, the Michigan Supreme Court stated that although either party to an employment contract for an indefinite term may generally terminate it at any time, for any reason (or lack thereof), "some grounds for discharging an employee are so contrary to public policy as to be actionable" nonetheless. *Id.* at 695. "Most often," *Suchodolski* observes, "these proscriptions are 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." *Id.*

However, "[t]he courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges." *Id. Suchodolski* identified two general categories of such an implied tort for retaliatory discharge: (1) "where the alleged reason for the discharge was the failure or refusal to violate a law in the course of employment," and (2) "when the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment." *Id*. at 695-696.

In *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 79-80; 503 NW2d 645 (1993), our Supreme Court provided guidance on when a claim for retaliatory discharge would be implied:

> In those cases in which Michigan courts have sustained a public policy claim, the statutes involved did not specifically proscribe retaliatory discharge. Where the statutes involved did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. . . . A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue.

Plaintiff's complaint alleges violations of MCL 750.351 and § 8 of the WFBA. Section 8 of the WFBA (MCL 408.478) provides:

> (1) An employer, agent, or representative of an employer, or other person having authority from the employer to hire, employ, or direct the services of other

> persons in the employment of the employer shall not demand or receive, directly or indirectly from an employee, a fee, gift, tip, gratuity, or other remuneration or consideration, as a condition of employment or continuation of employment.

According to MCL 750.351, one who engages in the above conduct is guilty of a misdemeanor.

MCL 408.483 further provides as follows:

> (1) An employer shall not discharge an employee or discriminate against an employee because the employee filed a complaint, instituted or caused to be instituted a proceeding under or regulated by this act, testified or is about to testify in a proceeding, or because of the exercise by the employee on behalf of an employee or others of a right afforded by this act.
>
> (2) An employee who believes that he or she is discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the department alleging the discrimination within 30 days after the violation occurs. Upon receipt of the complaint, the department shall cause an investigation to be made. If, upon the investigation, the department determines that this section was violated, the department shall order the rehiring or reinstatement of an employee to his or her former position with back pay.
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> (3) An employer may seek review of the department's determination by following the procedure provided in section 11(4) to (9).

The WFBA clearly proscribes retaliatory discharge; thus, plaintiff's claim of violation of public policy based on § 8 of the WFBA falls under the authority of *Dudewicz.* While plaintiff repeatedly states that an action for breach of public policy is an independent common law cause of action, plaintiff specifically alleged in his complaint that the public policy allegations arise out of violations of the WFBA and the trial court properly reviewed the pleadings in rendering its decision. Plaintiff's claim under the WFBA, as asserted in his complaint, is not sustainable as a public policy claim.

Plaintiff's public policy claim based upon MCL 750.351 also fails. In *Cork v Applebee's, Inc*, 239 Mich App 311, 318; 608 NW2d 62 (2000), the plaintiffs brought, in part, a claim for violation of public policy based on MCL 750.351. *Id.* at 318. This Court allowed the *Cork* plaintiffs to pursue their common law claims for conversion, unjust enrichment, and breach of contract at the circuit court level, because it concluded that the WFBA's remedy is cumulative where plaintiffs seek enforcement of common law rights. *Id. Cork* held, however, that the summary dismissal of the plaintiffs' claim of a public policy violation pursuant to MCL 750.351 was proper because the penal code statute is, "in effect, identical to subsection 8(1) of the WFBA . . . [and] the WFBA provides the exclusive remedy for [the] alleged violation." *Id.*

Plaintiff next argues that the WFBA merely provides additional remedies for a preexisting right such that any administrative remedy provided by the WFBA is cumulative. However, this assertion is based on plaintiff's characterization of his claim as sounding in tort. As previously indicated, plaintiff's alleged public policy tort(s) are not sustainable because there is an applicable statutory prohibition against discharge in retaliation for the conduct at issue.

Dudewicz, supra at 79. In other words, because the WFBA contains "an explicit prohibition on retaliatory discharge," *Suchodolski, supra* at 695, no cause of action should be implied. With no implied tort (and no other common law claim identified in plaintiff's complaint), no cumulative remedy exists in plaintiff's complaint as framed.

Plaintiff also claims that the WFBA does not require exhaustion of administrative remedies where the act provided an administrative remedy for a longstanding state policy. Thus, plaintiff argues, his claim originates in public policy, not in the act. The longstanding policy identified, however, is that expressed in MCL 750.351, enacted in 1931. As indicated in *Cork, supra*, § 8 of the WFBA and MCL 750.351 are, in effect, identical and the WFBA provides the exclusive remedy for the alleged violation at issue.

Plaintiff also argues that his claim is not precluded because the language of the WFBA makes the administrative remedy permissive rather than mandatory. The act states that "[a]n employee who believes that his or her employer has violated this act *may* file a complaint with the department within 12 months after the alleged violation." MCL 408.481 (1) (emphasis added). According to plaintiff, the Legislature's use of the word "may" rather than "shall" indicates that a claimant's pursuit of the administrative process was intended to be permissive. Plaintiff cites to *Murphy v Sears, Roebuck & Co*, 190 Mich App 384, 387; 476 NW2d 639 (1991) in support of this assertion, and argues that the trial court wrongly relied on *Duncan v Rolm Mil-Spec Computers*, 917 F2d 261 (CA 6, 1990) rather than *Murphy* in rendering its decision.

Duncan interpreted the language of the WFBA to require claimants to exhaust administrative remedies prior to filing actions in the circuit court. *Duncan, supra*. *Duncan* noted that the Michigan Court of Appeals typically construes the word "may" to be permissive rather than mandatory unless contrary to legislative intent. *Id.* at 265. *Duncan* concluded, however, that such a contrary legislative intent was evident in the WFBA from other statutory language. *Id.* *Duncan* therefore held that "use of the word 'may' in section 408.481(1) does not permit a claimant to file a civil action prior to seeking administrative relief." *Id.*

In *Murphy*, this Court found no language to indicate that the Legislature intended for the word "may" to be construed as mandatory in the circumstances of that case. *Murphy, supra* at 387. Noting the interpretation offered of the WFBA in *Duncan*, *Murphy* explained that the statutory scheme did not evidence a legislative intent that an aggrieved employee must exhaust all administrative remedies before filing a lawsuit, "at least where, as here, the employee's grievance is premised on a common-law action for breach of contract." *Id.* In other words, some part of the claim must be outside the purview of the statute in order for an employee to file a claim before the circuit court prior to exhausting administrative remedies. See, e.g., *Cork, supra* at 318. Such a holding is consistent with this Court's prior holding in *Cockels v International Business Expositions, Inc*, 159 Mich App 30, 35-36; 406 NW2d 465 (1987), wherein it was stated that although a termination in contravention of a strong public policy is wrongful, administrative remedies provided by the Legislature in statutory schemes embodying those public policies must be pursued before a grievant may seek legal redress in the courts.

In the instant matter, the trial court's reasoning was not in conflict with *Murphy*. The court cited *Duncan* for the proposition that employees are required to exhaust administrative remedies when a violation of the WFBA is alleged; it did not cite it as support for a blanket rule

that all claims are governed by the WFBA, regardless of whether some of the claims would traditionally be governed by the common law. Additionally, the court also cited *Murphy* and ultimately relied upon that opinion in its holding: "[p]laintiff's complaint is based solely on a claim for violation of public policy as expressed in the WFBA and MCL 750.351. Based on the principles expressed in Murphy and the persuasive reasoning in Paragon, the Court finds that plaintiff was required to first exhaust the administrative remedy provided by the WFBA." The trial court, then, properly recognized the distinguishing feature of *Murphy* that a plaintiff specifically alleging common law claims separate and distinct from policy violations expressed in and prohibited by statute is not required to exhaust administrative remedies before bringing the *common law* claims in circuit court. Notably, the trial court here gave plaintiff ample opportunity to amend his complaint to assert any common law claims but plaintiff elected not to file an amended complaint.

Finally, plaintiff argues that under *Faulkner v Flowers*, 206 Mich App 562, 569; 522 NW2d 700 (1994), he is entitled to file an action in circuit court rather than present his claim before an administrative agency because the relief afforded him in the latter setting would be inadequate. However, *Faulkner* merely held that plaintiffs who have initiated a WFBA administrative proceeding may also pursue a cause of action under the Whistleblowers' Protection Act because of the different remedies offered under each act. *Id.* That issue is not debated here. Moreover, the *Faulkner* Court did not indicate that as a matter of public policy plaintiffs must be free to forego the administrative remedies offered by the statute in pursuance of court action, as plaintiff argues. Furthermore, the option of court action in the case at hand is not entirely precluded, as plaintiff may bring his claim in circuit court once he has exhausted the administrative remedies provided by the WFBA.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto