# STATE OF MICHIGAN

# COURT OF CLAIMS

MARK ANDREWS,

Plaintiff,

v

MICHIGAN STATE POLICE,

Defendant.
_____/

**OPINION AND ORDER**

Case No. 22-000187-MZ

Hon. James Robert Redford

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Before the Court is defendant's motion for summary disposition under MCR 2.116(C)(7), (8), and (10). For the reasons stated in this opinion and order, defendant's motion is GRANTED, and the case is dismissed.

## I. BACKGROUND

This case arises out of plaintiff's involuntary transfer and ultimate termination from his employment with the Michigan State Police (MSP). Plaintiff is a military veteran who worked for the MSP from June 2012 until November 2021.

On approximately August 28, 2020, the MSP held a meeting at the home of an MSP supervisor that plaintiff alleges also served as a going-away/transfer party for an MSP employee. Plaintiff was not at the party, but alleges another trooper told him that on-duty troopers consumed alcohol. Plaintiff asserts that both the consumption of alcohol while on duty and in-person

meetings during the COVID-19 pandemic violated the MSP's internal policies. Plaintiff complained to someone with the MSP about the party, and his concerns made their way to Post Commander Morenko. Plaintiff alleges Commander Morenko filed an internal-affairs complaint against him, alleging plaintiff mishandled the filing of an internal report.

On January 8, 2021, plaintiff learned the MSP had suspended his employment pending an investigation, and on January 25, 2021, plaintiff learned he was terminated. Plaintiff and his union, the Michigan State Police Troopers Association, appealed the termination under the terms of plaintiff's collective-bargaining agreement, and the MSP suspended plaintiff's employment during the appeal. In early June 2021, an arbitrator overturned plaintiff's termination and imposed a 20-day suspension. In mid-June 2021, the MSP transferred plaintiff from the Monroe Post to the Metro South Post in Taylor, Michigan, which he characterizes as a "less desirable position."

On approximately June 26, 2021, plaintiff filed a complaint with the Governor under the Veterans' Preference Act (VPA), regarding the transfer and the broader situation. The MSP terminated plaintiff's employment again on November 12, 2021, allegedly because of a second investigation into plaintiff's handling of his internal complaint and his letter to the Governor. Plaintiff alleges the MSP retaliated against him in other ways as well, such as by denying him the opportunity to apply for a fire-inspector position, denying work benefits and overtime hours, embarrassing him by requiring him to remain at the station instead of on the job, and "[i]mpugning Plaintiff's reputation and besmirching his previously spotless reputation."

In January 2022, plaintiff sued the MSP in the Wayne County Circuit Court. The MSP moved for summary disposition before discovery, and the case was dismissed shortly thereafter.[1]

Plaintiff then filed a complaint in this Court in Docket No. 22-000100-MP, alleging wrongful termination under the Whistleblowers' Protection Act (WPA) and retaliation under the VPA. Plaintiff amended his complaint, replacing his WPA claim with one for wrongful termination in violation of Michigan public policy. The MSP moved for summary disposition in lieu of answering the complaint, arguing plaintiff failed to sign and verify his complaint as required under the Court of Claims Act, MCL 600.6431. Plaintiff did not request leave to amend the complaint or offer a verified complaint. This Court (Judge CAMERON), therefore, granted summary disposition, explaining that because plaintiff failed to verify his complaint in compliance with MCL 600.6431 and did not request an amendment, summary disposition was warranted.

Plaintiff later filed this separate matter. After the MSP initially moved for summary disposition, plaintiff amended his complaint, inserting a claim for wrongful termination in violation of Michigan public policy in place of his WPA claim, as he did in the earlier action. Plaintiff's Count II is a claim for retaliation in violation of the VPA. He requests unspecified economic and noneconomic damages, as well as attorney fees and costs.

## II. ANALYSIS

MCR 2.116(C)(7) provides for summary disposition on the basis of "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to

[1] Defendant notes in its motion for summary disposition that plaintiff agreed to dismiss his Wayne County Circuit Court Case when he learned the arbitrator upheld his termination.

arbitrate or litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." When determining whether a claim is barred under MCR 2.116(C)(7), this Court examines "all documentary evidence submitted by the parties, accept[s] all well-pleaded allegations as true, and construe[s] all evidence and pleadings in the light most favorable to the nonmoving party." *Dougherty v Detroit*, 340 Mich App 339, 345; 986 NW2d 467 (2021) (quotation marks and citation omitted).

MCR 2.116(C)(8) provides for summary disposition when a party "has failed to state a claim on which relief can be granted." A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). See also MCR 2.116(G)(5). In analyzing the claim, courts must accept as true all factual allegations in the complaint and only grant the motion "when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

MCR 2.116(C)(10) provides for dismissal when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A party moving for summary disposition under MCR 2.116(C)(10) may satisfy its burden "by submitting affirmative evidence that negates an essential element of the nonmoving party's claim, or by demonstrating to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (cleaned up). When deciding a motion under this rule, "a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *El-Khalil*, 504 Mich at 160. "A genuine issue of material fact exists when the record

leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

## A. PUBLIC-POLICY DISCHARGE CLAIM

The MSP first argues plaintiff's public-policy discharge claim fails as a matter of law because (1) the doctrine only applies to at-will employees, and (2) the doctrine does not apply to civil-service employees. Because the public-policy doctrine only applies in the context of at-will employment and because plaintiff was a civil-service employee, defendant is entitled to summary disposition of this issue.

Generally, "in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). "However, 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. The Michigan Supreme Court explained in *McNeil v Charlevoix Co*, 484 Mich 69, 79; 772 NW2d 18 (2009):

> An at-will employee's discharge violates public policy if any one of the following occurs: (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty; (2) the employee is discharged for the failure or refusal to violate the law in the course of employment; or (3) the employee is discharged or exercising a right conferred by a well-established legislative enactment.

Plaintiff relies on the third circumstance and asserts he was exercising a right conferred by a well-established legislative enactment by internally reporting the party and by filing the VPA grievance.

### 1. AT-WILL VERSUS JUST-CAUSE EMPLOYMENT

Just-cause employment is an exception to the presumption that employment is at-will, and it refers to a contractual relationship between an employer and employee that prevents the employer from terminating the employee's employment without just cause. *Lytle v Malady*, 458 Mich 153, 164; 579 NW2d 906 (1998). Under Michigan Const 1963, art 11, § 5, the MSP and its troopers "have the right to bargain collectively." Article 8, Part A, § 1 of the MSP bargaining agreement provides "[t]he Employer will utilize disciplinary action only for just cause toward employees who engage in violations of the Code of Conduct."

The public-policy exception originated in the at-will employment context in order to provide employees with some level of protection when they are terminated for certain unjust reasons. The rationale differs in a just-cause employment context because the employer must already justify the termination and establish it was for cause. In *Smith v Town and Country Props II, Inc*, 338 Mich App 462, 480; 980 NW2d 131 (2021), the Michigan Court of Appeals held "more specific indications of the state's desire to protect independent contractors" was required before expanding the application of the public-policy exception to include independent contractors, rather than only at-will employees. Likewise, there is no indication the State has sought to expand the public-policy doctrine to include just-cause employees. See *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 573; 753 NW2d 265 (2008) (explaining there is a "principle that the courts may only derive public policy from objective sources").

Plaintiff does not dispute that his employment relationship with the MSP is governed by a collective-bargaining agreement or that his employment is considered "just-cause" employment. The Michigan Supreme Court has specifically applied the public-policy exception to at-will employment situations, and there is no basis to find that it applies in this situation. See e.g.,

*McNeil*, 484 Mich at 79 (providing the public-policy exception applies to at-will employment situations); *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 244, 253; 531 NW2d 144 (1995) (applying the public-policy exception to an at-will employment); *Suchodolski*, 412 Mich at 694-695 (noting the public-policy exception applies to an at-will employment, which exists in the absence of a contract).

2. CIVIL-SERVICE EMPLOYEES

Next, the MSP argues even if plaintiff could sue under the public-policy doctrine, the doctrine is inapplicable to civil-service employees like plaintiff. This Court finds the public-policy doctrine is inapplicable to plaintiff as a civil-service employee.

The parties do not dispute that plaintiff is a civil-service employee. The Michigan Civil Service Commission is an agency created by Michigan's 1963 Constitution and acts as a quasi-judicial body. *Viculin v Dep't of Civil Serv*, 386 Mich 375, 385-386; 192 NW2d 449 (1971). Article 11, § 5 of the Michigan Constitution outlines the scope and duties of the Civil Service Commission and provides, in relevant part:

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, *and regulate all conditions of employment in the classified service*. [Emphasis added.]

For state police troopers, the constitutional provision provides a right to bargain collectively regarding the conditions of their employment, their compensation, working conditions and hours, and "other aspects of employment except promotions," which are determined by

examination, merit, and fitness. *Id*. See also Const 1963, art 4, § 48 ("The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service.").

The Commission possesses plenary power and has general control over employee-grievance procedures. *Viculin*, 386 Mich at 393. The Court of Appeals has explained the Civil Service Commission "regulates the terms and conditions of employment in the classified service." *Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 79; 630 NW2d 650 (2001). The Legislature may not take away its powers. *Hanlon v Civil Serv Comm'n*, 253 Mich App 710, 717; 660 NW2d 74 (2002).

Plaintiff relies on *Marsh v Dep't of Civil Serv*, 142 Mich App 557; 370 NW2d 613 (1985), to argue that he may sue for violation of Michigan public policy even though the Civil Service Commission would otherwise oversee his grievance against the MSP. In *Marsh*, the plaintiff, a Department of Treasury employee, alleged she was denied three promotions because of her gender, race, and disability. *Id*. at 559-560. The plaintiff eventually sued under the Elliott-Larsen Civil Rights act (ELCRA) and the Handicappers' Civil Rights Act (now the Persons with Disabilities Civil Rights Act), MCL 37.1101 *et seq*. *Id*. at 560-561. The Court of Appeals held both statutes applied to state civil-service employees because the statutes provided for a private cause of action for violations of their provisions and "employees of the state classified civil service may directly bring suit in the circuit court to enjoin the Department of Civil Service from violating Const 1963, art 11, § 5." *Id*. at 561. The Court noted it had previously concluded the Civil Service Commission did not have absolute power or exclusive jurisdiction over *discrimination* claims. *Id*. at 564-565,

citing *Mich Dep't of Civil Rights ex rel Jones v Mich Dep't of Civil Serv*, 101 Mich App 295; 301 NW2d 12 (1980) (involving discrimination claims under the predecessor to ELCRA).

However, there are several important distinctions between the present situation and that in *Marsh*. First, that plaintiff's lawsuit involved two statutes that provided direct access to the courts. *Id*. at 563. Here, plaintiff sues under a common-law doctrine developed through Michigan caselaw. Second, the *Marsh* Court explained that although Const 1963, art 4, § 48 "precludes the Legislature from enacting laws providing for the resolution of employment disputes concerning public employees in the state classified civil service," this provision must be read along with the constitutional provisions creating the Civil Rights Commission, Const 1963, art 5, § 29, and protecting against discrimination, Const 1963, art 1, § 2. *Id*. at 566-567. The latter constitutional provision *required* the Legislature to implement the section through appropriate legislation. *Id*. at 567. See also Const 1963, art 1, § 2 ("No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.").

The Court in *Marsh* explained that neither constitutional provision excluded state civil-service employees. *Marsh*, 142 Mich App at 566-567. Instead, ELCRA and the Handicappers' Civil Rights Act created statutory civil rights stemming from the Constitution. *Id*. Thus, the Court held:

> In light of these two constitutional provisions prohibiting discrimination, securing the constitutional and statutory civil rights of all persons, and mandating implementation of these provisions by the Legislature, we hold that the prohibition of legislation for resolution of employment disputes of the classified civil service, Const 1963, Art 4, § 48, does not extend to the area of employment discrimination. [*Id*. at 568-569.]

The Court specifically added, in a footnote, that under ELCRA and the Handicappers' Civil Rights Act, "only employment discrimination claims, *not all employment disputes*, can be brought directly before the Civil Rights Commission and circuit court." *Id*. at 569 n 11 (emphasis added). See also *Womack-Scott*, 246 Mich App at 77-78 (explaining that except for the plaintiff's civil-rights claims, her wrongful discharge claims were subject to the grievance procedures for classified civil-service employees). Therefore, the finding of *Marsh* was limited to the discrimination context, and does not apply to a public-policy claim in this context, in which plaintiff does not rely on a civil-rights statute or argue his claims would fall within the protections afforded by a specific constitutional provision.

Finally, plaintiff relies on the WPA, and specifically MCL 15.361(a), which defines an "employee" who may bring a WPA claim as to specifically exclude state classified civil-service employees. Plaintiff argues the Legislature's specific exclusion of state classified civil-service employees would be superfluous if civil-service employees were unable to bring *any* employment law claims. However, the public-policy doctrine is not a creature of statute, and no negative inference can be drawn from the Legislature's decision to expressly exempt civil-service employees from the protections of the WPA. Plaintiff does not cite any other legal authority for his position that he could circumvent the Civil Service Commission's plenary grievance powers by suing the MSP directly for violation of Michigan public policy. Therefore, defendant is entitled to dismissal of Count I.

B. VPA CLAIM

Next, the MSP argues plaintiff's VPA claim fails as a matter of law. Because the VPA does not create a private cause of action for wrongful transfer or termination, defendant is entitled to summary disposition.

To the extent the Court is required to interpret the VPA, the Court must determine the Legislature's intent. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). "The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *Id*. The VPA entitles a veteran to notice and a hearing before an employer may take an adverse employment action, and it converts at-will employment positions into just-cause positions. *Sherrod v Detroit*, 244 Mich App 516, 523; 625 NW2d 437 (2001). The VPA provides "[i]n every public department and upon the public works of the state and of every county and municipal corporation of this state, a veteran shall be preferred for appointment and employment." MCL 35.401(1). Important to this case, the VPA adds that when "there is a conflict between this act and 1941 PA 370, MCL 38.401 to 38.428, 1941 PA 370 [the county employees' civil service act], MCL 38.401 to 38.428, shall prevail."

The parties do not dispute that plaintiff is a veteran as the term is defined in the VPA. See MCL 35.401(2)(a) (defining "veteran" as an individual who is a veteran as defined as MCL 35.61 and who was honorably discharged); and MCL 35.61 (defining the term "veteran," in relevant part, as "an individual who served in the United States Armed Forces, including the reserve components, and was discharged or released under conditions other than dishonorable").

Regarding adverse employment actions, the statute provides, in relevant part, "No veteran . . . holding an office or employment in any public department or public works of the

state . . . shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency[.]" MCL 35.402. The statute adds that a state-employee veteran cannot be removed, transferred, or suspended without notice and a full hearing before the Governor, and removal, suspension, or transfer can be made only on written order of the Governor. *Id*. If the veteran is removed, transferred, or suspended from state employment in violation of the VPA, then the veteran may file a written protest with the Governor within 30 days. *Id*.

As for the penalty, MCL 35.403 provides a violation of the Act by an individual who has "the power of appointment to a position, under him," constitutes a misdemeanor and is punishable by a fine of $50 to $100, by imprisonment of not more than 90 days, or both. Additionally, MCL 35.404 provides a limited civil remedy: "In case the application of any such soldier, sailor or marine, shall be rejected by the person having the power of appointment to the position for which he has applied, he shall be entitled to remedy therefor by mandamus to enforce the provisions of this act."

Generally, a statutorily provided remedy is deemed exclusive. *Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). "[G]enerally speaking, a plaintiff cannot make a viable claim for money damages based strictly on violation of a statute unless the Legislature provides for a private statutory cause of action." *Randall v Mich High Sch Athletic Ass'n*, 334 Mich App 697, 717; 965 NW2d 690 (2020). When determining whether there is an exception to that general rule, the question is whether the Legislature intended to create a private cause of

action, either through its express language or by implication. *Lash v Traverse City*, 479 Mich 180, 193 n 24; 735 NW2d 28 (2007).

Here, the Legislature has not expressly authorized a private cause of action under the VPA for monetary damages in the context of a wrongful termination or transfer, and there is no evidence the Legislature intended such a private cause of action. See *id*. at 194. The Legislature has provided a civil remedy in one context: when a veteran applies for, but is rejected for a government position. MCL 35.404. In that context, the plaintiff can sue for mandamus relief to enforce the VPA. *Id*. Otherwise, the remedy is criminal in nature. MCL 35.403. Both remedial provisions of the VPA indicate they apply in the context of a failure to promote/appoint. Plaintiff does not request declaratory or injunctive relief, and has not pleaded a mandamus claim against the MSP.

Plaintiff has also not demonstrated a legislative intent to allow a private cause of action in this situation. The Legislature was explicit regarding when a veteran may sue a governmental agency, and it limited private lawsuits to the mandamus context. See *Randall*, 334 Mich App at 718 (declining to infer the right to a private cause of action when there was no ambiguity in the concussion-protection statute); *LM v Michigan*, 307 Mich App 685, 701; 862 NW2d 246 (2014) (holding the plaintiff did not state a claim for which relief could be granted when MCL 380.1278 did not expressly authorize a private cause of action and there was no evidence the Legislature intended for a right to a private cause of action).

Plaintiff relies on *Brown v Dep't of Veterans Affairs*, 247 F3d 1222 (CA Fed, 2001), arguing it establishes a private cause of action in this context. However, *Brown* involved federal statutes, *id*. at 1223-24, rather than Michigan's VPA. Moreover, the Court in *Brown* noted the statutes "accord[ed] veterans' preference only for initial employment" and held the plaintiffs failed

to state a claim upon which relief could be granted, related to their being denied promotions. *Id*. at 1222, 1225. There was no holding that the statutes provided a private cause of action. Therefore, plaintiff has failed to state a claim upon which relief can be granted, and defendant is entitled to dismissal of Count II. See MCR 2.116(C)(8).

## III. CONCLUSION

Therefore, the Court GRANTS defendant's motion for summary disposition and dismisses the case.

This is a final order and dispenses with the case.

Date: February 2, 2024

Hon. James Robert Redford
Judge, Court of Claims