Order

Michigan Supreme Court
Lansing, Michigan

July 15, 2022

Bridget M. McCormack,
Chief Justice

160495

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

CLEVELAND STEGALL,
Plaintiff-Appellant,

v

SC: 160495
COA: 341197
Oakland CC: 2016-155043-CD

RESOURCE TECHNOLOGY CORPORATION,
d/b/a BRIGHTWING, and FCA US, LLC,
Defendants-Appellees.

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On May 4, 2022, the Court heard oral argument on the application for leave to appeal the September 24, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals and REMAND this case to that court for further consideration of plaintiff's public-policy claim.

In Part II(A) of its opinion, the Court of Appeals erred by holding that plaintiff's public-policy claim fails because the public-policy exception does not extend to discharges in retaliation for internal reporting of alleged violations of the law. In this case, plaintiff did not argue for an addition to the public-policy exceptions that are recognized in *Suchodolski v Mich Consolidated Gas Co*, 412 Mich 692 (1982). Instead, plaintiff grounds his claim on two of the well-recognized *Suchodolski* exceptions—that he was discharged both because he exercised a right conferred by well-established legislative enactment and because he failed or refused to violate the law. *Suchodolski*, 412 Mich at 695-696. It bears noting that these are two separate exceptions under *Suchodolski*. It is irrelevant to the former exception whether plaintiff reported an actual or alleged violation of the law; that plaintiff relies on the exercise of a right conferred by a well-established legislative enactment such as the Occupational Safety and Health Act (OSHA), 29 USC 651 *et seq.*, is sufficient. The Court of Appeals majority erred by considering the requirements of the two *Suchodolski* exceptions together.

To the extent that the Court of Appeals majority held that a public-policy claim fails when only internal reports are made, the Court of Appeals has previously held that a plaintiff could support a public-policy claim on the basis of internal reporting. *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 531-532 (2014). We see no reason why limiting public-policy claims to external reports would serve the welfare of the people of Michigan, especially where the Whistleblowers' Protection Act, MCL 15.361 *et seq.*, might otherwise preempt claims that involve reports to public bodies. See MCL 15.362; *Anzaldua v Neogen Corp*, 292 Mich App 626, 631 (2011). In this case, plaintiff had a

good-faith belief that there was a violation of asbestos regulations at his workplace and followed proper internal reporting procedures. His internal report was thus sufficient to state a public-policy claim.[1]

We remand this case to the Court of Appeals for further consideration of whether plaintiff has established a prima facie claim that he was discharged in violation of public policy, whether plaintiff's public-policy claim is nonetheless preempted by either state or federal law, and whether arguments that the claim has been preempted are preserved. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I concur in the Court's order remanding to the Court of Appeals for further consideration of plaintiff's public-policy claim. I dissent from the order to the extent it denies leave to appeal with regard to plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* To establish a prima facie case under the WPA, a plaintiff must prove that:

> (1) The employee was engaged in one of the protected activities listed in the provision.

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[1] We do not take a position on whether there remains a genuine issue of material fact regarding plaintiff's public-policy claim, although we do note that some of the facts the dissent relies upon remain disputed. Because the Court of Appeals erred by concluding that internal reports could not support a public-policy claim and by conflating plaintiff's claims made under separate *Suchodolski* exceptions, we remand to the Court of Appeals for that court to consider the remaining issues in the first instance. However, the dissent forges ahead to prematurely reject plaintiff's claims. Specifically, the dissent relies on *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2 (2007), to conclude that plaintiff's claims are preempted by the OSHA and the Michigan Occupational Safety and Health Act (MiOSHA), MCL 408.1001 *et seq.* This ignores the fact that these specific preemption arguments were raised for the very first time in this Court and were thus never addressed by the Court of Appeals. We also note that, in *Suchodolski* itself, this Court cited MiOSHA as a potential source of a right conferred by well-established legislative enactment. *Suchodolski*, 412 Mich at 695 & n 2. It is unclear what impact *Dudewicz* has on MiOSHA preemption given this language in *Suchodolski* that specifically refers to MiOSHA in explaining the contours of this exception, and the dissent fails to note or address this tension. We continue to believe that these questions are more appropriately addressed by the Court of Appeals in the first instance.

> (2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.
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> (3) A causal connection exists between the employee's protected activity and the employer's act of discharging, threatening, or otherwise discriminating against the employee. [*Wurtz v Beecher Metro Dist*, 495 Mich 242, 251-252 (2014).]

The Court of Appeals majority and defendant Brightwing both acknowledged that plaintiff had engaged in a protected activity by filing a wrongful-termination complaint with the Michigan Occupational Safety and Health Administration (MiOSHA). *Stegall v Resource Technology Corp*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2019 (Docket No. 341197), p 5. Also, the Court of Appeals majority acknowledged that termination of an employment relationship amounts to an adverse action. *Id*. But the Court of Appeals majority held that plaintiff could not satisfy the third element because plaintiff had "shown nothing more than temporal proximity between his protected activity and his alleged discharge," relying on *West v Gen Motors Corp*, 469 Mich 186 (2003). *Id*. I agree with the Court of Appeals dissent that *West* does not establish that temporal proximity alone cannot, as a matter of law, establish causal connection and that the record reveals more than temporal proximity in this case at any rate. *Stegall* (GLEICHER, J., dissenting), unpub op at 8-9. *West* specifically noted that, contrary to the Court of Appeals' conclusion, the plaintiff did not have an " 'impeccable' or 'unblemished' " record. *West*, 469 Mich at 187. As the United States Court of Appeals for the Sixth Circuit has noted, retaliation can be evidence of causal connection because in some cases "little other than the protected activity could motivate the retaliation." *Mickey v Zeidler Tool & Die Co*, 516 F3d 516, 525 (CA 6, 2008). Unlike in *West*, the Court of Appeals dissent notes that in this case plaintiff's employment record was "entirely favorable," including a letter of recommendation from his supervisor "highly praising [his] work and abilities[.]" *Stegall* (GLEICHER, J., dissenting), unpub op at 8. Before plaintiff filed his MiOSHA complaint, he had been assured that he would be offered a new position. *Id*. However, he was terminated shortly after filing his complaint. Because I believe this is sufficient to create a jury question with regard to causation, I respectfully dissent.

ZAHRA, J. (*dissenting*).

I do not join the majority's holding that an internal report can form the basis for a public-policy claim because it is unnecessary to reach that issue to resolve this case.[2] Plaintiff's public-policy claim fails both because (1) it is preempted by the Michigan Occupational Safety and Health Act (MiOSHA), MCL 408.1001 *et seq*., and/or the

[2] The majority provides little discussion or analysis on this point.

federal Occupational Safety and Health Act (OSHA), 29 USC 651 *et seq*., and because (2) the public-policy exceptions to at-will employment that plaintiff invokes under *Suchodolski v Mich Consol Gas Co*[3] are not applicable. Therefore, I would deny leave to appeal.

Beginning with preemption, under *Dudewicz v Norris-Schmid, Inc*,[4] a public-policy claim is sustainable "only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue."[5] Both MiOSHA and OSHA prohibit retaliatory discharge. MiOSHA requires an employer to "[f]urnish to each employee, employment and a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee,"[6] and it prevents the discharge of an employee "because the employee filed a complaint . . . or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act."[7] OSHA similarly provides a right to a hazard-free workplace,[8] as well as protection against retaliatory discharge.[9] Thus, because both statutes prohibit retaliatory discharge, plaintiff's public-policy claim is preempted under *Dudewicz*.[10]

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[3] *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982).

[4] *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68 (1993), overruled in part on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 594 n 2 (2007).

[5] *Dudewicz*, 443 Mich at 80. Accord *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572 (2008). See also *Ohlsen v DST Indus, Inc*, 111 Mich App 580, 582 (1982) (denying the plaintiff's public-policy claim when he also sued under MiOSHA provisions that prohibited discharge in retaliation for the employee's exercise of statutory rights).

[6] MCL 408.1011(a).

[7] MCL 408.1065(1).

[8] See 29 USC 654(a) (providing that "[e]ach employer—(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter").

[9] See 29 USC 660(c)(1) (providing that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA]").

[10] Plaintiff argues that, in light of the broad discretion afforded to the Secretary of Labor in determining whether to bring an action under OSHA, there is a real possibility that the retaliatory termination will go unredressed. See *Taylor v Brighton Corp*, 616 F2d 256,

Even assuming that plaintiff's public-policy claims are not preempted by MiOSHA or OSHA, plaintiff does not satisfy the *Suchodolski* exceptions that he invokes.[11] The majority holds that under *Suchodolski*'s exception to at-will employment for exercising a right conferred by a well-established legislative enactment, "[i]t is irrelevant . . . whether plaintiff reported an actual or alleged violation of the law; that plaintiff relies on the exercise of a right conferred by a well-established legislative enactment such as [OSHA] is sufficient." But even if a public-policy claim could be grounded on OSHA, that is not the end of the analysis.

For adjudicating claims of unlawful retaliation, Michigan follows the burden-shifting framework set forth by the Supreme Court of the United States in *McDonnell Douglas Corp v Green*.[12] Under that framework, once the plaintiff-employee establishes a prima facie case of unlawful, retaliatory discharge, the burden shifts to the defendant-employer to show a legitimate, nonretaliatory reason for the discharge.[13] If the

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264 (CA 6, 1980) (holding that OSHA's antiretaliation provision, 29 USC 660(c), does not "create" a private cause of action for an employee who is discharged for reporting a safety violation). Therefore, according to plaintiff, the OSHA does not preempt his public-policy claim. But our caselaw indicates that whether the OSHA provides an adequate remedy is irrelevant. To be sure, this Court once claimed that a "statutory remedy is not deemed exclusive if such remedy is plainly inadequate." *Pompey v Gen Motors Corp*, 385 Mich 537, 553 n 14 (1971) (holding that the Michigan Civil Rights Commission did not have exclusive jurisdiction over workplace-discrimination claims). However, as this Court clarified in *Lash v Traverse City*, 479 Mich 180, 192 n 19 (2007), that statement is dictum, and the adequacy principle it set forth, "which has never since been cited in any majority opinion of this Court, appears inconsistent with subsequent caselaw." Furthermore, MiOSHA's antiretaliation provision, MCL 408.1065, mirrors that of OSHA, 29 USC 660(c), which provides that the Secretary of Labor has discretion as to bringing a cause of action. Therefore, similar reasoning would apply to MiOSHA: Preemption does not occur only when a statute provides an "adequate" remedy. See, e.g., *Ohlsen*, 111 Mich App at 584-586, citing *Schwartz v Mich Sugar Co*, 106 Mich App 471 (1981) (holding that when an employer discharges an employee because of his exercise of a right afforded by the MiOSHA's anti-retaliation provision, the remedy provided is exclusive, precluding civil suit). See also *White v Chrysler Corp*, 421 Mich 192, 206 (1984) (refusing to permit a tort remedy for violations of MiOSHA despite acknowledging that the statutory remedy was inadequate because it resulted "in the undercompensation of many seriously injured workers").

[11] See *Suchodolski*, 412 Mich at 695-696 (listing the three exceptions).

[12] *McDonnell Douglas Corp v Green*, 411 US 792, 802-804 (1973).

[13] See *Debano-Griffin v Lake Co*, 493 Mich 167, 176 (2013) (adopting and applying the *McDonnell Douglas* burden-shifting framework).

defendant-employer succeeds in rebutting the plaintiff-employee's prima face case, then the burden shifts back to the plaintiff-employee to show that the defendant-employer's proffered reason for the discharge was a mere pretext for unlawful conduct.[14]

Under that test, plaintiff's claim must fail. Even if plaintiff can establish a prima facie case of unlawful retaliation for exercising his right to an asbestos-free workplace by making internal complaints when in fact there was no asbestos,[15] defendant FCA still has an opportunity to show that it had a legitimate, nonretaliatory reason to terminate plaintiff's employment.[16] In my view, defendant FCA easily makes that showing, as the record shows that defendant FCA closed the entire plant when it eliminated the second shift, and plaintiff turned down an opportunity to work the third shift at another location. To side with plaintiff would require us to believe that defendant FCA decided to retaliate against plaintiff by closing an entire plant when it knew that plaintiff's complaints amounted to nothing more than "unfounded suspicions."[17]

Finally, under *Suchodolski*'s exception for failure or refusal to violate the law, it is incorrect to say that plaintiff—by complaining to his manager of possible asbestos in the workplace—was terminated for failing or refusing to violate workplace-safety laws, which in the relevant sense are directed at employers, not employees; that is, those laws impose duties on employers, not employees. As I see it, the law does not place any duty on plaintiff to do, or refrain from doing, anything to establish a hazard-free workplace.[18]

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[14] *Id.* (" '[A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful retaliation].' ") (citation omitted; alterations in original).

[15] Three separate inspections—by defendant FCA's plant health and safety manager, an outside asbestos specialist, and the Michigan Occupational Safety and Health Administration—all established that there was no asbestos in plaintiff's workplace.

[16] The alleged retaliatory discharge would not extend to defendant Brightwing, which had no part in the termination and attempted to help plaintiff find another job after defendant FCA terminated him. Thus, I would hold that plaintiff's public-policy claim also fails against Brightwing.

[17] *Stegall v Resource Technology Corp*, unpublished per curiam opinion of the Court of Appeals, issued September 24, 2019 (Docket No. 341197), p 3.

[18] While MiOSHA requires an employee to "[c]omply with rules and standards promulgated, and with orders issued pursuant to this act," MCL 408.1012(a), and OSHA requires an employee to "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct," 29 USC 654(b), neither of those provisions can be said to place a duty on plaintiff to establish a safe workplace, which is what is relevant here. This duty rests with an employer, not an employee.

What the law does do for plaintiff, however, is give him the right to such a workplace. Therefore, when plaintiff made his various demands, *he* was not failing or refusing to violate the law. The relevant inquiry under this *Suchodolski* exception is whether an *employee* was discharged because he or she failed or refused to violate the law. That is not this case.[19]

Here, plaintiff, by raising questions about workplace safety and being reluctant to work in certain areas of the plant without air-quality tests, an inspection, and personal protective equipment, cannot fairly be said to have *himself* failed or refused to violate the law, which directs certain duties at his *employer—not* him, an employee. Indeed, the very cases that the *Suchodolski* Court cited when it laid out this exception show that even plaintiff's characterization of his own actions—i.e., that he refused to "acquiesce" in the violation of the law—are not covered under it.[20]

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[19] Imagine, however, a hypothetical case in which a manager refused to send his subordinates (e.g., persons like plaintiff) into spaces where there might have been a health hazard (e.g., asbestos), and then that manager was fired. In my view, such a manager would have a strong argument that he has a viable claim under *Suchodolski*'s failure-or-refusal-to-violate-the-law exception. But, again, the relevant laws do not impose such a duty on plaintiff, though they do give him the right to a safe workplace; rather, the duty is on an *employer* to provide a hazard-free workplace to its employees. Refusing, as an employee, to go along with your employer's violations of workplace-safety laws is not the same as failing or refusing to violate those laws yourself by, say, requiring your subordinates to enter into possibly hazardous work spaces. And this is to say nothing of the fact that defendant FCA did not even violate the law, as there was no asbestos found at plaintiff's workplace. Thus, it boggles the mind to think that an employee could have failed or refused to violate the law—or acquiesced in its violation, in plaintiff's telling—when there was no actual violation of the law.

[20] See *Suchodolski*, 412 Mich at 695 & n 3, citing *Trombetta v Detroit, T & I R Co*, 81 Mich App 489 (1978) (discharge for refusing to falsify pollution-control reports that were required to be filed with the state); *McNulty v Borden, Inc*, 474 F Supp 1111 (ED Pa, 1979) (discharge for refusal to participate in an illegal price-fixing scheme); *Petermann v Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 396*, 174 Cal App 2d 184 (1959) (discharge because employee refused to give false testimony before a legislative committee); see also *id*. at 189 ("To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare."). Each of these cases involved a plaintiff who failed or refused to violate the law, which had imposed a duty *on him*. Again, that is not this case.

In sum, this Court should deny leave because plaintiff's public-policy claim is preempted under *Dudewicz*, and even if it is not, it fails under the two *Suchodolski* exceptions that he invokes.[21] Because a majority of this Court holds otherwise, however, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

[21] The majority asserts that it is inappropriate to deny leave to appeal because the preemption issue was raised for the first time in this Court. But in our order directing supplemental briefing, the parties were instructed to address "whether the Court of Appeals erred in holding that the appellees were entitled to summary disposition of the appellant's claim that he was discharged in violation of public policy." *Stegall v Resource Technology Corp*, 508 Mich 986, 986 (2021). That language certainly encompasses the preemption issue; indeed, the briefing addressed preemption extensively, thereby putting us in a position to rule on it. Moreover, even if it is true, as the majority claims, that it is "unclear" what impact *Dudewicz* has on MiOSHA or OSHA preemption, for the reasons I have given, this case is a poor vehicle to address that relationship. Simply put, plaintiff's public-policy claim is meritless because there was no asbestos found at his workplace; plaintiff could not have been terminated in violation of public policy when his employer did not violate any workplace-safety laws. To ignore that critical fact is to prefer a hypothetical case to this actual case.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 15, 2022

Clerk

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