STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER JANETSKY,

Plaintiff-Appellee,

UNPUBLISHED
September 28, 2023

No. 346542
Saginaw Circuit Court
LC No. 15-028306-CL

COUNTY OF SAGINAW and CHRISTOPHER BOYD,

Defendants-Appellants,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE and JOHN MCCOLGAN,

Defendants.

JENNIFER JANETSKY,

Plaintiff-Appellee,

v

No. 346565
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COUNTY OF SAGINAW, JOHN MCCOLGAN, and CHRISTOPHER BOYD,

Defendants-Appellants,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE,

Defendant.

Before: BOONSTRA, P.J., and GLEICHER, C.J., and M.J. KELLY, J.

GLEICHER, C.J. (*concurring in part and dissenting in part*)

Jennifer Janetsky contends that she was constructively discharged from her position as an assistant prosecuting attorney (APA) in the Saginaw County Prosecutor's Office after she reported that one of her superiors had endorsed an illegal plea agreement. A different panel of this Court determined that none of the causes of action Janetsky pleaded in support of her claim should have survived summary disposition, and remanded the matter to the circuit court for entry of an order dismissing the case.

Our Supreme Court reversed in part, holding that Janetsky had presented sufficient evidence to support a claim under the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq*. The Supreme Court directed this Court to determine whether Janetsky's evidence also established an actionable public policy tort claim, and to consider whether Janetsky's claims for false imprisonment and assault and battery are factually and legally supportable.

The majority dismisses all of Janetsky's claims but for the WPA action the Supreme Court found viable. I respectfully dissent.

I. FACTUAL BACKGROUND

Saginaw County APA Janet Janetsky charged Justin Hannahs with three counts of criminal sexual conduct in the first degree (CSC-I). During plea negotiations, Janetsky offered Hannahs the opportunity to plead guilty to a single count of CSC-I. Hannahs rejected the offer.

Mark Van Benschoten, an attorney and a friend of Hannah's family, visited Janetsky at her office and asked her to make a better offer. Janetsky referred Van Benschoten to her superiors, including defendant Christopher Boyd, the Chief Assistant Prosecutor. According to Janetsky, Boyd "pushed" her to make a better offer, but she resisted. Shortly thereafter, a problem with the prosecution's case emerged. Evidence surfaced that one of the complaining witnesses had possibly falsified the computer evidence provided to the prosecution.

Janetsky went on a honeymoon in early June 2014, and the Hannahs case remained pending. When she returned, Janetsky learned that Boyd had met with Hannahs' attorney before she left for her honeymoon and had offered Hannahs a plea to third-degree criminal sexual conduct (CSC-III) with a sentence recommendation of probation and a jail term. Hannahs accepted that offer and entered a plea. Janetsky knew that Boyd had not consulted with the complainants to obtain their views about this deal, in contravention of MCL 780.756(3). Janetsky also recognized that Hannahs' sentence violated MCL 771.1(1), which bars trial courts from imposing probation sentences for CSC-III convictions.

Janetsky met with John McColgan, the Saginaw County Prosecuting Attorney, to express her concerns about the plea deal. McColgan authorized her to file a motion to set aside the plea. Janetsky testified that she intended to allow Hannahs the option of accepting the plea, but "without the unlawful sentencing recommendation." Janetsky prepared the motion, and according to Janetsky, Boyd reluctantly signed it.

The prosecution of Hannahs fell apart after the case was remanded for a preliminary examination. One of the complaining witnesses was formally accused of perjuring herself at the exam. The charges against Hannahs were dismissed in June 2015.

Janetsky suspected that Boyd harbored ill will toward her because she had forced the plea withdrawal that he had negotiated, and she feared his retaliation. According to Janetsky, Boyd did retaliate in various ways during the next year, including by verbally abusing her in front of her peers and by creating a hostile work environment. She testified that the retaliation escalated and came to a head on June 1, 2015, during a meeting about an unrelated case. Janetsky described that the case was one "in which the defense attorney indicated that they had gotten a better offer from . . . Boyd than the one that I had offered. I came downstairs to try to ask . . . Boyd whether or not that was actually true and instead immediately was assaulted and berated."

According to Janetsky, an intern accompanied her to Boyd's office, but Boyd told the intern to leave, shut the door, returned to his desk and, "with a bright red face yelling," "ordered" Janetsky to sit. Boyd repeatedly demanded that she sit, Janetsky recounted, despite that she told him she preferred not to. In response to her hesitation to sit, Boyd "physically became redder, he became more agitated and he began yelling more." Janetsky testified that she "first . . . tried to calmly respond and tell him that I was trying to follow his direct order," but Boyd admonished her for failing to sit, and also accused her "little cronies" of sending her "useless crap" in e-mails or texts. Janetsky claims that she responded, "[Y]ou're hostile and agitated and unprofessional and inappropriate . . . and I am not going to continue this conversation without my union present." Boyd "continued to yell and did not get me my union rep." When she tried to leave Boyd's office, Janetsky continued, Boyd

> stood up. He's still yelling. He's not getting me my union rep. I said I'm going to go and I started to move this way toward the door . . . . I started to move to my left toward the door. That's when Boyd got up, he came flying out from behind the desk, very quickly came behind me, around me, behind me. Put his hand on the door and blocked my exit.

Under questioning by defense counsel, she added the following details:

> *Q.* And did you reach for the [door] handle?
>
> *A.* I'm sure that I did.
>
> *Q.* Did you grab the handle?
>
> *A.* I - - yes, I believe my hand was on the door when his hand hit the top of the door right above my head.
>
> *Q.* And then your testimony is in the time that you started - - after you started to move toward the door, . . . Boyd came from around his desk and walked toward the door and then behind you at the door?
>
> *A.* As I'm walking toward the door, he was already standing, he's already out from behind his chair. He had a straight shot to go this way, so I'm walking

this way toward the door, he comes behind me like this and throws his hand on the door to block it.

Q. And what hand did he put on the door?

A. His left hand because he was facing me.

Q. And did he have any contact with you when his left hand went on the door.

A. No, he did not - - I could - - all I could feel was the slam - - the bang of the door.

Q. So he was behind you at this time.

A. Correct.

Janetsky testified that her hand was on the door when Boyd slammed it shut. She estimated that the confrontation at the door lasted "thirty seconds or less." Boyd then abruptly "threw the door open" and called another assistant prosecutor into the room. During the conversation that ensued, Janetsky claimed that she told Boyd: "[Y]ou're not mad about this text situation, you're mad about the Hannahs case," and that Boyd responded, "[Y]ou're darned right, you embarrassed me." Although she had no physical contact with Boyd, Janetsky testified that she was fearful of physical contact and thought "that I would have to fight my way out of the room."

Boyd then removed Janetsky from the Hannahs case. Janetsky notified McColgan that Boyd had created a hostile work environment. McColgan placed Janetsky on paid administrative leave, and two weeks later changed her status to unpaid administrative leave. Janetsky became unable to work due to stress and anxiety, and involuntarily resigned from her employment.

Janetsky's complaint identified five causes of action: violation of the WPA; public policy tort; assault and battery; intentional infliction of emotional distress; and false imprisonment. The circuit court denied summary disposition of Janetsky's claims against Boyd for assault and battery and false imprisonment, rejecting Boyd's argument that he was immune from suit under the governmental tort liability act, MCL 691.1401 *et seq*. This Court granted defendants' application for leave to appeal and reversed and remanded for entry of an order granting summary disposition to defendants. *Janetsky v Saginaw Co*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2020 (Docket Nos. 346542 & 346565). The Supreme Court reversed in part and remanded the matter to this Court for further proceedings. *Janetsky v Saginaw Co*, 510 Mich 1104; 982 NW2d 374 (2022).

I concur with the majority that on remand, the issues presented are whether: (1) Janetsky established prima facie cases of false imprisonment and assault and battery; (2) Janetsky's WPA claim is barred by the statute of limitations; (3) the county was Janetsky's "employer" under the WPA; (4) Janetsky suffered an "adverse employment action" under the WPA, and (5) Janetsky's public policy claim is "legally or factually supported." The majority correctly holds that Janetsky's WPA claim must proceed to trial with her damages limited to those that accrued within the statutory period of limitations. I also concur that Saginaw County was not Janetsky's employer.

I part ways with the majority, however, regarding the viability of Janetsky's claims for false imprisonment, assault and battery, and public policy tort.

II. ANALYSIS

A. FALSE IMPRISONMENT

Janetsky's false imprisonment claim arises from her confrontation with Boyd in his office, and his forceful closing of the office door when she attempted to leave. The majority forecloses Janetsky's false imprisonment claim despite that the evidence supports each and every element of false imprisonment under Michigan law.

According to the majority, Janetsky "did not establish that she was actually confined or conscious of any confinement; at best, Boyd's office door remained closed for 30 seconds before being opened." Citing *Moore v Detroit*, 252 Mich App 384, 388; 652 NW2d 688 (2002), the majority implies that because Janetsky's confinement was only "momentary and fleeting," her false imprisonment claim lacks merit. The majority additionally holds that Boyd had the "authority" "to insist that [she] remain at a workplace meeting in his office, at least if she wished to continue her employment." The record refutes the first two propositions and I disagree with the third.

The record supports that Janetsky was very much aware of her confinement, as her comment that she thought she would have to "fight her way" out of the room graphically attests. The majority's reliance on the alleged brevity of Janetsky's confinement represents an incorrect application of dictum and contradicts longstanding law. And the notion that a supervisor is privileged to "insist" a subordinate being screamed at remain seated during a supervisor's tirade is troubling at best.

The tort known as false imprisonment protects an individual's freedom of movement. The First Restatement of Torts described false imprisonment as "[a]n act which, directly or indirectly, is a legal cause of confinement of another within boundaries fixed by the actor for any time, no matter how short in duration[.]" Such an act "makes the actor liable to the other irrespective of whether harm is caused to any legally protected interest of the other" if the actor intended the confinement, the other was "conscious" of and did not consent to the confinement, and the confinement was not "otherwise privileged." Restatement Torts, 1st, § 35(1) (1934).

The Second Restatement of Torts describes the tort similarly, although it introduces the concept of "merely transitory or otherwise harmless confinement:"

> (1) An actor is subject to liability to another for false imprisonment if
>
> (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
>
> (b) his act directly or indirectly results in such a confinement of the other, and
>
> (c) the other is conscious of the confinement or is harmed by it.

> (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm. [Restatement Torts, 2d, § 35 (1965).]

Subsection (2) tethers the duration of a confinement to intent. If there is no intent to confine, the Second Restatement posits, a "merely transitory otherwise harmless confinement" is not actionable.

The Third Restatement again reformulates the contours of the tort, explaining that "an actor is subject to liability to another for false imprisonment if":

> (a) the actor intends to confine the other within a limited area, or the actor's intent is sufficient under § 11 (transferred intent);
>
> (b) the actor's affirmative conduct causes a confinement of the other, as provided in §§ 8 and 9, or the actor fails to release the other from a confinement despite owing a duty to do so;
>
> (c) the other is aware that he or she is confined or the other suffers bodily harm as a result of the confinement; and
>
> (d) the other does not consent to the confinement, as provided in § 12. [Restatement Torts, 3d, § 7 TD (2018).]

"Confinement" of another is established if:

> (a) the actor employs physical barriers that preclude, or appear to preclude, the other from exiting the area of confinement, and the other is unaware of a readily available and safe means of exit;
>
> (b) the actor employs physical force or restraint, or the actor makes an express or implied threat of immediate physical force or restraint, and the other submits to the force, restraint, or threat rather than exiting the area of confinement;
>
> (c) the actor causes duress, other than by a threat of force or of restraint, and the other submits to the duress rather than exiting the area of confinement; or
>
> (d) the other submits to the actor's assertion of legal authority, as provided in § 9. [Restatement Torts, 3d § 8 TD.]

The Comments to the Third Restatement include the observation that "[t]he temporal scope of confinement can be very brief. If D grabs P by the arm against P's will, refusing to let P go, that is sufficient for false imprisonment, even if P breaks free in less than a minute. Of course, the duration of confinement is a relevant consideration in the determination of a plaintiff's damages." *Id*. at cmt c.

Michigan's common law has been consistent with the three Restatement approaches to this tort. Although a fractured decision, Justice Levin's opinion in *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 341; 508 NW2d 464 (1993), adopts the Second Restatement's description of the elements of false imprisonment as: "an act committed with the intention of confining another, the act directly or indirectly results in such confinement, and the person confined is conscious of his confinement." None of the other Justices disagreed with this definition.

Janetsky's testimony describes a false imprisonment consistent with these elements. Janetsky testified that when Boyd continued yelling at her while becoming more agitated, she announced that she was "going to go and started to move . . . toward the door." She recollected that Boyd then "came flying out from behind the desk" and "blocked my exit." This testimony amply supports that Boyd intended to confine Janetsky in his office, did in fact confine her by closing the door as she tried to leave, and that Janetsky was entirely aware of her confinement. Were there any doubt about Janetsky's ability to establish a prima facie case, M Civ JI 116.02 dispels it:

> False imprisonment is the unlawful restraint of an individual's personal liberty or freedom of movement. To constitute a false imprisonment, there must be an intentional and unlawful restraint, detention or confinement that deprives a person of his or her personal liberty or freedom of movement against his or her will. The restraint necessary to create liability for false imprisonment may be imposed either by actual physical force or by an express or implied threat of force.

Janetsky's evidence satisfies these elements.

Apparently relying in part on *Moore*, 252 Mich App 384, the majority implies that because Boyd's door was closed for only 30 seconds before he opened it, Janetsky's confinement was "momentary and fleeting" and therefore not actionable. *Moore* does state, in obiter dictum, that "brief confinements or restraints are insufficient for false imprisonment." *Id*. at 388. The majority's reliance on this dictum is problematic for several reasons.

First, the overwhelming weight of the common law[1] (including Michigan's common law) does not support the proposition that a court may dismiss a false imprisonment claim based on the court's perception that the period of confinement was "too brief" to be actionable. What does "too brief" mean in the false imprisonment context? Is five minutes "too brief?" How are judges supposed to gauge the time component? Prosser's textbook teaches that "[i]t is at least settled that the imprisonment need not be for more than an appreciable length of time, and that it is not necessary that any damage result from it other than the confinement itself, since the tort is complete with even a brief restraint of the plaintiff's freedom." Prosser & Keeton, Torts (5th ed), § 11, p 48. This makes sense, since the tort is intended to protect a person's "dignitary interest in feeling free to choose one's own location[.]" Restatement Torts, 2d, § 35 cmt h. That is why "[a]n intentional confinement that causes no physical harm, no pain, no anxiety, and no loss of opportunity can be a false imprisonment." Goldberg & Zipursky, *Torts As Wrongs*, 88 Tex L Rev 917, 955 (2010). By engrafting a nebulous time requirement on the tort, the majority loses sight

[1] See 32 Am Jur 2d False Imprisonment § 15.

of the reasons that even a "brief" false imprisonment can significantly disrupt a person's sense of well-being, warranting a remedy.

Second, *Moore* cited as authority for the notion that "brief confinements or restraints are insufficient for false imprisonment" this Court's opinion in *Willoughby v Lehrbass*, 150 Mich App 319; 388 NW2d 688 (1986). *Willoughby* does not hold that "brief" confinements are not actionable. Rather, this Court held in *Willoughby* that the plaintiff failed to plead or present evidence that one of the defendants accused of false imprisonment (a high school principal) had "intentionally falsely imprisoned" the plaintiff. *Id.* at 348. The other defendant, the Court concluded, had not "detain[ed]" the plaintiff, and the plaintiff's complaint failed to allege that he had. *Willoughby* did not affect a sea change in Michigan's false imprisonment law by inserting a time component, and *Moore*'s indirect suggestion that it did should not be mechanically accepted by this Court.

Third, the majority's application of a timeframe for false imprisonment claims is incompatible with the role of a jury in determining whether a intended and unwelcome confinement merits an award of damages. Here, a jury may be persuaded that Janetsky suffered no damages due to the brevity of the time she was forced to remain in Boyd's office. Whether a confinement was too short to merit a remedy is the jury's decision to make.

Finally, I cannot accept the majority's novel theory that Boyd, "as plaintiff's direct supervisor, possessed at least some authority to insist that plaintiff remain at a workplace meeting in his office, at least if she wished to continue her employment." The law recognizes several defenses to false imprisonment, including consent and privilege. The law does not recognize the "privilege" of an employer to trap an employee in an office so that he can berate her. I cannot accept the majority's view that Janetsky should have willingly submitted herself to Boyd's tantrum if she wished to keep her job, or that such workplace behavior is immune from a claim of false imprisonment.

B. ASSAULT AND BATTERY

The majority's determination that Janetsky's struggle with Boyd over control of the door did not constitute an assault and battery also elides the facts and the law. "An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances which create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented." M Civ JI 115.01. "A battery is the willful or intentional touching of a person against that person's will [by another / by an object or substance put in motion by another person]." M Civ JI 115.02.

Boyd's act of intentionally and forcefully shutting the door while Janetsky held the handle, coupled with Janetsky's apprehension of physical contact, suffices to create a prima facie case of assault and battery. As the model jury instruction states and the law reinforces, a battery can be accomplished by an intentional, unconsented, or offensive touching of something closely connected with a person. See *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A jury should decide whether Boyd's act of slamming the door shut while Janetsky held the handle satisfies that standard. And this Court has repeatedly held that "because an attempt to commit a battery will establish an assault, every battery necessarily includes an assault because a battery is

the very consummation of the assault." *Lakin v Rund*, 318 Mich App 127, 131; 896 NW2d 76 (2016) (quotation marks and citations omitted). In my view, Janetsky's evidence supports both of these torts.

C. PUBLIC POLICY TORT

In its remand order, the Supreme Court characterized Janetsky's public policy tort claim as "based on her alleged refusal to violate the law – i.e., her attempt to set aside [the] plea and sentencing agreement" based on her view that it violated MCL 771.1. *Janetsky*, 510 Mich at 1106. The majority dispenses with Janetsky's public policy tort claim by holding that because *Janetsky* was never asked to violate the law and could not possibly have personally violated MCL 771.1(1), she has no claim under a public policy tort theory.

In my view, Chief Justice CLEMENT's discussion of Janetsky's public policy tort claim in her separate statement in the Supreme Court's remand order expresses the correct legal approach:

> MCL 771.1(1) is a formal legislative expression of the state's public policy, which it presumably prefers to see obeyed. To the extent that plaintiff can demonstrate that defendants retaliated against her as a result of her efforts to bring the underlying criminal prosecution into compliance with MCL 771.1(1), I believe that should give rise to a common-law claim for termination in violation of public policy as was recognized in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). [*Janetsky*, 510 Mich at 1108-1109 (CLEMENT, J., concurring in part and dissenting in part).]

Chief Justice CLEMENT aptly summarized: "Because MCL 771.1(1) is an expression of the state's public policy, I do believe that it is a legitimate basis for plaintiff's claim that she was terminated in violation of that public policy when she alleges that she was retaliated against for seeking to achieve compliance with the statute." *Id*. at 1109.

In rejecting Janetsky's public policy claim, the majority hangs its hat on the fact that MCL 771.1(1) constrains the trial court's discretion to sentence a CSC-II defendant to probation, but does not preclude a prosecuting attorney from offering a plea deal that includes probation. This analysis collides with the reasons that our Supreme Court permits public policy tort claims in at-will employment situations.

In *Suchodolski*, 412 Mich at 694-695, our Supreme Court held that even though an at-will employee is subject to termination at any time and for no stated reason, "some grounds for discharging an employee are so contrary to public policy as to be actionable." "Most often," but not always, the Supreme Court explained, "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*. at 695. But "sufficient legislative expression of policy" may exist even absent "an explicit [legislative] prohibition on retaliatory discharges." *Id*.

Viewed in the light most favorable to Janetsky, the evidence supports that she was constructively discharged because she objected to a bargained-for sentence that violated Michigan law. The public policy expressed in MCL 771.1(1) is straightforward: the Legislature prohibits a

court from sentencing a defendant convicted of CSC-III to probation because in the Legislature's view, probation is a disproportionately light punishment for a serious sexual offense.

Given the clear-cut public policy embodied in MCL 771.1(1), a prosecuting attorney should not apply his stamp of approval to a plea deal permitting a CSC-III defendant to enjoy a probationary sentence. According to Janetsky, Boyd did exactly that. And according to Janetsky, Boyd attempted to pressure her to keep quiet about the deal, and only reluctantly signed the motion to set aside the plea. Janetsky refused to quietly accede to advocating or overlooking an illegal sentence, and insisted that her office pursue a motion for plea withdrawal. These actions, she claims, precipitated Boyd's retribution.

While Janetsky's WPA claim is based on a *report* of an illegal plea, her public policy claim arises from her active efforts to undo a wrong, which included exposing Boyd's complicity with the plea. Janetsky did not personally "fail" or "refuse" to violate a law in the course of her employment. But she exposed a legal violation and demanded that it be remedied. If Janetsky was constructively discharged because she refused to sit idly by while a court and a prosecuting attorney violated the law, her discharge violated public policy. I would hold that Janetsky has presented evidence entitling a jury to determine whether her public policy tort claim has merit.

/s/ Elizabeth L. Gleicher