

STATE OF MICHIGAN
COURT OF APPEALS

KATHERINE M. ERNSTING,

Plaintiff-Appellant,

V

AVE MARIA COLLEGE,

Defendant-Appellee.

FOR PUBLICATION

March 6, 2007

9:00 a.m.

No. 265187

Washtenaw Circuit Court

LC No. 04-000989-CD

Before: Wilder, P.J., and Zahra and Davis, JJ.

WILDER, P.J.

In this action brought under the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, plaintiff appeals as of right from the order granting defendant's motion for summary disposition under MCR 2.116(C)(8) and (10). We reverse.

I

From September 10, 2001 to September 2003, plaintiff was employed by defendant as the Director of Public Relations until her placement as special assistant to the president of Ave Maria College. She served in this position until she was terminated in July 2004. In a single count complaint alleging wrongful termination, plaintiff alleged defendant violated the WPA by terminating her employment in response to her reports and participation in a United States Department of Education (DOE) investigation regarding defendant's administration of Title IV Student Financial Assistance Programs during the 2000/01, 2001/02 and 2002/03 award years.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Following a hearing, the trial court granted defendant's motion. Rejecting plaintiff's reliance on *Jacobson v Parada Fed Credit Union*, 457 Mich 318; 577 NW2d 881 (1998), and *Dolan v Continental Airlines/Continental Express*, 454 Mich 373; 563 NW2d 23 (1997), the trial court determined plaintiff's claim did not involve a report to a public body, as required by the WPA, concluding instead that the DOE is not a "law enforcement agency," and therefore not a "public body" under the terms of the act:

This Court is not persuaded that the Department of Education and its Office of Inspector General is [a] "law enforcement agency." [*Jacobson* and *Dolan*] involve the Federal Bureau of Investigation and the Drug Enforcement Agency, respectively. These two federal agencies possess not only the authority to

investigate claims, but also the authority to make arrests. Plaintiff does not provide, and this Court has found, no authority given to the Department of Education to arrest. While it may . . . have the authority to investigate criminal action, it does not possess the authority to effectuate enforcement of the laws and therefore it is not a “law enforcement agency.” This conclusion is supported by the common meaning of the word “enforce”: 1. to give force to; urge 2. to bring about or impose by force. 3. *to compel observance of*.¹ [Footnote and emphasis in original.]

Accordingly, the trial court granted defendant’s motion for summary disposition.² Plaintiff’s motion for reconsideration was denied. Plaintiff now appeals.

II

This Court reviews questions of law involving statutory interpretation and statutory construction de novo. *Michigan Mun Liability & Property Pool v Muskegon County Bd of County Rd Comm’rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995). This Court also reviews de novo the trial court’s grant of summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint; a court only considers the pleadings when deciding a motion brought under this section. *Maiden, supra* at 119. For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* “A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” *Id.*, citing *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record,

¹ Webster’s New World Dictionary, Second College Edition, David Guralnik, Ed. (Simon and Schuster 1984).

² Not relevant to this appeal is the trial court’s denial of plaintiff’s motion to amend her complaint.

giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

III

Plaintiff argues the trial court erred in finding that plaintiff was not engaged in a protected activity under the WPA because the DOE is not a “public body” pursuant to MCL 15.361(d)(v). We agree.

We first consider whether a federal agency, as opposed to a state or local agency, may be considered a “public body” under the WPA. Plaintiff’s whistleblower claim is brought under MCL 15.362, which states:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a *public body*, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [Emphasis added.]

“Protected activity” under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule, (2) being about to report such a violation to a public body, or (3) being asked by a public body to participate in an investigation. *Roulston v Tendercare, Inc*, 239 Mich App 270, 279; 608 NW2d 525, citing MCL 15.362. To establish a prima facie case under the WPA, plaintiff must show that (1) she was engaged in a protected activity as defined by the act, (2) defendant discharged her, and (3) a causal connection existed between the protected activity and the discharge. *Roulston, supra* at 279.

MCL 15.361(d) defines a “public body” under the WPA as follows:

“Public body” means all of the following:

- (i) A *state* officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
- (ii) An agency, board, commission, council, member, or employee of the legislative branch of *state* government.
- (iii) A *county, city, township, village, intercounty, intercity, or regional governing body, a council, school district, special district, or municipal corporation, or a board, department, commission, council, agency, or any member or employee thereof.*

(iv) Any other body which is created by *state or local authority* or which is primarily funded by or through state or local authority, or any member or employee of that body.

(v) *A law enforcement agency or any member or employee of a law enforcement agency.*

(vi) The judiciary and any member or employee of the judiciary.
[Emphasis added.]

When construing the provisions of a statute, the primary task of this Court is to discern and give effect to the intent of the Legislature:

This task begins by examining the language of the statute itself. The words of a statute provide “the most reliable evidence of its intent” If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. [*Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (internal citations omitted).]

The WPA does not define a “law enforcement agency.” In reliance on the rule of *noscitur a sociis*, which “stands for the principle that a word or phrase is given meaning by its context or setting,” see *Herald Co v Bay City*, 463 Mich 111, 130 n 10; 614 NW2d 873 (2000), defendant argues the Legislature implicitly intended to exclude federal law enforcement agencies from the definition of a “public body” because subsections (i) through (iv) expressly limit the definition of a public body to include only state and local governmental entities. We cannot agree. Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, and a dictionary may be consulted for this purpose.” *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 102; 693 NW2d 170 (2005). Black’s Law Dictionary (8th ed) defines “law enforcement” as “[t]he detection and punishment of violations of the law. This term is not limited to the enforcement of criminal laws.” Clearly, the function of detecting and punishing violations of the law is not performed solely by the express language of MCL 15.361(d)(v). Nothing in MCL 15.361(d)(v) demonstrates the Legislature’s intent that the term “law enforcement agency” is limited to state or local enforcement agencies. “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Hill v Sacka*, 256 Mich App 443, 447-448; 666 NW2d 282 (2003) (citation omitted).

Had the Legislature intended to limit the term “law enforcement agency,” to mean only state and local law enforcement agencies, it could have expressly so stated, as it did in subsections (i) through (iv), and as it has done in other statutes.³ “The omission of a provision in

³ See MCL 3.731(b) (“law enforcement agency” means a *police or sheriff’s department* that has
(continued...)

one part of a statute that is included in another part of a statute should be construed as intentional, and provisions not included by the Legislature should not be included by the courts.” *Polkton*, *supra* at 103 (citations omitted).

Our interpretation of MCL 15.361(d)(v) is further supported by the language of MCL 15.362, which unambiguously provides for the reporting of violations of state and local laws as well as a “*violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of . . . the United States.*” “Statutes in *pari materia* are statutes sharing a common purpose or relating to the same subject. They are construed together as one law, regardless of whether they contain any reference to one another.” *Omne Financial Inc, v Shacks Inc*, 460 Mich 305, 312; 596 NW2d 591 (1999), citing *State Treasurer v Schuster*, 456 Mich 408; 572 NW2d 628 (1998).

Because MCL 15.361(d)(v) and MCL 15.362 relate to the same subject, the WPA, and are thus read in *pari materia*, interpreting 15.361(d)(v) in the manner advanced by defendant would render the language pertaining to the reporting of violations of federal laws in MCL 15.362 nugatory.⁴ *Bageris v Brandon Twp*, 264 Mich App 156, 162; 691 NW2d 459 (2004) (construction of statutes that would render any part of a statute surplusage or nugatory are to be avoided).

Moreover, because MCL 15.361(d)(v) is unambiguous, we reject as unpersuasive defendant’s argument that the legislative history and House Legislative Analyses, HB 5088, 5089 (February 5, 1981), reflect a legislative intent to limit the definition of a “public body” to state and local agencies. It is well settled in Michigan that legislative analysis is a “generally unpersuasive tool of statutory construction,” *Frank W Lynch & Co v Flex Technologies, Inc*, 463

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the authority to enforce the general criminal laws of this state or a similar governmental organization of a physically adjacent state); MCL 28.241a(i) (defining “law enforcement agency” as the police department of a *city, township, or village*, the sheriff’s department of a *county*, the department, or any other governmental law enforcement agency of this *state*); MCL 28.258(1)(d) (“law enforcement agency” means the department; a police agency of a *city, village, or township*; a *sheriff’s department*; and any other governmental law enforcement agency in this *state*); MCL 257.675d(2)(a) (“law enforcement agency” means a police agency of a *city, village, or township*; a *sheriff’s department*; the *department of state police*; or any other governmental law enforcement agency in this *state*); MCL 287.705(1) (“law enforcement agency” means the *department of state police, the department of natural resources*, or a law enforcement agency of a *county, township, city, or village* that is responsible for the prevention and detection of crime and enforcement of the criminal laws of this *state*); and MCL 722.822(d) (“law enforcement agency” means a police department of a *city, village, or township, a sheriff’s department, the department of state police*, or any other governmental law enforcement agency in this *state*).

⁴ For this same reason, we reject defendant’s reliance on *Ciccarelli v Plastic Surgery Affiliates, PC*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2001 (Docket No. 219780), which applied the rule *noscitur a sociis* to interpret MCL 15.361(d) to expressly limit “public body” to bodies of state government or its political subdivisions. Moreover, *Ciccarelli* is an unpublished opinion and, therefore, not binding on this Court. MCR 7.215(C)(1).

Mich 578, 587; 624 NW2d 180 (2001), particularly where the analyses themselves carry a warning “that they do not constitute an official statement of legislative intent.” *Morales v Mich Parole Bd*, 260 Mich App 29, 43; 676 NW2d 221 (2003), citing *Lynch, supra* at 587 n 7. In conclusion we hold that under the plain language of MCL 15.361(d), a federal agency may qualify as a “law enforcement agency” and thus a public body under the WPA.

B

We next address whether the DOE as a federal agency qualifies as a “law enforcement agency” as contemplated under the WPA. We initially note that the trial court erred by determining whether an agency is a “law enforcement agency” based exclusively on whether the agency has “arrest powers” to enforce the law. An “arrest” is “[a] seizure or forcible restraint” or “[t]he taking or keeping of a person in custody by legal authority” Black’s Law Dictionary (8th ed). In focusing exclusively on arrest powers, the trial court overlooked the settled principle that the Legislature designed the WPA to protect the public from unlawful conduct by corporations and government bodies. *Anzaldúa v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998), quoting *Dolan, supra* at 378 n 9. It is axiomatic that a corporation or government body is not subject to the threat of arrest, and as such, the power to arrest cannot be the sole factor in determining whether an agency constitutes a law enforcement agency. Instead, we consider, as discussed *supra*, the specific powers granted to the DOE to detect and punish violations of the law.

The Department of Education is a department within the Executive branch, 5 USC 101; 20 USC 3411, to ensure, among other things, that education issues receive proper treatment at the federal level, 20 USC 3402. Congress enacted the Inspector General Act of 1978, 5 USC Appx 1 *et seq.*, in order “to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of . . . departments and agencies.” *United States Nuclear Regulatory Comm’n v Federal Labor Relations Auth*, 25 F3d 229, 233 (CA 4, 1994). “To that end, Congress established in each specified governmental agency [including the Department of Education] an Office of Inspector General, as an “independent and objective unit,” charging each unit with the responsibility of conducting and supervising audits and civil and criminal investigations relating to that agency’s operations.” *Id.*, quoting 5 USC Appx 4(a)(1) (footnote omitted).

With regard to investigative powers, the DOE Inspector General is authorized to have access to all pertinent documents, persons and given broad subpoena powers pursuant to 5 USC Appx 6. In addition, the DOE Inspector General under 31 USC 3803 is also authorized to investigate allegations that an entity filed a false, fictitious, or fraudulent claim with the DOE. “[A]fter reasonable notice and opportunity for a hearing” the DOE is authorized to “suspend or terminate the eligibility status for any or all programs under this subchapter . . . of any otherwise eligible institution” or “impose a civil penalty upon such institution of not to exceed \$25,000 for each violation or misrepresentation.” 20 USC 1094(c)(3). Moreover, effective December 8, 2003, Section 6(e) was added to the Inspector General Act of 1978, as added by Section 812 of the Homeland Security Act of 2002, Pub L 107-296, which authorized the DOE Inspector

General and assistants to carry firearms, make warrantless arrests (on the reasonable belief that a felony has been committed), seek and execute warrants, search premises upon probable cause and seize evidence without authorization from the United States Attorney General.⁵

Given these statutory powers, we conclude that the DOE as a federal institution falls within the definition of a “law enforcement agency” as contemplated under the WPA.

We respectfully disagree with the dissent’s view that the term “law enforcement agency” as more narrowly construed by this Court in *In re Faketty*, 121 Mich App 266, 271; 328 Nw2d 551 (1982), is applicable here. In *Faketty*, this Court interpreted the meaning of the term “law enforcement agency” as it was used in the juvenile court rule that permitted the juvenile court to order the expunction of delinquency and neglect records of juveniles (JCR 1969, 13). This Court held that the term law enforcement agency as used within rule 13 referred to agencies charged with the prevention and detection of crime and enforcement of the general criminal laws of the state, and concluded that because the Michigan Department of Corrections had authority relating “solely to the administration of penal institutions, probation, pardons, paroles and commutations, *inter alia*, it did not have responsibility to enforce the general criminal laws of the state.

We first note that *Faketty* is not binding on this Court. MCR 7.215(J)(1). Moreover, *Faketty* is readily distinguished. For example, the WPA, by its plain language, is intended to protect an employee who reports or is about to report . . . a violation or a suspected violation of a law or regulation or rule. MCL 15.362 (emphasis added). As noted in *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993), the administrative procedures act (APA) provides:

“Rule” means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability *that implements or applies law enforced or administered by the agency*, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof [MCL 24.207 (emphasis added).]

Moreover, administrative “[a]gencies have the authority to interpret the statutes they are bound to administer and enforce.” *Clonlara, Inc, supra* at 240. Whereas there was a narrow context in which this Court in *Faketty* considered whether the Department of Corrections was a law enforcement agency under JCR 13, here, because remedial statutes like the WPA are liberally

⁵ The DOE Inspector General has concurrent responsibility with the Department of Justice (DOJ) and the FBI for the prevention and detection of waste and abuse within the DOE. However, prior to the enactment of Section 812 of the Homeland Security Act of 2002, DOE inspector General relied on Memoranda of Understanding with the DOJ, which provided temporary grants of law enforcement powers through deputations. As the volume of investigations increased, deputations were authorized on a office wide basis. The Memoranda of Understanding were replaced, pursuant to Section 6(e)(4) of the Inspector General Act, with United States Attorney General Guidelines. See Attorney General’s Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority (December 8, 2003); see Pub L 107-296, 116 Stat 2135 (codified as amended in scattered sections of the USC).

construed in favor of the persons intended to be benefited, *Brown v Mayor of Detroit*, 271 Mich App 692, 706; 723 NW2d 464 (2006), we conclude that the DOE, with its power to conduct civil and criminal investigations in order to enforce the laws under its purview, constitutes a law enforcement agency within the meaning of the WPA.

IV

Because the plain language of MCL 15.361(d) contemplates that a federal agency may qualify as a “law enforcement agency” under the WPA, and given the broad grant of statutory authority to detect and punish violations of laws relating to DOE’s operations, we conclude the DOE is a “law enforcement agency” as defined under MCL 15.361(d)(v). Having reported wrongdoing to a “public body” as defined under MCL 15.361(d), plaintiff demonstrated she was engaged in a protected activity under the WPA. The trial court erred in granting defendant’s motion for summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Alton T. Davis