UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANTONIO AMORMINO,

Plaintiff,

v.

LNW GAMING, INC. D/B/A LIGHT & WONDER, LIGHT AND WONDER INTERNATIONAL, INC., LIGHT & WONDER, INC.,

Defendants.

CASE NO. 2:24-cv-13009

HON. JONATHAN J.C. GREY

MAGISTRATE JUDGE CURTIS IVY, JR

Removal from:
Oakland County Circuit Court
Case No. 24-210324-CD
Hon. Daniel P. O'Brien

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DEFENDANT LNW GAMING, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT[1]

[1] Defendants Light and Wonder International, Inc. and Light & Wonder, Inc. are not proper parties to this action as Plaintiff alleges he was employed by Light & Wonder, which he concedes was the d/b/a for LNW Gaming, Inc. Accordingly, Defendants Light and Wonder International, Inc. and Light & Wonder, Inc. (the "Non-Employer Defendants") joined in a simultaneously filed Motion to Dismiss the Non-Employer Defendants. The Non-Employer Defendants also note that Plaintiff's employer, LNW Gaming, Inc., has filed the instant Motion to Dismiss Plaintiff's claims

Defendant, LNW Gaming, Inc. ("LNW"), through its counsel, Jackson Lewis P.C., moves to dismiss Plaintiff's Complaint in its entirety, pursuant to Fed. R. Civ. P. 12(b)(6). As set forth in detail in the accompanying Brief in Support, Plaintiff's Complaint fails to state a claim upon which relief can be granted. More specifically, Plaintiff has failed to plead a claim upon which relief can be granted under the Whistleblowers' Protection Act ("WPA") where he has failed to plead he engaged in protected activity as defined by the WPA, and where he has failed to sufficiently plead and otherwise cannot establish causation. In addition, Plaintiff's public policy claims are preempted by statute and Plaintiff claims that another individual who engaged in the same or similar protected conduct as him, was not subjected to any adverse action. Accordingly, Plaintiff's claims should be dismissed.

Pursuant to L.R. 7.1, counsel for LNW sought concurrence in the relief requested in this Motion on November 19, 2024, but concurrence was denied.

Wherefore, for the reasons set forth more fully herein, LNW respectfully requests that this Court dismiss Plaintiff's claims in their entirety with prejudice, and

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pursuant to Fed. R. 12(b)(6). For the reasons set forth more fully in their own Motion to Dismiss, the Non-Employer Defendants maintain that they are not proper Defendants and that Plaintiff's claims should be dismissed against them in their entirety for the reasons set forth more fully in their simultaneously filed Motion to Dismiss. However, in the event Plaintiff's claims are not dismissed in their entirety as to the Non-Employer Defendants, for the reasons set forth therein, the Non-Employer Defendants join in and incorporate by referenced herein, LNW Gaming, Inc.'s Motion to Dismiss, and request that the Complaint be dismissed against them in its entirety with prejudice for the reasons set forth in this Motion.

award LNW its attorneys' fees and costs incurred in bringing this Motion before the Court.

Respectfully submitted,
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Dated: November 20, 2024

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BRIEF IN SUPPORT OF DEFENDANT LNW GAMING, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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ISSUES PRESENTED

1. Should Plaintiff's WPA claim be dismissed where Plaintiff's complaint to a federal agency does not constitute a "public body," as defined by the WPA?

   LNW answers: Yes

   Plaintiff answers: No

   This Court should answer: Yes

2. Should Plaintiff's WPA claim be dismissed where the irrefutable evidence of which this Court can take judicial notice confirms that LNW did not have knowledge of Plaintiff's OSHA complaint until after he was discharged?

   LNW answers: Yes

   Plaintiff answers: No

   This Court should answer: Yes

3. Should Plaintiff's Wrongful Discharge in Violation of Public Policy Claim be dismissed where the Sarbanes-Oxley Act, 18 U.S.C.§1514A contains a separate enforcement provision and cause of action which precludes a public policy claim?

   LNW answers: Yes

   Plaintiff answers: No

   This Court should answer: Yes

4. Should Plaintiff's Wrongful Discharge in Violation of Public Policy Claim be dismissed where it's precluded by the Whistleblowers' Protection Act?

LNW answers: Yes

Plaintiff answers: No

This Court should answer: Yes

5. Should Plaintiff's Wrongful Discharge in Violation of Public Policy claim be dismissed where Plaintiff cannot establish causation where he has alleged another employee engaged in the very conduct he alleges constituted "protected activity", and which he claims led to his termination, but where Plaintiff failed to plead or otherwise establish that this individual was subjected to any adverse action?

LNW answers: Yes

Plaintiff answers: No

This Court should answer: Yes

6. Should Plaintiff's claims be dismissed in their entirety with prejudice due to Plaintiff's failure to state a public policy claim or claim under the WPA upon which relief can be granted?

LNW answers: Yes

Plaintiff answers: No

This Court should answer: Yes

I. INTRODUCTION[2]

Plaintiff Antonio Amormino, who concedes in his Complaint that he was employed solely by "Defendant Light & Wonder", which he indicates is the d/b/a for LNW Gaming, Inc. ("LNW"), filed the instant lawsuit against LNW, Light and Wonder International, Inc. and Light & Wonder, Inc., alleging two counts: Count I – Wrongful Termination in Violation of the Whistleblower's [sic] Protection Act; and Count II – Wrongful Discharge in Violation of Public Policy. (ECF No. 1-1, PageID.13-21). Plaintiff's claims against LNW, as well as any named Defendant, however, are subject to dismissal because Plaintiff's Complaint fails to state a claim upon which relief can be granted.

[2] Defendants Light and Wonder International, Inc. and Light & Wonder, Inc. are not proper parties to this action as Plaintiff alleges he was employed by Light & Wonder, which he concedes was the d/b/a for LNW Gaming, Inc. Accordingly, Defendants Light and Wonder International, Inc. and Light & Wonder, Inc. (the "Non-Employer Defendants") joined in a simultaneously filed Motion to Dismiss the Non-Employer Defendants. The Non-Employer Defendants also note that Plaintiff's employer, LNW Gaming, Inc. has filed the instant Motion to Dismiss Plaintiff's claims pursuant to Fed. R. 12(b)(6). For the reasons set forth more fully in their own Motion to Dismiss, the Non-Employer Defendants maintain that they are not proper Defendants and that Plaintiff's claims should be dismissed against them in their entirety for the reasons set forth more fully in their simultaneously filed Motion to Dismiss. However, in the event Plaintiff's claims are not dismissed in their entirety as to the Non-Employer Defendants, for the reasons set forth therein, the Non-Employer Defendants join in and incorporate by referenced herein, LNW Gaming, Inc.'s Motion to Dismiss, and request that the Complaint be dismissed against them in its entirety with prejudice for the reasons set forth in this Motion.

Accordingly, LNW denies any allegation that it violated the WPA or any public policy and moves to dismiss Plaintiff's Complaint in lieu of an Answer pursuant to Fed. R. Civ. P. 12(b)(6). More specifically, Count I of Plaintiff's Complaint, his WPA claim, is subject to dismissal because Plaintiff's complaint to OSHA, a federal agency, did not constitute a report to a "public body" as that term is defined by the WPA. Likewise, Plaintiff has not pled, nor can he establish, causation where he has failed to plead that LNW had notice of his OSHA complaint prior to his termination, and where the OSHA complaint irrefutably establishes that the complaint was not received by LNW until after Plaintiff's termination.

Count II of Plaintiff's Complaint, discharge in violation of public policy, fails because it is preempted by statute, where the Sarbanes Oxley Act, 18 U.S.C. §1514 *et seq*, contains both an exclusive enforcement procedure and an exhaustion requirement, and where Plaintiff's claim is likewise precluded by the WPA. Likewise, where, as here, Plaintiff alleges that another employee engaged in the same or similar protected conduct as him, but was not subjected to any adverse action, he cannot establish causation as a matter of law.

Accordingly, and for the reasons set forth more fully herein, LNW respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), and award LNW its costs and attorneys' fees

incurred in defending against this action, and having to bring this Motion before the Court.

II. STATEMENT OF RELEVANT FACTS

Despite having named three Defendants, the factual allegations in Plaintiff's Complaint refer only to "Defendant" and "Light & Wonder", which he indicates was the D/B/A for LNW Gaming, Inc., his employer. (See W2 attached as Ex. 1, identifying Plaintiff's employer as LNW Gaming Inc). More, specifically, Plaintiff alleges that he "began working for Defendant Light & Wonder in May of 2022", and that he worked full time at the Farmington Hills location. (ECF No. 1-1, PageID.15-16, ¶¶ 8-9). Plaintiff also alleges that he was "employed by Defendant Light & Wonder as the Head of Casino Studio for North America" and that "Defendant is a publicly traded company subject to the provisions of the Sarbanes Oxley Act of 2022." (*Id*. at PageID. 15, ¶¶ 11-12). Plaintiff further alleges that on "July 9, 2024, Defendant Light & Wonder's Vice President of Operations, Dror Damchinsky, requested that Plaintiff alter the budget tracking file." (*Id*. at ¶ 15). Plaintiff claims he did not comply "and stated that the request was illegal." (*Id*. at ¶ 16).

Plaintiff alleges Damchinsky approached him a second time on July 31, 2024, and requested Plaintiff generate different numbers for the company's capital asset reports. (*Id*. ¶ 18.) Plaintiff alleges he also refused that request. (*Id*. at PageID.16, ¶ 19.) Plaintiff further alleges he complained internally to Vickie Huber, Head of

Accounting, and Melissa Sly, Office Manager, about Damchinsky's requests and told them he believed the alleged requests were illegal and unethical. (*Id*. at ¶ 22.) Plaintiff claims that Huber agreed with him that Damchinksy's request was illegal and unethical. (*Id*. at ¶ 23.)

Plaintiff further alleges that on August 2, 2024, Sly filed an internal complaint with human resources regarding Damchinsky's request. *(Id*. at ¶ 24.) Plaintiff claims that on August 5, 2024, he was contacted by two corporate investigators "to schedule a meeting regarding Melissa Sly's complaint of Mr. Damchinsky's illegal request." (*Id*. at ¶ 25.) Plaintiff further alleges that he attended the scheduled meeting on August 6, 2024, wherein he claims "Plaintiff and Melissa Sly's Complaint was disregarded." (*Id*. at PageID.17, ¶ 26.) The following day, Plaintiff alleges his mid-year review, previously scheduled for August 9, 2024, was canceled. (*Id*. at ¶ 27.) Plaintiff further alleges he was placed on administrative leave on August 12, 2024. (*Id*. ¶29.) Plaintiff claims he filed a complaint with OSHA on August 12, 2024. (*Id*. at ¶ 28.)[3] Plaintiff also alleges that LNW terminated his employment on August 16, 2024. (*Id*. at ¶ 30.)

On August 19, 2024, three days after Plaintiff was terminated, the U.S. Department of Labor Occupational Safety and Health Administration emailed

[3] Notably, Plaintiff did not attach a copy of his OSHA complaint to his Complaint. Therein, Plaintiff alleged a violation of the Sarbanes-Oxley Act, 15 U.S.C.§1514A. (Ex. 1, Plaintiff's OSHA Complaint.)

"notice that a complaint ha[d] been filed on August 12, 2024 with this office by Antonio Amormino" and enclosed a copy of the Complaint. (Ex. 2, OSHA Complaint). Plaintiff thereafter filed this two-count Complaint on October 14, 2024.

III. LEGAL ARGUMENT

A. Standard of Review

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level" and are sufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That is, to avoid dismissal under Rule 12(b)(6), the complaint must contain enough facts to establish a plausible, as opposed to merely a possible, entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citing *Twombly*, 550 U.S. at 557, 570).

In *Iqbal*, the Supreme Court directed courts to adopt a two-pronged approach in applying these principles. First, the court must review the complaint to identify and disregard all conclusory allegations, that is, any allegations in the complaint that are merely legal conclusions. (*Id*. at 680.) The court is not permitted to accept legal conclusions couched as factual allegations. (*Id*. at 680.) Indeed, "the tenet that a

court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." (*Id.* at 678.)

Second, accepting as true the remaining allegations, the court must decide whether, in context, the claim is plausible based on its judicial experience and common sense. (*Id.* at 679.) The Supreme Court's standard requires courts to infer from the factual allegations in the complaint "obvious alternative explanation[s]" that suggest lawful conduct, rather than the unlawful conduct the plaintiff would ask the court to infer. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (citing *Iqbal*, 556 U.S. at 682; *Twombly*, 550 U.S. at 567). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not show[n] . . . that the pleader is entitled to relief." (*Id.* quoting Fed. R. Civ. P. 8(a)(2)).

In ruling on a 12(b)(6) motion, the court may consider "the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). Indeed, the Sixth Circuit has "taken a liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6)." *Armengau v. Cline*, 7 Fed. Appx. 336, 344 (6th Cir. 2001). See also *Hinton v. Corr. Corp. of Am.*, 624 F. Supp.2d 45, 46 (D.D.C. 2009)

(internal citations and quotations omitted); *Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. App. 2004) (on a motion to dismiss a court can consider documents that are "referred to in the complaint and are integral to [Plaintiff]'s [] claim"). "A court's consideration of these documents does not convert the motion to dismiss into a motion for summary judgment." *Hood v. Ford Motor Co*., 2011 U.S. Dist. LEXIS 92854,[4] at * 13 (W.D. Mich. Aug. 19, 2011) (citing Greenburg, 177 F.3d at 514); *see also Marshall v. Honeywell Tech. Solutions, Inc*., 536 F. Supp. 2d 59, 65 (D.D.C. 2008) ("where a document is referred to in the complaint and is central to the plaintiff's claim, such a document attached to the motion papers may be considered without converting the motion to one for summary judgment.")(internal citation and quotation omitted); *Blakley v. Schlumberger Tech. Corp*., 648 F.3d 921, 931 (8th Cir. 2011) (concluding conversion of motion to dismiss was not necessary because "an EEOC charge is part of the public record"); *Epps v. Potomac Elec. Power Co*., 389 F. Supp. 3d 53, 59 n.2 (D.D.C. 2019) ("Additionally, the Court can take judicial notice of Plaintiff's EEOC charge as it is a public document.") (citation omitted); *Muhammad v. N.Y.C. Transit Auth*., 450 F. Supp. 2d 198, 204-05 (E.D.N.Y. 2006) (considering EEOC charge without converting motion to dismiss to one for summary judgment because "the charge and the agency's determination are both public records" of which court could take judicial notice); *Janik v. CSX Transp., Inc*., No.

[4] Unpublished decisions are attached as Exhibit 3.

1:21-cv-781, 2024 U.S. Dist. LEXIS 129706 *6 (S.D. Ohio July 23, 2024)(attaching Plaintiff's OSHA charge did not convert motion to dismiss to a motion for summary judgment because it was referred to in the plaintiff's complaint, and was central to plaintiff's claim); *Sosnowy v. A. Perri Farms, Inc.*, 764 F. Supp.2d 457, 475 (E.D.N.Y. 2011) (considering defendants' submission of plaintiff's W-2 forms on a motion to dismiss without converting motion to one for summary judgment).

B. Plaintiff's WPA Claim (Count I) Is Subject to Dismissal Because He Failed to Engage In Protected Activity As Defined By The WPA And Because He Failed to Plead Causation

To establish a *prima facie* case for retaliation under the WPA, Plaintiff must show that (1) he was engaged in a protected activity as defined by the WPA, (2) he suffered an adverse employment action, and (3) a causal connection between the protected activity and the adverse employment action. *Walters v. Pride Ambulance Co.*, 683 F. Supp. 2d 580, 588 (W.D. Mich. 2010). Here, Plaintiff can make no such showing because he failed to make a report to a public body as defined by the WPA, and because he failed to plead, and otherwise cannot establish causation as a matter of law.

1. Plaintiff's Complaint to OSHA Does Not Constitute A Complaint To A Public Body Under Michigan's WPA

The WPA provides that an "employer shall not discharge, threaten, or otherwise discriminate against an employee…because the employee…reports or is about to report, verbally or in writing, a violation or suspected violation of a law or

regulation or rule…to a public body…". MCL 15.362. Protected activities under the WPA consist of reporting or being about to report a violation of a law, regulation, or rule to a public body. *Wurtz v. Beecher Metro. Dist.*, 848 N.W.2d 121, 125 n.13 (Mich. 2014); M.C.L. §15.362. *See also Chandler v Dowell Schlumberger Inc*, 572 N.W.2d 210, 215 (Mich. 1998).

Here, Plaintiff alleges he filed a complaint with OSHA on August 12, 2024. (ECF No.1-1, PageID.17, ¶28.) However, Plaintiff's filing of an OSHA complaint does not constitute a complaint to a "public body" as that term is defined under the WPA. In fact, the WPA defines a "public body," as:

> (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.

M.C.L. § 15.361 (Emphasis added.) In *Lewandowski v. Nuclear Mgmt. Co., LLC,* 724 N.W.2d 718, 722 (Mich. App. 2006), the Michigan Court of Appeals rejected the plaintiff's claim that a report to the Nuclear Regulatory Commission constituted a report to a public body, as that term was defined by the WPA. In so concluding, the Court of Appeals carefully analyzed the context of the WPA:

> the first subsection of MCL 15.361(d) refers to the executive branch of state government. MCL 15.361(d)(i). The second subsection refers to the legislative branch of state government. MCL 15.361(d)(ii). The first and second series of the third subsection clearly refer to local government. MCL 15.361(d)(iii). The fourth subsection refers to any other body created by or funded by or through state or local authority and, ***hence, does not encompass the federal government***. MCL 15.361(d)(iv). Given the clearly state and local context of the first four subsections, to interpret the third series of the third subsection to include federal agencies or commissions would be to interpret the series out of context. Griffith, supra at 533. Hence, plaintiff cannot sustain his argument under MCL 15.361(d)(iii).

(*Id*. at 721-722, emphasis added.) Accordingly, because Plaintiff's complaint to the U.S. Department of Labor/OSHA does not constitute a complaint to a public body as defined by the WPA, his claim must be dismissed as he has failed to plead that he engaged in any protected activity as defined by the WPA.

2. Plaintiff's WPA Claim Also Fails Because He Failed to Plead Causation

In support of his WPA claim, Plaintiff alleges that he was discharged after he filed a complaint with OSHA. (ECF No. 1-1, PageID.16-17, ¶ 22, 24-26, 28.) However, the correspondence from OSHA to LNW, which Plaintiff concedes is the

d/b/a for Light and Wonder, confirms that the first date anyone at LNW had any knowledge of Plaintiff's complaint to OSHA was August 19, 2024. (Ex. 1, OSHA Ltr.) It is axiomatic and logical that "[t]he decisionmaker's knowledge of the protected activity is an essential element of the prima facie case of unlawful retaliation." *Frazier v. USF Holland, Inc*., 250 F. App'x 142, 148 (6th Cir. 2007) (*citing Mulhall v. Ashcroft*, 287 F.3d 543, 551 (6th Cir. 2002). Here, where Plaintiff has failed to plead that LNW had knowledge of his OSHA complaint at any time prior to his termination, and where the correspondence sent by OSHA to LNW irrefutably establishes that the first date LNW knew of Plaintiff's OSHA complaint was August 19, 2024, after his termination, Plaintiff has failed to plead and cannot establish causation. Accordingly, his WPA claim should be dismissed.

C. Plaintiff's Public Policy Claim (Count II) Must Be Dismissed Because It is Preempted By The Michigan Whistleblowers' Protection Act, Which Is His Exclusive Remedy

Count II of Plaintiff's Complaint alleges a "public policy" claim. While the Complaint portends to contain two separate causes of action, Plaintiff alleges the identical facts in support of both his WPA and public policy claims. Specifically, Plaintiff alleges that LNW retaliated against him because he reported a violation or suspected violation to OSHA, and internally. Plaintiff alleges almost no facts in support of his public policy claim that are separate or distinct from the facts in

support of his WPA claim. (*See generally*, Compl., ECF No. 1-1, PageID.15-17, ¶15-29.)

However, the law is clear that the WPA is a plaintiff's exclusive remedy for an allegation of retaliatory discharge for reporting a violation or suspected violation of law. *Dolan v. Continental Airlines/Continental Express*, 454 Mich 373 (1997). The remedies provided by the WPA are "exclusive and not cumulative," meaning that Plaintiff cannot pursue a public policy and WPA claim based upon the same set of facts and circumstances. *Dudewicz v. Norris Schmid, Inc.*, 443 Mich. 68, 79 (1993). Indeed, a public policy claim is viable "only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Id. at 80.* In an even broader sense, the Michigan Supreme Court held that "In those cases in which Michigan courts have sustained a public policy claim, the statute involved did not specifically proscribe retaliatory discharge. *Where the statutes did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim*." (*Id.* at 79, emphasis added.)

Here, Plaintiff alleges the identical facts and legal analysis in support of his WPA and public policy claims. Because the WPA provides a statutory remedy for the retaliatory discharge in violation of public policy claim alleged by Plaintiff, it is preempted by the WPA. Because the WPA is Plaintiff's exclusive remedy, his public policy claim must be dismissed pursuant to F.R.C.P. 12(b)(6). *Newton*, Nos. 332498,

333750, 2017 Mich. App. LEXIS 1917 at *15, 22-23 (Ct. App. Nov. 28, 2017), *cert. denied*, 502 Mich. 938 (2018) (holding that "the WPA provide[d] [plaintiff's] exclusive remedy and preempt[ed] common-law public-policy claims arising from her reporting activity." *Id.* at *15

D. Plaintiff's Public Policy Claim (Count II) Must Be Dismissed Because It Is Preempted By The Enforcement Provision Contained in the Sarbanes-Oxley Act

In Michigan, there is a strong presumption that employment is terminable at the will of either party; and, generally, an at-will employee may not bring a cause of action for wrongful discharge unless his discharge was prohibited by statute or was "so contrary to public policy as to be actionable." *Kimmelman v Heather Downs Mgmt Ltd.*, 253 N.W.2d 265, 269 (Mich. App. 2008) ("where there exists a statute explicitly proscribing a particular adverse employment action, that statute is the exclusive remedy, and no other 'public policy.'")

The Sarbanes-Oxley Act ("SOX"), 18 U.S.C. §1514, *et seq* provides whistleblower protection for employees of publicly traded companies by creating a civil action for retaliation. Section 1514A(a) provides, in relevant part, that no publicly traded company:

> may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the

> employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
>
> * * *
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)[.]

Whether SOX precluded a public policy claim was decided by the Michigan Court of Appeals in *Nezwisky v. Borgwarner, Inc.*, No. 346346, 2020 Mich. App. LEXIS 2939 (Ct. App. Apr. 16, 2020). There, the plaintiff argued her public policy claim was not precluded by SOX. The Michigan Court of Appeals rejected the plaintiff's argument and held that the whistleblower protection remedy of SOX is the exclusive remedy for plaintiff's wrongful termination claim; therefore, plaintiff's public-policy claim could not be maintained as a separate cause of action. (*Id.* at *5.)

Federal District Courts considering this issue have held likewise. In *Stewart v. Everyware Glob., Inc.*, 68 F. Supp. 3d 759, 763-64 (S.D. Ohio 2014), the District Court granted the defendant's motion to dismiss the plaintiff's public policy claim. In so doing, the District Court examined other federal District Court decisions that had decided this issue, and concluded "SOX provides sufficiently broad and inclusive remedies which adequately protect the public policy embodied in that statute…" (*Id.* at 765, internal citations omitted.) The court's decision rested on

several other federal district court decisions that had previously addressed this issue. *See e.g.*, *Mann v. Fifth Third Bank*, Nos. 1:09-cv-14, 1:09-cv-476 (unreported), 2011 U.S. Dist. LEXIS 44853, (S.D. Ohio 2011) (holding Sox's "full panoply of remedies if someone is fired for reporting such violations" operated to sufficiently protect employees; *Taylor v. Fannie Mae*, 65 F.Supp.2d 121, 2014 U.S. Dist. LEXIS 119042, at *4 (D.D.C. August 25, 2014) (rejecting a public policy claim and holding that SOX provided a suitable remedy for plaintiff's termination; therefore, there was no need to create a new exception to the at-will employment doctrine where there is already a statutory framework in place); *Hein v. AT & T Operations, Inc.*, No. 09-cv-00291-WYD-CVS (unreported), 2010 U.S. Dist. LEXIS 133809, at *5-6 (D. Colo. Dec. 17, 2010)(dismissal of plaintiff's wrongful discharge claim because SOX provided its own remedy for retaliatory discharge, and holding the public policy exception to the at-will doctrine is not available when the statute relied upon for the policy provides a remedy for retaliatory discharge); *Day v. Staples, Inc.*, 555 F.3d 42, 59-60 (1st Cir. 2009)(declining to recognize a claim for wrongful termination under Massachusetts common law in light of plaintiff's SOX claim, holding:

> In passing SOX, Congress aimed to create comprehensive legislation to fill the gaps in a patchwork of state laws governing corporate fraud and protections for whistleblowers. It would be entirely inappropriate for plaintiff to be able to use a federal statute designed to address the inadequacies of state law to create a new common law cause of action under [State] law.

Because SOX already prohibits retaliatory discharge for engaging in the conduct alleged in the Complaint, and because the Michigan Court of Appeals and other Courts which have addressed the issue, have held that a public policy claim is precluded by SOX, this Court should dismiss Plaintiff's discharge in violation of public policy claim.

E. Plaintiff Has Failed to Plead a Public Policy Claim Upon Which Relief Can Be Granted Where He Contends That Another Employee Engaged In the Same or Similar Conduct, But Does Not Allege That Her Employment Was Terminated

It is also undisputed that Sly, who Plaintiff alleges filed an internal complaint with human resources regarding Damchinsky's alleged illegal request, was not subjected to any discipline or discharge. (Complaint ¶¶24-26.) Indeed, the Complaint is devoid of any allegations regarding any purported adverse action taken against Sly, even though Plaintiff claims it was Sly who filed the formal complaint, Sly's complaint that Plaintiff was contacted by two corporate investigators about, and Sly's complaint, as well as his, that was disregarded. *Id.*

Accordingly, as Plaintiff claims that at least one other individual engaged in the same conduct on which he bases his public policy claim and that individual was not subject to an adverse employment action, Plaintiff's public policy claim must be dismissed. Indeed, in *Schuessler v Roman Catholic Diocese*, ___NW2d___; 2017 Mich App LEXIS 1012, at *7 (Ct App, June 20, 2017)(Ex. 2, Unpublished decisions), the plaintiff was terminated for using inappropriate language in reference

to her coworkers, after complaining of purported unlawful activity. (*Id*. at *2.) The plaintiff alleged she was discharged in retaliation for having engaged in the alleged protected activity. However, the Court of Appeals held that the plaintiff was unable to establish her *prima facie* case of retaliation where two other employees who participated in that investigation into alleged wrongdoing were not disciplined.

This Court should reach the same determination and dismiss Plaintiff's public policy claim where Plaintiff claims he engaged in the same or similar conduct as Sly, who was not terminated, as evidenced by the Complaint, which contains no assertion that Sly was terminated, or otherwise that she was subjected to any adverse action.

F. To The Extent Plaintiff's Public Policy Claim is Based on A Purported Internal Report, Plaintiff Has Failed to Plead a Public Policy Claim Upon Which Relief Can Be Granted

Further, as the court stated in *Stegall v Res Tech Corp*, No 341197, 2019 Mich. App. LEXIS 5745, at *5 (Sept 24, 2019),"there is no Michigan caselaw extending the public policy exception to discharges in retaliation for internal reporting of alleged violations of the law . . . . "). *See also Cushman-Lagerstrom v. Citizens Ins*, 72 F. App.'x 322, 330 (6th Cir. 2003) ("Michigan does not recognize a common law cause of action for an employee who has been discharged for [internally] reporting violations of law[.]" (*Id.* at 330, also stating "In short, there is no common law cause of action for discharge in retaliation for internal reporting of violations of law.").

Mills v. United Producers, 2012 U.S. Dist. LEXIS 126791, at *43-44 (E.D. Mich. Sept 6, 2012) (internal reporting is not a "refusal to violate the law"). Thus, to the extent that Plaintiff's alleged protected activity is his alleged internal report about the purported request to "generate different numbers for the company's capital assets," (ECF No. 1-1, PageID.16, ¶ 22) Plaintiff has failed to allege a public policy wrongful/retaliatory discharge claim, and Count II of his Complaint should be dismissed.

IV. CONCLUSION

Wherefore, Defendant LNW Gaming, Inc. d/b/a Light & Wonder, respectfully requests that the Court grant its Motion to Dismiss Plaintiff's Complaint, dismiss Plaintiff's Complaint in its entirety with prejudice, and award LNW its costs and attorneys' fees incurred in defending against this action, and having to bring this Motion before the Court.

Respectfully submitted,
JACKSON LEWIS P.C.

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Attorneys for Defendants

Dated: November 20, 2024

CERTIFICATE OF SERVICE

On this day November 20, 2024, the undersigned did cause to be filed the foregoing document with the Court using the CM/ECF system, which will send notice of its filing to all counsel of record.

/s/ Emily M. Petroski
Emily M. Petroski (P63336)

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