APPENDIX

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Appendix A

Opinion in the United States Circuit Court of Appeals for the Sixth Circuit

(March 2, 2021)

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0111n.06

Case No. 20-1764

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Mar 02, 2021
DEBORAH S. HUNT, Clerk

CHERYL FRITZE,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
NEXSTAR BROADCASTING, INC.,	)	MICHIGAN
	)	
Defendant-Appellee.	)	

BEFORE: GILMAN, GIBBONS, and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. Cheryl Fritze worked as an editor for a broadcast news station. The station fired her for creating a disruptive work environment. That prompted this lawsuit, in which Fritze claims that the station violated the Michigan Whistleblowers' Protection Act by punishing her for complaining about inadequate investigations of sexual harassment. The district court ruled as a matter of law that Fritze failed to satisfy the elements of a claim under the Act. We agree and affirm.

I.

For decades, local television station WLNS has broadcast in Lansing, Michigan. Jamshid Sardar has served as the station's News Director for 12 years. In 2013, Sardar offered, and Cheryl Fritze accepted, a job as the newsroom's Assignment Editor.

In that capacity, Fritze managed the newsroom's workflow, "assign[ing] reporters and photographers to the daily duties" of putting stories together. R.41-4 at 5. Fritze described her first year at the station as "pleasant." *Id.* at 7.

After that, tension between her and Sardar emerged. Private disagreements became public ones as their feud "spilled out on[to] the newsroom floor." *Id.* at 17. On one occasion, after objecting to Sardar's decision to run a story, Fritze proclaimed in the middle of the newsroom that she was "done," and walked out of the room. *Id.*

An ownership change added more tension. Early in 2017, Nexstar Media Broadcasting acquired WLNS. Fritze was not happy about the change. In a highly public setting, she described Nexstar as a company in which "all they do is come in and chop off all managers." R.41-13 at 20.

In the spring of 2017, Fritze filed a complaint with human resources alleging that Sardar "had engaged in an inappropriate sexual relationship with another female employee of WLNS" in violation of company policy. R.48 at 5. Management started an investigation. The allegation was never substantiated, but Sardar received a directive to review the company's workplace policies.

A WLNS employee complained to human resources that the feud intensified after the investigation, claiming that Fritze "hate[d]" Sardar and was "out to get" him. R.41-13 at 38. Nexstar opened a new inquiry into Fritze and Sardar's relationship, asking a neutral investigator to take a "fresh" look at the situation. R.41-24 at 3. After interviewing and surveying employees who worked directly with Fritze, the investigator recommended that Fritze "be immediately removed from WLNS" because she had "exhibited countless acts of insubordination" and had "issues taking direction from" Sardar. *Id.* at 3, 7.

Nexstar did not act on the recommendation, at least not immediately. It instead appointed an "outside mediator who had no contacts with the news industry" to work with Fritze and Sardar. R.14-3 at 4. But that did not improve matters.

The station discharged Fritze in 2018.

Fritze filed this lawsuit in state court, alleging wrongful discharge in violation of the Michigan Whistleblowers' Protection Act. *See* Mich. Comp. Law § 15.361 *et seq.* Nexstar removed the case to federal court on diversity grounds. Fritze claimed that the company fired her for raising concerns about inadequate investigations of sexual harassment of other employees. The district court granted Nexstar summary judgment, reasoning that Fritze failed to satisfy several elements of a claim under the statute.

II.

The Michigan Whistleblowers' Protection Act prohibits employers from firing an employee "because the employee . . . reports or is about to report . . . a violation or a suspected violation of a law . . . to a public body." Mich. Comp. Laws § 15.362. To obtain relief, a claimant must show (1) that she engaged in protected activity by reporting a violation of law to a public body, (2) that the company discharged or otherwise punished her, and (3) that the protected activity caused the employer's action. *Wurtz v. Beecher Metro. Dist.*, 848 N.W.2d 121, 125–26 (Mich. 2014); *Debano-Griffin v. Lake County*, 828 N.W.2d 634, 638 (Mich. 2013).

Fritze's claim has several unfilled gaps. To resolve this appeal, we need to address just two—that she did not report a "violation of a law" and did not make a report to a "public body."

Violation of a law. Fritze did not report a "violation of a law," to start. Such a disclosure occurs when the employee makes "a charge of illegality against a person or entity" or tells "a public body pertinent information related to illegality." *Rivera v. SVRC Indus., Inc.*, 934 N.W.2d

286, 296 (Mich. Ct. App. 2019) (quotations omitted). An employer's failure to follow internal rules or procedures does not amount to a violation of law, *see Suchodolski v. Michigan Consol. Gas Co.*, 316 N.W.2d 710, 712 (Mich. 1982), unless the internal rule or regulation has been "promulgated pursuant to the law," *Henry v. City of Detroit*, 594 N.W.2d 107, 111 (Mich. Ct. App. 1999). A report that an employer failed to follow its own internal policies does not therefore ordinarily constitute a violation of law. *See Suchodolski*, 316 N.W.2d at 712.

Fritze stipulated that "she was never sexually harassed." R.48 at 5. Her complaint was that Nexstar "was not properly investigating instances of the sexual harassment of subordinate female employees and interns by their Nexstar managers." R.44-1 at 3. She also looked for ways she could "effectuate change at Nexstar (since Fritze indicated that internal reporting measures were not working)." *Id.* The "Nexstar Employee Guidebook" outlines the company's policy on sexual harassment. R.48 at 3. The policy prohibits discrimination because of race, sex, and age, among other categories, and it prohibits sexual harassment as well as retaliation against any employee for raising concerns about harassment. *Id.* The policy also directs employees subjected to harassment to report the conduct to (1) a supervisor, (2) human resources, or (3) a toll-free hotline. Any such report is entitled to a response from the company.

While it no doubt serves everyone's interests for a company to follow its workplace policies, a company's failure to do so does not by itself constitute a "violation of a law." The problem for Fritze is that Nexstar did not create its internal policies "pursuant to law of this state . . . or the United States." Mich. Comp. Laws § 15.362. It created them as a matter of company governance. That does not suffice under the Act. *See Suchodolski*, 316 N.W.2d at 712. Any other approach would mean that a complaint to a state agency, say the Michigan Department of Civil Rights, about a company's non-compliance with its own policies, as opposed to state

statutes or state regulations, would suffice to trigger liability under the Act. But that's not what the statute says or envisions as reporting a "violation of a law."

That Fritze was told she could "reach out to other female Nexstar employees to see what their experiences had been relating to Nexstar's conduct related to sexual harassment" does not alter this conclusion. R.44-1 at 3. She wanted help "connecting the dots across the country of the other women who were victims of sexual harassment at Nexstar stations." R.41-4 at 40. That may be a noble objective. But it does not amount to complaints about illegality.

A public body. Also missing from Fritze's case is a report to a "public body." Under the Act, a "public body" includes state and local governments, agencies, the courts, the executive branch, and any other Michigan "body" that "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." Mich. Comp. Laws § 15.361(d)(iv)–(vi). Public bodies do not include private companies, meaning that a private employee's communication with her private employer is a "nonactionable communication." *Rivera*, 934 N.W.2d at 297; *see also Brown v. Mayor of Detroit*, 734 N.W.2d 514, 517 (Mich. 2007); *Koets v. Am. Legion, Dep't of Michigan*, No. 333347, 2017 WL 3397404, at *6 n.3 (Mich. Ct. App. Aug. 8, 2017); *Denney v. Dow Chem. Co.*, No. 294278, 2011 WL 92964, at *5 (Mich. Ct. App. Jan. 11, 2011); *Chang Lim v. Terumo Corp.*, No. 11-CV-12983, 2014 WL 1389067, at *7 (E.D. Mich. Apr. 9, 2014).

That means that Fritze's reports to Nexstar and its employees do not qualify as reports to a "public body." Nexstar and its affiliate WLNS are private corporations. Her coworkers were private, not government, employees. Internal reports of sexual harassment and workplace misconduct do not satisfy this element of the claim.

That Fritze spoke to an attorney, but did not hire him, does not fill this gap. A licensed and hired Michigan attorney, it is true, was treated as a "public body" by one Michigan intermediate court opinion. *McNeil-Marks v. Midmichigan Med. Ctr.-Gratiot*, 891 N.W.2d 528, 538 (Mich. Ct. App. 2016). Subsequent Michigan decisions appear to have cabined that decision. Not "all communications with attorneys," one has said, "categorically constitute reports to a public body." *McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot*, No. 348987, 2020 WL 2610106, at *10 (Mich. Ct. App. May 21, 2020) (quotations omitted). Courts "must engage in a deeper analysis of the particular facts and circumstances" of the plaintiff's "communication" with the attorney to see if it meets the test. *Id.*; *Rivera*, 934 N.W.2d at 295. The analysis, another court has said, must include a search for "record evidence of an attorney-client relationship" or evidence that the attorney "perform[ed] specific legal work" for the plaintiff. *Newton v. Mariners Inn*, No. 332498, 2017 WL 5759949, at *7 (Mich. Ct. App. Nov. 28, 2017); *see also Shephard v. Benevis, LLC*, No. 350164, 2021 WL 70642, at *4 (Mich. Ct. App. Jan. 7, 2021); *Brooks v. Genesee County*, No. 330119, 2017 WL 2988838, at *3 (Mich. Ct. App. July 13, 2017); *Yurk v. Application Software Tech. Corp.*, No. 2:15-cv-13962, 2018 WL 453889, at *9 (E.D. Mich. Jan. 17, 2018).

Fritze's discussion with attorney David Mittleman does not qualify as a report to a "public body." Fritze had one meeting with Mittleman, and she did not retain his services or sign an "engagement letter[]" to hire him. R.41-4 at 35. Nor did Mittleman perform any legal work for Fritze. Even if an attorney in some settings might qualify as a public body under Michigan law, *McNeil-Marks*, 891 N.W.2d at 538, this relationship never materialized to that level.

That Mittleman suggested that Fritze contact other female Nexstar employees about their experience with sexual harassment at the company does not alter this conclusion. It remains undisputed that Mittleman never formed an attorney-client relationship with Fritze and never

performed any legal work on her behalf. Even if he offered suggestions of this sort, that does not make him a "public body." *See Rivera*, 934 N.W.2d at 295.

We affirm.

Appendix B

Order Denying Rehearing of the United States Circuit Court of Appeals for the Sixth Circuit

(March 18, 2021)

Case No. 20-1764

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CHERYL FRITZE

Plaintiff - Appellant

v.

NEXSTAR BROADCASTING, INC.; NEXSTAR MEDIA GROUP, INC., dba WLNS

Defendants - Appellees

BEFORE: GILMAN, GIBBONS, SUTTON, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: March 18, 2021

Appendix C

Opinion and Order of the United States District Court for the Western District of Michigan

(July 13, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHERYL FRITZE,

Plaintiff,

v.

NEXSTAR BROADCASTING, INC. and NEXSTAR MEDIA GROUP, INC.,

Defendants.
_____/

Case No. 1:18-cv-1313

HON. JANET T. NEFF

OPINION AND ORDER

This removed diversity case is before the Court on Defendants' Motion for Summary Judgment (ECF No. 40). Plaintiff filed a response in opposition to their motion (ECF No. 44), and Defendants filed a reply to the response (ECF No. 46). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the reasons that follow, the Court grants Defendants' motion.

I. BACKGROUND

A. Factual Background

On December 16, 2013, Plaintiff was hired as an Assignment Editor in the News Department of the television station WLNS, which is located in Lansing, Michigan (Jt. Stat.[1] ¶ 6). At the time of Plaintiff's hire, the WLNS News Department was managed by a News Director, Jamshid Sardar (*id.* ¶ 7). WLNS also employed an Assistant News Director, Norman Stangland,

[1] The parties filed a "Joint Statement of Uncontested Material Facts" (Jt. Stat.) (ECF No. 48), upon which this Court relies for resolution of this motion unless otherwise indicated.

who carried out various oversight responsibilities and served as the News Director in Sardar's absence (*id.* ¶ 8).

Plaintiff alleges that in 2014, she initiated a complaint, alleging that a news anchor, Evan Pinsonnault, engaged in sexual harassment of other female employees (Compl. [ECF No. 1-2] ¶¶ 21-26). Plaintiff alleges that after refusing to take any action for months, management finally severed Pinsonnault's employment "but then started an adversarial relationship with Plaintiff" (*id.* ¶ 27). Plaintiff alleges that she also reported to the station manager an "incident involv[ing] a multitude of degrading behaviors surrounding the reporting on the 'Fifty Shades of Grey' book series" (*id.* ¶ 29). Plaintiff testified that she herself was never sexually harassed at work (Jt. Stat. ¶¶ 26 & 35).

On November 20, 2015, during a meeting among newsroom staff, Plaintiff "angrily disagreed with Sardar's editorial decision to run a story," declared "I am done," and left the newsroom (Jt. Stat. ¶ 23). WLNS Station Manager Robert Simone met with Plaintiff on November 23, 2015, following the incident (*id.*). On or about December 2, 2015, Plaintiff received a performance evaluation encompassing the time period of January 1, 2015 through December 31, 2015, in which Sardar rated her overall performance as "meets expectations" (*id.* ¶ 24). However, regarding "communication," in particular, he rated her performance as "unsatisfactory," the lowest rating, noting that "[m]any concerns expressed, be careful about tone" (Ex. 6, ECF No. 41-7 at PageID.451). The Human Resources/Business Administrator documented two incidents in 2015 about Plaintiff's disruptive actions/words in the newsroom (ECF No. 41-13 at PageID.481 & 483).

The following year, in her performance evaluation encompassing the period of time from January 1, 2016 through December 31, 2016, Sardar again rated Plaintiff's overall performance as "meets expectations" (Jt. Stat. ¶ 25). And Sardar again noted that "[t]here have been concerns and

complaints by several people in the newsroom about Cheryl's comments on several topics" (Ex. 7, ECF No. 41-8 at PageID.455). Additional work performance incidents were documented in 2016 (ECF No. 41-13 at PageID.493 & 495).

On or around January 17, 2017, Nexstar Media Group, Inc. (NMG) acquired WLNS (Jt. Stat. ¶¶ 9, 11, 22). Perry Sook is NMG's founder Chairman, President and Chief Executive Officer of NMG (*id.* ¶ 2). Terri Bush is NMG's Associate General Counsel and Senior Vice President of Human Resources, and, in that capacity, she oversees investigations into alleged misconduct by employees (*id.* ¶ 5).

Nexstar Broadcasting, Inc. (NBI) is a wholly-owned subsidiary of NMG, and, following the acquisition, Plaintiff became an employee of NBI, not NMG (Jt. Stat. ¶¶ 9, 11, 22). NBI is one of the largest broadcast groups in the United States in terms of the number of owned or operated television stations/markets and expected total annual revenue (*id.* ¶ 3). Plaintiff continued to serve as WLNS's Assignment Editor, without any change to her job responsibilities (*id.* ¶ 12). NBI/WLNS employed Plaintiff on an "at will" basis (*id.* ¶ 10).

A handbook called the "Nexstar Employee Guidebook" describes the workplace employment policies at WLNS (Jt. Stat. ¶ 13). The Nexstar Employee Guidebook includes an express policy and affirmation that prohibits discrimination against any condition of employment because of race, color, national origin, sex, religion, age, genetic information, disability, veteran status or any other status protected by applicable law (*id.* ¶ 14). The Nexstar Employee Guidebook also contains a policy prohibiting sexual harassment and inappropriate sexual conduct and a statement of the company's policy prohibiting retaliation against any employee who either complains of harassment or discriminatory treatment in violation of the company's policies or who assists in an investigation of a complaint (*id.* ¶¶ 15-16).

Per the "Open Door Policy," employees who believe they are being subjected to unlawful harassment or discrimination are instructed to report their complaints to (1) their supervisor or other manager; (2) Human Resources; or (3) a toll-free hotline, which is reviewed on a daily basis (Jt. Stat. ¶ 17). Employees are also informed that they may elevate their concerns regarding possible harassment or discrimination to the Vice President of Human Resources (*id.*). The Nexstar Employee Guidebook includes an overview of the company's performance management process and contains a policy that addresses the content of employee evaluations (*id.* ¶ 18). Last, a "Business Conduct Policy" requires all employees to conduct themselves to the highest ethical standards in all employment related endeavors and to show respect to co-workers and customers at all times (*id.* ¶ 19).

Plaintiff reviewed the Nexstar Employee Guidebook and acknowledged receiving a copy of the handbook on January 23, 2017 (Jt. Stat. ¶ 20). WLNS News Director Sardar prepared guidelines that he expected news department employees to follow in performing various news gathering and reporting activities (*id.* ¶ 21). Plaintiff testified that she did not consider Sardar's guidelines to be a matter of federal or Michigan law (*id.*).

In March 2017, Plaintiff spoke with Bush regarding her "concerns" (Jt. Stat. ¶ 5), to "giv[e] her the history of events and [Sardar's] response to those events" (Pl. Dep. at 116, ECF No. 41-4 at PageID.420; Pl. Dep. at 23, ECF No. 41-4 at PageID.428). Plaintiff conceded that she was never sexually harassed and claimed that other WLNS newsroom personnel, both male and female, shared her view that Sardar's conduct was "disrespectful," "rude or abrupt," and that Sardar was a "bully" (Jt. Stat. ¶¶ 26, 35). Bush directed the investigations into Plaintiff's allegations (*id.* ¶ 5).

In May 2017, Plaintiff filed a complaint with Bush, alleging that Sardar had engaged in an inappropriate sexual relationship with another female employee of WLNS, who was not assigned

to the News Department (Jt. Stat. ¶ 27). Bush contacted Simone on May 23, 2017 to inform him of Plaintiff's complaint and that an investigation was underway (*id.* ¶ 28). Correspondence regarding the conclusion of the investigation was prepared by Susan Ellenberg, NMG's Regional Human Resources Business Manager, whose responsibilities included assisting Bush in investigations regarding alleged harassment and other policy violations within her region (*id.* ¶ 29). This correspondence was hand delivered to her by Simone (*id.*). As a result of that investigation, Sardar was issued verbal guidance regarding interactions with female employees, reminded of Defendants' policies regarding romantic relationships between supervisors and coworkers, and informed that no meetings with Plaintiff should take place without Assistant News Director Stangland as a witness (*id.* ¶ 30).

On July 5, 2017, Plaintiff emailed Simone complaining that Sardar had posted an article to WLNS' Facebook page that had "no journalistic standards" (Jt. Stat. ¶ 31). Within four minutes, Simone had reviewed the post and directed that the post be deleted (*id.*).

Plaintiff subsequently met with an "acquaintance," David Mittleman, a practicing attorney whom Plaintiff believed could "help [her] in reaching out, trying to help the other women in Nexstar stations across the country who are dealing with sexual harassment issues as well" (Pl. Dep. at 27, ECF No. 41-4 at PageID.429). Mittleman placed the meeting as occurring on December 4, 2017 (Mittleman Decl., ECF No. 44-1 at PageID.614). He indicated that Plaintiff "came to see [him] to discuss concerns she had that her employer, Nexstar Broadcasting, was not properly investigating instances of the sexual harassment of subordinate female employees and interns by their Nexstar managers" and that they discussed that "the first thing she should do to effectuate change at Nexstar (since Fritze indicated that internal reporting measures were not working) would be for Fritze to reach out to other female Nexstar employees to see what their

experiences had been relating to Nexstar's conduct related to sexual harassment and discrimination" (*id.*). Plaintiff did not retain Mittleman (Pl. Dep. at 27, ECF No. 41-4 at PageID.429). Nor did Mittleman indicate that he was going to file a lawsuit on her behalf (*id.* at 63, PageID.435).

During 2017 and 2018, numerous additional instances were documented regarding Plaintiff's performance at work, including: a "workplace disruption" incident documented on February 1, 2018, when an employee complained that Plaintiff was undermining leadership in the newsroom; and an incident when Plaintiff complained on March 1, 2018 that Sardar was "singling" her out and "harassing" her (ECF No. 41-13 at PageID.502, 505, 511; ECF No. 41-25 at PageID.561; ECF No. 41-26 at PageID.571). In April 2018, Sardar and Plaintiff attempted mediation (Pl. Dep. at 133-34, ECF No. 41-4 at PageID.421-422). According to Station Manager Simone, following Plaintiff's refusal to continue to attend mediation sessions, he determined that Plaintiff had become "unmanageable" and made the decision to discharge her (Simone Decl., ECF No. 14-3 at PageID.102). Plaintiff's employment was terminated on May 14, 2018 (Jt. Stat. ¶ 36).

B. Procedural Posture

On August 9, 2018, Plaintiff initiated this case in state court, alleging a single count titled "Wrongful Discharge against Public Policy and in Violation of the Michigan Whistleblower Protection Statute" (Compl., ECF No. 1-2 at PageID.13). Plaintiff alleges that she performed "outstanding work … throughout her employment, but the severe sexually inappropriate misconduct of male employees eroded Plaintiff's relationship with Defendant as management decided to protect the male employees" (*id.* ¶ 16). Plaintiff alleges that Defendants "attempted to silence Plaintiff and future protesters of sexual abuses by terminating Plaintiff's employment" (*id.* ¶ 49).

In November 2018, Defendants removed the case to this Court based on diversity jurisdiction[2] and filed their Answer. A Case Management Order was issued on January 24, 2019. In July 2019, the parties attempted to mediate a resolution of their case, which was unsuccessful. Following the close of discovery, the Court issued a briefing schedule on Defendants' proposed dispositive motion (ECF No. 33). The motion is fully briefed and ripe for decision.

II. ANALYSIS

A. Motion Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The court must consider the evidence and all reasonable inferences in favor of the nonmoving party. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013); *U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013). The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010). The burden then "shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (citing *Anderson*, 477 U.S. at 249). "A dispute is genuine if there is evidence 'upon which a reasonable jury could return a verdict in favor of the non-moving party.' A factual dispute is material only if it could affect the outcome of the suit under the

[2] Defendants represented that Plaintiff is a citizen of Michigan and Defendants are citizens of Delaware (ECF No. 1, Notice ¶ 1; *see also* Compl. [ECF No. 1-2] ¶ 1 and Jt. Stat. ¶ 4).

governing law." *Smith v. Erie Cty. Sheriff's Dep't*, 603 F. App'x 414, 418 (6th Cir. 2015) (citation omitted). The parties do not dispute that Michigan law governs Plaintiff's claims in this diversity case. "The ultimate question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestlé USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 251-52).

B. Discussion

1. Defendant Nexstar Media Group, Inc. (NMG)

First, as a threshold matter, Defendants assert in one sentence in the Introduction to their brief that this Court should dismiss Defendant NMG from this case because NMG did not employ Plaintiff (ECF No. 41 at PageID.283). Plaintiff does not address this topic in her response (ECF No. 44), and Defendants also did not raise it again in their reply brief (ECF No. 46). Given the Court's decision that Defendants are entitled to judgment as a matter of law on Plaintiff's claims, the Court declines to address this argument.

2. Plaintiff's Claim for Retaliatory Discharge in Violation of Michigan Public Policy

Next, Defendants argue that Plaintiff may not sustain a cause of action for wrongful discharge in violation of public policy because (1) the Whistleblowers' Protection Act, MICH. COMP. LAWS § 15.361 *et seq.*, already confers upon an alleged victim of retaliation the right to sue; (2) a public policy cause of action is not available for internal reports; and (3) Plaintiff was not asked to and did not refuse to violate any law (ECF No. 41 at PageID.300-302).

Plaintiff did not address any public policy claim in her response to Defendants' motion (ECF No. 44).

Defendants' argument for dismissal of Plaintiff's public policy claim has merit.

To the extent Plaintiff attempted to plead in her state-court complaint a public policy claim separate from her whistleblower claim, the Court agrees with Defendants' assertion in their reply brief that Plaintiff has since abandoned such claim (ECF No. 46 at PageID.732). The Sixth Circuit's jurisprudence on abandonment of claims is clear: "a plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment." *Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) (collecting cases).

Even assuming arguendo that such claim still merits analysis, the Court determines that the claim is properly dismissed. As an at-will employee, Plaintiff could be fired "at any time for any, or no, reason," *Suchodolski v. Michigan Consol. Gas Co.*, 316 N.W.2d 710, 711 (Mich. 1982), unless that reason was in violation of public policy or other federal or state law. "[U]nder Michigan law, '[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.'" *Allen v. Charter Cty. of Wayne*, 192 F. App'x 347, 353 (6th Cir. 2006) (citation omitted). "Where a statute specifically proscribes the conduct at issue, 'Michigan courts have consistently denied a public policy claim.'" *Id.* *See also Lewandowski v. Nuclear Mgt.*, 724 N.W.2d 718, 723 (Mich. Ct. App. 2006) ("[A]n employee has no common-law right to avoid termination when he or she reports an employer's violation of the law. In other words, a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue.") (citations omitted). Because Michigan's whistleblower statute specifically prevents employers from retaliating against employees who report, or intend to report, violations of law to the authorities, *see infra*, Plaintiff's public policy claim on this same basis is preempted.

3. Plaintiff's Claim Under Michigan's Whistleblowers Protection Act

Defendants argue that Plaintiff's whistleblower claim should be dismissed where her internal requests for investigations do not constitute a report of a violation or suspected violation of a law to a public body (ECF No. 41 at PageID.303). Similarly, Defendants argue that Plaintiff's informal discussion with an individual who was not her attorney regarding WLNS decisions is not a report to a public body as construed by the state statute (*id.* at PageID.303-304). Defendants also argue that there is no admissible evidence in this record that Defendants knew of her communication with the attorney (*id.* at PageID.305). Last, Defendants argue that Plaintiff has not established a causal connection between her activities and her discharge and cannot establish that Defendants' articulated legitimate, non-retaliatory rationale to discharge is pretext (*id.* at PageID.305-306). Defendants opine that the record instead clearly establishes Plaintiff's record of "creating a divisive and unprofessional working environment and that Defendants took extraordinary steps to save the working relationship between Sardar and Fritze—and thus Fritze's job" (*id.* at PageID.306).

In response, Plaintiff argues that she has pled and supported a viable whistleblower claim where she was (1) "discovering and exposing ineffective and non[-]investigating of sexual harassment by Defendant Nexstar," and (2) "communicat[ing] with attorney David Mittleman," communications about which she ensured Sook and Nexstar leadership were aware (ECF No. 44 at PageID.607-608). According to Plaintiff, she has established a "clear causal connection between her intent to report sexual harassment at Nexstar (including Nexstar's laxity in investigating these types of allegations) and Nexstar's decision to discharge her to avoid any complication in its 7.2 billion dollar acquisition of the Tribune stations" (*id.* at PageID.608-610).

In reply, Defendants opine that Plaintiff's "tortured effort" to save her whistleblower claim relies almost exclusively on "distortions of the record, self-serving speculation, hearsay, and purported 'facts' that are unsubstantiated by citation to competent evidence of record" (ECF No. 46 at PageID.731).

Defendants' argument for dismissal of Plaintiff's whistleblower claim has merit.

Michigan's Whistleblower Protection Act (WPA) prohibits employers from discriminating against an employee "because 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… to a public body…" MICH. COMP. LAWS § 15.362. Under the WPA, "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.

MICH. COMP. LAWS § 15.361(d).

Michigan courts have identified the following three elements a plaintiff must establish to carry her burden of making a prima facie case for retaliation under the WPA:

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

> (2) [T]he employee was discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment.
>
> (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.

Rivera v. SVRC Indus., Inc., 934 N.W.2d 286, 293 (Mich. Ct. App. 2019) (quoting *Wurtz v. Beecher Metro Dist.*, 848 N.W.2d 121, 125-26 (Mich. 2014)).

"[W]hen a plaintiff presents circumstantial evidence of retaliation, the burden then shifts to the defendant to rebut the presumption of a causal connection by articulating a legitimate business reason for its adverse employment action." *Rivera, supra.* If the defendant offers such a reason, then the burden shifts back to the plaintiff to show that a genuine issue of material fact still exists by showing that "'a reasonable fact-finder could still conclude that the plaintiff's protected activity was a motivating factor for the employer's adverse action,' i.e., that the employer's articulated legitimate reason was a pretext disguising unlawful animus." *Id.* (quoting *Debano-Griffin v. Lake Co.*, 828 N.W.2d 634, 638 (Mich. 2013) (citations omitted)).

The determination whether evidence establishes a prima facie case under the WPA is a question of law. *Roulston v. Tendercare (Michigan), Inc.*, 608 N.W.2d 525, 529 (Mich. Ct. App. 2000). The Court determines that Plaintiff's claim fails at the outset because she has not established the first prong of a prima facie case for retaliation under Michigan's whistleblower statute. And "one who engages in no 'protected activity' under the act is not intended to benefit from its operation." *Chandler v. Dowell Schlumberger Inc.*, 572 N.W.2d 210, 215 (Mich. 1998).

Again, as purported protected activity under the whistleblower statute, Plaintiff relies on her activity (1) "discovering and exposing ineffective and non[-]investigating of sexual harassment by Defendant Nexstar" and (2) "communicating" with attorney Mittleman about Defendants' investigations. The effectiveness or quality of Defendants' investigations, does not, as a threshold

matter, concern "violations of law" that would support a whistleblower claim. Reports of an employer's alleged mismanagement or failures to follow provisions in a personnel handbook are not reports of "violations of law." The Michigan Supreme Court has held that "a corporate management dispute … lacks the kind of violation of a clearly mandated public policy that would support an action for retaliatory discharge." *Suchodolski*, 316 N.W.2d at 712 (affirming summary judgment for the employer where the plaintiff-employee alleged that his complaints about his employer's internal accounting practices, which related to matters that could have interfered with the Public Service Commission's ability to perform its regulatory functions, led to his discharge). *See, e.g., Brooks v. Genesee Cty.*, No. 330119, 2017 WL 2988838, at *3 (Mich. Ct. App. July 13, 2017) (holding that an employee's "disagreement" with and violations of his employer's policy prohibiting discussion of a criminal investigation "do not constitute reports to a public body of violations or suspected violations of law" under Michigan's whistleblower statute); *Cuevas v. Bd. of Hosp. Managers of Hurley Med. Ctr.*, No. 329589, 2017 WL 127737, at *5 (Mich. Ct. App. Jan. 12, 2017) (holding that the plaintiff failed to demonstrate that she engaged in a protected activity to establish the first element for a prima facie case of retaliation under the WPA where she complained of her employer's mishandling or failure to comply with an internal operating procedure for the scanning of documents). *See also Melchi v. Burns Int'l Sec. Servs., Inc.*, 597 F. Supp. 575, 584 (E.D. Mich. 1984) (holding that the plaintiff's allegations concerning his former employer's management practices did not support an action for retaliatory discharge under Michigan's whistleblower statute).

Indeed, as Defendants point out, Plaintiff's internal efforts often resulted in additional investigation and/or actions, e.g., the departure of a news anchor and the removal of a social media post. *See, e.g., Oakes v. Weaver*, 331 F. Supp. 3d 726, 747-48 (E.D. Mich. 2018) (holding that the

plaintiff's communications detailing her numerous concerns about actions by the mayor and various associates or advisors were not "reports" of any violations of law under Michigan's whistleblower statute "but merely advice that was intended to—and did—*prevent* violations of the law by the responsible officials") (emphasis in original). *Cf. Mortimer v. Alpena Cty. Prob. Court*, No. 304863, 2012 WL 3322401, at *3 (Mich. Ct. App. Aug. 14, 2012) (holding that the plaintiff did not engage in a protected activity pursuant to the WPA where "an incorrect legal interpretation of the law is not itself a violation of the law"). In sum, as a matter of Michigan law, Plaintiff's reports of Defendants' alleged failure to perform adequate investigations into sexual harassment in the workplace do not concern "violations of law."

However, even assuming arguendo that Plaintiff's reports constitute reports of "violations of law" within the meaning of Michigan's whistleblower statute, Plaintiff's reports to her employer are not protected activity. Defendants are private corporations, not "public bodies," as defined in the state statute. "There is no provision within the plain language of the statutory definition of 'public body' that includes employees of private companies." *Denney v. Dow Chem. Co.*, No. 294278, 2011 WL 92964, at *5 (Mich. Ct. App. Jan. 11, 2011). And "[n]othing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself." *Id.* A plaintiff's communication with her employer is a "nonactionable communication." *Rivera*, 934 N.W.2d at 297. Therefore, Plaintiff's internal reporting to her private employer is not "protected activity" under the whistleblower statute, even assuming the topic of such reports comes within the purview of the statute.

Similarly, Plaintiff has not established, on this record, that her meeting with Mittleman constitutes a report to a public body. Michigan courts have held that while a licensed and practicing member in good standing of the State Bar of Michigan is a member of a "public body"

for purposes of the whistleblower statute, *McNeill-Marks v. MidMich. Med. Ctr.*, 891 N.W.2d 528, 539 (Mich. Ct. App. 2016), not "all communications with attorneys, no matter who they represent, categorically constitute 'reports' to a 'public body' for WPA purposes," *McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot*, No. 348987, 2020 WL 2610106, at *10 (Mich. Ct. App. May 21, 2020). Rather, when a person claims whistleblower status based on an allegation that a communication with an attorney constituted a "report," "trial courts must engage in a deeper analysis of the particular facts and circumstances of the communication." *McNeill-Marks*, 2020 WL 2610106, at *10.

For example, in *Newton v. Mariners Inn*, No. 332498, 2017 WL 5759949, at *22-23 (Mich. Ct. App. Nov. 28, 2017), lv. den. 915 N.W.2d 459 (Mich. July 27, 2018), where the plaintiff asserted that she had made a report to a "public body" when she met with an attorney and two others, the Michigan Court of Appeals determined that the assertion did not have "support in the record" where there was no evidence of either an "attorney-client relationship" or the performance of "specific legal work." The Michigan Court of Appeals ultimately dismissed the plaintiff's whistleblower claim. This Court likewise concludes that Plaintiff's single meeting with Mittleman in this case, a meeting that did not culminate in Plaintiff retaining Mittleman's services or his performance of specific legal work, does not, under Michigan law, constitute a report of a violation of the law to a public body.

In sum, Plaintiff has simply not established that she falls within the protection of Michigan's whistleblower statute. Because she has not set forth a prima facie case, the Court need not address whether there was a legitimate business reason for her discharge or whether such reason was a pretext. Defendants are entitled to prevail as a matter of law on Plaintiff's WPA claim.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment (ECF No. 40) is GRANTED.

Because this Opinion and Order resolves all pending claims in this case, a corresponding Judgment will enter. *See* FED. R. CIV. P. 58.

Dated: July 13, 2020

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge