STATE OF MICHIGAN

COURT OF APPEALS

DONALD ZUB,

Plaintiff-Appellant,

v

WAYNE COUNTY COMMISSION,

Defendant-Appellee.

UNPUBLISHED
September 9, 1997

No. 192641
Wayne Circuit Court
LC No. 94-401439-NZ

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting summary disposition to defendant in this employment case. We affirm.

Plaintiff, a former local elected official, was hired as an administrative assistant to the clerk of the Wayne County Commission. He performed a variety of administrative and social functions, some of which took advantage of his political background. In 1991 defendant terminated plaintiff's employment. Plaintiff concedes he was an "at will" employee. Plaintiff received a lump-sum distribution of the pension contributions made in his behalf. He was then retained as an independent contractor, with the same duties he performed as an employee. Written contracts established plaintiff's dates of service and compensation levels as an independent contractor. The final contract extension covered the period of December 1, 1991, through November 30, 1992. In a letter dated October 27, 1992, defendant informed plaintiff that his contract would not be renewed again, and that his services were no longer needed after October 30, 1992.[1]

Plaintiff brought this suit, alleging breach of contract and race discrimination arising from defendant's decision to terminate his employment status and make him an independent contractor. In particular, plaintiff alleged that defendant singled him out as a white person in a scheme to deprive him of pension benefits by forcing him into a status (independent contractor) in which no pension benefits accrued.

Defendant moved for summary disposition under MCR 2.116(C)(10). The trial court found that plaintiff was an at-will employee who had no expectation of continued employment or benefits, that

his termination did not violate state laws regarding the denial of accrued benefits, and that plaintiff had not shown that similarly situated employees were treated differently because the employees he offered as similarly situated were not comparable. Summary disposition was granted.

We review the trial court's decision de novo. We must consider the affidavits, pleadings, depositions, and other materials supporting and opposing the motion, MCR 2.116(G)(5), to determine whether it is impossible for the claim to be supported at trial because of some deficiency which cannot be overcome. *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973).

I - Breach of Contract

Plaintiff first argues that the court erred by dismissing Count I of his complaint, which alleged a breach of contract. Specifically, he alleged that his accrued benefits constituted a contractual obligation which could not be diminished or impaired by defendant. We find no error.

Plaintiff has not presented a contract which itemizes his entitlement to pension benefits. However, state law provides for the preservation and payment of accrued benefits. See Const 1963, art 9, § 24 ("The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby"); *In re Constitutionality of 1972 PA 258*, 389 Mich 659, 663; 209 NW2d 200 (1973).

Defendant paid plaintiff his accrued pension benefits when plaintiff ceased his employment relationship. Thus, defendant complied with MCL 46.12a(1)(b); MSA 5.333(1)(1)(b), which states in part:

> If the employment or the pension or retirement benefits of an employee who participated in the cost of pension or retirement benefits are terminated before the employee receives pension or retirement benefits equal to the total amount of the employee's participation, the balance of the total participation shall be refunded to the employee at the time of termination . . . .

Defendant also complied with the Constitutional provision which prohibits employers from impairing *accrued* pension rights. Plaintiff had no right to any benefits for work not yet performed. *Ass'n of Professional & Technical Employees v Detroit*, 154 Mich App 440, 446; 398 NW2d 436 (1986). Thus, defendant did not violate any state law.

Plaintiff further argues that public policy was violated even if state law was not expressly offended because federal law would have prohibited defendant's conduct. Our Supreme Court in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692; 316 NW2d 710 (1982) discussed three narrow situations where termination of an at-will employee may be prohibited by public policy:

> In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason. See generally *Toussaint v Blue Cross & Blue Shield of Michigan*,

408 Mich 579, 292 NW2d 880 (1980). However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable. *Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty.*

The courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges. *Such a cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment*. Thus, in *Trombetta v Detroit, T & I R Co*, 81 Mich App 489, 265 NW2d 385 (1978), the Court said that it would have been impermissible to discharge an employee for refusing to falsify pollution control reports that were required to be filed with the state.

In addition, the courts have found implied a prohibition on retaliatory discharges when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment. See, *e.g., Sventko v Kroger Co*, *supra*; *Hrab v Hayes-Albion Corp*, 103 Mich App 90, 302 NW2d 606 (1981). Both cases involved allegations of discharges in retaliation for having filed workers' compensation claims. [412 Mich at 694-696 (footnotes omitted; emphasis added).]

Had an employer within the scope of ERISA[2] committed a similar act, plaintiff reasons, the federal law would have been violated. See 29 USC § 1140; *Inter-Modal Rail Employees Ass'n v Atchison, T & SF R Co*, ___ US ___; 117 S Ct 1513; 137 L Ed 2d 763 (ERISA prohibits discharge "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [benefit] plan."). Thus, plaintiff argues, his termination violates Michigan's public policy.

We need not reach the difficult issue of whether federal law would prohibit defendant's actions. Even if we consider plaintiff's premise as true for the sake of argument, his charge that he was terminated to prevent attainment of future pension benefits does not fit within any of the three narrow public policy exceptions established by the Supreme Court. We conclude, therefore, that the trial court did not err when it ruled plaintiff had no cause of action based on public policy.

II - Discrimination

Plaintiff next argues that the trial court erred when it dismissed his claim for race discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2202(1); MSA 3.548(202)(1). Again, we disagree. Plaintiff asserted a disparate impact resulting from his removal from the payroll. In such cases, plaintiff must show as part of his prima facie case that similarly situated employees outside the protected class "were unaffected by the employer's adverse conduct." *Lytle v Malady*, __ Mich __; __ NW2d __ (1997), Slip Op p 27. This plaintiff has failed to do. On appeal, plaintiff has not identified the names

and job responsibilities of any similarly situated employees. At the motion hearing below, he offered two African-American employees as being similarly situated: Ms. Hearn and Mr. Carter. The circuit court did not err when it concluded neither employee was similarly situated. Cf *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 652; 513 NW2d 441 (1994). Ms. Hearn was a secretary – a clerical employee – whose job responsibilities were not comparable to plaintiff's non-clerical position. The two jobs were substantially different. *Id*. Mr. Carter was an independent contractor who, like plaintiff, had his contract terminated. Thus, while Mr. Carter may have been in a comparable situation, he was not treated more favorably and therefore provides no foundation for a disparate treatment claim.

Because plaintiff has failed to present a prima facie case, we need not address his argument that the proffered motive for termination (financial considerations) was a pretext. That analysis is triggered only after a prima facie case is shown. *Lytle*, *supra* Slip Op at 28.

Affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell

[1] Although plaintiff mentioned at the motion hearing that he had not been paid for the final month of his contract, that claim was not raised in the complaint. We offer no opinion on such a claim.

[2] Employees Retirement Income Security Act, 29 USC § 1001 et seq. ERISA is not directly applicable because it excludes governmental plans from its scope. 29 USC § 1003(b).