STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL C. MACMILLAN,

Plaintiff-Appellant,

v

DE ANGELIS LANDSCAPE,

Defendant-Appellee.

UNPUBLISHED
September 19, 1997

No. 193031
Genesee Circuit Court
LC No. 95-035614 CL

Before: Doctoroff, P.J., and Kelly and Young, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's retaliatory discharge action brought under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.; MSA 17.428(1) *et seq*., and the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. We affirm.

I

Briefly, plaintiff was hired by defendant on May 13, 1992, as a superintendent foreman in charge of grading, sewers, and road construction. In 1993, plaintiff began working on a project initiated by the Michigan Department of Transportation (MDOT) and administered by the Oakland County Road Commission (OCRC). Pursuant to agreement with the OCRC, defendant was required to pay prevailing wage rates to its employees according to the wage rate for the employee's work category. From October or November 1992 until November 1994, plaintiff informed the OCRC of various pay discrepancies involving female and Mexican-American employees. On December 22, 1994, plaintiff was told that he was being laid off. While the parties dispute whether plaintiff has discharged or whether he quit, it is undisputed that plaintiff took another job with the OCRC on January 9, 1995.

Plaintiff filed a complaint against defendant alleging that he was discharged in violation of both the WPA and Elliott-Larsen. Plaintiff further alleged that his discharge was in retaliation for reporting defendant's illegal and discriminatory conduct to the OCRC. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) claiming that defendant had never discharged plaintiff, and

that plaintiff had, in fact, quit to take a job with the OCRC. In granting defendant's motion, the trial court found that plaintiff failed to present evidence of any clear and/or unequivocal statements constituting a discharge, and that there was no genuine issue of material fact concerning whether plaintiff had in fact been discharged.

II

This Court reviews a motion for summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Id*. A court reviewing such a motion, therefore, must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, granting that party the benefit of any reasonable doubt, and determine whether there is a genuine issue of disputed fact. *Id*.

A prima facie case of retaliation in violation of the WPA requires proof (1) that the plaintiff was involved in a protected activity as defined by the act, (2) that the plaintiff was subsequently discharged, and (3) that there was a causal connection between the protected activity and the discharge. *Tyrna v Adamo, Inc*, 159 Mich App 592, 601; 407 NW2d 47 (1987). Similarly, to establish a prima facie case of unlawful retaliation under Elliott-Larsen, a plaintiff must show that (1) he engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; ___ NW2d ___ (1997).

Having reviewed the record, we conclude that plaintiff failed to present evidence creating a genuine issue of material fact with respect to whether he was discharged, and that defendant was therefore entitled to summary disposition as a matter of law.[1] Plaintiff's sole evidence in support of his "belief" that he was "discharged" was (1) the "tone of voice" that Jim DeAngelis, defendant's president, used when informing plaintiff that he was being laid off, (2) the fact that he was laid off at a time when, according to plaintiff, "there was a lot of work to still be done," (3) the fact that he was told without explanation to turn his truck in, and (4) the fact that he was never called back to work. However, we believe that plaintiff's unsupported "belief" that he was discharged was not enough, alone, to create a genuine issue of material fact. See *Bouwman v Chrysler*, 114 Mich App 670, 682; 319 NW2d 621 (1982).[2]

Defendant's undisputed evidence showed that plaintiff was never told that he was discharged and that he never even inquired about his employment status. Moreover, plaintiff admitted that because the landscape business was seasonal, it was defendant's normal practice to lay him off during that period of time.[3] Finally, and particularly fatal to plaintiff's claim, was DeAngelis' undisputed testimony that he had called to recall plaintiff to work. Plaintiff admitted that DeAngelis placed a call to him on January 6, 1995, but that plaintiff never returned the call because he started working for the OCRC.[4]

Therefore, there being no adverse employment action, we conclude that the trial court properly granted summary disposition to defendant.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.

[1] We note that the trial court relied on *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 437 NW2d 268 (1991), in requiring plaintiff to provide evidence of "clear and/or unequivocal" statements amounting to a discharge. This was error. In *Rowe*, the Court held that oral statements of job security must be "clear and unequivocal" to overcome the presumption of employment at will. *Id*. at 645. *Rowe* was a *Toussaint*-type employment case, and its "clear and unequivocal" standard simply does not apply here.

[2] We acknowledge that an employee may be "constructively discharged" where "working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). However, we note that plaintiff did not claim below, and does not now argue on appeal, that he was constructively discharged.

[3] Plaintiff also did not dispute DeAngelis' testimony that, in addition to plaintiff, virtually all of defendant's field staff was laid off.

[4] In fact, plaintiff had considered going to work for the OCRC as early as January 1994.