STATE OF MICHIGAN

COURT OF APPEALS

ROBERT A. VICHINSKY,

Plaintiff-Appellant,

v

AUTOMOBILE CLUB OF MICHIGAN, AUTO CLUB INSURANCE ASSOCIATION, AAA MICHIGAN and RODERICK MACKENZIE,

Defendants-Appellees.

UNPUBLISHED
January 5, 1999

No. 203005
Wayne Circuit Court
LC No. 96-603388 NZ

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) with respect to plaintiff's violation of public policy and breach of contract claims. The trial court had previously granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) with respect to plaintiff's Whistle-Blowers' Protection Act (the "WPA"), MCL 15.361 *et seq*.; MSA 17.428(1) *et seq*., and professional negligence claims. We affirm.

I. Basic Facts And Procedural History

Plaintiff was employed as a claims representative by defendants Automobile Club of Michigan, Auto Club Insurance Association, and AAA Michigan (collectively the "ACIA"). Defendant MacKenzie is an ACIA employee who allegedly fired plaintiff because he testified in a deposition in a no-fault insurance claimant's lawsuit against ACIA that ACIA is understaffed, that it does not have a procedure manual for paying claims and that it routinely fails to pay claims in a timely manner as required by law. Plaintiff filed suit and the trial court granted summary disposition as indicated *supra*.

II. Standard of Review

A. Motions Under MCR 2.116(C)(8)

This Court reviews a decision on a motion for summary disposition de novo. *Eason v Coggins Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Id*. Such a motion should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a recovery. *Id*. This Court accepts as true all factual allegations supporting the claim, as well as any reasonable inferences or conclusions that can be drawn from those allegations. *Id*. "However, mere conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Id*.

B. Motions Under MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Such a motion tests the factual basis of a plaintiff's allegations. *Id*. This Court must view the pleadings, affidavits, depositions, admissions and any other documentary evidence in favor of the nonmoving party. *Id*. This Court must then decide "whether a genuine issue regarding any material fact exists to warrant a trial." *Id.*

C. Discovery

We review a trial court's decision regarding whether to grant a motion to compel discovery for an abuse of discretion. *Eyde v Eyde*, 172 Mich App 49, 54; 431 NW2d 459 (1988).

III. Plaintiff's WPA Claim

Plaintiff's argues that the trial court should not have granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) with respect to plaintiff's WPA claim. We disagree. We find that plaintiff did not state a cause of action under § 2 of the WPA, MCL 15.362; MSA 17.428(2), because he did not allege *any* facts to establish that he engaged in protected activity as defined by the act. *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997). Plaintiff did not report a violation of law to a public body. *Chandler v Dowell Schlumberger*, 456 Mich 395, 399; 572 NW2d 210 (1998). The definition of "public body" includes the judiciary and any member or employee of the judiciary. MCL 15.361(d)(vi); MSA 17.428(1). We conclude that plaintiff's testimony in a civil discovery deposition did not constitute a report to the judiciary. Judges normally do not attend and are not involved in discovery depositions. Plaintiff did not allege that the deposition was filed with the trial court or that he requested such a filing. A civil discovery deposition is not equivalent to a criminal grand jury proceeding, where even though a judge may not be present the specific purpose of the proceeding is to uncover evidence of criminal wrongdoing. Moreover, plaintiff alleged *no* facts to establish that he was requested by the judiciary to participate in the court action. *Chandler*, *supra*, 456 Mich 399. There is *no* indication that plaintiff testified pursuant to a subpoena or that a judge made any request whatsoever that plaintiff testify at the deposition. We thus conclude that plaintiff failed to state a

claim for violation of the WPA because there are *no* facts alleged in the complaint to establish that plaintiff engaged in protected activity as defined by the WPA.

IV. Plaintiff's Public Policy Claim

Plaintiff argues that the trial court improperly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) with respect to plaintiff's violation of public policy claim. We again disagree. We find that plaintiff failed to demonstrate a genuine issue of material fact with respect to his public policy claim because he has adduced *no* evidence that the reason for his discharge was the exercise of a statutory right or refusal to violate a law. See *Prysak v R L Polk Co*, 193 Mich App 1, 9; 483 NW2d 629 (1992). Plaintiff contends that he was fired because he testified truthfully at the deposition and that such a discharge would be contrary to the public policy against perjury set forth in MCL 750.423; MSA 28.665. However, there is *no* evidence of record that plaintiff was fired because he testified *truthfully* at his deposition. Plaintiff indicated in an affidavit that MacKenzie told him that the reason for his discharge was that his deposition testimony could cost ACIA millions of dollars. However, this affidavit does not establish that plaintiff was fired because of any *truthful* testimony. It was just as possible that MacKenzie's statement referred to unprofessional and improper comments made by plaintiff at the deposition, including an exchange in which plaintiff referred to the law firm of the no-fault claimant's counsel as "the scum-of-the-earth." Defendant adduced evidence that plaintiff's improper behavior at the deposition was the culmination of a long history of such conduct. Upon consideration of all of the evidence of record adduced by plaintiff, we conclude that he failed to establish a material factual dispute regarding whether the discharge was due to any *truthful* testimony as opposed to plaintiff's unprofessional remarks at the deposition.

V. Plaintiff's Breach of Contract Claims

Plaintiff argues that the trial court improperly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) with respect to his breach of contract claim. We disagree. Plaintiff contended that a binding contract between ACIA and plaintiff was formed because of a written service guarantee provided by ACIA's legal department that provided, *inter alia*, that the legal department would prepare claims representatives for depositions. However, plaintiff has adduced *no* evidence of any objective acts or words of the parties that would establish that the service guarantee was intended to be a binding contract and not merely an expression of the legal department's intent. See, in general, *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992); *Heritage Broadcasting v Wilson Communications*, 170 Mich App 812, 818; 428 NW2d 784 (1988). Also, there is *no* evidence that any offer made by ACIA's legal department was ever accepted by plaintiff or by anyone acting on plaintiff's behalf. *Kamalnath, supra*, 194 Mich App 549-550. In addition, we do not believe that the service guarantee is reasonably capable of being interpreted as a promise to discharge for just cause only. *Dolan v Continental Airlines*, 454 Mich 373, 384-386; 563 NW2d 23 (1997).

VI. Plaintiff's Professional Negligence Claim

Plaintiff argues that the trial court improperly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) with respect to his professional negligence claim. We disagree. Plaintiff alleged in a conclusory fashion that an attorney-client relationship existed between ACIA's counsel and plaintiff. However, plaintiff failed to allege *any* facts in his complaint to establish the existence of an attorney-client relationship between ACIA's legal department and plaintiff. A corporate attorney's client is the corporation itself. MRPC 1.13(a); *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 514; 309 NW2d 645 (1981). Plaintiff has offered no reason to disregard that general principle in this case. Also, a fiduciary relationship did not exist between ACIA's counsel and plaintiff as plaintiff alleged *no* facts to establish that he reposed faith, confidence and trust in the judgment and advice of ACIA's counsel. *Id.*, pp 514-515.

VII. Plaintiff's Motion To Compel Discovery

Plaintiff argues that the trial court abused its discretion when it denied plaintiff's motion to compel discovery of a memorandum written by ACIA counsel Norris Goudy (who attended plaintiff's deposition) to fellow ACIA counsel John Gullen. We disagree. Gullen's factual representations as counsel of record in defendants' brief in response to plaintiff's motion to compel established that the memorandum was prepared in anticipation of litigation. MCR 2.114(D); MCR 2.302(B)(3)(a). It does not matter that litigation had not yet been commenced or threatened when the memorandum was prepared. *Great Lakes Concrete v Eash*, 148 Mich App 649, 654, n, 2; 385 NW2d 296 (1986). It was clear from Gullen's representations concerning the facts of the situation that the prospect of litigation was identifiable. *Id*. In addition, plaintiff did not make a showing below that he had a substantial need for the memorandum and that he could not obtain the substantial equivalent of the document without undue hardship. *Id*., p 657. There is no indication that the memorandum would have provided plaintiff with useful information or that plaintiff could have impeached Goudy with the memorandum. *Id*. Plaintiff's counsel had the opportunity to depose Goudy below. The trial court thus did not abuse its discretion in denying plaintiff's motion to compel.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck