STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM C. PERKINS II,

Plaintiff-Appellant,

v

K MART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
September 28, 1999

No. 209572
Oakland Circuit Court
LC No. 96-535313 CL

Before: Bandstra, P.J., and Whitbeck and Talbot, JJ

PER CURIAM.

Following a jury trial, plaintiff appeals as of right from a judgment of no cause of action in favor of defendant. We affirm in part, reverse in part and remand for further proceedings.

I

Following his termination from employment as a pharmacy manager, plaintiff sued his former employer, defendant Kmart Corporation, claiming age discrimination, retaliation, and self-defamation. Defendant responded to plaintiff's age discrimination claim by citing plaintiff's low performance evaluations, customer relations problems, and dispensing errors as reasons for his termination. The most recent incident occurred on February 15, 1995, when plaintiff overrode a computer warning alerting him to a "severe" interaction between two prescription drugs he filled for a customer.

As one of his age discrimination theories, plaintiff claimed that his younger replacement, Lawrence Chwalek, had a similar number of incident reports and had authorized the exact same prescription override for the same customer, but was not terminated or reprimanded. During discovery, plaintiff requested all incident reports concerning Chwalek and copies of prescription override reports and prescription logs for the date plaintiff claimed Chwalek committed the same offense for which plaintiff was ultimately terminated.

On August 4, 1997, defendant moved for summary disposition on plaintiff's age discrimination, retaliation, and self-defamation claims pursuant to MCR 2.116(C)(10). Subsequently, plaintiff moved

to compel discovery, requesting unredacted copies of the requested prescription reports and all incident reports concerning Chwalek. In response, defendant maintained that it had to redact the patients' names from the prescription reports to protect their privacy, and stated that the one incident report it provided to plaintiff concerning Chwalek was the only one it could locate. Without ruling on plaintiff's motion to compel, the trial court granted defendant's motion for summary disposition as to the age discrimination and retaliation claims, but denied the motion as to the self-defamation claim. Subsequently, plaintiff re-noticed his motion to compel discovery, but the trial court refused to address the motion on the basis that plaintiff should have postured the motion as one for discovery sanctions. The trial court subsequently denied plaintiff's motions for reconsideration of both its rulings.

II

Plaintiff first argues that the trial court erred in dismissing his age discrimination claim under the Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), before ruling on his motion to compel discovery. We agree.

Michigan follows an open, broad, discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending lawsuit. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.*

In the present case, the trial court based its decision granting summary disposition on the ground that plaintiff failed to submit documentary evidence to establish that defendant's proffered reason for plaintiff's discharge was a pretext for age discrimination. Plaintiff contends, however, that the records and reports he requested would show that a similarly-situated, younger pharmacist, Chwalek, had a similar number of incident reports and had committed an offense identical to the offense for which plaintiff was ultimately terminated. Specifically, plaintiff contends that the requested information would have shown that Chwalek was subject to a similar number of incident reports as plaintiff. Plaintiff further contends that the redactions on the prescription logs and override reports frustrated his ability to show that Chwalek had filled the same allegedly conflicting prescriptions for the same customer.

We make no finding concerning either the discoverability of the records or what they ultimately might prove. However, we cannot conclude with certainty that the requested records could not raise a material factual dispute concerning pretext. See *Meagher v Wayne State Univ*, 222 Mich App 700, 712; 565 NW2d 401 (1997) (pretext may be proved "(1) by showing that [defendant's proffered] reason(s) [for termination] had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision"). If the incident reports and prescription logs show that Chwalek had a similar record and had committed an offense identical to the offense for which plaintiff was ultimately terminated, the information could establish that defendant's

proffered reason for termination was false. Because plaintiff was denied evidence that may show pretext, the trial court did not and could not evaluate whether defendant's evidence of cause, if any, was a pretext for age discrimination.

Furthermore, we reject the trial court's ruling that the information plaintiff requested lacks consequence on the basis that plaintiff alleged an intentional discrimination theory, not a theory of disparate treatment. We question the validity of that distinction in light of this Court's holding in *Meagher*, *supra* at 709 ("[i]ntentional discrimination is not a separate theory, but rather another name for disparate treatment"). Nevertheless, we need not address the issue because, in our view, plaintiff's pleadings can be read to allege either theory.

Finally, we recognize that the trial court, in addressing plaintiff's motion for reconsideration, ruled that defendant correctly redacted the names on the prescription logs and override reports due to the patient-physician privilege. We hold, however, that because plaintiff claims that the records are crucial to his case, the trial court should have made that ruling when plaintiff's motion to compel was scheduled, not on a motion for reconsideration when plaintiff had no further opportunity to contest summary disposition. A timely ruling would have given plaintiff the opportunity to devise some remedy, such as lettering the prescriptions in a manner that would allow plaintiff to determine whether the prescriptions at issue were filled for the same customer. Therefore, we conclude that the trial court erred in dismissing plaintiff's age discrimination claim before ruling on his motion to compel discovery. Accordingly, we remand for the trial court to consider plaintiff's motion to compel discovery. Defendant may resubmit its motion for summary disposition on plaintiff's age discrimination claim once the discovery dispute has been resolved.[1]

III

Next, plaintiff contends that the trial court erred in granting summary disposition in favor of defendant on his retaliation claim. Plaintiff contends that a genuine issue of material fact existed as to whether he established a causal connection between his alleged complaint of age discrimination and his termination. We disagree.

We review a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Id.* Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996).

To establish a prima facie case of unlawful retaliation under the Civil Rights Act, MCL 37.2701; MSA 3.548(701), the plaintiff must show: "(1) that 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; 566 NW2d 661 (1997).

In support of his claim, plaintiff refers to a conversation he had with Frank Oldani, defendant's general store manager, in which plaintiff suggested that some day Oldani might experience some of the same problems plaintiff was encountering. According to plaintiff, Oldani responded by asking plaintiff if he was suggesting age discrimination, to which plaintiff responded, "no, but it's a thought". Plaintiff claims that Oldani subsequently began to build the case against him that ultimately resulted in his termination.

Assuming without deciding that plaintiff's conversation with Oldani constituted protected activity, we hold that the trial court correctly ruled that plaintiff failed to establish a causal nexus between the conversation and plaintiff's termination. Plaintiff presented no evidence to establish that Oldani was involved in the decision to terminate him or that Oldani reported the conversation to the district pharmacy manager who made the decision to terminate him. Moreover, while the evidence established that Oldani performed at least three employee evaluations of plaintiff ranging from "meets expectations" to "needs improvement," each evaluation Oldani signed predated the alleged conversation. Accordingly, the trial court did not err in dismissing plaintiff's retaliation claim.

IV

Plaintiff further argues that the trial court erred in granting defendant's motion for a directed verdict at the conclusion of the trial on plaintiff's self-defamation claim on the ground that the claim was barred by the statute of limitations. We disagree. Libel and slander actions are governed by a one-year statute of limitations under MCL 600.5805(7); MSA 27A.5805(7), which begins to run from the date of each utterance or publication. *Hawkins v Justin*, 109 Mich App 743, 745-746; 311 NW2d 465 (1981); *Grist v The Upjohn Co*, 1 Mich App 72, 81-82; 134 NW2d 358 (1965).

Plaintiff alleged that the defamatory statement he was forced to repeat (i.e., that he was terminated for violating company policy) was made on March 9, 1995, the date plaintiff was terminated. At trial, plaintiff testified that he told the following people the reason for his termination: his wife on March 9, 1995; his potential employers within the six months after his termination; his psychologist in April 1995; and, his neighbors about six to eight months after his termination. However, plaintiff did not file his self-defamation suit until December 12, 1996, more than one year after each alleged utterance. Therefore, we conclude that the trial court properly determined that plaintiff's claim was barred by MCL 600.5805(7); MSA 27A.5805(7). In addition, contrary to plaintiff's claim, defendant included the statute of limitations as an affirmative defense in his statement of affirmative defenses submitted to the trial court as required by MCR 2.111(F)(3).

In view of our resolution of the preceding issue, we decline to address plaintiff's remaining arguments concerning the trial court's alleged instruction error and denial of his motion for judgment notwithstanding the verdict.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[1] Given our resolution of this issue, we need not address plaintiff's specific arguments relating to the trial court's summary disposition ruling.