STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS MCDONALD,

Plaintiff-Appellant,

v

LADBROKE RACING MICHIGAN, INC., d/b/a LADBROKE DRC,

Defendant-Appellee.

UNPUBLISHED
September 28, 1999

No. 209910
Wayne Circuit Court
LC No. 93-303333 CK

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

I. Introduction

Plaintiff Douglas McDonald appeals as of right an order granting summary disposition to defendant Ladbroke Racing Michigan, Inc, d/b/a/ Ladbroke DRC ("Ladbroke"), pursuant to MCR 2.116(C)(10). McDonald's appeal presents two basic issues. The first is whether McDonald established a prima facie case of unlawful retaliation under the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., by showing that he was engaged in a protected activity, Ladbroke knew that he had engaged in a protected activity, and the protected activity was casually connected to plaintiff's discharge from employment. The second issue is whether McDonald established a genuine issue of material fact regarding whether Ladbroke engaged in extreme and outrageous conduct. We conclude that the trial court did not err by finding that the case lacked a material fact in dispute regarding either issue and, accordingly, we affirm.

II. Basic Facts And Procedural History

In 1990, Ladbroke, a horse racing track then operating in Livonia, employed McDonald as a unionized outside maintenance worker. Ms. Rose Wilkins, a Ladbroke patron, complained to Ladbroke's Director of Security that McDonald accosted her and used threatening and foul language toward her on August 11, 1990. After conducting an investigation to verify Wilkins' allegations, Ladbroke's General Manager, Richard Schnaars, fired McDonald on August 21, 1990. On that same day, McDonald responded by filing a grievance with his union, which went to binding arbitration. After

the incident, Wilkins filed a criminal complaint in Livonia and the prosecutor chard McDonald with disorderly conduct.

Subsequently, McDonald filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that Ladbroke violated the federal Civil Rights Act, 42 USC 2000e et seq. ("Title VII"), when it discharged him in retaliation for filing two affidavits in support of two African-American co-workers' charges of racial discrimination by Ladbroke. One affidavit was signed on September 16, 1988, while the second affidavit was signed on March 8, 1989.

In late December 1990, a trial was held on the criminal charge of disorderly conduct. Wilkins testified that McDonald accosted her by saying, "F--- you, bitch . . . I'm going to get you." The district court dismissed the criminal charge against McDonald after concluding that this was protected speech.

In early March 1991, an arbitrator heard testimony in McDonald's union grievance regarding his termination. In late May 1991, the arbitrator concluded that Ladbroke had just cause to fire McDonald and that there was nothing in the record supporting McDonald's contention that he was fired because he testified in prior EEOC proceedings. Specifically, the arbitrator found that "[b]ased on . . . the entire record and the demeanor of the witnesses, I find the facts relating to the August 11 incident as testified to by the Employer's witnesses to be credible." The arbitrator also found that there was "nothing in the record to establish the Employer terminated the Grievant because he testified in two prior EEOC proceedings or because of his union and/or protected activities." McDonald never attempted to vacate the arbitration decision.

In mid-May 1992, the EEOC determined that Ladbroke had not violated Title VII when it discharged McDonald. Specifically, the EEOC found that Ladbroke discharged McDonald in accordance with its written policy, that there was no independent evidence showing that Schnaars knew that McDonald had filed the affidavits with the EEOC, and that there was no causal connection between McDonald's assistance to the EEOC and his discharge.

In early February 1993, McDonald filed a complaint in Wayne Circuit Court alleging wrongful discharge/breach of contract, retaliatory discharge in violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101, *et seq*.; MSA 3.548(101), *et seq*., and intentional infliction of emotional distress. In late June 1993, before conducting discovery, Ladbroke moved for summary disposition pursuant to MCR 2.116(C)(8) arguing that McDonald could not support his retaliation claim because McDonald's affidavits involved a federal proceedings under the EEOC. Following a hearing, the circuit court granted Ladbroke's motion and dismissed the case. Thereafter, McDonald filed a claim of appeal with this Court. In *McDonald v Ladbroke Racing Michigan*, unpublished per curiam opinion of the Court of Appeals, issued December 6, 1996 (Docket No. 178065), this Court affirmed in part and reversed in part and remanded for further proceedings. Specifically, this Court reversed the summary disposition of McDonald's retaliatory discharge claim after concluding that filing a claim with the EEOC was sufficient to support a claim under the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. While this Court affirmed the summary disposition of McDonald's intentional infliction of emotional distress claim, the Court gave McDonald the opportunity to amend that claim in his complaint on remand.

During discovery on remand, McDonald admitted in his deposition that he did not tell anyone working for Ladbroke that he had filed affidavits in an EEOC proceeding concerning the charges of discrimination filed by his co-workers. McDonald also conceded that no one from the EEOC told him that they had informed Ladbroke or any of its employees about the affidavits. Moreover, McDonald admitted that neither Schnaars, the general manager, nor Hecimovitch, McDonald's direct supervisor, told him that they were aware of the affidavits. Schnaars, who was not yet working for Ladbroke when McDonald signed the affidavits, testified that he did not know that McDonald had signed them until McDonald filed this lawsuit.

In early January 1998, after discovery closed, Ladbroke moved for summary disposition pursuant to MCR 2.116(C)(10). Following a hearing in early February 1998, the trial court granted Ladbroke's motion and dismissed the case with prejudice. In relevant part, the trial court found:

> The first claim is that the signing of the affidavit was too remote in time. I don't find that the period itself, though case law has said three months, four months, whatever it's been, too long, I don't find necessarily that 17 months and 25 months is too long, I think you need to look at the other circumstances that show a continuing interference with McDonald's job or otherwise causally connective reporting to the termination. Here, there are no such facts.
>
> McDonald admits that he told no one at the employer about signing the affidavits and that he doesn't know of anyone at the EEOC telling the employer about signing the affidavits, that in fact, the decision-maker in this case was not employed with the race track at the time of the signing of the affidavits. There is just nothing there to show that the decision-maker knew that the affidavits were signed.
>
> Given these facts, I find that the signing of the affidavit, 25 and 17 months before, is too remote in time. . . . [T]herefore, the claim for retaliation cannot withstand this motion.
>
> * * *
>
> The same is true for the intentional infliction count. . . . [F]rom the information the employer had, . . . if in fact, that what this lady said, . . . if in fact that's true, the outrageous conduct was not on behalf of the employer but the employee, McDonald. So, for that reason, the Court will dismiss this with prejudice on the basis that there is no issue of fact.

III. Standard Of Review

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. MCR 2.116(G)(5). The moving party must specifically identify

the matters which have no disputed factual issues, and has the initial burden of supporting his position with evidence from the record. *Richardson v Michigan Humane Society,* 221 Mich App 526, 527; 561 NW2d 873 (1997). Although the party opposing the motion receives the benefit of any reasonable doubt, it still has the burden of producing evidence that a genuine issue of disputed fact exists that is material to the dispositive legal claims. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994); *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990).

IV. Retaliatory Discharge

McDonald contends that the trial court erred in granting summary disposition of his retaliatory discharge claim. We disagree.

As this Court observed in *DeFlaviis v Lord & Taylor*, 223 Mich App 432, 436; 566 NW2d 661 (1997):

> Section 701 of the Civil Rights Act, MCL 37.2701; MSA 3.548(101) reads in relevant part as follows:
>
> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.
>
> To establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he was 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.

In this case, McDonald failed to establish a genuine issue of material fact concerning elements (2) and (4). Although McDonald may have engaged in a protected activity[1] by filing affidavits in an EEOC proceeding, McDonald failed to produce evidence showing that Ladbroke knew about the affidavits, which were filed approximately seventeen and twenty-three months respectively before McDonald was discharged. Indeed, McDonald admitted that he did not notify Ladbroke, or tell anyone working for Ladbroke, that he had filed these affidavits. McDonald also admitted that no one from the EEOC informed him that Ladbroke had been told about these affidavits. Further, Ladbroke did not employ the decision-maker in this case, Schnaars, at the time McDonald filed the affidavits and McDonald did not present any evidence that Schnaars otherwise knew about the affidavits. Because there was no evidence that Ladbroke knew about the affidavits, there was also no genuine issue of material fact concerning whether a causal connection existed between the protected activity (filing the affidavits with the EEOC) and the adverse employment action (discharge). In other words, Ladbroke

could not fire McDonald *because of* his affidavits if Ladbroke personnel did not know the affidavits exited.

V. Intentional Infliction Of Emotional Distress

McDonald contends that the trial court erred by granting summary disposition of his claim for intentional infliction of emotional distress. Again, we disagree.

To show intentional infliction of emotional distress, McDonald must produce evidence on the four elements of this tort: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602-603; 374 NW2d 905 (1985); *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995).

Although McDonald made many allegations in his second amended complaint, McDonald alleged that Ladbroke's outrageous conduct principally consisted of "[conspiring] to have McDonald's employment terminated for assisting fellow co-workers with their respective discrimination claims against Ladbroke." However, because McDonald failed to establish a genuine issue of material fact regarding his claim of retaliation, this claim likewise fails. None of McDonald's other claimed errors support reversal of the trial court's order granting summary disposition. McDonald failed to establish a genuine issue of material fact regarding whether Ladbroke's alleged conduct rose to the level of extreme and outrageous. *Roberts*, *supra* at 602-603; *Doe*, *supra* at 91. Also, McDonald did not offer proof regarding his other alleged claims of extreme and outrageous behavior on the part of Ladbroke.[2]

VI. Conclusion

With respect to his claim of retaliatory discharge, we hold that McDonald failed to establish a genuine issue of material fact concerning elements (2) and (4) of a prima facie case of unlawful discrimination: that Ladbroke knew he had engaged in a protected activity and that there was a causal connection between the protected activity and his dismissal. With respect to his claim of intentional infliction of emotional distress, we hold that McDonald failed to establish a genuine issue of material fact concerning the first element of this tort: that Ladbroke engaged in extreme and outrageous conduct. Therefore, we conclude that the trial court did not err by granting summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] A panel of this Court, in McDonald's first appeal, determined that McDonald engaged in an act protected by the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, when he filed affidavits with the EEOC. We see no reason to revisit this issue in the instant appeal.

[2] On appeal, McDonald has submitted various statements and other documents that were not submitted to the trial court. Because a party may not enlarge the record on appeal by submitting materials that were not submitted to the trial court, *Moore v St Clair Co*, 120 Mich App 335, 338; 328 NW2d 47 (1982), we disregard these items.