STATE OF MICHIGAN

COURT OF APPEALS

WALTER FELTON,

Plaintiff-Appellant,

v

SAYLOR-BEALL MANUFACTURING COMPANY and DONALD GILLINTINE,

Defendants-Appellees.

UNPUBLISHED
October 5, 1999

No. 210442
Clinton Circuit Court
LC No. 96-008328 CL

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition for defendants pursuant to MCR 2.116(C)(10) in this suit alleging wrongful discharge, injurious falsehood, and tortious interference with contractual relations. Additional claims of age discrimination and slander were dismissed by stipulation of the parties. We affirm.

FACTS

Plaintiff Walter Felton began working for defendant Saylor-Beall Manufacturing Company in 1968 and worked there continuously until his employment was terminated in November 1995. Plaintiff was initially a union member, but moved between union-represented positions and management positions several times throughout his employment with the company. According to plaintiff, when he was first offered a non-union supervisory position he sought assurances from the plant manager that he could return to his former union position without losing seniority if he did not like being a supervisor. A clause was added to the union contract protecting plaintiff's seniority and allowing him to return to union status on request; however, this provision was eliminated from the 1991 contract,[1] and plaintiff was offered the option of returning to a union position to protect the accrual of seniority. Plaintiff chose to remain in the non-union supervisory position.

The events leading to plaintiff's termination occurred on November 28, 1995. Plaintiff instructed two employees to carry a Christmas tree to another area of the building, and defendant Don Gillentine, Saylor-Beall's vice-president of manufacturing, suggested that the tree be moved on a cart,

rather than be carried. An argument ensued, with plaintiff demanding that Gillentine stop interfering with his directives. Gillentine claimed that plaintiff pushed him, and that plaintiff was warned that he would be fired if he continued to push Gillentine. Plaintiff allegedly failed to heed the warning and was told that he was fired. The police were called when plaintiff refused to leave. The employees moving the tree heard the argument, but did not see whether physical force was used by either man.

The plant manager testified that his decision to terminate plaintiff's employment was based upon several factors, including: (1) plaintiff's employment history, including the physical assault against Gillentine; (2) plaintiff's numerous prior threats of violence against other employees, including threats to kill an employee; (3) plaintiff's use of a company truck for personal reasons without authorization while his driver's license was suspended; (4) plaintiff's argument with one of defendant's distributors that resulted in injury to the business relationship; and (5) ongoing complaints by employees, including plaintiff's subordinates, that they were afraid plaintiff would hurt them. Plaintiff, however, contended that he was fired because he had made complaints that Gillentine was misappropriating company property.

I

Plaintiff first contends that the trial court clearly erred in determining that plaintiff was not protected by an express just-cause employment agreement and a progressive discipline policy. Whether the facts as presented resulted in the creation of a contract is an issue of law that is reviewed de novo. *Bracco v Michigan Technological University*, 231 Mich App 578, 585; 588 NW2d 467 (1998).

In Michigan, there is a presumption that employment contracts are terminable at will by either party. *Toussaint v Blue Cross Blue Shield of Michigan*, 408 Mich 579, 596; 292 NW2d 880 (1980). However, this presumption may be overcome by proof of an express contract containing a provision forbidding discharge without just cause, established by either (1) express oral or written language, or (2) an employee's legitimate expectations grounded in the employer's policies or procedures. *Rood v General Dynamics Corp*, 444 Mich 107, 117-118; 507 NW2d 591 (1993). Plaintiff's claim is based on the first "contractual" subcategory; that is, he claims he received express oral promises that he would not be terminated without just cause.

Just-cause employment may be found only where "the oral statements of job security were clear and convincing" or "clear and unequivocal." *Bracco, supra,* at 596, citing *Rowe v Montgomery Ward Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991). It is not sufficient that an employee have a *subjective* expectation of just-cause employment. Rather, there must be mutual assent to a just-cause provision under an objective standard, looking at the express words of the parties and their visible acts, and the oral statements of job security must be clear and unequivocal. *Bracco, supra* at 601. To ascertain whether there was mutual assent, the Court in *Bracco* examined testimony of the person who originally interviewed the plaintiff in that case, stating, "[c]learly, then, to assess whether there was mutual assent to a just-cause provision expressed in clear and unequivocal oral statements of job security, [the interviewer's] testimony is critical." *Id.* at 601. In the present case, the only evidence of an express contract is plaintiff's allegation that former plant managers had promised he would not be

discharged without cause and that he would be protected by the union's progressive discipline policies. Plaintiff presented no documentary evidence that an express oral contract existed. He failed to produce depositions or affidavits from either of the former managers and did not provide any explanation why their testimony could not be presented. Plaintiff failed to meet his burden of showing either mutual assent to a just-cause provision or statements of job security that are clear and unequivocal.

The only evidence supporting the existence of a just-cause contract and progressive-discipline policy were copies of the 1982 and 1988 union contracts. However, the provision allegedly guaranteeing just-cause employment and adherence to a progressive discipline policy was not in effect at the time plaintiff was terminated, and plaintiff has not established that he was still protected. Plaintiff received a memorandum informing him of this change to the union contract, and he was thus on notice that the express written protections included in the contract were terminated. Plaintiff correctly argues that mutual agreement was required to change the existing terms of employment, and that an employer may not modify an oral express just-cause contract by merely distributing a policy statement announcing an at-will policy. *Farrell v ACIA (On Remand)*, 187 Mich App 220, 227-228; 466 NW2d 298 (1991); *Bullock v ACIA*, 432 Mich 472, 483; 444 NW2d 114 (1989). Rather, such an action is normally interpreted as an *offer* to change the employment terms, *id.*, and acceptance may not be presumed where the employee merely continues his or her employment. *Farrell, supra* at 227-228. Here, however, plaintiff did not merely continue his employment. Plaintiff had the option, under the existing contract, and as evidenced by the memorandum, to return to a union-represented position. He chose to remain in a non-union supervisory position, representing his agreement to the modified contract. Based on this evidence and the lack of supporting documentation with respect to an alleged verbal contract, the trial court did not err in granting summary disposition.

II

Plaintiff claims that the lower court erred in granting summary disposition with respect to his claim against Gillentine of injurious falsehood. Injurious falsehood is a claim of interference with an economically advantageous relationship which results in pecuniary loss. *Kollenberg v Ramirez*, 127 Mich App 345, 350-351; 339 NW2d 176 (1983). One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if:

> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
>
> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity. [*Id. at* 352, quoting 3 Restatement Torts, 2d § 623A, p 334.]

It is essentially undisputed that Gillentine reported the alleged assault to the plant manager intending that plaintiff be terminated, satisfying the first element. In evaluating the second element, we note that the tort of injurious falsehood is similar to defamation, and the requirement of knowledge of falsity or reckless disregard is the same as that required to sustain a defamation action. *Ireland v Edwards*, 230 Mich App 607, 615; 584 NW2d 632 (1998); *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221;

480 NW2d 326 (1991). In opposing summary disposition in a defamation action, the plaintiff bears the burden of showing actual malice by clear and convincing evidence. *Id.* at 615. The same burden can reasonably be applied to a claim of injurious falsehood. Here, the only evidence that Gillentine made false statements to the police and the plant manager is plaintiff's own allegation that he did not touch Gillentine. Plaintiff was required to provide something more to the court than his mere allegations to defeat Gillentine's motion for summary disposition.

III

Plaintiff asserts that the trial court erred in granting summary disposition with respect to plaintiff's tortious interference claim. We disagree. To maintain a cause of action for tortious interference with a contract, a plaintiff must establish a breach of contract caused by the defendant. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986). Because there could be no breach arising from the termination of plaintiff's at-will employment, *id*., summary disposition was properly granted.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] The 1991 contract became effective in 1992.