

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD T. ANDERSON, JR.,

Plaintiff-Appellant,

v

NATIONWIDE SECURITY, INC.,

Defendant-Appellee.

UNPUBLISHED

September 29, 2000

No. 203547

Wayne Circuit Court

LC No. 96-600049-CL

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders denying his motion to amend his complaint and granting summary disposition in favor of defendant. We affirm.

Plaintiff's religious discrimination, misrepresentation, and "breach of promise" claims arise from his termination as a security guard employee of defendant on April 2, 1994. Plaintiff had been hired on December 23, 1993, to work as a security guard at the Yellow Freight Trucking Company from 11:00 p.m. or 12:00 a.m. until 7:00 a.m. or 8:00 a.m. Plaintiff claimed that he was terminated because of a conversation he had with his supervisor, Bennie McGhee, approximately a week before his termination, concerning religion. Plaintiff claims that McGhee did not agree with his religious beliefs, and thereafter, treated him differently by not being friendly and not speaking with him in the morning as was his usual custom.

McGhee testified at deposition that on February 12, 1994, Claude Wood, another employee who was working with plaintiff, informed him that plaintiff had reported to work, but then left his post until returning approximately 1½ hours before the end of his shift. Thereafter, McGhee removed plaintiff from the Yellow Freight account, and plaintiff's paycheck was reduced for the time that he was absent from his post. Although McGhee did not have the authority to terminate plaintiff's employment, McGhee had the authority to remove an employee from an account. Defendant filed a motion for summary disposition, which the trial court granted. Following the grant of defendant's motion for

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

summary disposition, plaintiff filed an “application” for leave to amend his complaint, which the trial court denied.

Plaintiff first argues that the trial court erred in granting defendant’s motion for summary disposition regarding the religious discrimination claim. A trial court’s decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff’s claim. *Spiek, supra*, p 337. In evaluating a motion for summary disposition brought under this subsection, a court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

Plaintiff alleges that defendant engaged in disparate treatment in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, by terminating his employment because of his religious beliefs. Specifically, plaintiff presents his testimony that he and McGhee had a conversation in which they discussed religion, and that McGhee told him that he did not believe in plaintiff’s religious beliefs. Plaintiff claims that McGhee then treated him differently by not being friendly and not speaking with him in the morning. Because we do not consider McGhee’s behavior to constitute direct evidence of religious discrimination, but merely a disagreement surrounding religious beliefs, we apply the *McDonnell Douglas*¹ prima facie method of proving intentional discrimination. See *Harrison v Olde Financial Corp*, 225 Mich App 601, 606-607; 572 NW2d 679 (1997). This requires plaintiff to show that (1) he was a member of a protected class; (2) he was subject to an adverse employment action; (3) he was qualified for the position; and (4) other similarly situated employees outside the protected class were not affected by the employer’s adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

In this case, plaintiff has failed to identify the protected class in which he is a member, and has failed to show that he was treated differently than another nonclass member employee for the same or similar conduct. Plaintiff does not identify the protected class of which he is a member. Apparently, plaintiff contends it is sufficient to allege that he is a member of a protected class merely because McGhee stated that he did not agree with plaintiff’s religious beliefs; however, this is insufficient. Furthermore, at deposition, plaintiff refused to disclose his church or religious beliefs claiming that it would be prejudicial. Regarding whether plaintiff was treated differently than nonclass members for the same or similar conduct, plaintiff failed to clearly address this issue. It appears that plaintiff’s argument is that he was treated differently from McGhee because McGhee was not terminated; however, plaintiff did not identify any individual that had discussed religion with McGhee, but yet was not fired for abandoning his post. Plaintiff has clearly failed to establish a prima facie case of religious discrimination.

Assuming plaintiff has established a prima facie case of religious discrimination, plaintiff has failed to show that defendant’s legitimate reason for termination was a pretext. *Harrison, supra*, p 608. McGhee testified that he removed plaintiff from the Yellow Freight account because plaintiff had abandoned his post for approximately five hours, and not because of plaintiff’s religious beliefs. In an

¹ *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

affidavit, Claude Wood stated that he was employed as a security guard for defendant and saw plaintiff abandon his post. Wood reported plaintiff's absence to McGee. According to defendant's employee rules and regulations, a copy of which was signed by plaintiff, defendant had the right to terminate an employee for leaving a post of duty before being relieved or being absent from a post without permission or justification. Plaintiff offered no evidence to rebut the affidavit of Wood or the testimony of McGhee. Therefore, the trial court did not err in granting defendant's motion for summary disposition regarding the religious discrimination claim.

Plaintiff also argues that the trial court abused its discretion when it denied plaintiff discovery of McGhee's religious beliefs. First, we note that plaintiff failed to present to this Court the trial court's decision, set forth in a transcript, to deny plaintiff's motion to compel discovery of McGhee's religious beliefs. Failure to provide the relevant transcripts, as required by MCR 7.210(B)(1)(a), will constitute a waiver of the issue because this Court is otherwise unable to review the trial court's reasoning. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). In any event, we discern no abuse of the trial court's discretion because McGhee's religious beliefs are not relevant to plaintiff's claim of religious discrimination.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition regarding the "breach of promise" claim. This claim is founded on the allegation that defendant promised to reassign or rehire plaintiff after he was terminated. However, plaintiff has failed to overcome his at-will employment with defendant. Both the employment policies and practices handbook and the employee rules and regulations acknowledgment form signed by plaintiff clearly show that plaintiff was an at-will employee. Further, plaintiff has not specified who told him that he would be reassigned or rehired, and, the documentation indicates that it may be modified only in writing by defendant's president. Accordingly, plaintiff has failed to overcome the at-will nature of his employment. *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993); *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627; 473 NW2d 268 (1991).

Plaintiff further argues that the trial court erred when it granted defendant's motion for summary disposition regarding the misrepresentation claim. Plaintiff's misrepresentation claim is based on defendant's alleged promise to reassign or rehire him. To establish a claim of misrepresentation, a plaintiff must show: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation it was known to be false or it was made recklessly without any knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff should act on it; (5) the plaintiff acted in reliance on it; and (6) the plaintiff suffered injury as a result. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992), quoting *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Plaintiff claims that he had a conversation with a person in defendant's Southfield office a couple of days after McGhee had told plaintiff that he was fired. The person told plaintiff that plaintiff was a good worker and that the company would find him another job. Assuming that plaintiff can establish that a promise was made for future employment, plaintiff did not present any evidence that the promise

was made in bad faith. Therefore, the trial court did not err in granting summary disposition in favor of defendant.

Plaintiff's last issue is that the trial court abused its discretion when it denied plaintiff's motion to amend his complaint. We again note that plaintiff has failed to file with this Court the transcript of the trial court's hearing on plaintiff's motion, as required by MCR 7.210(B)(1)(a). In any event, we find that the trial court did not abuse its discretion in denying the motion to amend the complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Generally, a court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). In this case, we find that the trial court properly denied plaintiff's motion to amend the complaint based on prejudicial delay and futility. *Weymers, supra*, p 658. Plaintiff did not move to amend the complaint until after the trial court granted summary disposition in favor of defendant; however, plaintiff had been aware of the facts relating to the motion to amend well before defendant had filed its motion for summary disposition. Moreover, the proposed amendments were futile because they added no substantive claims to the complaint. Accordingly, we find no abuse of discretion on the part of the trial court in denying plaintiff's motion to amend the complaint.

Affirmed.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Robert B. Burns