STATE OF MICHIGAN

COURT OF APPEALS

IAYPO MONTGOMERY,

Plaintiff-Appellant,

v

EAST DETROIT PUBLIC SCHOOLS and EAST DETROIT BOARD OF EDUCATION,

Defendants-Appellees.

UNPUBLISHED
May 19, 2009

No. 283398
Macomb Circuit Court
LC No. 2006-003625-CD

Before: Servitto, P.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants, thereby dismissing plaintiff's complaint. We affirm.

On appeal, plaintiff argues that the trial court erred in dismissing his retaliation and race discrimination claims under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, his retaliation claim under the Whistle Blower's Protection Act (WBPA), MCL 15.361 *et seq*, his breach of employment contract claim and his claim for intentional infliction of emotional distress (IIED).

We review a trial court's decision to grant or deny a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In doing so we consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

I. Plaintiff's CRA and WBPA Retaliation Claims

The CRA prohibits an employer from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding or hearing under the act. MCL 37.2701(a); *Feick v Monroe County*, 229 Mich App 335, 344; 582 NW2d 207 (1998). To establish a prima facie case of retaliation under the CRA, a plaintiff must establish that "(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). Similarly, to establish a prima facie case of retaliation under the WBPA, a plaintiff must similarly show that (1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998).

In regard to plaintiff's retaliation claim under the CRA, plaintiff alleged that he was suspended three and one-half days in retaliation for uncovering a subordinate's embezzlement, and that his position was eliminated in retaliation for uncovering a subordinate's embezzlement and/or for filing an EEOC racial discrimination claim. Under the CRA:

> 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. [MCL 37.2701(a).]

Here, uncovering and reporting a subordinate's embezzlement does not implicate activity *under the CRA*, and thus is not a protected activity. See *Barrett v Kirtland Community College*, 245 Mich App 306, 318; 628 NW2d 63 (2001). However, filing an EEOC racial discrimination claim may be protected activity under the CRA. See *Feick, supra* at 344. Thus, plaintiff's only remaining retaliation claim under the CRA is that his position was wrongly eliminated in retaliation for filing an EEOC racial discrimination claim.

In regard to plaintiff's retaliation claim under the WBPA, plaintiff has cited one event that would qualify as an adverse employment action; having his job eliminated. *Chandler, supra* at 399. Plaintiff alleges that his job was eliminated in retaliation for uncovering a subordinate's embezzlement and/or for filing an EEOC racial discrimination claim. It is undisputed that plaintiff was asked by the police to participate in their investigation of Nancy Clement's alleged embezzlement. Plaintiff's participation in the embezzlement incident, as well as the filing of an EEOC racial discrimination claim are therefore both considered to be protected activities under the WBPA. MCL 15.362; *Chandler, supra* at 399. Plaintiff's retaliation claim under the WBPA comprises whether his position was wrongly eliminated in retaliation for uncovering a subordinate's embezzlement and/or for filing an EEOC racial discrimination claim.

Accordingly, a prima facie case of retaliation under the CRA has been made if plaintiff can establish a causal connection between filing an EEOC claim and the elimination of his position. *DeFlaviis, supra*, at 436. Further, a prima facie case of retaliation under the WBPA has been made if plaintiff can establish a causal connection between filing an EEOC claim and participating in an embezzlement investigation and the elimination of his position. *Chandler, supra*, at 399.

Here, plaintiff has established that he uncovered, reported and participated in the subsequent investigation of Clement's embezzlement in April 2006. There is also no dispute that plaintiff filed an EEOC claim of racial discrimination on May 4, 2006. Defendants admittedly

became aware that plaintiff filed an EEOC claim on May 24, 2006, and plaintiff learned his position was going to be eliminated on June 15, 2006.

In *Garg v Macomb County Comm Hosp*, 472 Mich 263, 286; 696 NW2d 646 (2005), our Supreme Court reiterated that, "in order to show causation in a retaliatory discrimination case, '[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action.'" quoting *West v Gen Motors Corp*, 469 Mich 177, 186, 665 NW2d 468 (2003).

Here, plaintiff has presented no evidence beyond coincidence to establish a causal connection between the protected activities and the subsequent elimination of his position. In fact, the evidence presented tends to show that defendants were considering eliminating plaintiff's position in February 2006, which was well before any of plaintiff's protected activity took place. Further, only after conducting an analysis to determine whether plaintiff's duties could be assumed by already existing personnel did the board follow through with Bruce Kefgen's prior recommendation to address a $230,000 budget deficit by eliminating plaintiff's position.

We reject plaintiff's contention that there was no budget deficit and that defendants "finagled the 'budget' in an attempt to couch [p]laintiff's termination as economically necessary." Although plaintiff maintains that the district's revenue had increased in the 2006-2007 fiscal year, plaintiff wholly ignores whether necessary annual expenses had also increased, which would result in a budget deficit. Thus, we conclude that plaintiff has failed to establish a causal connection between his engagement in a protected activity and the subsequent adverse employment actions. Accordingly, the trial court did not err when it concluded that defendants' decision to eliminate plaintiff's position did not constitute retaliation under either the CRA or the WBPA. *Chandler, supra* at 399; *DeFlaviis, supra* at 436; See also *Barrett, supra, at* 316-317.

II. Plaintiff's Breach of Contract Claim

Plaintiff next argues that because defendants failed to provide notice (as required by MCL 380.1229) that his employment contract was not being renewed, the trial court erred when it dismissed his breach of contract claim as a matter of law. We disagree. As previously discussed, we review a trial court's decision to grant or deny a motion for summary disposition de novo. *Dressel, supra* at 561.

MCL 380.1229 provides:

> (2) . . . If written notice of nonrenewal of the contract of a [non-tenured administrator] is not given at least 60 days before the termination date of the contract, the contract is renewed for an additional 1-year period.
>
> (3) A notification of nonrenewal of contract of a person described in subsection (2) may be given only for a reason that is not arbitrary or capricious. The board shall not issue a notice of nonrenewal under this section unless the affected person has been provided with not less than 30 days' advance notice that the board is considering the nonrenewal together with a written statement of the reasons the board is considering the nonrenewal. After the issuance of the written statement,

> but before the nonrenewal statement is issued, the affected person shall be given the opportunity to meet with not less than a majority of the board to discuss the reasons stated in the written statement. . . . If the board fails to provide for a meeting with the board, or if a court finds that the reason for nonrenewal is arbitrary or capricious, the affected person's contract is renewed for an additional 1-year period. . . .

The statutory requirements do "not apply to nontenured school administrators who are laid off for economic reasons." *Roberts v Beecher Community School District*, 143 Mich App 266, 268-269; 372 NW2d 328 (1985). Where "a school board's action in dismissing an administrator is genuinely mandated by economic conditions, the potential for arbitrary and capricious behavior is all but precluded." *Id*., at 269.[1]

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[1] Former MCL 380.132 provided.

> (1) The board shall employ a superintendent of schools if 12 or more teachers are employed. If less than 12 teachers are employed, the board 5 may employ a superintendent of schools. The superintendent shall possess the qualifications prescribed in section 1246. The contract with the superintendent shall be for a term, not to exceed 3 years, fixed by the board.
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> (2) The board may employ assistant superintendents, principals, assistant principals, guidance directors, and other administrators who do not assume tenure in position, for terms, not to exceed 3 years, fixed by the board and shall define their duties. The employment shall be under written contract. Notification of nonrenewal of contract shall be given in writing at least 90 days prior to the contract termination date or the contract is renewed for an additional l-year period.
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> (3) The superintendent shall:
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> > (a) Recommend in writing teachers necessary for the schools.
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> > (b) Suspend a teacher for cause until the board may consider the suspension.
> >
> > (c) Supervise and direct the work of the teachers and other employees of the board.
> >
> > (d) Classify and control the promotion of pupils.
> >
> > (e) Recommend to the board the best methods of arranging the course of study and the proper textbooks to be used.

(continued…)

Here, the evidence presented establishes that defendants had been considering eliminating plaintiff's position for some time, and when faced with a budget deadline and a $230,000 deficit, the board adopted a last minute budget, which among other things, followed Kefgen's recommendation to eliminate plaintiff's position. As mentioned, plaintiff has presented no evidence to rebut defendants' evidence that (1) the board was faced with a $230,000 deficit that it had to account for before it could legally operate for the 2006-2007 fiscal year, and (2) plaintiff's position was eliminated based on economic reasons. Therefore, the trial court did not err when it concluded that defendants' failing to meet the notice requirements did not constitute a breach of plaintiff's employment contract.

III. Plaintiff's CRA Race Discrimination Claim

Plaintiff next argues that the trial court erred when it concluded that plaintiff failed to establish a racial discrimination claim under the CRA. Again, we disagree. As previously discussed, we review a trial court's decision to grant or deny a motion for summary disposition de novo. *Dressel, supra* at 561.

Under the CRA, an employer may not fail or refuse to fire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of religion, race, color, national origin, age, sex, height, weight or marital status. MCL 37.2202(1)(a); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002). To establish a prima facie case of discrimination, a plaintiff must establish (1) that he is a member of a protected class, (2) was subjected to an adverse employment action, and (3) others, similarly situated and outside the protected class, were treated differently for the same or similar conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997); *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999) (citations omitted).

Plaintiff, who is a member of a protected class,[2] has cited two events that would qualify as adverse employment actions; being suspended without pay for three and one-half days and having his job eliminated and not receiving a severance package. *Id*. at 311-312. In regard to the complained of adverse actions, we conclude that plaintiff has failed to establish that other

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> (f) Make written reports to the board and to the state board at least annually in regard to matters pertaining to the educational interests of the school district.
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> (g) Assist the board in matters pertaining to the general welfare of the school and perform other duties which the board may require.
>
> (h) Put into practice the educational policies of the state board and of the board within the means provided by the board.

[2] All employees are inherently members of a protected class because all persons may be discriminated against. *Haynie v Department of State Police*, 468 Mich 302, 308; 664 NW2d 129 (2003).

similarly situated employees, outside of his protected class, were treated more favorably under similar circumstances. Although no employee was identically situated as plaintiff, who was defendants only "controller," twenty other individuals (all Caucasian) lost their jobs between March 2006 and August 2006, including Kim Rocht, whose position as "clerk/payroll person" was the most similar to plaintiff's position. Like plaintiff, no evidence has been presented that any of these individuals received a severance package. The only individual that received a $100,000 severance package was Pat Salemi, whose non-similar position, assistant superintendent of curriculum, was eliminated in the previous year in an effort to help balance the budget. Plaintiff has therefore failed to establish a prima facie case that defendants racially discriminated against him when they eliminated his position without offering him a severance package. *Town, supra* at 695; *Wilcoxon, supra* at 361; See also *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802-804 (CA 6, 1994) (holding that a supervisor and a non-supervisor were not similarly situated employees for purposes of a discrimination claim).

Finally, we conclude that neither Robert Parsons, plaintiff's supervisor, nor Clement were similarly situated employees treated more favorably than plaintiff under similar circumstances. There is no dispute that plaintiff was suspended for three and one-half days without pay for insubordination, while neither Parsons, nor Clement were ever suspended without pay in regard to the embezzlement incident. Unlike plaintiff, however, Parsons never ignored a direct order from his superior. In fact, plaintiff has not presented any evidence that would suggest that Parsons acted in a manner that would require disciplinary action. Furthermore, although Clement admittedly embezzled money from defendants, for which she was never suspended without pay, Clement's situation was not similar to plaintiff's situation. Clement was on vacation while the embezzlement allegations were being investigated, and upon her return, she immediately resigned when given the option of either resigning or being terminated, and thus, suspension was not necessary. Plaintiff has therefore failed to establish a prima facie case that defendants racially discriminated against him when they suspended him without pay for three and one-half days for insubordination. *Town, supra* at 695; *Wilcoxon, supra* at 361.

IIII. Plaintiff's IIED Claim

Plaintiff's final argument on appeal is that the trial court erred when it dismissed his IIED claim as a matter of law. Once again, we disagree. As previously discussed, we review a trial court's decision to grant or deny a motion for summary disposition de novo. *Dressel, supra* at 561.

To prevail on an IIED claim, the plaintiff must show that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that proximately caused the plaintiff to suffer severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* Whether the conduct in question is extreme and outrageous is a question for the court. *Van Vorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004).

As noted by the trial court, defendant's treatment of plaintiff, which included positive acts such as informing plaintiff that they were considering eliminating his position, and encouraging him to apply for the director of fiscal services position, as well as negative acts of

suspending him without pay for insubordination, and a last minute elimination of his position, were "nothing out of the ordinary." Plaintiff has therefore failed to present evidence that could lead a rational trier of fact to conclude that plaintiff was treated outside the bounds of decency, in a manner that could "be regarded as atrocious and utterly intolerable in a civilized community." The trial court therefore did not err when it found as a matter of law that plaintiff failed to establish an IIED claim. MCR 2.116(C)(10); *Powelson, supra* at 234.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra