STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1731

Craig J. DeBerg,
Appellant,

vs.

RSM McGladrey, Inc.,
a Delaware corporation, et al.,
Respondents.

Filed October 7, 2008
Reversed and remanded
Klaphake, Judge

Hennepin County District Court
File No. 27 CV-0703473

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Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Craig J. DeBerg filed an administrative charge with the Minnesota Department of Human Rights (the department) alleging age discrimination against his former employer, respondents RSM McGladrey, Inc., and McGladrey & Pullen, LLP

(collectively "McGladrey"). Without notifying the department, appellant subsequently began a civil action asserting these same claims against McGladrey and a claim of tortious interference with contract against respondent Donald Natenstedt. Upon receipt of notice of the suit from respondents, the department withdrew the administrative charges.

On respondents' motion, the district court granted summary judgment in favor of respondents, concluding that appellant's civil action was time-barred and that his tortious interference with contract claim was preempted by the Minnesota Human Rights Act (the act), Minn. Stat. §§ 363A.001-.38 (2006).

Because (1) the provisions of the act toll the statute of limitations during the time an administrative charge is pending before the department, (2) appellant's failure to notify the department was cured by respondents' notice to the department before its motion to dismiss, and (3) genuine issues of material fact preclude summary judgment on the tort claim, we reverse and remand to the district court.

FACTS

McGladrey employed appellant from 1993 to December 9, 2005, as a certified public accountant. Respondent Natenstedt became the managing director of McGladrey's Minneapolis offices in 2004.

In 2005, McGladrey hired Gail Robertson, who was in her thirties, to assist appellant, who was then 50 years old. Shortly after this, McGladrey proposed new, less attractive compensation arrangements to appellant. At the same time, various managers made remarks to appellant, which he perceived to be age related. One partner said he did

not think appellant could continue to produce at historic levels; several managers asked him how long he expected to continue working; and someone told appellant that he needed professional coaching to help him deal with younger people.

In October 2005, the manager of SCEU, another unit of McGladrey, approached appellant about working for that unit under his current compensation terms. In order to do so, appellant had to secure the approval of Natenstedt. This approval was apparently not forthcoming. On December 9, 2005, appellant made a counterproposal for a new compensation agreement to McGladrey. Instead, McGladrey terminated appellant's employment and placed Robertson in his position.

On December 8, 2006, appellant filed an administrative charge with the Minnesota Department of Human Rights (the department), alleging age discrimination in employment. On February 20, 2007, while this charge was pending, appellant served a summons and complaint asserting one count of age discrimination against McGladrey and one count of tortious interference with contract against Natenstedt. Appellant did not notify the department, as required by Minn. Stat. § 363A.33, subd. 1(3).

On March 7, 2007, an employee of respondents' attorney, Linda Elias, contacted the department to learn the status of the administrative charge. The charge was still pending and Elias informed the department that appellant had begun a civil action. On March 8, 2007, the department notified the parties that it had withdrawn the administrative action. On March 13, 2007, respondents initiated a motion to dismiss for failure to state a claim upon which relief can be granted. On May 7, 2007, appellant filed a response with additional material outside of the pleadings, including the charge filed

with the department, affidavits of service, and the department's termination letter. Respondents filed a reply memorandum and attached Elias' affidavit.

The district court heard the motion on May 14, 2007. The district court's July 3, 2007 order granted summary judgment to respondents and dismissed the complaint with prejudice, stating that appellant's civil action was time-barred because appellant initiated the suit more than one year after the occurrence and failed to give the commissioner notice. The court further held that appellant's tort claim was preempted by the act.

On July 30, 2007, the district court denied appellant's motion to reconsider. Appellant moved on August 17, 2007, for relief from the judgment under Minn. R. Civ. P. 60.02; respondents filed a reply on August 28, 2007. Without waiting for a decision, appellant filed a notice of appeal of the district court's grant of summary judgment with this court on September 7, 2007. On September 18, the district court denied appellant's motion, permitting this appeal to proceed.

D E C I S I O N

Standard of Review

When a party asserts the defense that a pleading fails to state a claim upon which relief can be granted, and matters outside the pleadings are presented to and not excluded by the court, the court may treat the motion as one for summary judgment. Minn. R. Civ. P. 12.02. The court must give the parties a reasonable opportunity to present all pertinent information. *Id.* If, upon consideration of all record evidence, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law, the court must issue a summary judgment. Minn. R. Civ. P. 56.03. We review the district court's

grant of summary judgment to determine if there are any genuine issues of material fact and if the district court erred in its application of the law. *Antone v. Mirviss*, 720 N.W.2d 331, 334 (Minn. 2006).

Statute of Limitations

Minn. Stat. § 363A.28 provides that an aggrieved party may file an administrative charge with the department or bring a civil action alleging violations of the act. *Id.*, subd. 1. In either case, the administrative charge or the civil action must be brought within one year of the occurrence providing a basis for the action. *Id.*, subd. 3. The one-year limitation is tolled during the time the parties engage in a dispute resolution process. *Id.*

Minn. Stat. § 363A.33 sets forth the requirements for bringing a private civil action to redress an unfair discriminatory practice. Either the commissioner or the aggrieved party can file an action in district court. *Id.*, subd. 1. In addition, a party can file a civil action (1) within 45 days of department notification that it will not be pursuing a charge; (2) within 45 days of receiving notification that the commissioner has reaffirmed a determination of no probable cause; or (3) if more than 45 days have elapsed since filing and no hearing has been held or agreement reached, upon notice to the commissioner of the party's intent to file a civil action. In the latter case, the suit must be commenced within 90 days after giving notice. *Id.*

The district court concluded that the civil action must be filed within one year of the discriminatory occurrence. We disagree. An initial claim, either administrative or civil, must be made within a year of occurrence. Minn. Stat. § 363A.28, subd. 3. But Minn. Stat. § 363A.33, subd. 1(1-3), which permits the filing of a civil suit upon certain

conditions, cannot be reconciled with the rest of the statute unless it acts to extend the time for filing a civil suit, in effect tolling the statute of limitations. *See* Minn. Stat. § 645.17 (2006) (setting forth presumption that legislature intended all parts of a statute to be effective).

For example, the commissioner is required to make a determination of probable cause within one year of filing of a charge, with limited exceptions. Minn. Stat. § 363A.29, subd. 2. Under the district court's reasoning, a party would be unable to bring a civil action within 45 days of receiving notice from the department of its decision not to pursue a charge, even if the department had taken up to a year to make that determination, despite Minn. Stat. § 363A.33, subd. 1(1). This would make the provisions of Minn. Stat. § 363A.33 largely meaningless, surely not a result intended by the legislature. *See* Minn. Stat. § 645.08 (prohibiting construction of statutes "inconsistent with the manifest intent of the legislature").

The timely filing of an administrative charge effectively tolls the limitations period as to a subsequent civil action if the aggrieved party follows the statutory procedure. Thus, the district court's blanket conclusion that appellant was barred from bringing a civil action more than one year after the occurrence is erroneous.

Respondents suggest that appellant's civil action is barred because he neglected to give notice to the commissioner before filing his suit. Minn. Stat. § 363A.33, subd. 1(3), permits an aggrieved party to file a civil action if more than 45 days have passed since the filing of the administrative charge, as long as no hearing has been held, the commissioner has not entered into a conciliation agreement, the commissioner is given

notice of the charging party's intent to bring a civil action, and a civil action is commenced within 90 days of the notice. The clear intent of these requirements is to avoid duplicative actions while encouraging speedy resolution of a claim, either administratively or by civil action. Here, although appellant failed to give notice of his intent to bring a civil action, no hearing was pending before the commissioner, and appellant's civil action was commenced within 90 days of the filing of the administrative charge. Further, respondents did give the commissioner notice, with the result that there were no duplicative proceedings.

Respondents urge us to consider *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712 (Minn. App. 1997). In *Sullivan,* this court concluded that the district court lacked personal jurisdiction when the aggrieved party failed to comply with the provision requiring the party to commence a civil action within 90 days after giving the commissioner notice of intent to file a civil action. *Id.* at 716 (construing earlier version of the act). *Sullivan* involved greater issues of timeliness than those before us here; Sullivan not only failed to notify the department, but also initiated a valid civil action well more than 90 days after notice to the department. *Id.* at 715. Further, Sullivan provided a copy of his complaint to the department only after his employer had answered the complaint. *Id.* at 714.

Here, by contrast, appellant timely commenced his civil action and notice was provided to the department before respondent replied to complaint, albeit by respondent. Thus, we do not find *Sullivan* controlling. We are instructed to liberally construe the provisions of the act "for the accomplishment of the purposes thereof." Minn. Stat.

§ 363A.04. Because the district court's order had the effect of depriving appellant of any forum for consideration of his discrimination claim, even though appellant's action did not violate the act's twin goals of avoiding duplicative action and speedily resolving controversies, we reverse the district court's order. *See* Minn. Stat. § 363A.02, subd. 1 (stating that act's purpose is "to secure for persons in this state, freedom from discrimination . . . in employment because of . . . age").[1]

Tortious Interference with Contract

The district court concluded that appellant's tortious interference with contract claim against respondent Natenstedt was preempted by Minn. Stat. § 363A.04, which states that the act provides the exclusive remedy for actions declared unfair under the act. In his complaint, appellant alleged that "[u]pon information and belief, [respondent] Natenstedt intentionally and improperly interfered with the prospective contractual relationship" between appellant and the California division of McGladrey. Appellant did not plead a specific basis or motivation for Natenstedt's interference with the prospective contract. The district court reasoned that "if Natenstedt had an improper motive for denying [appellant's] transfer, his motive would have been age discrimination."

[1] We note by analogy that the federal requirement that a "right-to-sue" letter be issued prior to the filing of a Title VII complaint has been viewed as a condition precedent, rather than a jurisdictional matter, and that the subsequent issuance of a right-to-sue letter cures the defect. *See, e.g., Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1351 (9th Cir. 1984 (stating that right-to-sue letter issued almost two years after filing of civil action cured any defect); *Pinkard v. Pullman-Standard*, 678 F.2d 1211, 1215 (5th Cir. 1982) (same); *Henderson v. E. Freight Ways, Inc.*, 460 F.2d 258, 259 (4th Cir. 1972) (stating that issuance of "suit-letter" validated pending action, particularly in light of remedial nature of statute).

To sustain a tortious interference with contract claim, the aggrieved party must show that (1) there was a contract; (2) the wrongdoer knew of the contract; (3) the wrongdoer intentionally procured the breach of the contract; (4) this action was taken without justification; and (5) damages resulted from the wrongful act. *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 389 (Minn. App. 2003). "A corporate officer or manager has a qualified privilege to interfere in contracts between the corporate entity and its employees." *Id.* It is presumed that the manager is acting on behalf of the corporation and that without such a qualified privilege, an individual may be reluctant to perform personnel duties. *Id.* But a manager or officer is liable for interference with contract if the actions are outside the scope of his or her duties; actions motivated by actual malice, bad faith, spite, personal ill-will, hostility, or deliberate attempts to harm are not privileged. *Id.*

The district court assumed that Natenstedt acted improperly based on appellant's age, but nothing in the complaint supports that limitation, which states only that Natenstedt acted "intentionally and improperly." Appellant alleges a prima facie case of tortious interference with contract, which is sufficient under notice pleadings requirement. *See* Minn. R. Civ. P. 8.05. A matter is preempted under Minn. Stat. § 363A.04 when identical facts provide a basis for both a violation under the act and a secondary cause of action. *See Vaughn v. Nw. Airlines, Inc.*, 558 N.W.2d 736, 745 (Minn. 1997); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377-78 (Minn. 1990). But in *Ferguson v. Michael Foods, Inc.*, 74 F. Supp. 2d 862 (D. Minn. 1999), the court discounted the claim that the act preempted the aggrieved party's tortious interference

with contract claim, noting "[b]ecause the conduct prohibited under [the act] does not necessarily equate with individual conduct actionable under a tortious interference theory, [the act] cannot be considered automatically preemptive of [plaintiff's] interference claim." *Id.* at 874.

This record is inadequate to determine if appellant relies on the same facts to establish both his age discrimination claim and tortious interference with contract claim. Appellant asserts that he was not prepared to withstand summary judgment when the district court converted respondents' motion to dismiss to summary judgment, and in this instance that may be true. It is possible that Natenstedt acted out of personal animus or ill will, rather than age bias; no evidence about Natenstedt's motive was included in the summary judgment documents, and the court denied appellant's motion to supplement the record under Minn. R. Civ. P. 60. The parties had not engaged in discovery that could have fleshed out appellant's claim. Under these circumstances, genuine issues of material fact remain, and the district court erred by granting summary judgment, particularly without giving the parties the opportunity to supplement the record.

The district court erred by granting summary judgment. Appellant's age discrimination claim is not barred by the statute of limitations or the tardy compliance with the statutory notice requirement. The facts in the record are insufficient to determine if his tortious interference with contract claim is preempted by the Minnesota Human Rights Act and, therefore, summary judgment is not appropriate.

Reversed and remanded.