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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

TERRY MCGINNIS, *Plaintiff/Appellant*,

v.

ARIZONA PUBLIC SERVICE COMPANY, *Defendant/Appellee*.

No. 1 CA-CV 17-0486
FILED 6-7-2018

Appeal from the Superior Court in Maricopa County
No. CV2016-094740
The Honorable David M. Talamante, Judge

AFFIRMED

COUNSEL

Gregory Law Group, Gilbert
By Robert M. Gregory
Counsel for Plaintiff/Appellant

Ogletree, Deakins, Nash, Smoak & Stewart PC, Phoenix
By Nonnie Shivers, Sasha H. Ellis
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Michael J. Brown joined.

T H O M P S O N, Judge:

¶1 Terry McGinnis appeals from the dismissal of his complaint against his former employer, Arizona Public Service Company ("APS"), asserting wrongful termination and intentional infliction of emotional distress. For the following reasons, we affirm.

FACTUAL[1] AND PROCEDURAL BACKGROUND

¶2 McGinnis worked for APS as a journeyman electrician. Because he was a member of the International Brotherhood of Electrical Workers Local No. 387 (the "Union"), a collective bargaining agreement between the Union and APS governed the terms of his employment.

¶3 In October 2015, McGinnis was driving an APS truck and attached trailer from a substation in Flagstaff when one of the trailer tires blew out. McGinnis changed the tire and drove to the "Flagstaff Yard," leaving the trailer there. The same trailer had experienced a tire blowout three weeks earlier, while driven by a different electrician.

¶4 Thereafter, the APS Director of Transportation (the "Director") contacted the Leader of Substation Construction (the "Construction Leader"), who was also McGinnis's supervisor, regarding the two blowouts. The Director opened an investigation, and mechanics inspecting the trailer determined that one of the tires was underinflated and another had a deep gash on the sidewall. The Director was apprised of what the mechanics found.

¶5 Thereafter, McGinnis was sent to the Flagstaff Yard to retrieve the trailer, without having been told about the tire problems. McGinnis noticed the underinflated tire and asked a mechanic to inflate it, which was accomplished. McGinnis did not notice the sidewall gash. Unaware of this potential safety issue, McGinnis then drove the truck and trailer eighty miles to the Cholla Power Plant, without incident, where the tires were replaced.

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[1] In reviewing a dismissal for failure to state a claim, we consider the facts alleged in the complaint to be true and "view them in the light most favorable to the plaintiff to determine whether the complaint states a valid claim for relief." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 552 (App. 1995) (citation omitted).

¶6 At a meeting thereafter, the Construction Leader personally attacked McGinnis accusing him of failing to properly inspect the truck and trailer before driving. After learning that both the Director and the Construction Leader knew about the tire problems but had failed to warn him, McGinnis contacted his Union representative to file a grievance. He informed the Union representative that APS had violated its Safety Handbook. McGinnis also informed his supervisor "that APS had violated Arizona law by recklessly endangering his life."

¶7 APS denied the grievance for lack of evidence. Thereafter, McGinnis alleges that his supervisor harassed him and created a hostile work environment.

¶8 One month after the denial of his grievance, McGinnis was terminated after he tipped a crane over. Although he admits that he tipped the crane over, he alleges that "the conditions that gave rise to the crane tipping over were out of [his] control."

¶9 Following his termination, McGinnis filed a complaint against APS in superior court alleging negligence, negligent failure to warn, and wrongful termination. After APS moved to dismiss McGinnis' complaint pursuant to Arizona Rule of Civil Procedure ("Rule") 12(b)(6), the superior court granted McGinnis an opportunity to amend his complaint. The amended complaint included claims for wrongful termination and intentional infliction of emotional distress but omitted the negligence claims. APS then moved to dismiss the amended complaint pursuant to Rule 12(b)(6), and the court granted its motion.

¶10 McGinnis appeals from the dismissal, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2018).

DISCUSSION

¶11 This court reviews *de novo* the dismissal of a complaint for failure to state a claim pursuant to Rule 12(b)(6). *See Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7 (2012). In doing so, we "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008) (citation omitted). Dismissal is appropriate only if, as a matter of law, the plaintiff "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman*, at 356, ¶ 8 (citation omitted).

I. Wrongful Termination

¶12 Pursuant to the Arizona Employment Protection Act ("AEPA") section 23-1501, an "employment relationship is severable at the pleasure of either the employee or the employer." A.R.S. § 23-1501(A)(2) (2018). The statute goes on to establish limited circumstances in which an employee can sue for wrongful termination. *See* A.R.S. § 23-1501(A)(3); *Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 196 Ariz. 597, 599, ¶ 4 (App. 2000) (explaining that "[t]he legislature's stated intent in enacting § 23–1501 was to limit the circumstances in which a terminated employee can sue an employer"). McGinnis alleges that two of those circumstances exist in this case. *See* A.R.S. § 23-1501(A)(3)(a), (c)(ii).

A. A.R.S. § 23-1501(A)(3)(c)(ii)

¶13 McGinnis first asserts a claim for wrongful termination pursuant to § 23-1501(A)(3)(c)(ii). This provision establishes an employee's right to bring a claim for wrongful termination if he or she is terminated in retaliation for disclosing to management that the employer "has violated, is violating or will violate the Constitution of Arizona or the statutes of this state." A.R.S. § 23-1501(A)(3)(c)(ii). The burden of proving that he has a cause of action under § 23-1501(A)(3)(c)(ii) falls on McGinnis. *See Taylor v. Graham County Chamber of Commerce*, 201 Ariz. 184, 194, ¶ 37 (App. 2001) (explaining that the AEPA places the burden on the employee "to prove his or her employment relationship is not severable at will because it falls within one of the statutorily limited circumstances").

¶14 In *Galati v. America West Airlines, Inc.*, 205 Ariz. 290 (App. 2003), the plaintiff argued that "a whistleblower who has reported violations of federal law" could bring a claim for wrongful termination. *See id*. at 292, ¶ 6. This court disagreed and held that § 23-1501(A)(3)(c)(ii) provides protection only to employees who had disclosed "violations of the Arizona Constitution and Arizona statutes." *Id.* at 293, ¶ 10.

¶15 Here, the amended complaint alleges that McGinnis "informed his direct supervisor . . . that APS had violated Arizona law by recklessly endangering his life." McGinnis contends that this disclosure satisfies the requirement of § 23-1501(A)(3)(c)(ii). The amended complaint, however, does not identify any Arizona statute or constitutional provision that APS violated, and no such violation is apparent from the face of the complaint.

¶16 In responding to APS's motion to dismiss, McGinnis argued that he reported to his supervisor that APS "had placed his life in danger,

in violation of [A.R.S.] § 28-981." That statute establishes a driver's responsibility to ensure that his or her vehicle is in "a safe mechanical condition that does not endanger the driver or other occupant or a person on the highway." A.R.S. § 28-981(A)(2). McGinnis does not explain how this duty extends to APS as an employer.**]** In his response to APS's motion, McGinnis also argued that APS violated A.R.S. § 13-1201, Arizona's criminal endangerment statute. A.R.S. § 13-1201 (2018). The amended complaint, however, does not allege the statutory elements of this crime.[2]

¶17 Because the amended complaint does not establish that McGinnis disclosed to his supervisor a violation of Arizona statutory or constitutional law prior to his termination, the superior court properly found that the complaint did not state a claim for relief under § 23-1501(A)(3)(c)(ii).

B. A.R.S. § 23-1501(A)(3)(a)

¶18 McGinnis next asserts a claim for wrongful termination pursuant to § 23-1501(A)(3)(a). This provision establishes an employee's right to bring a claim for wrongful termination if the employer has "terminated the employment relationship . . . in breach of an employment contract." A.R.S. § 23-1501(A)(3)(a).

¶19 In order to state a claim for relief under § 23-1501(A)(3)(a), the plaintiff must establish the existence of an employment contract, which requires:

> [A] written contract . . . setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise **expressly restricting the right of either party to terminate the employment relationship**. Both the

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[2] "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13-1201(A). "Recklessly" means:

> [T]hat a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

A.R.S. § 13-105(10)(c) (2018).

> employee and the employer must sign this written contract, or this written contract must be set forth in the employment handbook or manual or any similar document distributed to the employee**, if that document expresses the intent that it is a contract of employment**, or this written contract must be set forth in a writing signed by the party to be charged.

A.R.S. § 23-1501(A)(2) (emphasis added).

¶20 The amended complaint alleges that "APS's Safety Handbook constituted an implied-in-fact contract between APS and Plaintiff." Specifically, the complaint alleges that the "contract was formed when [McGinnis] agreed to be employed by APS and APS offered to [McGinnis], as a term of his employment, protection guidelines promulgated in the Safety Handbook." The complaint further states that "[i]n the foreword to the Safety Handbook, Donald E. Brandt, APS's Chairman of the Board of Directors and Chief Executive Officer, noted that the Safety Handbook is 'a fundamental roadmap for working safely, and helps ensure all APS employees are on the same page from a safety perspective.'"

¶21 The portions of APS's Safety Handbook that McGinnis relies upon do not establish an intent to make the Safety Handbook "a contract of employment" or to restrict "the right of either party to terminate the employment relationship." A.R.S. § 23-1501(A)(2). Accordingly, McGinnis has not satisfied the statutory requirements for a valid breach of contract claim under § 12-1501(A)(3)(a). *See Taylor*, 201 Ariz. at 194, ¶ 38 (explaining that a personnel manual did not satisfy the statutory prerequisites necessary to maintain "a viable action for breach of contract" under the AEPA).

¶22 On appeal, McGinnis argues that the APS Safety Handbook was "incorporated into" the Collective Bargaining Agreement between APS and the Union, and that federal courts have "consistently characterized" collective bargaining agreements as contracts "providing the terms of employment for union employees." To the extent that McGinnis's claim for wrongful termination is dependent upon the Collective Bargaining Agreement, it is preempted by federal law. *See United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 368 (1990) ("[A]ny state-law cause of action for violation of collective-bargaining agreements is entirely displaced by federal law."); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405–06 (1988) ("[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state

law . . . is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute.").

¶23 We conclude that the allegations of McGinnis's amended complaint fail to allege the existence of a written contract that (1) expressed an intent to be an employment contract and (2) restricted APS's ability to terminate McGinnis as required by § 12-1501(A)(2). Accordingly, the superior court properly found that the amended complaint did not state a claim for relief under § 23-1501(A)(3)(a).

II. Intentional Infliction of Emotional Distress

¶24 McGinnis also asserts a claim for intentional infliction of emotional distress. Specifically, the amended complaint alleges that McGinnis suffered:

> [S]evere emotional distress, including anger, distrust of his supervisor and other APS representatives who knew about the defective tire, sleeplessness, worry about whether such an incident would occur again, and worry about whether his life was in danger, as a result of the blowout . . . and APS's failure to protect him from potential injury when [it] easily could have.

McGinnis argues that it was egregious for the Director and the Construction Leader to knowingly let him "drive a vehicle that was not only unsafe, but which had a risk of blowing out and exposing [him] to substantial risk of harm, if not death."

¶25 To establish a claim for intentional infliction of emotional distress, McGinnis must show that: (1) APS's conduct was "extreme and outrageous," (2) APS either intended to cause McGinnis emotional distress or recklessly disregarded the near certainty that distress would result from its conduct, and (3) APS's conduct actually caused severe emotional distress. *See Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 149 Ariz. 76, 78–79 (1986). McGinnis can recover for intentional infliction of emotional distress only if APS's actions are "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." *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix*, 118 Ariz. 473, 476 (1978) (citation and quotations omitted).

¶26 The superior court makes a "preliminary determination" regarding "whether the conduct may be considered so outrageous and

extreme so as to permit recovery." *Nelson v. Phoenix Resort Corp*., 181 Ariz. 188, 199 (App. 1994)(citation omitted); *see also Patton*, 118 Ariz. at 476 ("It is the duty of the court as society's conscience to determine whether the acts complained of can be considered sufficiently extreme and outrageous to state a claim for relief.") (citation omitted). After considering the allegations in the amended complaint, we conclude that the court properly determined that APS's alleged conduct was not so outrageous in character or so extreme in degree as to go beyond all possible bounds of decency. Accordingly, we affirm the court's decision that the amended complaint did not state a claim for intentional infliction of emotional distress.

CONCLUSION

¶27 For the foregoing reasons, we affirm the superior court's dismissal of the amended complaint. Although APS requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01, we deny this request. We award costs to APS upon compliance with Arizona Rule of Civil Appellate Procedure 21.

AMY M. WOOD • Clerk of the Court
FILED: AA