STATE OF MICHIGAN

COURT OF APPEALS

YONGPING JIANG,

Plaintiff-Appellant,

v

THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, a Michigan corporation, THE UNIVERSITY OF MICHIGAN MEDICAL CENTER, and ALVIN H. SCHMAIER, M.D.,

Defendants-Appellees.

UNPUBLISHED
October 2, 1998

No. 199714
Washtenaw Circuit Court
LC No. 93-000490 NZ
Court of Claims
LC No. 94-015459 CM

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

This case is before this Court pursuant to our Supreme Court's order remanding this matter for consideration as on leave granted. *Jiang v Univ of Michigan Bd of Regents*, 453 Mich 962; 557 NW2d 312 (1996). At issue is a dual order entered by Judge Kurtis T. Wilder, sitting as the Washtenaw Circuit Court with regard to plaintiff's circuit court complaint and as the Court of Claims with regard to plaintiff's complaint in that court, which awarded defendants summary disposition pursuant to MCR 2.116(C)(10), thereby dismissing plaintiff's suit alleging improper discharge from employment. We affirm.

Plaintiff first argues that summary disposition of his claim under the Whistleblowers' Protection Act (WPA), MCL 15.362; MSA 17.428(2), was improper because a genuine issue of material fact existed. We disagree.

In order to establish a prima facie case under the WPA, plaintiff must demonstrate that (1) he was engaged in a protected activity as defined by the act, (2) he was subsequently discharged, and (3) there existed a causal connection between the protected activity and the discharge. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 325; 559 NW2d 86 (1996). On

appeal, this Court reviews the evidence de novo to determine whether plaintiff has established a prima facie case under the act. *Id.* Although MCL 15.362; MSA 17.428(2), protects an employee who is about to report a violation of a law or rule to a public body, but is discharged before he can do so, *Lynd v Adapt, Inc*, 200 Mich App 305, 306; 503 NW2d 766 (1993), one seeking protection under the "about to report" language of the act must prove his intent by clear and convincing evidence, *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 400; 572 NW2d 210 (1998). In the present case, plaintiff did not report the alleged violations to a "public body" before or after his discharge, stating in his deposition testimony only that it was his "plan" to do so. The trial court's award of summary disposition was therefore proper.

Plaintiff next contends that the trial court erred by dismissing his claims for wrongful and retaliatory discharge on the ground that these claims were preempted by the WPA. In *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993), the Court held that a public policy claim is sustainable only where there exists no "applicable statutory prohibition against discharge in retaliation for the conduct at issue." The trial court correctly held that because the WPA does contain such a prohibition, plaintiff's wrongful and retaliatory discharge claims were barred.

Plaintiff further maintains that he alleged a prima facie case of ethnic discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and the trial court therefore erred by dismissing his discrimination claim. However, our review of the evidence, including plaintiff's deposition testimony, compels the conclusion that he has not "provided enough evidence to create a rebuttable presumption of discrimination," *Harrison v Olde Financial Corp*, 225 Mich App 601, 608; 572 NW2d 679 (1997), and the trial court's award of summary disposition was proper.

Plaintiff further argues that the trial court erroneously dismissed his defamation claim on the ground that there had been no publication to unauthorized individuals of plaintiff's threat toward his supervisor, defendant Schmaier, nor was there a manifestation of actual malice or false statement that would create any issue of fact. We agree with the trial court. There is nothing in the record supporting plaintiff's premise that Schmaier led university authorities to believe that plaintiff's threat was directed against Schmaier's physical well-being. Furthermore, Schmaier had a qualified privilege to inform university personnel regarding plaintiff's conduct, *Merritt v Detroit Memorial Hosp*, 81 Mich App 279, 285; 265 NW2d 124 (1978), and plaintiff has failed to demonstrate the actual malice necessary to recover, *Tumbarella v Kroger Co*, 85 Mich App 482, 493-494; 271 NW2d 284 (1978). There was no error.

As his next allegations of error, plaintiff contends that the trial court erred by dismissing his breach of contract and negligence claims. The contract claim is based on his averment that he was not provided with the benefits promised him by Schmaier, while the negligence allegation emanates from his assertion that Schmaier failed to act in a reasonable and prudent manner as his "mentor."

Plaintiff's first argument is unpersuasive for two reasons. First, the terms of plaintiff's employment are set out in the university's April 9, 1992, letter to him and are not subject to variation by whatever oral representations Schmaier may have made. Cf. *Sittler v Ford Bd of Control of the Michigan College of Mining & Technology*, 333 Mich 681, 686-687; 53 NW2d 681 (1952);

Martin v East Lansing School Dist, 193 Mich App 166, 182-183; 483 NW2d 656 (1992). Second, because plaintiff's discharge was not wrongful, it was not a breach of contract for the university to fail to allow him to continue using its laboratory facilities until June 30, 1993.

The dismissal of plaintiff's negligence claim was also proper. As plaintiff's supervisor, defendant Schmaier was required to disagree with, criticize and discipline plaintiff if necessary, and Schmaier's performance of these duties does not constitute negligence. Furthermore, it is well established that plaintiff cannot bring a tort action for nonperformance of a contract. *Hart v Ludwig*, 347 Mich 559, 562-566; 79 NW2d 895 (1956). Finally, "there is no separate and distinct duty imposed by law to evaluate or correctly evaluate employees . . . ." *Ferrett v General Motors Corp*, 438 Mich 235, 246; 475 NW2d 243 (1991).

Plaintiff additionally contends that Judge Wilder abused his discretion by refusing to disqualify himself in view of the fact that his wife was employed by the University of Michigan in the office of the general counsel. Plaintiff has failed to preserve this issue for appellate review because he did not appeal Judge Wilder's decision to the chief judge of the circuit, and we therefore decline to consider it. MCR 2.003(C)(3)(a); *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989).

We need not reach plaintiff's final allegation of error, that Judge Wilder erred by dismissing plaintiff's circuit court claims against defendant Schmaier, because the issue is moot in view of the award of summary disposition for defendants regarding all claims in circuit court and the Court of Claims.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff