STATE OF MICHIGAN

COURT OF APPEALS

CHATHAPURAM S. RAMANATHAN,

Plaintiff-Appellant,

v

BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY and LEON CHESTANG,

Defendants-Appellees.

UNPUBLISHED
April 12, 2002

No. 227726
Wayne Circuit Court
LC No. 98-810999-NO

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In this action alleging violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and interference with a contractual relationship, plaintiff appeals as of right the circuit court's orders granting summary disposition to defendants. We affirm in part, reverse in part and remand.

In 1992, defendant Wayne State University (WSU) hired plaintiff as an associate professor in the School of Social Work. Plaintiff is of Asian Indian descent. In October 1993, plaintiff met with his supervisor, Leon Chestang, Dean of the School of Social Work, to share concerns about interactions with Professor Alison Favorini, plaintiff's colleague. Plaintiff alleged that Favorini had made discriminatory remarks to him based on his race and culture. After the meeting, plaintiff sent a follow-up memorandum to Chestang, indicating that he planned to file a complaint with WSU's Equal Opportunity Office (EEO), as Chestang had suggested during their meeting. In turn, Chestang responded by memorandum, denying that he had recommended that plaintiff approach the EEO. He instead characterized the situation as plaintiff's problem in communicating with others.

In October 1993, plaintiff filed a complaint with WSU's EEO, where he alleged that defendants had revoked travel funds. Plaintiff also listed two race-based comments made by Favorini. He contended that he was discriminated against based on his gender[1] and race or national origin.

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[1] Plaintiff has abandoned the gender discrimination claim.

In two faculty meetings in late 1993, Chestang allegedly characterized a sitar as an "obscure" instrument and commented about a sacrificial lamb and added that he would not want to be "curried." Several other faculty members heard these remarks and felt that they were negatively directed toward plaintiff's race.

In May 1994, plaintiff filed another complaint with the EEO alleging discrimination and a hostile work environment. That complaint reflected that plaintiff believed that he was the victim of continuing retaliation for his previous complaints to the EEO. Plaintiff also contended that his salary was less than that of other similarly-situated faculty members. He believed that Chestang repressed a positive performance evaluation to avoid giving plaintiff a merit increase and that others had been encouraged to denigrate him. In his reply memorandum to the EEO, Chestang denied all of the allegations. Thereafter, the EEO issued a Notice of Disposition, where it closed the matter with no finding of probable cause for discrimination or retaliation.

On October 31, 1994, before the expiration of his teaching contract,[2] plaintiff applied for tenure at WSU. As a result of plaintiff's tenure application, Chestang solicited external review letters from various individuals. Nine individuals responded with review letters in December 1994 and January 1995; seven of those reviewers positively evaluated plaintiff's credentials and work. The School of Social Work committee recommended in January 1995 that plaintiff receive tenure. The school committee had reviewed eight of the nine review letters. One letter, the so-called "after-acquired" letter, was received after the committee had met. Nonetheless, Chestang submitted that letter, in addition to the other eight, to the university committee. Chestang also submitted his own recommendation to that committee. In it, he did not recommend plaintiff for a tenured position on the basis of the quality of plaintiff's scholarship and teaching.

In early 1995, after a complaint from plaintiff, WSU agreed to credit plaintiff with two years of service from his previous teaching post, which enhanced plaintiff's credentials in his tenure application. WSU denied plaintiff's request for tenure in a letter dated April 27, 1995. Defendants explained that WSU had not awarded tenure to plaintiff because of the quality of his scholarship and teaching. Plaintiff's employment contract with defendants expired on May 21, 1995.

In July 1995, plaintiff filed a grievance with his teaching union based on the denial of tenure to him. WSU agreed that plaintiff's file could be resubmitted for a de novo hearing. In a follow-up letter, defendants explained to plaintiff that WSU again denied tenure to him because his teaching performance was only average and several external auditors had questioned the quality of his scholarship.

In the fall of 1995, plaintiff began work in a non-tenured position at Southwest Missouri State University (SMSU). Plaintiff resigned in the spring of 1996 and returned to Michigan, where he established a private practice.

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[2] Plaintiff's contract was set to expire on May 21, 1995.

Plaintiff filed the instant suit in April 1998, alleging race discrimination in violation of the CRA, retaliation in violation of the CRA, and tortious interference with a contractual relationship. Defendant Chestang moved for partial summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10) on plaintiff's claim of contract interference, asserting that the claim must fail because no contract of employment existed between plaintiff and SMSU. At the hearing on Chestang's motion, plaintiff's counsel admitted that she had made a mistake in the complaint by alleging tortious interference with a *contractual* relationship, where the body of the allegation clearly indicated that the claim was for interference with an *expectancy* or a *business relationship*. The trial court granted the motion.

Defendants thereafter moved for summary disposition on the remaining counts, asserting that those claims were barred by the statute of limitations and that no evidence supported either claim. Defendants argued that all of the incidents that plaintiff claimed were racial harassment occurred more than three years before plaintiff filed the instant suit. Defendants then asserted that the evidence did not support plaintiff's claim of discriminatory animus based on plaintiff's race or national origin. The trial court granted that motion as well.

On appeal, defendants repeatedly assert that plaintiff's claims are barred by the statute of limitations because plaintiff's claims accrued more than three years[3] before he filed the instant suit. For example, defendants contend that plaintiff's retaliation claim accrued on December 13, 1993, when Chestang first notified plaintiff that his contract would not be renewed, or on January 23, 1995, when Chestang authored the negative recommendation. Weighing against those calculated dates is the fact that plaintiff continued to be employed by WSU through May 1995. Further, although Chestang authored the negative recommendation in January 1995, WSU did not deny tenure to plaintiff until April 1995. Plaintiff also received a second de novo tenure hearing and WSU again denied tenure to him on June 12, 1996. Under the totality of these circumstances, plaintiff's suit filed in early April 1998 was timely. Therefore, had the circuit court granted summary disposition to defendants under MCR 2.116(C)(7), it would have done so in error.[4]

Defendants also moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). We review motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the circuit court and the parties relied on documents outside the pleadings, this Court will treat the motions as having been granted pursuant to MCR 2.116(C)(10). See *Pippin v Atallah*, 245 Mich App 136, 141; 626 NW2d 911 (2001). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120. A litigant's mere pledge to

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[3] The statute of limitations for a claim under the CRA is three years after the cause of action accrued. MCL 600.5805(8).

[4] It does not appear from the record that the circuit court granted summary disposition to defendants on this basis.

establish at trial that a genuine issue of material fact exists is not sufficient to overcome summary disposition. *Id.*

I

Plaintiff first asserts that he sufficiently demonstrated a genuine issue of material fact regarding his claim of a hostile work environment. We agree.

To establish a case of hostile work environment, a plaintiff must show:

> (1) that the employee belonged to a protected group, (2) that the employee was subjected to communication or conduct on the basis of [race], i.e., that, 'but for the fact of her [race], she would not have been the object of harassment,' (3) that the employee was subjected to unwelcome conduct or communication [involving race], (4) that the unwelcome [racial] conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment, and (5) respondeat superior. [*Meyer v City of Center Line*, 242 Mich App 560, 573; 619 NW2d 182 (2000).]

The dispositive issue here involves element four, whether the alleged racial communications and/or conduct were intended to, or substantially interfered with, plaintiff's employment or created a hostile work environment.

Whether the unwelcome conduct created a hostile work environment "shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996) (citation omitted). Consequently, to survive summary disposition, plaintiff had to present documentary evidence that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances, the comments made to him were sufficiently severe or pervasive to create a hostile work environment. See *id.*

We reject plaintiff's claim that a hostile work environment arose from other employees' alleged interference with plaintiff's office, his office door, or his mail. Further, plaintiff has not overcome defendants' reasonable explanation for the disparity in salary between plaintiff and another faculty member. The fact that defendants denied some of his travel funding requests also is not a basis for plaintiff's hostile work environment claims. Further, we reject plaintiff's assertion that one isolated conversation with Associate Dean Phyllis Vroom comprises a hostile work environment. A "stray remark" cannot give rise to liability. See *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 540; 620 NW2d 836 (2001).

Plaintiff has created, however, an issue of fact regarding a hostile working environment in violation of the CRA based on the comments from Favorini and Chestang's response to those comments. Plaintiff's alleged interactions with Favorini create a triable issue of fact. Further, the fact that Chestang apparently did nothing to investigate plaintiff's complaints could support a finding that Chestang contributed to the hostile work environment.

Moreover, Chestang, plaintiff's supervisor, made two discriminatory remarks at faculty meetings. Although the sitar comment is seemingly innocuous, the fact that it occurred at a faculty meeting could support plaintiff's claim that Chestang intended the comment to be derogatory to plaintiff's Asian Indian heritage. On its face, the curried lamb comment, made at a staff meeting, also could be seen as derogatory to plaintiff's race. Indeed, other faculty members testified that they believed it was derogatory.

The essence of a hostile work environment action is that "one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one [race] that they alter the conditions of employment for them." *Radtke v Everett*, 442 Mich 368, 385; 501 NW2d 155 (1993). Generally, a single incident of discrimination, unless extreme, will not create an offensive, hostile, or intimidating work environment. *Id.* at 395. Therefore, a plaintiff typically must prove that: (1) a continuous or periodic problem existed or a repetition of an episode was likely to occur and (2) the employer failed to rectify a problem after adequate notice. *Id.*

Here, plaintiff has presented evidence that he told Chestang about Favorini's discriminatory comments. Chestang's reply memorandum demonstrates that he did not take action and, indeed, Chestang characterized the situation as "a problem in communication" between plaintiff and Favorini. It thus cannot be said that defendants exercised reasonable care to prevent and promptly correct the problem. Further, Chestang himself then exacerbated the problem by making inappropriate comments during staff meetings.

In defendants' motion for summary disposition on this point, they do not present documentary evidence to rebut plaintiff's claim, but rather, label plaintiff as "hypersensitive." In his response to that motion, plaintiff rebutted the assertion that he was merely hypersensitive with the deposition testimony of three other WSU professors, whose testimony could support his contention that Chestang's comments were derogatory and could confirm that plaintiff was not merely overly sensitive. Therefore, a genuine issue of material fact exists on this point. See *Meyer, supra.*

II

Plaintiff also contends that the trial court erred in granting defendants' motion for summary disposition regarding disparate treatment and intentional discrimination due to his race. A review of the record reflects that plaintiff has demonstrated that a genuine issue of material fact exists on this point.

A prima facie case of discrimination requires a showing that: (1) the employee was a member of a protected class, (2) the employee was discriminated against with respect to employment, (3) the defendant employer was predisposed to discriminate against persons in the class, and (4) the defendant acted upon that disposition when making the employment decision. *Downey v Charlevoix Co of Road Commr's*, 227 Mich App 621, 631; 576 NW2d 712 (1998).

Plaintiff is a member of a protected minority class, which satisfies the first element of the prima face case. In relation to the remaining elements, plaintiff claims that he has direct evidence of discrimination. "Direct evidence" has been defined as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001)

(citation omitted). Racial slurs by a decision maker constitute direct evidence of discrimination and are sufficient to place the plaintiff's case before the jury. See *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997). Under *Kresnak*, the two comments from Chestang, plaintiff's supervisor, constitute direct evidence of racial discrimination. Where a plaintiff has direct evidence of discrimination, the plaintiff may go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case. *Hazle, supra* at 462.

The facts here present a question of mixed motives. In other words, defendants' decisions not to renew plaintiff's contract and not to grant him tenure could have been based on several factors, both legitimate factors and illegally discriminatory factors. This Court has adopted the federal framework in analyzing "mixed motive" cases and has explained that the following principles of proof apply in a typical single-plaintiff, mixed-motive employment discrimination case:

> First, as with circumstantial discrimination cases, in a case involving direct evidence of discrimination, the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Second, whatever the nature of the challenged employment action, the plaintiff must establish evidence of the plaintiff's qualification (or other eligibility) and direct proof that the discriminatory animus was causally related to the decision maker's action. Upon such a presentation of proofs, an employer may not avoid trial by merely "articulating" a nondiscriminatory reason for its action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. [*Harrison v Olde Financial Corp*, 225 Mich App 601, 612-613; 572 NW2d 679 (1997).]

Here, plaintiff has produced evidence suggesting that Chestang had a discriminatory animus against him because of his Asian Indian heritage. Plaintiff's credentials, the seven favorable external review letters, and the positive recommendation from the school committee demonstrate plaintiff's qualifications. Plaintiff has presented proof that Chestang was displeased with plaintiff's complaints about Favorini and his EEO complaints. Under these facts, defendants may not avoid trial by merely articulating a nondiscriminatory reason for their actions.

Alternately, the Court in *Harrison, supra*, observed that the employer also may assert that, even if the plaintiff's allegations are true, the employer would have reached the same decision without consideration of the discriminatory factors. *Id.* at 613. Thus, an employer may escape liability if it can show that it would have made the same decision even in the absence of discrimination. *Id.* at 611. Defendants, however, continue to argue that they had legitimate, nondiscriminatory reasons for deciding as they did, which is not enough to avoid trial under *Harrison*. In light of all the evidence, plaintiff's claims of discrimination based on race should have been presented to the factfinder. See *Graham v Ford*, 237 Mich App 670, 681; 604 NW2d 713 (1999).

Where, as here, plaintiff has presented direct evidence of discrimination, the case need not be analyzed under the *McDonnell Douglas*[5] structure. *Harrison, supra.* We therefore do not examine the parties' arguments pursuant to *McDonnell Douglas*.

Finally, assuming arguendo that an inference arises under the "same actor" theory, that inference is not enough to support defendant's motion for summary disposition. We decline to accept defendants' invitation to rely on this inference where, in deciding a motion for summary disposition, all reasonable inferences are resolved in the *nonmoving* party's favor. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

III

This issue examines whether plaintiff established a prima facie case of retaliation under the CRA. We opine that plaintiff has created a genuine issue of material fact that Chestang retaliated against him for complaining to the EEO.

To establish a prima facie case of retaliation under the CRA, a plaintiff must show: (1) that he or she engaged in a protected activity, (2) that the defendant knew that the plaintiff had done so, (3) that the defendant took an adverse employment action and (4) that a causal connection existed between the protected activity and the adverse employment action. *Meyer, supra* at 568-569.

As noted, a plaintiff first must establish that he or she engaged in activity protected under the act. *Barrett v Kirtland Cmty College*, 245 Mich App 306, 318; 628 NW2d 63 (2001). The CRA specifically prohibits retaliation or discrimination where an individual has opposed a violation of the CRA or made a charge under the CRA. In this case, plaintiff made a claim of discrimination with WSU's EEO. The question then becomes whether plaintiff's EEO claim suffices as protected activity. MCL 37.2701(a) provides that protected activity occurs where a "person opposed a violation of this act, or . . . has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." Given the breadth of that language, plaintiff's EEO claim meets the first requisite element in *Meyer, supra*.

The next element is that defendant had actual knowledge that the employee had taken the action. Chestang argues that he was unaware until June 1995 that plaintiff actually had complained to the EEO. That assertion is undercut, however, by plaintiff's memorandum of October 22, 1993, where he informed Chestang that he would be filing a complaint with the EEO. Further, Chestang responded to the EEO in June 1994, before his negative tenure recommendation and contract non-renewal. Accordingly, plaintiff has satisfied the actual knowledge element.

Plaintiff then must show that defendants took an employment action adverse to him. The record reflects that plaintiff's contract was not renewed and he was not awarded tenure. Those facts comprise adverse employment actions such that plaintiff has met this element.

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

Finally, plaintiff must show that a causal connection existed between his protected complaint to the EEO and the adverse employment actions. Plaintiff's EEO complaint was pending when Chestang decided not to renew plaintiff's contract. Also, plaintiff's EEO complaint had been rejected by the EEO within four months of Chestang's negative recommendation regarding tenured employment. One could infer from the evidence that Chestang reached the complained-of decisions to retaliate against plaintiff for his EEO complaint. See *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 443; 566 NW2d 661 (1997). Thus, plaintiff has come forward with sufficient evidence to create a genuine issue of material fact as related to Chestang's decision not to recommend plaintiff for tenure.

To rebut plaintiff's assertions, defendants merely conclude that plaintiff cannot establish any causal link. Yet plaintiff has created a genuine issue of material fact sufficient to survive summary disposition. Plaintiff has shown that his school colleagues recommended him for tenure and that seven out of nine external reviewers recommended him for tenure. Yet Chestang did not recommend him. Plaintiff has shown that animosity existed between him and Chestang over the Favorini situation. Plaintiff has shown that Chestang made disparaging remarks about him at faculty meetings. Plaintiff has shown that his contract was not renewed. All of these events occurred after plaintiff filed his EEO complaint. Those facts are sufficient to overcome summary disposition on this point.

Based on the preceding analysis, we reverse the grant of summary disposition to defendants on Counts I and II of plaintiff's complaint. Plaintiff has created a genuine issue of material fact regarding his hostile work environment and discrimination claims.

IV

We next examine whether the "continuing violations" doctrine applies to toll the statute of limitations. Under the totality of the circumstances here, we rule that the doctrine applies.

The question presented in this issue is whether plaintiff's claims survive the statutory limitations period for discriminatory harassment and hostile environment violations of the CRA, which is three years after the cause of action accrued. MCL 600.5805(8); *Womack-Scott v Dep't of Corrections*, 246 Mich App 70, 74; 630 NW2d 650 (2001). Plaintiff asserts that his claims survive the statute of limitations via the "continuing violations doctrine," which applies to claims filed under the CRA. *Stewart v Fairlane Cmty Mental Health Centre*, 225 Mich App 410, 422; 571 NW2d 542 (1997).

As an initial matter, we reject plaintiff's argument that defendants waived the statute of limitations defense for failure to raise it as required by the court rules. Defendants raised the limitations defense in their answer to plaintiff's complaint.

Analysis of this issue involves the determination of which event in plaintiff's WSU career comprised the accrual of his action. Plaintiff alleges that his action accrued when he learned that WSU denied tenure to him, which was in April 1995. In a discriminatory termination case, the time of accrual commences on the date that the employer terminated the plaintiff. See *Womack-Scott*, *supra* at 74-75. Correspondingly, the time of accrual here commenced on the date that defendants refused to give tenure to plaintiff. WSU first denied

plaintiff's request for tenure via a letter dated April 27, 1995; plaintiff filed suit in early April 1998, which is within the three-year statutory period.

Defendants, however, argue that plaintiff's action accrued as to those elements when the alleged harassment and/or hostile environment occurred, which was in the fall of 1993. To rebut this argument, plaintiff relies on the continuing violations doctrine. In *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), our Supreme Court recognized an exception to the statute of limitations for continuing violations, which applies where an employee challenges a series of allegedly discriminatory acts that are so sufficiently related as to constitute a pattern. Where continuing violations are present, the statute of limitations does not bar a plaintiff's claims, provided one of the acts occurred within the limitation period.

The *Sumner* Court also set forth the factors to be considered in determining whether a continuing course of discriminatory conduct exists:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. [*Id*. at 538, quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).]

Here, the acts all involved discrimination from Chestang or other colleagues. The acts were not frequently recurring, as pointed out by defendants, who would limit the acts to those occurring in the fall of 1993 and ignore any subsequent acts. One question, then, is whether the acts in the fall of 1993 should have triggered plaintiff's awareness of the duty to assert his rights. The comments in 1993 were not of such a degree that plaintiff should have been aware of his duty. Given his academic credentials, plaintiff reasonably could have believed that defendants' discriminatory animus would not have extended to the tenure process.

Plaintiff bases his claim on the denial of his tenure application, which, like a termination of employment, has a degree of permanence. It triggered his search for another tenured position and triggered the time for him to assert his rights. See *Novak v Nationwide Mut Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999). See, also, *Meek v Michigan Bell Telephone Co*, 193 Mich App 340; 483 NW2d 407 (1991). Thus, plaintiff's claims are timely under the continuing violations doctrine.

V

Plaintiff next argues that defendants have not shown that they were entitled to summary disposition regarding future damages. The issue has been abandoned on appeal because it was insufficiently briefed. See *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

Even when considered on its merits, however, the issue provides no benefit to plaintiff. While it may be true that a plaintiff does not violate the duty to mitigate damages by refusing to accept a position that is an unreasonable distance from his home, *Rasheed v Chrysler Corp*, 445 Mich 109, 121; 517 NW2d 19 (1994), mitigation damages are deducted from damages *otherwise payable*. See, generally, *In re Estate of Prichard*, 169 Mich App 140, 153; 425 NW2d 744 (1988). Thus, the mitigation issue does not arise unless a defendant is liable for damages otherwise payable. Where the circuit court here summarily dismissed plaintiff's claims, plaintiff was not entitled to any damages. Defendants need not show that plaintiff failed to mitigate "zero" damages. Accordingly, this issue is irrelevant at this stage of the proceedings.[6]

VI

Plaintiff finally argues that he has created a genuine issue of material fact regarding his claim of tortious interference with a business expectancy. We disagree.

Plaintiff's complaint does not contain an allegation of tortious interference with a *business expectancy*. Rather, plaintiff's complaint alleges tortious interference with a *contractual relationship*. Indeed, at the motion hearing, plaintiff's counsel admitted a mistake in alleging tortious interference with a contractual relationship and contended that the claim actually was for interference with a business expectancy. Therefore, it is uncontested that plaintiff's claim of tortious interference with a contractual relationship fails.

The grant of a defendant's motion for summary disposition does not preclude amendment of a plaintiff's complaint. *Sharp v Lansing*, 238 Mich App 515, 523; 606 NW2d 424 (1999). Plaintiff, however, never moved in the court below to amend his complaint to reflect the business expectancy allegation. See *Collucci v Eklund*, 240 Mich App 654, 661 n 3; 613 NW2d 402 (2000). Issues not raised in the trial court are not preserved for review. *Koster v June's Trucking, Inc*, 244 Mich App 162, 168; 625 NW2d 82 (2000).

Even had plaintiff moved to amend his complaint, however, such an amendment would have been futile. See *Dampier v Wayne Co*, 233 Mich App 714, 734; 592 NW2d 809 (1999). The elements of tortious interference with a business relationship are:

> [T]he existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. . . . To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. [*BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (citations omitted).]

The evidence provided by plaintiff in response to Chestang's motion for summary disposition

[6] Upon remand, however, the mitigation issue may become relevant should the factfinder decide that plaintiff is entitled to damages.

does not establish the above elements. Plaintiff has not offered admissible evidence sufficient to show an intentional interference by Chestang that induced SMSU to breach that expectancy.

In ruling on a motion for summary disposition, a court should consider the substantively admissible evidence actually proffered in opposition to the motion. *Maiden, supra* at 121. In opposition to defendants' motion, plaintiff offered his own affidavit, where he alleged that Grant Hull of SMSU told him that Chestang had "bad mouthed" him to the SMSU Vice President. Evidence from plaintiff regarding his conversation with Hull about a conversation that Chestang had with the Vice President is inadmissible hearsay, which may not be considered in opposing a motion for summary disposition. See *Maiden, supra* at 125.

Plaintiff argues that this is a credibility issue that should not be decided on summary disposition. Before a jury may consider credibility, however, a genuine issue of material fact must exist. Without plaintiff's inadmissible hearsay evidence, the only evidence regarding Chestang's conversations with SMSU is from Hull's affidavit. In that affidavit, Hull denied that Chestang disparaged or insulted plaintiff on a personal or professional level. Further, Hull stated that nothing in his conversation with Chestang played any role in SMSU's decision not to extend an offer of tenured employment to plaintiff.

Because the court may not consider plaintiff's hearsay evidence, those facts from Hull stand unrebutted. Plaintiff therefore has not established a prima facie case of tortious interference with a business expectancy and the circuit court properly granted summary disposition to defendants on this point. Given that conclusion, we decline to address Chestang's additional defenses of qualified privilege and governmental immunity.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot