STATE OF MICHIGAN

COURT OF APPEALS

WALTER ROBERTS,

Plaintiff-Appellant,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST. JOSEPH MERCY HOSPITAL, and THERESA VETTESE,

Defendants-Appellees,

and

BRIAN DROZDOWSKI,

Defendant.

UNPUBLISHED
November 21, 2006

No. 258912
Washtenaw Circuit Court
LC No. 03-000179-NO

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition under MCR 2.116(C)(10) as to plaintiff's claims of defamation, tortious interference with an advantageous relationship, and age discrimination. We affirm.

This claim arises out of plaintiff's termination from, and subsequent reinstatement in, defendant Trinity Health-Michigan's (Trinity) residency program at St. Joseph Mercy Hospital (St. Joe's). Plaintiff alleges that the director of St. Joe's program, Dr. Theresa Vettese, defamed him and tortiously interfered with his business relationship with Wayne State University/Detroit Medical Center (WSU/DCM), where he was scheduled to begin a radiation oncology residency immediately following his one-year transitional residency at St. Joe's. Specifically, plaintiff argues that Vettese incorrectly informed WSU/DCM that plaintiff had been terminated from the program and that he would not finish the program on time, which resulted in his residency being given to another candidate, delaying plaintiff's residency at WSU/DCM by two years. Plaintiff also alleges that he was subjected to age-related discrimination in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 27.2102 *et seq*.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR

2.116(C)(10) tests the factual support for the claim. *Id*. A trial court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In ruling on a motion under MCR 2.116(C)(10), the trial court must view the pleadings, affidavits, and other documentary evidence in a light most favorable to the nonmoving party. *Id*.

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition under MCR 2.116(C)(10) because defendants' motion violated MCR 2.116(G)(4), which states as follows:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

More specifically, plaintiff asserts that the trial court should have rejected defendants' "global motion." We disagree.

Defendants clearly articulated in each subargument the counts that they were requesting that the trial court dismiss, as well as the specific grounds for dismissal. Defendants' pleadings were sufficient to provide plaintiff with ample notice of the bases for seeking summary disposition and were sufficient to allow plaintiff to defend against their motion. Plaintiff refers this Court to *Meyer v City of Center Line*, 242 Mich App 560; 619 NW2d 182 (2000), and *Int'l Brotherhood of Electric Workers, Local 58 v McNulty*, 214 Mich App 437; 543 NW2d 25 (1995), to support his argument. In both cases, the defendants not only did not specifically identify the issues they believed lacked genuine issues of material fact, they also failed to support their motions with documentary evidence. *Meyer*, *supra* at 574-575; *Int'l Brotherhood*, *supra* at 442-443. Here, defendants presented documentary evidence in support of their motion. Therefore, plaintiff's reliance on *Meyer* and *Int'l Brotherhood* is misplaced.

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition as to plaintiff's defamation and tortious interference claims under the doctrine of judicial nonintervention. We agree.

During the pendency of this appeal, our Supreme Court rejected the longstanding, judicially created doctrine of nonintervention – which precludes cases between a physician and a private hospital where the court is required to review the hospital's staffing decisions – concluding that it is "inconsistent with the statutory regime governing the peer review process enacted by the Legislature." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 678; 719 NW2d 1 (2006). It reasoned that "[t]he nonintervention doctrine, which, in some formulations, precludes all judicial review of contract and tort claims that might have some relationship to peer review, is inconsistent with the legislative mandate that covers protection of the peer review communicative process only." *Id*. at 679. Given the general rule of complete judicial retroactivity unless otherwise specified, *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586-587;

702 NW2d 539 (2005), the trial court's grant of summary disposition under the judicial nonintervention doctrine was erroneous. Because the result was nevertheless correct, we will not reverse on this basis. *H A Smith Lumber & Hardware Co v Decina* (*On Remand*), 265 Mich App 380, 385; 695 NW2d 347 (2005).

Next, plaintiff argues that the trial court erred in concluding that there was no genuine issue of material fact as to his defamation and tortious interference claims against Vettese. Plaintiff contends that the trial court erred in accepting Vettese's testimony that she spoke to Dr. Arthur Frazier, the director of WSU/DCM's program, only once in early February, after plaintiff had been terminated. Plaintiff asserts that Frazier testified that he spoke with her in January, before plaintiff had been terminated. Plaintiff asserts that a rational fact-finder, crediting Frazier's testimony over Vettese's, could conclude that Vettese was lying maliciously about plaintiff's status in St. Joe's program for the purpose of disrupting his career and preventing him from beginning his residency at WSU/DCM. We again disagree.

The elements of defamation are:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).]

"Substantial truth is an absolute defense to a defamation claim." *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001). Furthermore, "an employer has a qualified privilege to divulge information regarding a former employee to a prospective employer." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 79; 480 NW2d 297 (1991). A "[p]laintiff may overcome this qualified privilege only by showing that the statement was made with actual malice, that is, knowledge of its falsity or reckless disregard of the truth." *Id*.

It appears that Vettese's statements were at least substantially true. Plaintiff was terminated from St. Joe's program for unprofessional conduct. He was gone from the program for a month, and he was not scheduled to complete St. Joe's program until the end of July 2002 at the time that he was reinstated. Although plaintiff relies heavily on the timing of Vettese's statements to show that they were false, plaintiff's own pleadings are inconsistent as to the timing. In his response in opposition to defendants' motion for summary disposition, he argued that her statements were made both before plaintiff was terminated and after plaintiff was reinstated. Plaintiff relies on Frazier's testimony to contradict Vettese's timing, but Frazier was not clear on when he spoke with Vettese. Indeed, he stated at his deposition, "I don't recall the exact date that I talked to her [Vettese]. Maybe you have the time frame based on her recollection, but I thought it was in January." On the other hand, Vettese was clear that she spoke with Frazier in early February, before she made her decision to reinstate plaintiff. Plaintiff has not met his burden in showing that Vettese's statements were false.

Even if Vettese's statements were false, they were still qualifiedly privileged as statements made from an employer to a prospective employer. Therefore, plaintiff must show that Vettese made those statements with malice, i.e., she knew that her statements were false or

she made them without regard for their truthfulness. Plaintiff has made no such showing in this case.

As to his claim of tortious interference with his business relationship with WSU/DCM, plaintiff must show the following:

> "[1] the existence of a valid business relationship or expectancy, [2] knowledge of the relationship or expectancy on the part of the defendant, [3] and intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [4] 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. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." [*Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan* (*On Remand*), 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (ordinals added).]

Plaintiff failed to raise a genuine issue of material fact as to whether Vettese intentionally interfered with his business relationship with WSU/DMC because Vettese did not affirmatively act to interfere with plaintiff's relationship with WSU/DCM. To the contrary, it was Frazier who solicited the information from Vettese regarding plaintiff's status at St. Joe's.

Although judicial nonintervention may not be used as a basis for summary disposition on the facts of this case, summary disposition was otherwise properly granted to defendants as to plaintiff's defamation and tortious interference claims. We therefore decline to address defendant's arguments regarding alternate grounds for affirmance.

Finally, we reject plaintiff's argument that the trial court erred in dismissing his age discrimination claim under the ELCRA; specifically, the prohibition against age discrimination under MCL 37.2202(1)(a).

A plaintiff may bring a claim under the ELCRA based on disparate treatment or disparate impact discrimination on the basis of a number of classes, including age. *Wilcoxon v Minnesota Mining and Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). A disparate treatment claim is a claim for intentional discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Disparate treatment discrimination may be proved by direct or by circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is "'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), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

Plaintiff contends that he presented sufficient direct evidence of age discrimination to survive defendant's motion for summary disposition. Specifically, plaintiff relies on Vettese stating that she expected more of plaintiff because of his age and questioning how plaintiff could keep up with the demands of residency's call schedule, given that she was younger than him and

could not do it herself. These remarks were made some time before the termination decision and do not by themselves "require the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, *supra*. Presuming they could be so interpreted, plaintiff's performance problems and unprofessional behavior preclude plaintiff from showing that his age "was more likely than not a 'substantial' or 'motivating' factor in the decision." *Sniecinski*, *supra* at 133. For the same reason, in the absence of a showing of pretext, plaintiff cannot prevail under the burden-shifting analysis applicable to circumstantial evidence claims. *Id*. at 133-134.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis