

FILED: December 29, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHAEL COCCHIARA,
Plaintiff-Appellant,

v.

LITHIA MOTORS, INC.; and LITHIA MOTORS SUPPORT SERVICES, INC.,
Defendants-Respondents,

and

LITHIA DM, INC., dba Lithia Chrysler Jeep Dodge,
Defendant.

Jackson County Circuit Court
062731L7

A146452

Ronald D. Grensky, Judge.

Argued and submitted on September 21, 2011.

G. Jefferson Campbell, Jr., argued the cause for appellant. With him on the briefs was G. Jefferson Campbell, Jr., P.C.

Ryan J. Vanderhoof argued the cause for respondents. With him on the brief was Hornecker, Cowling, Hassen & Heysell, L.L.P.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

HADLOCK, J.

Affirmed.

1 HADLOCK, J.

2 Plaintiff, who used to work for defendants as a car salesman, alleges that he
3 sought less-stressful employment after he suffered a heart attack. Plaintiff asserts that
4 defendants promised to give him a "corporate" position that would accommodate his
5 needs and further claims that, in reliance on that promise, he turned down a job with a
6 different employer. This litigation followed defendants' later decision not to hire plaintiff
7 for the corporate job. Plaintiff's amended complaint included claims for fraudulent
8 misrepresentation, promissory estoppel, and violation of ORS 659A.112, which prohibits
9 employment discrimination on the basis of disability. The trial court granted defendants'
10 motion for summary judgment on the first two claims, plaintiff voluntarily dismissed the
11 statutory claim without prejudice, and this appeal followed. Because we agree that
12 defendants were entitled to summary judgment on the promissory estoppel and fraudulent
13 misrepresentation claims, we affirm.¹

14 We state the facts in the light most favorable to plaintiff, the nonmoving
15 party. See [Bastasch v. Hansen](#), 239 Or App 325, 327, 246 P3d 10 (2010) ("On appeal of
16 a grant of summary judgment, we review the record in the light most favorable to the
17 nonmoving party to determine whether there are any genuine issues of material fact and
18 whether the moving party is entitled to judgment as a matter of law."). Plaintiff asserts in
19 his declaration that he told defendants that he needed less stressful employment and had

¹ For ease of reading, we use the term "defendants" in this opinion to refer interchangeably to the two defendant-respondents, Lithia Motors, Inc., and Lithia Support Services, Inc., and to those defendants' individual agents, even though the individual agents are not themselves named defendants.

1 accepted a job with a different employer, the *Medford Mail Tribune*. According to
2 plaintiff, defendants then made the following representations to him: that plaintiff was
3 "too valuable" to defendants and should reject the *Medford Mail Tribune* job; that
4 defendants would give plaintiff a new "corporate" purchasing job that they believed
5 would meet plaintiff's needs and "accommodate [his] health disability"; and that he
6 should come in the next day to finalize paperwork for that new job, as a "mere formality."
7 In reliance on those assertions, plaintiff withdrew his acceptance of the job offer from the
8 *Medford Mail Tribune*. When plaintiff went to defendants' dealership the following day,
9 however, he discovered that he "had not been hired for the job but was merely being
10 interviewed for this new 'corporate' job." Plaintiff attempted to get the position that he
11 previously had been offered at the *Medford Mail Tribune* but was unsuccessful, and he
12 eventually ended up accepting employment that paid less than he would have been paid
13 in the corporate job with defendants.

14 As noted, plaintiff sued defendants for fraudulent misrepresentation,
15 promissory estoppel, and unlawfully discriminating against him on the basis of disability,
16 in violation of ORS 659A.112. Plaintiff's demands for economic damages related solely
17 to the wages that he claims he would have earned in the corporate job with defendants; he
18 did not claim damages associated with wages that he might have earned at the *Medford*
19 *Mail Tribune*. Defendants moved for summary judgment on the first two claims, arguing
20 that this court's decision in [Slate v. Saxon, Marquoit, Bertoni & Todd](#), 166 Or App 1, 999
21 P2d 1152, *rev den*, 330 Or 375 (2000), defeated those claims. According to defendants,
22 because the corporate job would have given plaintiff only "at will" employment, plaintiff

1 could not reasonably rely on defendants' alleged promise to give him that job.
2 Defendants also argued that, in any event, plaintiff had no claim for damages associated
3 with the alleged loss of the corporate job because defendants could have fired him from
4 that position at any time, even if they had hired him into it. *Cf. Slate*, 166 Or App at 7
5 (where the plaintiff had been promised at-will employment, "there could have been no
6 reasonable basis for reliance on and no substantial change of position that was
7 attributable to the promise *per se*"). The trial court granted defendants' motion for
8 summary judgment on the common-law claims and, after plaintiff voluntarily dismissed
9 his statutory claim, the trial court entered a general judgment in defendants' favor.

10 On appeal, plaintiff first argues that the declaration he submitted at trial
11 included averments sufficient to overcome defendants' summary judgment motion on his
12 fraudulent-misrepresentation claim. Plaintiff emphasizes two assertions in that
13 declaration: (1) that defendants repeatedly told him that he definitely had the corporate
14 job and, therefore, should not go to work at the *Medford Mail Tribune*; and (2) that, based
15 on the context in which the statements occurred, he reasonably believed that defendants
16 were offering him the corporate job "as an accommodation" for disability following his
17 heart attack. Plaintiff argues that Oregon statutes prohibiting disability discrimination
18 required defendants to give him the corporate job as an accommodation, and he contends
19 that the job therefore could not--as a matter of law--have constituted employment at will.
20 Accordingly, plaintiff concludes, he was entitled to rely on defendants' false
21 representations that he definitely had the corporate job, and he could recover damages
22 caused by that reliance. For similar reasons, plaintiff contends that the assertions in his

1 declaration were sufficient to defeat defendants' motion for summary judgment on his
2 promissory-estoppel claim.

3 In response, defendants assert that nothing in the record supports plaintiff's
4 claim that the corporate job would constitute anything other than at-will employment.
5 Consequently, they argue, this court's decision in *Slate* establishes that plaintiff could not
6 reasonably rely on defendant's alleged promise of employment and could not recover any
7 damages associated with defendants' failure to follow through on that alleged promise, on
8 either a promissory-estoppel or a fraudulent-misrepresentation theory. With respect to
9 plaintiff's argument that Oregon statutes required defendants to give plaintiff the
10 corporate position as an "accommodation job," differentiating this case from *Slate*,
11 defendants provide a two-fold response. First, defendants argue that "a job offered to a
12 disabled employee, even an 'accommodation job,' is still employment at-will." Second,
13 defendants argue that, even if they had a statutory obligation to accommodate plaintiff's
14 disability, that obligation "is only related to the third [statutory] claim for relief, which is
15 not the subject of this appeal." As explained below, we agree with defendants that *Slate*
16 controls. Accordingly, we affirm.

17 Because our decision in *Slate* guides our resolution of this case, we discuss
18 that opinion in some detail. The plaintiff in *Slate* had been a law clerk at the defendant
19 law firm, which offered him a position as an associate attorney, conditioned on the
20 plaintiff passing the Oregon bar examination and on the defendants' renewal of some
21 juvenile and indigent-defense contracts. 166 Or App at 3. Those conditions later were
22 met, yet the "defendants advised plaintiff that they were terminating the planned

1 employment arrangement, although plaintiff had not yet begun working for them." *Id.*
2 The plaintiff sued for breach of contract and promissory estoppel, claiming damages
3 associated with having taken the bar examination in Oregon, instead of in another
4 jurisdiction, and with having not sought alternative employment. *Id.* at 5. The trial court
5 granted summary judgment to the defendants, and we affirmed. *Id.* at 3.

6 Our holding in *Slate* turned on the at-will nature of the employment that the
7 defendants had offered the plaintiff. We held that the plaintiff could not establish any
8 breach of contract, as the defendants had promised him nothing other than employment
9 that was terminable at will. We also held, for two reasons, that the trial court correctly
10 had granted the defendants' motion for summary judgment on the plaintiff's promissory-
11 estoppel claim. First, because the promised employment was at will, "there could have
12 been no reasonable basis for reliance on" that promise. *Id.* at 7. In other words, the
13 plaintiff could not *reasonably* have understood that the promised employment would last
14 for any particular length of time. Second, any monetary losses that the plaintiff
15 experienced were not "attributable to the promise [of employment] *per se.*" *Id.* That is,
16 the plaintiff would have experienced the same losses if the defendants had hired him, but
17 had "discharged [him] immediately after he came to work rather than before." *Id.*
18 Because the plaintiff could not have recovered damages for being terminated from the at-
19 will job, he also could not have recovered damages from not having been hired into that
20 position. *Id.* at 7-8.

21 Here, too--momentarily leaving aside the disability-discrimination claim,
22 which we address later in this opinion--there is no genuine dispute about the at-will

1 nature of the promised employment. Defendants submitted evidence that the corporate
2 job was an at-will position, and plaintiff has acknowledged that he and defendants
3 engaged in "no discussion as to the job tenure status of the new corporate job."
4 Consequently, plaintiff could not reasonably rely on defendants' statements as having
5 promised anything other than at-will employment, and he also could not recover damages
6 associated with the loss of income from the corporate job, as defendants could have fired
7 him from it at any time. Our reasoning in *Slate* applies with equal force here:

8 "The necessary premise of plaintiff's argument is that he relied on and
9 changed his position in response to the promise that he would be employed
10 for at least an infinitesimal period of time, independently of the promised
11 infinitesimal period of employment itself. Plaintiff alleges that he was
12 damaged 'by foregoing other job search activities and refraining from
13 registering for and taking the Massachusetts bar examination and accepting
14 a practice opportunity in that state.' However, the same losses would have
15 been incurred if plaintiff had been discharged immediately after he came to
16 work rather than before. It is circular and not based on reality to argue, as
17 he does, that either his reliance or his change in position was attributable to
18 the promise of at will employment rather than the at will employment
19 contract itself."

20 166 Or App at 7.

21 Plaintiff contends that *Slate* does not defeat his promissory-estoppel claim
22 because, unlike the plaintiff in *Slate*, he turned down other employment to take the job
23 that defendant allegedly had promised him. That distinction is immaterial. Plaintiff has
24 not claimed damages from the alleged loss of employment with the *Medford Mail*
25 *Tribune*. Rather, he claims damages associated only with not having been hired into the
26 "corporate" position with defendants--a job from which defendants could have fired him
27 at any time. Under *Slate*, plaintiff has no claim for damages associated with the loss of

1 *that* promised job.

2 Plaintiff also contends that, even if *Slate* disposes of his promissory-
3 estoppel claim, the trial court erred by relying on that decision as a basis for granting
4 defendants summary judgment on his fraudulent-misrepresentation claim, as the latter
5 type of claim was not at issue in *Slate*. We do not agree that *Slate's* rationale is limited to
6 promissory-estoppel claims.

7 To prevail on a claim for fraudulent misrepresentation, a plaintiff must
8 prove, among other things, that he or she justifiably relied on the defendant's false
9 statements and that damage to the plaintiff resulted from that reliance. See [Knepper v.](#)
10 [Brown](#), 345 Or 320, 329-30, 195 P3d 383 (2008) (implicitly equating claim for
11 "fraudulent misrepresentation" with a claim for intentional "fraud" and citing cases that
12 describe the elements of those claims); *Riley Hill General Contractor v. Tandy Corp.*,
13 303 Or 390, 405, 737 P2d 595 (1987) (cited in *Knepper*; listing elements of intentional
14 "tort action in deceit"); *Webb v. Clark*, 274 Or 387, 391, 546 P2d 1078 (1976) (cited in
15 *Knepper*; listing elements of "actionable fraud"). Thus, a fraudulent-misrepresentation
16 claim, like one for promissory estoppel, requires proof both of reasonable reliance and of
17 damages caused by the misrepresentation or promise.² See *Slate*, 166 Or App at 7

² Some of our cases discuss the justifiability of the plaintiff's reliance in terms of whether the plaintiff had "a right to rely" on the misrepresentation, rather than the "reasonableness" of that reliance. A careful reading of the cases makes clear, however, that we use those terms interchangeably when discussing claims for common-law fraud and fraudulent misrepresentation. See, e.g., *Knepper*, 182 Or App at 605 (discussing, without differentiation in meaning, whether the plaintiff "justifiably" relied on a misrepresentation, whether a person generally has a "right to rely" on a certain kind of statement, and whether a person may "reasonably rely" on that type of representation).

1 (discussing reliance and damages elements of promissory-estoppel claim).

2 Here, plaintiff claims damages associated only with not being hired for the
3 promised corporate job, primarily the wages that he claims he would have earned in that
4 position. But because defendants lawfully could have terminated plaintiff from that job
5 at any time, under *Slate*, defendant's promise of employment cannot be said to have
6 caused plaintiff any damages--at least, not any damages associated with the loss of that
7 promised employment, which is what plaintiff claims in this case. For the same reason
8 that defendants' promise to hire plaintiff into the corporate job cannot subject them to
9 liability on a promissory-estoppel theory under *Slate*, defendants also cannot be liable for
10 damages based on alleged misrepresentations that simply mirror the alleged promise, *i.e.*,
11 statements that plaintiff definitely had the corporate job. Consequently, we disagree with
12 plaintiff to the extent that he suggests that *Slate* has no bearing on the viability of claims
13 for fraudulent misrepresentation. To the contrary, *Slate* defeats plaintiff's fraudulent-
14 misrepresentation claim.

15 Plaintiff also cites two federal cases, *Arboireau v. Adidas-Salomon AG*, 347
16 F3d 1158 (9th Cir 2003), and *Meade v. Cedarapids, Inc.*, 164 F3d 1218 (9th Cir 1999),
17 for the proposition that defendants had a legal duty to inform him "that he did not
18 definitely have the new corporate job and would be competing with other applicants for
19 this job position." Those opinions do not assist plaintiff here, even though they are based
20 on Oregon law. In each of those cases, the Ninth Circuit Court of Appeals concluded that
21 a trial court erred in granting summary judgment to the defendant employer on the
22 plaintiff's claim for fraudulent misrepresentation. *Arboireau*, 347 F3d at 1166-69;

1 *Meade*, 164 F3d at 1222-23. Despite the fact that the promised employment in both cases
2 was at will, the Ninth Circuit held that the plaintiff had come forward with sufficient
3 evidence to support a claim of reasonable reliance on the alleged misrepresentations: in
4 *Arboireau*, misrepresentations about the job's "locational stability" in Oregon, 347 F3d at
5 1166-67 (the defendants allegedly knew that the job likely would be moved to Germany);
6 in *Meade*, representations that a Eugene facility was growing when, in fact, it was
7 closing, 164 F3d at 1223.

8 Although plaintiff's reliance on those decisions is understandable, we find
9 the holdings unhelpful for at least three reasons. First, the alleged misrepresentations in
10 this case all related to the certainty of the job offer itself; that is, the statements related
11 directly to whether plaintiff definitely was being promised employment. Under *Slate*,
12 plaintiff could not reasonably form an expectation of employment, in reliance on that
13 promise (or misrepresentation), because the undisputed evidence shows that the promised
14 employment was at-will in nature.³ In *Arboireau* and *Meade*, in contrast, the promises
15 did not relate to the certainty of the job offers or of subsequent employment, but to the
16 *conditions* of the promised employment--conditions that the plaintiffs reasonably could
17 take into account in deciding whether to accept the offers.

18 Second, the Ninth Circuit did not discuss, either in *Arboireau* or in *Meade*,
19 whether the plaintiffs could establish *damages* caused by the alleged misrepresentations.
20 *Slate* is based largely on the plaintiff's inability to prove that he suffered any damages

³ Again, we discuss plaintiff's allegation that he was promised the corporate position
as an "accommodation job" later in this opinion.

1 from the defendants' breach of a promise to give him at-will employment. Our holding
2 here similarly is based on our conclusion that plaintiff has not alleged any claim for
3 damages that fairly can be said to spring from defendants' failure to give him the
4 corporate job; as a matter of law, plaintiff could not prove any entitlement to lost wages
5 from that job, as defendants could have fired him from it at any time. Because *Arboireau*
6 and *Meade* do not discuss the damages element of a fraudulent-misrepresentation claim,
7 they give us no reason to reverse the trial court's decision.

8 In any event, the Ninth Circuit's interpretations of Oregon law are not
9 binding on this court. [*Neff v. Jackson County*](#), 187 Or App 402, 411 n 11, 67 P3d 977
10 (2003). Moreover, we note that the Ninth Circuit did not address our decision in *Slate*
11 when it issued *Arboireau*, even though *Slate* predated that opinion by about three years.
12 We cannot discern, therefore, whether the court was aware of *Slate* when it decided
13 *Arboireau*, or whether it would have reached the same decision even if it had taken *Slate*
14 into account. For all of those reasons, neither *Arboireau* nor *Meade* persuades us that the
15 trial court erred in granting defendants' motion for summary judgment on plaintiffs'
16 fraudulent-misrepresentation claim.

17 Finally, plaintiff argues that the trial court should have denied defendant's
18 summary judgment motion, with respect to both of plaintiff's common-law claims,
19 because defendants had a *statutory* "obligation to provide the Plaintiff with an
20 'accommodation job' that he could adequately perform with his disability and [that] was
21 available in the Defendants' operations." Plaintiff relies on various provisions of ORS
22 chapter 659A for that proposition. Because defendants were legally obligated to give him

1 the corporate position as an "accommodation job," plaintiff asserts, that job was no
2 longer terminable "at will." Accordingly, plaintiff concludes, he reasonably could rely on
3 defendants' alleged promise to give him that position.

4 Plaintiff acknowledges "the general rule * * * that an employer may
5 discharge an employee at any time and for any reason, absent a contractual, statutory, or
6 constitutional requirement to the contrary." Washburn v. Columbia Forest Products,
7 Inc., 340 Or 469, 475, 134 P3d 161 (2006). And he cites no authority for his contention
8 that, when an employer gives an employee a specific job to accommodate that employee's
9 disability, the job cannot--as a matter of law--be terminable at will. Nor are we aware of
10 any authority supporting that theory, either under ORS chapter 659, or under analogous
11 provisions of the federal Americans with Disabilities Act (ADA).

12 We reject plaintiff's theory, however, not because we can find no case law
13 supporting it, but because it has no foundation in the Oregon statutes that prohibit
14 discrimination against persons with disabilities. Like the ADA, Oregon law generally
15 prohibits employers from discriminating "on the basis of disability." ORS 659A.112(1).
16 One prohibited form of discrimination is failing to reasonably accommodate the
17 disabilities of qualified individuals:

18 "(2) An employer violates subsection (1) of this section [prohibiting
19 discrimination on the basis of disability] if the employer does any of the
20 following:

21 "* * * * *

22 "(e) The employer does not make reasonable accommodation to the
23 known physical or mental limitations of a qualified individual with a
24 disability who is a job applicant or employee, unless the employer can

1 demonstrate that the accommodation would impose an undue hardship on
2 the operation of the business of the employer."

3 ORS 659A.112. An employer may reasonably accommodate disabled employees in
4 various ways, including through "reassignment to a vacant position." ORS
5 659A.118(1)(b).

6 Those statutes do not transform the at-will nature of a particular job,
7 however, simply because a disabled individual is hired to fill that position. The
8 requirement that an employer reasonably accommodate a qualified individual's
9 disabilities does not mean that the employer cannot fire a disabled employee at any time,
10 for any permissible reason or even for no reason. The statutes prohibit only disability
11 *discrimination* and--as part of that prohibition--require employers to take reasonable steps
12 to employ qualified, disabled individuals through accommodation that does not "impose
13 an undue hardship on the operation of the business of the employer." ORS
14 659A.112(2)(e). Thus, the statutes do not deprive employers of the right to terminate or
15 take other actions against disabled employees, as long as the employers do not take those
16 actions "on the basis of disability" or through refusal to reasonably accommodate the
17 employees' disabilities.

18 In short, an at-will job remains an at-will job, even when a disabled
19 individual holds it, and even when the individual has been given the job as an
20 accommodation for his or her disabilities. That the individual is protected from disability
21 discrimination--just like every other person employed by an Oregon employer that has

1 more than six employees⁴--does not mean that the individual's employment is not
2 terminable at will. Accordingly, *Slate* governs here: because defendants could have
3 terminated plaintiff from the "corporate job" at any time, even if they had given him that
4 position, plaintiff could not reasonably rely on any promise of employment in the job,
5 and he has no claim for damages associated with not having been hired into it.

6 Lest we be misunderstood, we emphasize that nothing in this opinion
7 should be read to express any view on whether plaintiff might be able to establish that
8 defendants violated ORS 659A.112 by discriminating against him on the basis of
9 disability, either by refusing to reasonably accommodate his disability or otherwise. That
10 question relates only to plaintiff's third claim for relief, which he voluntarily dismissed,
11 and which is not before us on appeal. Here, we hold only that a job does not
12 automatically and necessarily lose its "at will" quality when an employer gives it to a
13 disabled individual, even if the employer does so in an effort to accommodate that
14 individual's disabilities. Because plaintiff's contrary contention is the sole disability-
15 related reason that he contends this case is not governed by *Slate*, we agree with the trial
16 court that defendants were entitled to summary judgment on plaintiff's common-law
17 claims for relief.

18 Affirmed.

⁴ "The requirements of ORS 659A.103 to 659A.145 apply only to employers who employ six or more persons." ORS 659A.106.