STATE OF MICHIGAN
COURT OF APPEALS

PAUL DEBROW,

Plaintiff-Appellant,

v

CENTURY 21 GREAT LAKES INC., a Michigan corporation, CENTURY FRANCHISE ASSOCIATION, a foreign corporation and KATHY MILLER,

Defendants-Appellees.

UNPUBLISHED
August 13, 1996

No. 161048
LC No. 91 420886 CK

Before: Michael J. Kelly, P.J., and Young and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order entered December 30, 1992, in Oakland Circuit Court dismissing his complaint with prejudice after the court had previously granted defendants' motions for summary disposition. Plaintiff's first amended complaint dated December 16, 1991, alleged counts of age and handicap discrimination, breach of employment contract and intentional infliction of emotional distress against defendant Century 21 Great Lakes, Inc. Plaintiff also alleged counts of conspiracy to commit age and handicap discrimination, tortious interference with a business expectancy and intentional infliction of emotional distress against defendants Century 21 Franchise Association and Kathy Miller. The court granted summary disposition with respect to all counts.

In July 1978, Century 21 of Michigan, Inc., hired plaintiff as a broker's service representative. Century 21 allegedly assured plaintiff that he would "be there as long as [he] wanted to be" and that he could only be terminated for "good cause". Plaintiff admitted that he had to perform to Century 21's subjective standard of satisfaction. In 1980, plaintiff was promoted and assumed a position as director of management development.

In 1980, Century 21 International, bought Century 21 of Michigan. Plaintiff was promoted to regional director in May 1981. Shortly before his promotion, plaintiff discussed his concern that International might discharge him. He was assured "that is not what International [does] . . . they couldn't do it without a damn good reason. . . [T]rust me". Plaintiff later suffered a heart attack in

* Circuit judge, sitting on the Court of Appeals by assignment.

October and remained away from work until December 1981 or January 1982. After the death of the president of Century 21 of Michigan in November 1981, plaintiff assumed the additional position as president and member of the board of directors of Century 21 of Michigan.

In December 1981, the president of International, appointed plaintiff as president and regional director of the newly created Century 21 Great Lakes Region. This position was created after International merged the Michigan, Ohio, Pennsylvania and West Virginia regions to form Century 21 Great Lakes, Inc. Plaintiff was responsible for the day-to-day operations of the new region.

Near the end of 1990, plaintiff began experiencing chest pains which he attributed to his heart. About the same time, defendant Miller and others, former Century 21 of Ohio franchisees, notified other Ohio franchises of their plan to form an association "to regain [] our synergism, market share, and franchise services". Dissatisfied with the way the Great Lakes region was run, they formed Century Franchise Association (CFA) "to bring a new direction to the leadership of the Century 21 Great Lakes Region". One of the problems perceived by this group was plaintiff himself. They sought an "appointment of a new director who is more knowledgeable with respect to the Ohio Markets": "Paul DeBrow must be fired". Based upon these complaints the International removed plaintiff as a corporation director on January 29, 1991.

On January 30, 1991, the chairman of the Great Lakes Board of Directors sought plaintiff's resignation as president based upon a "failure of leadership". During his meeting with plaintiff, the Chairman allegedly told him, "You're getting too old for this shit". The chairman allegedly offered plaintiff alternative employment, but plaintiff informed Great Lakes personnel on February 1, 1991, that he had been fired as regional director.

Plaintiff claims the circuit court committed reversible error in granting summary disposition under MCR 2.116(C)(10) in favor of defendant Century 21 Great Lakes on plaintiff's breach of contract claim.

This Court reviews de novo the grant of motions for summary disposition under MCR 2.116(C)(10). *Coleman-Nichols v Tixon Corp*., 102 Mich App 645, 650; 513 NW2d 441 (1994). Plaintiff's claim is that his contract with defendant Century 21 Great Lakes Inc. was a good cause contract and that only failure to do a good job would constitute a good cause for discharge. *Thomas v John Deere Corp*., 205 Mich App 91, 95; 517 NW2d 265 (1994). The good cause was the employer's subjective satisfaction. As the board of directors of Great Lakes found plaintiff's "failure of leadership" in the Great Lakes Region to be the reason for his termination, the board had just cause to terminate plaintiff. The employment contract "does not give courts the authority to second-guess defendant's' determination. *Id*. at 95. Summary disposition under MCR 2.116(C)(10) was proper as plaintiff did not produce evidence to create a genuine issue of fact.

Plaintiff further claims the court erred in granting summary disposition under MCR 2.116(C)(10) on his claim for age discrimination.

Plaintiff's amended complaint dated October 9, 1992, apparently alleges both intentional

discrimination and disparate treatment based upon his age. See *Wolff v Automobile Club*, 194 Mich App 6, 11; 486 NW2d 75 (1992). To establish a prima facie case of intentional age discrimination, a plaintiff must show that he was a member of a protected class; he was discharged; he was qualified for the position; and he was replaced by a younger person *Weatherly v Teledyne*, 194 Mich App 352, 358; 486 NW2d 361 (1992); *Wolff, supra* at 11. Age need not be the only or main reason for discharge, it need only make a difference in the decision to discharge a person. *Barnell v Taubman Co*, 203 Mich App 110, 121; 512 NW2d 13 (1993). To show disparate treatment, a plaintiff must show that he was a member of a protected class and that he was treated differently than a person of a different class for the same or similar conduct. *Wolff, supra*.

Once plaintiff proves his prima facie case of discrimination by a preponderance of the evidence. "The burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions . . . ." *Barnell, supra* at 120; *Featherly, supra* at 358. The burden then shifts to plaintiff to show "by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext." *Barnell, supra* at 120; *Featherly, supra* at 358.

Plaintiff's proofs fail on both claims. First, plaintiff failed to allege that he was replaced with a younger employee, he argued that the employee was younger, but without a showing of his age. Defendant Great Lakes asserts in its brief that plaintiff's successor was a member of the same class. See *Wolff, supra*. Whether that is true or not, plaintiff has omitted an essential element of a prima facie cause of action.

With regard to plaintiff's disparate treatment claim, plaintiff also fails to present a prima facie case. Plaintiff admitted that he knew of no other acts of discrimination against him; he did not know of any opportunities which were denied him, nor did he have knowledge of younger, similarly situated employees who defendant treated differently than plaintiff. Plaintiff has failed to present a prima facie case of intentional discrimination. Plaintiff failed to show that Great Lakes' purported reason for discharge was pretextual. When Great Lakes offered a legitimate reason for discharge, failure in leadership, plaintiff failed to show that this reason was merely a pretext. Plaintiff has not shown by a preponderance of the evidence that Great Lakes reliance on these complaints was "pretextual," e.g., that Great Lakes either manufactured these complaints or had reason to believe that the complaints were made in bad faith. The trial court properly granted summary disposition under MCR 2.116(C)(10) with respect to plaintiff's age discrimination claims.

Plaintiff next claims error in the grant of summary disposition to his claim of handicap discrimination.

The trial court properly granted summary disposition under MCR 2.116(C)(10) on plaintiff's handicap discrimination claim. An employer shall not discharge an employee where the handicap "is unrelated to the individual's ability to perform the duties of a particular job or position." *Szymczak v American Seating Co*, 204 Mich App 255, 257; 524 NW2d 251 (1994); *Murphy v Bradford-White Corp*, 166 Mich App 195, 196-197; 420 NW2d 101 (1987); *Carden v General Motors*, 196 Mich App 202, 212; 401 NW2d 273 (1986). When determining whether an employer has discharged an employee because of that employee's handicap, "the Legislature intended an inquiry into the employer's

reasons for its action. Thus, the employer's good faith or lack of a discriminatory intent is relevant." *Murphy, supra* at 200; accord *Sanchez, supra* at 502. Although defendant knew that plaintiff had complained of chest pain, plaintiff has not tied this knowledge to an intent to discriminate by discharging him because of his heart condition. Thus, plaintiff failed to present a genuine issue of material fact to prevent summary disposition under MCR 2.116(C)(10).

Plaintiff next claims error in the granting of summary disposition on his claim of intentional infliction of emotional distress. This issue should have been decided under MCR 2.116(C)(8) rather than MCR 2.116(C)(10). This Court may review the trial court's disposition as though it were decided under the correct rule. *Johnson v Davis*, 156 Mich App 550, 553; 402 NW2d 486 (1986). A motion under MCR 2.116(C)(8), failure to state a claim under which relief can be granted, tests the legal sufficiency of a claim by the pleadings alone. *Jackson v White Castle Systems Inc.*, 205 Mich App 137, 139; 517 NW2d 286 (1994), lv pending. The court should only grant the motion where the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recover. *Id*. At 149-140.

The trial court properly granted summary disposition in favor of defendant on plaintiff's intentional infliction of emotional distress claim. To establish a claim of intentional infliction of emotional distress, the plaintiff must show "(1) extreme or outrageous conduct, (2) which intentionally and recklessly, (3) causes extreme emotional distress" *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657; 517 NW2d 564 (1994).

Plaintiff only points to defendant's alleged age and handicap discrimination as evidence of "outrageous conduct." Defendants' act of firing plaintiff based on his alleged failure in leadership and handicap discrimination does not rise to the level of "outrageous" conduct. Defendants merely "have done no more than to insist upon their legal rights in a permissible way, even though they are well aware that firing plaintiff for his failure in leadership was . . . certain to cause emotional distress. *Gonyea v Motor Pars Fed Cr Un*, 192 Mich App 74, 81; 480 NW2d 297 (1991)." Therefore, summary disposition was appropriate under MCR 2.116(C)(8).

Plaintiff next claims error in the granting of summary disposition on his claim of tortious interference with his employment relationship by defendant Century Franchise Associates and Kathy Miller. The trial court's grant of summary disposition under MCR 2.116(C)(10) was proper.

An at-will employment contract is actionable under a tortious interference theory of liability because "an at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship." *Feaheny v Caldwell*, 175 Mich App 291, 403; 437 NW2d 358 (1989). To establish a claim for tortious interference with a contractual or business relationship, a plaintiff "must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Formall v Community National Bank*, 166 Mich App 772, 779; 421 NW2d 289 (1988). In addition to being intentional, such interference must also be improper. *Id*. "A 'wrongful act per se' is an act that can never be justified under any circumstances." *Patillo v Equitable Life Assurance Society*, 199 Mich App 450, 457; 502

NW2d 696 (1993); *Formall, supra* at 780. The plaintiff must demonstrate, "with specificity," proof of the defendant's "affirmative acts which corroborate the unlawful purpose of the interference." *Feaheny, supra* at 305; *Formall, supra* at 779. "Defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action." *Formall, supra* at 780.

Plaintiff failed to articulate with specificity why any of defendants' alleged complaints to International were wrongful. Plaintiff's evidence shows, instead, that defendants were legitimately concerned about their own businesses and sought plaintiff's removal as a way to better insure their interests and "regain the market share." Because plaintiff failed to assert a genuine issue of fact, summary disposition under MCR 2.118(C)(10) was proper.

Plaintiff next claims error in the granting of summary disposition on his claims of conspiracy to discriminate against him based on his age and handicap.

Plaintiff did not allege a conspiracy claim based on the Handicapper's Civil Rights Act, MCL 37.1602(b); MSA 3.550(602)(b) against defendants CFA, and Miller. Rather, he alleged discrimination based on handicap, MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). Since CFA and Miller were not plaintiff's employer, summary disposition under MCR 2.116(C)(8) on such a conspiracy claim would have been proper

With regard to the Elliott-Larsen Civil Rights Act conspiracy claim, MCL 37.,2701; MSA 3.548(701), plaintiff relies upon subsection (b) which proscribes two or more persons from acting to "[a]id abet, incite, compel, or coerce a person to engage in a violation of [the] act."

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins v Columbia Casualty Ins*, 194 Mich App 300, 313; 486 NW2d 351 (1992); *Feaheny v Caldwell, supra* at 307; *Rosenberg v Rosenberg Special Account*, 134 Mich App 342, 354; 351 NW2d 563 (1984). Each defendant must proceed "tortiously, which is to say with intent to commit the tort or with negligence." *Rosenberg, supra* at 354. Thus, a plaintiff must present evidence of an alleged conspirator's discriminatory animus or intent under §701(b), in addition to some concerted action to aid, abet, incite, or compel someone to violate a person's civil rights.

Plaintiff has failed to show that any of the defendants held a discriminatory animus or intent to compel Great Lakes or International to fire plaintiff because of his age. The evidence showed that they wanted him fired solely to protect their economic interests. Thus, plaintiff has failed to present a genuine issue of material fact and summary disposition under MCR 2.116(C)(10) would have been proper.

On plaintiff's claim of intentional infliction of emotional distress the trial court properly granted summary disposition in favor of defendants. Plaintiff's only examples of "outrageous conduct" are defendants' complaints to International. Since defendants made their complaints to International based upon their concern over their own economic interests, such activity does not '"go beyond all possible bounds of decency. . . ."' *Meek v Michigan Bell*, 193 Mich App 340; 483

NW2d 407 (1992). Thus, plaintiff failed to state a claim and the court properly granted summary disposition under MCR 2.118(C)(8).

Affirmed

/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.
/s/ Nick O. Holowka