

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL MCGEE,

Plaintiff-Appellant,

v

KEVIN RINKE and RINKE PONTIAC/GMC, INC.,

Defendants-Appellees.

UNPUBLISHED

August 20, 1996

No. 177728

LC No. 93-001473

Before: Murphy, P.J., and Reilly, and C.W. Simon, Jr.* , JJ

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendants' motion for summary disposition on plaintiff's claims of age discrimination, intentional infliction of emotional distress, constructive discharge, tortious interference with business relations. We affirm in part, reverse in part and remand for further proceedings.

Plaintiff was promoted to used car sales manager for Rinke Pontiac/GMC on November 25, 1986. On June 30, 1992, plaintiff was terminated as the sales manager and offered a sales position, which he declined. Plaintiff was forty-five. The man who replaced him as sales manager was twenty-four. Plaintiff contends that he was terminated because of his age. Defendants contend that plaintiff was terminated because he was unable to manage the used car business successfully.

Plaintiff first contends that the trial court erred in granting defendants' motion for a protective order and quashing plaintiff's document subpoenas issued to General Motors and Comerica Bank. Plaintiff requested:

Any and all records, documents, applications, credit reports and any other documents of every nature and kind associated with a loan application made by Kevin Rinke and/or Roland Rinke and/or Rinke Pontiac/GMC, Inc., as it relates to the purchase of the Cadillac dealership located in Warren, Michigan.

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

Although these documents related to the purchase of another business, plaintiff had reason to believe that among them was information regarding the financial condition of Rinke Pontiac/GMC. According to an affidavit filed by plaintiff, Kevin Rinke showed him a profit and loss statement that showed a profit attributable to the used car department and explained that the statement was for the purpose of obtaining a loan to purchase the Cadillac dealership and that plaintiff should not expect a commission bonus based on the profits shown on that statement.

Defense counsel essentially conceded the relevance of financial statements pertaining to Rinke Pontiac in the following colloquy that occurred at oral argument on defendants' motion.

[Plaintiff's counsel]: Mr. McGee was advised by way of answers to interrogatories that he was let go because he was incompetent and the used car department was using [sic, losing?] a great deal of money. Mr. McGee was told just prior to his leaving that the used car department in fact was making money and it was reflected in the financial statements that were given to Comerica Bank when Mr. Rinke tried to purchase a Cadillac dealership. It's a direct contradiction of the answers to the interrogatories.

In order to prove that Mr. McGee was doing a good job and that the used car department was not losing money, we need access to the records. We provided a statement from Mr. McGee stating that Mr. Rinke did in fact make those representations to him.

[Defense counsel]: Those subpoenas aren't even rationally related to the information he's seeking. If that's all he wants, why didn't he simply request financial statements with reflect [sic] to the used car operations? If that's all he wants, then that's fine, he can proceed with the subpoena with respect to that - -

Nevertheless, the trial court stated that it "didn't understand how it is that you want to go into a different dealership" and granted the motion for a protective order because it did not find that the request for documents was "necessary."

Generally, any document that is relevant and not privileged is freely discoverable upon request. *Hartmann v Shearson Lehman Hutton, Inc.*, 194 Mich App 25, 28; 486 NW2d 53 (1992). There is no requirement that there be good cause for discovery of relevant and nonprivileged documents. *Eyde v Eyde*, 172 Mich App 49, 55; 431 NW2d 459 (1988). However, the court may restrict discovery pursuant to MCR 2.302(C), which governs the issuance of a protective order and requires the party seeking the order to demonstrate good cause. We review the trial court's decision to grant or deny a discovery motion for an abuse of discretion. *Id.* at 55.

We agree with plaintiff that the trial court abused its discretion by issuing a protective order that precluded discovery of the requested documents altogether. The financial condition of Rinke Pontiac was relevant to plaintiff's claims because defendants relied on the lack of profitability of Rinke Pontiac's used car business as their explanation for plaintiff's termination as the used car sales manager. Defendants' representations about the financial condition of Rinke Pontiac, even when made to a third

party, are relevant to establishing that defendants' proffered reason for plaintiff's termination was a mere pretext for age discrimination. Although defendants argue that plaintiff's deposition testimony demonstrates that he was aware that Rinke Pontiac was losing money, the fact that plaintiff conceded that there were losses is not an adequate basis for denying discovery relating to a relevant issue.

We recognize, as did defense counsel at oral argument, that plaintiff's request for documents in the subpoenas was not limited to those relating to the financial condition of Rinke Pontiac. Rather than precluding discovery of all the materials, "[t]his Court favors allowing discovery of the materials and allowing the trial court to edit confidential information from the documents in camera; this will preserve the one party's expectation of privacy and furnish the other party with the required information." *Eyde*, at 56; See also *Yates v Keane*, 184 Mich App 80, 84; 457 NW2d 693 (1990). We are confident that the trial court will be able to fashion a protective order that will allow plaintiff access to relevant materials and protect defendants from "annoyance, embarrassment, oppression, or undue burden or expense", MCR 2.302(C), inasmuch as defendants suggested such a protective order in its motion as an alternative to a complete prohibition of the discovery.¹

Plaintiff also contends that the trial court erred in granting defendants' motion for summary disposition of his age discrimination, constructive discharge, and intentional infliction of emotional distress claims. In light of our conclusion that plaintiff was improperly precluded from discovering materials relevant to show that defendants' proffered reason for his termination was pretextual, we believe that summary disposition of his age discrimination claim and related allegations of constructive discharge² was premature. The order granting summary disposition on these two counts is reversed.

However, we agree with the trial court that defendants were entitled to summary disposition on plaintiff's intentional infliction of emotional distress claim. Plaintiff has not suggested and we fail to see how defendants' representations as to the financial condition of Rinke Pontiac would create a genuine issue of material fact as to this claim. Accordingly, defendants were entitled to summary disposition pursuant to MCR 2.116(C)(10). Furthermore, a review of the complaint does not reveal allegations of outrageous conduct on the part of defendants toward plaintiff. Thus, defendants were also entitled to summary disposition on the basis of MCR 2.116(C)(8). *ARIM v General Motors Corp*, 206 Mich App 178, 196; 520 NW2d 695 (1994).

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon, Jr.

¹ Defendants asked the court enter a protective order pursuant to MCR 2.302(C)(2), (3), and (4) "requiring Plaintiff to limit the requested information to only that information this court deems to be

discoverable, and to further order that any information received shall not be communicated to any persons, other than the parties to this action.”

² As explained in *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994), constructive discharge is not a separate cause of action, although it is routinely alleged as a separate count as plaintiff has done in this case. Rather, the theory is used to refute an employer’s argument that no suit relating to the employee’s termination should lie because the employee left the job voluntarily.