# STATE OF MICHIGAN

# COURT OF APPEALS

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CHARLES L. PARK,

Plaintiff-Appellant,

v

HOLLAND MOTOR EXPRESS, INC., n/k/a/ TNT HOLLAND MOTOR EXPRESS, INC.,

Defendant-Appellee.

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UNPUBLISHED
November 4, 1996

No. 183296
LC No. 92-017466-NZ

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order that granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff worked for defendant as a dock worker at defendant's Romulus terminal. Plaintiff began his employment in September 1989, but defendant terminated him on December 2, 1989. On July 19, 1989, plaintiff filled out an application for employment with defendant and indicated on his application that he had never been denied a license to operate a motor vehicle and also indicated that he had never had his driver's license suspended or revoked. On or about November 27, 1989, defendant received plaintiff's driving record from a background investigation that showed, contrary to plaintiff's application, that he was convicted of driving while impaired in 1985 and as a result, plaintiff had his driving privileges restricted for four months. Sometime on or after December 1, 1989, defendant also received information that plaintiff had an ongoing workers' compensation claim against a former employer.

Plaintiff brought a cause of action for wrongful and retaliatory discharge and breach of contract. Plaintiff claimed that defendant learned of his workers' compensation claim before December 2, 1989, and terminated his employment based on his ongoing claim against his former employer. Defendant claimed that it had no knowledge of plaintiff's workers' compensation claim on December 2, 1989, the date of plaintiff's termination. Philip Butts, a safety supervisor for defendant, testified that he and Jim

Smith, operations manager for defendant, based their decision to terminate plaintiff solely on the discrepancy between plaintiff's application for employment and his driving record.

Plaintiff testified in a deposition that, after filling out the application for employment, he did not discuss his application with a manager or a supervisor. However, nine months later, plaintiff swore in an affidavit that he discussed his application and his driving record with Jim Smith. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), claiming that plaintiff failed to state a claim upon which relief could be granted, and under MCR 2.116(C)(10), claiming that there was no genuine issue of material fact. The trial court granted defendant's motion, concluding that a party cannot create an issue of fact by contradicting a clear and unequivocal statement previously taken in a deposition as to a relevant fact by merely submitting an affidavit that contradicts it. In addition, the trial court found that there was no evidence to contradict Butts' testimony that plaintiff's employment was terminated because of the discrepancy between plaintiff's application and his driving record.

We review the trial court's grant of a motion for summary disposition de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). A motion brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence and must specifically identify the matters that have no disputed factual issues. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). In addition, speculation and conjecture are insufficient. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

To establish a prima facie case of retaliatory discharge, the plaintiff must prove: (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989); see also *Howard v Canteen Corp*, 192 Mich App 427, 434; 481 NW2d 718 (1992). In the present case, even if defendant had knowledge of plaintiff's ongoing workers' compensation claim, we find that plaintiff failed to provide any evidence of a causal connection between knowledge of the workers' compensation claim and his termination. *Id.*

To the contrary, Butts stated in his affidavit that he was unaware of plaintiff's workers' compensation claim at the time he discussed plaintiff's termination with Smith. Butts further testified that he and Smith made their decision to terminate plaintiff solely and entirely on the discrepancy between plaintiffs driving record and his application. Plaintiff claimed, in his affidavit, that he discussed his driving record with Smith after he filled out his application. However, as noted by the trial court, an affidavit

conflicting with prior deposition testimony is insufficient to create a genuine issue of material fact. *Kaufman & Payton, PC v Nikkila,* 200 Mich App 250, 256-257; 503 NW2d 728 (1993). Therefore, there was no genuine issue as to a material fact, and trial court correctly granted summary disposition in favor of defendant. *Skinner, supra*.

We affirm.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra