

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOUGLAS MCDONALD

Plaintiff-Appellant,

v

LADBROKE RACING MICHIGAN,

Defendant-Appellee.

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UNPUBLISHED

December 6, 1996

No. 178065

LC No. 93-303333-CK

Before: Reilly, P.J., and Sawyer and W.E. Collette,\* JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(8)<sup>1</sup>. Plaintiff sued defendant for retaliatory discharge under the Elliott-Larsen Civil Rights Act (Elliott-Larsen), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and for intentional infliction of emotional distress. We affirm in part and reverse in part and remand for further proceedings.

Plaintiff first contends that the trial court erred in granting summary disposition of his retaliatory discharge claim. We agree.

The issue in this case is whether retaliation for filing affidavits on behalf of coworkers who pursued civil rights claims under federal law is actionable under MCL 37.2701(a); MSA 3.548(701)(a). Plaintiff's first amended complaint alleged that he signed "an affidavit on behalf of the complainants in two separate EEOC [Equal Employment Opportunity Commission] complaints filed against defendant and in favor of co-workers . . ." The affidavits allegedly "recounted specific allegations of racial discrimination perpetrated by the Defendant against the complainants." Defendant contends that supporting coworkers' claims pursued under the federal civil rights law does not entitle plaintiff to the protection of MCL 37.2701(a); 3.548(701)(a). MCL 37.2701; MSA 3.548(701) states as follows:

Two or more persons shall not conspire to, or a person shall not:

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

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [Emphasis added.]

The trial court in this case granted defendant summary disposition because it concluded that the above provision did not protect plaintiff from retaliatory discharge because plaintiff's affidavits concerned a federal, EEOC proceeding.

In *McLemore v Detroit Receiving Hosp and University Medical Center*, 196 Mich App 391; 493 NW2d 441 (1992), this Court upheld a retaliatory discharge verdict for the plaintiff who alleged that she was laid off in retaliation for filing a complaint with the EEOC. In that case, the plaintiff worked as an instructor for the defendant. She applied for an associate director position with the defendant, but a man was chosen instead. She filed a complaint with the defendant hospital suggesting that the decision might have been motivated by "bias" and asked for an explanation in order to avoid "litigation." *Id.* at 394. The position became available again, and the plaintiff was once again rejected in favor of a man. The plaintiff filed a complaint with the EEOC charging sex discrimination. She was laid off less than two months later. *Id.* The plaintiff sued the defendants for sex discrimination, breach of contract and under the retaliatory discharge provision of Elliott-Larsen. The trial court directed a verdict on the sex discrimination claim, but the jury found for the plaintiff on the breach of contract and retaliatory discharge claims. The defendants appealed, arguing that the court should have granted their motion for judgment notwithstanding the verdict because there was insufficient evidence to support the retaliation claim.

This Court held that the evidence supported the verdict rendered, despite the fact that the plaintiff filed her complaint with the EEOC and not the Michigan Civil Rights Commission. This Court first rejected the defendants' assertion that its actions before the plaintiff filed her charge with the EEOC could not support her retaliation claim. *Id.* at 395-396. In other words, the jury properly considered the defendants' actions that allegedly occurred in response to the complaint plaintiff filed with the hospital referring to "bias" and "litigation." After reviewing the evidence of defendants' actions before and after she filed her complaint with the EEOC, this Court further concluded:

A rational trier of fact could infer that all this [the memoranda and job evaluations critical of the plaintiff's performance] was motivated by a fear of an EEOC charge and litigation to follow. When plaintiff filed her complaint with the EEOC, defendants' fears were realized, and they responded by using the first available opportunity to rid themselves of her. [*Id.* at 398]

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Therefore, the evidence, viewed in light most favorable to plaintiff, supports the inference that she was laid off in retaliation for charging defendants with sex

discrimination. The trial court did not err in denying the motion for judgment notwithstanding the verdict. [*Id.*]

Although the Court did not explicitly discuss the precise issue raised by defendant in this case, the analysis in *McLemore* is inconsistent with the position advanced by defendant. According to defendant, plaintiff has failed to state a claim because his affidavits were filed in support of claims brought under the federal, rather than state, civil rights act. *McLemore* indicates that evidence that an employer retaliated against an employee for filing a claim with the EEOC is sufficient to support a claim under MCL 37.2701(a); MSA 3.548(701)(a). We cannot accept defendant's argument that MCL 37.2701(a); MSA 3.548(701)(a) requires activities in support of a claim brought only under Elliott-Larsen without rejecting the holding of *McLemore*, which is controlling under Administrative Order 1996-4. Therefore, we conclude that defendant was not entitled to summary disposition under MCR 2.116(C)(8) on the grounds that the affidavits were filed in support of federal civil rights. Summary disposition of plaintiff's retaliatory discharge claim is reversed.

Plaintiff also contends that the trial court erred in granting defendant summary disposition of his claim for intentional infliction of emotional distress. The elements of this tort are: 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation; and 4) severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Although this count of the complaint was labeled "intentional infliction of emotional distress," plaintiff pled only negligence, not intentional or reckless conduct. Plaintiff also failed to allege causation, and failed to allege that he suffered severe emotional distress. Thus, summary disposition was proper. However, because plaintiff has alleged facts that could be sufficiently extreme and outrageous to support a claim of intentional infliction of emotional distress, plaintiff should have the opportunity to amend his complaint on remand, as permitted by MCR 2.116(I)(5).

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ David H. Sawyer

/s/ William E. Collette

<sup>1</sup> We note that defendant attached documentary evidence to its motion purportedly brought under MCR 2.116(C)(8). Defendant also argued at the hearing on its motion that plaintiff had not filed any affidavits in support of his response to the motion. Under MCR 2.116(G)(5), only the pleadings may be considered when the motion is brought under MCR 2.116(C)(8). "A motion under MCR 2.116(C)(8) may not be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2). When considering such a motion, the trial court must rely only on the pleadings. MCR 2.116(G)(5)." *Patterson v Kleiman*, 447 Mich 429, 432; 526 N.W.2d 879 (1994). The trial court's

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opinion does not indicate that it considered the attachments that were inappropriately attached to defendant's motion. On appeal, this Court has considered only the pleadings in reaching its conclusion.