STATE OF MICHIGAN

COURT OF APPEALS

WALTER NYZIO, Plaintiff–Appellant,	UNPUBLISHED January 31, 1997
v	No. 181306 Oakland Circuit Court
BUDD COMPANY and AL WIELECHOWSKI, Defendants–Appellees.	LC No. 92-426386

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Plaintiff appeals as of right from various orders of the Oakland Circuit Court that together granted summary disposition in favor of defendants on all of plaintiff's claims in this employment action. We affirm.

Plaintiff, who is in his mid- to late-forties, worked as an estimator at defendant's Rochester Hills plant. In June 1986, defendant Al Wielechowski (Wielechowski) became plaintiff's supervisor. Plaintiff alleged that defendant Wielechowski immediately began harassing him and discriminating against him by embarrassing plaintiff in front of other employees, referring to him as "old man," and giving him unsatisfactory annual evaluations. Plaintiff alleged that he pleaded with management to do something about Wielechowski's behavior.

In 1989, plaintiff began experiencing medical problems that he attributed to workplace stress. Plaintiff's physician notified defendant Budd Company (Budd) officials of his medical condition. Budd finally granted plaintiff's requests for a transfer and on August 1, 1989, sent him to a new position in the engineering department. In January 1991, plaintiff and nine other employees in this section were laid off for financial reasons. Budd subsequently terminated plaintiff's employment. Plaintiff then filed suit

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

against Budd and Wielechowski alleging discrimination on the basis of age and handicap, intentional infliction of emotional distress, and tortious interference with contractual relations.

I

Plaintiff first claims that the trial court improperly granted defendants' motion for summary disposition because a genuine issue of material fact existed regarding whether defendants discriminated against plaintiff on the basis of age in violation of the Michigan Civil Rights Act, MCL 37.2101 *et. seq.*; MSA 3.548(101) *et seq*. We disagree. Plaintiff alleges that his initial transfer out of Wielechowski's division was an adverse employment decision that was made on the basis of age. Although plaintiff characterizes this as a demotion, we determine that no rational trier of fact could view plaintiff's transfer as an adverse employment decision. It is uncontested that plaintiff requested and received this transfer. Plaintiff's salary and benefits were not reduced when he was transferred.[1] Although he may have lost seniority, there is no evidence that this did not occur with all intra-company transfers. There is no basis upon which to view plaintiff's transfer as a demotion. See *Cherry v Thermo Electron Corp*, 800 F Supp 508, 511-512 (ED Mich 1992).[2]

Further, plaintiff contends that defendants discriminated against him on the basis of age by laying him off and then terminating him. Again, we disagree. When, as here, an employee is discharged because of an economically motivated reduction in work force, a prima facie case of age discrimination requires an initial showing, by a preponderance of the evidence, that (1) the plaintiff was within the protected class and was discharged, (2) the plaintiff was qualified to assume another position at the time of the discharge, and (3) age was a "determining factor" in the employer's decision to discharge the plaintiff. *Lytle v Malady*, 209 Mich App 179, 185-186; 530 NW2d 135 (1995), lv gtd 451 Mich 920; 550 NW2d 535 (1996).

Because plaintiff failed to establish that he was qualified to assume another position or that age was a determining factor in Budd's decision to lay off plaintiff, the trial court properly granted summary disposition in plaintiff's age discrimination claim. Plaintiff's reliance on the conduct of Wielechowski in this regard is misplaced because it was established that Wielechowski was not involved in this decision.

II

Next, plaintiff asserts that the trial court improperly granted defendants' motion for summary disposition because there was an issue of material fact regarding whether defendants discriminated against him on the basis of a handicap in violation of the Michigan Handicappers Civil Rights Act (MHCRA), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*. We disagree. To state a prima facie case of discrimination under the MHCRA, a plaintiff has the burden of establishing that (1) the plaintiff is "handicapped" as defined by the MHCRA, (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Hall v Hackley Hospital*, 210 Mich App 48, 53-54; 532 NW2d 893 (1995). MCL 37.1202; MSA 3.550(202) prohibits an employer from discharging an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job

or position. Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to show legitimate, nondiscriminatory reasons for its actions. *Crittendon v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989). The burden then shifts back to the plaintiff, who has to show that the employer's reasons constituted a pretext for discrimination. *Id*.

Here, plaintiff alleges that defendants violated the MHCRA by terminating his employment because of his high blood pressure and hypertension. Even assuming that plaintiff is actually "handicapped" for the purposes of the MHCRA and that this handicap was unrelated to his ability to perform his duties, we are unable to find that plaintiff succeeded in establishing a prima facie case of handicap discrimination. Plaintiff presented no evidence that he was transferred and eventually terminated because of his handicap. Indeed, there is no evidence that the individuals who made the decision to terminate plaintiff even knew of plaintiff's medical problems. Furthermore, even if plaintiff were able to establish a prima facie case of handicap discrimination, Budd produced ample support for its assertion that plaintiff was terminated as part of an economically motivated corporate restructuring. Plaintiff was one of ten employees laid off in the engineering division, and the decision to do so was based on his low seniority within the engineering department.

Plaintiff alleges further that Budd did not allow him a reasonable time to heal in violation of the MHCRA, see *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504, 507; 476 NW2d 451 (1991), and instead threatened him with termination for his absenteeism. However, in order to bring a claim for failure to accommodate, a plaintiff must have notified the employer in writing of the need for accommodation within 182 days after the date the handicapper knew or reasonably should have known that accommodation was needed. MCL 37.1210(18); MSA 3.550(210)(18). Plaintiff failed to comply with this requirement.

III

Next, plaintiff argues that he submitted evidence which raised a genuine issue of material fact regarding whether Wielechowski tortiously interfered with his at-will employment contract. We disagree. In a claim for tortious interference with contractual relations, including an at-will employment contract, see *Patillo v Equitable Life Assurance Society of the United States*, 199 Mich App 450, 457; 502 NW2d 696 (1992), the plaintiff has the burden of proving (1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract), (2) knowledge of the relation on the part of the interferer, (3) an intentional interference inducing or causing a breach of the relationship, and (4) resultant damage to the party whose relationship has been disrupted. *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d 358 (1989).[3]

Here, summary disposition was properly granted because plaintiff failed to establish that Wielechowski's actions induced or caused the termination of plaintiff's employment contract. As stated earlier, plaintiff was terminated as a consequence of economically motivated corporate restructuring. Further, although Wielechowski's treatment of plaintiff may have caused plaintiff to request a lateral transfer, as we have noted previously, there is no evidence to support the claim that the transfer was a demotion.

IV

Lastly, plaintiff claims that he submitted evidence which raises genuine issues of material fact concerning defendants' liability to him for intentional infliction of emotional distress. We disagree. The elements of intentional infliction of emotional distress 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). Liability for intentional infliction of emotional distress is found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Id.*

After reviewing the record, we conclude, as did the trial court, that plaintiff has failed to establish a genuine issue of fact that the conduct of defendants reasonably may be regarded as extreme and outrageous.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan

[1] While plaintiff claims that he "felt" forced to accept the transfer, speculation and conjecture are insufficient means by which to counter an opposing party's motion for summary disposition. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

[2] Federal precedent, while not binding, is persuasive authority in interpreting and applying the Michigan Civil Rights Act. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW3d 135 (1995), lv gtd 451 Mich 920; 550 NW2d 535 (1996).

[3] Contrary to both parties' assumptions, we recognize that tortious interference with an advantageous or business relationship and tortious interference with a contractual relationship are separate, but nearly identical, torts. *Winiemko v Valenti*, 203 Mich App 411, 416 n 2; 513 NW2d 181 (1994). The difference between these related torts is that a plaintiff must prove the existence of a contract in order to establish a prima facie case of tortious interference with a contractual relationship, while a prima facie case of tortious interference with an advantageous or business relationship does not require this showing. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992). However, since plaintiff had an at-will employment contract, from which stemmed his advantageous business relationship, we treat his claim as one of tortious interference with a contractual relationship.