STATE OF MICHIGAN

COURT OF APPEALS

JAMES KIRKLAND,

Plaintiff-Appellant,

v

DIECAST CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 3, 1998

No. 198076
Jackson Circuit Court
LC No. 95-072510 NZ

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).[1] We affirm.

Plaintiff was hired by defendant on April 17, 1963 to work in defendant's die-casting factory in Jackson. On or near May 13, 1994, a number of employees, including plaintiff, began picketing defendant's place of business. On June 17, 1994, defendant sent plaintiff a letter, discharging plaintiff from his employment. The letter alleged that on June 13, 1994 plaintiff had assaulted a security officer, throwing him to the pavement in the path of a moving vehicle that was attempting to cross the picket line to enter the plant.[2] On June 9, 1995, plaintiff filed a complaint alleging that his discharge was in retaliation for plaintiff's filing of workers' compensation benefit claims, and further alleging handicap discrimination, age discrimination, defamation and intentional infliction of emotional distress. The trial court dismissed all of plaintiff's claims on defendant's motion for summary disposition.

I

On appeal, plaintiff first alleges that his discharge "was in retaliation for, and in an attempt to circumvent Plaintiff's future entitlement to benefits" under the Worker's Disability Compensation Act (WDCA), MCL 418.301(11); MSA 17.237(301)(11), which provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be

> instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

Plaintiff argues that he presented a prima facie case of retaliatory discharge and that the trial court erred in dismissing his claim. The trial court found that plaintiff had not proven pretext and that there were no facts to support plaintiff's retaliation or discrimination claims. We review this issue de novo, *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996), and affirm.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). A court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence submitted by the parties. *Royce, supra.* The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the nonmoving party, would leave open an issue upon which reasonable minds might differ. *Id.* The motion must not be granted unless the nonmoving party's claim has some deficiency which cannot be overcome. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 284; 393 NW2d 610 (1986).

The law concerning retaliatory discharge actions has undergone some turbulence in Michigan over the past several decades. As a result, the law as it currently stands is unclear as to the elements that constitute a prima facie case under § 301(11). In order to rectify this difficulty, we turn to prior retaliatory discharge cases involving workers' compensation claims as well as prior cases involving similar claims brought under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*

In *Goins v Ford Motor Co*, 131 Mich App 185; 347 NW2d 184 (1984), a panel of this Court held that where "the plaintiff claims that he or she was unlawfully discharged for filing a workers' compensation claim, plaintiff has the burden of proving that the filing of the workers' compensation claim was a significant factor in defendant's decision to discharge the plaintiff." *Goins, supra* at 198. The Court also found however, that the plaintiff's discharge claim was one "sounding in tort." *Id.* This latter part of the Court's holding led to the abrogation of *Goins* as subsequent panels held that such an action was one in contract. See, e.g., *Watassek v Michigan Dept of Mental Health*, 143 Mich App 556, 565; 372 NW2d 617 (1985); *Lopus v L & L Shop-Rite, Inc*, 171 Mich App 486, 490-491; 430 NW2d 757 (1988); *Mourad v Auto Club Ins Ass'n*, 186 Mich App 715, 726; 465 NW2d 395 (1991). Then, in 1992, this Court again concluded that an action for wrongful discharge in retaliation for filing a workers' compensation claim was one grounded in tort law. *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 10; 495 NW2d 152 (1992). The Court reasoned that the action sound in tort, not contract, because it has been statutorily codified. *Id.* In 1995, the Michigan Supreme Court agreed with *Dunbar* and held that "[a] cause of action seeking damages from an employer who violates the worker's compensation act is independent of the contract, and sounds in tort, not contract." *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 248-249; 531 NW2d 144 (1995).

The Supreme Court's decision in *Phillips* clarified the nature of an action for retaliatory discharge and the damages that may be recovered. The Court did not, however, enunciate the elements of a prima facie case under the WDCA. In fact, our review of Michigan case law indicates that this

issue has not yet been addressed. While *Goins, supra*, did address the burden of proof in a retaliatory discharge action, the precedential value of *Goins* was called into question by subsequent cases. Additionally, the action in *Goins* was not brought under § 301(11). Nonetheless, since the premise of *Goins* (that a retaliatory discharge action is an action in tort) has been reaffirmed by the Supreme Court's decision in *Phillips, supra*, we believe that the burden of proof requirement set forth in *Goins, supra* at 198, is still good law.

Even if we reaffirm the decision in *Goins*, however, there is still no dispositive case law concerning the elements of a prima facie case under § 301(11). Therefore, we find instructive case law involving wrongful discharges in other context, such as under the Whistleblowers' Protection Act. Section 2 of the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362; MSA 17.428(2).]

To establish a prima facie case under § 2 of the WPA, the plaintiff must show that (1) he was engaged in protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge. *Chandler v Dowell Schlumberger Inc*, ___Mich___; ___NW2d___ (Docket No. 104864, issued 1/21/98, slip op p 5).

Given the similarities between the purpose and structure of § 2 of the WPA and § 301(11) of the WDCA, we find it appropriate to impose similar requirements on a plaintiff wishing to establish a prima facie case under the WDCA. See *Shallal v Catholic Social Services*, 455 Mich 604, 616; 566 NW2d 571 (1997) (noting that whistleblower statutes are "analogous to antiretaliation provisions of other employment discrimination statutes and therefore should receive treatment under the standards of proof of those analogous statutes") (quoting *Rouse v Farmers State Bank of Jewell, Iowa*, 866 F Supp 1191, 1204 [ND Iowa 1994]). Thus, we hold that a plaintiff must establish the following three elements to state a prima facie case under § 301(11) of the WDCA. The plaintiff must show (1) that he was engaged in a protected activity as defined by the act (that he "filed a complaint or instituted or caused to be instituted a proceeding" under the WDCA or that he exercised a "right afforded by" the WDCA on behalf of himself or others), (2) that the defendant discharged him, and (3) that the protected activity was a "significant factor" in the defendant's decision to discharge him (see *Goins, supra* at 198).[3]

After reviewing the record, we agree with the trial court that plaintiff did not meet his burden of proving that "the filing of the workers' compensation claim was a significant factor in defendant's decision to discharge [him]." *Goins, supra*. At his deposition, plaintiff testified that he injured his back

at work in 1983 or 1984. Subsequently, he missed work on five or six different occasions. Plaintiff received workers' compensation benefits for each of the times he missed work between 1984 and 1995 because of the injury, and plaintiff's claims for workers' compensation benefits were never contested by defendant. Plaintiff testified that his belief that he was discharged because of past workers' compensation claims was not based on anything that anyone had said to him, but that it was merely his opinion. Plaintiff's speculation and conjecture is insufficient to establish a prima facie case of retaliatory discharge. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

II

Plaintiff next contends that the trial court erred in granting defendant's motion for summary disposition regarding plaintiff's handicapper discrimination claim. Plaintiff argues that he presented sufficient evidence of a pretextual firing. We disagree.

The applicable section of the Handicappers' Civil Rights Act, MCL 37.1202(1)(b); MSA 3.550(202)(1)(b), provides that "[a]n employer shall not . . . [d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." In order to demonstrate a prima facie case of handicap discrimination, a plaintiff must demonstrate that he or she is handicapped as defined in the act, that the handicap is unrelated to plaintiff's ability to perform the duties of a particular job, and that plaintiff has been discriminated against in one of the ways set forward in the act. *Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997). Once the plaintiff presents evidence that he or she is "handicapped" and that the handicap does not affect his or her ability to perform the duties of a particular job, the burden then shifts to the defendant to show a legitimate, nondiscriminatory reason for its rejection of the plaintiff. *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989). If the defendant makes such a showing, the burden of proof shifts back to the plaintiff to show that the defendant's reason was false or that it was a mere pretext. *Id*.

On appeal, plaintiff only discusses whether he presented enough evidence to establish that defendant's reason for firing him was pretextual. However, plaintiff has come forward with no evidence indicating that defendant perceived him to be handicapped. The president of defendant corporation acknowledged that plaintiff had been injured at work and collected workers' compensation benefits but never indicated that he considered plaintiff to be handicapped. Similarly, plaintiff did not allege that he had indicated to defendant that he was handicapped. Since plaintiff has not shown that defendant perceived him to be handicapped, he cannot logically or factually establish that defendant discharged him on the basis of handicap. *Murphy v Bradford-White Corp*, 166 Mich App 195, 200-201; 420 NW2d 101 (1987).

III

Plaintiff's next argument is that the trial court erred in dismissing his age discrimination claim. Plaintiff contends that he presented evidence of a prima facie case of age discrimination and that

defendant's stated reason for firing plaintiff was a mere pretext. Once again, after reviewing the record, we disagree.

An employer may not fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation or a term, condition or privilege

of employment because of age. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). To establish a prima facie case of age discrimination, which invokes a rebuttable presumption of discrimination, a plaintiff must show (1) that he is a member of a protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by a younger person. *Id*. at 711. There must be at least a logical connection between each of these elements and the illegal discrimination. *Id*. Such an inference may be drawn from the replacement of an older worker with a significantly younger worker. *Id*. Once a plaintiff establishes a prima facie case of age discrimination, the burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for its actions. *Id*. If the defendant meets the burden of production, the plaintiff must then prove that the reason proffered was a mere pretext. *Id*.

Plaintiff failed to present a prima facie case of age discrimination. The parties do not dispute that plaintiff was fifty-two years old on June 13, 1994. Neither do the parties dispute that plaintiff was discharged or that he was qualified for his position. However, plaintiff has failed to provide any evidence that he was replaced by a younger person. At his deposition, plaintiff testified that he did not know who, if anyone, replaced him but that he had heard that "[t]hey hired a bunch of scabs" who he guessed were younger than him. Plaintiff subsequently submitted an affidavit bearing his own statement that "[s]ince my deposition testimony, I have learned as a matter of fact, that the employee who replaced me was Steven Lewis, date of birth July 5, 1966." However, an exhibit attached to plaintiff's brief in opposition to defendant's motion for summary disposition was a list of employee's names, birth dates and hire dates. That list indicates that Lewis was hired more than a month before plaintiff was discharged.

The existence of a disputed fact must be established by admissible evidence; a mere promise to offer factual support at trial is insufficient. *Cox v Dearborn Heights*, 210 Mich App 389, 398; 534 NW2d 135 (1995). In this case, plaintiff's unsupported hearsay statement that he has "learned as a matter of fact" that he was replaced by a younger person would be inadmissible at trial and is insufficient to create a disputed fact regarding whether plaintiff was replaced by a younger person. Therefore, because plaintiff has failed to provide any admissible evidence that he was replaced by a younger person, he failed to state a prima facie case of age discrimination.

IV

Plaintiff next argues that the trial court erroneously dismissed his defamation claim because he presented sufficient evidence that defendant published plaintiff's discharge letter with knowledge of its falsity or reckless disregard of the truth. Plaintiff's claim is based on the letter defendant sent to plaintiff discharging him for an alleged assault on a security guard. A copy of the letter was forwarded to the union president.

The elements of libel are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) actionability of the statement. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press*, 213 Mich App 317, 323; 539 NW2d 774 (1995). Plaintiff concedes that defendant has a qualified privilege to defame him because the union has an interest

in the subject matter of the communication at issue. *Smith v Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989). A plaintiff can overcome a qualified privilege only by showing "actual malice," which is defined as "knowledge that the published statement was false or a reckless disregard as to whether the statement was false or not." *Grebner v Runyon*, 132 Mich App 327, 332; 347 NW2d 741 (1984). Reckless disregard for the truth is measured by "whether the publisher in fact entertained serious doubts concerning the truth of the statements published." *Id.* at 333. It may not be established "merely be showing that the statements were made with preconceived objectives or insufficient investigation." *Id.*

In the present case, we find that plaintiff failed to raise a material factual dispute as to whether defendant acted with actual malice. Plaintiff argues that the videotape relied on by defendant does not clearly show that plaintiff assaulted the security guard. Plaintiff also argues that defendant's reliance on the tape and failure to discuss the incident with him before sending him a letter of discharge indicates reckless disregard for the truth. However, the evidence does not support plaintiff's allegations. The president of defendant corporation testified that he, along with defendant's vice president and legal advisor, made the determination to fire plaintiff based on their review of the videotape of the incident, a written statement by the security guard, and a statement by the lead foreman of the security guards. While this investigation was minimal, we find it sufficient under the circumstances. We also note that summary disposition was proper given the fact that plaintiff failed to present evidence that defendant in fact entertained serious doubts concerning the truth of the statements published.

Plaintiff also contends that defendant should be liable for republication of the letter because defendant caused other employees on the picket line to learn of plaintiff's discharge. Plaintiff relies on *Tumbarella v Kroger Co*, 85 Mich App 482, 496; 271 NW2d 284 (1978), wherein this Court held that "one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original publication." *Id.* However, plaintiff has presented no evidence that the president of defendant corporation showed the discharge letter to anyone but Edward Markiewicz, the president of plaintiff's union. An affidavit from Markiewicz states that he provided a copy of the letter to the UAW International representative but that, to the best of his knowledge, Markiewicz was the only Diecast employee who had a copy of the discharge letter. Markiewicz also stated that the letter was not made public in any way. Therefore, based on the evidence presented, we find that plaintiff did not present a material factual dispute on the issue of liability.

V

Plaintiff's final claim concerns whether the trial court erroneously dismissed his claim of intentional infliction of emotional distress because plaintiff's evidence established that defendant's conduct was extreme and outrageous. We find no error. 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 requires conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and intolerable in a civilized community. *Id.* Whether conduct is so extreme as to permit an action for intentional infliction of emotional distress is

initially a determination for the court, but when reasonable men can differ the issue is for the jury. *Id*. at 92.

Plaintiff contends that defendant's conduct in discharging plaintiff was extreme and outrageous because the videotape of the incident raises doubt as to whether plaintiff actually assaulted the security guard and because defendant failed to question plaintiff or other picketers about the incident before discharging plaintiff. However, plaintiff cannot maintain a claim for intentional infliction of emotional distress on the mere evidence that defendant informed plaintiff of defendant's belief that he had engaged in certain conduct and, on that basis, discharged him. See *Fulghum v United Parcel Service*, 424 Mich 89, 97; 378 NW2d 472 (1985). Therefore, the trial court properly granted defendant's motion for summary disposition regarding plaintiff's intentional infliction of emotional distress claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] Defendant moved for summary disposition under MCR 2.116(C)(7), (8) and (10). The trial court granted defendant's motion pursuant to subrule (C)(10).

[2] The body of the letter provided:

> On Monday June 13, 1994 at approximately 6:50 a.m., you violently assaulted plant security officer Tom Napier. On this date and time you were observed as you grabbed the security officer from behind, and threw him to the pavement in the path of a moving vehicle that was crossing the picket line to enter the plant. Your assault endangered the plant security officer's life as he was thrown mere inches from the front wheels of the moving vehicle. If not for the warning shouts of others at the scene, the security officer would have been run over by the vehicle.
>
> After investigation of the incident, it has been decided that you are to be discharged.

[3] To establish a prima facie case, the plaintiff must prove that he was discharged because he *engaged* in a protected activity; this Court has previously held that a retaliatory discharge claim cannot be based on the discharge of an employee purportedly in anticipation of future claims by the employee for workers' compensation benefits. See, e.g., *Griffey v Prestige Stamping, Inc*, 189 Mich App 665; 473 NW2d 790 (1991); *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638; 413 NW2d 79 (1987).