

STATE OF MICHIGAN
COURT OF APPEALS

ERIC TUCKER,

Plaintiff-Appellant,

v

CITY OF DETROIT, DENNIS W. ARCHER, and
FREEMAN HENDRIX,

Defendants-Appellees,

and

JAY ALIX,

Defendant.

UNPUBLISHED

January 18, 2000

No. 211015

Wayne Circuit Court

LC No. 95-535301 CK

Before: Jansen, P.J., and Hood and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm.¹

Plaintiff held the position of director of finance for Prince George's County in Maryland when he was approached by representatives of defendant, City of Detroit, regarding a position with the city. After a face to face meeting with the Mayor of the City of Detroit, defendant Dennis W. Archer, plaintiff was hired as the finance director. Plaintiff alleged that he negotiated a four-year agreement, which provided that he would be discharged only for cause, and that this induced him to move with his family to the City of Detroit. Plaintiff acted as finance director from June 27, 1994 until his discharge on August 31, 1995. Defendants asserted that plaintiff was unable to work in harmony with his peers and caused jurisdictional disputes with other department heads. Although plaintiff was hired by defendant Archer, plaintiff was to report to defendant Freeman Hendrix due to time constraints on defendant Archer's time, but he did not do so. Defendant Hendrix and Deputy Mayor, Nettie Seabrooks,

allegedly attempted to resolve plaintiff's conflicts with other staff members, but were unable to change plaintiff's behavior and treatment of others. Accordingly, plaintiff was terminated.

Plaintiff alleged that he was about to report various illegalities in the administration and was treated differently because of his race. Although plaintiff and defendant Archer, who hired plaintiff, were both African-American, plaintiff alleged that "light-skinned" African-Americans were given preferential treatment over "dark-skinned" African Americans, and plaintiff characterized himself as dark-skinned. Additionally, plaintiff alleged that upon his discharge, he was escorted out of his office by police officers who then followed him home and searched his apartment without his consent.

Plaintiff filed this lawsuit which was assigned to Judge Kirsten Frank Kelly. On March 29, 1997, at a hearing regarding plaintiff's motion for sanctions, Judge Kelly declined to hear defendants' motion for summary disposition, but ruled that she would allow additional discovery prior to any hearing. On September 26, 1997, Judge Kelly heard oral arguments regarding plaintiff's motion for production of documents and motion for leave to file a second amended complaint. At the hearing, Judge Kelly acknowledged that transfer of the case was imminent due to her assignment to the family court and was hesitant to rule on the issues due to the transfer. Judge Kelly ultimately granted plaintiff's motion for leave to file a second amended complaint and ruled that documents should be secured for review by Judge William Giovan to whom the case would transfer. On October 8, 1997, Judge Giovan signed the order granting plaintiff leave to file his second amended complaint. On November 14, 1997, the parties appeared before Judge Giovan regarding plaintiff's motion for production of documents. Judge Giovan noted that plaintiff's second amended complaint contained thirteen counts. Rather than order the exchange of additional discovery, Judge Giovan ruled that he would entertain defendants' motion for summary disposition to "weed" out the claims raised by plaintiff which were being pursued in good faith. After considering defendants' motion, Judge Giovan granted defendants' motion for summary disposition as to all claims brought by plaintiff.

Plaintiff first argues that Judge Giovan erred in failing to abide by the prior rulings of Judge Kelly and erred in granting summary disposition prior to the close of discovery. We disagree. A circuit court judge is required to follow published decisions of the Court of Appeals and Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). There is no requirement that one circuit court judge follow the decision of another. *Id.* Accordingly, Judge Giovan was not bound by the rulings of Judge Kelly. Furthermore, summary disposition is appropriate prior to the close of discovery where no fair chance exists that further discovery will result in factual support for the nonmoving party. *Ireland v Edwards*, 230 Mich App 607, 623; 584 NW2d 632 (1998). Plaintiff's brief on appeal states that defendants failed to produce "certain requested materials." However, plaintiff failed to identify which documents were necessary, and the proofs he expected to derive from those documents. Because there was no identification of the type of evidence which would be produced or revealed in discovery, the trial court did not err in granting summary disposition prior to the close of discovery.

Plaintiff next argues that the trial court improperly granted summary disposition of his race discrimination claim. We disagree. We review summary disposition decisions de novo. *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997).

To prove a prima facie case of discrimination, [the] plaintiff must prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered an adverse employment action ...; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. Once [the] plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a “legitimate, nondiscriminatory reason” for [the] plaintiff’s termination to overcome and dispose of this presumption. [*Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998).]

In the present case, plaintiff failed to establish his prima facie case. Specifically, plaintiff failed to establish that he suffered adverse employment action as a result of his classification as a “dark-skinned” individual. Plaintiff asserted in his deposition that he would present his ideas to defendant Archer, who would then seek the opinions of Caucasian or “light-skinned” African-Americans or tell plaintiff to consult with those individuals. For example, defendant Archer told plaintiff to consult with Phyllis James, Corporation Counsel, about a tax matter when, according to plaintiff, “she’s not a tax person.” Plaintiff testified that there were ten different classifications of skin color, and he classified James as an African-American but with “cream” skin color. When asked if it was possible if defendant Archer told plaintiff to consult with James because someone within her office would have knowledge of tax matters, plaintiff could not state what defendant Archer’s motivation was. Additionally when asked if plaintiff was asked to consult with others because of their positions within the organization, plaintiff could not answer. When asked if other department heads were asked to consult with others, plaintiff did not have that information within the “best” of his knowledge. Plaintiff’s deposition testimony failed to establish that consulting others was adverse employment action as a result of “skin color” instead of a requirement that all department heads were obliged to do in light of the interaction of their offices.

Even assuming that plaintiff had provided deposition testimony which would establish his protected class and adverse employment action as a result, the circumstances surrounding his employment create a presumption against discrimination. That is, plaintiff worked for defendants from June 27, 1994, to August 31, 1995. Plaintiff was hired after a face to face meeting with defendant Archer, and the decision to discharge plaintiff was defendant Archer’s. In *Town v Michigan Bell*, 455 Mich 688, 700; 568 NW2d 64 (1997) (Opinion of Brickley, J., joined by Boyle and Weaver, JJ.) (Riley, J., concurring in relevant part), our Supreme Court held:

(I)n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer. [quoting *Proud v Stone*, 945 F2d 796, 797 (CA 4, 1991).]

In the companion case to *Town*, *McConnell v Rollins Burdick Hunter*, the *McConnell* plaintiff was hired as a sales representative in July of 1988, when he was fifty-five years of age. In January of 1989, the plaintiff was informed that he needed to improve his sales production. The plaintiff was unable to

improve his production and was discharged in January of 1990, after eighteen months. *Id.* at 692. The Supreme Court held that the paucity of evidence combined with this inference revealed that summary disposition was proper. Likewise, in the present case, plaintiff failed to establish that “dark-skinned” African-Americans received adverse employment treatment. The paucity of evidence combined with the fact that plaintiff was hired and fired by defendant Archer within a brief period of time (fourteen months) indicates that the trial court properly granted defendants’ motion for summary disposition of this claim.

Plaintiff next argues that the trial court erred in dismissing his racially hostile work environment claim. We disagree.

In order to establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee’s employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Downey v Charlevoix Cty Brd*, 227 Mich App 621, 629; 576 NW2d 712 (1998).]

Plaintiff argues that decisions were made based on race. That is, ideas were not adopted or received unless they came from Caucasians or “light-skinned” African-Americans. Additionally, plaintiff was asked to make decisions based on race. In support of this claim, plaintiff submitted an affidavit in support. Assuming that this affidavit was preserved in the lower court record, the affidavit fails to comply with the requirements of MCR 2.119(B). *SSC Associates Limited Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). It does not state that it was made with personal knowledge. MCR 2.119(B)(1)(a). Furthermore, the portion of plaintiff’s affidavit which addresses the hostile work environment claim contains no specific details. MCR 2.119(B)(1)(b). Mere conclusory allegations which are devoid of detail do not satisfy the obligation of an opposing party to a motion for summary disposition. *Quinto v Cross & Peters*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). While plaintiff asserts that other individuals were given preferential treatment and had their ideas adopted based on race, he fails to name specific individuals and identify their skin color and fails to identify specific plans which were received over the plans of individuals who were not given preferential treatment due to skin color. Thus, the facts alleged do not constitute conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed. *Id.* In light of these deficiencies, the trial court properly granted defendants’ motion for summary disposition of the hostile work environment claim.

Plaintiff next argues asserts that the trial court erred in granting summary disposition of the Whistleblower’s Protection Act (WPA) and retaliation claims. We disagree.

The WPA protects an employee from discharge, threats, or other discrimination regarding her employment because she “reports or is about to report, verbally or in

writing, a violation or a suspected violation of law or regulation or rule” MCL 15.362; MSA 17.428(2). To establish a prima facie case, a plaintiff must demonstrate that (1) the plaintiff was engaged in a protected activity as defined by the act, (2) the plaintiff was subsequently discharged, and (3) there existed a causal connection between the protected activity and the discharge. [*Roberson v Occupational Health Centers*, 220 Mich App 322, 325; 559 NW2d 86 (1996).]

“An employer is entitled to objective notice of a report or a threat to report by the whistleblower.” *Id.* at 326, quoting *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993). In the present case, plaintiff presented an affidavit which addressed this claim. Once again, even assuming that this affidavit was filed with the trial court, it fails to satisfy the specificity requirements of MCR 2.119(B) and fails to state that it is made with personal knowledge. While plaintiff *felt* that he was reporting “improper and/or illegal” dealings, he failed to provide the subject matter of the dealings such that it could be concluded whether the subject matter actually involved an activity that was protected by the act. Even assuming that plaintiff had demonstrated his actions constituted protected activity, he has failed to establish that there was a causal connection between the activity and his discharge. There is no indication that defendants were aware of any report or threat to report by plaintiff. Accordingly, plaintiff failed to meet the elements of this claim.

In plaintiff’s deposition, he did, in fact, provide examples of activity which he alleged to be illegal. However, when referring to a contract with Optimum Solutions, plaintiff initially testified that it was “illegal,” but changed his testimony to state that the contract was not a “prudent use of city resources.” However, plaintiff had deemed the transaction “illegal” because he felt that it was his fiduciary duty to protect the city’s resources. Additionally, plaintiff thought a self-insurance contract with W.L. Long was illegal, but he did not seek an opinion from the law department. Plaintiff also thought that the property from which Focus Hope operated should be taxable because it was a profit making activity. However, plaintiff “probably” discussed it with the “office of the law,” but could not recall with whom. The deposition testimony failed to establish the elements of plaintiff’s claim.

It should be noted that retaliation is referred to as an action under the Whistleblower’s Protection Act. *Tyrna v Adamo, Inc*, 159 Mich App 592, 601; 407 NW2d 47 (1987). However, in the present case, plaintiff argues also that retaliation occurred for filing the instant lawsuit. That is, once potential employers of plaintiff’s called for references to defendants, the potential employers were referred to attorneys for defendants. Plaintiff fails to provide any authority which indicates that a retaliation claim exists independent of any statutory authority. Furthermore, plaintiff fails to cite any authority in support of maintaining this cause of action. A statement of a position without citation to authority is insufficient to bring an issue before this Court. *Mann v Mann*, 190 Mich App 526, 536-537; 476 NW2d 439 (1991). A party may not leave it to this Court to search for authority to sustain a position. *Id.* Additionally, plaintiff has failed to provide any documentary evidence to substantiate that potential employers were referred to defendant’s attorneys. That is, plaintiff has failed to obtain an affidavit from those individuals attesting that this procedure occurred. Accordingly, the statement of retaliation is premised on hearsay. “Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by

admissible evidence.” *SSC, supra*. Accordingly, the trial court properly granted summary disposition of this claim where plaintiff failed to meet the elements or create a question of fact with admissible documentary evidence.

Plaintiff next argues that the trial court erred in granting summary disposition of his fraudulent inducement and intentional infliction of emotional distress claims. We disagree. Plaintiff alleges that defendant Archer promised plaintiff that he would not be terminated without just cause when this assertion violated the city charter. “There can be no fraud where a person has the means to determine that a representation is not true.” *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Plaintiff cannot maintain a cause of action for fraudulent inducement because the information was available to plaintiff through the city charter.

The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). 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. *Doe v Mills*, 212 Mich App 73, 91-92; 536 NW2d 824 (1995). Plaintiff failed to allege intentional conduct which would require submission of this issue to the jury, and the trial court properly dismissed this cause of action.

Plaintiff next argues that the trial court erred in granting summary disposition of his claim of trespass. A trespass is an unauthorized invasion upon the private property of another. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). However, there must be an intent to intrude on the property of another without authorization to do so. *Id*. If the intrusion was due to an accident caused by negligent or an abnormally dangerous condition, an action for trespass is not proper. *Id*. In the present case, police officers testified that their entry into plaintiff’s apartment was authorized because plaintiff let them in with his personal belongings. Plaintiff, however, was obtrusive in his testimony. Plaintiff testified that he was first aware of the officers in his apartment when he saw them, and they did not knock, they just came in. However, he later confessed to the circumstances surrounding their entry, that is, that the officers drove him home and helped him carry in his personal belongings. While plaintiff testified that he had a problem with defendant Hendrix’s instructions to assist plaintiff and had a problem with the officers entry into his home, plaintiff did not express that to anyone. Therefore, plaintiff cannot state that the entry was unauthorized, when by his actions in letting the officers enter, he seemingly authorized their entry. Alternatively, the “actor must intend to intrude on the property.” *Id*. That requirement is also not fulfilled because the police officers entered plaintiff’s home not only because he did not express any objection, but also because they thought it was a permissible entry. Accordingly, the trial court properly dismissed this claim.

Plaintiff next argues that the trial court erred in dismissing the false arrest and false imprisonment claims. To prevail on a claim for false arrest or imprisonment, a plaintiff must show that the arrest was not legal, that is, it was not based on probable cause. *Young v Barker*, 158 Mich App 709, 720; 405 NW2d 395 (1987). In the present case, there was no arrest of plaintiff. Officers testified that he was free to leave at any time and that they did not have probable cause to arrest him. In

support of his claims, plaintiff presented the affidavit of James Jackson. Again, it is unknown whether this affidavit was preserved in the lower court record. However, this affidavit fails to satisfy the specificity requirements of MCR 2.119. *SSC, supra*. The affidavit concludes that Jackson is an expert in police practices and procedures. However, there is no foundation for this statement. The affidavit next states that Jackson had the opportunity to review the “facts in this case.” However, Jackson fails to set forth what “facts” he reviewed. It is not known whether he reviewed the deposition testimony of plaintiff and the police officers. Jackson concludes that, under the circumstances, a civilian would reasonably conclude that he was under arrest. However, case law regarding false arrest or imprisonment does not address the beliefs of the person in custody. Rather, the first inquiry is whether there was an arrest. *Young, supra*. Accordingly, Jackson’s affidavit fails to create a question of fact because of the deficiencies. Furthermore, in *Hottmann v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997), this Court rejected the affidavit of an expert and held that “the duty to interpret and apply the law has been allocated to the courts, not to the parties’ expert witnesses.” Accordingly, Jackson’s opinion regarding the ultimate issue has no bearing on a legal interpretation belonging to this Court. Summary disposition was proper of the false arrest and false imprisonment claims based on plaintiff’s failure to establish the elements of the offense.

Plaintiff next argues that the trial court erred in granting summary disposition of his claim for civil conspiracy. We disagree.

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. [*Feaheny v Caldwell*, 175 Mich App 291, 307; 437 NW2d 358 (1989).]

Pursuant to *Feaheny, supra*, summary disposition was appropriate because plaintiff has failed to provide evidence that the decisions to accept or reject plaintiff’s ideas were merely business decisions.

Plaintiff next contends that the trial court erred in dismissing the claim for tortious interference with a business relationship. Specifically, plaintiff contends that the individual defendants, including defendant Hendrix, acted for their own benefit in having plaintiff terminated. We disagree. In *Pryor v Sloan Valve Co*, 194 Mich App 556, 560; 487 NW2d 846 (1992), this Court set forth the elements required to establish a cause of action for tortious interference with economic advantage or business relations: (1) a valid business relationship or expectancy, (2) knowledge of the relationship on the part of the interferer, (3) an intentional interference inducing or causing a breach or termination of a relationship or expectancy, and (4) damages.

However, in this case, plaintiff alleges that the individual defendants, as employees of defendant City of Detroit, intervened in plaintiff’s employment with the city. Under these circumstances, plaintiff must demonstrate that each defendant did per se wrongful acts or did lawful acts with malice and without justification. *Feaheny, supra*. Additionally, plaintiff must prove, with specificity, affirmative acts by defendants which corroborated the unlawful purpose of the interference. *Id.* Where the defendants served as agents for a corporation, the plaintiff has the difficult obstacle of showing that each

defendant stood as a third party to the at-will employment contract at the time the acts were performed. *Id.* In the present case, plaintiff failed to meet this high burden that the individual defendants acted out of a personal motive to harm plaintiff or to otherwise acquire pecuniary advantage. Accordingly, summary disposition of this claim was proper.

Plaintiff next argues that the trial court erred in dismissing his defamation claim. We disagree. In *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 443-444; 566 NW2d 661 (1997), this Court set forth the requirements for a defamation claim:

The elements of a defamation claim 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) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.

In the present case, plaintiff failed to establish, with admissible documentary evidence, that the statements were made. Rather, the allegations by plaintiff are raised through hearsay which will not operate to create a question of fact. *SSC, supra*. Because of the documentary evidence deficiency, the defamation claim was properly dismissed.

Lastly, plaintiff failed to argue the merits of the discharge in violation of public policy claim. Therefore, this claim has been abandoned on appeal. *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998).

Affirmed.

/s/ Kathleen Jansen

/s/ Harold Hood

/s/ Kurtis T. Wilder

¹ As an initial matter, we note that all original documents contained in the lower court record were not preserved for appellate review. Accordingly, the circuit court requested that the parties recreate portions of the record on appeal. However, in recreating the lower court file, numerous copies of some documents have been preserved while other documents are completely absent from the record. For example, plaintiff failed to preserve in the record his answer and any accompanying documentary evidence to defendants' motion for summary disposition. Plaintiff, as the appellant, had the duty to file with the trial court all transcripts and other proceedings. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). "We limit our review to what is presented on appeal and will not consider any alleged evidence or testimony proffered by the parties where there is no record support." *Id.* Additionally, plaintiff's brief on appeal fails to comply with MCR 7.212(C)(6) and MCR 7.212(C)(7). Despite these deficiencies, we nevertheless have addressed the merits of plaintiff's claim of appeal.