

STATE OF MICHIGAN
COURT OF APPEALS

LARRY G. OWEN,

Plaintiff-Appellant,

v

UNADILLA TOWNSHIP and MICHAEL VOGEL,

Defendants-Appellees.

UNPUBLISHED

April 9, 1999

No. 206769

Livingston Circuit Court

LC No. 95-014510 NO

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff filed suit against defendants Unadilla Township and Michael Vogel, alleging, in relevant part, that they discharged him from his position as chief of police in violation of various public policies.¹ Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

The issue in this case is whether the trial court properly granted defendants' motion for summary disposition. We review the trial court's decision de novo. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). The nonmoving party must come forward with admissible evidence demonstrating the existence of a genuine issue of material fact in support of the claim presented. *Id.* Giving the nonmoving party every reasonable benefit of the doubt, the trial court must determine whether the record leaves open an issue about which reasonable minds might differ. *Moore v First Casualty Security Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).²

In the absence of an express agreement to the contrary, an employer enjoys a significant amount of freedom to discharge its employees at any time, for any reason. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 484; 516 NW2d 102 (1994). There are certain cases, however, in which the employer's motive for discharging an employee so contravenes established public policy that it gives the employee a cause of action for wrongful discharge. *Suchodoski v Michigan Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982).

Michigan courts recognize two distinct categories of public policy exceptions relevant under the facts of plaintiff's case. The first category encompasses those cases in which the employer discharged the employee because he refused to engage in some conduct that would have violated the law. *Id.*, 695; *Vagts, supra*, 485. The second category encompasses those cases in which the employer discharged an employee because he exercised a right incident to the employment relationship, conferred on him by some firmly rooted legislative enactment. *Vagts, supra*, 485; see, e.g., *Sucholdoski, supra*, 696-697. Accordingly, in order for plaintiff to have avoided summary disposition, he must have demonstrated a genuine issue of material fact (1) that he refused to engage in some conduct that would have violated the law or (2) that he exercised some statutory right incident to the employment relationship.

We find that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact that he refused to engage in some conduct that would have violated that law. Plaintiff claims that he “thwarted [defendant] Vogel’s attempts to act as a de facto police chief” in violation of MCL 750.215; MSA 28.412.³ We find that the evidence, however, does not demonstrate that defendant Vogel impersonated a police officer or ordered plaintiff to assist him in doing so. Although plaintiff described three incidents in which he claimed that defendant Vogel attempted to usurp authority reserved to police officers, he presented no evidence that he ordered plaintiff to do anything illegal.

First, defendant Vogel received complaints about a dilapidated building and ordered plaintiff to ticket the property owner for violating the building code. Similarly, defendant Vogel received complaints about the storage of junk vehicles on a parcel of residential property and ordered plaintiff to ticket the property owner for violating that part of the ordinance prohibiting such storage. Finally, defendant Vogel received complaints about some horseback riders who repeatedly trespassed on a private road and ordered plaintiff to “tell them to stay off”, ticketing them if necessary. Because plaintiff did not believe that the township ordinance supported such tickets, he refused to comply with each of the orders. Even construed most favorably to plaintiff, the evidence does not demonstrate that had plaintiff acquiesced to defendant Vogel’s orders, it would have constituted a violation of the law. Indeed, plaintiff acknowledged that he could have written the tickets. Moreover, plaintiff acknowledged that defendant Vogel possessed the authority, akin to that possessed by every other citizen, to request that he write a ticket. In sum, we conclude that plaintiff failed to present any evidence that defendant Vogel did more than insist that plaintiff do what he perceived to be his job.⁴

Plaintiff next claims that he refused to alter an accident report in violation of: (1) MCL 750.423; MSA 28.665,⁵ (2) MCL 750.424; MSA 28.666,⁶ (3) MCL 750.425; MSA 28.667,⁷ and (4) MCL 257.744a; MSA 9.2444(1).⁸ The record shows that a Carol Giacinto reported to plaintiff that she was driving through the township when another driver forced her off the road. Although plaintiff did not issue a citation, he did indicate in the accident report that Giacinto was at fault. The record further shows that sometime thereafter, Giacinto complained to Trustee Angelo Pecora that she was unhappy with the way plaintiff handled the incident and advised him that she could identify the other vehicle involved. In response, Pecora advised her to call plaintiff and explore her options. Plaintiff alleged in his complaint that Pecora requested that he alter the accident report. Although plaintiff maintains in his

brief that Pecora demanded that he falsify the accident report, plaintiff's deposition testimony and affidavit do not support such a claim. Rather, plaintiff's deposition testimony indicates only that "he refused to change an accident report for a friend of one of the Township Board members." Nowhere does plaintiff indicate the nature of the change sought, and his affidavit wholly fails to support this claim. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (noting that the nonmoving party must present documentary evidence demonstrating the existence of a factual dispute and mere allegations and unsupported assertions are insufficient to satisfy the burden). Further, plaintiff failed to present any evidence, save for his own opinion, that his refusal to change the report was a factor in the board's decision to terminate his employment. Thus, we conclude that plaintiff failed to demonstrate the existence of a genuine issue of material fact in support of his claim that he was terminated from his position for refusing to engage in conduct that would have violated the law.

We also find that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact that he exercised some statutory right incident to the employment relationship. Plaintiff claims that "he requested that [defendant Unadilla Township] pay him overtime pursuant to" MCL 408.384a(1); MSA 17.255(4a)(1).⁹ The record shows that in 1993, plaintiff arranged for a traffic enforcement grant to pay himself overtime. When defendant Vogel learned of the grant, he confronted plaintiff and told him that because he was the chief of police, he was not entitled to overtime pay. In addition, he advised plaintiff that the board of trustees expected him to work whatever hours he required to "get the job done." Sometime thereafter, plaintiff approached the police committee about establishing a schedule. When he complained about the number of hours he worked, however, the committee responded: "that goes with the territory[; y]ou do your - do the work or we'll find somebody else to do it." Plaintiff did not, however, request that defendant Unadilla Township pay him overtime or submit documentation to the committee that he actually worked overtime until after defendant discharged him. Thus, we conclude that the trial court did not err when it found that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of his claim that he exercised a statutory right incident to the employment relationship.

Having concluded that plaintiff failed to demonstrate a genuine issue of material fact that he refused to engage in conduct that would have violated the law or that he exercised a statutory right incident to the employment relationship, we need not elaborate on plaintiff's final claim that the trial court erred in concluding that plaintiff failed to submit evidence sufficient to demonstrate a genuine issue of material fact that there existed a causal connection between a protected activity and his discharge. Suffice it to say that our review of the record would lead us to conclude that plaintiff failed to present facts, as opposed to suspicions, that would support a conclusion that there was a causal connection between his discharge and the alleged protected activity.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Brian K. Zahra

¹ Plaintiff additionally alleged intentional interference with contractual relations by defendant Vogel. Plaintiff, however, expressly abandons his additional allegation on appeal.

² Plaintiff maintains that the trial court held that he failed to state a claim upon which relief can be granted and dismissed his claim pursuant to MCR 2.116(C)(8). Thus, plaintiff concludes, the question before this Court is the legal, as opposed to the factual sufficiency of his claim. Defendants, however, filed their motion for summary disposition pursuant to MCR 2.116(C)(10), maintaining that even if the statutes plaintiff cited in his complaint could properly form the basis of a claim for discharge in violation of public policy, there exists no evidence that the conduct plaintiff described implicated the policies embodied in the statutes or that it caused his discharge. In addition, the trial court examined the evidence submitted for and against defendants' motion and specifically found that plaintiff failed to submit evidence sufficient to demonstrate a genuine issue of material fact in support of his claim. Although the trial court then proceeded to state that: "I don't find any of this . . . from a legal standpoint that suggested [plaintiff] could not be fired for these reasons[.]" it does not appear to us that this formed the basis of the court's decision. Accordingly, we find that the question before us is the factual sufficiency of plaintiff's claim.

³ MCL 750.215; MSA 28.412 provides that

[a]ny person who shall falsely assume to be a . . . police officer, and shall take it upon himself to act as such, or to require any person to aid or assist him or her in any manner pertaining to the duty of a . . . police officer shall be guilty of a misdemeanor

⁴ We note that plaintiff also presented evidence that defendant Vogel received repeated complaints about drinking, junk cars, and loud parties at a local residence known as the "crooked house." In response, the board of trustees requested that Unadilla Township police officer Robert Markham take on this house as a special assignment. Plaintiff indicated that he objected when advised of the assignment. Plaintiff presented no evidence, however, that he did anything to prevent Officer Markham from following through on the board's request. See *Vagts, supra*, (suggesting that evidence the employee merely objected to an illegal request is insufficient to demonstrate that the employee refused to engage in conduct that would violate the law). In any event, plaintiff presented no evidence that the board's request contravened any law.

⁵ MCL 750.423; MSA 28.665 provides that

[a]ny person . . . of whom an oath shall be required by law, who shall wilfully swear falsely, in regard to any manner or thing, respecting which such oath is . . . required, shall be guilty of perjury

⁶ MCL 750.424; MSA 28.666 provides that

[a]ny person who shall be guilty of subornation of perjury, by procuring another to commit the crime of perjury, shall be punished as provided in [MCL 750.425; MSA 28.667].

⁷ MCL 750.425; MSA 28.667 provides that

[a]ny person who shall endeavor to incite any person to commit the crime of perjury, though no perjury be committed, shall be guilty of a felony

⁸ MCL 257.744a; MSA 9.2444(1) provides that

[a] police officer who, knowing the statement is false, makes a materially false statement in a citation issued under section 742 is guilty of perjury

⁹ MCL 408.384a(1); MSA 17.255(4a)(1) provides that

[e]xcept as otherwise provided in this section, an employee shall receive compensation at not less than 1-1/2 times the regular rate at which the employee is employed for employment in a workweek in excess of 40 hours.