

STATE OF MICHIGAN
COURT OF APPEALS

DEMETRIUS PATTERSON,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

May 17, 2005

No. 251192

Wayne Circuit Court

LC No. 02-200173-NZ

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant in this action alleging interference with plaintiff's employment relationship and violation of New York State's Human Rights Law, NY Exec Law, § 296 (McKinney). We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition on his claim of discrimination and in determining that the sole basis for plaintiff's discharge by his employer, Gannett Corporation, Inc., was for plagiarism. We review de novo a trial court's decision on a motion for summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* After reviewing the pleadings, affidavits, depositions, admissions, and any other evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

To establish a prima facie case of racial discrimination in employment under the New York State Human Rights Law, NY Exec Law, § 296 (McKinney), a plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was discharged or terminated from employment or suffered an adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v American Lung Ass'n*, 90 NY2d 623, 629; 687 NE2d 1308; 665 NYS2d 25 (1997). The burden then shifts to the employer to rebut the presumption of discrimination by clearly setting forth legitimate, independent, and nondiscriminatory reasons to support its employment decision, through the introduction of admissible evidence. *Id.* To be successful on a claim, a plaintiff must demonstrate that the legitimate reasons offered by the

defendant for the discharge are a mere pretext for discrimination by proving that both the stated reasons are false and that discrimination was the real reason for the termination. *Id.* at 629-630.

The parties do not dispute that plaintiff meets the first three criteria to establish a discrimination claim. The dispute arises regarding whether the discharge occurred under circumstances giving rise to an inference of discrimination. Plaintiff claims that he was treated differently from non-minority employees, but fails to offer any evidence of disparate treatment to support his claim. Further, plaintiff does not assert that he was discriminated against because of his race; rather, plaintiff asserts that he was discharged because of his investigation and exposure of discriminatory practices in defendant's minority dealership program.

The circumstances of plaintiff's discharge do not give rise to an inference of discrimination. Plaintiff was discharged from his position as a journalist in 2001. His article on defendant's purported discriminatory practices appeared in 1997. Even assuming that contacts with defendant regarding the alleged discriminatory practices continued to occur from 1998 to 2000, the temporal or causal link to plaintiff's discharge is tenuous and removed at best. Plaintiff admits that he has no evidence or personal knowledge of any contact by defendant with his employer Gannett, or its staff, requesting plaintiff's termination, reassignment, or other disciplinary action. No witness has indicated any contact with defendant regarding plaintiff, other than for the purpose of obtaining an opportunity to provide responsive information and materials representative of defendant's perspective on the allegations pertaining to treatment of its minority dealership owners. Plaintiff asserts that collaboration between counsel for his employer and defendant in responding to Equal Employment Opportunity Commission (EEOC) complaints filed by plaintiff, weeks before his termination, raises an inference of discrimination. While "proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection," *Moon v Transport Drivers, Inc.*, 836 F2d 226, 229 (CA 6, 1987), "temporal proximity alone is insufficient to establish a causal connection for a retaliation claim." *Little v BP Exploration & Oil Co.*, 265 F3d 357, 363-364 (CA 6, 2001).

The verbal threats cited by plaintiff from defendant's staff are insufficient to infer discriminatory action. Plaintiff has failed to produce any evidence that any of these individuals contacted his employer or took any steps to seek plaintiff's discharge. In addition, the occurrence of the alleged threats is disputed and denied by defendant's staff.

New York courts have held that:

To prevail on their summary judgment motion, defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. [*Forrest v Jewish Guild for Blind*, 3 NY3d 295, 305; 819 NE2d 998; 786 NYS2d 382 (2004).]

Even assuming that plaintiff had established all the criteria required for a claim of discrimination, he has failed to overcome the evidence presented by defendant that the basis for plaintiff's discharge was plagiarism. All of the evidence presented supports defendant's contention that the sole basis for plaintiff's discharge was plagiarism of material for a corporate profile on a company not associated in any manner with defendant. Plagiarism is a legitimate,

nondiscriminatory reason for plaintiff's discharge, particularly given Gannett's disseminated policies and standards for professional conduct.

Plaintiff offers no evidence that this legitimate explanation by defendant is a pretext for unlawful discrimination. Plaintiff has failed to demonstrate that the reason asserted by defendant for his discharge is false and that racially motivated discrimination was the real reason for termination of his employment by Gannett. Plaintiff has failed to demonstrate that any causal relationship exists between the alleged threats or communications by defendant's staff with plaintiff's employer in reference to an article, published four years before plaintiff's discharge, that could demonstrate that the discharge occurred under circumstances that give rise to an inference of discrimination. *Forrest, supra* at 308. Plaintiff's mere assertion that his employer's reason for his termination is pretextual is insufficient:

“[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated[.]” But plaintiff's prima facie case, combined with *no* evidence that the stated justification is false other than plaintiff's unsupported assertion that this is so, may not. [*Id.* at 308 n 6, quoting *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133, 148; 120 S Ct 2097; 147 L Ed 2d 105 (2000).]

As such, plaintiff has not succeeded in raising an issue of fact regarding whether he was discriminated against on the basis of his race.

Plaintiff's employment records with Gannett demonstrate longstanding concerns regarding his performance. Even if contentiousness existed between plaintiff and his supervisors, there was no allegation that racial animus was a contributory factor. Plaintiff has provided no testimony or evidence delineating a basis for his claim that any unfair treatment or harassment he alleges occurred was based on his race. Rather, plaintiff has consistently asserted that the content of the unflattering article, published by his employer regarding defendant's discriminatory treatment of minority dealership owners, was the basis for his discharge, not racial discrimination directed toward plaintiff. The assertions of verbal threats and dislike cited by plaintiff regarding defendant's employees are insufficient to infer racial discrimination because the allegations focus on individual responses to plaintiff's article or its content and not any personal characteristic of plaintiff. As with plaintiff's direct supervisors:

Personal animosity is not the equivalent of . . . discrimination and is not proscribed The plaintiff cannot turn a personal feud into a . . . discrimination case by accusation. [*Id.* at 310 (citations omitted).]

Plaintiff contends that the behavior alleged as the basis for his discharge does not, by definition, constitute plagiarism and that the trial court erred in its determination that whether plaintiff actually plagiarized information is immaterial. It is irrelevant whether the behavior alleged by plaintiff's employer constitutes plagiarism. It is sufficient that Gannett's policies and standards of professional conduct define plaintiff's behavior as plagiarism, and prohibits such conduct. Courts have recognized that even if the criteria upon which a plaintiff was evaluated was subjective or inaccurate, it does not lead to an inference that an employer was motivated by

discriminatory animus or raise a reasonable inference that the discharge determination was pretextual. *Coleman v Prudential Relocation*, 975 F Supp 234, 239-240 (WD NY, 1997).

Plaintiff appears to have lost sight of who the defendant is in this cause of action and its relationship to plaintiff. Defendant was not plaintiff's employer, and proof of pretext cannot rest on "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" *Id.* at 243, quoting *Price Waterhouse v Hopkins*, 490 US 228, 277; 109 S Ct 1775; 104 L Ed 2d 268 (1989) (O'Connor, J., concurring). Consequently:

[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of a discriminatory discharge. [*McCarthy v Kemper Life Ins Cos*, 924 F2d 683, 686 (CA 7, 1991).]

Further, it is recognized that:

To be probative of discrimination, isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process. [*Geier v Medtronic, Inc*, 99 F3d 238, 242 (CA 7, 1996).]

Plaintiff has not sustained his burden of demonstrating that he was the victim of intentional discrimination. Plaintiff has failed to prove any nexus between the referenced comments or contacts of defendant's staff members four years before his discharge by his employer. Further, plaintiff has failed to come forward with any evidence that the reason for his discharge was pretextual. And plaintiff has failed to demonstrate the existence of any racial animus. Therefore, the trial court properly dismissed plaintiff's claim of discrimination.

Plaintiff next argues that the trial court erred in granting summary disposition on his claim that defendant tortiously interfered with his employment relationship with Gannett. Pursuant to New York law, a claim of tortious interference with an employment contract requires:

(a) that a valid contract exists; (b) that a third party had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff. [*Millar v Ojima*, 354 F Supp 2d 220, 229 (ED NY, 2005), quoting *Finley v Giacobbe*, 79 F3d 1285, 1294 (CA 2, 1996).]

In general, at-will employment contracts will not give rise to a cause of action for tortious interference with a contract. *Albert v Loksen*, 239 F3d 256, 274 (CA 2, 2001). However, "[a]n at-will employee may maintain a tortious interference claim . . . in 'certain limited situations.'" *Id.*, quoting *Finley, supra* at 1295. An at-will employee may maintain a tortious interference claim if the employee asserts "that a 'third party used wrongful means to effect the termination such as fraud, misrepresentation, or threats, that the means used violated a duty owed by the defendant to the plaintiff, or that the defendant acted with malice.'" *Albert, supra* at 274, quoting *Cohen v Davis*, 926 F Supp 399, 403 (SD NY, 1996).

The fact that plaintiff has failed to overcome the legitimate, nondiscriminatory basis for discharge by his employer is fatal to a claim of tortious interference with employment. Plaintiff

has not come forward with any evidence that defendant or its employees had any contact or engaged in improper actions to influence plaintiff's employment relationship with Gannett. While acknowledging the existence of communications between defendant's staff and employees of Gannett, even if any of the statements by defendant's staff may have harmed plaintiff, plaintiff has failed to demonstrate any evidence or proof from which it could be inferred that defendant's sole purpose in these statements or communications was to inflict harm upon plaintiff. As such, the trial court properly granted summary disposition in favor of defendant on plaintiff's tortious interference claim.

Plaintiff next argues that the trial court erred in granting summary disposition on his claim that defendant violated the New York State Human Rights Law, NY Exec Law, § 296 (McKinney) and that his discharge was in retaliation for his opposition to this violation. Specifically, plaintiff contends that discriminatory practices by defendant in securing dealership locations for its minority dealership owners violates New York State Human Rights Law, NY Exec Law, § 296[5](b)(1) and (b)(2), which preclude discrimination in the sale or lease of commercial property. Plaintiff asserts that his exposure of defendant's alleged discriminatory practices toward its minority dealership owners resulted in his retaliatory discharge in violation of New York State Human Rights Law, NY Exec Law, § 296[7]. In order to substantiate such a claim, plaintiff must demonstrate that: (1) he has engaged in a protected activity; (2) his employer was aware that he participated in such an activity; (3) he suffered an adverse employment action based upon his activity, and (4) a causal connection exists between the protected activity and the adverse employment action. *Forrest, supra* at 313.

Assuming that plaintiff meets the first two criteria, plaintiff's claim fails on the remaining two prongs of the test. Plaintiff has failed to demonstrate that his discharge was based on his involvement in exposing defendant's alleged discriminatory conduct toward its minority dealership owners or that any causal connection existed between plaintiff's article on defendant and his termination. Rather, the un rebutted evidence is that plaintiff's employment with Gannett was terminated for plagiarism. Specifically:

[P]laintiff has 'failed to submit sufficient evidence from which a jury could reasonably conclude a causal connection between any protected activity he engaged in and any adverse employment action,' or, as with [his] discrimination claim, to rebut defendant's evidence that any adverse action taken against [him] was justified by the legitimate, nondiscriminatory reasons already described. [*Forrest, supra* at 313 (citation omitted).]

Given plaintiff's failure to demonstrate an issue of material fact that he was either discriminated against based on his race or retaliated against, his assertion that defendant aided and abetted his employer in any act of discrimination or retaliation cannot survive. New York State Human Rights Law, NY Exec Law, § 296[6]; *Forrest, supra* at 314.

Plaintiff next argues that the trial court prematurely granted summary disposition before completion of discovery. In *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), this Court noted:

As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may be proper

before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. [(internal citations omitted).]

We review a trial court's decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). Plaintiff asserts that summary disposition was premature because discovery was not complete. While incomplete discovery typically precludes a grant of summary disposition, summary disposition may be appropriate if no disputed issue is before the court or if additional discovery does not present a fair opportunity of finding factual support for the nonmoving party's claims. *VanVorous, supra* at 477.

“[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists.” *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Despite Michigan's discovery rules being broadly construed, *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003), the support of open and extensive discovery is not intended to promote “fishing expedition[s].” *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996). To permit discovery to continue based solely on conjecture is tantamount to allowing an impermissible fishing expedition. *VanVorous, supra* at 477. The evidence alleged by plaintiff to be adduced in further discovery fails to address the issue of the reason for plaintiff's discharge being plagiarism and whether defendant had any involvement with Gannett in deciding to terminate plaintiff's employment. Plaintiff has provided no basis to conclude that further discovery would stand a reasonable chance of uncovering factual support for his claims. The mere promise or assertion that facts will be established is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Therefore, summary disposition was not premature.

We affirm.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra