S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

GORDON MCINTOSH,

Plaintiff-Appellee,

v

CITY OF DEARBORN and KAREN WISNIEWSKI,

Defendants-Appellants.

UNPUBLISHED
May 25, 2006

No. 265648
Wayne Circuit Court
LC No. 04-434360-CZ

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendants appeal by leave granted an order denying their motion for summary disposition with regard to plaintiff's malicious prosecution, abuse of process, and employment discrimination claims. We reverse.

Defendants argue that the trial court should have granted their motion for summary dismissal of plaintiff's malicious prosecution, abuse of process, and employment discrimination claims. After review de novo, considering the record evidence in a light most favorable to plaintiff to determine whether a genuine issue of material fact exists, we agree. See *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).[1]

First, defendants argue that the trial court should have summarily dismissed plaintiff's malicious prosecution claim against Wisniewski arising from her attempt to secure a PPO against plaintiff. We agree. To establish a malicious prosecution claim, a plaintiff must prove that (1) the defendant initiated a criminal prosecution against him, (2) the criminal proceedings terminated in the plaintiff's favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his or her actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice.

[1] Although the trial court did not indicate under which court rule it was denying defendants' motion, because it considered evidence outside the pleadings with regard to all three claims, we will treat the motion as having been denied under MCR 2.116(C)(10). See *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

Matthews v Blue Cross Blue Shield of Michigan, 456 Mich 365, 378; 572 NW2d 603 (1998). A malicious prosecution plaintiff also must suffer "some injury which would not necessarily occur in all suits prosecuted for similar causes of action." *Barnard v Hartman*, 130 Mich App 692, 695; 344 NW2d 53 (1983). Ordinary claims of embarrassment or emotional distress are insufficient, as are claims of damaged reputation. *Id*.; see, also, *Kauffman v Shefman*, 169 Mich App 829, 840; 426 NW2d 819 (1988).

Here, the evidence is insufficient to establish, at least, one of these requirements because Wisniewski arguably had probable cause to attempt to secure the PPO against plaintiff. See *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999). Probable cause is defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993). The evidence provided to the trial court showed that plaintiff and Wisniewski had an extremely acrimonious history that dated back several years. It is undisputed that Wisniewski's personal property, including her home and her car, had been vandalized numerous times, that she had received derogatory and threatening anonymous letters mailed to her home, and that she had received numerous unsolicited and antagonistic mailings from various companies. There is also evidence of plaintiff making untoward comments to or about Wisniewski at their workplace and that the internal affairs investigators led her to believe that plaintiff may have been the person responsible for the reprehensible conduct. Further, it is undisputed that plaintiff resides in the same neighborhood and in close proximity to Wisniewski's residence, and that plaintiff secretly videotaped illegal fireworks being ignited at her home. Based on these facts, plaintiff cannot show that Wisniewski lacked a "reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant" Wisniewski's belief that plaintiff was the person who committed those acts against her. See *id*. Further, the evidence is insufficient to support a finding that Wisniewski sought a PPO against plaintiff "with malice" or for an illegitimate purpose, or that plaintiff suffered the requisite injury. Accordingly, summary disposition of this claim is proper as a matter of law and defendants' motion in this regard should have been granted by the trial court. See MCR 2.116(C)(10).

Next, defendants argue that the trial court erred by refusing to summarily dismiss plaintiff's abuse of process claim. We agree. "To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981), citing *Spear v Pendill*, 164 Mich 620, 623; 130 NW 343 (1911). In other words, a plaintiff must show that the defendant used a proper legal procedure for a purpose other than that which it was designed to accomplish. *Friedman*, *supra* at 30 n 18, quoting 3 Restatement Torts, 2d, § 682, comment a, p 474; *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

Plaintiff argues that Wisniewski's attempt to secure a PPO against him constituted an abuse of process. As discussed above, Wisniewski sought a PPO against plaintiff because of her reasonable belief that plaintiff was the individual responsible for the recurring violent and harassing acts. There is no evidence in the record that suggests that Wisniewski misused the process of obtaining a PPO for anything other than a peremptory measure to protect herself and her family. Plaintiff relies exclusively on one sentence Wisniewski wrote in what appears to be a handwritten letter in support of her PPO petition: "I need this order so that I can have some

leverage because he is going to continue this." Plaintiff argues that this sentence supports the two essential elements of an abuse of process claim. It does not.

When read in context, this sentence is simply a topic sentence that articulates the ultimate result Wisniewski desired to achieve by securing a PPO. After this sentence, Wisniewski explained why she believed plaintiff was a threat to her and the basis for her beliefs. She then wrote, "[a] PPO would remove all doubt as to what parameters [plaintiff] cannot cross." Wisniewski continued, "I want to be able to call the police when/if he is in violation and have some legal action. I just want him to stay away." Clearly, Wisniewski's desire to "have some leverage," when taken in context, did not mean she desired to abuse the PPO process, but rather, she desired to have a legal means to immediate relief in the event plaintiff harassed her. Even assuming that Wisniewski filed for a PPO as retaliation for plaintiff videotaping the use of illegal fireworks at her home, "an action for abuse of process lies for the improper use of process following its issuance, not for maliciously causing it to issue." *Friedman*, *supra* at 31. In sum, the record evidence does not establish that Wisniewski used the PPO process for an improper purpose after the PPO was issued; thus, the trial court should have summarily dismissed this claim. See *id*. at 30-31.

Next, defendants argue that the trial court erred by denying the city's request for summary disposition of plaintiff's civil rights claim. We agree.

Plaintiff claims that the city discriminated against him because of his sex in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq*. MCL 37.2202(1)(a) provides, in relevant part, that an employer cannot discriminate against an individual because of the individual's sex. A plaintiff may establish proof of discriminatory treatment in violation of the Civil Rights Act either by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Plaintiff alleges that direct, not indirect, evidence supports his claim. Direct evidence is evidence, "which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). In direct evidence cases, the plaintiff must show (1) that he is a member of a protected class; (2) an adverse employment action; (3) the employer was predisposed to discriminating against members of the plaintiff's protected class, and (4) the employer actually acted on that predisposition in visiting the adverse employment action on the plaintiff. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360-361; 597 NW2d 250 (1999).

Here, plaintiff's argument is that he was frequently disciplined for his interactions with Wisniewski and Wisniewski was not—purportedly because she was "a member of a protected class"—which is direct evidence of discrimination. But, there is an ample stock of evidence in the record that memorializes the great number of resources that the city expended in investigating and attempting to resolve an unfortunate and hostile personal dispute between two of its police officers. Although plaintiff argues at length with regard to the propriety of the city's disciplinary decisions, nowhere in the record is there any evidence that the city was predisposed to discriminate against men or that the city acted on that predisposition in purportedly "forcing" plaintiff's transfer to patrol. In fact, the evidence clearly indicates that plaintiff was disciplined differently because his conduct was different—he was disciplined for conducting an independent investigation regarding Wisniewski using police department resources and for making inappropriate remarks to coworkers about Wisniewski. Wisniewski was disciplined for igniting

illegal fireworks at her home on her own personal time. Therefore, plaintiff has failed to establish a genuine issue of material fact that he suffered an adverse employment action, more likely than not, because of his sex and summary dismissal of this claim is proper. See MCR 2.116(C)(10); *Sniecinski*, *supra* at 133.

Reversed and remanded for the entry of an order granting defendants' motion for summary disposition as to these claims. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto