STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW FOOTE,

Plaintiff-Appellant,

v

DOW CHEMICAL COMPANY and DOMINIC ZOELLER,

Defendants-Appellees.

UNPUBLISHED
January 19, 2010

No. 288294
Midland Circuit Court
LC No. 07-002416-NZ

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

In this case stemming from allegations of wrongful termination, plaintiff, Matthew Foote, appeals as of right from the circuit court's order granting summary disposition to defendants, plaintiff's former employer Dow Chemical Company and one of its supervisors, Dominic Zoeller. We affirm.[1]

I. Facts

> The trial court's opinion and order includes a concise statement of the case:
>
> Foote filed this lawsuit against Defendants . . . alleging claims of breach of contract and tortious interference with a business relationship or expectancy, which claims arise out of what Foote alleges was the wrongful termination of his employment with Dow. . . .
>
> * * *
>
> Foote began his employment with Dow in August of 1989. In 2002, he was promoted to the position of Resource Coordinator/Leader, a position he held until he was terminated in April 2007. Neither party raises issues regarding the security of Foote's employment prior to the events giving rise to this lawsuit.

[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

> After learning of billing irregularities on the part of its uniform provider, Cintas, Dow assigned Foote and his co-worker, Mike Hollies, the task of tracking and monitoring uniform charges. In January 2007, at a monthly meeting with Foote and Hollies, Cintas invited them, as well as other Dow employees, to a Detroit Pistons basketball game. Dow's management approved the attendance at the game. However, Foote nonetheless believed that attendance at the game presented a conflict of interest. At the time, Foote raised this concern with Zoeller, but did not proceed to discuss the situation with Zoeller's supervisor or other officials at Dow. The game was played in February 2007, and Dow employees did indeed attend. Foote made no further mention of his disagreement with the decision until after his employment with Dow was terminated.
>
> It is undisputed that around the time that the Dow employees attended the Pistons game, Foote also began a consensual sexual relationship with a direct subordinate Libby Soler. Shortly after beginning the relationship, Foote took steps to remove Soler from his direct reporting line, essentially swapping her for a different employee whose skills were similar. In his deposition, Foote testified that he discussed this arrangement with Zoeller, and then discussed it in more detail with Balaji Venkataraman on or about April 9, 2007. Foote acknowledges that he expressed the proposal as being a prudent business decision and that he did not disclose his relationship with Soler as being the true reason for wanting to make the proposed changes. Immediately following the conversation with Mr. Venkataraman, Foote discussed the proposal with Tara Kutchey of Dow's Human Resources Department. He did disclose that he and Ms. Soler were having an "out-of-work relationship," but did not specifically state that it was sexual in nature. He claims that he was advised by Kutchey at that time that it was not necessary to reveal the relationship to Zoeller, but that a day or two later, Kutchey told Foote that it would be . . . better for Zoeller to hear about it from Foote than from someone else.
>
> Following this advice, on or about April 20, 2007, Foote did in fact set up a meeting with Zoeller to tell him the details of the situation. After Foote revealed the relationship and the steps he had taken to move Soler, Zoeller told Foote that he needed to let it "soak in." On April 26, 2007, Foote received a letter advising him that his employment would be terminated effective April 30, 2007. The letter set forth six conclusions made by Dow regarding Foote's conduct, and advised him that those conclusions supported a finding that he had violated Dow's Code of Business Conduct. The letter further advised Foote that Dow had lost confidence in him as an employee, and was therefore terminating his employment. [Parentheticals, record citations, and footnotes omitted.]

The trial court held that plaintiff's employment arrangement with Dow was an at-will one, and thus that Dow could terminate him without just cause. The court further noted that Dow's Code of Business Conduct, which announced an anti-retaliation policy, began with the disclaimer that no part of that Code established an employment contract. The court elaborated:

> There is a dispute between the parties regarding the reason for Foote's termination. . . . Foote believes it was in retaliation for his report of his concerns

> surrounding the Pistons basketball game. Dow asserts that the termination was due to loss of confidence in Foote as a result of his relationship with Soler and the manner in which he handled the situation. Foote points out . . . that nowhere in any of Dow's policies is a relationship between employees prohibited. These arguments are inconsequential. As . . . Foote was in fact an at-will employee of Dow, and . . . no binding contract existed, Dow had the right to terminate Foote's employment for either reason.

The court dismissed plaintiff's claim of tortious interference with business relationship or expectancy against Zoeller on the ground that such claims are actionable against only third parties to the business relationship, which Zoeller was not. The court added that Zoeller's termination of plaintiff was not solely for Zoeller's benefit, on the ground that plaintiff had raised his concern about the ethics of attending the basketball game directly to Zoeller, and that no action was taken against Zoeller in the matter.

The trial court accordingly dismissed Foote's complaint with prejudice. On appeal, plaintiff challenges the dismissal of both of his claims.

II. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

III. Wrongful Termination/Breach of Contract

Plaintiff argues that the trial court erred in concluding that plaintiff had no rights to enforce in connection with Dow's established policies and procedures. We disagree. Plaintiff relies on *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579, 598; 292 NW2d 880 (1980), where our Supreme Court held that an employment contract may take on a just-cause provision "by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements." However, that case concerned an employee handbook that expressly provided that it was company policy to terminate employees for "just cause only." *Id.* at 597. In contrast, Dow's Code of Business Conduct, regardless of any reassuring language relating to job security, states on its first page, "Nothing in this document constitutes a contract of employment with any individual." The Code stands as a statement of intentions, aspirations, and goals, but not of contractually enforceable rights. Accordingly, the trial court correctly held that even if defendant's theory of why he was terminated is correct—that his supervisor developed personal resentment over plaintiff's mention of an ethics concern—Dow was within its rights in doing so. The same would be true even if plaintiff violated none of Dow's policies, or if, as plaintiff also suggests, Dow dismissed plaintiff in order to improve its position in upcoming labor union negotiations.

Further, the Code's disclaimer of itself in connection with contractual rights comports with the presumption that an employment arrangement is at-will. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163-164, 186; 579 NW2d 906 (1998) (Weaver, J., joined by Boyle

and Taylor, JJ.; Mallett, C.J., concurring in pertinent part and dissenting in part). In addition, other employment documentation relating to plaintiff further supports the trial court's determination that plaintiff was an at-will employee. In particular, the application for employment that plaintiff completed in 1988, concludes with the statement, "I understand that I will have the right to terminate my employment with Dow at any time without notice and for any reason. I understand that Dow has the same right." Just below that provision is plaintiff's signature agreeing that he had read and understood the contents of the application. And the employment agreement that followed repeats that statement, under the heading "Employment at Will."

For these reasons, the trial court correctly rebuffed plaintiff's attempts to distill a contractual right to continued employment but for just cause from the duly disclaimed Code of Business Conduct, or from informal, noncontractual, customs and implications about the workplace.

IV. Tortious Interference

Plaintiff next argues that the trial court erred in dismissing his tortious interference claim against Zoeller, on the ground that the evidence raised a question of fact concerning whether Zoeller was motivated solely by personal self interest when he interfered with plaintiff's employment. We disagree.

Generally, "[t]o maintain a cause of action for tortious interference, the plaintiff[] must establish that the defendant was a 'third party' to the contract or business relationship." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993). Obviously, Zoeller, operating in his capacity as Dow's employee and plaintiff's supervisor, was not a third party to plaintiff's relationship with Dow, and it was on this basis that the trial court dismissed this claim.

Plaintiff, however, does not address this aspect of the tort squarely, but attempts to invoke the exception to that rule, which applies where corporate agents "acted solely for their own benefit with no benefit to the corporation." *Id.* This exception, however, is inapplicable to the present situation because plaintiff has not shown that Zoeller acted for his own benefit or purpose. Plaintiff, for example, acknowledges that Zoeller may have been a mere contributor to the decision to terminate him, which indicates that others in the corporation wanted that result as well and, to the extent that Zoeller acted on those wishes, he was operating for the benefit of the corporation and not for himself. Further, if we were to assume without deciding, that Dow sought to terminate plaintiff to improve its negotiating position, then Zoeller's actions were directly in furtherance of his duties to the corporation, and not to serve himself. Lastly, we note the trial court's pertinent observation, when it stated that it "fails to see the benefit to Zoeller in retaliating against Foote in this situation where the initial report, made prior to Foote's termination, was made to Zoeller himself, and no action was taken against Zoeller as a result." Plaintiff fails to rebut this sound reasoning.

For these reasons, the trial court correctly dismissed plaintiff's claim of tortious interference.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck