STATE OF MICHIGAN

COURT OF APPEALS

COFESSCO FIRE PROTECTION, L.L.C., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED October 7, 2010
v	Nos. 290959; 292357 Muskegon Circuit Court
BRUCE STEELE and VANGUARD FIRE & SUPPLY COMPANY, Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,	LC No. 07-045605-CK
and KENNETH A. WENTWORTH and EVEN & FRANKS, P.L.L.C., Third-Party Defendants-Appellees.	

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 290959, defendants Bruce Steele and Vanguard Fire & Supply Company ("Vanguard") appeal as of right from the circuit court's order granting summary disposition in favor of plaintiff Cofessco Fire Protection, L.L.C. ("Cofessco") and third-party defendant Kenneth A. Wentworth on Steele's age discrimination claim. Defendants also challenge the circuit court's earlier order granting summary disposition for Cofessco, Wentworth, and third-party defendant Even & Franks, P.L.L.C. (collectively "the Cofessco parties"), on defendants' counterclaims and third-party claims, as well as the trial court's admission of evidence during trial and denial of their motion for a directed verdict. In Docket No. 292357, defendants appeal as of right from the circuit court's judgment awarding the Cofessco parties costs and attorney fees relating to defendants' counterclaims and third-party claims. We affirm.

I. TRIAL ISSUES

In Docket No. 290959, defendants first argue that the trial court improperly admitted as evidence during trial a "Summary of Accounts Lost to Vanguard," as well as Robert Johnson's testimony regarding the summary. We disagree. Defendants preserved their challenge to

Johnson's testimony regarding the summary of lost accounts by objecting to his testimony below. MRE 103(a)(1); *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997).

We review for an abuse of discretion a trial court's decision to admit evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 158. We review de novo preliminary questions of law pertinent to evidentiary determinations. *Id.* at 159.

Defendants first contend that the summary was not properly authenticated because Johnson did not create the summary and had no personal knowledge about the information contained in the summary. Defendants' argument is inconsistent with the controlling evidentiary rule. MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "Testimony that a matter is what it is claimed to be" is one means of authentication. MRE 901(b)(1). Contrary to defendants' assertion, Johnson had personal knowledge of the information contained in the summary. Johnson testified that the summary was compiled from customer information in Cofessco's computer system. Customer data is entered into the computer system after a service technician completes a work order for a customer. The summary contained the amounts invoiced to customers over a five-year period. Although Johnson did not create the summary, he kept track of the data contained in the summary. Thus, Johnson's testimony was sufficient to show that the summary of lost accounts was what it was claimed to be.

Defendants also argue that the summary constituted inadmissible hearsay. MRE 801(c) states that "'[h]earsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Defendants contend that the summary was not admissible under MRE 803(6), the business records exception to the hearsay rule, because Johnson admitted that the summary was created for purposes of litigation. The summary was admissible, however, pursuant to both MRE 803(6) and MRE 1006, as a summary of voluminous records maintained in the course of regularly conducted business activity.

MRE 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Johnson testified that the information in the summary was a compilation of data kept in Cofessco's ordinary course of business.

MRE 1006 states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Although defendants contend that the original documents were not available for review, the record does not indicate that defendants asked that the originals be made available. It was up to defendants to avail themselves of the right to examine or copy the original records. *People v Sawyer*, 215 Mich App 183, 196; 545 NW2d 6 (1996). In objecting to the admission of the summary and Johnson's testimony, defense counsel stated that he had no indication that the originals were present in court "where they are supposed to be." Contrary to counsel's assertion, MRE 1006 only provides that the court "may order" that the originals be produced in court. Thus, Cofessco was required to produce the originals in court only if the trial court ordered it to do so. Here, the record does not indicate that defendants requested that the originals be produced or that the trial court ordered that they be produced in court. Thus, the trial court was within its discretion in allowing the summary and Johnson's testimony into evidence.

Defendants next argue that the trial court erred by denying their motion for a directed verdict because Cofessco failed to establish a causal connection between Steele's alleged defamatory statements and any economic damage. We review de novo a trial court's denial of a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). We examine the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Id.* A motion for directed verdict is properly granted only when the evidence fails to establish a claim as a matter of law. *Id.*

We initially address Cofessco's argument that Steele's comments constituted defamation per se, which does not require a causal connection between the defamatory statements and the economic damage. "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 at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). In cases involving defamation per se, damages need not be proven because injury is presumed. *Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 727-728; 613 NW2d 378 (2000).

Cofessco argues that Steele's statements constituted defamation per se because they concerned Cofessco's business reputation and ability to conduct business. As such, Cofessco maintains that it was not required to show actual harm. We disagree. MCL 600.2911(1) designates only two types of defamation in which the plaintiff need not prove damages: "[w]ords imputing a lack of chastity," and "words imputing the commission of a criminal offense." MCL 600.2911(1); *Burden*, 240 Mich App at 728-729. Further, subsection (2)(a) of the statute provides:

> Except as provided in subdivision (b),[1] in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.

Thus, based on the statutory language, Cofessco was required to show it incurred actual damages as a result of Steele's defamatory statements regarding Cofessco's business.

Nonetheless, the record demonstrates that Cofessco presented sufficient evidence to avoid a directed verdict on the defamation claim. Johnson testified that after Steele's termination, there developed a trend of customers that stopped using Cofessco's services and instead retained Vanguard to perform those services. Johnson testified regarding the summary of lost accounts, which listed 92 customers. Although Johnson admitted that several customers listed in the summary remained Cofessco's customers, he testified that a large percentage of the 92 customers on the list stopped using Cofessco's services because of Steele's defamatory statements. Johnson maintained that between January 1, 2004, and January 1, 2007, before Steele's termination, Cofessco lost only three customers to Vanguard. Further, Larry Cooper, Cofessco's accountant, opined that Cofessco lost a total of $194,628 as a result of Steele's statements. Therefore, Cofessco presented evidence to establish a causal connection between its economic damages and Steele's statements.

II. BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT

Defendants next argue that the trial court erred by granting summary disposition for the Cofessco parties on Steele's claim pursuant to the Bullard-Plawecki Employee Right to Know Act ("ERKA"), MCL 423.501 *et seq.* We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). A motion under subrule (C)(8) is properly granted if no factual development could justify recovery. *Id*.

MCL 423.503 of the ERKA requires that an employer allow an employee to review his or her personnel record upon written request. Under MCL 423.504, an employer must provide an employee with a copy of the information contained in the employee's personnel record. Information intentionally excluded from a personnel record that is statutorily required to be included in the record may not be used by the employer in a judicial proceeding. MCL 423.502. Further, MCL 423.511 provides:

> If an employer violates this act, an employee may commence an action in the circuit court *to compel compliance with this act*. The circuit court for the county in which the complainant resides, the circuit court for the county in which the complainant is employed, or the circuit court for the county in which the

[1] It is undisputed that subdivison (b), pertaining to damages in libel actions, is inapplicable.

> personnel record is maintained shall have jurisdiction to issue the order. Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to this act the following damages:
>
> (a) For a violation of this act, actual damages plus costs.
>
> (b) For a wilful and knowing violation of this act, $200.00 plus costs, reasonable attorney's fees, and actual damages. [Emphasis added.]

The trial court properly granted summary disposition for the Cofessco parties on Steele's ERKA claim. MCL 423.511 specifically allows an employee to commence an action "to compel compliance with" the ERKA. The parties agree that the Cofessco parties had provided Steele with a copy of the employment contract on or about August 21, 2008. Steele filed his countercomplaint/third-party complaint on October 7, 2008. Because Steele already had a copy of the employment contract in his possession at the time he filed his action, he did not commence an action "to compel compliance with" the ERKA as required to obtain attorney fees, costs, and damages under MCL 423.511.

This Court's decision in *McManamon v Redford Twp*, 256 Mich App 603; 671 NW2d 56 (2003), supports this conclusion. In that case, the defendant argued that two requirements must be met before a plaintiff is entitled to damages under the ERKA: (1) the trial court must first order compliance with the act, and (2) there must be a failure to comply with the court's order. *Id.* at 611-613. This Court disagreed. In holding that a plaintiff need not first obtain an order compelling compliance before he is entitled to damages, this Court stated that a "[p]laintiff is obliged to commence an action to compel compliance, and, in such an action, may seek compliance and damages for a violation of the act." *Id.* at 614. This reasoning is inapplicable to an employer who has already complied with the act.

In *Russell v Bronson Heating & Cooling*, 345 F Supp 2d 761 (ED Mich, 2004), the court reached a similar conclusion. The *Russell* Court opined that the statute does not contemplate a situation in which a plaintiff obtains a copy of a personnel file before filing an action to compel compliance with the ERKA. *Id.* at 795.

Thus, because Steele had already obtained a copy of the employment contract at the time he filed his action, the trial court properly dismissed the action under MCR 2.116(C)(8).

III. FRAUD/SILENT FRAUD

Defendants next argue that the trial court erred by granting summary disposition for the Cofessco parties on Steele's fraud or silent fraud claim. We disagree. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31.

In his countercomplaint alleging actual or silent fraud, Steele asserted that Cofessco misrepresented that it had turned over a complete copy of his employment file in order to conceal the employment contract and prevent Steele from exercising the termination clause in the contract. The trial court properly determined that Steele failed to establish the reliance necessary for an actual or silent fraud claim.

To establish fraud, the plaintiff must show: (1) that the defendant made a material representation, (2) that was false, (3) that the defendant knew that the representation was false when it was made or that it was made recklessly without any knowledge of its truth or falsity, (4) that the defendant made the representation with the intent that the plaintiff act upon it, (5) that the plaintiff did act in reliance on the representation, and (6) that the plaintiff suffered damages. *Brownell v Garber*, 199 Mich App 519, 533; 503 NW2d 81 (1993). "The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose." *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). "A claim of silent fraud requires a plaintiff [to] allege that the defendant intended to induce him to rely on its nondisclosure and that defendant had an affirmative duty to disclose." *Id.* Thus, both fraud and silent fraud require reliance. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006); *Brownell*, 199 Mich App at 533.

Here, Steele's deposition testimony shows that he did not rely on Cofessco's misrepresentation or failure to disclose material information. Steele testified that he signed the employment contract in March 1992 but did not receive a copy of it at that time. He knew that the contract contained a noncompete clause but did not think that it prevented him from working for Vanguard. Approximately one week after he began working for Vanguard, Dave Cooper from Cofessco telephoned him and told him that the Cofessco employees recently signed a different employment contract because the previous contract was legally unenforceable. Steele's conversation with Dave Cooper occurred before Steele's wife obtained Steele's personnel file from Even & Franks. Steele maintained that he did not believe that he had violated the employment contract in any way.

Steele asserts that if he had been provided with the employment contract, he would have canceled it and would not have had to defend against Cofessco's claims based on the contract in its amended complaint. Contrary to this contention, Steele testified that he did not believe that the noncompete clause prevented him from working for Vanguard and that Dave Cooper had informed him that the contract was unenforceable. Steele's conversation with Cooper occurred before Steele's wife obtained a copy of Steele's employment file. Thus, Steele's own deposition testimony shows that he did not rely on the representation that the employment file constituted Steele's entire employment record. Similarly, he did not rely on Cofessco's silence or failure to disclose the entire employment record. Accordingly, the trial court properly granted summary disposition under MCR 2.116(C)(10) with respect to Steele's fraud claim.

IV. ELLIOT-LARSEN CIVIL RIGHTS ACT (AGE DISCRIMINATION)

Defendants next argue that the trial court erred by granting summary disposition for Cofessco and Wentworth on Steele's age discrimination claim pursuant to the Civil Rights Act ("CRA"), MCL 37.2101 *et seq.* We disagree.

MCL 37.2202(1)(a) of the CRA prohibits an employer from discharging a person because of his or her age. Proof of discrimination in violation of the CRA may be established either by direct evidence or by circumstantial evidence. *Sniecinski*, 469 Mich at 132. "In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Id.* Direct evidence is evidence that, if believed, requires a conclusion that discrimination was a motivating factor in the adverse employment action. *Id.* at 133. Where direct evidence is presented, a plaintiff need not present a prima facie case within the *McDonnell Douglas*[2] framework. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). The *McDonnell Douglas* burden-shifting approach applies only to discrimination claims based on indirect or circumstantial evidence. *Id.* at 540.

To establish a prima facie case under the *McDonnell Douglas* approach, a plaintiff must show by a preponderance of the evidence that (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he was discharged under circumstances that give rise to an inference of unlawful discrimination. *DeBrow*, 463 Mich at 538 n 8. "If the plaintiff submits such a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action." *Id.* "Upon such a showing, the burden returns to the plaintiff to show that the employer's stated reason for its action was actually a mere pretext." *Id.*

Here, Steele presented no direct evidence of age discrimination. Thus, the *McDonnell Douglas* burden-shifting approach was applicable. *DeBrow*, 463 Mich at 540. The trial court determined that the first three elements of the *McDonnell Douglas* test were satisfied, but that the fourth was not. Steele argues that the fourth element was met because he was replaced by Jeff Hughey, a younger worker. Cofessco and Wentworth dispute that Hughey replaced Steele and contend that Hughey, a 16-year veteran of Cofessco, merely returned to Cofessco's employ two months before Steele's termination following a six-month stint at Vanguard. For purposes of this analysis, we assume that Steele is correct that Hughey replaced him and that Steele thus established a prima facie case of age discrimination. It was then Cofessco's and Wentworth's burden to articulate a legitimate, nondiscriminatory reason for Steele's discharge. *DeBrow*, 463 Mich at 538 n 8.

Cofessco and Wentworth argue that Steele was not terminated because of his age, but rather because of his poor attitude in the workplace. Wentworth submitted an affidavit stating that Steele exhibited a poor attitude during his last five years working for Cofessco. In fact, in a letter dated May 3, 2002, Wentworth informed Steele that if his attitude did not improve, Steele would have to find another job because Wentworth would no longer be able to employ him. Cofessco and Wentworth also submitted affidavits of several Cofessco employees stating that Steele often criticized the management of the company, stated that he was not happy working for Cofessco, complained that he did not make enough money, and complained about working

[2] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

conditions. Cofessco and Wentworth also relied on a letter addressed to Wentworth from Steele's wife acknowledging that Steele had been "bitter" and "difficult lately."

Further, Cofessco and Wentworth relied on Steele's own deposition testimony in which he admitted that he had previously testified that he disagreed with the decision to oust Coleman from the company, he lost respect for Wentworth, and he thought that Johnson was arrogant. Steele admitted that he made his feelings known to Wentworth and that his opinion of Johnson was evident in his attitude. Steele admitted that he did not approve of the manner in which the company was being managed and that he also made this opinion known. Cofessco and Wentworth further presented evidence that Steele called in sick the day after he was transferred to the shop technician position, although he was not ill. Steele admitted at that time that he was disgruntled about the job change. Thus, Cofessco and Wentworth presented evidence of a legitimate, nondiscriminatory reason for Steele's termination. The burden then shifted back to Steele to show that this reason was a mere pretext for discrimination. *DeBrow*, 463 Mich at 538 n 8.

Steele failed to present evidence showing that his discharge was a pretext for discrimination. He testified that he believed that he was discharged on the basis of his age because others who were discharged before him "were older people, too." After listing the names of several previous employees, however, Steele admitted that he had no information indicating why they were terminated and that he merely assumed that they were terminated because of their ages. Steele also relied on the affidavits of Harold Newfer and Rick Wagner, but those affidavits did not support Steele's claim; rather, the affidavits asserted only weight and race discrimination. Further, contrary to defense counsel's assertion that Richard Coleman had relevant information supporting Steele's age discrimination claim, Coleman testified that Wentworth never said or did anything suggesting a belief that older workers were negatively impacting the company. Coleman further testified that he did not recall any older workers being terminated and replaced with younger employees.

Steele argues that Wentworth's changed stories regarding the reason for Steele's termination was sufficient to create a question of fact. Wentworth testified in his deposition that he terminated Steele's employment because Steele no longer fit within Cofessco's "vision" and he did not discharge Steele because of performance problems. During cross-examination at trial, however, Wentworth testified as follows:

> *Q.* And now I want to clear up something about your answer to the question . . . about why [Steele] was fired. Now the truth is, he wasn't fired for performance problems at all was he?
>
> *A.* I'm afraid he was.
>
> *Q.* That's what your testimony is here today. But that wasn't your testimony when your deposition was taken was it?
>
> *A.* No, it was not.

Q. When your deposition was taken you were very clear, and I asked you specifically whether there was performance problems and your answer was, no, [Steele] wasn't fired for performance wasn't it?

A. That's what I said.

Q. And what you said was, he was fired because he didn't fit in with your vision, wasn't it?

A. That's correct.

Q. And if you recall I asked you several times to describe for me what it was about your vision that [Steele] didn't fit into and you never could tell me, could you?

A. Did not want to tell you, sir. He's my brother-in-law and I still do not want to.

* * *

Q. The question is, I asked, do you recall during your deposition, I asked you several times what it was about your vision for Cofessco that Mr. Steele didn't fit into, do you recall that?

A. Yes, I do.

Q. And do you recall, you never gave me an answer. You could not give me an answer, do you recall?

A. I could give you an answer.

Q. You didn't during the deposition though did you?

A. I gave you an answer that he did not fit the vision of the company and that is still a correct answer.

Q. And you never described during the deposition what it was about [Steele] that didn't fit the vision of the company, did[] you? If you want to look at the transcript, I'll he happy to show it to you.

A. I believe what you're saying. I do not want to sling mud at my brother-in-law.

Although Wentworth's trial testimony differed from his deposition testimony, the differences do not support Steele's age discrimination claim. Wentworth's testimony did not change in any manner tending to show that Steele was discharged because of his age. Rather, Wentworth's testimony indicates that did not wish to disparage Steele. Wentworth's testimony cannot be read as indicating that his reasons for Steele's termination were a mere pretext for age discrimination. Thus, Steele has failed to fulfill his burden under *McDonnell Douglas*, and the trial court properly granted summary disposition for Cofessco and Wentworth.

V. SANCTIONS FOR FRIVOLOUS CLAIMS

In Docket No. 292357, defendants challenge the trial court's imposition of sanctions against them for filing frivolous claims. We review for clear error a trial court's determination whether an action is frivolous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous when, although there may exist evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id.* at 661-662.

Under MCR 2.114(F), "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)[,]" which states that sanctions "*shall* be awarded as provided by MCL 600.2591." (Emphasis added.) MCL 600.2591(3) provides:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

"Whether a claim is frivolous within the meaning of MCR 2.114(F) and MCL 600.2591 depends on the facts of the case." *Kitchen,* 465 Mich at 662.

Regarding defendants' defamation claims, the trial court determined that the claims were frivolous as of November 10, 2008, a few days after trial. The trial court erred by analyzing the claims as of that date instead of the date on which the countercomplaint was filed. "To determine whether sanctions are appropriate under MCL 600.2591[,] . . . it is necessary to evaluate [a] claim at the time the lawsuit was filed." *In re Attorney Fees & Costs*, 233 Mich App 694, 702; 593 NW2d 589 (1999). Nevertheless, the trial court's decision on sanctions was not clearly erroneous, because the record supports the conclusion that at the time Steele and Vanguard filed the defamation claim, they had no reasonable basis to believe that the facts underlying the claim were true.

To establish defamation, a plaintiff must prove "either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan*, 474 Mich at 24. Because MCL 600.2911(1) limits defamation per se to "[w]ords imputing a lack of chastity," and "words imputing the commission of a criminal offense," defendants were required to show special harm. Although Steele alleged that his reputation had been harmed, at his deposition he admitted that this allegation was not true:

> *Q.* You have alleged that your reputation has been ruined somehow in your lawsuit?
>
> *A.* I would just like to move on with my life, and it just seems that –
>
> * * *

A. It just feels like I am being dragged down by everything, you know. I just want to move on.

Q. Well, if you want to move on, you have got a lawsuit going here, so –

A. Well, I wasn't the one that brought it on me first. I mean, you know, I got sued first.

Q. So is that why you filed your lawsuit, because someone sued you?

A. No.

Q. Okay, all right. Well, let's talk about your reputation. How has it been ruined?

A. Well, because my name is being put out there, and they are saying I am a disgruntled employee.

Q. You have testified under oath in the lawsuit that you were disgruntled, so how else has your reputation been ruined?

A. I don't know. I got stressed out on how am I going to pay for everything.

Q. Well, that has got nothing to do with your reputation. You have alleged that your reputation has been ruined, so tell me how it has been ruined.

A. Well, people know that I am a good worker, and for them to think that I am not because word has it that, you know, I am just a bad guy or whatever, you know. I feel that, you know, I am still a good worker to this day.

Q. Who said you weren't a good worker?

A. No one, it is just that, you know, why did he let me go, you know, I mean.

Q. Well, that is really not my question. I am trying to find out how your reputation has been ruined, and you really haven't told me anything yet that is even close as to why it was ruined. So tell me, why was your reputation ruined?

A. Not really sure.

Q. Pardon?

A. I am not really sure.

Q. Okay. So what you are telling me is, you really had no basis to make that allegation in your complaint, is that true?

A. Allegation is –

Q. You have alleged that your reputation has been ruined, but what you are telling me is you are not aware of it having been ruined, is that true?

A. Yes.

Because Steele admitted that he did not suffer the alleged harm as a result of the purported defamatory statements, he had no reasonable basis to believe that the facts underlying his legal position were true. Accordingly, his claim was frivolous. MCL 600.2591(3)(a)(ii). Further, because Vanguard's defamation claim against Cofessco was based on the same alleged defamatory statements, Vanguard's claim was frivolous for the same reason.

Defendants next argue that the trial court erroneously determined that Steele's ERKA claim was frivolous. MCL 423.511 allows an employee to commence "an action" "to compel compliance with [the] act." Even if "an action" is interpreted to include the countercomplaint/third-party complaint filed in this case as defendants contend, the ERKA claim was not asserted in an effort to compel compliance with the act because Steele already had the employment contract in his possession at the time he filed the claim. Accordingly, the trial court properly concluded that the claim was devoid of arguable legal merit. MCL 600.2591(3)(a)(iii).

The trial court also properly determined that Steele's fraud and negligent misrepresentation claims were devoid of arguable legal merit. Steele alleged that Cofessco and Even & Franks concealed the employment contract to prevent him from exercising his right to terminate the contract. Steele testified, however, that before his wife obtained his incomplete personnel file from Even & Franks, Dave Cooper from Cofessco informed him that the contract was legally unenforceable. Thus, Steele did not rely on any misrepresentation or silence on behalf of Cofessco or Even & Franks. Steele's failure to establish reliance was fatal to both claims. *Hamade*, 271 Mich App at 171; *Brownell*, 199 Mich App at 533; *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989).

Finally, the trial court properly determined that Steele's age discrimination claim was devoid of arguable legal merit. In addition, Steele had no reasonable basis to believe that the facts underlying his claim were true. MCL 600.2591(3)(a)(ii). As previously discussed, Steele failed to present any evidence indicating that his termination was because of his age. During his deposition, he testified that he believed that he was discharged because of his age because "everybody else that got let go prior to [him] being let go were older people, too." After listing several former employees, however, Steele admitted that he did not know why they were terminated. In addition, perhaps most telling that Steele did not believe that he was discharged because of his age was his trial testimony:

Q. When – you heard – well let me ask you this. When you lost your job at Cofessco on May 31, 2007, right [sic]?

A. Yes.

Q. How was it you came to be employed at Vanguard? Did they call you; did you call them?

A. Well like I say went on vacation [sic]. When I came back I found out that [] Coleman had been let go. I didn't feel good about that. I went in, discussed that with Ken [Wentworth]. He said that he had to digest everything of what I was saying. Few days later he said he was taking my truck away putting me in the shop, cutting my hours. I said so I was being demoted huh, and he says well you can take it any way you want. He says we're creating a new job. I was like well OK, so I went in and worked one day at the shop, took the next day off which I called in sick and put in my resumes all over and probably within three or four days after putting a resume in I got a call from Vanguard and from a couple other fire companies.

Thus, Steele's testimony shows that his age discrimination claim was frivolous. The trial court did not clearly err by granting the Cofessco parties' motion for costs and attorney fees.

Affirmed.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto

STATE OF MICHIGAN

COURT OF APPEALS

COFESSCO FIRE PROTECTION, L.L.C.,

Plaintiff/Counter-Defendant-Appellee,

v

BRUCE STEELE and VANGUARD FIRE & SUPPLY COMPANY,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

KENNETH A. WENTWORTH and EVEN & FRANKS, P.L.L.C.,

Third-Party Defendants-Appellees.

UNPUBLISHED
October 7, 2010

Nos. 290959; 292357
Muskegon Circuit Court
LC No. 07-045605-CK

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur in result only.

/s/ Douglas B. Shapiro