Michigan Supreme Court
Lansing, Michigan

OPINION

FILED July 10, 2019

STATE OF MICHIGAN

SUPREME COURT

ALI A. EL-KHALIL,

Plaintiff-Appellant,

v No. 157846

OAKWOOD HEALTHCARE, INC.,
OAKWOOD HOSPITAL–SOUTHSHORE,
OAKWOOD HOSPITAL–DEARBORN,
DR. RODERICK BOYES, M.D., and
DR. IQBAL NASIR, M.D.,

Defendants-Appellees.

BEFORE THE ENTIRE BENCH

PER CURIAM.

The issue in this case is the proper analysis of a motion for summary disposition under MCR 2.116(C)(8). We emphasize that a motion for summary disposition under MCR 2.116(C)(8) must be decided on the pleadings alone and that all factual allegations must be taken as true. In this case, the Court of Appeals erroneously conducted an MCR 2.116(C)(10) analysis instead of a (C)(8) analysis because it considered evidence beyond

the pleadings and required evidentiary support for plaintiff's allegations rather than accepting them as true. We reverse the judgment of the Court of Appeals, which had affirmed under MCR 2.116(C)(8) the trial court's order granting summary disposition of plaintiff's Elliott-Larsen Civil Rights Act (ELCRA) and breach-of-contract claims, and we remand to that Court for consideration of those claims under MCR 2.116(C)(7).

I. FACTS AND PROCEDURAL HISTORY

A. PLAINTIFF'S FIRST LAWSUIT

Plaintiff Ali El-Khalil, a podiatrist, was employed by Oakwood Hospital–Dearborn (Oakwood Dearborn) from 2008 until 2011, when he was granted staff privileges at various Oakwood hospitals. His privileges were renewed for one- or two-year periods thereafter until June 2015. In August 2014, plaintiff sued Oakwood Healthcare, Inc., Dr. Roderick Boyes, and others, alleging racial discrimination on the basis of his Arabic ethnicity in violation of the ELCRA, tortious interference with an advantageous business relationship, and defamation. Plaintiff claimed that Oakwood and various physicians made false allegations against him in retaliation for his allegations of incompetency and criminality against other physicians. As a result of these allegations, the hospital had initiated administrative proceedings against plaintiff, and after a peer-review process, plaintiff was required to attend an anger-management program, which he successfully completed. Plaintiff asserted that the peer-review process and resulting actions were conducted with malice and in bad faith.

The trial court granted defendants summary disposition of the discrimination and tortious-interference claims under MCR 2.116(C)(7) and (C)(8), and plaintiff later

stipulated to dismissal of his defamation claim.[1] After plaintiff's claims were dismissed, the vice chief of staff at Oakwood Dearborn notified plaintiff that the Medical Staff Peer Review Committee had recently reviewed complaints from plaintiff's peers about plaintiff's behavior. Several e-mails, dated February through May 2015, were attached to the notice. Plaintiff was required to attend the committee's next meeting. Plaintiff responded to the hospital that the complaints were part of an organized plan against him because of racial prejudice and because of his 2014 lawsuit.

On June 2, 2015, Oakwood Dearborn denied plaintiff's reappointment application, citing the complaints about his behavior. The same month, Oakwood Dearborn, Oakwood Hospital–Southshore, and Oakwood Hospital–Wayne followed suit. At that time, plaintiff still had privileges at Oakwood Hospital–Taylor and six other hospitals.

B. PLAINTIFF'S SECOND LAWSUIT

On June 24, 2015, plaintiff filed the lawsuit that is the subject of this appeal, initially alleging only breach of contract based on an alleged breach of the Medical Staff Bylaws, which were part of plaintiff's employment agreement. Plaintiff alleged that his privileges were not set to expire until November 2015 and that they had been suspended without appropriate procedures and notice. On July 6, 2015, plaintiff amended the complaint, adding a claim of unlawful retaliation in violation of the ELCRA, MCL 37.2101 *et seq*. Plaintiff alleged that defendants unlawfully retaliated against him because of his previous

[1] The Court of Appeals denied plaintiff's delayed application for leave to appeal. *El-Khalil v Oakwood Health Care Systems Inc*, unpublished order of the Court of Appeals, entered January 8, 2016 (Docket No. 328569). Plaintiff did not seek leave to appeal that decision in this Court.

lawsuit. Along with his amended complaint, plaintiff attached the e-mails from physicians complaining about his behavior. Plaintiff also attached his response, in which he had denied the allegations made in the e-mails and argued that the complaints arose from racial prejudice and in retaliation for his first lawsuit.

In lieu of filing an answer, defendants moved for summary disposition under MCR 2.116(C)(7) (immunity and release) and (C)(8) (failure to state a claim on which relief can be granted). The trial court granted summary disposition to defendants without specifically identifying which rule supported its decision. With respect to plaintiff's ELCRA claim, the trial court concluded that defendants had "produced significant evidence that Plaintiff has committed a series of abusive, hostile and otherwise unprofessional behaviors," that any adverse action was connected to plaintiff's behavior rather than his protected activity, and that "Plaintiff has offered no support for his retaliation claims beyond his assertions." Regarding the contract claim,[2] the trial court held that while the bylaws were an enforceable contract, plaintiff offered no support beyond his bare assertions that defendants' actions were contrary to the bylaws, and the bylaws contained a release from liability. And the

[2] Plaintiff's first amended complaint alleged that defendants breached Article V of the bylaws by terminating his staff privileges before the end of his appointment term. In response to defendants' motion, plaintiff also argued that his breach-of-contract claim was based on defendants' alleged violation of Article II, § 2(C)—i.e., that defendants denied him renewal of staff privileges because of discrimination and retaliation, rather than because of criteria related to the efficient delivery of quality patient care in the hospital or because of criteria related to professional ability and judgment. Plaintiff acknowledges that this second theory was not specifically pleaded in his first amended complaint, but he argues that the bylaws were attached to the pleading and defendants addressed the argument in their reply. The trial court rejected both theories in granting defendants summary disposition.

trial court further held regarding the breach-of-contract claim that Drs. Boyes and Nasir were entitled to qualified immunity under the Healthcare Quality Improvement Act, 42 USC 11111(a), and under the healthcare peer-review statute, MCL 331.531(2)(a), and that plaintiff offered no evidentiary support for his claim that defendants were not entitled to qualified immunity.

The Court of Appeals affirmed in an unpublished per curiam opinion. *El-Khalil v Oakwood Health Care Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 4, 2017 (Docket No. 329986) (*El-Khalil I*). The Court of Appeals determined that the trial court reviewed the summary-disposition motion under MCR 2.116(C)(10), affirmed the decision under that subrule, and found it unnecessary to reach the issues of immunity or release under Subrule (C)(7). *Id*. at 4.[3]

This Court vacated the Court of Appeals opinion and remanded for review under MCR 2.116(C)(7) and (C)(8). *El-Khalil v Oakwood*, 501 Mich 940 (2017). On remand, the Court of Appeals held in an unpublished per curiam opinion that summary disposition of plaintiff's ELCRA-retaliation and breach-of-contract claims was appropriate under MCR 2.116(C)(8) and found it unnecessary to address whether summary disposition of either claim was appropriate under MCR 2.116(C)(7) based on immunity or release. *El-Khalil v Oakwood Health Care Inc*, unpublished per curiam opinion of the Court of

[3] On appeal, plaintiff did not challenge the trial court's dismissal of his breach-of-contract claim based on Article V of the bylaws; instead, plaintiff argued only that he had sufficiently alleged a breach of Article II, § 2(C) of the bylaws. The Court of Appeals acknowledged that plaintiff abandoned his Article V claim and addressed only the Article II theory.

Appeals, issued April 17, 2018 (Docket No. 329986) (*El-Khalil II*). Plaintiff filed an application for leave to appeal in this Court, asking us to peremptorily reverse the Court of Appeals or grant leave to appeal, contending that the Court of Appeals simply gave an MCR 2.116(C)(8) label to what was essentially its (C)(10) analysis.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

III. ANALYSIS

The standards governing summary disposition are cited so often and have become such a part of the fabric of our caselaw that the reader of judicial opinions is likely to skim ahead to the analysis. But this case reveals the dangers in doing so. The distinction between MCR 2.116(C)(8) and (C)(10) is one with an important difference: a claim's legal sufficiency as opposed to a claim's factual sufficiency.

A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

A motion under MCR 2.116(C)(10), on the other hand, tests the *factual sufficiency* of a claim. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson*, 502 Mich at 761 (quotation marks, citation, and brackets omitted).

A. PLAINTIFF'S ELCRA CLAIM

Plaintiff alleged that defendants retaliated against him in violation of MCL 37.2701 of the ELCRA, which states, in part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

"[T]o establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Rymal v Baergen*, 262 Mich App 274, 300; 686 NW2d 241 (2004) (quotation marks and citation omitted).

As correctly noted by the Court of Appeals, there is no dispute that plaintiff's first amended complaint sufficiently pleaded the first two elements by alleging that plaintiff's

2014 lawsuit was a protected activity and that defendants had notice of the lawsuit. MCL 37.2701. Regarding the third element, defendants don't dispute that suspension of or failure to renew plaintiff's hospital privileges in retaliation for the prior lawsuit was materially adverse to plaintiff. See *Chen v Wayne State Univ*, 284 Mich App 172, 201-202; 771 NW2d 820 (2009); *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The disputed element is whether plaintiff adequately pleaded a causal connection between his 2014 lawsuit and the nonrenewal of his hospital privileges. Plaintiff alleged in his first amended complaint that defendants violated the ELCRA because they denied his reappointment in retaliation for the lawsuit he previously filed against defendants under the ELCRA. This allegation was sufficient under MCR 2.116(C)(8) to satisfy the fourth element of an ELCRA-retaliation claim.[4]

The Court of Appeals concluded that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiff failed to present evidence of a causal connection

[4] MCL 37.2701(a) prohibits an employer from "[r]etaliat[ing] against a person *because* the person has opposed a violation of this act . . . ." (Emphasis added.) We have interpreted the "because" causation language in MCL 37.2701(a) as requiring " 'a causal connection between the protected activity and the adverse employment action.' " *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). We need not explore today the precise contours of the "causal connection" standard for purposes of MCL 37.2701(a). However, we note that in *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003), we indicated that the "causal connection" standard for purposes of MCL 15.362 of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., requires "because of" causation. See *id*. at 185 ("To prevail, plaintiff had to show that his employer took adverse employment action *because of* plaintiff's protected activity . . . ."). And "whistleblower statutes are analogous to antiretaliation provisions of other employment discrimination statutes." *Garg*, 472 Mich at 277 n 5 (quotation marks, citation, and brackets omitted). Again, however, we need not reach this question today.

between his protected activity and the adverse employment action and, therefore, he failed to present a prima facie case of retaliation. *El-Khalil II*, unpub op at 6. According to the panel, plaintiff "provided no evidence to show that retaliation was a motivating factor" in the adverse employment action. *Id*. This inquiry was beyond the scope of appropriate review, as whether the elements of a prima facie case of discrimination have been established constitutes an evidentiary standard, not a pleading requirement. *Swierkiewicz v Sorema NA*, 534 US 506, 510-511; 122 S Ct 992; 152 L Ed 2d 1 (2002).

While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot. Plaintiff alleged that the adverse employment action resulted from his protected activity. That is enough to withstand challenge under MCR 2.116(C)(8). The relative strength of the evidence offered by plaintiff and defendants will matter if the court is asked to decide whether the record contains a genuine issue of material fact. But that is only a question under MCR 2.116(C)(10).

Defendants argue that because plaintiff had attached to his first amended complaint several e-mails from his colleagues alleging threatening behavior by plaintiff, it was proper for the trial court to consider those e-mails in support of defendants' argument that plaintiff failed to plead a viable ELCRA claim under MCR 2.116(C)(8). We do not disagree that the trial court could properly consider the e-mails under MCR 2.116(C)(8) because they were part of the pleadings. MCR 2.113(C). But plaintiff did not adopt those e-mails and the assertions levied against him in them as true. Rather, plaintiff alleged that the e-mail assertions were evidence of defendants' retaliatory conduct. The trial court's error was not in considering the e-mails as part of the pleadings; the trial court erred by considering the

content of the e-mails as substantive evidence sufficient to dismiss plaintiff's claim under MCR 2.116(C)(8).[5]

We hold that the Court of Appeals erroneously evaluated plaintiff's causation allegations under MCR 2.116(C)(10). The Court of Appeals' conclusion that summary disposition was appropriate because plaintiff "failed to present a prima facie case of retaliation," *El-Khalil II*, unpub op at 6, shows that it applied the wrong standard. Plaintiff adequately pleaded causation by alleging that defendants decided not to reappoint him after and *because of* his 2014 lawsuit. See *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995) (stating that a motion for summary disposition under MCR 2.116(C)(8) "is tested on the pleadings alone, and all factual allegations contained in the complaint must be accepted as true"). While plaintiff will need to factually establish the causal-connection element of retaliation if defendants move for summary disposition under MCR

[5] The trial court and the Court of Appeals relied on other evidence as well, including affidavits that had been attached by both parties to their summary-disposition motions. While consideration of these documents may have been appropriate in evaluating defendants' motion under MCR 2.116(C)(7), if relevant, they were not properly considered under MCR 2.116(C)(8). Because the Court of Appeals did not address defendants' arguments under MCR 2.116(C)(7), and because we remand this case to the Court of Appeals for consideration under MCR 2.116(C)(7), we do not decide whether these documents were sufficient to entitle defendants to summary disposition under MCR 2.116(C)(7).

We also note that the Court of Appeals has held in the past that "where a party brings a summary-disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Because neither the parties nor the lower courts have argued that this rule applies, we decline to address whether we would adopt this rule or how it would apply in this case.

2.116(C)(10), i.e., show more than temporal proximity between the adverse employment action and the lawsuit, it was premature for the Court of Appeals to affirm dismissal on that basis under MCR 2.116(C)(8).

B. PLAINTIFF'S BREACH-OF-CONTRACT CLAIM

Similarly, plaintiff sufficiently pleaded a claim for breach of contract. "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in [injury] to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Plaintiff argues that defendants breached Article II, § 2(C) of the bylaws by denying him a renewal of staff privileges for reasons unrelated to the efficient delivery of quality patient care and professional ability and judgment.[6] Section 2(C) provides:

[6] As discussed earlier, plaintiff's first amended complaint alleged breach of Article V but, in response to defendants' motion, plaintiff argued that defendants also breached Article II when they declined to reappoint him, allegedly in retaliation for his prior lawsuit. Defendants responded to that claim in their reply, and the trial court granted summary disposition in favor of defendants based on both theories. On appeal, plaintiff abandoned the Article V theory and argued only that defendants breached Article II. The Court of Appeals addressed the Article II theory in both of its opinions. Prior to their response to plaintiff's application in this appeal, defendants did not challenge plaintiff's failure to include the Article II theory in his first amended complaint. In fact, in their response to plaintiff's prior application for leave to appeal in this Court, defendants specifically stated that the Court of Appeals "properly decided" plaintiff's breach-of-contract claim under the Article II theory. Accordingly, because defendants did not preserve a challenge to plaintiff's failure to raise this theory in his first amended complaint, we consider this theory as if it had been pleaded in the first amended complaint. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court.").

> Medical Staff membership or particular clinical privileges shall not be denied on the basis of any criteria unrelated to the efficient delivery of quality patient care in the hospital, to professional ability and judgment, or to the community need, including but not limited to sex, race, creed, color, sexual orientation and national origin.

The Court of Appeals concluded that plaintiff's colleagues' complaints against him served as a sufficient basis to deny him a renewal of staff privileges under § 2(C) and therefore held that dismissal of plaintiff's breach-of-contract claim under MCR 2.116(C)(8) was appropriate. *El-Khalil II*, unpub op at 6-7. According to the panel, the colleagues' complaints about plaintiff's unprofessional interactions with staff at the hospital supported the finding of a violation of § 2(C) because unprofessional interactions with hospital staff can negatively affect the quality of healthcare provided to patients. *Id*. at 7.

Summary disposition under MCR 2.116(C)(8) was improper for the breach-of-contract claim for the same reasons summary disposition was improper for the ELCRA claim. Plaintiff asserts that the denial of his privileges was in breach of the bylaws, not for unprofessional conduct as defendants argued. Plaintiff's assertion is legally sufficient for his breach-of-contract claim to survive MCR 2.116(C)(8). The factual dispute as to whether his colleagues' complaints were true or whether they were falsely leveled against him because of discrimination and retaliation is a determination to be made under MCR 2.116(C)(10).

IV. CONCLUSION

Because the Court of Appeals erroneously conducted what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for plaintiff's allegations rather than accepting them as true, we reverse

the judgment of the Court of Appeals and remand to that Court for consideration of plaintiff's ELCRA and breach-of-contract claims under MCR 2.116(C)(7).

We do not retain jurisdiction.

Bridget M. McCormack
Stephen J. Markman
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh