STATE OF MICHIGAN

COURT OF APPEALS

DANIEL L. MEIER, Plaintiff-Appellant,	UNPUBLISHED July 27, 2006
v DETROIT DIESEL CORPORATION, Defendant-Appellee.	No. 268009 Wayne Circuit Court LC No. 05-527698-CZ

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

In this employment case, plaintiff appeals the trial court's order that denied his motion for summary disposition and granted summary disposition to defendant. We affirm.[1]

Plaintiff challenges the court's dismissal of his retaliation claim. Plaintiff alleged that defendant retaliated against him for filing this lawsuit against defendant and that defendant terminated him in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.[2] The elements necessary to establish a prima facie case of a WPA violation are: (1) that plaintiff was engaged in protected activities as defined by the act; (2) that plaintiff was subsequently discharged, threatened, or otherwise discriminated against; and (3) that a causal connection existed between the protected activity and the discharge, threat, or discrimination. *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 491; 705 NW2d 689 (2005).

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[1] We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Summary disposition is appropriate when, except as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

[2] Plaintiff was terminated after he filed his other claims on appeal and he later amended his complaint to assert his WPA claim.

Plaintiff failed to establish the first and third elements of a prima facie case of retaliation. A report of "a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . ." is protected activity under the WPA. MCL 15.362. Plaintiff cited no authority to support the proposition that a lawsuit alleging exclusively common-law claims like defamation, fraud, or invasion of privacy constitutes report of a violation of law.[3] Further, were we to read the WPA so broadly, protected activity would include any dispute between an employer and an employee that resulted in a lawsuit. The WPA would then apply to breach of contract suits and other common-law claims that have no public dimension. To the contrary, the WPA presumes a public interest in the protected activity, such as reports of violations of civil rights, environmental regulations, and the like. There must be a public element to the matter about which a whistleblower raises an alarm. See, e.g., *Shallal v Catholic Social Services of Wayne Country,* 455 Mich 604, 621; 566 NW2d 571 (1977) ("The primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, and not personal vindictiveness.") (Quotation, citation omitted.)

Further, were we to find that plaintiff engaged in a protected activity, plaintiff failed to establish a causal connection between his activity and his termination. He merely presented a timeline of events and suggested that the temporal proximity between when he filed suit and when he was terminated demonstrated retaliation. But our Supreme Court has held that "[s]omething more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed." *West v General Motors Corp*, 469 Mich 177, 186; 665 NW2d 468, 473 (2003). Plaintiff presented no admissible evidence that would tend to show that he was terminated because he filed suit. Defendant, on the other hand, presented documentary evidence of a preexisting chain of action taken by defendant concerning plaintiff's work performance. The court therefore did not err when it denied plaintiff's motion for summary disposition. Dismissal under MCR 2.116(C)(10) is appropriate because plaintiff did not present a material question of fact concerning the causal connection between his termination and his allegedly protected activity.

Plaintiff's remaining claims fail under MCR 2.116(C)(8).[4] To establish a claim of defamation a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff;

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[3] A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

[4] A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). Summary disposition of a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8); *Henry v Dow Chemical Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). Because a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone, the motion need not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most

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(2) an unprivileged publication to a third party; (3) fault amounting to at least 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 (defamation per quod). *Kefgen v Davidson,* 241 Mich App 611, 617; 617 NW2d 351 (2000).

Plaintiff failed to plead these elements. Plaintiff asserts that defendant defamed him with false employee evaluations and degrading emails, but failed to identify any specific words or statements that he believes are defamatory. Further, plaintiff alleged no actual publication or distribution of any defamatory material, other than to state that e-mails are regularly reviewed by others in the company and that other employers would inevitably receive the material. Even if this constitutes publication, these communications were privileged. Defendant had the qualified privilege of publishing statements to other employees whose duties relate to the subject matter. See, e.g., *Smith v Fergan*, 181 Mich App 594, 597; 450 NW2d 3 (1989). Plaintiff could overcome that qualified privilege only by showing that the statement was uttered with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth. *Id*. But general allegations of malice, like the ones plaintiff made, are insufficient to establish a genuine issue of material fact. *Id.* Finally, plaintiff did not plead appropriate damages, other than to speculate that he was denied a raise due to the evaluations and that the evaluations would be on file and would hurt him in the event that a potential employer contacted defendant. Accordingly, dismissal under MCR 2.116(C)(8) was proper because plaintiff failed to state a claim of defamation and no factual development could possibly justify recovery. *Adair, supra* at 119.

Plaintiff also failed to properly plead his fraud claim. To establish a claim of fraud, defendant must show that (1) defendant made a material representation; (2) the representation was false; (3) when defendant made the representation, defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) defendant made the representation with the intention that the plaintiff would act upon it; (5) plaintiff acted in reliance upon it; and (6) plaintiff suffered damage. *Bergen v Baker,* 264 Mich App 376, 382; 691 NW2d 770 (2004). Fraud must be specifically pleaded, and must rest on a statement regarding a past or an existing fact. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208-209; 544 NW2d 727 (1996).

Plaintiff alleged that defendant misrepresented to him that its merger with Daimler Chrysler would be "worth it" in three years, that he could expect ten percent raises in the future, that he could pick his new computer, and that he would receive a settlement offer. These allegations are insufficient. Plaintiff did not present particulars regarding how defendant knew any of the statements were false when uttered, nor how or why defendant intended to have plaintiff rely upon them. Future promises sound in contract and are not actionable as fraud. *Baker, supra* at 209. Furthermore, plaintiff, other than stating that he remained employed with defendant and worked long hours, did not plead how he relied on the allegedly false statements

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favorable to the nonmoving party. *Adair, supra* at 119. However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra* at 119.

and how that reliance was detrimental. The court did not err when it ordered dismissal under MCR 2.116(C)(8) because plaintiff failed to state a claim of fraud and no factual development could possibly justify recovery. *Adair, supra* at 119.

Plaintiff's claim of assault must also fail. "To recover civil damages for assault, plaintiff must show an intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004) (citations, quotation omitted). Plaintiff alleged that his supervisor bought a squared off gold ring for his right hand, made fists at the plaintiff with that hand, had the present ability to contact plaintiff, and that plaintiff was surprised and caught off guard by him. The complaint, however, is conclusory in its allegations and, even if true, fails to state a claim of assault. Plaintiff did not allege facts giving rise to an inference regarding whether any of the conduct was intentional. Moreover, making fists at someone is a vague characterization that captures harmless gestures as well as intentional assaults without reference to the proximity and direction of the movement of the fist. Under the circumstances, the court did not err when it ordered dismissal under MCR 2.116(C)(8) because plaintiff failed to state a claim of assault and no factual development could possibly justify recovery. *Adair, supra* at 119.

Plaintiff also failed to state a claim of invasion of privacy. Michigan has long recognized the common-law tort of invasion of privacy. *Lewis v LeGrow*, 258 Mich App 175, 193, 670 NW2d 675, 687 (2003). The action has evolved into four distinct tort theories: (1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage. *Id.* Plaintiff advanced the theory of intrusion upon his seclusion. To establish a prima facie case of intrusion upon seclusion, he must plead the following: (1) the existence of a secret and private subject matter; (2) a right possessed by plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man. *Id.*

Plaintiff alleged that defendant 1) obtained information about his private bank account and transactions, 2) hired a private investigator to conduct surveillance on him at home, 3) contacted his friends and family without divulging the purpose of the contact, 4) communicated with health care institutions that provided services to plaintiff, 5) had someone follow him into the bathroom and look into the gap in the stall door for several seconds, followed later by his supervisor commenting to him about him going to the bathroom. Plaintiff's allegations are again insufficient because he failed to plead beyond conclusory allegations how defendant intruded into his private affairs. Even if his complaint establishes that defendant somehow possessed private information about plaintiff that he had a right to keep secret, it does not state how defendant obtained it. Viewed in the light most favorable to plaintiff, the complaint only claims that defendant had the information, perhaps by virtue of a third party, and not that it broke the law in obtaining it. Dismissal under MCR 2.116(C)(8) was appropriate because plaintiff failed to state a claim of invasion of privacy and no factual development could possibly justify recovery. *Adair, supra* at 119.

Plaintiff's claim of "intentional harm" also lacks merit. He failed to cite any legal authority establishing that "intentional harm" is an independent tort in Michigan. He cited two cases that instead discussed allegedly willful and wanton behavior in the context of a sled injury, *Cheeseman v Huron Clinton Metropolitan Authority*, 191 Mich App 334; 477 NW2d 700 (1991), and a defective disposable lighter, *Boumelhem v Bic Corp*, 211 Mich App 175; 535 NW2d 574 (1995). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson, supra* at 243. Dismissal under MCR 2.116(C)(8) was appropriate because plaintiff failed to state a claim and no factual development could possibly justify recovery. *Adair, supra* at 119.

Finally, plaintiff's claim of negligence was not properly before the trial court. Claims of personal injuries against employers are limited by statute to the exclusive remedy of an action for workers' compensation benefits before the workers' compensation bureau. MCL 418.131(1). The only exception is an intentional tort, which exists "only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury." *Id.* An employer intends an injury "if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* Whether an act was an intentional tort is a question of law for the court. *Id.* Plaintiff's amended complaint alleged negligence, not intentional conduct with the knowledge that an injury was certain to occur. On its face, plaintiff's complaint presents a claim of ordinary negligence that is therefore subject to the exclusive remedy provision of MCL 418.131(1). The court did not err when it ordered plaintiff's claim of negligence dismissed pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper