

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**GUILLERMO A. LANDE,
Plaintiff,**

v.

**Case No. 15-149749-CB
Hon. James M. Alexander**

**INTERPRO TECHNOLOGY, INC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ Motion for Summary Disposition. This is an employment and breach of contract case. Plaintiff worked for Defendant Interpro Technology as an IT engineer and software developer from 1996 until 2015. Plaintiff claims that he has a history of eye-related medical problems that got progressively worse over this time. At the end of his employment, Plaintiff claims that “he had little or no sight in [his] right eye, and limited effective sight in the other.”

Plaintiff generally claims that, as a result of his disability, Defendants discriminated against him, failed to provide accommodations, and subjected him to a hostile work environment. Plaintiff then brought the present action for disability discrimination under the Persons with Disabilities Civil Rights Act. In Response, Interpro filed a Counterclaim for breach of contract based on the parties’ Confidentiality Agreement.

Defendant now seeks summary disposition under MCR 2.116(C)(10), which tests the factual support for a plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817

(1999). In evaluating a (C)(10) motion, the Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.*; MCR 2.116(G)(5). The moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

1. Plaintiff's Persons with Disabilities Claim

Under the Persons with Disabilities Civil Rights Act, MCL 37.1201, *et seq*, an employer may not:

Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position. MCL 37.1202(1)(b).

To establish a prima facie case of discrimination under the statute, a plaintiff must show that (1) he is "disabled" as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Chiles v Mach Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999).

In a discrimination case, once a plaintiff establishes a prima facie case, a presumption of discrimination arises. *Lytle v Malady*, 458 Mich 153, 173; 579 NW2d 906 (1998). The burden then shifts to the defendant to articulate and produce evidence of a "legitimate, nondiscriminatory reason" for the alleged discrimination. *Id.* Once a defendant produces this evidence, the burden shifts back to the plaintiff to demonstrate that a defendant's proffered reasons were pretext for discrimination. *Id.* at 174.

The parties do not dispute the first two elements necessary to establish a prima facie case of discrimination: (1) that Plaintiff was disabled, or (2) that his disability is unrelated to his ability to perform the duties of a particular job. Rather, the sole dispute is whether Plaintiff was subjected to adverse employment action because of his disability.

Defendants first claim that there is no evidence that Plaintiff suffered any adverse employment action because he was not terminated; rather, he quit. In support of this claim, Defendants attach the affidavits of Sandra McGuffie, an Interpro owner and Executive Vice President, and Thomas Perry, Interpro's Chief Technology Officer.

McGuffie and Perry claim that McGuffie met with Plaintiff on August 3, 2015 to confront him about taking excessive lunch breaks. During this meeting, McGuffie claims that she told Plaintiff that he needed to follow Interpro's rules, and that if he did not want to, then he could leave. In response, Perry claims that Plaintiff responded that he didn't have to follow the rules. They then claim that Plaintiff cleaned out his desk, packed up his fan and computer monitor, and left Interpro's office. Defendants argue that documentary evidence kept in the course of Interpro's business supports their position.

In response, Plaintiff claims (via affidavit) that, at the August 3 meeting, McGuffie "told [him] to take [his] things and get out." Consistent with this testimony, Plaintiff also attaches a copy of a text message he sent to Defendant Kevin Ouelette, Interpro's President, on August 5, 2015. In part, this text message reads "Sandy had no legitimate reasons for firing me." Plaintiff's girlfriend (also via affidavit) claims that, right after the August 3 meeting, Plaintiff told her that "Sandy just fired me."

Defendants acknowledge that Lande testified that McGuffie fired him, but argue that such testimony is "self-serving." In other words, Defendants challenge Plaintiff's credibility.

But Michigan courts have long held that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts ‘may not resolve factual disputes or determine credibility in ruling on a summary disposition motion’” citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). *White*, 275 Mich App at 625.

Because both parties present evidence supporting their version of events, summary disposition on this issue is wholly inappropriate and DENIED.

Defendants next claim that, even if Plaintiff was subject to adverse employment action, he cannot produce any evidence that his disability caused Interpro to act.

In support of his claim, Plaintiff argues that, as the years went on and his eyesight deteriorated, it became increasingly dangerous for him to drive. But, Plaintiff argues, Defendant refused to allow him to work from home like many other employees. Plaintiff also claims that Defendant refused to purchase him a larger computer monitor – resulting in Plaintiff purchasing the same out of his own funds. But Plaintiff admits that Defendant, years later, agreed to reimburse him for the monitors he purchased over the years.

Plaintiff also claims that Defendants frequently forced him to cancel medical appointments because he was needed on work projects that only he was qualified to deal with. Finally, Plaintiff claims that, just three days before his employment ended, Plaintiff “pleaded” with Interpro to be able to work from home because he had been in two auto accidents on his way to or from work. Instead, Plaintiff claims that he was fired on August 3. Plaintiff also claims that Defendants “harassed [him] when he was undergoing, and recovering from, [eye]

surgery.”¹ Plaintiff supports each of these assertions with his affidavit and other documentary evidence.

Defendants respond that they had a legitimate reason for their actions – namely, they claim that Plaintiff was taking excessive lunch breaks – “in violation of Interpro’s rules.” In support of their claim, Defendants present affidavits and other documentary evidence.

In other words, there is a material question of fact in dispute that precludes summary disposition as a matter of law. In *Vanguard Ins Co v Bolt*, 204 Mich. App. 271; 514 N.W.2d 525 (1994), the Court of Appeals held:

The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent’s credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent’s credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

Such is the case here. It is impossible for this Court to rule on this issue without weighing evidence and determining credibility. As a result, summary disposition is wholly inappropriate and DENIED.

2. Interpro’s Breach of Contract Counterclaim

Interpro next seeks summary disposition on its breach of contract counterclaim. The same is based on a July 2, 2008 Confidentiality Agreement that Plaintiff executed while employed by Interpro. Under its terms, Plaintiff agreed that, upon separation from his employment, he would return or destroy all confidential and proprietary information.

“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 damages

¹ Defendants also argue (and Plaintiff concedes) that Plaintiff cannot pursue any claims for hostile work environment that occurred more than three years before the filing of his Complaint under MCL 600.5805(10).

to the party claiming breach.” *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

The Agreement specifically provides (emphasis added):

The Undersigned covenant that they will preserve any documents provided to them by Interpro or which they have access to (collectively the “Documents”), and copies, work papers, notes, drafts or abstracts of any documents containing a Trade Secret (the “Related Documents”) and **shall immediately return the Documents and Related Documents to Interpro upon** the earlier of (a) **the termination of the Undersigned’s consulting arrangement with Interpro**, or (b) demand by Interpro **without retaining copies of the same**.

In support of its claim that Plaintiff breached the Confidentiality Agreement, Interpro argues that, “[a]fter his separation, [Plaintiff] did not return any documents or provide written verification that he had destroyed confidential documents in his possession, despite Interpro’s request that he do so.” And, Interpro claims, Plaintiff admitted in his deposition that he still has hundreds of pages of Interpro’s and its customers’ documents that he was required to return under the Agreement.

In response, Plaintiff argues that (1) Interpro has not specifically identified any documents in Plaintiff’s possession that could be considered as confidential under the Agreement, and (2) Defendants have no evidence that Plaintiff circulated any of the documents to any third party.

Both of these arguments miss the mark. First, the above provision does not require information to be confidential in order to qualify for return and non-retention. Rather, the Agreement provides that Plaintiff “shall immediately return **the Documents**” upon his termination “without retaining copies of the same.” “The Documents” is a specifically defined term. It means “any documents provided to [Plaintiff] by Interpro or which [he] has access to.”

There is no confidentiality requirement with respect to “the Documents.”² Plaintiff admits that he has retained some documents. While he argues that no Interpro representative objected to his copying internal documents to his personal server, this is of no consequence. Upon termination of his employment, Plaintiff was required to return and not retain any Interpro documents.

Similarly, Plaintiff’s circulation argument is also misguided. The above-quoted provision requires Plaintiff to return and not retain. Circulation is not mentioned in this provision. As a result, Plaintiff’s argument that he never circulated any of the information is irrelevant to whether he breached this specific portion of the Agreement.

Because Plaintiff admits that he has retained documents provided to him by (or which he had access to at) Interpro, he is in breach of the Confidentiality Agreement. That said, Interpro offers no argument or evidence as to its damages for said breach.

For the foregoing reason, the Court finds that Interpro is entitled to summary disposition on its breach of contract counterclaim – but only as to Plaintiff’s liability for breaching the Confidentiality Agreement. The issue of damages is preserved for trial.

IT IS SO ORDERED.

September 14, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

² There is a trade secret requirement for “Related Documents” – a **separately defined term** that is **also** subject to return and non-retention.