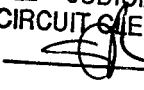


MISSOURI CIRCUIT COURT  
TWENTY-SECOND JUDICIAL CIRCUIT  
(City of St. Louis)

**FILED**  
DEC 12 2013

22<sup>ND</sup> JUDICIAL CIRCUIT  
CIRCUIT CLERK'S OFFICE  
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KEVIN P. NOBLE, )  
 )  
Plaintiff, )  
 ) Cause No.1222-CC09403  
vs. )  
 ) Division No. 18  
THE YOUNG MEN'S CHRISTIAN )  
ASSOCIATION OF GREATER ST. )  
LOUIS, et al., )  
 )  
Defendants. )

**ENTERED**  
DEC 16  
SR

MEMORANDUM, ORDER AND PARTIAL JUDGMENT

The Court has before it the Motion for Summary Judgment of Defendants The Young Men's Christian Association of Greater St. Louis/The YMCA of Greater St. Louis ("YMCA"), Terry Klein, and Vicki Adrian. The Court has reviewed the submissions of the parties, the relevant authorities, and the arguments of counsel, and now grants the motion in part and denies it in part.

Plaintiff Kevin Noble brought this action for damages against Defendants alleging age discrimination in employment, disability discrimination in employment, and prima facie tort. Plaintiff was employed by the YMCA from February 12, 1979 until May 29, 2012. Plaintiff's last position with the YMCA was Chief Engineer. Plaintiff's salary as Chief Engineer was \$87,000 per year, plus benefits. He was 56 years of age when he was terminated.

Defendants move for summary judgment, arguing that Plaintiff cannot make out an essential element on each of his claims. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

matter of law. Larabee v. Eichler, 271 S.W.3d 542, 545 (Mo. banc 2008); Rule 74.04(c)(6). A defending party moving for summary judgment may establish a right to judgment by showing "(1) facts that negate any one of the claimant's element facts, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense." Id.

Plaintiff alleges that he was chosen for layoff because of his age and/or disability. Regarding Count I, Plaintiff believes his age was a contributing factor for his layoff because of (1) his back injury; (2) the cost of his health insurance at his age; and (3) the number of sick days he used due to his back injury. Chris Fargo, who was not selected for layoff and assumed some of Plaintiff's duties after he was terminated, was in his 40s.

A claim of unlawful age discrimination based on discharge under the Missouri Human Rights Act requires a plaintiff to show that: (1) Plaintiff is a member of a protected class; (2) Defendant discharged Plaintiff; (3) Plaintiff's age was a contributing factor in such discharge; and (4) Plaintiff was damaged. Hervey v. Missouri Department of Corrections, 379 S.W.3d 156 (Mo. banc 2012). Defendants argue that Plaintiff's claim fails because other positions such as Director, Maintenance Support and Property Manager of the South County Branch were subsequently filled by

existing YMCA employees who were older than Plaintiff. However, it is also uncontroverted that Defendants made a decision to terminate Plaintiff, who was older and had a higher salary, and retain a younger, lesser-paid employee. An employer's motivation for discharge is generally a factual issue relying on circumstantial evidence. Williams v. Trans States Airlines, Inc., 281 S.W.3d 854, 867 (Mo.App. E.D. 2009). The Court believes there are genuine issues of material fact regarding whether Plaintiff's age was a contributing factor in his selection for termination.

Regarding Count II, Plaintiff alleges that he was discriminated against by being terminated from his employment and not being chosen for the new position of Director, Maintenance Support, because of his perceived disability. A claim for disability discrimination requires a showing that (1) Plaintiff is legally disabled; (2) Plaintiff was discharged; and (3) the disability was a contributing factor in Plaintiff's discharge. Medley v. Valentine Radford Communications, Inc., 173 S.W.3d 315, 320-21 (Mo.App. W.D. 2005).

Plaintiff does not consider himself disabled, and never disclosed any disability to the YMCA. Disability is defined in §213.010(4) RSMo to include "a person who is regarded as having an impairment." Plaintiff alleges that about two to three months prior to his termination, Vicki Adrian, Director of Human Resources, observed Plaintiff wearing a back brace and commented that she heard that Plaintiff had been hurt the day before.

There was never a record of Plaintiff's alleged disability or perceived disability because he kept that information private. He never told Klein that he had back problems. Plaintiff admits that when Ms. Adrian saw him in the back brace, she did not mention Plaintiff's back brace, nor did she mention that it had been his back that was injured the day before. When Klein submitted the restructuring proposal eliminating Plaintiff's job, he had no knowledge of Plaintiff's back condition. When Karen Kocher, Chief Operating Officer, reviewed and approved the restructuring proposal, she had no knowledge of Plaintiff's back condition. When Gary Schlansker, Chief Executive Officer, reviewed and approved the restructuring proposal, he had no knowledge of Plaintiff's back condition. The Court finds that Defendants are entitled to summary judgment on Plaintiff's claim of disability discrimination because it is undisputed that his back problems were not a contributing factor in his termination.

Regarding Count III, Prima Facie Tort, Plaintiff alleges that after his employment was terminated, Klein and Adrian engaged in a number of specific actions, without sufficient justification, with the intent to injure Plaintiff. Specifically, Plaintiff alleges (1) that Defendants escorted him out of the building "as if he were a thief," damaging his personal and professional character and reputation; (2) that Defendants would not allow him to go to his office to retrieve his personal things; (3) that Defendants begrudgingly allowed him to retrieve his subdivision access card from his work truck, harassing him and yelling at him not to touch

anything and to get out of the truck; (4) that Defendants walked Plaintiff to an awaiting cab without allowing him to take anything further from the truck; (5) that Defendants sent Plaintiff's personal belongings to his home in a box, which was placed on his front doorstep and not protected from the weather, and sent items with a courier without first notifying Plaintiff; and (6) that Defendants failed and refused to provide Plaintiff with his personal, specialized tools that were kept in the work truck as well as personal papers and money he kept in the truck.

Prima Facie Tort is described in Missouri as a "tort of last resort." A plaintiff must plead and prove (1) an intentional lawful act by the defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant's act. Woolsey v. Bank of Versailles, 951 S.W.2d 662, 668 (Mo.App. W.D. 1997). The prima facie tort doctrine cannot be utilized to sue for conduct which is encompassed under an existing, nominate tort. Thomas v. Special Olympics Mo., Inc., 31 S.W.3d 442, 450 (Mo.App. W.D. 2000). The Court believes that the conduct alleged, to the extent it is actionable, is encompassed within several nominate torts, including intentional infliction of emotional distress, conversion, and negligence. As such, the Court finds that Plaintiff's claim for prima facie tort fails to state a claim and must be dismissed.

#### ORDER AND PARTIAL JUDGMENT

In light of the foregoing, it is

ORDERED that Defendants The Young Men's Christian Association of Greater St. Louis/The YMCA of Greater St. Louis ("YMCA"), Terry Klein, and Vicki Adrian's Joint Motion for Summary Judgment be and the same is hereby granted in part and denied in party; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants and against Plaintiff on Count II of the Petition herein, which Count II is dismissed with prejudice, there being no genuine issue of material fact and Defendants being entitled to judgment as a matter of law; and it is

FURTHER ORDERED that Count III of the Petition be and the same is hereby dismissed with prejudice for failure to state a claim.

SO ORDERED:



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Robert H. Dierker  
Circuit Judge

Dated: December 12, 2013

cc: David Heimos  
Andrew Martone