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APPENDIX

**Michigan Supreme Court
Lansing, Michigan**

Order

March 5, 2018

156495

ALFONSO IGNACIO VIGGERS,

Plaintiff-Appellant,

AL-AZHAR F. PACHA and ALPAC, INC.,

Defendants-Appellees,

and

JOHN DOE,

Defendant.

SC: 156495

COA: 334522

Washtenaw CC: 15-001193-CZ

On order of the Court, the application for leave to appeal the August 15, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I. BASIC FACTS

Viggers, a citizen of Mexico and Spain, began working for ALPAC in 2007 as a computer programming and database administrator contractor. He resigned from ALPAC in 2012, but he returned in January 2013. Viggers was assigned to work at the University for the duration of his employment with ALPAC. This case arises out of statements and actions made by Pacha, the owner and president of ALPAC, that resulted in the termination of Viggers's employment from ALPAC and the rescission of a job offer from the University of Michigan.

In April 2014, Pacha initiated the process to sponsor a green card on Viggers's behalf. Sometime after, Viggers was notified that the University wished to hire him as a permanent employee. A University employee asked Pacha to allow Viggers to apply for the permanent position, so Pacha released Viggers from his non-compete agreement, thereby authorizing him to pursue a permanent position with the University. In December 2014, the University extended a job offer to plaintiff, which plaintiff accepted.

On March 26, Viggers told Pacha that he had verbally accepted the position with the University. The next day, Pacha's immigration lawyer advised him that if Viggers was no longer intending to work for ALPAC, "it may be deemed either a misrepresentation or fraud for [Pacha] to continue to sponsor him for a green card." At that point, Viggers was given two options; he could move forward with a H-1B visa with the University or

immediately because he wanted to decide whether to terminate Viggers's employment.

About 20 days after receiving the second e-mail, Pacha e-mailed three University employees requesting a meeting about Viggers. He indicated in the e-mail that Viggers was not pleased about the green card process, which had been halted on the advice of Pacha's immigration lawyer. And he stated that in response to the green card decision he had "received direct threats from" Viggers. Pacha requested a meeting with the University employees to discuss Viggers's employment options. He explained in his deposition that he requested the meeting because he had decided to terminate Viggers's employment and he wanted to inform the University that Viggers would no longer be reporting to his job assignment. Pacha also wanted to discuss a suitable termination date to avoid delays in any of the University's projects.

At the meeting with the University employees, Pacha informed them that he was terminating Viggers's employment because he was afraid that Viggers "would do something to impact [ALPAC's] business with [the University] and [ALPAC] would be held liable if something went wrong while [plaintiff] was [an ALPAC] employee." One of the University employees testified that although he did not remember the exact language used during the meeting, he recalled that Pacha explained that Viggers was unhappy with ALPAC "dropping the green card process" and that Viggers made an additional threat that once he

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Viggers argues that the trial court erred by granting summary disposition in favor of Pacha and ALPAC on his claims for defamation, tortious interference with a business expectancy, and wrongful termination. We review de novo a trial court's ruling on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich.App. 362, 369; 775 N.W.2d 618 (2009). Under MCR 2.116(C)(10), a party may move for dismissal on the ground that "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When reviewing a motion brought pursuant to MCR 2.116(C)(10),² this Court "must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion." *Baker v Arbor Drugs, Inc*, 215 Mich.App. 198, 202; 544 N.W.2d 727 (1996).

B. ANALYSIS

1. DEFAMATION

Viggers contends that Pacha committed defamation per se. Accusations of criminal activity are considered "defamation per se" under the law and so do not require proof of damage to the plaintiffs reputation. *Tomkiewicz v Detroit News, Inc*, 246 Mich.App. 662, 667 n 2; 635 N.W.2d 36 (2001). See also MCL 600.2911(1) ("[W]ords imputing the commission of a criminal offense" "are actionable in themselves."). However,

around comes around"—coupled with Viggers obvious dissatisfaction with the green card process give rise to a reasonable inference that Viggers was, in fact, directing a threat at Pacha. Further, in his deposition, Pacha explained that he believed Viggers might use his position at the University to cause liability for Pacha or cause his business harm, and he explained the basis for that fear. Pacha's statements to the University were also limited. He only generally stated that Viggers had threatened him—he did not show the e-mails to the employees. Further, the reason Pacha made the disclosure was for a proper business purpose: he was terminating Viggers's employment with ALPAC, which meant that Viggers would no longer be reporting to the University as an employee of ALPAC. Pacha also explained that he wanted to avoid delaying any University projects as a result of his decision to fire Viggers. In addition, Pacha limited his communications regarding the perceived threats to the proper employees within the University, i.e. two individuals who were Viggers's supervisors at the University, and the human resources manager, who was involved in employment decisions, including decisions involving Viggers. Based on the foregoing, the trial court properly concluded that Pacha's communications were subject to a qualified privilege.

Viggers asserted that he overcame the qualified privilege by providing evidence of actual malice. In support, he contends that Pacha acted with malice as demonstrated by the delay in

speech is a defense." Here, as noted above, Pacha's statements were protected by a qualified privilege and Viggers failed to overcome the privilege by establishing that the statements were made with actual malice. Accordingly, the trial court properly granted summary disposition in favor of Pacha and ALPAC on Viggers's tortious interference claim.

3. WRONGFUL TERMINATION

Finally, Viggers asserts that the trial court erred in granting summary disposition in favor of Pacha and ALPAC on his wrongful termination claim. Viggers was an at-will employee. "In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich. 692, 694-695; 316 N.W.2d 710 (1982). "However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* "Most often these proscriptions are found in explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Id.* Here, Viggers contends that Pacha violated MCL 750.351 because he "demanded [that he] decline his prospective position with the University as a prerequisite for resuming the Green Card process." MCL 750.351 states in relevant part:

/s/Patrick M. Meter

/s/Michael J. Kelly

FootNotes

1. According to Viggers, he was notified in late April 2015 that the University suspended the visa process due to accusations made by Viggers's stepmother. Viggers believed that his stepmother's statements contributed to the University's decision to rescind the job offer because she damaged his reputation to the extent that when Pacha made accusations involving him, the University believed those accusations without any further proof.

2. Where, as here, the trial court grants a motion for summary disposition brought under MCR 2.116(C)(8) and (C)(10), and it is clear that the trial court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)." *Kefgen v Davidson*, 241 Mich.App. 611, 616; 617 N.W.2d 351 (2000).

3. We further note that even if Viggers could establish a violation under MCL 750.351, he would not be entitled to relief in the circuit court. Viggers's exclusive remedy for a violation of MCL 750.351 exists under the wages and fringe benefits act (WFBA), MCL 408.471 et seq. See *Cork v Applebee's of Mich, Inc*, 239 Mich.App. 311, 318; 608 N.W.2d 62 (2000) (stating that the plaintiff's claim of a public policy violation under MCL 750.351 "was properly dismissed because that

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**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WASHTENAW**

ALPHONSO IGNACIO VIGGERS,
Plaintiff,

v.

AL-AZHAR F. PACHA (ALPAC INC) and
DOE DEFENDANTS,
Defendant

Case No. 15-1193-CZ
Judge Carol Kuhnke

**ORDER DENYING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY DISPOSITION I, IV, V, VI
AND VII OF HIS COMPLAINT, DENYING
JUDGMENT UNDER MCR 2.605 AND
GRANTING SUMMARY DISPOSITION OF
COUNTS I, IV, V, VI AND VII TO DEFENDANTS
PURSUANT TO MCR 2.116(I)**

At a session of said Court, in the City Of
Ann Arbor, County of Washtenaw, State of
Michigan on the 17th day of August, 2016
PRESENT: AUG 17 2016

This matter having come before the Court by
way of a Motion for Partial Summary Disposition
filed by Plaintiff, the parties having been heard,
and the Court being fully advised in the premises,
now therefore;

**Transcript of the hearing on June 15, 2016
(excerpts)**

(page 25 *et seq*, starting from line 17)

THE COURT: I agree that the statements made by Mr. Pacha are subject to a qualified privilege, which means that they're evaluated as having been in good faith except with proof of actual malice. The Plaintiff does not plead malice, but I'll assume for purposes of deciding this motion that he did plead malice and certainly he believed that there was malice that is replete through the complaint filed by the Plaintiff.

Considering the motion as though it evaluated a complaint with malice, I agree with the defense that the Plaintiff will be unable to prove malice. He's offered no proof today except his suppositions and an alleged motive, but the actions of Mr. Pacha don't demonstrate malice. And he had as he needed to have in order to enjoy the privilege a good reason to have the conversations that he had. And because I find that there was qualified privilege and that there's no evidence of malice, I'll grant the summary disposition as it relates to Plaintiff's claim of defamation.

[...]

So I deny Plaintiff's motion for summary disposition. I'm granting the Defendant's motion for summary disposition or request that I evaluate a motion for summary disposition under MCR 2.116(I).

(page 22, starting from lines 5-18)

THE PLAINTIFF: Now how -- in that case, how will the Court re-address [sic] the damage to my reputation? Because the Court had read the emails. There's no threat in the emails. I never said to Defendant that I will use my position at the University to negatively impact and that -- impact his business with the University and that is a serious accusation that any public official should understand. It --

THE COURT: There has been no finding by me or a jury that you did not earn any damage to your reputation, Mr. Viggers. That finding has not been made.

THE PLAINTIFF: Um --

THE COURT: It hasn't been found the other way either.[...]

* * *

(page 24, lines 1-11)

[THE COURT:] a job that he used to make money on, and now you were going to be doing that job for the University of Michigan and not make him any money at all. And somehow that situation got turned around so that you were not going to work for the University of Michigan, and Mr. Pacha didn't want you back, and neither one of them would support your Visa, and I don't put the blame on your stepmother. You made a threat or you made a comment to -- I took that back, don't shake your head at me. You made a comment to Mr. Al-Pacha that caused him to withdraw [...]

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help me make Defendant re-address his tortious statements.

THE COURT: I disagree.

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5. The only references that Mr. Viggers made regarding his prospective employment were in the sense that, in the context of our stalled negotiations, he was retaining his prospective employment at the University of Michigan.
6. Any threats that I imputed to Mr. Viggers are, at best, my interpretation. Mr. Viggers never made any actual threats.

I declare under penalty of perjury that the foregoing is true and correct.

	(unsigned)
Date	Al-Azhar Pacha

(attached to the proposed affidavit as exhibit:

- Transcript of the deposition of Amy Ranno, page 21.
- Transcript of the deposition of Ronald Loveless, page 34.
- Transcript of the deposition of Lukeland Gentes, page 25.
- Transcript of the deposition of Al-Azhar Pacha, pages 57-60.

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-- End of proposed affidavit --

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Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if

social, or beneficial purpose as a condition of employment or continuation of employment.

MCL 408.481 (excerpt)

408.481 Complaint; filing; form; notice to employer; investigation; informal resolution of dispute; notice to employer and employee; request for review; oaths and affirmations; subpoena; witnesses; evidence; parties to proceeding; appointment and duties of hearings officer; hearing; determination; judicial review; venue.

Sec. 11.

(1) An employee who believes that his or her employer has violated this act may file a written complaint with the department within 12 months after the alleged violation. A complaint filed under section 13(2) shall be filed within 30 days after the alleged violation occurs. Bilingual complaint forms shall be provided by the department in those areas where substantial numbers of non-English speaking employees are employed.

MCL 423.452

423.452 Disclosure of information relating to employee's job performance; immunity; exception.

Sec. 2.

An employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. An employer who discloses

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for libel based on a publication, the retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel; and for other libel, the retraction shall be published or communicated in substantially the same manner as the original libel.

MCR 2.306 (excerpt)

Rule 2.306 Depositions on Oral Examination

(A) When Depositions May Be Taken.

(1) After commencement of the action, a party may take the testimony of a person, including a party, by deposition on oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney. A reasonable time is deemed to have elapsed if:

- (a) the defendant has filed an answer;
- (b) the defendant's attorney has filed an appearance;
- (c) the defendant has served notice of the taking of a deposition or has taken other action seeking discovery;
- (d) the defendant has filed a motion under MCR 2.116; or
- (e) 28 days have expired after service of the summons and complaint on a defendant or after service made under MCR 2.106.

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203(b)(1)(B)(iii)(III) and 8 C.F.R. § 204.5(i)(3)(iii), requiring "a comparable position" and "[a]n offer of employment from a prospective United States employer," does not exclude a beneficiary who has multiple job offers from multiple employers.

Furthermore, this interpretation is in accord with our earlier conclusion that a beneficiary may qualify for the outstanding researcher classification with a permanent, part-time position. Had Congress wanted to exclude the possibility that a beneficiary for the outstanding researcher classification have multiple job offers from multiple employers, Congress could have added the requirement that the prospective position be full-time, or otherwise must be the beneficiary's sole or primary employment.

In conclusion, in order to meet the requirements at Section 203(b)(1)(B)(iii)(III) and 8 C.F.R. § 204.5(i)(3)(iii), the beneficiary need only one qualifying offer from one petitioning employer. This requirement has been met in the instant case. Whether or not the beneficiary may have other job offers from other employers does not take away his eligibility for the classification sought.

17. Transcr. of the hearing on February 24, 2016, page (lines 15-16); also transcr. of the hearing on March 16, 2016, page 9 (lines 4-8).
18. Transcript of the hearing on April 20, 2016, page 11, lines 6-11.
19. Pl. Suppl. Mot. for Partial Summ. Disposition, unnamed exhibit (transcript of Pacha's deposition), page 77 (lines 13-23) (filed Jun. 2, 2016).
20. *Id.*, page 78 (lines 12-21).
21. *Id.*, pages 52 (lines 13-25) and 53 (lines 1-10).
22. *Id.*, page 56 (lines 17-23).
23. *Id.*, pages 58 (lines 13-25), 59, and 60 (lines 1-2).
24. *Id.*, pages 48 (lines 15-20) and 49.
25. Transcript of the hearing on June 15, 2016, page 26 (lines 2-10).
26. Transcript of the hearing on July 13, 2016, page 18 (lines 17-22).
27. Pl. Suppl. to Mot. for Summary Disposition and proposed affidavit attached to it (filed Aug. 8, 2016).
28. Df. Resp. In Opposition to Mot. for Summary Disposition, page 16 (filed Aug. 10, 2016).
29. Transcript of the hearing on August 17, 2016, page 18 (lines 8-9).
30. *Id.*, pages 24 (line 25), and 25 (lines 1-4).
31. *Id.*, page 25 (lines 8-11).
32. *Id.*, pages 20 (lines 24-25), and 21 (lines 1-12).
33. *Id.*, page 24 (lines 8-10).
34. *Id.*, page 22 (lines 13-18).