STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2286

Martin T. Breaker,
Appellant,

vs.

Board of Trustees, Minnesota State Colleges
and Universities, et al.,
Respondents.

Filed July 16, 2012
Affirmed
Hudson, Judge

Beltrami County District Court
File No. 04-CV-11-1514

Martin Breaker, Crookston, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Gary R. Cunningham, Assistant Attorney General, St. Paul, Minnesota (for respondents)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the district court's grant of judgment on the pleadings dismissing his claim for intentional infliction of emotional distress. We affirm.

FACTS

Appellant Martin T. Breaker was released from active duty in the United States military in September 2008 following a three-year deployment to Iraq. Prior to his deployment, appellant was employed at Bemidji State University (BSU) as an assistant professor and program coordinator in the business department. From July 2008 until August 2009, appellant engaged in negotiations with BSU for his return to work. BSU agreed to reemploy appellant following his discharge from military duty, but appellant and BSU were unable to agree regarding the terms of his reemployment.

In January 2011, appellant filed a complaint against the State of Minnesota, Minnesota State Colleges and Universities, BSU, and several individuals (the respondents), claiming intentional infliction of emotional distress. Appellant alleged that, in February 2010, he began to suffer from severe distress because of BSU's failure to reemploy him. The respondents moved for judgment on the pleadings or for summary judgment. The district court granted the motion and entered judgment against appellant. This appeal follows.

D E C I S I O N

Before trial, a party may move for judgment on the pleadings if the complaint fails to set forth a legally sufficient claim for relief. Minn. R. Civ. P. 12.03. This court must accept the facts alleged in the complaint as true and draw all inferences in favor of the nonmoving party. *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010). On appeal, this court reviews the pleadings de novo. *Id.*

Appellant argues that the district court erred in granting the respondents' motion for judgment on the pleadings based on its determination that the complaint failed to set forth a legally sufficient claim of intentional infliction of emotional distress. To recover for intentional infliction of emotional distress, a plaintiff must show that the defendant's conduct: (1) was extreme and outrageous; (2) was intentional or reckless; (3) caused emotional distress; and (4) the distress was severe. *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 438–39 (Minn. 1983).

To satisfy the first element, the respondents' conduct "must be so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Id.* at 439 (quotation omitted). Appellant contends that the respondents' conduct was extreme and outrageous for three reasons. First, he contends that the respondents "intentionally, willfully, and maliciously" violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) when they did not reemploy him at the same pay rate, seniority, and status that he would have had if he had been continuously employed at BSU. *See* 38 U.S.C. § 4313(a) (2006) (providing that "a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed"). Appellant argues that violations of USERRA are by their nature outrageous.[1]

[1] Appellant cites three federal cases in support of this argument. *See Mills v. E. Gulf Coal Preparation Co., LLC*, 2010 WL 2509835 (S.D.W.Va. June 18, 2010), *report and recommendation adopted*, 2011 WL 867350 (S.D.W.Va. Mar. 14, 2011); *Koehler v. PepsiAmericas, Inc.*, 268 F. App'x 396 (6th Cir. 2008); *Lees v. Sea Breeze Health Care Ctr., Inc.*, 391 F. Supp. 2d 1103 (S.D. Ala. 2005). But all three cases are distinguishable from this matter. Unlike the plaintiffs in *Mills* and *Lees*, appellant did not allege that the

Appellant's complaint does not establish that the respondents violated USERRA. Instead, the pleadings indicate that BSU and appellant, despite some disagreement about the extent of appellant's rights under USERRA, attempted to negotiate a reemployment contract that would be acceptable to both parties. While appellant ultimately was not reemployed by BSU, the pleadings do not establish that the respondents' conduct was "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Hubbard*, 330 N.W.2d at 439 (quotation omitted). Rather, the pleadings indicate that BSU attempted to reemploy appellant but that the parties were unable to agree on the terms of his reemployment.

Appellant contends that the respondents committed extreme and outrageous conduct and violated USERRA when they failed to provide him with an appointment form after a labor-relations representative told him in an e-mail that he was entitled to return to work after signing an appointment form. The respondents' failure to provide him with the appointment form did not rise to the level of extreme and outrageous conduct.

Second, appellant argues that the respondents' conduct was extreme and outrageous because they abused their position of power by attempting to coerce him into agreeing to an employment contract that did not comply with USERRA. But appellant's complaint did not allege any facts to support this assertion. While the respondents, as the employer, were likely in a position of power while they negotiated with appellant about

---

respondents harassed him, made anti-military comments, or engaged in similar behavior. And *Koehler* is not applicable because it involves an interpretation of a provision of USERRA, not an analysis of a claim of intentional infliction of emotional distress.

his reemployment, the fact that they did not come to an agreement and appellant never went back to work does not establish that the respondents abused that power.

Third, appellant argues that the respondents' conduct was extreme and outrageous because the respondents knew or should have known that he was particularly susceptible to emotional distress because of his military service. Appellant did not plead any facts that support his claim that the respondents acted in any way that was not respectful of his military service or his emotional state. Instead, the pleadings establish that the respondents' conduct and communication with appellant were respectful of his military service and his request to be reemployed at BSU.

Appellant further argues that the respondents' conduct was intentional or reckless and he suffered severe distress as a result of their conduct. Because the allegations in appellant's complaint, even if true, would not establish facts sufficient to show that the respondents' conduct was extreme and outrageous, we do not address the other three intentional-infliction-of-emotional-distress elements. *See Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 865 (Minn. 2003) (noting as dispositive a lack of evidence of extreme and outrageous conduct).

Accordingly, we conclude that the district court did not err when it granted the respondents' motion for judgment on the pleadings because appellant failed to plead facts sufficient to support a claim of intentional infliction of emotional distress.

Affirmed.