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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JAMES R. NORTON, JR.,

Plaintiff and Appellant,

v.

CHARTER COMMUNICATIONS, INC.,
et al.,

Defendants and Respondents.

A133953

(Del Norte County
Super. Ct. No. CVUJ 08-1409)

James Norton, Jr., sued his former employer, Charter Communications, Inc., and Charter Communications LLC (Charter). His complaint alleged wrongful termination in retaliation for his making an ethics complaint, intentional infliction of emotional distress, intentional interference with prospective economic advantage, and interference with contract. Charter moved for summary judgment, arguing there were no triable issues of material fact as to whether Norton’s termination was retaliatory or whether Charter engaged in the wrongful conduct necessary for his other causes of action. The trial court granted Charter summary judgment on all claims. Our review confirms its assessment of the evidence, and we affirm.

BACKGROUND

Norton began working for Charter in Crescent City in 2001. His offer of employment, acceptance letter, Charter’s written code of conduct, and its employee handbook stated that he was an at-will employee. Norton understood this meant Charter had a right to terminate his employment at any time with or without cause.

In late March 2007, a position for a “headend technician” became available in Charter’s Crescent City system. All of Charter’s system technicians were offered the opportunity to work in the headend while Charter searched for a permanent headend technician. Norton did some work in the headend during that spring and summer and interviewed for the permanent position in July.

On August 29, Norton asked his supervisor, Earl DeSomber, about the status of the headend vacancy. According to Charter, DeSomber replied that he had not interviewed well and that Charter was looking at another candidate. According to Norton, DeSomber said only that no decision had been made.

On September 10, Norton learned, when he was introduced to the new headend technician, that he did not get the job. At around 10:00 a.m. he left Human Resources Manager Donna Perdun a phone message saying “I am so angry I can barely speak,” and that he hoped to talk to her “before I do something stupid.” Norton called Perdun again at about 2:15 p.m. He said he felt DeSomber had misled him about the headend position and that he “was so angry that he could punch DeSomber.” Norton said he was considering filing an ethics complaint against DeSomber.

Perdun told Norton to do what he thought best about filing a complaint. She then related her conversation with Norton to his immediate manager, Brian Lindholme, and the northwest general manager Linda Kimberly. According to Lindholme, Perdun mentioned that “the actual words of ethics [were] brought up” either in that call or during their next conversation.

Shortly after Norton spoke with Perdun he ran into colleague Dennis Putman, who suggested he go home early and “come back tomorrow with a new attitude or whatever.” Putman agreed to tell DeSomber that Norton had gone home. Norton responded, “Good, because if I had to go in there and talk to him, I don’t know what might happen” and “I’d probably walk out of his office with a bloody knuckle and he’d have a bloody lip.” Norton left work around 2:30 p.m., before the end of his shift. Putman told DeSomber that Norton was “pretty upset” and had gone home.

Norton returned to Charter around 6:30 that evening. DeSomber saw him and asked why he left work early without authorization. Norton said it was because he did not trust himself to be civil and that he “might even take a poke at [you], and, you know, hurt my hand and maybe even break [your] jaw” DeSomber relayed the conversation in an email to Perdun, Lindholme, and Kimberly. He wrote: “I did just confirm that Jim left unauthorized. He stated he felt it better he go home without talking to me he was afraid he would not be able to control himself, stated that I would have a broken jaw and he would not have a job!!! He did talk with Donna Perdun. Jim never mentioned to her that he was leaving. I do take this as a threat and feel it should be documented.”

On the morning of September 12, Kimberly, Lindholme, and Kathleen Martin, Charter’s human resources director for the region, reached a consensus that Norton’s conduct was serious enough to warrant his immediate suspension and a recommendation that he be terminated. DeSomber notified Norton of his suspension around 9:30 a.m. In emails to Perdun sent the night of September 11 and to Perdun and Lindholme around noon on September 12, Norton expressed his belief that DeSomber was retaliating against him for complaining to human resources about his handling of the headend vacancy.

Martin recommended to Shirley Brown-Douglas, Charter’s vice president of human resources for the western division, that Norton be terminated for threatening DeSomber. On September 13, Norton was terminated. He subsequently lodged a written complaint with Charter asserting that DeSomber lied to him and other applicants about the headend position and then terminated him in retaliation to “cover it up.”

Norton sought alternative employment and, on October 7, 2007, started a new job with Blue Mountain Telecommunications (Blue Mountain), a company that constructs communication systems for a number of telecommunications providers. Charter was Blue Mountain’s largest customer, providing 60 to 70 percent of its business and almost all of its business in the area that includes Crescent City. DeSomber initially told Blue Mountain that he had no problem with its employing Norton as long as Norton stayed off

Charter's Crescent City property. But, about six weeks into Norton's new employment, Kimberly directed that Norton not be allowed to work on any Charter project. Blue Mountain then offered Norton a position that did not involve Charter projects, but he declined it because the job would have required him to relocate with his family to eastern Washington. There was effectively no other work for him at Blue Mountain, so he was terminated on November 20, 2007.

Norton filed this action against Charter, which successfully moved for summary judgment on all of his causes of action. This timely appeal followed.

DISCUSSION

I. Summary Judgment Standards

Summary judgment is proper when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)¹ We generally review a ruling granting summary judgment de novo. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798.) "First, the reviewing court identifies the issues framed by the pleadings, because the motion must be based on the issues as so framed. [Citation.] Second, the court determines whether . . . if the moving party is the defendant, whether the moving party either has negated at least one element of each of the plaintiff's causes of action, or has established every single element of a complete defense to plaintiff's cause or causes of action. [Citations.] Finally, if the moving party has established a prima facie basis for judgment in its favor, the court considers whether the opposing party has demonstrated that a triable issue of material fact exists so as to preclude summary judgment." (*Schrader v. Scott* (1992) 8 Cal.App.4th 1679, 1683–1684.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show 'specific facts,' and cannot rely upon the allegations of the pleadings." (*Horn, supra*, at p. 805.)

¹ Further statutory citations are to the Code of Civil Procedure.

There is one exception to the de novo review standard for summary judgments, which is applicable here. (See *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1288.) Section 437c, subdivision (e) provides: “If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on the grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, . . . where a material fact is an individual’s state of mind, or lack thereof, and that fact is sought to be established solely by the individual’s affirmation thereof.” Accordingly, we will review the trial court’s assessment of Charter’s “state-of-mind” declarations submitted in support of summary judgment for abuse of discretion.

II. Analysis

A. Wrongful Termination

Norton’s cause of action for wrongful termination is premised on his position that, although he was “generally” an at-will employee, his status was modified through provisions of Charter’s employee handbook and written code of conduct that guaranteed employees would not be terminated for reporting ethical breaches by other employees. We need not decide whether those provisions modified Norton’s at-will status, because, assuming arguendo that they did, Norton cannot establish he was terminated in retaliation for reporting ethical breaches by DeSomber.

Charter’s motion was supported by declarations from Kimberly, Martin and Lindholme that Norton was terminated for violating Charter’s workplace violence policy and leaving work early without authorization, and not for complaining about DeSomber. The trial court found their declarations credible. It explained its reasoning: “While memories of these three people var[y] somewhat in exactly what happened, they are consistent in their account that in no way would they recommend that the plaintiff be terminated for making any report of ethical wrongdoing. The clear, consistent, and primary concern was that plaintiff had violated company no threats and no violence

policy. Ms. Martin, the H.R. person, was particularly concerned about any on-going potential for violence against other Charter employees. . . . [¶] In exercising my discretion to consider each of the declarations as well as the affirmation by those people with regard to their mental state and their motivation, I find that in considering them that those declarations and affirmation of their mental state at the time are credible under the circumstances. And those circumstances include the following: One, that the three generally support each other on the critical issues and reasons why a decision was made to suspend and terminate Mr. Norton. Two, that none of the three had any history of animosity I'm aware of against the plaintiff. [¶] Three, there was no evidence that they had any bias in favor of Mr. DeSomber. I don't even recall, other than Mr. Lindholme, the others have any history with him. Fourth, none of those three have any personal decision in deciding to fire the plaintiff in retaliation for complaining about Mr. DeSomber. [¶] Next, Mr. DeSomber . . . is not one of the three critical decision makers. And even though they had to get permission from the vice president in charge, I find the three are the three critical decision makers." The court also found it was unlikely that Kimberly, Lindholme and Martin would conspire to suppress an ethical complaint about a single lie by a local supervisor.

Norton asserts the court erred in crediting the state-of-mind declarations because of what he alleges were significant inconsistencies and contradictions between the written testimony and the witnesses' earlier deposition testimony. We disagree. We review the trial judge's assessment of the declarations under section 473c, subdivision (e) for abuse of discretion and do not decide de novo whether they should be believed. (See, e.g., *Butcher v. Gay* (1994) 29 Cal.App.4th 388, 400 & fn. 3.) There was no abuse of discretion here. It is undisputed that Norton made multiple comments about assaulting DeSomber, and the court reasonably credited the testimony that the managerial personnel responsible decided to terminate him because they took those threats seriously. Norton emphasizes minor inconsistencies between the declarations and the declarants' deposition testimony, primarily concerning the timing and sequence of various communications and

variations in the witnesses' recollections of events at different points in time. But, the possibility that the court *could* have found the state-of-mind declarations were not credible evidence of Charter's reason for firing Norton does not mean we may disregard its contrary conclusion. "[T]he appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] We have said that when two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) The court's exercise of the discretion granted it by section 437c, subdivision (e) was well within the bounds of reason, so we will not disturb it.

Norton also argues that the circumstantial evidence of retaliation was sufficient to defeat summary judgment. Norton acknowledges that the critical issue is whether Charter honestly believed he threatened DeSomber with violence. But he maintains the existence of disputed factual issues is apparent through circumstantial evidence that Charter's actions did "not correspond to those of a person or company that believes it is at risk." Specifically, Norton says that Charter would have taken more stringent security measures had it truly viewed his comments as threats. For example, he observes that he was allowed to attend a staff meeting on September 11th; that there was no security at his suspension meeting; and that DeSomber did not obtain police protection or a restraining order. But, as the trial court found, such conjectural suspicions and interpretations about Charter's actions are not evidence. (See *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1404 [conjecture and speculation are insufficient to defeat summary judgment].) Norton submitted no factual evidence that demonstrates Charter did not take his statements about DeSomber at face value or that its actual motive for firing him was retaliatory. He speculates that Charter personnel lied about various events leading to his termination, but, as we have explained, the trial court credited their declaration testimony and we cannot second guess that determination. (§ 437c, subd. (e).)

B. Intentional Infliction of Emotional Distress

Norton's cause of action for intentional infliction of emotional distress was based on allegations that Charter, through Kimberly and DeSomber, intentionally (and gratuitously) caused him to lose his job with Blue Mountain by barring him from working on any Charter projects. The trial court ruled that Charter's action did not constitute the extreme and outrageous conduct required for such a claim. It explained: "Given that Charter and Kimberly believe that plaintiff had threatened the plaintiff's supervisor, plaintiff has not established that this statement that he could not work on Charter projects was so extreme and so outrageous as to go beyond all possible bounds of decency as to be regarded as atrocious and utterly intolerable in a civilized society." We agree. Charter's state-of-mind declarations evidenced an honest concern about Norton's threats. Whether or not Charter foresaw that its directive to Blue Mountain would cause Norton to lose his job, Norton cannot show anything "extreme and outrageous" about an employer taking such a step to guard against a threat of workplace violence or other potentially harmful acts by an obviously angry former employee. Not surprisingly, Norton cites no authority for his position that anything Charter did might reasonably be viewed as "atrocious and utterly intolerable in a civilized society." (See *ibid.*)

C. Interference With Prospective Economic Advantage and Contract

Norton's third cause of action, for interference with prospective economic advantage, was also based on his allegations that Charter sabotaged his employment with Blue Mountain. But, a viable claim for interference with economic advantage must allege that the defendant's conduct was "wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, fn. 11.) "The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. [Citation.] We conclude, therefore, that *an act is independently wrongful if it is unlawful,*

that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.” (*Id.* at pp. 1158-1159, italics added.) Norton relies solely on his claim of intentional infliction of emotional distress to satisfy the requirement that Charter engaged in independently wrongful conduct, so his interference with economic advantage claim necessarily fails along with his cause of action for intentional infliction of emotional distress.

Norton’s fourth cause of action, for interference with contract, suffers the same defect. It is undisputed that he was an at-will employee of Blue Mountain. “[A] plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage. That is, to recover for a defendant’s interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act—i.e., an act ‘proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.’ ” (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152-1153, quoting *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1159.)

Norton argues that *Reeves* does not apply here because its holding is limited to the situation in which one employer sues another for hiring away its at-will employees. We disagree. It is true that such a factual scenario was before the court in *Reeves*, and the Supreme Court considered the anti-competitive effects of dissuading employers from lawfully wooing away a competitor’s at-will employees in reaching its holding. (See *Reeves v. Hanlon*, *supra*, 33 Cal.4th at pp. 1145, 1149–1152.) But the court’s reasoning in *Reeves* is more expansive. The court distinguished third-party interference with at-will contracts from interference with other legally binding agreements on the ground that, as between the contracting parties, at-will contracts primarily create “no legal right but only an expectancy; and when the contract is terminated by the choice of [a contracting party] there is no breach of it.” (*Id.* at pp. 1151-1152.) In this sense, the court reasoned, interference with an at-will contract is closely aligned with interference with prospective

economic advantage, which “similarly compensates for the loss of an advantageous economic relationship but does not require the existence of a legally binding contract.” (*Id.* at p. 1152.) Therefore, “[c]onsistent with the decisions recognizing that an intentional interference with an at-will contract may be actionable, but mindful that an interference as such is primarily an interference with the future relation between the contracting parties” (*ibid.*), the court held the “independently wrongful act” standard applicable to intentional interference with prospective economic advantage applies also to intentional interference with at-will employment relationships (*id.* at pp. 1152-1153).

The court’s holding, consistent with its reasoning, is thus not as narrow as Norton suggests. Moreover, Norton cites no cases that limit *Reeves* to actions between competing employers, and we have found none. (Cf. *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685 [applying *Reeves* to *employee*’s intentional interference claim against a potential employer who reneged on a job offer after plaintiff left his former at-will position].) Summary judgment was properly granted as to this claim as well.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.