

STATE OF MICHIGAN
COURT OF APPEALS

LARRY TOLLIVER,

Plaintiff-Appellant,

v

POLAR REFRIGERATION COMPANY,

Defendant-Appellee.

UNPUBLISHED

May 3, 1996

No. 170287

LC No. 92-230454-NO

Before: Taylor, P.J., and Fitzgerald and P. D. Houk,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition, pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff asserted a claim under the Michigan Civil Rights Act (MCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* In particular, plaintiff alleged racial discrimination, constructive discharge, and that he was subjected to disparate treatment in wages and working conditions in violation of the MCRA.

Under the MCRA, a *prima facie* case of race discrimination can be made through evidence showing either intentional discrimination or disparate treatment. *Reisman v Wayne State University Board of Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991). Once a *prima facie* case of discrimination is shown, the burden of production shifts to the defendant to articulate legitimate nondiscriminatory reasons for its actions. *Lytle v Malady*, 209 Mich App 179, 186-187; 530 NW2d 135 (1995). If the defense meets this burden of production, the plaintiff must then produce evidence showing that the defendant's proffered nondiscriminatory reasons were merely a pretext for discrimination. *Lytle, supra* at 187; *Reisman supra* at 539. To survive a summary disposition motion brought under MCR 2.116(C)(10), plaintiff need only tender specific factual evidence establishing a *prima facie* case and evidence from which a reasonable jury could conclude that defendant's proffered nondiscriminatory reasons were a pretext for unlawful discrimination. *Lytle, supra* at 187-188. That is, the plaintiff must establish, either directly or indirectly, a genuine issue of material fact that the

* Circuit judge, sitting on the Court of Appeals by assignment.

defendant's reasons were not credible and that illegal discrimination was more likely the true motive behind the defendant's actions. *Id.*

Plaintiff's discrimination claim based upon constructive discharge fails because the evidence presented by plaintiff did not show that he was constructively discharged from his employment with defendant. In *Mollett v Taylor*, 197 Mich App 328, 336; 494 NW2d 832 (1992), this Court defined constructive discharge as follows:

A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. [Quoting *Mourad v ACIA*, 186 Mich App 715, 721; 465 NW2d 395 (1991).]

Plaintiff's own deposition testimony establishes that his work conditions were not deliberately made so intolerable that a reasonable person would have felt compelled to resign. Plaintiff testified that he got along well with other employees at Polar, and had no problems there except for one racist remark by Dave Farabaugh. This remark was not so offensive to plaintiff as to compel his immediate resignation. Indeed, it was several months after this incident, which according to plaintiff's deposition was the only one in which, to his knowledge, any person in the firm, whether a principal or merely another employee, uttered a racially hostile remark, that plaintiff submitted his resignation, indicating he intended to pursue other opportunities. Thus, although Farabaugh's remark was offensive to plaintiff, it did not show that his work conditions had become so "difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." Further, because plaintiff was never aware of being referred to as "BLT,"¹ this could have had no effect upon his work conditions or his decision to resign. Accordingly, the constructive-discharge claim was without evidentiary support and the court was correct in granting summary disposition.

Plaintiff's disparate treatment claim also was properly dismissed because the complained of menial work was also performed by white employees. Defendant's business records showed that the white employees also washed trucks, cleaned gutters, etc. Further, while plaintiff did present evidence showing that he was paid less than certain white employees, defendant presented legitimate nondiscriminatory reasons for the difference in wages. These included greater training, education, or experience possessed by those employees. As plaintiff never countered defendant's evidence by producing evidence that the proffered nondiscriminatory reasons were merely a pretext for race discrimination, summary disposition was properly granted to defendant.

Affirmed.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk

¹ “BLT” apparently meant “Black Larry Tolliver” and was used to distinguish plaintiff from a Caucasian employee also named Larry.