

STATE OF MICHIGAN
COURT OF APPEALS

ANDREW BLAZIC

Plaintiff-Appellant,

v

WAYNE COUNTY and THOMAS BEDNARSKI,

Defendants-Appellees.

UNPUBLISHED
October 11, 1996

No. 180155
LC No. 93-324599

Before: Jansen, P. J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting summary disposition in favor of defendant Wayne County in this age discrimination and constructive discharge case. We affirm.

Plaintiff was employed as Assistant Director of Wayne County's Emergency Management Division. Plaintiff's superior was Mark Sparks, the director of the emergency management division. In 1991, plaintiff told Sparks that plaintiff intended to retire in 1992. In a letter dated May 29, 1991, Sparks notified Wayne County Executive McNamara of plaintiff's intent to retire in 1992, and the letter was copied to Thomas Bednarski, the director of personnel/human resources. In a letter dated March 25, 1992, Sparks informed McNamara that plaintiff intended to retire effective October 1, 1992. In the meantime, Bednarski learned that Don Wolliford had been selected to replace plaintiff upon his retirement.

In early 1992, but at a time after March 25, 1992, Sparks asked plaintiff to consider staying past October because there were some large training exercises scheduled in September, 1992. Plaintiff said that he would. After that conversation, plaintiff did not give a new date for his retirement. However, neither plaintiff nor Sparks informed McNamara or Bednarski that there had been a change in plaintiff's retirement plans.

Subsequently, Bednarski and McNamara had a conversation, the "general content" of which was that Bednarski was "to follow through and work out that Mr. Williford is placed in the position at a

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

reasonable time period since he had been offered the job.” Bednarski interpreted McNamara’s statements to mean that plaintiff was to be removed from his position either by retirement or reassignment.

On January 26, 1993, Bednarski instructed Sparks to advise plaintiff that he “should put in for his retirement” as soon as possible and that if he did not do so, he could lose his appointment. Sparks advised plaintiff as instructed by Bednarski. Plaintiff responded that he would file for retirement as requested provided the county compensated him for some accumulated leave time. Sparks relayed this information to Bednarski, who became very upset and told Sparks that McNamara would probably just fire plaintiff. Sparks told Bednarski not to tell McNamara right away, and after Sparks explained the reaction to plaintiff, plaintiff submitted his retirement paperwork. He applied for and received a duty-disability retirement¹, which was effective May 1, 1993.

On August 30, 1993, plaintiff filed this action alleging age discrimination and constructive discharge. In Count I, plaintiff alleged that at the time of his forced retirement on May 1, 1993, he was fifty-seven years old, that he was qualified, and that he was replaced by a younger employee, Donald Williford. Although the complaint stated that Williford was thought to be in his mid-forties, he actually was fifty-one as of May 1, 1993. In Count II, plaintiff alleged that defendants “set out on a course of conduct which made Plaintiff’s working conditions so intolerable that similarly situated person [sic] would likewise feel compelled to resign” and “to pressure plaintiff into giving up his position as Assistant Director of Emergency Management in order to give Plaintiff’s position to a younger employee.”

Defendants filed a motion for summary disposition “pursuant to MCR 2.116(C)(1), (2), (3), and (10). With respect to the age discrimination claim, they asserted that plaintiff had failed to show an adverse employment action; that plaintiff failed to state a prima facie case of age discrimination because his replacement was a member of the protected class; and that plaintiff had no evidence that age was considered by the county with respect to the decisions made about plaintiff’s employment. Plaintiff responded in part:

Mr. Bednarski’s truly unbelievable legitimate business reason was that since Blazic announced in 1991 that he was going to retire in 1992, then Blazic had to retire and could not change his mind.

Bednarski could not offer any legal, administrative, civil service rule, contractual provision, or logical basis for that position. The simple implication is that because of Blazic’s age (over 50) and years of service (over 25 years), he [Bednarski] could force Blazic to retire and then replace him with the younger Wiliford [sic]. Therefore, Blazic’s age (retirement age) was a determining factor, in the County’s decision to fire Blazic.

The trial court relied on MCR 2.116(C)(10) in granting defendants’ motion. The court explained its reasoning as follows:

In this case the plaintiff was not forced to retire. He gave his employer his intent to retire in the coming year which his immediate supervisor passed on to the County

executive and to the director of personnel. Two subsequent letters corroborated this and the plaintiff never expressed a change in his intention intended [sic] retirement or contradicted the two letters.

The plaintiff's response to the defendants' motion failed to raise any factual disputes through deposition testimony or any other documentary evidence that can do so. His conclusionary allegations and subjective beliefs are insufficient evidence to establish the age discrimination as a matter of law, and your motion is granted.

We agree with the trial court that defendants were entitled to summary disposition. Viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff has not created a genuine issue of material fact with respect to his age discrimination claim. There is no evidence indicating that age was a determining factor in the decisions made by the county with respect to plaintiff's employment. Although, as plaintiff argues, the trial court's statement "plaintiff never expressed a change" in his intention to retire was incorrect, the uncontroverted evidence is that the change in plans discussed by Sparks and plaintiff was not communicated to McNamara or Bednarski, whom plaintiff claims discriminated against him.² Without evidence indicating Bednarski's knowledge that plaintiff had changed his mind about retiring, plaintiff has failed to show that the county's proffered reason for its employees' actions was pretextual. On appeal, plaintiff claims that he has shown a viable claim of age discrimination under a disparate treatment theory, but he has not come forward with evidence to support his claim that he was treated differently because of his age. Therefore, plaintiff's age discrimination claim was properly dismissed.

Plaintiff's complaint also contains a separate count of "constructive discharge." Constructive discharge is not in itself a cause of action, but is a response to the argument that no suit should lie because the plaintiff left the job voluntarily. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). An underlying cause of action is needed where, as here, it is asserted that a plaintiff did not voluntarily resign but was instead constructively discharged. *Id.* Because we have concluded that plaintiff's underlying claim was properly dismissed, the constructive discharge claim must also fail.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

¹ According to the complaint, as of January 29, 1993, plaintiff was suffering from a disabling back injury that had no impact on his abilities to perform the assistant director position, but prevented him from performing the duties of a corporal in the Wayne County Sheriff's Department, the position he held before his appointment. Whether plaintiff was entitled to a duty-disability retirement because he was

unable to perform a job other than the position he held at the time he applied for retirement is not material to the resolution of plaintiff's claims. Furthermore, although defense counsel suggested at oral argument that plaintiff was disabled from performing the assistant director position, that argument was not raised in defendants' brief in support of the motion for summary disposition. We express no opinion on these matters.

² Plaintiff has not asserted that Sparks' original communications regarding plaintiff's intent to retire or the subsequent failure to communicate the change in those plans was part of a plan to discriminate against plaintiff.