

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL MERLINGTON

Plaintiff-Appellant,

v

HURON COUNTY MENTAL HEALTH
SERVICES,

Defendant-Appellee.

UNPUBLISHED
November 8, 1996

No. 184871
LC No. 94-8719-NZ

Before: Markman, P.J., and McDonald and M. J. Matuzak,* JJ.

MARKMAN, P.J., (concurring in part and dissenting in part).

I concur in part and dissent in part. I concur in the majority's conclusion that the court erred in granting defendant's motion for summary disposition in the gender discrimination action but depart from its conclusion that plaintiff has presented sufficient evidence to establish a claim of constructive wrongful discharge.

With respect to the gender discrimination claim, plaintiff has presented evidence which, at least marginally, suggests disparate treatment between herself and male employees of defendant. *Schuyttes v Naylor*, 195 Mich App 640; 491 NW2d 240 (1992). She alleges specific facts that, if true, establish that male employees in the office were treated differently than she, e.g. with respect to the provision of secretarial support. While plaintiff fails to make any showing that the disparate treatment was because of her sex, such an inference may be drawn. In deciding a motion for summary disposition, all reasonable inferences must be drawn in the non-moving party's favor. *Farm Bureau Ins v Stark*, 437 Mich 175, 184-85; 468 NW2d 498 (1991). In response to this prima facie case, defendant has offered virtually nothing in rebuttal. It has failed to offer any explanation or justification for such allegedly disparate treatment and it has failed to offer any evidence that such treatment was grounded in non-gender based reasons. In view of this non-response, this Court has little alternative here but to reverse the grant of summary disposition.

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

With respect to the constructive wrongful discharge claim, I find plaintiff's claim without merit. Not every decision by an employee to leave his or her employment under difficult circumstances constitutes a constructive discharge. Rather, a constructive discharge occurs only when an employer has *deliberately* made an employee's working conditions so *intolerable* that an employee has been *forced* into involuntary resignation. *Vagts v Perry Drug Stores*, 204 Mich App 481, 487; 516 NW2d 102 (1994). A reasonable person in the employee's position must have felt compelled to resign as a result of the employer's conduct. *Id.* Therefore, it is required that an employee arguing constructive wrongful discharge demonstrate: (a) that her employer has created intolerable working conditions for the employee; (b) that the employer intended that such intolerable working conditions be created; and (c) that a reasonable employee would feel compelled to terminate her employment as a result of such conditions.

In my judgment, the court did not err in its conclusion that insufficient evidence existed to sustain plaintiff's claim. To defeat a summary disposition motion, plaintiff must do more than merely demonstrate that she was subject to treatment which, to her mind, was unfair or inequitable. Rather, she must evidence that her employer has deliberately created intolerable working conditions that would cause a reasonable person to feel compelled to leave her employment. In my judgment, plaintiff has failed to set forth a prima facie case in this regard. While reasonable inferences must be drawn in favor of plaintiff, *Farm Bureau, supra*, the inferences which plaintiff wishes to have drawn here are far too remote and speculative. That plaintiff may have suffered through a turbulent relationship with her supervisors is hardly sufficient to establish the elements of a constructive wrongful discharge. As the defendant correctly observes, most of plaintiff's allegations "relate to [plaintiff's] disagreements with managerial decisions." One need not take sides with respect to these disagreements to conclude that they do not give rise to evidence of a constructive wrongful discharge. Difficult working conditions are distinct from intolerable working conditions; and an employer acting in a manner disapproved by an employee is distinct from an employer deliberately seeking to create an intolerable working condition. Moreover, there is evidence here that plaintiff was given the opportunity to find other employment with defendant if she was unhappy with her current position— an opportunity which plaintiff chose not to pursue.

Because I believe that the majority opinion would transform a garden variety employer-employee dispute into a constructive wrongful discharge, I would affirm the trial court on this claim.

/s/ Stephen J. Markman