

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CHARLES J. KISH

Plaintiff-Appellant,

v

COUNTY OF WAYNE and ROBERT L. ALLEN,

Defendants-Appellees.

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UNPUBLISHED

February 21, 1997

No. 187790

LC No. 94-414477 CZ

Before: Cavanagh, P.J., and Gage and D.A. Burrell,\* JJ.

PER CURIAM.

Plaintiff appeals as of right trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff brought this action against his employer claiming breach of contract, violation of his constitutional rights pursuant to 42 USC 1983, violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, constructive discharge, and violation of the Employee Right To Know Act, MCL 423.501 *et seq.*; MSA 17,62(1) *et seq.* On appeal, plaintiff claims that the trial court erroneously dismissed his breach of contract claim for failure to include his union as a defendant and erroneously determined that plaintiff failed to submit factual support for his remaining claims. We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

I

In his first issue, plaintiff argues that the trial court erroneously dismissed his breach of contract suit against defendant Wayne County because plaintiff did not also bring an action against the union for

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

breach of the duty of fair representation. Under Michigan labor law, a plaintiff who is represented by a collective bargaining unit cannot pursue his breach of contract claim against the employer unless he is successful in his claim of breach of the duty of fair representation against the union. *Knoke v East Jackson Public School Dist*, 201 Mich App 480, 485; 506 NW2d 878 (1993). This rule is consistent with cases brought under the federal law, where the “plaintiff-employee must demonstrate that his union breached its duty of fair representation in pursuing his claim.” *Romero v Paragon Steel Division, Portec, Inc*, 116 Mich App 261, 263; 323 NW2d 363 (1982) (citing *Vaca v Sipes*, 386 US 171, 179-180; 87 S Ct 903; 17 L Ed 2d 842 (1967)). Under federal labor law, although the union’s wrongdoing must be proven to permit judicial resolution of the plaintiff’s breach of contract claim against the employer, the union is not an indispensable party and an employee may sue the employer without also suing the union. *DelCostello v Teamsters*, 462 US 151, 165; 103 S Ct 2281; 76 L Ed 2d 476 (1983).

We conclude that the trial court erred in determining that plaintiff could not maintain a breach of contract action against defendants without also maintaining a breach of duty of fair representation claim against the union. However, because plaintiff failed to establish a question of fact regarding whether the union breached its duty of fair representation, the trial court did not err in granting defendants’ motion for summary disposition.

To prevail on a claim of unfair representation, a party must establish both a breach of the union’s duty of fair representation and a breach of the collective bargaining agreement. *Goolsby v Detroit*, 211 Mich App 214, 223; 535 NW2d 568 (1995). When a plaintiff’s claim is predicated on allegations that the union failed to pursue a meritorious grievance, this Court recognizes that a union has considerable discretion to decide which grievances shall be pressed to arbitration and which shall be settled, and must be permitted to assess each grievance with a view to individual merit. *Knoke, supra* at 486.

In the instant case, plaintiff has failed to demonstrate that the union abused its discretion in failing to pursue a grievance. Plaintiff testified in his deposition that he opted for early retirement after discussing his options with the union. This evidence establishes that both plaintiff and his union representatives had cause to believe that a satisfactory solution could be had by plaintiff’s early retirement. The fact that the settlement agreement subsequently proved to be unsatisfactory does not indicate that the union acted in bad faith. Because plaintiff chose to take an early retirement in order to avoid disciplinary termination, the union’s failure to file a grievance cannot be considered an abuse of discretion. Although there is no evidence that plaintiff explicitly stated that he would waive his right to file a grievance, his decision to pursue early retirement must be considered an implicit rejection of the grievance option. Under these circumstances, there is no question of fact regarding plaintiff’s claim that the union breached its duty of fair representation.

In sum, the trial court improperly granted defendants’ motion for summary disposition on the ground that plaintiff did not also sue the union. However, plaintiff failed to establish factual support for his breach of duty of fair representation allegations. This Court will not reverse where the right result is

reached for the wrong reason. *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996). Accordingly, we affirm the trial court's grant of defendant's motion for summary disposition.

## II

Plaintiff next claims that the trial court erred in granting defendants' motion for summary disposition with regard to plaintiff's racial discrimination claim. Plaintiff's claim of disparate treatment requires a showing that the plaintiff was a member of the class entitled to protection under the act and that he was treated differently than persons of a different class for the same or similar conduct. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994).

Plaintiff has alleged that he was treated differently than Keith Hunter, an employee of a different race. Plaintiff has established, through deposition testimony, that Hunter escaped disciplinary action despite his frequent unexplained absences. However, while absenteeism is misconduct, it is of a different character than plaintiff's abusive conduct toward subordinates and members of the public. Hunter was therefore not similarly situated to plaintiff, and plaintiff has consequently failed to offer evidence in support of a prima facie case of race discrimination.

On appeal, plaintiff argues that there was evidence that Hunter "orally chastised" three persons, yet escaped disciplinary action. Specifically, plaintiff points to his own deposition testimony, in which he stated that three people told him that Hunter had verbally abused them. However, this testimony is hearsay and as such does not constitute admissible evidence. The existence of a disputed fact must be established by admissible evidence. *Cox v Dearborn Heights*, 210 Mich App 389, 398; 534 NW2d 135 (1995). Because plaintiff offered no admissible evidence that Hunter had verbally abused others, the trial court did not err in granting defendants' motion for summary disposition on this issue.

## III

In his third issue, plaintiff claims that the trial court erroneously determined that plaintiff failed to produce factual support for his constructive discharge claim. However, constructive discharge is not actionable in itself. Instead, constructive discharge is actionable only when it occurs in the context of otherwise wrongful discharge. See, e.g., *Champion v Nation Wide Security, Inc*, 450 Mich 702, 711; 545 NW2d 596 (1996) (sexual harassment claim); *Radtke v Everett*, 442 Mich 368, 377; 501 NW2d 155 (1993) (sex discrimination claim); *Manning v Hazel Park*, 202 Mich App 685, 696-697; 509 NW2d 874 (1993) (sex and age discrimination claims); *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152-153; 483 NW2d 652 (1992) (breach of employment contract claim). Because plaintiff's allegations of constructive discharge have not been made in the context of any viable wrongful discharge or discrimination claim, plaintiff is not entitled to relief.

## IV

Plaintiff also seeks relief under 42 USC 1983. This statute provides that any person, acting under color of state law, who deprives a citizen of his or her constitutional rights or privileges, is liable to that person. In establishing a cause of action against state officials under § 1983, the plaintiff must plead

and prove that he has been deprived of a federal right and that the defendant deprived him of that right while acting under color of state law. *Mollett v City of Taylor*, 197 Mich App 328, 344; 494 NW2d 832 (1992).

We assume that because plaintiff's collective bargaining agreement prohibited his discharge except for just cause, he held a protected property interest in his employment, and that defendants could not deny him that right without due process. See *Garner v Michigan State University*, 185 Mich App 750, 759; 462 NW2d 832 (1990). However, this Court has held that when administrative remedies which afford due process are available to the employee, the employee must exhaust these remedies before establishing a § 1983 action against the employer. *Mollett, supra* at 344-345. In the instant case, plaintiff failed to exhaust his administrative remedies because he opted for early retirement in lieu of pursuing the posttermination grievance procedure under the collective bargaining agreement. The trial court therefore did not err in dismissing plaintiff's § 1983 claim.

V

In his last issue, plaintiff claims that the trial court erred in determining that he failed to prove that defendants violated the Employee Right To Know Act. The statute, provides, in pertinent part:

An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. [MCL 423.503; MSA 17.62(3).]

Plaintiff claims that the absence of the December 7, 1993, disciplinary records from his file constitutes a violation of this act. However, as the trial court noted, no disciplinary action was taken in the instant case because plaintiff accepted early retirement in lieu of termination. Because no disciplinary action was actually taken, records of the unconsummated termination decision should not have been placed in the record. In fact, noting disciplinary action in an employee's personnel file when none was taken would constitute placement of false information in the file, in itself a violation of the act. See MCL 423.505; MSA 17.62(5). Accordingly, the trial court properly granted defendants' motion for summary disposition with regard to this claim.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Daniel A. Burress