

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN STATE UNIVERSITY
ADMINISTRATIVE PROFESSIONAL
SUPERVISORS ASSOCIATION, INC., and
DAVID MARQUETTE,

UNPUBLISHED
May 27, 1997

Plaintiffs-Appellees,

v

BOARD OF TRUSTEES OF MICHIGAN STATE
UNIVERSITY, and RALPH W. BONNER, jointly
and severally,

No. 171124
Court of Claims
LC No. 91-13830 CM

Defendants-Appellants.

MICHIGAN STATE UNIVERSITY
ADMINISTRATIVE PROFESSIONAL
SUPERVISORS ASSOCIATION, INC., and
DAVID MARQUETTE,

Plaintiffs-Appellees,

v

BOARD OF TRUSTEES OF MICHIGAN STATE
UNIVERSITY,

No. 180043
Ingham Circuit Court
LC No. 93-76201 CL

Defendant-Appellant.

Before: White, P.J., and Griffin and D. C. Kolenda*, JJ.

PER CURIAM.

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

In docket no. 171124, we reverse the Court of Claims' declaratory ruling that defendant's Anti-Discrimination Judicial Board (ADJB) policy and procedures were constitutionally invalid, and vacate the judgment and award of damages to plaintiff Marquette (plaintiff) on his constructive discharge and gross negligence claims. In docket no. 180043, we reverse the circuit court's order vacating an arbitration award in defendant's favor, and reinstate the arbitration award.

I

In 1970, defendant adopted Anti-Discrimination Policy and Procedures, which included the establishment of the ADJB to receive employee complaints, conduct hearings, and issue recommendations to MSU's President. The ADJB was comprised of MSU student, staff and faculty representatives. Its jurisdiction did not extend to claims for which another procedure for binding adjudication was provided by contract.

Defendant Bonner, MSU's Director of Human Relations, served as Executive Secretary to the ADJB, and Bonner's department was administratively responsible for the ADJB, including the intake of cases, conducting fact-finding prior to cases going forward, and mediating disputes. His office also provided secretarial support to the ADJB.

Plaintiff was Manager of University Printing Services at MSU and had been employed with MSU since 1970. Two female employees under plaintiff's supervision filed sex discrimination complaints against plaintiff with the ADJB in May 1990. The ADJB conducted a formal hearing in March 1991 and submitted recommendations to defendant's president, which included that steps be initiated to remove plaintiff from his job. Defendant's president, however, concluded only that plaintiff had exercised poor judgment, and determined that plaintiff would no longer supervise the two women who filed complaints against him. In May 1991, a third female employee under plaintiff's supervision filed a sex discrimination claim against plaintiff. Plaintiff refused to submit to the ADJB's jurisdiction on the ground that the complainant had an arbitrable grievance pending. Despite plaintiff's objection, the investigation went forward for a time, but no hearing was ever held and the record is devoid of any indication that defendant took action against plaintiff as a result of this complaint.

Plaintiff MSUAPSA is a collective bargaining organization for defendant's managerial employees. MSUAPSA and three of its members,¹ including plaintiff, filed a circuit court action against defendants MSU and Bonner on July 12, 1991, alleging that the ADJB policy and proceedings had violated their rights to due process under the Michigan Constitution; the ADJB policy and procedures were unauthorized and violated the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, because MSU did not secure the Michigan Civil Rights Commission's (CRC) approval before implementing them; and negligence. The complaint alleged that defendant violated its own ADJB procedures, including by hearing the complaints against plaintiff when it lacked jurisdiction to do so, and that the ADJB hearing was neither fair nor impartial. The complaint further alleged that the ADJB's recommendations to MSU's president, and the record provided the president, were biased. The complaint alleged that defendant Bonner owed plaintiffs a duty, as executive secretary of the ADJB, to follow the ADJB policy and procedures, but failed to do so. Further, the complaint alleged that

MSUAPSA members had a property interest in continued employment and a liberty interest in being free from being stigmatized by false, inaccurate, and misleading reasons adopted by the ADJB. The action was transferred from circuit court to the Court of Claims in September 1991.

Plaintiff's last day of work was July 26, 1991. He retired effective November 1, 1991. On November 11, 1991 plaintiff filed a collective bargaining grievance claiming that he had been constructively discharged.

In the meantime, the Court of Claims case proceeded.² MSU moved to dismiss plaintiffs' claim that the ADJB policy and procedures violated the CRA. In an opinion and order dated January 9, 1992, the Court of Claims followed *Van Dam v Civil Service Bd*, 162 Mich App 135, 140-141; 412 NW2d 260 (1987), which held that the defendants' failure to obtain CRC approval of a voluntary affirmative action plan rendered it invalid, and concluded that the ADJB was an internal discrimination review board, and not an affirmative action plan, but that *Van Dam* nonetheless applied.

In February 1992, pursuant to a stipulation, plaintiffs filed their first verified supplemental complaint, which added a claim that plaintiff had been constructively discharged. Plaintiff alleged that he had been continuously harassed by the ADJB and that defendants made plaintiff's working conditions so difficult and unpleasant, by virtue of allowing the ADJB "unfettered discretion to attack supervisors," that he was forced to leave his position. Defendant's answer, filed on March 9, 1992, asserted only governmental immunity as an affirmative defense.

On March 17, 1992, the Michigan Supreme Court decided *Victorson v Dep't of Treasury*, 439 Mich 131, 143-144; 482 NW2d 685 (1992), discussed *infra*, which held that voluntary affirmative action plans unapproved by the MCRC are not necessarily invalid as a matter of law. On July 20, 1992, the Court of Claims issued an opinion and order denying MSU's second motion for summary disposition pertinent to plaintiffs' CRA claim. The court concluded that *Victorson*, *supra*, did not compel a different conclusion than it had reached earlier.

Arbitration proceedings on plaintiff's grievance commenced in February 1993.³

On February 22, 1993, MSU filed in the Court of Claims case a motion to permit it to plead an additional affirmative defense under *Mollett v City of Taylor*, 197 Mich App 328; 494 NW2d 832 (1992), which had been decided December 7, 1992. *Mollett* held that a public employee alleging constructive discharge must exhaust administrative remedies before commencing an action in circuit court. *Id.* at 337. On May 12, 1993, the court denied MSU's motion without prejudice to renewal, if trial, then set for June 7, 1993, were adjourned. Trial was adjourned, and, on June 14, MSU again sought to amend its answer. On June 16, 1993, the parties received notice of the new trial date, August 10, 1993. On July 21, 1993, the Court of Claims again denied MSU's motion because trial was approaching, again without prejudice if trial were later adjourned.

A bench trial began on August 10, 1993, and on August 12, 1993, the Court of Claims issued its findings of fact and conclusions of law from the bench, concluding that plaintiff had been constructively discharged, that Bonner was grossly negligent, and that plaintiff had suffered \$105,000

economic damages and \$10,000 emotional distress damages. Later in August, the arbitrator issued his decision concluding that plaintiff had not been constructively discharged.

In November 1993, plaintiff filed a circuit court action to vacate the arbitrator's decision. Defendants moved for summary disposition. Judgment in the Court of Claims case was entered on December 1, 1993. Appended to the judgment was a declaratory ruling that MSU's ADJB policy was invalid because it had not been submitted to the CRC for pre-approval. The action to vacate the arbitration award proceeded, with plaintiff responding to defendants' motion, and the circuit court summarily denied defendants' motion for summary disposition on the sole basis that the civil suit had *res judicata* effect as to the issues presented in the arbitration. Defendants moved for reconsideration, which was denied. In October, 1994, the court entered judgment vacating the arbitrator's decision. The Court of Claims appeal is No. 171124. The appeal of the circuit court judgment vacating the arbitration award is No. 180043.

II. No. 171124

A

MSU first argues that the CRA, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, does not require that an employer secure the MCRC's approval before instituting an internal process for resolving discrimination complaints. MSUAPSA argues that any self-initiated plans concerning discrimination must be approved by the CRC before implementation.

Assuming, arguendo, that defendant's policy was an affirmative action plan, *Victorson, supra*, applies. Under *Victorson*, employment decisions made pursuant to unapproved affirmative action plans do not necessarily constitute discrimination in violation of the CRA as a matter of law. 439 Mich at 143-144. The absence of an approved plan does not mean that the employer is precluded from articulating a nondiscriminatory reason for its employment decisions. An employer is to be afforded an opportunity to show that the plan is otherwise valid by showing that 1) the unapproved plan is similar in purpose to the CRA, (2) the plan does not unnecessarily trammel the rights of nonminorities, and (3) the plan is temporary in nature. 439 Mich at 146.

Because the Court of Claims did not give MSU an opportunity to show that the ADJB policy and procedures were "otherwise valid," summary disposition was inappropriate. *Id.* Further, if the challenged policy and procedures were not an affirmative action plan, we reach the same result. Contrary to MSUAPSA's argument, *Victorson* does not mandate that any procedure to combat discrimination which an employer self-initiates must be submitted for the CRC's approval before implementation.

Under normal circumstances, we would remand for further proceedings consistent with *Victorson*. However, because the challenged policies and procedures are no longer in effect, remanding would be futile. We therefore vacate the Court of Claims' declaratory ruling.

B

Defendants also challenges the Court of Claims' finding that plaintiff was constructively discharged and argues that the trial court improperly refused to allow defendants to add the affirmative defense of failure to exhaust collective bargaining remedies.

We are satisfied from our review of the record that the trial court erred in concluding that plaintiff was constructively discharged. Plaintiff was not fired or removed from his position. Defendant affirmatively asked plaintiff to remain on the job and there was no evidence that this request was not sincere. Further, under the circumstances of this case, removal of plaintiff's authority to supervise two employees did not constitute constructive discharge, nor did the ADJB's pursuit, for a time, of the Allison complaint. 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. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151; 483 NW2d 652 (1992). The proofs in this case fail to establish that such was the case here.

Further, we conclude that given the nature of the defense, once *Mollett* was decided, the trial court should have allowed defendants to add the affirmative defense of failure to exhaust administrative remedies, notwithstanding that defendants might have asserted the defense more diligently. We thus vacate the Court of Claims' finding of constructive discharge and its award of damages in plaintiff's favor.

C

Defendants argue as to plaintiffs' gross negligence claim that, assuming Bonner owed plaintiff a duty of care, Bonner's deference to the ADJB regarding the Board's jurisdiction did not constitute gross negligence.

The trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C). Conduct is grossly negligent which is so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c); MSA 3,996(107)(2)(c); *Jennings v Southwood*, 446 Mich 125, 132; 521 NW2d 230 (1994).

Bonner testified that he received plaintiff's letter stating that plaintiff objected to the ADJB taking jurisdiction of Allison's complaint, and that he knew that to proceed with the complaint was a violation of the ADJB's policy and procedures. Bonner testified that after receiving plaintiff's letter, he forwarded it to the chair of the ADJB, and that the ADJB notified him that it would proceed with the complaint. Bonner conceded he was aware that the ADJB was in violation of its rules, and that he failed to intervene.

The trial court concluded that the ADJB "was operated, contrary to Dr. Bonner's opinion, as a loose cannon rolling around out there . . ." and that Bonner did nothing to intervene or prevent the ADJB from pursuing Allison's complaint against plaintiff despite his knowledge that the ADJB lacked jurisdiction.

The court's finding of gross negligence involved the Allison investigation only, and not the first two investigations. The trial court found that the violation of the Anti-discrimination policy and procedures as to Allison's complaint was "an egregious error" on Bonner's part "not merely lax, not merely neglectful of the duties," and amounted to gross negligence. We cannot agree.

It was the ADJB that decided to hold a hearing on the Allison complaint regardless of plaintiff's proper refusal to attend, not Bonner, and, in fact, no such hearing was ever held. Bonner did not supervise the ADJB or its chairperson's handling of jurisdiction questions. Under these circumstances, Bonner's failure to intervene, thus allowing Allison's complaint against plaintiff to proceed, at least for a time, did not constitute conduct so reckless as to demonstrate a substantial lack of concern for whether an injury would result, especially where no hearing was held.

In docket no. 171124, we vacate the Court of Claims' judgment in plaintiff's favor and vacate the declaratory ruling that defendant's ADJB policy and procedures were constitutionally invalid.

III. No. 180043

In docket no. 180043, we observe that no judgment was entered in the Court of Claims case until December, 1993, well after the arbitrator's award in August 1993. Even if we were to focus on the date of the Court of Claims' oral decision, we today vacate that decision in case No. 171124. Further, an arbitrator's decision is subject to narrow court review. A court may only decide whether the arbitrator's award "draws its essence" from the contract. If the arbitrator did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases. *Gogebic Medical Care Facility v AFSCME Local 992*, 209 Mich App 693, 696-697; 531 NW2d 728 (1995). Although plaintiffs' complaint alleged that the arbitrator exceeded the scope of his authority and that the award was outside the scope of the collective bargaining agreement, we conclude that there is no need to further review this claim because the face of the arbitrator's award does not reveal any such abuse of authority. *Gordon v Sel-Way, Inc, v Spence Bros*, 438 Mich 488, 497-498; 475 NW2d 704 (1991). We vacate the circuit court's order vacating the arbitration award in defendant's favor and reinstate the arbitration award.

/s/ Helene N. White

/s/ Richard A. Griffin

/s/ Dennis C. Kolenda

¹ The claims of the individual plaintiffs other than Marquette were eventually resolved by mediation.

² In January 1992, the Court of Claims dismissed plaintiff's claims of interference with contractual relations and simple negligence.

³ The proceedings were held over two days, on February 16, 1993 and May 10, 1993.