STATE OF MICHIGAN

COURT OF APPEALS

DAN JONES, JR., and BARBARA JONES,

Plaintiff-Appellants,

v

CITY OF DETROIT, ISAIAH MCKINNON, and DANIEL MCKANE,

Defendant-Appellees.

UNPUBLISHED
May 5, 1998

No. 196581
Wayne Circuit Court
LC No. 95-505464 CZ

Before: Holbrook, Jr., P.J., and Young, Jr., and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants. We affirm.

Plaintiff, Dan Jones, Jr., was employed by the Detroit Police Department for more than twenty-six years until he retired from his final position of commander. Plaintiff claimed that he was constructively discharged by defendants and that their actions violated the city charter, his employment contract, state law, and his constitutional rights. Plaintiff's spouse, Barbara Jones, stated a claim for loss of consortium. Defendants' motions for summary disposition on all counts were granted by the trial court.

On appeal, plaintiff first argues that the trial court improperly dismissed his claims of wrongful discharge, violation of city charter, breach of contract, and violation of his equal protection and due process rights. We disagree. Plaintiff was not constructively discharged. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign, or when working conditions would have been so difficult or unpleasant that a reasonable person would have felt compelled to resign. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994); *Fischhaber v General Motors Corp*, 174 Mich App 450, 454-455; 436 NW2d 386 (1988). Plaintiff received a poor performance evaluation from Chief McKinnon containing specific and documented criticisms of plaintiff's performance and management

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

style. The memorandum warned that plaintiff's performance would be reassessed, and that if it did not improve, he would be demoted. Plaintiff retired, however, before this reassessment occurred. Plaintiff merely assumed that he could not have received an objective reevaluation. Plaintiff's subjective belief is insufficient to create a genuine issue of material fact on this issue. Further, although plaintiff believed that a demotion would have made his working conditions intolerable, he was not in fact demoted and did not attempt to prevent this allegedly intolerable result by responding to Chief McKinnon's criticisms. Nevertheless, even if plaintiff had been constructively discharged, his claims would have also failed because, as a commander, he was an at-will employee that was terminable at the will of the chief of police. See *Jackson v Detroit Police Chief*, 201 Mich App 173, 174-176; 506 NW2d 251 (1993). As an at-will employee, plaintiff did not have a property interest in his continued employment and, therefore, did not have any inherent rights to procedural due process. *Manning v Hazel Park*, 202 Mich App 685, 694; 509 NW2d 874 (1993).

Plaintiff also argues that the trial court improperly dismissed his claim that his First Amendment rights with regard to his participation on the Malice Green review board were violated by defendants' constructive discharge of him. We disagree. Plaintiff failed to establish that his allegedly protected conduct was a substantial or motivating factor in Chief McKinnon's criticisms of his performance. *Hopkins v Midland*, 158 Mich App 361, 386; 404 NW2d 744 (1987), citing *Mt Healthy City School Dist Bd of Ed v Doyle*, 429 US 274, 287; 97 S Ct 568; 50 L Ed 2d 471 (1977). Plaintiff provided no such evidence to the trial court beyond his own allegations and subjective view of Chief McKinnon's treatment of him. Plaintiff failed to set forth any such facts indicating that Chief McKinnon was reacting to plaintiff's actions on the review board. Defendants, on the contrary, demonstrated that plaintiff was promoted to the rank of commander after he had begun to voice complaints concerning the review board and that Chief McKinnon's criticisms were based on independent reasons. Neither the May 11, 1994, memorandum nor plaintiff's interview with Chief McKinnon addressed plaintiff's participation on the review board. The memorandum only addressed plaintiff's performance as a commander: citing numerous, specific deficiencies in plaintiff's performance as well as conflicts between his management style and the departmental vision outlined by Chief McKinnon. Therefore, plaintiff failed to demonstrate that plaintiff's allegedly protected activity was a motivating factor in Chief McKinnon's criticisms. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (where the nonmovant has the burden of proof, it may not rest upon mere allegations or denials in its pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial).

Plaintiff next argues that the trial court improperly dismissed his claim that his First Amendment rights with regard to the formation of a commanders' union were violated by defendants' constructive discharge of him. We disagree. Because exclusive jurisdiction over this claim is vested in the MERC, the trial court lacked subject matter jurisdiction to decide the matter. Plaintiff had an explicit statutory right not to be discharged or discriminated against for his participation in union activities. MCL 423.210; MSA 17.455(10). MERC is designated to occupy the field of unfair labor practices, which would necessarily include the prevention of retaliatory actions against union participating employees. While plaintiff correctly notes that his First Amendment rights predate any statutory remedy under MERC, plaintiff did not possess a common-law right not to be discharged for the exercise of his free

speech regarding union activities. Further, public policy indicates that claims of retaliatory discharge for union activities would be most appropriately addressed pursuant to the statutory scheme set forth by the Legislature, instead of as general constitutional claims. Therefore, we conclude that the MERC had exclusive jurisdiction over this claim. See *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 118-119; 252 NW2d 818 (1977); *Demings v Ecorse*, 127 Mich App 608, 619; 339 NW2d 498 (1983), mod on other grounds, 423 Mich 49; 377 NW2d 275 (1985). Even if we were to address this claim on the merits, however, we would conclude that the claim was properly dismissed because plaintiff failed to establish that his union-related conduct was a substantial or motivating factor in Chief McKinnon's criticisms of his performance. *Quinto, supra; Hopkins, supra*.

Plaintiffs next argue that the trial court improperly dismissed their tort claims. We disagree. Plaintiff conceded in the trial court that the city and Chief McKinnon were immune from his tort claims. Therefore, this Court is not required to review a contrary argument on appeal. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997) (a party cannot stipulate to a matter in the trial court and then argue on appeal that the resultant action was error). With regard to Deputy Chief McKane, there is no precedent to establish that he should be treated as a high level governmental executive. See *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995) (executive immunity applied to the police chief of the City of Detroit, but deputy chief and other officers were treated as lower level governmental employees). As a lower level governmental employee, however, McKane would be entitled to governmental immunity, because plaintiff failed to provide any evidence that McKane acted in bad faith or with gross negligence. MCL 691.1407(2); MSA 3.996(107)(2). McKane did not prepare the memorandum which plaintiff alleged was the basis for his forced retirement. Any actions taken by McKane in support of or at the direction of Chief McKinnon in the evaluation of plaintiff's performance would have been within the scope of McKane's employment and a valid exercise of governmental function. Plaintiff also provided no evidence that McKane knew that any of the allegations in the memorandum were false. McKane's prior comment that, in his opinion, plaintiff was "doing fine" does not render McKane's subsequent support of Chief McKinnon's criticisms invalid. Therefore, summary disposition as to defendant McKane was proper because reasonable minds could not differ as to whether his conduct constituted gross negligence. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Accordingly, plaintiffs' direct and derivative claims were properly dismissed.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert P. Young, Jr.
/s/ James M. Batzer