STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN L. MYERS, f/k/a KATHRYN L. WINKELHAUS,

Plaintiff-Appellant,

v

CHARLES E. WINKELHAUS,

Defendant-Appellee.

UNPUBLISHED
October 26, 2010

No. 290542
Washtenaw Circuit Court
LC No. 00-000026-DM

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

JANSEN, J. (*dissenting*).

I would affirm the trial court's determination that plaintiff voluntarily left her employment with Borders. Therefore, I respectfully dissent.

The record evidence in this case established that plaintiff left her employment with Borders after the company's chief executive officer transferred her from her former position as a senior executive to a new position within the company. Plaintiff admitted that once this transfer took place, she decided to leave the company. Plaintiff believed that the new position to which she had been reassigned was inferior and of lower prestige, and did not feel that it was a position that she wished to hold. Although plaintiff felt that she had been effectively forced out of the company by way of the reassignment, the trial court found that she had voluntarily left her employment. As a consequence, the trial court ruled that plaintiff was not entitled, under the terms of the previous judgment, to modify the amount of spousal support that she owed to defendant.

This Court reviews for clear error the trial court's findings of fact related to an award of spousal support. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). "A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. at 654-655. In my opinion, the trial court properly determined that plaintiff voluntarily left her employment with Borders. It is clear from the record that, although plaintiff was transferred from her previous position as a senior executive to a new position within the company, she was offered the opportunity to continue working for the company. Furthermore, the new position carried the same salary as plaintiff's previous position at Borders. At no time was plaintiff "terminated" within the common understanding of that term. This much is beyond

dispute. On the record before us, I simply cannot conclude that the trial court erred by finding that plaintiff voluntarily left her employment with Borders. *Id*.

As further support for the trial court's finding, I also note that plaintiff's argument that her employment was involuntarily terminated is tantamount to an allegation of constructive discharge. A constructive discharge occurs only when an employer has deliberately made an employee's working conditions so intolerable that the employee is forced into resigning, or stated differently, when working conditions have become so difficult that a reasonable person in the employee's position would feel compelled to resign. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487-488; 516 NW2d 102 (1994). The general rule is that a mere demotion or transfer to a position of lower pay or prestige does not, in and of itself, constitute a constructive discharge. See, e.g., *Turner v Anheuser-Busch, Inc*, 7 Cal 4th 1238, 1247; 876 P2d 1022; 32 Cal Rptr 2d 223 (1994); *Jett v Dallas Ind School Dist*, 798 F2d 748, 755 (CA 5, 1986).

Nor can I agree with the majority's conclusion that by agreeing to modify the spousal support obligation via the 2003 consent order, "the parties . . . necessarily and undeniably agreed that plaintiff suffered an involuntary job loss" within the meaning of the earlier 2001 judgment. I have examined the terms of the 2003 consent order. Quite simply, the 2003 order does not even address whether plaintiff's job loss was voluntary or involuntary in nature. Moreover, the 2003 order specifically provides that "[a]ll other provisions of the [2001] Judgment . . . pertaining to spousal support are incorporated herein and remain the order of the court." Thus, the provision of the 2001 judgment stating that plaintiff could "petition to decrease or terminate the alimony obligation in the event of her . . . involuntary loss of employment" clearly remained in effect.

In sum, the evidence establishes that plaintiff voluntarily left her employment with Borders. I cannot conclude that the trial court clearly erred by so finding. I would affirm the trial court's determination that plaintiff voluntarily left her employment and that she was therefore not entitled to a modification of spousal support in this case.

/s/ Kathleen Jansen