

STATE OF MICHIGAN
COURT OF APPEALS

PHILLIP M. KELLER,

Plaintiff-Appellant,

v

CITY OF GRAND RAPIDS,

Defendant-Appellee.

UNPUBLISHED

August 7, 2001

No. 223083

Kent Circuit Court

LC No. 95-001019-CL

Before: Saad, P.J., and Fitzgerald and O’Connell, JJ.

O’CONNELL, J. (*dissenting*).

I respectfully dissent. In my opinion, the learned trial court correctly determined that the evidence, viewed in the light most favorable to plaintiff, did not establish a prima facie case of retaliatory discharge under the Whistleblowers’ Protection Act, (WPA) MCL 15.361 *et seq.* Specifically, I agree with the trial court that plaintiff was not constructively discharged. I would affirm the trial court’s judgment notwithstanding the verdict.

As the lead opinion correctly observes, to set forth a prima facie claim of retaliatory discharge under the WPA, a plaintiff must demonstrate (1) that the plaintiff was engaged in protected activity as defined by the WPA, (2) that the plaintiff was discharged, and (3) that a causal connection existed between the plaintiff’s protected activity and the discharge. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997). At issue here is whether plaintiff set forth sufficient evidence to demonstrate that he was constructively discharged. In *Jacobson v Parada Federal Credit Union*, 457 Mich 318, 325-326; 577 NW2d 881 (1998), our Supreme Court made the following observations with regard to constructive discharge.

“[A] constructive discharge only occurs where an employer or its agent’s conduct is so severe that a reasonable person in the employee’s place would feel compelled to resign. . . .” [*Id.*, quoting *Champion v Nation Wide Security Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996) (footnote omitted).]

According to the record, plaintiff voluntarily left his job as an emergency communications operator (ECO) on July 14, 1994. On that day, plaintiff’s immediate

supervisor, Robert Dykhouse, asked plaintiff to perform a clerical task¹ while he was answering emergency calls. Dykhouse testified that he asked plaintiff to perform this task at the request of the department manager, Ralph Gould. When Dykhouse, at Gould's request, later cited plaintiff in an occurrence information note (OINK) for failing to properly perform the clerical task, plaintiff, in an angry outburst, threw his headset, and after walking into Gould's office in an attempt to turn in his office key, left the premises before the end of his shift. Dykhouse later called plaintiff at home at Gould's request, and told him that his outburst would be forgotten, and that he was free to return to work after two days off.² Dykhouse also informed plaintiff that the one hour he left early before his shift ended could be claimed as sick time. According to plaintiff, he refused this offer, and subsequently tendered his resignation.³

In *LaPointe v United Autoworkers Local 600*, 103 F3d 485, 489 (CA 6, 1996), the Sixth Circuit Court of Appeals made the following persuasive observations with regard to the law of constructive discharge.

It is the law of this circuit that an employee who leaves his employment when he has been presented with legitimate opportunities for continued employment with that employer, even in a less prestigious position, is precluded from claiming constructive discharge. *Wilson [v Firestone Tire & Rubber Co, 932 F2d 510, 515 (CA 6, 1991)]*⁴ Here, by retiring from Ford when he had the option of returning to his former job with the company, [the plaintiff] . . . precluded his claim of constructive discharge by Ford. . . . [*Id.*]

See also *Wilson v Firestone Tire & Rubber Co*, 932 F2d 510, 515 (CA 6, 1991) (“[T]he presentation to [the plaintiff] of other legitimate options for continued employment with the company . . . precludes a finding that [the plaintiff] was constructively discharged.”). I recognize that plaintiff alleged several instances of harassment at the hands of Gould that occurred over a five-year period. However, in my opinion, the fact that plaintiff refused a legitimate offer, authorized by Gould, to return to his employment after his angry outburst, precludes a finding that he was constructively discharged. See *Fischhaber v General Motors Corp*, 174 Mich App

¹ Specifically, plaintiff was asked to update training manuals. According to Dykhouse's trial testimony, it was not uncommon for ECOs to be asked to perform incidental clerical tasks while they answered calls.

² According to the record, the incidents on July 14, 1994, occurred before plaintiff's already scheduled two days off of work.

³ According to plaintiff's trial testimony, the incident on July 14, 1994, followed several incidents of harassment by Gould. I also agree with the trial court that the evidence put forth by plaintiff, even when viewed in the light most favorable to him, was insufficient as a matter of law to lead reasonable jurors to conclude that a reasonable person in plaintiff's position would have felt compelled to resign. *Jacobson, supra* at 326.

⁴ In *LaPointe, supra*, the plaintiff, an employee of Ford Motor Company, claimed that he was subject to harassment in his position as the health and safety representative for his union, and that he was therefore compelled to leave his job at Ford. Though the facts in *LaPointe* are distinguishable from the present case, I nonetheless find the *LaPointe* court's reasoning instructive.

450, 455; 436 NW2d 386 (1988) (no evidence of constructive discharge where the plaintiff failed to inquire about offered demotion before he retired). Therefore, I would affirm the trial court's judgment notwithstanding the verdict.⁵

/s/ Peter D. O'Connell

⁵ In passing, I also share the trial court's view that the existing record presented insufficient evidence on which reasonable minds could differ regarding whether a causal connection existed between plaintiff's constructive discharge and the activity protected by the WPA.