

STATE OF MICHIGAN
COURT OF APPEALS

KEN VEENMAN,

Plaintiff-Appellant,

v

HOLLAND BOARD OF PUBLIC WORKS, JIM
THEIS, and CINDY BAKER,

Defendants-Appellees.

UNPUBLISHED
March 17, 2000

No. 214045
Ottawa Circuit Court
LC No. 97-028066-CZ

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (10). We affirm.

Plaintiff, born July 19, 1942, is a former employee of defendant Holland Board of Public Works (BPW). Plaintiff was hired by BPW in January 1989, serving as warehouse store keeper from 1990 until he resigned in January 1996. In his complaint, plaintiff alleged that defendants had violated the prohibition against age discrimination found in the Michigan's Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*. Plaintiff also brought a claim for intentional infliction of emotional distress. Plaintiff alleged that defendants' actions led to his constructive discharge. Defendants filed their motion for summary disposition, arguing, in part,¹ that no material fact existed with respect to plaintiff's age discrimination claim, and that plaintiff failed to state a claim upon which relief could be granted for intentional infliction of emotional distress. The trial court agreed, dismissing plaintiff's claims pursuant to MCR 2.116(C)(8) and (C)(10).

Plaintiff first argues on appeal that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) to defendant Baker on plaintiff's claim of age discrimination. Specifically, plaintiff argues that the trial court erred in concluding that no genuine issue of material fact exists on whether Baker's alleged misconduct created a hostile work environment. We disagree. "This Court reviews decisions on motions for summary disposition de novo." *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 434; 600 NW2d 695 (1999).

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

The trial court explained its grant of summary disposition to Baker as follows:

Plaintiff has presented evidence to establish that Baker made several comments indicating that she thought plaintiff was too old to work in the warehouse. One comment was made directly to plaintiff by Baker, stating that she did not want anyone over the age of fifty working in the warehouse. Two other employees, David VanDyke and Donald Bump, testified that Baker made statements indicating that she thought plaintiff was too old to work in the warehouse. However, neither VanDyke nor Bump could recall specifically what Baker had said or in what context the statements were made. Relatively isolated instances of non-severe misconduct will not support a hostile work environment claim. *Saxton v AT&T Co*, 10 F3d 526, 533 (CA 7, 1993). . . . A reasonable person, considering the totality of the circumstances, would not find that Baker's isolated comments were sufficiently severe or pervasive to create a hostile work environment based on age.

We agree with the trial court's well reasoned analysis.

In *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621; 576 NW2d 712 (1998), this Court outlined the elements of the prima facie case of discrimination based on hostile work environment:

In order to establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Id.* at 629.]

Granting the benefit of any reasonable doubt to plaintiff, we conclude that he fails to support a claim for hostile environment age discrimination. Considering the totality of the circumstances, we conclude that a reasonable person would not "have perceived the conduct at issue as . . . having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996), quoting *Radtke v Everett*, 442 Mich 368, 394; 501

NW2d 155 (1993). Accordingly, the trial court's grant of summary disposition regarding Baker pursuant to MCR 2.116(C)(10) was proper.²

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant Theis pursuant to MCR 2.116(C)(8). We disagree.

MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition . . . valid. [*Stehlik, supra* at 85.]

The trial court explained its decision as follows:

[P]laintiff alleges that Theis reprimanded plaintiff for "socializing on the job," and that Theis prepared a written disciplinary action reprimanding plaintiff for "the frequency with which he used the bathroom." Plaintiff also alleges that Theis later altered the disciplinary document in order to retain the right to discharge plaintiff. However, plaintiff has alleged no specific conduct or communication by Theis that is based on plaintiff's age. Plaintiff's complaint indicates that he was subject to harassment by Theis because of plaintiff's knowledge of the discrepancies in the underground wire inventory. . . . Plaintiff has failed to allege that, but for his age, plaintiff would not have been subject to the same conduct.

After reviewing the complaint, we agree with the trial court that plaintiff's claim must fail because he has not alleged specific instances of misconduct by Theis based on plaintiff's age.

Plaintiff attempts to correct this problem by arguing that because Theis and Baker "acted in concert, they are equally responsible for each other's words and deeds." However, plaintiff cites no Michigan case law in support of his contention that Baker's conduct can be imputed to Theis. Instead, plaintiff relies on the persuasive authority of *Wells v New Cherokee Corp*, 58 F3d 233 (CA 6, 1995). We believe plaintiff's reliance on *Wells* is misplaced because it is distinguishable from the case before us. The passage in *Wells* cited by plaintiff addressed the validity of the following proposed jury instruction: "[B]efore you may find that a statement tends to prove that [the defendant] discriminated against [the plaintiff] because of her age, you must first find that the person who allegedly made the statement was the same person who made the ultimate decision to discharge [the plaintiff.]" *Id.* at 237. The *Wells* court's conclusion that the trial court did not err in giving the instruction was based on its conclusion that "convincing" evidence existed that the manager who had the authority to discharge the plaintiff and the supervisor who made the disparaging age-based comments "worked closely together and consulted with each other on personnel decisions." *Id.* at 238. There is nothing in plaintiff's pleadings in the case at hand that suggests that Baker and Theis had a similar relationship. Plaintiff places great significance on an alleged comment made by Theis to Baker in which Theis stated, in response to Baker's dispirited comments about not accomplishing anything during the past year, that "they had gotten rid of [plaintiff]." Accepting that the comment was made, we do not believe it is

reasonable to conclude from this singular remark that Baker played a significant role in the decision to terminate plaintiff. All other allegations of concerted action between Baker and Theis contained in plaintiff's complaint are merely conclusions unsupported by allegations of fact. See *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).³

Next, plaintiff claims that the trial court erred in dismissing plaintiff's constructive discharge claim. We disagree. As this Court observed in *Vagts v Perry Drug Stores, Inc.*, 204 Mich App 481, 487; 516 NW2d 102 (1994), "an underlying cause of action is needed where it is asserted that a plaintiff did not voluntarily resign but was instead constructively discharged." Because the summary dismissal of plaintiff's age discrimination claims against Baker and Theis was proper, we conclude the trial court did not err in also dismissing plaintiff's constructive discharge claim.

Finally, we reject plaintiff's argument that the trial court erred in dismissing his claim of intentional infliction of emotional distress. To establish a prima facie case of intentional infliction of emotional distress, a plaintiff must establish that the defendant subjected the plaintiff to conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). We agree with the trial court that defendants' behavior, as alleged by plaintiff, does not rise to the requisite level of extreme and outrageous conduct needed to support a claim for intentional infliction of emotional distress claim. Accordingly, summary disposition was properly granted pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

¹ Defendants also argued that summary disposition was appropriate under MCR 2.116(C)(4), arguing (1) that the trial court lacked subject matter jurisdiction over plaintiff's claims of constructive discharge and intentional infliction of emotional distress because plaintiff failed to exhaust his remedies under the collective bargaining agreement, and (2) that the court lacked subject matter jurisdiction over all of plaintiff's claims because the Michigan Employment Relations Commission had exclusive jurisdiction. Both of these arguments were rejected by the trial court and are not a part of this appeal.

² Plaintiff also argues on appeal that the trial court erred because his claim of age discrimination was not predicated solely on the theory of hostile work environment. However, plaintiff failed to advise the court of any other theory other than the hostile work environment theory of discrimination. In any event, we believe that plaintiff fails to establish his prima facie case under any of the approaches suggested in his brief on appeal.

³ We note that plaintiff also alleged that he was subject to harassment by Theis based on plaintiff's knowledge of discrepancies in the underground wire inventory and that Theis reprimanded him for socializing on the job and frequent bathroom use.