

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA ROCK,

Plaintiff-Appellant,

v

V. W. KAISER ENGINEERING, INC.,

Defendant-Appellee.

UNPUBLISHED

May 26, 2009

No. 283353

Tuscola Circuit Court

LC No. 06-023931-CD

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition in this employment discrimination action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Background

Plaintiff began working in defendant's shipping department in 2001 making \$8 or \$8.50 an hour. By 2005, she was earning \$11.98 an hour. Based on personal issues she was having with other shipping employees, plaintiff requested a transfer to the production department in June 2005. The request was approved, but plaintiff was told that it would entail a decrease in pay to \$10 an hour because she had no experience as a machine operator and that she would need to wait 90 days because the shipping department was busy and defendant could not afford to transfer her at that time. Plaintiff agreed to the pay decrease and transferred to the production department in September 2005. Plaintiff earned raises as she learned machine operations and was earning \$11.32 as of May 2006. At the time she quit, plaintiff had been approved for a raise to \$11.82 per hour. Dissatisfied with her pay, plaintiff resigned in August 2006. Plaintiff thereafter filed this action alleging claims for violation of the "Equal Pay Act," MCL 408.397,¹ and violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* The trial court

¹ The statute cited is actually a provision of the Michigan Minimum Wage Law of 1964 ("MWL"), MCL 408.381 *et seq.* What is colloquially known as the Equal Pay Act is § 206(d)(1) of the Fair Labor Standards Act of 1938 ("FLSA"), 29 USC 201 *et seq.*

dismissed those claims on defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

II. Standard of Review

We review the trial court's ruling on a motion for summary disposition *de novo*. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra*.

III. Discrimination Claims

An employer is prohibited from discriminating against an employee on the basis of the employee's race, religion, color, national origin, age, sex, height, weight and marital status. MCL 37.2202(1). An employment discrimination claim can be made out in four different ways: disparate impact, disparate treatment, intentional discrimination, and harassment creating a hostile work environment. Plaintiff's first claim as presented on appeal is limited to the theory that she was constructively discharged as a result of intentional discrimination. Plaintiff's second claim on appeal involves two separate issues: (1) that she established a prima facie case of employment discrimination under the disparate treatment theory, and (2) that she established a violation of MCL 408.397, both predicated on the change in her pay.

A. Constructive Discharge

Constructive discharge is not itself a cause of action. *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 321 n 9; 577 NW2d 881 (1998), overruled on other grounds by *Joilet v Pitoniak*, 475 Mich 30, 32; 715 NW2d 60 (2006). If an employee is constructively discharged, she is treated as if her employer had actually fired her. *Id.* at 329. Constructive discharge is thus a defense to a claim that the employee left the job voluntarily. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). "A constructive discharge is established where 'an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's place would feel compelled to resign.'" *Id.*, quoting *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991). The courts "apply an objective standard of reasonableness to the action of the employee." *Jacobson, supra* at 328. "Where reasonable persons could reach different conclusions regarding whether [the elements of a constructive discharge] are established, the issue becomes a question of fact for the jury and not one properly decided by the trial court." *Vagts, supra* at 488.

The submitted evidence showed that plaintiff initiated the transfer, that she was informed the transfer would require a pay reduction because she was essentially starting a new job, that she would have to wait 90 days before the transfer could be completed,² and that plaintiff voluntarily accepted the new position under those conditions. According to plaintiff, her former rate of pay was to be reinstated as soon as she proved herself, but a month after her transfer, her supervisor told her that she would never be paid more than the “guy” working next to her. This statement is some evidence of discrimination, but was countered by evidence that the man who trained plaintiff and had worked in the shop about nine months longer than plaintiff was being paid *less* than plaintiff. The evidence also showed that plaintiff continued to earn raises and, by the time she left the job approximately one year later, she was earning \$11.32 an hour, only 66 cents an hour less than her former rate of pay, and had been approved for a 50-cent raise. Further, plaintiff did not show that any male machine operators were earning more than her at the time.

In any event, “a difference in pay alone cannot support a finding that a reasonable employee would have been forced to resign.” *LeGalley v Bronson Community Schools*, 127 Mich App 482, 487; 339 NW2d 223 (1983). Accord *Bourque v Powell Electrical Mfg Co*, 617 F2d 61, 65 (CA 5, 1980) (evidence that a female employee voluntarily transferred to a different job at a rate of pay she knew to be unequal to that of men in the same position is insufficient to prove a constructive discharge). The only other circumstances presented were that plaintiff was assigned to work on various machines, some of which were more difficult or unpleasant to operate than her usual machine. However, defendant’s general foreman testified that plaintiff was periodically reassigned to different machines based on need and plaintiff admitted that other employees were also assigned to different machines at times. Under the circumstances, the trial court did not err in finding that the evidence was insufficient to make out a prima facie case of constructive discharge.

B. Disparate Treatment

A prima facie case of discrimination under a disparate treatment theory can be made out by showing that an employee is a member of a class entitled to protection under the CRA and that, for the same or similar conduct, the employee was treated differently than similarly situated employees outside that class. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994); *Duranceau v Alpena Power Co*, 250 Mich App 179, 181-182; 646 NW2d 872 (2002). Employees are similarly situated where all relevant aspects of their employment situation are nearly identical. *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997). In addition, the employee’s protected classification must be a factor in the allegedly discriminatory decision. *Duranceau, supra*; *Plieth v St Raymond Church*, 210 Mich App 568, 573-574; 534 NW2d 164 (1995).

Plaintiff asserts that she was similarly situated to Mark Williams because he did not have to take a cut in pay when he transferred from shipping to production. However, plaintiff failed to

² According to defendant, the 90 days was necessary because shipping was busy and defendant could not afford to have plaintiff transfer areas at that time.

present evidence that she and Williams were similarly situated. Plaintiff started in shipping and was paid \$8 or \$8.50 an hour. She earned raises over the next four years that increased her pay to \$11.98 an hour. She then transferred to production, an area in which she had no experience. Employees starting in production were paid \$8 or \$9 an hour. Because plaintiff was familiar with general aspects of the company, she started at \$10 an hour. Williams started in production at \$8 an hour and within a few months was earning \$9.16 an hour. He then was assigned to work in shipping on an as-needed basis while also continuing to work in production. During that time, Williams's pay remained unchanged. Williams's assignment to shipping later ended and he returned to working solely in production. The evidence thus showed that Williams was not similarly situated to plaintiff because Williams did not transfer from one department to another as plaintiff did.

Plaintiff also contends that she was similarly situated to other male employees who earned more than she did despite the fact that she had more years of experience. Again, plaintiff has not shown that she was similarly situated to the men working in the production department. The crux of her argument is that she had four years' seniority with the company and, thus, should not have been paid less than men with less seniority. However, plaintiff has not shown that defendant's employees were paid on the basis of seniority alone. The evidence indicated that there were also raises based on merit and skill. Plaintiff has also failed to show that any man with four years' seniority in one department was allowed to transfer to another department in which he had no experience without a change in pay. Further, plaintiff's four years with the company were spent in the shipping department and the skills she developed there did not transfer to the production department, so she essentially entered the production department as a new employee. Defendant's records show that every shipping clerk and machine operator hired since September 1, 2005, started at \$8 an hour with the only exceptions being one man who started at \$9 an hour and plaintiff who started at \$10 an hour. The only men who started at more than \$10 an hour were not similarly situated because they were hired as supervisors and both had several years of experience.

In light of plaintiff's failure to show that she was treated differently than similarly situated male employees, *Betty, supra*; *Duranceau, supra*, the trial court properly dismissed plaintiff's disparate treatment claim.

C. MWL Claim

The MWL sets a minimum wage for employees, MCL 408.384, and requires payment of overtime for more than 40 hours a week except as otherwise provided, MCL 408.384a. Section 17 of the act provides in relevant part:

An employer having employees subject to the provisions of this act shall not discriminate between employees within an establishment on the basis of sex by paying wages to employees in the establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in the establishment for equal work on jobs, the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions, except where the payment is made pursuant to (a) a seniority system; (b) a merit system; (c) a system which measures earnings by quantity or quality of production; (d) a differential based on a factor other than sex. [MCL 408.397(1).]

As an initial matter, plaintiff has not shown that defendant is subject to the MWL. See MCL 408.394 (outlining various employers who are not subject to the act). Even assuming defendant is subject to the MWL, however, we find that plaintiff has not established a prima facie case.

Although there is very little case law construing MCL 408.397, because the statute is substantially similar to § 206(d)(1) of the FLSA, this Court may look to interpretations of the federal statute for persuasive authority. *Dana v American Youth Foundation*, 257 Mich App 208, 215; 668 NW2d 174 (2003).

In order for plaintiff to prove a violation of the Equal Pay Act, she “must first establish a prima facie case of unequal pay by showing that 1) she was compensated differently than a male employee; 2) she and the male employee performed equal work requiring equal skill, effort, and responsibility; and 3) they had similar working conditions.” *Boumehdi v Plastag Holdings, LLC*, 489 F3d 781, 793 (CA 7, 2007). As previously noted, plaintiff has not shown that she was paid less at any given time than any other male employee who started as a machine operator at the same time she did. As for her claim that she was paid comparatively less based on a failure to credit her with her years of seniority, she has also not identified any man with four years’ seniority in shipping who transferred to production and earned a higher wage than she earned in production. “Different job levels, different skill levels, previous training, and experience: all may account for unequal salaries in an environment free of discrimination. *Pouncy v Prudential Ins Co*, 668 F2d 795, 803 (CA 5, 1982). Having failed to make out a prima facie claim, the trial court properly dismissed plaintiff’s MWL claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro