STATE OF MICHIGAN

COURT OF APPEALS

DR. JEREMY KALLENBACH,

Plaintiff-Appellant,

v

WAYNE STATE UNIVERSITY SCHOOL OF MEDICINE and KAREN WARSOW,

Defendants-Appellees,

and

DETROIT MEDICAL CENTER, AFFILIATED INTERNISTS CORPORATION, DR. DEBORAH MYERS, and ROBERT SCOTT,

Defendants.

UNPUBLISHED
June 28, 2002

No. 230064
Wayne Circuit Court
LC No. 98-836321-CK

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's orders granting defendants summary disposition in this suit alleging breach of employment contract, constructive discharge, discrimination based on national origin and religion, defamation and tortious interference with contractual relations. We affirm in part and reverse in part.

This Court reviews the circuit court's summary disposition determinations de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Motions brought under MCR 2.116(C)(10)[1] test the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted in the light most favorable to the nonmoving party. *Maiden, supra* at 120. Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence presented fails to establish that a genuine issue of material fact exists. *Id.*

[1] We review the circuit court's determination under MCR 2.116(C)(10), as the court looked beyond the pleadings in deciding defendants' motions. *Trepanier v National Amusements, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 224262, issued 4/5/02), slip op at 2.

I

Plaintiff, a South African born and trained physician, and an orthodox Jew, emigrated to the United States from South Africa in 1994 to accept a position as associate professor of medicine at WSU and work at WSU's affiliate hospitals. Plaintiff has a medical degree and a Ph.D., specializes in pulmonary medicine, and has particular expertise in asthma.

Plaintiff alleged that he was discriminated against on the basis of national origin (South African) and religion (Orthodox Judaism). Plaintiff testified at deposition that Dr. James Fisher,[2] who was hired after plaintiff and was plaintiff's supervisor until June 1998, did not support his efforts to obtain funding and establish an asthma clinic, which was one of the reasons WSU had recruited and hired plaintiff. Plaintiff testified that the Chief of Medicine at Detroit Receiving Hospital, Dr. Robertson, approached him and asked if he would consider the position of head of Pulmonary Medicine at Receiving Hospital, that plaintiff said he would, that Dr. Robertson told plaintiff that he, plaintiff, should speak to Dr. Fisher about it, and that when plaintiff spoke to Dr. Fisher about it, Dr. Fisher would not recommend him because, in Dr. Fisher's words, plaintiff was "not politically correct" for that position because he was South African. Plaintiff also presented evidence that Dr. Fisher appointed an African-American female, Dr. Myers, to a post at Detroit Receiving, whom plaintiff asserted was less qualified and less experienced than he. Although Dr. Myers was hired to work with plaintiff in his asthma program, plaintiff was not consulted. Plaintiff testified that in various ways, Dr. Myers undermined him and did not work "with" him on the asthma project, but struck out on her own, and that Dr. Fisher told him that if he, Dr. Fisher, took plaintiff's side against Dr. Myers, he (Dr. Fisher) would be "a dead man." Plaintiff also testified that Dr. Fisher asked him to employ a woman at his asthma clinic, and that plaintiff responded that the clinic was still in its infancy and there was not enough work yet to justify hiring someone. Plaintiff testified that Dr. Fisher responded by saying that he thought the woman, who was African-American, "puts a far better face on inner-city asthma than you do." Plaintiff also testified that when the DMC bought Sinai Hospital, Dr. Fisher said to him "perhaps we should get you assigned to Sinai. I think you might feel more comfortable there than you do here." Plaintiff also testified that Dr. Fisher told him that he affected the department negatively by not working on the Jewish Sabbath. Dr. Jack Sobel, WSU's chief of infectious diseases and the person who hired Dr. Fisher, testified at deposition that plaintiff spoke to him a number of times about what plaintiff perceived as discriminatory treatment by Dr. Fisher. Dr. Sobel testified that plaintiff told him about Dr. Fisher's comments that plaintiff was not "politically correct" for the chief of pulmonary medicine position at Receiving Hospital and that an African-American physician would "put a better face on inner city asthma" than plaintiff.

WSU maintains that "most of plaintiff's claims relate to his clinical duties," as opposed to his academic responsibilities, notes that plaintiff settled his claim with former defendant Affiliated Internists (AI), with whom plaintiff had a contract regarding his clinical responsibilities, and argues that plaintiff thus has no claim against WSU. We disagree.

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[2] When Dr. Fisher left WSU around June 1998, he was replaced by Dr. Badr.

The record supports that plaintiff's academic duties were intertwined with his clinical duties[3] and that WSU, through Dr. Fisher, had authority to and did affect the terms and conditions of plaintiff's academic **and** clinical duties. The bulk of the alleged discrimination centers on statements and conduct of Dr. Fisher, plaintiff's supervisor and the Chief of Pulmonary/Critical Care at WSU. Fisher was a WSU employee, not an AI employee.

The circuit court initially denied defendant summary disposition of plaintiff's discrimination claims,[4] but granted a later motion under *Chambers v Trettco,* 463 Mich 297; 614 NW2d 910 (2000), on the ground that WSU did not have sufficient notice of the alleged discrimination. This was proper as to plaintiff's harassment allegations, but error as to plaintiff's other allegations of disparate treatment. *Chambers*, a hostile environment sexual harassment case, addressed primarily the extent of an *employer's vicarious liability* for sexual harassment committed by an agent, and determined that the employer may be liable if it failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment.

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[3] By letter dated May 10, 1994, defendant WSU offered plaintiff a one year appointment to an associate professor position in the Department of Internal Medicine, stating in pertinent part:

> Dear Dr. Kallenbach:
>
> On behalf of the School of Medicine and the Department of Internal Medicine, we are pleased to offer you an appointment at the rank of Associate Professor . . . .
>
> You will be responsible to the Dean and by his delegation to the Chair of your Department. Your duties, subject to periodic review, will include the following:
>
> Participate in the teaching program of medical students and house officers in the Department of Internal Medicine and the Division of Critical Care Medicine.
>
> **Incidental patient care as it relates to teaching responsibilities and research.**
>
> Participate in clinical research protocols in Critical Care related fields.
>
> Perform related duties as required or assigned.

Also, one of the WSU letters offering plaintiff employment, signed by Dr. Santen, the Chair of the Department of Internal Medicine, stated that **plaintiff's associate professor positions "would entail spending six clinical months each year on the Critical Care Units at Harper Hospital and Detroit Receiving Hospital."**

[4]WSU filed a motion for summary disposition of all plaintiff's claims, Warsow filed a motion for summary disposition of plaintiff's claims against her individually, and plaintiff filed a motion for partial summary disposition on his breach of contract claim under MCR 2.116(C)(10). The circuit court granted defendant WSU's motion and dismissed plaintiff's breach of contract/constructive discharge claim, granted Warsow's motion, and denied WSU's motion as to plaintiff's discrimination claims, on the basis that questions of fact remained. Subsequently, WSU brought a second motion, to dismiss plaintiff's hostile environment claim, and the circuit court dismissed both plaintiff's disparate treatment and hostile environment claims.

Chambers, supra at 313. There is no such notice requirement for disparate treatment claims, thus we reverse as to that claim.

II

After plaintiff and WSU entered into an initial one-year written employment agreement in May 1994, WSU renewed plaintiff's employment annually, in writing, from 1995 to 1998. The 1998 employment agreement was to expire on June 30, 1999. On September 25, 1998, plaintiff was told that one of his staff, research assistant Karen Warsow, had complained about plaintiff's treatment of her. Plaintiff requested a meeting and, at the meeting, attended by plaintiff, Scott, Mascia and Dr. Badr, complaints by two other females against plaintiff were raised. Plaintiff testified that he was very upset and felt compelled to resign, and with hands shaking wrote out a note stating:

> Dear Dr. Badr,
>
> Please accept my resignation after I [sic] all vacation due to me has been taken.

Dr. Badr witnessed and signed the letter. WSU processed the resignation as effective on that date, September 25, 1998.

A

Plaintiff argues that his breach of contract claim was improperly dismissed because by changing the stated effective date of his resignation, WSU made his resignation void and breached his employment contract. Plaintiff argues that WSU made a counteroffer by changing the effective date of his resignation to immediate, and that plaintiff did not accept that counteroffer. Plaintiff argues that a question of fact remained whether he resigned.

WSU claims that plaintiff resigned his employment on September 25, 1998, that plaintiff's resignation letter showed plaintiff's present intent to resign immediately, and that WSU accepted plaintiff's resignation, properly processed the resignation effective that date, and paid plaintiff for his unused vacation.

Plaintiff relies on *Wiljaama v Flint Board of Education*, 50 Mich App 688, 690; 213 NW2d 830 (1973), in which the plaintiff was a tenured teacher in the Flint School District. The plaintiff submitted her resignation on November 19, 1970, effective November 23, 1970. The defendant changed the effective date of the resignation to November 20, 1970, without the plaintiff's knowledge or consent. On that date, the plaintiff attempted to withdraw her resignation, but was told it was too late. The trial court ruled that "the plaintiff's resignation was vitiated when the board of education, through one of its agents, changed the proposed effective date of the plaintiff's resignation . . . without the plaintiff's knowledge or consent." *Id.* at 690.

On appeal, this Court rejected the defendant's claim that the trial court erred in finding that the resignation was so altered as to be void as a matter of law, noting:

> It is fundamental law that there must be a meeting of the minds not only to make a contract but also to rescind or modify a contract after it has been made.

Here plaintiff was under an employment contract with the City of Flint's Board of Education. Plaintiff's resignation was akin to an offer to rescind the contract of employment on November 23, 1970. At this point the board of education had the option to either accept or reject this offer of resignation. However, the board chose to make a counteroffer by changing the effective date of the resignation to November 20, 1970. This counteroffer was neither communicated to nor accepted by the plaintiff. Consequently there was no meeting of the minds on plaintiff's offer to resign or on the board's counteroffer. Inasmuch as there was no meeting of the minds, it follows that the contract between the plaintiff and the board was not rescinded by the tender of plaintiff's resignation.

The defendant has attempted to neutralize any notion that changing the effective date of plaintiff's resignation from Monday, November 23, to Friday, November 20, was a counteroffer thus precluding any agreement to rescind the contract by referring to the change as a mere "ministerial act".

The defendant's argument is squarely answered by that portion of the plaintiff's brief which reads:

> "Defendant-appellant totally failed to introduce any evidence to show that Mrs. Wiljaama's [plaintiff's] rights under her contact regarding Blue Cross benefits, social security, workmen's compensation rights, death benefits, accrued vacation, personal leave rights, etc., would not be effected *[sic]* in any way by that change."

Furthermore, defendant ignores the fact that as the resigning party, plaintiff had the right to make an offer to the board of education regarding the effective date of the resignation. In the event of an accident or illness over the course of the intervening weekend, which would have brought into play the benefits listed in the quoted portion of plaintiff's brief arrayed above, plaintiff would have been denied coverage under the defendant's unilateral action of changing the effective date of the resignation to the preceding Friday. It is our opinion, therefore, that the change of dates materially affected the rights of the plaintiff and thus cannot be classified as a ministerial act.

For all of the reasons delineated above we hold that the trial court did not err by concluding that the plaintiff's resignation was so altered as to be void as a matter of law. [*Wiljaama, supra* at 690-691.]

B

We find *Wiljaama* distinguishable. In the instant case, plaintiff's resignation was immediately accepted in his presence at the September 25, 1998 meeting, before plaintiff's counsel's letter to defendant. Further, counsel's letter did not attempt to withdraw the resignation but, rather, asserted that plaintiff had not resigned. Additionally, it is undisputed that

WSU paid plaintiff for the vacation time he was owed, and that plaintiff accepted payment therefor.[5]

Plaintiff also asserts that the contract did not authorize Scott to accept his resignation. However, Scott testified at deposition that he had the authority to accept plaintiff's resignation, plaintiff's written employment agreement did not expressly address the issue of resignation, and we do not read the contract language as precluding acceptance by Scott.[6]

III

Plaintiff argues that issues of fact remained on his constructive discharge claim. We disagree.

A constructive discharge 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." *Champion v Nation Wide Security,* 450 Mich 702, 710; 545 NW2d 596 (1996).

> The law does not differentiate between employees who are actually discharged and those who are constructively discharged. In other words, once individuals establish their constructive discharge, they are treated as if their employer had actually fired them. *Lopez v S B Thomas, Inc,* 831 F2d 1184, 1188 (CA 2, 1987). The decision to terminate in a constructive discharge case, therefore, is imputed to the employer. [*Champion, supra* at 710.]

If 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. *Vagts, supra* at 488. Constructive discharge is not in and of itself a cause of action; it is a defense against the employer's argument that the plaintiff employee is precluded from bringing suit because the plaintiff voluntarily left employment, and an underlying cause of action is necessary to support maintenance of the employee's suit. *Vagts v Perry Drug Stores,* 204 Mich App 481, 487; 516 NW2d 102 (1994).

Defendant argues that in August and September 1998, three female WSU employees complained that plaintiff treated them rudely and unprofessionally, and that WSU conducted an investigation as a result. The record supports that on September 25, 1998, plaintiff was informed only that defendant Warsow had complained about him, and on learning this, plaintiff asked for a meeting. At the meeting were former defendant Robert Scott, a human resource department

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[5] Scott, Mascia and Dr. Badr testified that they believed plaintiff had a present intent to resign on September 25, 1998, and that he was just preserving his right to vacation pay. This understanding is reasonable in light of the contract, which provides that vacation days must be used during the term of appointment, i.e., within the given contract year, or they will be forfeited.

[6] Plaintiff's renewal letter for the period of July 1, 1998 through June 30, 1999, stated: "The terms of this agreement may not be modified by any oral statements or representations. This agreement may be modified only in writing signed by a University official as authorized by executive order." However, we do not read the contract language as precluding acceptance of a resignation.

manager, Nicole Mascia, a human resource representative, and Dr. Badr, plaintiff's supervisor after Dr. Fisher left WSU around June 1998. Plaintiff testified that the meeting began with Mascia reading Warsow's allegations to plaintiff, the bulk of which plaintiff denied. Plaintiff testified that Scott then pulled out a letter from plaintiff's secretary criticizing plaintiff, and also a letter from Dr. Myers addressed to plaintiff, which plaintiff had not received. Plaintiff testified that he was very upset, felt ambushed and set up, and said something to the effect that "you want me to resign, and I will resign." Plaintiff testified that Scott said "fine" and pulled out a pad and said to plaintiff "write your resignation here." Plaintiff said to Scott that he could not write because his hands were shaking too much, and Scott said "we'll wait as long as you want." Plaintiff eventually wrote the note quoted above, and Dr. Badr witnessed and signed the letter.

Given that plaintiff has not claimed any relationship or connection between his constructive discharge and discrimination claims, and that we must apply a "reasonable person" standard to the question of constructive discharge, we conclude that no question of fact remains whether WSU's agents' conduct was "so severe that a reasonable person in [plaintiff's] place would feel compelled to resign." *Champion, supra* at 710. Reasonable minds could not differ whether defendant's on September 25, 1998 conduct of bringing to plaintiff's attention that several female employees had complained of his treatment toward them, standing alone, would have led a reasonable person to feel compelled to resign. Plaintiff's constructive discharge claim was properly dismissed.

IV

Finally, plaintiff argues that issues of fact remained regarding his claims for defamation and tortious interference with contractual relations against defendant Warsow. Defendant argues that Warsow's statements were mere expressions of opinion and not defamatory, and that Warsow's statements to human resources representative Nicole Mascia were qualifiedly privileged.

The four elements of defamation are 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged publication to a third party, 3) fault amounting to at least negligence, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Rouch v Enquirer & News Ass'n*, 440 Mich 238, 251; 487 NW2d 205 (1992). A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual. *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000).

Whether a privilege exists is a question of law for the court, unless the facts needed to make that determination are disputed. *Bufalino v Detroit Magazine*, 433 Mich 766, 774 n 8; 449 NW2d 410 (1989); *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991). "The elements of a qualified privilege are 1) good faith, 2) an interest to be upheld, 3) a statement limited in scope to this purpose, 4) a proper occasion, 5) and publication in a proper manner and to proper parties only." *Gonyea v Credit Union*, 192 Mich App 74, 79; 480 NW2d 297 (1991). "Michigan law recognizes a qualified privilege as applying to communications on matters of 'shared interest' between parties." *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1990). A qualified privilege may be overcome by a showing of actual malice.

Warsow, plaintiff's research assistant and an employee of WSU, communicated her complaints to appropriate personnel in the workplace, i.e., to Nicole Mascia, a WSU human resources representative, in the context of plaintiff's treatment of Warsow in the workplace. Warsow and Mascia had a shared interest, as Warsow's complaints were that of a subordinate against a supervisor. *Rosenboom, supra* at 117-118 (holding that shared interest qualified privilege applied to allegedly slanderous communications between university student, who alleged being sexually assaulted, and her supervisor, who was also chair of academic department employing alleged perpetrator, as university policies strongly encouraged both employees and students to report sexual attacks.) Further, plaintiff failed to present proofs sufficient to create a genuine issue of material fact regarding actual malice, thus plaintiff did not overcome the shared interest qualified privilege. *Id.* at 118.

Nor did plaintiff present proofs sufficient to create a genuine issue of material fact regarding whether Warsow tortiously interfered with plaintiff's contractual relations. The elements of tortious interference with contractual relations are (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by defendant. *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). One who alleges tortious interference with a contractual relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice that is unjustified in law for the purpose of invading the contractual rights of another. *Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 499-500; 465 NW2d 5 (1990). A person is not liable for tortious interference with a contract if he or she is motivated by legitimate personal or business interests. *Wood*, *supra* at 500. Plaintiff did not present sufficient proofs to raise a question of fact whether there was an unjustified instigation of a breach.

We affirm the dismissal of plaintiff's claims against defendant Warsow, and the dismissal of plaintiff's constructive discharge and breach of contract claims against defendant WSU. We affirm the dismissal of plaintiff's harassment claim but reverse the dismissal of plaintiff's remaining disparate treatment discrimination claims against WSU.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White