STATE OF MICHIGAN

COURT OF APPEALS

BRUCE BOSS,

Plaintiff-Appellant,

v

KETTERING UNIVERSITY,

Defendant-Appellee.

UNPUBLISHED
August 5, 2004

No. 247077
Genesee Circuit Court
LC No. 02-073116-CL

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff began his employment as a professor for defendant Kettering University on July 18, 1966. In the early 1990's, plaintiff approached his department head and requested that the number of classes he taught be reduced from four per semester to three per semester. Because plaintiff also managed an important program for defendant, the department head thought that reducing the number of classes plaintiff taught was warranted.

In March 1998, the new department head advised plaintiff that he was scheduled to teach four classes for the spring semester. Plaintiff stated that he could not handle four classes due to health problems; however, the new department head informed him that any request for such an accommodation would have to be made to the human resources department. Plaintiff then requested a reduced class load from the human resources department, but was informed that he would need medical documentation to support his claim. However, plaintiff did not immediately seek medical documentation, and taught four classes that semester, after resigning from his position as manager of one of defendant's programs.

In June 1998, plaintiff provided defendant with medical documentation in support of his request for accommodation. Dr. H. T. Thawani diagnosed plaintiff with hypertension, hypercholesterolemia, depression with anxiety attacks, and obsessive-compulsive disorder. Thawani found that plaintiff's conditions significantly impaired his ability to handle stress, and as a result, recommended that plaintiff's request to teach three classes instead of four be granted. Thawani believed his recommendations were medically necessary to improve plaintiff's health.

Plaintiff provided defendant with additional medical documentation from Dr. R. Rao Kilaru, who diagnosed plaintiff with panic disorder, depression disorder, and essential hypertension. Dr. Kilaru stated that because of such clinical conditions, plaintiff's major life activity of work should be limited to nine "contact hours" per week and three "contact hours" per day. Kilaru stated that the restrictions applied for twelve months and that reevaluation would be necessary at that time.

In August 1998, based on the medical documentation provided by plaintiff's doctors, defendant granted plaintiff's request for accommodation for the fall 1998 semester, but indicated that it would be difficult to guarantee such a restricted schedule in future semesters. As such, defendant asked plaintiff to assess any other possible accommodations that would allow him to remain a full-time faculty member. Defendant requested that plaintiff have an independent medical examination before extending his accommodation to the winter 1999 semester.

In August 1999, based on updated medical documentation provided by Dr. Kilaru, defendant extended plaintiff's requested accommodation of teaching three classes instead of four for an additional twelve months. However, upon Dr. Kilaru's recommendation, plaintiff took a six month leave of absence beginning on January 1, 2000. Following the six-month period, Dr. Kilaru refused to sign a form that would have allowed plaintiff to return to work, and encouraged plaintiff to go on long-term disability, a status that would have allowed him to remain an employee of defendant.

Plaintiff refused to go on long-term disability, because he did not feel that he was disabled, felt that long-term disability was "undignified" and "not really justified," and because he would be precluded from going on campus, based on a policy employed by defendant for liability reasons. Plaintiff testified that "one of the reasons – one of the several reasons that retirement was a better option than long term disability was that I was welcome to be there [on campus]." Notwithstanding the potential to remain an employee of defendant through long-term disability, plaintiff chose to retire. While plaintiff's six-month leave of absence technically ended on July 1, 2000, defendant allowed plaintiff to extend his retirement date to July 18, 2000, in order to accommodate plaintiff's desire to have a full thirty-four year career.

Plaintiff brought suit against defendant under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq*., alleging that he was discriminated against, retaliated against, and harassed for exercising his rights under the PWDCRA, and that he was constructively discharged. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), on the basis that plaintiff was not disabled within the meaning of the PWDCRA; that plaintiff was not constructively discharged, but rather, voluntarily chose to retire; and that plaintiff was not subject to an adverse employment action or harassment.[1]

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[1] In his brief in response to defendant's motion for summary disposition, plaintiff requested the trial court to "consider Defendant's obvious spoliation of evidence," when ruling on defendant's motion for summary disposition. Plaintiff averred that the trial court should infer from defendant's failure, during discovery, to produce his employment records from July 1988 (continued…)

At the hearing on defendant's motion for summary disposition, plaintiff abandoned the discrimination claim, and indicated that he was instead focusing on the retaliation and harassment claims. The trial court determined that, viewing the evidence in the light most favorable to plaintiff, and assuming plaintiff was engaged in protected activity under the PWDCRA, and that defendant knew that plaintiff was engaged in protected activity, the issue was whether defendant took any materially adverse employment actions towards plaintiff or subjected him to severe or pervasive retaliatory harassment. The trial court applied an objective standard, and determined that the evidence did not rise to the level that plaintiff's working conditions were so intolerable that he was forced to resign. The trial court determined that no materially adverse employment action was taken, and noted that defendant made accommodations, including reassigning classrooms, and accommodating plaintiff's schedule. Additionally, the trial court ruled that no evidence of pretext or severe retaliatory harassment existed on the record, and granted summary disposition in favor of defendant. Plaintiff appeals as of right.

Plaintiff first argues that the trial court erred in granting summary disposition on his retaliatory harassment claim. We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Id*. "The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial," *Id*., and all reasonable inferences are resolved in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The PWDCRA prohibits retaliation against a person "because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding or hearing under this act." MCL 37.2701(a). "A prima facie case of retaliation can be established if a plaintiff proves: (1) that he was engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003).

(…continued)

through November 1997, that such records contained evidence adverse to defendant. The trial court did not address this issue when ruling on defendant's motion for summary disposition.

On appeal, plaintiff requests this Court to consider defendant's alleged spoliation of evidence when reviewing the trial court's grant of summary disposition in favor of defendant. However, the employment records of which plaintiff complains predate his 1998 request for accommodation. And because retaliation and harassment claims, by their very nature, are concerned with adverse employment actions that occur *after* a plaintiff engages in a protected activity, we find that it is unnecessary to address this issue when reviewing the trial court's grant of summary disposition in favor of defendant.

Assuming without deciding that plaintiff satisfied the first two elements, we agree with the trial court that plaintiff failed to demonstrate a genuine issue of material fact that he suffered an adverse employment action. This Court has defined an adverse employment action as an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities and has held that there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another are not controlling. *Peña*, *supra* at 311-312 (internal quotations omitted); see also *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999); *Crady v Liberty Nat'l Band & Trust Co*, 993 F2d 132, 136 (CA 7, 1993); *Kocsis v Multi-Care Mgt Inc*, 97 F3d 876, 886 (CA 6, 1996); and *Kelleher v Flawn*, 761 F2d 1079, 1086 (CA 5, 1985).

"Although there is no exhaustive list of adverse employment actions," it typically takes the form of an ultimate employment decision, such as termination, a demotion effectuated by a decrease in wage or salary, a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities. *Peña*, *supra* at 312. "In determining the existence of an adverse employment action, courts must keep in mind the fact that '[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.'" *Id*., quoting *Blackie v Maine*, 75 F3d 716, 725 (CA 1, 1996).

Here, in opposition to defendant's motion for summary disposition, plaintiff alleged that he had suffered the following incidents of adverse employment actions: (1) defendant "deleted" his "favorite elective class from his teaching responsibilities"; (2) defendant scheduled plaintiff to teach four classes, instead of three, even after his request for accommodation was granted; (3) defendant used "surveillance" on plaintiff, documenting when he was late for class; (4) defendant scheduled plaintiff to teach three required summer classes, when plaintiff had never taught summer classes, and tenured professors usually taught elective classes; (5) defendant gave plaintiff a one percent merit increase in salary, instead of his traditional three percent merit increase; and (6) defendant placed false information in plaintiff's employment file suggesting that plaintiff was involved in the criminal activity of destroying property, and documenting plaintiff's private medical information including a false prescription dosage. On appeal, plaintiff alleges additional adverse employment actions, including assigning plaintiff to the least desirable class locations and enlarging the size of plaintiff's classes.

We conclude that plaintiff failed to establish that he was subjected to any adverse employment action for purposes of his retaliation claim. As far as not being able to teach his favorite elective, being scheduled to teach required classes during the summer, the location of his classes, and the size of his classes, such alleged adverse employment actions amount to mere inconveniences or alterations of job responsibilities, and do not rise to the level of ultimate employment decisions. *Peña*, *supra* at 311-312.

As to plaintiff's subjective perception that he was adversely affected because his department head sent him a reminder that repeated tardiness is a violation of professorial responsibilities, we find that requiring employees to adhere to employer expectations concerning working hours and timeliness does not rise to the level of an adverse employment action. Further, we note that the reminder followed two department-wide memos concerning tardiness,

and defendant's observation that plaintiff was late to his classes fifteen times during a one and a half month period.

As to plaintiff's contention that defendant scheduled him to teach four classes instead of three after his request for accommodation had been granted, we note that defendant conceded its mistake. Further, plaintiff was never required to teach four classes after his request for accommodation was granted.

As to plaintiff's contention that defendant placed false information in his employment file concerning a false prescription dosage, we note that this refers to a memo from plaintiff's department head inquiring as to whether plaintiff's erratic behavior was a result of the medical conditions for which he was being accommodated or was attributable to the medication he was taking. This was a legitimate query and not an action adverse to plaintiff. As to plaintiff's contention that defendant placed false information in his employment file concerning the criminal activity of destroying property, we note that this refers to a memo from plaintiff's department head which referenced a broken "card swiper," but did not accuse plaintiff of any wrongdoing. Finally, we fail to see how receiving a one percent merit increase instead of a three percent merit increase constitutes an adverse employment action, where plaintiff did not receive a demotion evidenced by a decrease in wage or salary.

The mere fact that plaintiff was displeased by defendant's acts or omissions does not elevate those acts or omissions to the level of materially adverse employment actions. *Peña, supra* at 312. While the events of which plaintiff complains may not have made it an idyllic work environment, they certainly did not constitute adverse employment actions. *Id*. at 315. Because there was no genuine issue of material fact that plaintiff did not suffer any adverse employment actions, the trial court properly granted defendant's motion for summary disposition as it pertained to plaintiff's retaliation claim.[2]

Plaintiff also argues that the trial court erred in granting summary disposition on his constructive discharge claim. We disagree. We initially note that constructive discharge is not itself a cause of action; rather, it is a defense against the argument that no claim should exist because the plaintiff 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 shoes would feel compelled to resign.'" *Id*. at 487-488, quoting *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991).

We agree with the trial court that plaintiff failed to demonstrate a genuine issue of material fact that he was constructively discharged. Defendant did not make plaintiff's working

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[2] Because we find that plaintiff did not suffer any adverse employment actions, it is unnecessary for us to address whether there was a causal connection between plaintiff's protected activity and the alleged adverse employment actions.

conditions so intolerable that plaintiff was forced into an involuntary resignation, and plaintiff's working conditions did not become so difficult or unpleasant that a reasonable person in plaintiff's circumstances would have felt compelled to resign. *Vagts*, *supra* at 487. Rather, plaintiff chose to retire rather than remain employed with defendant while on long-term disability. Indeed, plaintiff concedes that defendant would have allowed him to return to work following his six-month leave of absence, and that the reason he could not return was due to Dr. Thawani's unwillingness to sign a release authorizing him to do so.

We find compelling the reasoning set out in *LaPointe v United Autoworkers Local 600*, 103 F3d 485, 489 (CA 6, 1996), where the Court of Appeals for the Sixth Circuit held that "an employee who leaves his employment when he has been presented with legitimate options for continued employment with that employer . . . is precluded from claiming constructive discharge." Plaintiff admits that he had the option to remain employed by defendant by going on long-term disability, but chose retirement instead because he felt long-term disability was undignified and would preclude him from coming on campus. Given plaintiff's admission that he had the option to remain employed with defendant, and that he chose instead to retire based on personal preference, plaintiff has failed to demonstrate a genuine issue of material fact that he was constructively discharged. Plaintiff's voluntary retirement precludes constructive discharge, given that he had options to remain employed. *LaPointe*, *supra* at 489.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra