STATE OF MICHIGAN

COURT OF APPEALS

NORMA CHEATHAM, WILLIE FULLER, ANTONIA FULLER, JONAS HILL, PAUL MANN and CORINE MANN,

Plaintiffs-Appellees/Cross-Appellants,

v

COUNTY OF WAYNE, DETROIT-WAYNE COUNTY COMMUNITY MENTAL HEALTH BOARD, ANGELA KENNEDY and JAROLD ADAMS,

Defendants-Appellants/ Cross-Appellees.

UNPUBLISHED
November 4, 1997

No. 174029
Wayne Circuit
LC No. 91-100322 CZ

NORMA CHEATHAM, WILLIE FULLER, ANTONIA FULLER, JONAS HILL, PAUL MANN and CORINE MANN,

Plaintiffs-Appellees,

v

COUNTY OF WAYNE, DETROIT-WAYNE COUNTY COMMUNITY MENTAL HEALTH BOARD, ANGELA KENNEDY and JAROLD ADAMS,

Defendants-Appellants.

No. 183075
Wayne Circuit
LC No. 91-100322 CZ

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Following a jury trial, defendants appeal as of right the judgments and award of costs and attorney fees in favor of plaintiffs Willie Fuller, Antonia Fuller, and Norma Cheatham, while plaintiffs cross-appeal the judgments of no cause of action entered against plaintiffs Jonas Hill, Paul Mann, and Corrine Mann in No. 174029. In No. 183075, plaintiffs appeal as of right the order awarding attorney fees and costs to defendants. We affirm the judgments of no cause of action entered against Jonas Hill, Paul Mann, and Corine Mann, reverse the judgments and the award of costs and attorney fees in favor of Norma Cheatham, Willie Fuller, and Antonia Fuller, and vacate the award of costs and attorney fees in favor of defendants.

These cases arose out of the 1988 reorganization of the Detroit Wayne County Community Mental Health Board ("Board") in which plaintiffs Norma Cheatham, Willie Fuller, Paul Mann, and Jonas Hill, four black, professional employees, claimed that they were denied, or were not considered for, promotions by their black female supervisors, defendants Dr. Angela Kennedy, the executive director, and Jarold Adams, the deputy director, on the basis of race discrimination. In addition, the three male plaintiffs claimed that they were denied promotions on the basis of gender discrimination, and that defendants breached their collective bargaining agreement by denying them promotions. Plaintiffs' principal claim is that the Board, through Kennedy and Adams, showed preference for non-black employees, specifically white employees, when it was reorganized in mid-1988. Pursuant to a "full management contract" with the State of Michigan, the Board assumed full responsibility for all mental health services in Wayne County with a nearly threefold increase in its budget, functions and staff. Under the provisions of the Government Administrators Association (GAA) contract, the union collective bargaining agreement with the County of Wayne, up to eighty executive service positions were to be filled by appointment at the "sole discretion of the County Executive." In addition to her claim of race discrimination, Cheatham claimed that she had been harassed by Kennedy and constructively discharged in retaliation for filing a civil rights complaint. Hill also alleged a claim of constructive discharge, and the spouses of Fuller and Mann claimed loss of consortium.

I

In their direct appeal in No. 174029, defendants first argue that the circuit court erred in failing to grant their motion for directed verdicts or judgments notwithstanding the verdicts as to Fuller's race and gender discrimination claims and Cheatham's race discrimination claim under MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) of the Elliott-Larsen Civil Rights Act ("ELCRA").[1] We agree.

This Court reviews motions for a directed verdict and judgment notwithstanding the verdict de novo as questions of law. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In *Matras v Amoco Oil*, 424 Mich 675, 681-682; 385 NW2d 586 (1986), the Court stated:

> In reviewing a trial court's failure to grant a defendant's motion for a directed verdict or judgment notwithstanding the verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiff. If reasonable jurors could honestly have reached different conclusions, the motion should

have been denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury.

To establish employment discrimination in a case involving an alleged failure to promote, the plaintiff must prove by a preponderance of the evidence that he or she belongs to a protected class, applied for the available position for which the plaintiff was qualified, but was rejected under circumstances giving rise to an inference of unlawful discrimination. *Pomranky v Zack Co*, 159 Mich App 338, 343-344; 405 NW2d 881 (1987).

In this case, defendants were entitled to a directed verdict or judgment notwithstanding the verdict as to Fuller's race and gender discrimination claims and Cheatham's race discrimination claim because these plaintiffs failed to present a prima facie case of discrimination because they did not apply for any of the positions in question. See *Cooke v Electronic Data Systems Corp*, 1991 Lexis 7173 (ED Mich, 1991); *Storch v Beacon Hotel Corporation*, 788 F Supp 960, 964 (ED Mich 1992).

Although Fuller claimed that it was futile to apply for the positions and that he had no formal notice of the positions, he admitted that he knew that there were job openings as a result of the reorganization. Fuller also acknowledged that he was aware that at least some of the positions were posted and that other Board employees had applied for them, including at least one black male who was promoted into that position. See *Rogers v Peninsula Steel Co*, 542 F Supp 1215, 1223 (ND Ohio 1982) ("The Court cannot excuse plaintiff's failure to apply where another minority employee had no difficulty applying. Alternatively, the Court cannot presume plaintiff's interest in the position where such interest was not expressed and lack of interest was strongly suggested.") Because application for the positions would not have been futile and because Fuller was aware of the job openings, the circuit court erred in failing to grant defendants' motion for a directed verdict or judgment notwithstanding the verdict as to Fuller's gender and race discrimination claims.

Likewise, defendants were entitled to a directed verdict or judgment notwithstanding the verdict as to Cheatham's race discrimination claim because she failed to come forward with any facts showing that application was futile or that she was discouraged from applying for the positions. Contrary to Cheatham's claim, her case is distinguishable from *Sklenor v Central Board of Education*, 497 F Supp 1154 (ED Mich 1980) because Cheatham was formally invited to apply for at least one position (the reimbursement management position), thus disproving her claim that she was not aware of the application process. Cheatham's reliance upon *Easley v Empire Inc*, 757 F2d 923 (CA 8 1985) is also misplaced because she was not excused from making a formal application since there was no known discriminatory policy at the Board against promoting black people. Finally, there was no evidence that Cheatham was discouraged from applying for the Manager I or quality assurance specialist position.

II

The circuit court also erred in failing to grant defendants' motion for directed verdict or judgment notwithstanding the verdict as to Fuller's breach of contract claim. Fuller's breach of contract action failed as a matter of law because the executive service positions to which he claimed entitlement

were exempt from the collective bargaining agreement with defendant County of Wayne. Moreover, there was no breach of the collective bargaining agreement because it was undisputed that the executive service positions were filled at the sole discretion of the county executive under the GAA contract. Although Fuller claimed that the civil service requirement of merit selection applied to these executive service positions, there was nothing to indicate that the civil service act, MCL 38.401 *et seq.*; MSA 5.1191 *et seq.*, or civil service rules and regulations, applied to executive service positions. Thus, even though the circuit court erred when it declined plaintiffs' request to take judicial notice of the civil service act, no prejudice resulted from this error because the act was inapplicable to this case. MRE 202; *American Casualty v Costello*, 174 Mich App 1, 8; 435 NW2d 760 (1989).

III

The circuit court also erred in failing to grant defendants' motion for directed verdict or judgment notwithstanding the verdict as to Cheatham's claims of unlawful retaliation and constructive discharge.

Article 7 of the ELCRA, MCL 37.2701; MSA 3.548(701), provides:

> Two or more person shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate 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.

To establish a prima facie case of unlawful retaliation under the act, a plaintiff must show that (1) he 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. *DeFlaviis v Lord & Taylor*, 223 Mich App 432, 436; 566 NW2d 661 (1997). In this case, Cheatham failed to establish a prima facie case of unlawful retaliation because there was no evidence of a causal connection between the filing of her complaint alleging racial discrimination and the alleged harassment that resulted in her alleged constructive discharge since Kennedy's alleged harassment well preceded the filing of the complaint.

Defendants were also entitled to a directed verdict or judgment notwithstanding the verdict as to Cheatham's claim of constructive discharge. In *Mollett v Taylor*, 197 Mich App 328, 336; 494 NW2d 832 (1992), this Court stated:

> A constructive discharge occurs when 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.

In this case, Cheatham failed to establish a prima facie case of constructive discharge. There was insufficient evidence supporting her constructive discharge claim because there was nothing to show that Kennedy or Adams deliberately made her working conditions so intolerable or so difficult or unpleasant that a reasonable person in Cheatham's position would have felt compelled to resign. The alleged harassment that led to her decision to resign involved Kennedy's apparently valid criticisms of Cheatham's poor work performance. The threshold for proving constructive discharge must be higher than a supervisor expressing valid criticism of an employee's work performance.

Given that Cheatham failed to present sufficient evidence establishing her claims of unlawful retaliation or constructive discharge, the circuit court erred in failing to grant defendants' motion for directed verdict or judgment notwithstanding the verdict with respect to these claims.

IV

Because we conclude that defendants were entitled to judgments in their favor as to Fuller's and Cheatham's claims, we do not consider their remaining claims of error.

V

On cross-appeal, plaintiffs Paul Mann, Corine Mann, and Jonas Hill argue that the circuit court abused its discretion by denying their motion for a new trial because the jury's verdicts of no cause of action were against the great weight of the evidence. *Bosak v Hutchinson*, 422 Mich 712, 737; 375 Mich 333 (1985); MCR 2.611(A)(1)(e). We disagree.

First, judgments of no cause of action were properly entered as to both Paul Mann's and Hill's claims of race and gender discrimination. Neither one established a prima facie case of race or gender discrimination since each failed to apply for the promotions in question. *Cooke, supra*; *Storch*, *supra*. As a result, defendants were also entitled to a judgment of no cause of action as to Corine Mann's loss of consortium claim. Second, neither Paul Mann nor Hill had a breach of contract claim as to the executive service positions because the GAA contract provided that these positions were filled by appointment at the "sole discretion of the County Executive." Finally, there was no evidence supporting Hill's claim that he was constructively discharged. Although Hill claimed that he left the Board because there was a lack of promotional opportunities, the record shows that he resigned to accept a better-paying middle-management position with an area hospital.

VI

On cross-appeal, plaintiff Willie Fuller also argues that the circuit court abused its discretion by refusing to allow him to amend his complaint to add a constructive discharge claim at the close of the trial. MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973); *Horn v Dep't of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996). We again disagree.

MCR 2.118(C) provides:

> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.
>
> (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

In this case, the circuit court properly denied leave to amend on the basis of undue delay and prejudice to the opposing party. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994); *Heins v Detroit Osteopathic Corp*, 150 Mich App 641, 645; 389 NW2d 141 (1986). After failing to plead or make an express claim for constructive discharge during the eleven-week trial, Fuller waited until the day before the jury was charged before orally moving to amend his complaint. Contrary to plaintiffs' assertion, defendants were surprised by Fuller's proposed amendment and would have been prejudiced. Although plaintiffs claim that their trial counsel talked about "constructive discharge as to three of them" in her opening statement, plaintiffs' counsel never stated that Fuller was constructively discharged. Further, contrary to plaintiffs' contention, the testimony of plaintiffs' actuarial expert concerning Fuller's damages was inadequate to constitute notice of Fuller's constructive discharge claim or to show that defendants impliedly consented to any amendment.

Finally, we note that Fuller's proposed amendment to the pleadings was properly denied because the amendment did not conform to the proofs adduced at trial. Although Fuller resigned from the Board in September, 1993, he admitted that he did not discuss the decision with his superiors until after he gave notice of his resignation, but acknowledged that Kennedy may have asked him to reconsider the decision after he gave notice. Although Fuller decided against reconsideration at that time, he did reconsider his decision after resigning and decided not to return, admitting that leaving was "my decision."

VII

There is also no merit to plaintiffs' claim on cross-appeal that the circuit court judge or the chief judge of the circuit court abused his discretion by denying plaintiffs' motion for recusal of the trial judge based on bias and prejudice. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992); MCR 2.003(B)(2). Although plaintiffs' counsel claimed that her ability to conduct discovery was hindered by "the appearance of possible bias" insofar as the circuit court judge was being investigated by the Judicial Tenure Commission ["JTC"] for an alleged impropriety with the City of Detroit, the record shows that the circuit court judge, while ruling against some of plaintiffs' discovery requests, extended discovery several times, allowing plaintiffs to obtain the personnel records of almost 60 people, which was virtually everybody who worked at the Board. Further, in this case, plaintiffs had nearly two years from the date of their complaint to conduct discovery. There is also no basis to

plaintiffs' assertion that the trial judge had a conflict of interest because of a grievance filed with the JTC involving the City of Detroit. First, as pointed out by this Court in *Czuprynski v Bay Judge*, 166 Mich App 118, 126; 420 NW2d 141 (1988), "[t]he mere filing of a grievance with the commission has no tendency to show merit in the grievance, or to show actual bias or prejudice on the part of the judge against the grievant." More important, apparently unbeknownst to plaintiffs' counsel, the City of Detroit was not a party to the instant action.

VIII

Because defendants were entitled to judgments as to all plaintiffs, we need not consider plaintiffs' remaining claims of error on cross-appeal in No. 174029.

IX

Nevertheless, we agree with plaintiffs in their appeal in No. 183075 that the circuit court clearly erred in awarding costs and attorney fees to defendants under MCR 600.2591; MSA 27A.2591, MCR 2.114 and MCR 2.625 on the basis that Hill's and Paul Mann's constructive discharge and breach of contract claims and Corine Mann's consortium claim were frivolous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). In the present case, the circuit court clearly erred in awarding sanctions because these plaintiffs' legal positions were not devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a). Further, although the circuit court's order made Cheatham jointly and severally liable to pay sanctions, the court made no findings relative to her allegedly frivolous claims. Our review of the record indicates that her claims were not frivolous. Thus, we vacate the circuit court's order awarding costs and attorney fees to defendants.[2]

X

Accordingly, we affirm the judgments of no cause of action entered against Jonas Hill, Paul Mann, and Corine Mann, reverse the judgments and the award of costs and attorney fees in favor of Norma Cheatham, Willie Fuller, and Antonia Fuller, and vacate the award of costs and attorney fees in favor of defendants. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

[1] While defendants also claim that the circuit court erred in denying their motion for summary disposition, they abandoned the issue on appeal, presenting only the trial testimony in arguing that they were entitled to directed verdicts or judgments notwithstanding the verdict as to Fuller and Cheatham's claims.

[2] However, we note that costs and attorney fees would have been proper in this case were Michigan to adopt a "loser pays" principle. See *Friedman v Dozorc*, 412 Mich 1; 312 NW2d 585 (1981).