

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN J. LAURSEN,

Plaintiff-Appellant,

v

DELOITTE & TOUCHE, f/k/a DELOITTE,
HASKINS & SELLS, BETTY MAPLE, and
RAY LOMBARDI,

Defendants-Appellees.

UNPUBLISHED

March 3, 1998

No. 195716

Wayne Circuit Court

LC No. 95-505092 CZ

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(10)(no genuine issue of material fact). Plaintiff had filed a claim against defendants, his former employers, for alleged violations of the Michigan Handicappers' Civil Rights Act (MHCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* Plaintiff was employed by defendant Deloitte & Touche as a CPA, and defendants Maple and Lombardi were employees of defendant Deloitte & Touche in managerial positions. Plaintiff alleged that defendants discriminated against him because of his handicap by failing to promote him and by constructively discharging him as well. Defendants moved for summary disposition, arguing that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law because they had made their decision not to promote plaintiff prior to learning of his handicap. The trial court found that defendants made their decision not to promote plaintiff prior to having knowledge of his handicap and granted defendants' motion for summary disposition. We reverse and remand.

This Court reviews a decision to grant a motion for summary disposition *de novo*. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The trial court, giving the benefit of reasonable doubt to the nonmoving party, must determine whether a record might be developed where reasonable minds might

differ upon an issue. *Id.* The nonmoving party may not rest upon mere allegations or denials, but must set forth specific facts to show that a genuine issue exists for trial. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Before summary disposition may be granted, the trial court must be sure that because of some deficiency that the nonmoving party cannot overcome, it is impossible for the claim to be supported at trial. *SSC Associates Limited Partnership v Gen'l Retirement System of Detroit*, 192 Mich App 360, 365; 480 NW2d 275 (1991). Generally, the courts are liberal in finding a genuine issue of material fact. *Id.* at 364-365.

The MHCRA provides that an employer shall not “[f]ail or refuse to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual’s ability to perform the duties of a particular job or position.” MCL 37.1202(1)(a); MSA 3.550(202)(1)(a). The MHCRA defines “handicap” as a determinable physical or mental characteristic of an individual that limits one or more of the major life activities of that individual and is unrelated to the individual’s ability to perform the duties of a particular job or position. MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A). To establish a prima facie case under the MHCRA, a plaintiff must show that “(1) he is handicapped as defined by the [MHCRA], (2) the handicap is unrelated to his ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways described in the statute.”¹ *Tranker v Figgie Int’l, Inc.*, 221 Mich App 7, 11; 561 NW2d 397 (1997). “Whether a defendant’s decision was motivated by a legitimate business judgment or a prohibited discriminatory bias is a question which should be left for resolution by the trier of fact.” *Crittenden v Chrysler Corp.*, 178 Mich App 324, 331; 443 NW2d 412 (1989).

A claim of constructive discharge is established if the plaintiff demonstrates that the employer deliberately made working conditions so intolerable that a reasonable person in similar circumstances would feel compelled to resign. *Vagts v Perry Drug Stores Inc.*, 204 Mich App 481, 487; 516 NW2d 102 (1994). “Where reasonable persons could reach different conclusions regarding whether these elements are established, the issue becomes a question of fact for the jury and not one properly decided by the trial court.” *Id.* at 488.

The key factual question in this case is whether defendants made a decision not to promote plaintiff at the May, 1992, partners’ meeting. Defendants rely upon the testimony of partners involved in the May meeting as consistently establishing that the decision made was not to promote plaintiff. Nonetheless, plaintiff argues that there was evidence suggesting that a decision to promote him was made at that meeting but that this decision was reversed when defendants learned about his handicap in early June.

We conclude that plaintiff came forward with sufficient evidence to create a genuine issue of material fact on this key question. For example, plaintiff presented evidence that preliminary recommendations before the May 1992 partners’ meeting indicated that a majority of partners had recommended promoting plaintiff to the tax manager position. However, after the partners’ meeting, some of the recommendations appear to have been altered to indicate a negative recommendation to plaintiff’s promotion. Defendants argue that the alterations were the result of some of the partners changing their minds after the partners’ meeting. However, one of the partners, Kosmatka, testified that she did not recall changing her positive recommendation for plaintiff’s promotion to a negative

recommendation. Kosmatka also testified that she did not recall whether an actual decision was made at the May 1992 partners' meeting regarding whether plaintiff would be promoted.

In addition, plaintiff was asked to complete the tax manager application even after defendants claim that it had already been decided at the May 1992 partners' meeting that plaintiff would not be promoted. Defendants argue that plaintiff was still given this application because it was defendants' general practice to give an application to "all" members of a peer group from which someone was being considered for promotion. However, plaintiff provided evidence indicating that this may have not been defendants' general practice and that at least one person had not been given an application when others in his peer group were being considered for the tax manager promotions and were thereafter actually promoted. Plaintiff also presented evidence regarding the perceptions that coworkers had about whether he would be promoted at the partners' meeting, his performance rankings compared to others who had and had not been promoted, and his billing rate. Again, defendants argue as to all of these matters that they are inconsequential or of much lesser weight than the testimony of partners at the meeting as to what occurred.

Notwithstanding defendants' arguments, we must give the benefit of all reasonable doubts to plaintiff as the nonmoving party. The factfinder may well be convinced by defendants' arguments regarding the contested evidence and reject plaintiffs' claims. However, we conclude that a genuine issue of material fact exists regarding when the decision not to promote plaintiff was made. Therefore, summary disposition was improperly granted to defendants on this issue.

Regarding plaintiff's constructive discharge claim, summary disposition was also improper. Reasonable minds could reach different conclusions regarding whether the circumstances in this case, as alleged by plaintiff, resulted in working conditions that were so intolerable that a reasonable person would feel compelled to resign. *Vagts, supra* at 487-488.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

¹ The issues regarding whether plaintiff's handicap falls within the MHCRA's definition of handicap and whether plaintiff's handicap is unrelated to his ability to perform the duties of a particular job are not before us.