STATE OF MICHIGAN

COURT OF APPEALS

HARRY SWYSTUN,

Plaintiff-Appellant,

v

FARMINGTON SCHOOL DISTRICT,

Defendant-Appellee.

UNPUBLISHED
February 21, 2003

No. 235812
Oakland Circuit Court
LC No. 00-026169-NZ

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition, and we affirm.

I. Nature of the Case

Following his retirement from the Farmington School District on March 24, 2000, plaintiff filed a complaint against the school district for violating the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., by discriminating against him on the basis of his age and sex. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) because plaintiff failed to establish that he suffered an adverse employment action and because he failed to present direct or circumstantial evidence to support his reverse sex discrimination claim.

II. Analysis[1]

[1] We review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Further:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled

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Plaintiff contends that the trial court erred by granting summary disposition to defendant on his age discrimination claim because plaintiff established a genuine issue of material fact that he suffered an adverse employment action. [2]

"Absent direct evidence of discrimination, a plaintiff may establish a prima facie case of employment discrimination by showing (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by one who was not a member of the protected class." *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 447; 622 NW2d 337 (2001). To establish that a plaintiff suffered an adverse employment action, the plaintiff must show that the action was "materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and . . . [plaintiff also] must have an objective basis for demonstrating that the change is adverse . . . ." *Meyer v City of Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000), quoting *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999). Objective evidence of an adverse action is required because "a plaintiff's 'subjective impressions as to the desirability of one position over another' [are] not controlling." *Wilcoxon, supra* at 364, quoting *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 886 (CA 6, 1996).

We hold that plaintiff failed to present any objective evidence that the principal's failure to appoint plaintiff department chair constituted a demotion or that it had a materially adverse effect on his employment status. While plaintiff offered his opinion on the biennial chair appointment in his affidavit, his subjective impressions of the "demotion" are insufficient to establish a prima facie case of discrimination. *Wilcoxon, supra* at 364. Further, plaintiff offered no evidence to support his claim that the loss of the department chair constituted a demotion, as opposed to a mere inconvenience or alteration of job responsibilities.[3] *Meyer, supra* at 569. Moreover, though discovery was closed at the time of the motion hearing, plaintiff failed to

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to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden, supra* at 120.]

[2] Plaintiff also claims that the trial court abused its discretion by denying his counsel's request for a one-week adjournment of the motion hearing. A motion for an adjournment must be based on good cause, and a trial court, in its discretion, may grant an adjournment to promote the cause of justice. MCR 2.503; *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). The motion transcript indicates that plaintiff scheduled another appointment during the motion hearing because defense counsel allegedly said he was thinking about adjourning the hearing. At the hearing, the trial court denied plaintiff's motion to adjourn the hearing notwithstanding the assertion that plaintiff wanted to be present for the court's ruling. Plaintiff did not argue below and does not argue on appeal that he had new facts or evidence to present at the hearing, or that he would otherwise be prejudiced by the failure to adjourn. The trial court clearly did not abuse its discretion; there was no "good cause" for adjournment and plaintiff was not prejudiced by the failure to adjourn. See *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

[3] While it is entirely conceivable that loss of a position as department chair may be a demotion, clearly plaintiff must offer evidence to support this, not simply state his opinion.

present any objective facts to raise an inference that there was some discriminatory reason for failing to appoint plaintiff to chair the department.[4] Accordingly, plaintiff failed to satisfy his burden of showing that his loss of the department head position was materially adverse, and therefore, he failed to demonstrate that he suffered any adverse employment action.[5]

Plaintiff further contends that the trial court erred by granting defendant's motion on plaintiff's constructive discharge claim. Below, plaintiff asserted that Horn's unsupportive and discriminatory actions caused him such medical and emotional suffering that he was forced to retire in March 2000. "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." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151; 483 NW2d 652 (1992). Constructive discharge is not a cause of action but "a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Accordingly, in order to maintain a claim based on constructive discharge, a "[p]laintiff must first establish the requisite statutory . . . harassment before a claim of additional aggravating circumstances is considered." *Radtke v Everett*, 442 Mich 368, 373 n 1; 501 NW2d 155 (1993). In other words, a finding of harassment is a "necessary predicate" to plaintiff's claim of constructive discharge. *Id*.

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[4] While not dispositive of plaintiff's claims, we observe that plaintiff filed this action following his medical leave and his request to retire. Plaintiff did not pursue a claim under the Workers Disability Compensation Act and he did not file a grievance under his collective bargaining agreement or pursue any other administrative remedies with regard to the allegations in this case. Nor did plaintiff make any claim at the time of his retirement that his retirement was anything other than voluntary; that is, he did not make such a claim with the school board or file a Teacher Tenure Act action, nor did he file a wrongful termination claim, which he could have done under the collective bargaining agreement. Again, while not dispositive, plaintiff's failure to pursue any of the aforementioned potential remedies is instructive.

[5] Plaintiff further claims that the trial court erred by finding that principal Rande Horn had no authority to hire or fire teachers at Harrison High School. In her bench ruling on defendant's motion for summary disposition, the trial judge stated that plaintiff failed to prove his claim that Horn discriminated against male applicants and observed that, contrary to plaintiff's assertion, defendant stated in its reply brief that school principals are not responsible for hiring or firing teachers. Plaintiff provided no evidence below or on appeal to establish that Horn was responsible for hiring or firing teachers.

More importantly, however, this fact is of no consequence to plaintiff's claim or the trial court's ultimate ruling. Neither Horn nor the district fired plaintiff and, regardless whether Horn or the district's personnel department made hiring decisions, plaintiff failed to present evidence supporting his allegation of discriminatory hiring practices at Harrison. It is well-established that "[a] party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). Therefore, the trial court correctly granted defendant's motion not based on who hired teachers at Harrison, but because plaintiff failed to support his assertions regarding the number of women and men hired at Harrison within the disputed period. In sum, plaintiff failed to establish a prima facie case of reverse sex discrimination because he failed to introduce any evidence, circumstantial or otherwise, that defendant discriminates against men.

As the trial court correctly ruled, plaintiff failed to establish a claim that he was harassed on the basis of his age or sex. "In order to establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior." *Downey v Charlevoix County Bd of Road Com'rs*, 227 Mich App 621, 629; 576 N.W.2d 712 (1998), citing *Radke, supra* at 382-383. Plaintiff's evidence of a hostile work environment consisted of two disagreements he and Horn had regarding field trip permission slips, two contentious discussions regarding plaintiff's schedule in 1995 and 1998, and plaintiff's allegation that Horn did not acknowledge his students' accomplishments. On this evidence, a rational trier of fact could not conclude that the district or Horn created a hostile work environment. Moreover, no reasonable juror could conclude that Horn's alleged conduct was based on plaintiff's protected status or that it was intended to or did create an intolerable work environment. Because plaintiff failed to establish his underlying discrimination claim, his claim of constructive discharge fails as a matter of law.[6]

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

[6] We reject plaintiff's claim that the trial court erroneously ruled that a plaintiff must present direct evidence of discrimination in order to survive a motion for summary disposition. To the contrary, in its bench ruling, the trial court specifically stated that a plaintiff may establish a discrimination claim through direct evidence or by the burden-shifting framework outlined above. Further, in deciding the motion, the trial court considered the evidence offered by plaintiff within that framework. Accordingly, plaintiff's claim is without merit.