STATE OF MINNESOTA
IN COURT OF APPEALS
A10-997

John F. Waldron,
Appellant,

vs.

Lyman Lumber Company,
Respondent.

Filed January 25, 2011
Reversed and remanded
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-09-11921

Andrew P. Muller, Muller & Muller PLLC, Minneapolis, Minnesota, and

John A. Klassen, John A. Klassen PA, Minneapolis, Minnesota (for appellant)

Joel E. Abrahamson, John H. Lassetter, Leonard, Street and Deinard P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

On appeal from summary judgment, appellant argues that genuine issues of material fact preclude summary judgment on his claim that respondent breached his severance agreement. We agree and therefore reverse and remand for trial.

FACTS

Appellant John Waldron began working for respondent Lyman Lumber Company in 1987, eventually serving as senior vice president of operations, the number-two executive in the company, and reporting to the president and chief executive officer, James Hurd. As senior vice president, Waldron's duties included planning, organizing, directing, and coordinating the operating functions of the Woodinville Companies located in Washington State. Waldron's duties also included supervising Lyman's vice president of builder operations for the Twin Cities, Dale Carlson, whose duties included those performed in the past by Waldron. Waldron's compensation was partially tied to the profits generated by the branches he oversaw.

In 1995, Waldron and Lyman executed an Executive Severance Pay Agreement. The severance agreement provided in part that Lyman would pay Waldron severance if Lyman terminated Waldron without cause.

During the fall of 2008, Lyman had "serious financial concerns" and was considering restructuring or bankruptcy. To make the company more attractive to lenders and avoid bankruptcy, Lyman sought the advice of a "turnaround group," Alliance Management. One concern was Woodinville's inability to meet its financial targets. Consequently, on Friday, October 24, Hurd met with Waldron and Carlson to discuss the Woodinville operations. Hurd asked Waldron to spend more time in Woodinville to determine why it was failing to meet its financial targets. Waldron's reaction is in dispute. Hurd claims that Waldron refused to spend more time in Woodinville, saying, "That doesn't work for me." Carlson recalls that Waldron was not interested in going to

Washington. Waldron testified that he was willing to spend more time in Woodinville but admitted that he never agreed to the idea, instead saying that he would think about it. Hurd also informed Waldron and Carlson that Alliance suggested replacing Waldron with Carlson in Woodinville. Waldron responded, "if you choose to do what Alliance is telling you to do, then I need to be gone because it's not a workable situation to do that at all." The parties agree that the meeting ended without a solution.

Waldron testified that on Monday, October 27, 2008, he reported to work "ready, willing and able to go spend more time out at Woodinville." But over the weekend, Hurd decided that Carlson would go to Woodinville and take over its management and Waldron would assume Carlson's day-to-day responsibilities. Waldron claims that Hurd would not discuss the matter further. Waldron viewed being replaced in Woodinville by Carlson, his subordinate, as a vote of no confidence in his management abilities and told Hurd that he needed a separation agreement because the situation was unworkable. Hurd told Waldron that he did not want him to quit because he needed him. But, feeling that he could not maintain his self respect if he stayed, Waldron met with the vice president of human resources and asked for a separation and release agreement. Waldron claims that the vice president of human resources characterized the change in his duties as a "big demotion."

Between October 27 and October 29, Waldron had multiple conversations with Hurd and expressed his unhappiness with the decision. From October 29 through November 9, Waldron took vacation during which his attorney sent Lyman a letter stating that replacing Waldron with his subordinate amounted to a constructive discharge,

entitling him to severance pay under the 1995 agreement. Lyman's attorney responded that Waldron's title and compensation remained unchanged. In a separate letter to Waldron, Hurd stated that Lyman needed Waldron "now more than ever," urging him not to quit, directing him to return to work on November 10, and warning that his failure to do so would be considered a voluntary resignation.

Waldron did not return to work on November 10 and, claiming that Lyman constructively discharged him without cause, sued Lyman for breaching its agreement to pay him severance. The district court granted summary judgment to Lyman. This appeal follows.

D E C I S I O N

Standard of Review

"On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A district court shall grant summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. "[T]he court must not weigh the evidence." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *Id.* "[S]ummary judgment is inappropriate when reasonable persons might draw different conclusions from the

evidence presented." *Id.* at 69. We view the evidence in the light most favorable to the one against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Breach of Severance Agreement

To prove he is entitled to severance pay, Waldron must prove that Lyman terminated his employment without cause. The severance agreement states:

> "Cause" shall mean Officer's commission of any material act of theft, embezzlement or willful fraud against the Company or the conviction of Officer (or Officer's entry of a guilty plea) relative to any criminal offense against the Company or in which the Company is injured, directly or indirectly, and which is more serious than a gross misdemeanor.

Waldron argues that he was terminated from employment without cause because he was constructively discharged. Lyman denies that it constructively discharged Waldron, arguing that, because the severance agreement did not restrict its right to change Waldron's duties, it had the right to change his duties and therefore Waldron's reassignment could not create intolerable working conditions. Waldron acknowledges that Lyman had the right to assign him other duties but argues that the right to do so was not unlimited. We agree with Lyman that, in the absence of restrictive contract language, Lyman had the right to change Waldron's job duties. But we agree with Waldron that Lyman's right to change his duties was not unlimited and that a change could amount to intolerable working conditions and therefore a constructive discharge.

Constructive Discharge

"[C]onstructive discharge occurs when an employee resigns in order to escape intolerable working conditions." *Navarre v. S. Wash. Cnty. Sch.*, 652 N.W.2d 9, 32 (Minn. 2002) (quotation omitted). "Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes." *Pa. State Police v. Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342, 2351 (2004). To establish constructive discharge, an employee must show that the employer created intolerable working conditions with the intention of forcing the employee to quit. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412 (Minn. App. 1995).[1]

To show constructive discharge, an employee must also show that he or she gave the employer a reasonable opportunity to remedy the problem. *See, e.g.*, *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 534 (8th Cir. 2008) (stating that employee must grant employer a reasonable opportunity to correct the intolerable condition before quitting). Waldron argues that the opportunity-to-remedy requirement only applies in discrimination cases. But no Minnesota court has determined that the opportunity-to-remedy requirement only applies in discrimination cases. We therefore decline to

[1] Minnesota courts have addressed the constructive-discharge doctrine primarily in the context of employment-discrimination cases. *See, e.g.*, *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 577 (Minn. App. 1997) (age discrimination), *review denied* (Minn. Aug. 21, 1997); *Pribil*, 533 N.W.2d at 412 (age discrimination). Neither the Minnesota Supreme Court nor this court has expressly addressed whether the doctrine applies in the context of a breach-of-contract claim. Because neither party argues that the constructive-discharge doctrine does not apply in the context of a breach of an employment or severance contract under Minnesota law, we do not address this issue.

embrace Waldron's argument which would require us to treat this case differently than a discrimination case.

Intolerable Working Conditions

Whether an employee's working conditions were intolerable is judged by a reasonable-person standard. *Diez*, 564 N.W.2d at 579. How the employee felt about his working conditions is not determinative. *Pribil*, 533 N.W.2d at 412. The inquiry of whether a constructive discharge has occurred is objective: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Pa. State Police*, 542 U.S. at 141, 124 S. Ct. at 2351. Whether an employee's working conditions would be intolerable to a reasonable person is a question of fact, usually to be decided by a jury. *Navarre v. S. Wash. Cnty. Sch.*, 633 N.W.2d 40, 57 (Minn. App. 2001), *rev'd on other grounds*, 652 N.W.2d 9 (Minn. 2002); *see also Bersie v. Zycad Corp.*, 399 N.W.2d 141, 146 (Minn. App. 1987) (stating that "[t]he ultimate weighing of the evidence rests with the fact-finder" when attempting to show constructive discharge).

A demotion can create intolerable working conditions. *See Pa. State Police*, 542 U.S. at 134, 124 S. Ct. at 2347 (listing "a humiliating demotion" as an example of "employer-sanctioned adverse action" that may give rise to a constructive-discharge claim); *Tadlock v. Powell*, 291 F.3d 541, 546–47 (8th Cir. 2002) (concluding that evidence was sufficient to support district court's finding of constructive discharge when employee was assigned to a different position in a different state and repeatedly communicated his desire to return to his former position, and the company would not

permit employee's return but did not tell him, and after nine months informed employee that the transfer was permanent); *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000) (holding that a transfer constitutes an adverse employment action when it "results in a significant change in working conditions or a diminution in the transferred employee's title, salary or benefits"); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 993 (10th Cir. 1994) ("A perceived demotion or reassignment to a job with lower status or lower pay may, depending upon the individual facts of the case, constitute aggravating factors that would justify finding of constructive discharge."); *Mair v. S. Minn. Broad. Co.*, 226 Minn. 137, 140, 32 N.W.2d 177, 179 (1948) ("[I]f the master deliberately enters into a contract providing for the employment of another as manager, the employee has a right to insist upon retaining that grade, in the absence of any showing which would justify the master in reducing the rank of the servant.").

In addition to claiming loss of authority and prestige, Waldron submitted evidence that his performance-based compensation would be diminished if Lyman removed his Woodinville duties. The district court addressed this issue by concluding that any loss of Waldron's earning potential was not objectively intolerable because high-level executives can expect their bonuses to be reduced when the company is struggling financially. But Waldron's concern about diminished compensation focused on the change in his duties, not on Lyman's financial struggles. As to Waldron's change in duties, the district court determined that, if Lyman's decision "resulted in a reduction of rank or material change in duties for Waldron, it was justified under the *Mair* standard in light of the business necessity to make organizational changes." But the *Mair* court did not discuss

justification in terms of business necessity to make organizational changes. The *Mair* court's language—"in the absence of any showing which would justify the master in reducing the rank of the servant"—appears to pertain to an employer's justification for reducing an employee's rank or changing his duties based on an employee's work performance. In this case, Lyman does not argue that its organizational change was based on Waldron's performance. Instead, it argues that economic circumstances necessitated its decision about Waldron's change in duties.

Even if the *Mair* court intended to include business necessity as a justification for an employer's organizational changes, whether the employer was justified in its decision-making is a question of fact to be decided by a jury. *See Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) (stating, in case involving alleged wrongful interference with a contractual relationship, that whether interfering with a contract is justified is an issue of fact); *Langseth by Langseth v. Bagan*, 298 Minn. 519, 520, 213 N.W.2d 334, 335 (1973) (stating in a negligence case that "[w]hen the attendant facts and circumstances indicate that there may be reasonable excuse or justification . . . the question is for the jury"); *Bennett v. Storz Broad. Co.*, 270 Minn. 525, 537, 134 N.W.2d 892, 900–01 (1965) (stating that whether justification to breach a restrictive employment covenant exists is a fact question).

We conclude that a rational trier of fact could find that Waldron's reassigned job duties were objectively intolerable.

Lyman's Intent

Waldron has not presented evidence to show that Lyman intended to force his resignation; rather, he argues that his resignation was reasonably foreseeable to Lyman upon his change in job duties. "Intent can be proven with direct or circumstantial evidence, or it can be inferred upon a showing that the employee's resignation was a reasonably foreseeable result of the employer's conduct." *Pribil*, 533 N.W.2d at 413. "If the employee cannot prove the employer consciously intended to force the employee to quit, he or she must prove that the employer intended the reasonably foreseeable consequences" of its actions. *Diez*, 564 N.W.2d at 579 (quotation omitted). Whether an employer intended to force an employee to resign is a fact question. *See Anda*, 517 F.3d at 535 (stating that employee failed to create a genuine issue of material fact by failing to present evidence of employer's intent).

Here, the district court stated:

> In assessing Lyman Lumber's intent, it is important that Alliance Management recommended that Carlson, not Waldron, go to Woodinville. Thus, Lyman Lumber was acting on the recommendation of a third-party consultant whom it had paid to provide it advice on how to improve its troubled financial situation. This fact negates improper intent; Lyman Lumber reorganized its executives' job duties in an attempt to save the company.
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> Based on the undisputed facts in the record, the Court finds that intent cannot be inferred. . . . [T]he evidence shows that Lyman Lumber sincerely believed that it needed Waldron's expertise, wanted to retain Waldron as its Senior Vice President of Operations, and that Waldron's resignation was merely an unintended consequence of its reorganization

> predicated upon economic necessity. For these reasons, no reasonable juror could find that Lyman Lumber intended to force Waldron to resign.

When Hurd first informed Waldron that Alliance suggested that Carlson take over his Woodinville duties, Waldron told Hurd: "If you choose to do what Alliance is telling you to do, then I need to be gone because it's not a workable situation to do that at all." Hurd therefore knew that his decision to replace Waldron with Carlson in Woodinville might result in Waldron's resignation. During his deposition, Hurd acknowledged that he knew there was a risk that Waldron would resign.

We conclude that Lyman's intent constitutes a genuine issue of material fact exist because a rational trier of fact could conclude that Waldron's resignation was reasonably foreseeable.

Opportunity to Remedy the Problem

Waldron claims that he told Hurd on October 24, 2008, that reassigning him Carlson's duties was "unworkable" and he would have to "be gone." He claims that on October 27, after Hurd told him that Carlson was replacing him in Woodinville, he asked if there was any room for discussion and Hurd replied, "I've made my decision." Waldron also claims that multiple conversations with Hurd ensued that week and Hurd would not reconsider his decision. And Waldron claims that the vice president of human resources told him he had two choices: "(1) Do what Hurd wants, even though it is a big demotion; or (2) Lyman will be putting together a separation and release agreement." Waldron responded that the first option would not work and then left on vacation.

Whether an employee has satisfied the opportunity-to-remedy requirement constitutes a question of fact. *See Van Steenburgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (concluding that employee presented sufficient evidence that she provided employer an adequate opportunity to remedy the situation before she quit to support the jury's finding of constructive discharge). Here, the district court determined that Waldron "did not provide Lyman Lumber a *reasonable* opportunity to assess the problem and to explore any possible options to work out the problem." We conclude that the opportunity-to-remedy requirement constitutes a genuine issue of material fact to be decided by a jury because a rational trier of fact could conclude that Waldron gave Lyman a reasonable opportunity to remedy the problem.

Because genuine issues of material fact exist regarding whether Lyman constructively discharged Waldron from his employment without cause and thereby breached the severance agreement, we reverse and remand for trial.

Reversed and remanded.