

MCGRATH PREVAILS IN A BINDING ARBITRATION EMPLOYMENT DISPUTE

Plaintiff, a former employee of Defendant, a national chemical manufacturer, filed her charge of discrimination with the United States Equal Employment Opportunity Commission, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, et seq., and seeking back pay, reinstatement or front pay, compensatory and punitive damages, attorneys' fees and expenses. Plaintiff alleged that she had been discriminated against on the basis of her gender and age, and had suffered retaliation by her employer when she complained about it. Following the issuance of her right to sue letter by the EEOC, Plaintiff commenced her action by submitting her claim to the American Arbitration Association, pursuant to the binding arbitration provisions of her employment agreement with the Defendant.

After five full days of testimony and evidence, the Arbitrator found in favor of McGrath's client, the national chemical manufacturer. The Arbitrator, the Honorable Richard Ralston, found in favor of McGrath's client for the following reasons:

Factual Background

"First and foremost, the evidence at the hearing, including the testimony of Plaintiff herself, clearly and convincingly demonstrated that her employment at Defendant was not terminated by her employer, but instead she voluntarily resigned on March 25, 2008, after she learned that her immediate supervisor (and close friend), Steven Smith, had just been named to the position of 'Quality Assurance Officer' at the strong suggestion of a representative of the Kansas Department of Health and Environment from whom a competency certificate was sought.

"According to Plant Manager Gregory Jones, Plaintiff made other attempts to resign her employment with Defendant on two prior occasions, once in November of 2004 and later after "The Rock Incident" in 2007. Jones did not accept her resignations on those prior occasions, but he did warn Plaintiff that a third attempt at resignation would be accepted by him as 'job abandonment.' Jones was true to his word; on Plaintiff's third attempt at resignation, when she threw her resignation letter on Jones' desk and immediately left his office on March 25, was accepted by Jones and Plaintiff's 15-year tenure at Defendant ended two weeks later.

"Neither Plaintiff nor Jones related substantially different facts surrounding her resignation. Jones did not want her to resign. He believed that she was a technically skilled research chemist whose technical abilities were exceptional. Plaintiff was a long-tenured employee in a relatively stable department and a valuable asset for the company. And, at least before her resignation, they considered each other as friends.

"However, despite her skills as a research chemist, Plaintiff had, as substantiated by her friend and colleague, Carrie Frost, assumed the mantle of the self-appointed 'spokesperson' for employees in the company laboratory, men and women - young and old, alike. Plaintiff felt compelled to take their perceived complaints straight to Jones, skipping both her immediate supervisor and his boss, David Moss, the Technical Director of the laboratory. She was not hesitant to 'jump the chain of command,' taking her complaints to executives several rungs above her immediate supervisor, Steven Smith. In fact, once she even made a complaint about Jones,

the plant manager, to the company president when Jones rejected her application to attend a west-coast convention trip because of budgetary constraints. Her complaint and the resulting email message from the Chief Executive Officer of the company did not endear her either to the company president or Jones.

“Nor was Plaintiff reticent to complain about the lack of competency on the part of her managers, particularly David Moss, the Technical Center Director and her own supervisor's immediate superior. She complained about Moss' ‘micro-managerial’ style which she felt was not conducive to a productive atmosphere. She complained that Moss was ‘short and rude’ to other employees, specifically Carrie Frost, a woman, and Dave White, a man, and showed a lack of respect toward both of them. That complaint was essentially gender-neutral. She complained that Moss permitted Bob Bennett, a supervisor in another department, to take college geology courses during work hours, even though Bennett was being trained to fill a potential vacancy with the expectation that her friend, Carrie Frost, might be promoted to the position of corporate geologist. That complaint was also gender-neutral in light of the fact that management was anticipating the promotion of Frost to a position held by a man. She also complained that Bennett was ‘taking advantage’ of Dave White, a male employee in another department, by making him perform work Bennett should have done. Her complaints centered on Moss and his treatment of both men and women who Plaintiff felt were being favored. Her criticism of Moss was increasingly harsh. In December of 2007, shortly before she received her 2007 performance evaluation, she went so far as to say to Jones, David Moss' boss, “When are you going to fire Dave Moss - he is no good for the lab.’

“Fellow employees were also the target of her complaints. For example, Plaintiff complained about a female employee who, she felt, was not working full days. Plaintiff even documented the time that female employee was not devoting to her job and took her complaint to management. When Plaintiff was confronted by Moss about monitoring a fellow employee's performance and the fact that she was not the employee's supervisor, she again went to Jones to complain about the reprimand. Jones advised Plaintiff that it was not her job to supervise or document the work of her colleagues. His advice resulted in her abrupt and angry departure from the workplace that day. Even then, she was told by Jones that another such departure during a work day could be considered ‘job abandonment.’

“Plaintiff also complained about new employees, who, in her estimation, were not competent to perform their assignments adequately. For example, about one of the new employees, Plaintiff told Jones, ‘don't even think of putting Kurt Windful in the analytical lab. I can't and won't work with someone who questions what I do.’ That comment was incorporated in her later written evaluation by Jones.

“By the end of 2007, Plaintiff's complaints and criticism of others in the laboratory had worn thin. Jones was frustrated at her lack of communication skills, her aggressiveness and her blunt and negative evaluation of others in the laboratory, all of which created unrest among the employees within the laboratory. For that reason, he gave her a ‘below expectations’ in her performance review in the categories of ‘cooperation/teamwork,’ ‘communications,’ and ‘adaptability.’ So even though he rated her well in both quality and quantity of her work with comments like, ‘Plaintiff does not put out data until she knows it is good,’ and ‘Plaintiff was huge part of why everything got done,’ she was not entitled to a ‘merit performance increase’ because of the low ratings she received in other areas of her performance. Those subpar evaluations disqualified her from receiving a ‘merit increase’ for 2008, even though she had received monetary bonuses in the preceding summer for her late-night efforts on behalf of the company.

“Despite his glowing reviews about her analytical and technical skills, Jones' comments about her ‘volatile personality which [was] frequently offensive and unprofessional,’ along with the ‘below expectations’ ratings, angered Plaintiff who had never before received a ‘below expectations’ rating in any performance category during her tenure at Defendant. That evaluation, which apparently weighed on her mind during the next month or so, along with the assignment of the ‘Quality Assurance Officer’ position to her boss, provided a catalyst to her resignation on March 25th. Essentially, she walked out the door on March 25, 2008.

“Plaintiff's anger and frustration about Moss's managerial style, her performance review and the assignment of the quality control function to her immediate supervisor, do not form the basis of ‘constructive

discharge’ as that concept is embraced by the United States Court of Appeals for the Tenth Circuit. Nor do they support a ‘hostile environment’ claim.

Law of the Tenth Circuit

“Typically, under federal law, ‘constructive discharge’ results from a ‘hostile work environment’ created by sexual, racial or religious harassment. The same legal standard applies to other forms of discriminatory activity. In order for a hostile work environment claim to succeed, either on summary judgment or at trial, ‘a plaintiff must show that a rational [trier of fact] could find that the workplace [was] permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victims' employment and create an abusive working environment.’” *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d, 1257, 1261 (10th Cir. 1998), quoting *Davis v. U.S. Postal Service*, 142 F.3d 1334, 1341 (10th Cir. 1998). Whether a work environment can be considered hostile or abusive, can be determined only by looking at all the circumstances . . . [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.’ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 370, 126 LEd.2d 295 (1993). So, ‘plaintiff must produce evidence that she was the object of harassment because of her gender.’ *Penry, supra*. Moreover, ‘constructive discharge [only] occurs when the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.’ *Sanchez v. Denver Public Schools*, 164 F.3d 527, 534 (10th Cir. 1998). That means Plaintiff was required to show that she had ‘no other choice than to quit.’ *Id*. In that determination, her subjective feelings are irrelevant. *Id*. ‘The conditions of employment must be objectively intolerable ...’. *Id*. Under Tenth Circuit law, ‘If an employee resigns of her own free will, even as a result of the employer's actions, that employee will not be held to have been constructively discharged.’ *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 858 (10th Cir. 2000).

“Considering all the testimony and evidence, Plaintiff simply did not prove a hostile work environment, as that concept is adopted in the Tenth Circuit, and she clearly did not prove a ‘constructive discharge.’ The evidence, including her own testimony, strongly supports a determination that she voluntarily resigned her position at Defendant of her own free will. In the absence of proof of a constructive discharge she cannot recover back pay or reinstatement (or front pay, its equitable substitute). *Mallinson-Montague v. Pocmick*, 224 F.3d 1224, 1236 {10th Cir. 2000}; *Derr v. Gulf Oil Corp.*, 796 F.2d 340,342 (10th Cir. 1986). On that issue alone, her claim fails.

No Proof of Gender or Age Discrimination

“Throughout her tenure at Defendant, Plaintiff’s complaints were never about gender or age discrimination. She never spoke about discrimination in those terms, or for that matter, in any terms. In none of her written or spoken words to management did she ever use the phrases ‘age discrimination’ or ‘gender discrimination.’ Recognizing that she was not required to make ‘a formal accusation of discrimination,’ or for that matter, *any* specified words to trigger protection under federal law, the generalized subject matter of her complaints were simply *not* related to protected activity under federal law. See *Garcia-Paz v. Swift Textiles, Inc.*, 873 F.Supp. 547,561 (D. Kan. 1995). In fact, her complaints were about a myriad of issues other than those related to age or gender discrimination. They were generic and universal; complaints about a whole spectrum of perceived affronts to herself and other employees. Those complaints were not limited to managers and supervisors, but also included fellow employees, men and women alike.

“There is no objective evidence to support a claim of gender *or* age discrimination other than one isolated comment which she and Frost attributed to David Moss. Plaintiff and Frost both testified that they overheard Moss say on his cell phone as they passed him in the hall one day, ‘Women will never be managers [here].’ No date was ascribed to that event and no other context was given.

“That testimony simply was not credible for a number of reasons. The comment was adamantly denied by Moss. Obviously, that circumstance alone would not be enough to discredit the women's testimony; Moss would be expected to deny it. But both women were close friends, and united in their dislike for David Moss.

They had clear motivation to ascribe an impermissible motivation to his hard, condescending and demanding management style. They both considered him a ‘know it all,’ even when it came to their own areas of expertise. Moreover, the comment was not related to *any* employment decision made, or being made at the time, with respect to either Plaintiff or Frost. Neither woman was then being considered for a management position. Indeed, because of the static nature of laboratory positions, *no* management position was open. As Jones himself put it, ‘There’s not a lot of mobility within the lab.’ Supervisors and managers within the laboratory held their jobs for decades. Frost herself testified that there are no management openings in her department, and that she had never been denied a position because of her gender. Moreover, women *had* held supervisory and managerial positions within the laboratory in the past. And finally, even if it had been said, the comment, unrelated to any employment decision made by Defendant with respect to Plaintiff, does not her discrimination case make. *See Merritt v. Tellabs Operations, Inc.*, 222 Fed.Appx. 679, 683 (10th Cir. 2007); *Heno v. Sprint/United Management Co.*, 208 F.3d 847,850 (10th Cir. 2000).

“Most importantly, the uncontested facts themselves belie either an age or gender discrimination case. Until her last annual evaluation, Plaintiff had always received passing, if not superior grades, from her managers. Throughout the years, she almost always got raises, and often received bonuses in excess of those received by younger employees and male employees. She was hired at the top of the grade for her position as a research chemist so her ability to advance in salary and position within her department was extremely limited. But even so, in 2004, she received the highest salary increase within her department, along with several bonus payments throughout the years for her performance and technical skills. That raise came from a ‘fixed pool’ of money allocated to the budget of her department which meant that other male or younger employees got far less that year. She was never suspended, disciplined, demoted or otherwise suffered an adverse employment decision from her managers until 2008, when she received the ‘below expectations’ rating on her 2007 Performance Development Review. Even then, that evaluation simply meant that she would not receive a ‘merit increase’ in the upcoming year.

“At the hearing, she asserted that she was denied the position of ‘Quality Assurance Officer,’ a title which would have, according to her, been a foundation for future salary raises. But the separation of the ‘Analyst’ position from the ‘Quality Assurance’ position was solely a response to the Kansas Department of Health and Environment. The state agency simply suggested the obvious - a chemical analyst should not be evaluating her own work. According to Smith and Jones, the separation of those two functions had no affect on her future employment track or salary increases. As she admitted at the hearing, the separation of those functions was a logical decision; a separation of the ‘fox from the chickens’ in oversight. The quality evaluator should not have been the person whose work was being evaluated.

“In none of their management actions was there any indication from Jones, Moss or Smith, her corporate superiors, that she was being suspended or even considered for discharge from her employment. Her inability to advance in position was simply a function of the structure of the laboratory. Essentially, because the laboratory was staffed with technicians, chemists and geologists, and those technical positions were limited, Plaintiff had no route for advancement within her department. So, whether she held the ‘Quality Assurance’ position or not made no difference in her advancement or salary structure. Her only upward route within Defendant was outside her department, a route she did not choose to travel.

“In short, other than criticism of her constant complaining, her supervisors unanimously valued her work and expertise and did not want her to leave. They simply wanted her to address and modify her communication and teamwork attitudes. The fact that they attempted to improve her relationships and communications within their department was not the result of age or gender discrimination, but rather to mentor an employee whose expertise and work ethic they valued.

Conclusion

“Plaintiff was not the subject of gender discrimination, age discrimination, or retaliation because of her complaints about those forms of discrimination. Rather, she voluntarily resigned from her employment at

Defendant and was not ‘constructively discharged,’ as that term is used in the law of the Tenth Circuit. For these reasons, her claims must fail.

“In view of the foregoing, and based upon the findings of fact and conclusions of law contained here, the undersigned Arbitrator hereby finds in favor of Defendant and against Plaintiff on all claims presented herein arising from her employment with Defendant.”

Richard L. Ralston, Arbitrator