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SUMMARY
May 23, 2024

2024COA58

No. 23CA1008, *Potts v. Gaia Children LLC* — Employment Law — Wrongful Discharge Contrary to Public Policy — Actual Discharge

In the first reported case in Colorado to do so, a division of the court of appeals adopts a test for evaluating a claim of actual discharge under Colorado law.

COLORADO COURT OF APPEALS **2024COA58**

Court of Appeals No. 23CA1008
Larimer County District Court No. 23CV30135
Honorable Joseph D. Findley, Judge

Debbi Potts,

Plaintiff-Appellant,

v.

Gaia Children, LLC d/b/a The Learning Experience,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE GROVE
Tow and Lipinsky, JJ., concur

Announced May 23, 2024

Hardin Thompson, P.C., Sara A. Green, Tampa, Florida, for Plaintiff-Appellant

Gardner Legal Services, LLC, Matthew R. Gardner, Boulder, Colorado, for
Defendant-Appellee

¶ 1 In this employment dispute, plaintiff, Debbi Potts, appeals the district court's order dismissing her claim for wrongful discharge in violation of public policy. Adopting a definition of "actual discharge" widely applied by federal courts, we conclude that the allegations in Potts's complaint, if proved, could support a factual finding that she was actually discharged from her place of employment. We therefore hold that, to the extent Potts's complaint relied on a theory of actual discharge, she stated a claim upon which relief could be granted. However, like the district court, we conclude that the allegations in Potts's complaint, even if proved, would not establish that she was constructively discharged. We therefore affirm in part and reverse in part and remand the case for further proceedings.

I. Background

¶ 2 We draw the following factual summary from the allegations in the amended complaint and documents referenced therein.

¶ 3 In April 2022, Potts was hired by defendant, Gaia Children, LLC, d/b/a The Learning Experience (Gaia), to work as a compliance specialist at Gaia's Learning Experience Center, a child

care facility. In her role as a compliance specialist, Potts was a mandatory reporter of child abuse.

¶ 4 Beginning in May 2022, Potts raised concerns about "unsafe practice[s] against the children" with Gaia's owner, Sara Brownell, and Jennifer Wright, the director of the Learning Experience Center. Among other things, she noted that certain staff responsible for child care were not CPR certified or trained and that "[d]efendants were falsifying training records." Potts alleged that she told Brownell and Wright that, on one occasion, she had been an "eyewitness to a child who stopped breathing," and that Gaia's staff "failed to call the paramedics for this child."

¶ 5 Gaia did not change its practices. On June 24, 2022, Potts reported Gaia and the Learning Experience Center to the "Colorado Department of Licensing"[1] and Larimer County Child Protection Services.

¶ 6 The following week, investigators from both agencies interviewed Potts at the Learning Experience Center. After the

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[1] We presume that this is a reference to the Division of Early Learning Licensing and Administration, which is part of the Colorado Department of Early Childhood.

interview, Wright approached Potts and asked her "what the investigators were inquiring about." After Potts told Wright that "she could not speak about what was discussed," Wright "immediately told [Potts] to leave and go home." Potts's shift had not ended, and she had never been sent home early before.

¶ 7 The following morning, a Thursday, Wright initiated the following text message exchange with Potts:

Wright and Potts's Text Exchange

¶ 8 Potts, believing her employment had been terminated, picked up her paycheck from the Learning Experience Center and returned her work-related items. No one at the Learning Experience Center questioned the return of the items, asked Potts if she was quitting, or discussed Potts's return date. Potts interpreted this interaction as confirming her belief that she had been fired.

¶ 9 The following Tuesday, July 5, Wright emailed the entire staff of the Learning Experience Center to announce that Potts was "no longer a part of the Learning Experience team." Wright's email said that the employees "should no longer speak to [Potts]" and that they should "alert Defendants if [Potts] reached out to them." Later that week, Brownell (Gaia's owner) went to each classroom and told staff members that they were "'in trouble' because [Potts] had 'reported them' to the state."

¶ 10 Potts sued Gaia (along with a related entity, which the parties later agreed to dismiss), alleging that she had been wrongfully discharged against public policy. *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 106-07 (Colo. 1992) (recognizing exception to the at-will employment doctrine if the employee's discharge contravenes a clear mandate of public policy). After Potts amended her complaint, Gaia filed a motion to dismiss, arguing that Potts had not adequately alleged that she was "terminated by Defendant" or that she "reasonably believe[d] she had been terminated." Gaia also asserted that Potts had not alleged that she was "subject to working conditions that became so difficult or intolerable that she had no other choice but to resign, and did not." Instead, Gaia

asserted, the only inference supported by the facts that Potts asserted in her complaint was that she voluntarily resigned.

¶ 11 The district court granted Gaia's motion. Focusing in large part on Wright's text message telling Potts not to come in to work on the day after her early dismissal and to "[e]njoy a nice long holiday weekend," the court concluded that the message could only be interpreted as a friendly grant of additional holiday time. And while the court considered the context in which Wright sent the message — including Potts's early dismissal the previous day, her inquiry about paychecks, and her return of Gaia's equipment — that did not alter the court's interpretation of the situation. In short, the court concluded that, while Potts may have assumed her employment had been terminated, "[t]he same set of facts could also indicate acceptance of a resignation." And because Potts never "confirmed that this situation had led to her discharge," the court ruled, Potts had not alleged "a set of facts that would support *actual* termination."

¶ 12 The court also rejected Potts's constructive discharge theory, concluding that, although she had "plead[ed] some allegations of a difficult work environment," none of those allegations, even if true,

would “support a finding that the working conditions were intolerable prior to leaving.”

¶ 13 Potts appeals the district court’s order dismissing her complaint.

II. C.R.C.P. 12(b)(5) Motion to Dismiss

A. Standard of Review and Principles of Law

¶ 14 We review a district court’s ruling on a C.R.C.P. 12(b)(5) motion to dismiss de novo. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

¶ 15 To survive a C.R.C.P. 12(b)(5) motion to dismiss, a complaint must state a claim that is plausible on its face. *Warne v. Hall*, 2016 CO 50, ¶ 24 (embracing the “plausibility standard” articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A complaint is plausible on its face if the plaintiff has pleaded facts that permit a reasonable inference that the defendant is liable for the alleged misconduct. *Iqbal*, 556 U.S. at 678. When considering whether a complaint has set forth a plausible claim for relief, a court must assume that its factual allegations are true, *Twombly*, 550 U.S. at 555-56, and it must view them in a light most favorable to the plaintiff, *Bewley v.*

Semler, 2018 CO 79, ¶ 14. However, a court need not make that assumption when it is faced with bare legal conclusions disguised as factual allegations. *Warne*, ¶ 9 (citing *Iqbal*, 556 U.S. at 678).

B. Wrongful Discharge Contrary to Public Policy

¶ 16 Unless otherwise agreed upon, the default employment arrangement in Colorado is at will — meaning either the employer or the employee may terminate the relationship at any time, for any reason. *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 523 (Colo. 1996).

¶ 17 There are exceptions to the general at-will rule. As relevant here, a plaintiff may recover for wrongful discharge in violation of public policy by proving the following:

> (1) the employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; (2) the action directed by the employer would violate a specific statute related to public health, safety, or welfare, or would undermine a clearly expressed policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker; (3) the employee was terminated as the result of refusing to perform the act directed by the employer; and (4) the employer was aware that the employee's refusal to perform the act was

> based on the employee's reasonable belief that
> the directed act was unlawful.

Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C., 232 P.3d 277, 281 (Colo. App. 2010).

¶ 18 The district court addressed only the third of these factors, concluding that Potts's complaint must be dismissed because she failed to allege sufficient facts to support a reasonable inference that she did not resign but was instead either actually or constructively discharged. On appeal, the parties likewise dispute only whether it is plausible, based on the allegations in Potts's complaint, that Gaia actually or constructively terminated her employment. We focus our analysis on the same issue.

C. Actual Discharge

¶ 19 The parties do not cite, and we have not found, any published Colorado decision articulating a test for when an employee has been actually discharged. Federal courts have addressed the issue, however, and generally recognize that, regardless of the legal context, "[a]n actual discharge . . . occurs when the employer uses language or engages in conduct that 'would logically lead a prudent person to believe [her] tenure has been terminated.'" *Chertkova v.*

Conn. Gen. Life Ins. Co., 92 F.3d 81, 88 (2d Cir. 1996) (citation omitted); *see also Fischer v. Forestwood Co.*, 525 F.3d 972, 979-80 (10th Cir. 2008) (same); *Thomas v. Dillard Dep't Stores, Inc.*, 116 F.3d 1432, 1434 (11th Cir. 1997) (same). The "[i]nquiry focuses on the reasonable perceptions of the employee, not on whether formal words of firing were in fact spoken." *Chertkova*, 92 F.3d at 88. The test is therefore objective rather than subjective and requires consideration of whether the circumstances would lead a reasonable employee to understand that she has been discharged from employment.

¶ 20 Part I above details the factual allegations in Potts's amended complaint. When we consider these facts in totality, viewing them in the light most favorable to Potts, we conclude that Potts's complaint included sufficient factual averments to nudge the question of actual discharge "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Three groups of allegations are particularly important to this conclusion.

¶ 21 First, after Potts declined to share the contents of her interview with Wright, Wright sent her home early. That was unprecedented in Potts's experience, and Wright followed up by

telling her, via text message, not to come in to work for the remainder of the week. Wright never provided a return date for Potts.

¶ 22 The district court interpreted the text message innocuously — concluding that "[t]he statement to 'enjoy a nice long holiday weekend' leads one to believe that there is an end to the holiday from work." That understanding of the text message is plausible. But Potts offered a competing, and equally reasonable, understanding of what Wright intended to convey — the message was sarcastic and essentially told her not to come back to work at all. Rather than viewing Potts's allegations in that favorable interpretive light, however, the district court decided to construe the message consistent with what Gaia, the defendant, said that it should mean. This was error because, when read in the context of Potts's other allegations, a reasonable person could interpret the text message as sarcastic and insincere. Because that interpretation favors Potts, the district court should have adopted it when resolving Gaia's motion to dismiss.

¶ 23 Second is Wright's decision to send Potts, Gaia's compliance specialist, home in the midst of an investigation by state and local

authorities. Wright sent Potts home early on Wednesday and, telling her she was not needed for the remainder of the week, directed her not to return. Viewing the allegations in the most favorable light to Potts, it would be reasonable to infer that Wright's decision to send Gaia's compliance specialist home during an ongoing investigation into Gaia's compliance — the time when she was most needed — was suspect, and that a reasonable person in Potts's position might understand that decision as an indication that she had been terminated. *See Pennypower Shopping News, Inc. v. NLRB*, 726 F.2d 626, 629 (10th Cir. 1984) ("The test of whether an employee has been discharged depends on the reasonable inferences that the employee could draw from the statements or conduct of the employer.").

¶ 24 Third, when Potts picked up her check, she returned equipment owned by Gaia. Potts did not tell anyone that she was resigning and no one at the Learning Experience Center informed her that she could return, or was even expected to return, to work. The district court noted that this could be viewed either as a resignation or as a termination. We agree that the conduct of both parties was ambiguous, but again, because the court was

considering a motion to dismiss, it should have resolved that ambiguity in favor of Potts. *See, e.g.*, *Marinhagen v. Boster, Inc.*, 840 P.2d 534, 540 (Kan. Ct. App. 1992) (reversing trial court's grant of summary judgment in favor of an employer who asserted that the employee had resigned, because "the trier of fact might determine either that [employee] quit since she never called [employer] or that she waited for [employer] to call her back to work and he never did").

¶ 25 In sum, when viewed in the light most favorable to Potts, the well-pleaded allegations in her complaint were sufficient to support a conclusion that Gaia terminated Potts's employment when Wright told her not to return that week, Wright gave Potts a final paycheck, and no one at Gaia said anything about her employment situation when Potts returned her employer-owned equipment. Accordingly, the district court erred by granting Gaia's motion to dismiss Potts's claim to the extent that Potts's complaint asserted that she was actually discharged.

D. Constructive Discharge

¶ 26 In the alternative, Potts contends that, if she was not actually discharged, then she was constructively discharged. The district

court rejected this claim after concluding that it failed as a matter of law. We agree with the district court's conclusion that the allegations in Potts's complaint are insufficient to support a constructive discharge claim.

¶ 27 To prove constructive discharge, a plaintiff must establish deliberate action on the part of an employer that makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign. *Wilson v. Bd. of Cnty. Comm'rs*, 703 P.2d 1257, 1259 (Colo. 1985). The determination of whether the actions of an employer amount to a constructive discharge depends on whether a reasonable person under the same or similar circumstances would view the new working conditions as intolerable and not on the subjective view of the employee. *Id.* at 1259-60.

¶ 28 Employees cannot simply "quit and sue," claiming they were constructively discharged. Instead, the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of competent, diligent, and reasonable employees to remain on the job to earn livelihoods. Thus, the proper focus is on whether the resignation was coerced.

Koinis v. Colo. Dep't of Pub. Safety, 97 P.3d 193, 197 (Colo. App. 2003).

¶ 29 Generally, constructive discharge occurs over a period of time and through a series of incidents. As the California Supreme Court has observed, the adverse working conditions "must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1027 (Cal. 1994); *see also Montemayor v. Jacor Commc'ns, Inc.*, 64 P.3d 916, 921 (Colo. App. 2002) ("Cumulative events can cause working conditions to deteriorate to an intolerable level."). In *Montemayor*, the employee resigned but later prevailed on a constructive discharge claim by presenting evidence that her supervisor had made a concerted effort to harass her, undermine her authority in front of her subordinates, and force her into a demotion. 64 P.3d at 922. On the other hand, in *Christie v. San Miguel County School District R-2(J)*, 759 P.2d 779, 782-83 (Colo. App. 1988), a division of this court affirmed the entry of a directed verdict for an employer on an employee's constructive discharge claim because, although the employee had resigned at the request

of her supervisor, the resignation request was not accompanied by harassment or coercion.

¶ 30 Potts failed to sufficiently plead constructive discharge. To support her claim she alleged the following.

- She reported Gaia to state and county authorities.
- Wright questioned Potts about the contents of her interview with state and county investigators.
- After Potts declined to disclose the contents of the interview, Wright sent her home for the day. This had not happened before.
- The next morning, Wright texted Potts that "[w]e won't need you to come in today" and to "[e]njoy a nice long holiday weekend."

As we have already discussed, Potts contends that the text message, when viewed in context, was sarcastic.

¶ 31 Potts's allegations do not support a conclusion that her working conditions were so difficult or intolerable that she had no other option but to resign. While it would be reasonable to assume that reporting Gaia's violations to state and county authorities may have made Potts uncomfortable, that was part of her job description

as a compliance specialist and mandatory reporter. Likewise, while being sent home from work may have been embarrassing and being told not to come in for the rest of the week could have been frustrating, these events, even when considered together, would not support a conclusion that Gaia had created an intolerable work environment or that Potts had resigned under pressure.

¶ 32 In contrast to the employee in *Montemayor*, Potts was not threatened with demotion, undermined in front of her coworkers, or harassed over a period of time; instead, she was sent home from work and told to stay home for the remainder of the week. If that were the standard, then virtually any employee suspension could constitute constructive discharge. Because we decline to adopt that approach, we conclude that the district court appropriately ruled that Potts could not proceed under a constructive discharge theory.

III. Attorney Fees

¶ 33 Gaia requests its appellate attorney fees because Potts's claim was dismissed under C.R.C.P. 12(b)(5). Because we reverse the district court's dismissal of Potts's complaint, we decline to award fees.

IV. Disposition

¶ 34 We affirm in part and reverse in part and remand the case with directions to reinstate the amended complaint and allow the action to continue under the actual discharge theory.

JUDGE TOW and JUDGE LIPINSKY concur.