COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0454

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CATHY STROZINSKY,

PLAINTIFF-APPELLANT,

V.

SCHOOL DISTRICT OF BROWN DEER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Cathy Strozinsky appeals from a grant of summary judgment to the School District of Brown Deer (the school district) on her claim for wrongful discharge, and from an order dismissing her remaining claim against the school district for constructive discharge. Because a question of

fact exists as to whether the conditions of Strozinsky's employment were made so intolerable as to constitute constructive discharge, we reverse.

I. BACKGROUND.

Strozinsky was employed by the school district as a payroll clerk in its central office from January of 1988 to September of 1995. She performed payroll functions including determining tax withholdings for all payroll checks issued to school district employees. Strozinsky's job also encompassed determining tax withholdings for the paycheck of Superintendent Kenneth Moe. Under the terms of Moe's employment contract, he received a bonus check annually, which Strozinsky was responsible for issuing in 1995. This bonus payment was paid directly into a tax sheltered annuity account, which Moe selected. In July 1995, Strozinsky issued a check payable to Janus Funds, at the request of Moe, in the amount of $9,149.00, as payment of his tax sheltered annuity bonus. The check was issued through the school district's accounts payable checking account. However, because the software used for that account was not capable of withholding social security tax, none was withheld from that check. After informing Moe of her intentions, Strozinsky adjusted Moe's next paycheck to reflect the original omission of the social security tax withholding, making the social security tax withheld on this check higher than normal. Thus, Moe's paycheck following the bonus check included a withholding of the social security tax for the amount normally withheld from his paycheck plus the amount that should have been withheld from the tax sheltered annuity bonus check.

After Moe received his paycheck on July 20, 1995, he confronted Strozinsky regarding the amount of social security tax withheld from his paycheck, apparently angered because of the reduction in his paycheck.

Strozinsky alleges that during this meeting, Moe spoke to her in an intimidating fashion and was "threatening in his demeanor" towards her. It was during this meeting that Strozinsky explained to Moe that the tax laws required him to pay social security taxes on his tax sheltered annuity bonus and that she was required to deduct the amount that should have been withheld from that check from his current paycheck. Strozinsky claims that Moe responded that he did not care, he did not want his check to reflect the withholding, and he threw his check across the desk at her and demanded that she change it.

Strozinsky left Moe's office and called the Internal Revenue Service (IRS) seeking advice. Strozinsky alleges that the IRS informed her that the tax should have been withheld from Moe's check but advised her that she should not argue with Moe, but rather, inform him that he should contact the IRS with his questions directly.

Strozinsky spoke with her immediate supervisor, Don Amundson, who reported directly to Moe, about the advice she received from the IRS. Amundson instructed her to issue a new check to Moe, without the withholding. Strozinsky also informed Amundson that the IRS advised her that she could be held personally liable for taxes not properly withheld,[1] at which time Amundson

[1] In her argument, Strozinsky cites I.R.C. § 3102 (b), which reads: "**Indemnification of employer.**—Every employer required so to deduct the tax [referring to social security tax deductions as required by I.R.C. § 3101(a)] shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer."

Additionally, I.R.C. § 6672 (a) provides:

> **(a) General rule.**—Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition

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told Strozinsky that he would take full responsibility for the failure to withhold, and he signed a statement prepared by Strozinsky to that effect. Strozinsky subsequently issued Moe a check, without withholding any social security taxes for the bonus money or for the regular paycheck. After seeing this check, Moe returned it to Amundson and asked that yet another check be issued, this one to withhold partial social security taxes. Although the computer software program that Strozinsky used in attempting to issue this check was incapable of taking partial withholding, Strozinsky continued to try, at Amundson's request.

Strozinsky alleges that Moe then confronted her again, in Amundson's presence, regarding the situation. During this conversation, Moe admitted he was required to pay the taxes as Strozinsky had originally indicated, but during the course of the discussion Strozinsky described his behavior as being "aggressive, screaming, red-faced, and out of control." Strozinsky contends that Moe expressed anger towards her because she had documented the transactions that took place by having Amundson sign her prepared statement accepting full responsibility for the non-reporting. Strozinsky claims that, as a result of Moe's behavior towards her, she became physically ill. Strozinsky then complained to Karen Rutt, in the school district's human resources department, in writing: "The way Mr. Moe addressed me was very demeaning and very upsetting to me. I would like it understood that I feel this is a form of harassment." Strozinsky also gave a copy of the complaint to Amundson in person and Strozinsky claims he responded by saying "Are you sure you want to do this? You're talking about the

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> to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II or subchapter A or chapter 68 for any offense to which this section is applicable.

superintendent, and you know what he gets like." According to the school district's affidavits, Strozinsky also told Amundson that she could no longer work there because of the incident.

Thereafter, Amundson informed Strozinsky that he had instructed Rutt not to take action on Strozinsky's complaint. Following that day, Strozinsky took a scheduled vacation and returned to work on August 2, 1995. On that day, Strozinsky claims Amundson returned Strozinsky's complaint to her, saying he would pretend he never saw it. The next day, on August 3, 1995, Moe conducted a meeting with Amundson and Strozinsky. Strozinsky alleges that at this meeting she attempted to explain to Moe that she was trying to do her job in the appropriate and legal manner and that she did not trust Amundson or Moe to "back her up" against the IRS and that is why she had Amundson sign the statement. It is Strozinsky's recollection that Moe repeatedly told her if she did not trust him, she should not be working for him. Strozinsky further alleges that Moe instructed her that if she ever again created a document like the statement she had Amundson sign, she would be "out the door."

Strozinsky claims that after this series of interactions, Moe and Amundson retaliated against her by refusing to communicate with her and by placing unnecessary pressure on her. Strozinsky claims that after this retaliation, work became unbearable, and, because she felt threatened, she tendered her written resignation, which became effective September 30, 1995.

Strozinsky now contends that Moe and Amundson's treatment of her constitutes both wrongful and constructive discharge. Strozinsky filed suit against the school district in June 1996. The school district was granted summary judgment on the wrongful discharge claim on May 21, 1997. Strozinsky filed a

motion for reconsideration seeking reversal of the summary judgment, noting that "Wisconsin does not recognize a stand alone cause of action for 'constructive discharge.'" The trial court refused to reverse the grant of summary judgment, but the trial court dismissed the constructive discharge claim finding that a claim for constructive discharge cannot stand alone in Wisconsin. This appeal followed.

II. ANALYSIS.

Our review of a trial court's grant of summary judgment is *de novo.* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We use the same summary judgment methodology as the trial court. ***Id.*** That methodology has been described in many cases, *see, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RULE 802.08(2), STATS. Further, summary judgment may be inappropriate "where motive or intent are at issue." ***Bartman v. Allis-Chalmers Corp.***, 799 F.2d 311, 312 (7th Cir. 1986).

Strozinsky contends that summary judgment was inappropriate because a genuine issue of material fact existed with regard to whether she was discharged because of her efforts to comply with the Internal Revenue Code and § 943.39, STATS.[2] Employment in Wisconsin is "at will." That is, "where an

[2] The section of the Internal Revenue Code to which Strozinsky refers is § 3101 (a), which imposes social security tax on every individual by a percentage of their wage. *See* I.R.C. § 3101 (a). Section 943.39, STATS., reads:

> **Fraudulent writings.** Whoever, with intent to injure or defraud, does any of the following is guilty of a Class D felony:

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employment [is] for an indefinite term, an employer may discharge an employee 'for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.'" ***Brockmeyer v. Dun & Bradstreet***, 113 Wis.2d 561, 567, 335 N.W.2d 834, 837 (1983). Since the employment at will doctrine developed however, exceptions have been carved out by the legislature to avoid discrimination, and by courts seeking to "protect workers who are wrongfully discharged under circumstances not covered by any legislation or whose job security is not safeguarded by a collective bargaining agreement or civil service regulations." ***Id.*** at 568, 335 N.W.2d at 838. One such exception developed by courts is the public policy exception, which allows a discharged employee to recover "when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law." ***Id.*** at 573, 335 N.W.2d at 840. ***Brockmeyer*** instructs, however, that "[c]ourts should proceed cautiously when making public policy determinations," ***id.***, and that the public policy exception is indeed a narrow one. ***Id.*** at 574, 335 N.W.2d at 841.

Strozinsky asserts that her situation falls within the public policy exception to the "at will" employment doctrine. If so, according to ***Brockmeyer***, Strozinsky is required to establish that a public policy exists as evidenced by

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> **(1)** Being a director, officer, manager, agent or employe of any corporation or limited liability company falsifies any record, account or other document belonging to that corporation or limited liability company by alteration, false entry or omission, or makes, circulates or publishes any written statement regarding the corporation or limited liability company which he or she knows is false; or
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> **(2)** By means of deceit obtains a signature to a writing which is the subject of forgery under s. 943.38 (1); or
>
> **(3)** Makes a false written statement with knowledge that it is false and with intent that it shall ultimately appear to have been signed under oath.

existing law, and that her discharge violated that public policy. ***Id.*** at 574, 335 N.W.2d at 840-41. Strozinsky, claims that her "discharge" violated public policy because she was "compelled to act in a way that was contrary to the letter or the spirit of [ ] statutory provision[s]," *see* ***Bushko v. Miller Brewing Co.***, 134 Wis.2d 136, 142, 396 N.W.2d 167, 170 (1986), namely, I.R.C. §§ 3101 and 3102(a) & (b), and § 943.39(1), STATS.

However, because Strozinsky resigned her position, whether ***Brockmeyer***'s exception is met requires a determination as to whether Strozinsky's resignation amounts to constructive discharge, as she claims. A claim for constructive discharge mandates that "a plaintiff … show that his [or her] working conditions were so intolerable that a reasonable person would have been compelled to resign." ***Rabinovitz v. Pena***, 89 F.3d 482, 489 (7th Cir. 1996). "Where work conditions are intolerable, under the constructive discharge doctrine a plaintiff can resign, and then bring suit against her employer as if she were fired." ***Chambers v. American Trans Air, Inc.***, 17 F.3d 998, 1005 (7th Cir. 1994).

We conclude that there are sufficient facts alleged to make this case inappropriate for summary judgment. *See* RULE 802.08(2), STATS. A jury needs to assess whether the conditions at Strozinsky's workplace were so intolerable that a reasonable person would be forced to resign, *cf.*, ***Drabek v. Sabley***, 31 Wis.2d 184, 187, 142 N.W.2d 798, 800 (1966) (reasonableness is a jury question). We also conclude that there exists a genuine issue of material fact as to whether Strozinsky's efforts to comply with the I.R.C. §§ 3101 and 3102(a), and § 943.39(1), STATS., triggered intolerable working conditions, making her "discharge" a violation of public policy. Accordingly, we reverse the judgment of the trial court.

By the Court.—Judgment reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.