

**IN THE COURT OF APPEALS OF IOWA**

No. 7-870 / 07-0616  
Filed January 16, 2008

**KELLY SUE SMITHBURG,**  
Plaintiff-Appellant,

**vs.**

**J & B PLASTICS, INC., and**  
**JAY SILVERMAN,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Jefferson County, Michael R.  
Mullins, Judge.

Plaintiff appeals from a district court ruling granting summary judgment in  
favor of defendants. **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellant.

Theresa C. Davis and Sarah J. Gayer of Shuttleworth & Ingersoll, P.L.C.,  
Cedar Rapids, for appellees.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

**MILLER, J.**

Kelly Smithburg appeals from a district court ruling granting summary judgment in favor of J & B Plastics, Inc. and its former president, Jay Silverman. We affirm the judgment of the district court.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

The summary judgment record reveals the following undisputed facts. Smithburg began working for J & B Plastics in 1999 as an administrative assistant for Silverman. She was in charge of “payroll, typing reports on manufacturing, accounts payable, typing sales quotes and bills of lading, and handwriting some checks.”

A couple of years before Smithburg began working for J & B Plastics she sought medical treatment for a numb sensation in her arms. She was seen again for this condition in 1999 and was referred to physical therapy. Her physical therapist noted that Smithburg “believed the data entry work she did for ten years had aggravated her condition.”

In January 2004, Smithburg awoke on one occasion feeling as if the joints of her fingers were swollen. She sought treatment from her family physician, Dr. Terry Cochran, on January 22, 2004. Shortly thereafter, she began experiencing “intense pain in her right elbow and shoulder in grabbing with her right hand.” In May 2004, Dr. Cochran became concerned that Smithburg was suffering from carpal tunnel syndrome. He referred her to Dr. Michael Pogel, a neurologist, for electromyogram (EMG) testing on her right wrist and arm. The EMG test is used to diagnose and assess the severity of the carpal tunnel injury and assists in localizing the problem.

Smithburg scheduled the EMG test for June 7, 2004. When she arrived at Dr. Pogel's office that day, she filled out a form that asked her whether her condition was work-related. Smithburg placed a question mark next to that question. A receptionist from the doctor's office then called Silverman and asked him to indicate whether Smithburg's "condition was work related and would be covered under workers' compensation coverage, or submit a letter indicating the Smithburg did not use her arm repetitively at work." Silverman "declined to do either" because it was the first notice he had received of Smithburg's medical condition. The doctor's office refused to administer the test after speaking to Silverman. Following Smithburg's inability to obtain the EMG test, Dr. Cochran prescribed "very simple conservative measures," including physical therapy and fitting for a brace, to treat her condition.

When Smithburg returned to work on June 8, she engaged Silverman in a conversation about his refusal to cooperate with Dr. Pogel's office. She continued the conversation the next day, which resulted in a confrontation between her and Silverman. On June 11, 2004, Smithburg received a written warning regarding her "uncooperative attitude" and "disruptive behavior and insubordination in the office." Upon receiving the written warning, Smithburg tendered her resignation with the company.

Smithburg obtained a lower-paying position with a different company in July 2004. She continued with physical therapy until August 2004 by which time her symptoms had improved. An EMG test was performed on Smithburg on August 30 and confirmed the carpal tunnel diagnosis. She did not seek any further medical treatment for her carpal tunnel symptoms after August 2004.

Smithburg initiated workers' compensation proceedings, seeking benefits from J & B Plastics for her carpal tunnel injury. The workers' compensation commissioner denied Smithburg's claim for temporary and permanent disability benefits but awarded her medical expenses after determining her carpal tunnel syndrome arose out of her employment with J & B Plastics.

On June 1, 2006, Smithburg filed a petition in district court against J & B Plastics and Silverman, alleging the defendants tortiously interfered with her medical care and constructively discharged her in retaliation for seeking workers' compensation benefits. The defendants filed a motion for summary judgment, which the district court granted. The district court concluded Smithburg's tortious interference with medical care claim was barred by Iowa Code section 85.20 (2005), the exclusivity provision of the workers' compensation statute. The court further concluded "under the facts of this case, Plaintiff cannot as a matter of law satisfy the elements of constructive discharge."

Smithburg appeals the district court ruling and raises the following issue:

- I. Whether the trial court erred in granting defendants' motion for summary judgment as to plaintiff's claim for wrongful constructive discharge from employment.

**II. SCOPE AND STANDARDS OF REVIEW.**

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut.*

*Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Grinnell Mut. Reins.*, 654 N.W.2d at 535. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *Id.*

### III. MERITS.

Smithburg argues the district court erred in entering summary judgment in favor of defendants on her wrongful discharge claim because reasonable minds could differ as to whether Silverman's conduct regarding her potential workers' compensation claim compelled her to resign from her position with J & B Plastics. We do not agree.

"Constructive discharge exists when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *First Judicial Dist. Dep't of Corr. Servs. v. Iowa Civil Rights Comm'n*, 315 N.W.2d 83, 87 (Iowa 1982). To find constructive discharge, the fact finder, using an objective test, must conclude that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's situation would be compelled to resign." *Haberer v. Woodbury County*, 560 N.W.2d 571, 575 (Iowa 1997).

Smithburg's affidavit in support of her resistance to the defendants' summary judgment motion stated that on June 8, 2004, the day after she was unable to have the EMG performed, she engaged Silverman in a conversation about his refusal to provide Dr. Pogel's office with the company's workers' compensation identification number. According to Smithburg, when she informed Silverman during that conversation that she was suffering from carpal tunnel

syndrome, he “glared at [her] and walked away.” She also alleged during the course of her employment, Silverman “made repeated, disparaging remarks about the quality of medical services rendered by my medical providers” and about “employees who suffered work-related . . . injuries.”

On June 9, Smithburg “confronted Mr. Silverman about his behavior the previous day and he demanded, ‘Do you have any idea how much we have to pay out for workmen’s comp? I just can’t stand hearing that word carpal tunnel.’” Smithburg alleged Silverman then threatened her with disciplinary action “if I continued requesting a Workers’ Compensation employer’s number” and “demanded that if I obtained the EMG testing I must mark the physician’s medical forms and documents that my carpal tunnel was not ‘work-related.’” She told him she would not “follow his instruction” because she did not know at that time whether her injury was work-related.<sup>1</sup>

On June 11, Smithburg received a written warning regarding her “alleged ‘uncooperative behavior.’” Smithburg submitted a letter of resignation from her position with J & B Plastics that same day. She believed she “had no choice but to resign from my job” due to the defendants’ “refusal to cooperate with me, their interference with my medical care, and Mr. Silverman’s instruction that I be untruthful in a written document.”

“Generally, trivial or isolated acts of the employer are not sufficient to support a constructive discharge claim.” *Van Meter Indus. v. Mason City Human*

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<sup>1</sup> Dr. Cochran testified at a deposition “there is always the option[ ] of getting these studies done under the private insurance if there continues to be a delay and discrepancy on the workers’ comp side.” It appears Smithburg ultimately exercised that option as she had the EMG test performed on August 30, 2004, without a workers’ compensation claim number from J & B Plastics.

*Rights Comm'n*, 675 N.W.2d 503, 511 (Iowa 2004). Instead, the “working conditions must be unusually ‘aggravated’ or amount to a ‘continuous pattern’ before the situation will be deemed intolerable.” *Haberer*, 560 N.W.2d at 576 (citation omitted). Conditions will not be considered intolerable unless the employer has been given a reasonable chance to resolve the problem. *Van Meter Indus.*, 675 N.W.2d at 511. “[A]n employee cannot simply ‘quit and sue,’ claiming he or she was constructively discharged.” *Haberer*, 560 N.W.2d at 575 (citation omitted).

The district court was correct in finding “under the facts of the present case, Plaintiff cannot as a matter of law satisfy the elements of constructive discharge.”<sup>2</sup> The undisputed facts reveal Smithburg did not give her employer a “reasonable chance to resolve the problem.” *Van Meter Indus.*, 675 N.W.2d at 511. The first time the defendants were made aware of Smithburg’s medical condition was on June 7. Her resignation only four days later was “precipitous; she overreacted.” *First Judicial Dist. Dep’t of Corr. Servs.*, 315 N.W.2d at 89 (finding employee who resigned the day after her employer restricted her from the jail “failed to make a good faith effort to determine” whether her employer’s action “would render her employment as onerous as she now contends”); *cf. Van Meter Indus.*, 675 N.W.2d at 513 (holding an employee who waited one month before quitting after employer’s adverse act did not act precipitously). Smithburg’s abrupt resignation in the same week her employer first learned of her possible work-related injury did not give her “employer an adequate opportunity to address her grievances.” *Van Meter Indus.*, 675 N.W.2d at 513;

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<sup>2</sup> We accordingly need not and do not address the parties’ arguments regarding the application of section 85.20 to Smithburg’s constructive discharge claim.

see also *Haberer*, 560 N.W.2d at 577 (finding an employee could not succeed on his constructive discharge claim due, in part, to his “rash and intemperate” resignation).

“The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.” *Haberer*, 560 N.W.2d at 575. The work conditions described by Smithburg were not “sufficiently extraordinary and egregious” to establish that a reasonable person in her position would have felt compelled to resign. *Id.* The district court correctly found Silverman’s conduct in the days preceding Smithburg’s resignation did not render her work environment “so intolerable that” she was “forced into an involuntary resignation.” *First Judicial Dist. Dep’t of Corr. Servs.*, 315 N.W.2d at 87 (listing cases with burdensome working conditions where no constructive discharge was found). We therefore conclude summary judgment was properly granted in favor of J & B Plastics and Silverman on Smithburg’s constructive discharge claim.

#### **IV. CONCLUSION.**

The district court did not err in granting summary judgment in favor of the defendants on Smithburg’s constructive discharge claim. We accordingly affirm the judgment of the district court.

**AFFIRMED.**