STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE E. WILKERSON, M.D., Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 265220 Washtenaw Circuit Court
UNIVERSITY OF MICHIGAN, Defendant-Appellant.	LC No. 03-001418-CZ

Before: Donofrio, P.J., and O'Connell and Servitto, JJ.

PER CURIAM.

Defendant, University of Michigan, appeals by leave granted from the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7) and (10) in plaintiff's, Catherine E. Wilkerson, M.D., action alleging sex discrimination and retaliation under the Michigan Civil Rights Act, MCL 37.2101 *et seq*. Because plaintiff did not timely file her claim for discriminatory/retaliatory termination based on the elimination of her position, those claims are time-barred. Plaintiff's claims based on defendant's denial of other employment opportunities arising after December 19, 2000, are not time-barred, but because plaintiff failed to establish a question of fact regarding two of the three positions she identifies, summary disposition was appropriate. We reverse the trial court's order denying defendant's motion for summary disposition with respect to plaintiff's termination claim, and her claim for failure to rehire for the University Hospital prompt care area and Visteon factory position. We remand plaintiff's remaining claim for retaliatory failure to hire for further proceedings in the trial court. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiff was employed as a physician in the prompt care area of defendant's Hurley Medical Center ("Hurley"). In the late 1990s, Hurley began a process of staffing the prompt care area with physician assistants instead of physicians. By 1998, plaintiff was the only physician remaining in the prompt care area, and Hurley indicated that if she left, she would be replaced by a physician's assistant. In August 1999, plaintiff's immediate supervisor, Dr. Carl Chudnofsky, submitted a funding request for the prompt care area and emergency rooms to Hurley's Vice President, Daniel George. Dr. Chudnofsky did not propose eliminating plaintiff's position, but emphasized the need to hire more full-time equivalent physicians for the main and pediatric emergency rooms.

In October 1999, a female physician's assistant confided in plaintiff that Dr. Chudnofsky was sexually harassing her. Plaintiff gave advice and support to the physician assistant, and discussed the physician assistant's problem with hospital administrators. Plaintiff held a longstanding personal belief that Dr. Chudnofsky and her male colleagues were contemptuous of female colleagues and female patients, and that Dr. Chudnofsky was perpetuating a misogynistic "boy's club environment" in the hospital.

In the meantime, Vice President George responded to Dr. Chudnofsky's funding proposal by suggesting that plaintiff's position be eliminated in favor of a lower-paid physician's assistant. The savings would be used to hire another emergency room physician. Dr. Chudnofsky agreed, and Dr. William Barsan, the head of defendant's emergency medicine department, notified plaintiff that her position would be eliminated at the end of 2000. Dr. Barsan advised plaintiff that he would try to find another position for her in defendant's medical system, possibly in one of the freestanding prompt care clinics that defendant intended to open.

Plaintiff believed that she was being terminated in retaliation for opposing Dr. Chudnofsky's discriminatory conduct. Plaintiff complained to Dr. Barsan, and also filed a complaint with the Equal Employment Opportunity Commission and the Michigan Department of Civil Rights.

Plaintiff worked her last shift for defendant on December 17, 2000. Defendant abandoned its plans to open the freestanding prompt care clinics and failed to rehire plaintiff for another position after she was terminated. Defendant continued with its plans to open a new prompt care area at University Hospital, and plaintiff hoped to obtain a position there as a staff physician. In December 2001, defendant decided that the new prompt care area at University Hospital would be staffed entirely by physician assistants, thus foreclosing any opportunity for plaintiff to work there. Plaintiff also hoped to work open shifts in an M-Works occupational injury clinic in 2001, but the shifts were filled with existing employees.

On December 19, 2003, plaintiff brought this action alleging discrimination based on sex and unlawful retaliation. She alleged that defendant eliminated her position, and subsequently denied her other employment opportunities, on the basis of her sex and in retaliation for opposing sexual discrimination. Defendant moved for summary disposition on the grounds that plaintiff's claims were barred by the statute of limitation, and further, plaintiff could not factually support her claims of discrimination and retaliation. The trial court denied defendant's motion.

II

We review de novo a trial court's decision on a motion for summary disposition. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. In reviewing a motion under MCR 2.116(C)(7), the court must accept as true a plaintiff's well-pleaded factual allegations, unless contradicted by any affidavits, admissions, or other documentary evidence submitted by parties, construing them in the plaintiff's favor. *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

III

On appeal, defendant argues that the trial court erred in failing to dismiss plaintiff's claims in their entirety based on the statute of limitations. Defendant relies heavily on our Supreme Court's decision in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), to argue that plaintiff's claims were not timely filed. In *Garg*, *supra* at 282, our Supreme Court held that the "continuing violations" doctrine, previously adopted in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), was contrary to the plain language of MCL 600.5805 and MCL 600.5827. The trial court considered *Garg*, but refused to give it retroactive effect.

It is unnecessary to consider whether *Garg* applies retroactively, because it has no bearing on this case. Plaintiff does not rely on the continuing violations doctrine to argue that she timely filed her discriminatory/retaliatory termination claim. Instead, she argues that she timely filed this claim because it did not accrue until December 31, 2000, which is listed as the effective date of her termination in defendant's internal records. Further, resort to the continuing violations doctrine is unnecessary with respect to plaintiff's claims involving defendant's denial of other employment opportunities arising after 2001. Therefore, we decline to decide whether *Garg* may be given retroactive effect.

Because an action under the Civil rights Act must be brought within three years after the cause of action accrued, the issue in this case is whether plaintiff's discriminatory/retaliatory termination claim began accruing on December 17, 2000, the last day plaintiff worked, or December 31, 2000, the effective date of plaintiff's termination in defendant's administrative records. MCL 500.5805(10); *Collins v Comerica Bank*, 468 Mich 628, 630; 664 NW2d 713 (2003). This Court has held that a claim of discriminatory discharge accrues on the date the plaintiff is discharged. *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 290; 542 NW2d 365 (1995).

In *Parker*, the plaintiffs received written notice on December 3, 1990, that their positions would be terminated pursuant to a work force reduction plan. The last day they actually worked was December 21, 1990. *Parker*, *supra* at 289. The defendant employer's records stated that their effective date of separation was January 7, 1991. *Id.* The plaintiffs filed their discrimination action on January 7, 1994. *Id.* This Court held that the plaintiffs' claims were barred by the statute of limitations, because "[t]he last day worked is the date of discharge," irrespective of the "effective" date of termination recorded by their employer. *Id.*at 290.

In *Collins*, *supra* at 628, the Supreme Court distinguished *Parker*. In *Collins*, the plaintiff was suspended from her position on September 5, 1996, pending an investigation of alleged misconduct. *Id.* at 629. The plaintiff was required to be available during her normal

working hours. *Id.* The defendant terminated her employment on September 25, 1996. *Id.* at 630. The plaintiff filed her discrimination action on September 25, 1999. *Id.* The Supreme Court held that *Parker* was distinguishable, explaining:

> Properly understood, *Parker*'s "last day worked" holding is limited to situations where a discriminatory discharge claim has already surfaced. We agree with *Parker*'s holding because "the effective date of separation" there was not the date of discharge. *Rather, where a plaintiff has already been subjected to an alleged discriminatory termination, a cause of action naturally accrues on the last day an employee worked.*
>
> However, if a discharge has yet to occur, it cannot be said that the last day worked represents the discharge date. Simply put, a claim for discriminatory discharge cannot arise until a claimant has been discharged. Accordingly, the "last day worked" cannot represent the date of discharge, as held in *Parker*, where a claimant's last day actually worked precedes the discharge. [*Id.* at 633 (emphasis added).]

In this case, plaintiff's discriminatory/retaliatory discharge claim had already surfaced by her last day of work, because defendant had already decided that she would not work after 2000. This case is therefore analogous to *Parker*, where the plaintiffs were informed of their discharge ahead of time, but were not "effectively" discharged until after their last day of actual work. *Collins* is distinguishable because, unlike this case, the plaintiff's employment status was still undecided on her last day of work. Here, as in *Parker*, plaintiff was already subjected to an alleged discriminatory/retaliatory termination, so her cause of action naturally accrued on her last day of work, December 17, 2000.

Plaintiff asserts that she was available to work for the remainder of the month, but the documentary evidence does not establish that there was any mutual agreement that she was "on call" during this time, or otherwise committed to work if needed. Plaintiff cites Dr. Barsan's letter of January 6, 2000, but this letter merely states that plaintiff's position would be eliminated at the end of the year. Furthermore, plaintiff informed the Hurley administration that her "preference would be to finish my obligation in early December and have some time with my family before launching into the next phase." Accordingly, there is no evidentiary support for plaintiff's claim that she was available to work after December 17, 2000. Because plaintiff's discriminatory/retaliatory termination claim began accruing, at the latest, on December 17, 2000, and because she did not file her complaint until December 19, 2003, the trial court erred in denying defendant's motion for summary disposition with respect to this claim.[1]

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[1] Our Supreme Court recently addressed the accrual of a claim alleging a violation of the Civil Rights Act in *Joliet v Pitoniak*, 475 Mich 30; 715 NW2d 60 (2006). In *Joliet*, the Court held that "if a plaintiff's complaint does not make out a claim of *discriminatory discharge*, a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts
(continued…)

However, the trial court correctly determined that plaintiff's claims based on defendant's failure to consider her for other employment opportunities were not barred by the statute of limitations. Plaintiff alleged that defendant denied her employment opportunities that became available in 2001 and 2002 in retaliation for filing an administrative civil rights complaint. Each of these alleged lost employment opportunities occurred within the three-year period before plaintiff filed her complaint. The Supreme Court's abrogation of the continuing violations doctrine in *Garg* is not relevant to these claims, because they pertain solely to occurrences within the limitations period. Defendant argues that plaintiff should not be permitted to extend her cause of action by continually applying for new positions after she was terminated. In essence, this argument is predicated on the converse of the continuing violations doctrine, i.e., that claims for recent alleged acts of discrimination should not be deemed timely if they are sufficiently related to past acts. Defendant fails to offer any legal support for this argument and we find it unpersuasive. We conclude that the trial court properly determined that plaintiff's claims based on defendant's failure to consider her for other employment opportunities arising after December 19, 2000, were not barred by the statute of limitations.

IV

Defendant alternatively argues that plaintiff's claims alleging that it improperly denied plaintiff other employment opportunities after 2000 should have been dismissed under MCR 2.116(C)(10), because there was no genuine issue of material fact with respect to the factual merit of these claims. The Civil Rights Act provides that an employer shall not discriminate on the basis of sex. MCL 37.2202(1). The statute also provides that a person may not retaliate against a person for opposing a violation of the act, or for filing a complaint under the act. MCL 37.2701(a).

Plaintiff does not rely on direct evidence of discrimination or retaliation, so she must prove her claims through indirect evidence utilizing the shifting burdens of proof paradigm enunciated in *McDonnell Douglas Corp v Green*, 411 US 792, 802-805; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). Under this test, plaintiff must prove that (1) she belongs to a protected class (in the instant case, a woman and a person who engaged in a protected activity); (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). Defendant does not dispute that plaintiff presented sufficient evidence to establish a genuine issue of fact in support of each of these elements as they apply in the context of plaintiff's action.

Once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an

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committed before the termination. *Id.* at 32. Because this case involves a discriminatory discharge claim, not a claim of constructive discharge, *Joliet* is instructive. Nonetheless, because plaintiff was already subjected to an alleged discriminatory/retaliatory termination on her last day of work, our conclusion that her claim began accruing on that date is not inconsistent with the rationale in *Joliet*.

effort to rebut the presumption created by the plaintiff's prima facie case. *Hazle, supra* at 464. In *Hazle*, the Supreme Court explained:

> The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel. . . . If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away.
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> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. . . . [A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for unlawful discrimination. [*Id.* at 464-466 (citations and internal quotation marks omitted).]

A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Feick v Monroe Co,* 229 Mich App 335, 343; 582 NW2d 207 (1998).

In support of her claim, plaintiff identified three job opportunities that defendant denied her after she lost her position in the prompt care area: (1) a position as a staff physician in the new prompt care area at University Hospital; (2) the opportunity to work open shifts in defendant's M-Works occupational medicine program; and (3) the opportunity to work as a M-Works physician in an assignment at a Visteon plant.

In the year following her termination, defendant formulated plans to open an overnight prompt care area at University Hospital. At a December 20, 2001, faculty meeting, Dr. Barsan proposed staffing the new prompt care area with physician assistants, because the department did not have enough funds to hire additional attending physicians. The minutes for this meeting indicate, "Most of the faculty present supported having the PAs [physician assistants] staff the fast track; > 70% were in agreement and all (100%) said they would be supportive." Plaintiff's husband submitted an affidavit in which he averred that he was present at the meeting when Dr. Barsan made this decision, and did not believe that the faculty voted. He recalled that Dr. Barsan asked "does anyone have a problem with this" and then moved on.

Dr. William Wilkerson's affidavit does not establish a question of fact regarding Dr. Barsan's alleged retaliatory intent. Dr. Barsan's proposal was consistent with the evolving model for prompt care area staffing, and a majority of the 12 faculty members and four chief residents present at the meeting agreed to it. Under these circumstances, a reasonable trier of fact could not infer that Dr. Barsan contrived this plan in order to block an employment opportunity for plaintiff. Plaintiff did not introduce any evidence that any of the other faculty members were motivated to retaliate against her, and Dr. William Wilkerson's affidavit does not

establish that Dr. Barsan interfered with anyone's attempt to object to the plan or circumvented full discussion. Accordingly, defendant was entitled to summary disposition with respect to this claim.

Also in 2001, supervision of defendant's M-Works occupational injury clinic came under the emergency medicine department. Plaintiff alleges that she tried to work some open shifts at M-Works in 2001, when a physician went on maternity leave, but defendant did not select her. When the EEOC interviewed Dr. Andrew Barnosky in the course of investigating plaintiff's complaint, it recorded the following summary of his explanation for why plaintiff could not work at M-Works:

> The claimant has a Masters degree in Public Health and she is board certified in preventative medicine, which is a related field to occupational medicine. The claimant could not be considered for any position in occupational medicine because of hospital credentialing guidelines. The guidelines stipulate that in order to work in occupational medicine at UM, a physician must be board certified in either Occupational Medicine or Emergency Medicine. The credentialing guidelines were probably developed at the time Occupational Medicine was moved to Emergency Medicine from Internal Medicine. He is not sure who developed the credentialing guidelines but believes Dr. Barsan and the hospital administration developed the guidelines. He believes that claimant would be qualified to work in occupational medicine in other facilities but she is not qualified under the current UM Hospital guidelines.

In fact, the credentials were not changed, and plaintiff's board certification in preventative medicine would have qualified her for an M-Works position.

We conclude that the evidence established a question of fact regarding defendant's motives for failing to rehire plaintiff for any of the open M-Works shifts. Evidence that Dr. Barsan or other administrators disseminated false information regarding the required credentials for the position, combined with evidence that Dr. Barsan told plaintiff that he would be angry with her if she pursued her complaints outside the department, is sufficient to support an inference that Dr. Barsan may have denied plaintiff an M-Works position in retaliation for her civil rights complaint and opposition to alleged discrimination, and manufactured an excuse for not hiring her. Defendant argues that no physicians were hired for M-Works in 2000 or 2001, and that the M-Works director, Dr. Daniel Chapman, was able to assign all open shifts to physicians who were already on staff. However, a trier of fact could still infer that defendant chose this option in order to avoid considering plaintiff for rehire. Thus, the trial court properly denied defendant's motion for summary disposition with respect to this claim.

Finally, we conclude that plaintiff failed to establish a question of fact with respect to the M-Works position in a Visteon plant that defendant filled in 2002. Plaintiff alleges that she did not apply for this position because she relied on Dr. Barnosky's statement that she did not possess the necessary credentials. However, Dr. Barnosky gave the statement in question on June 25, 2003, after the position was filled. Accordingly, plaintiff failed to establish a causal connection between her failure to apply for the position and defendant's dissemination of inaccurate information. Thus, defendant was entitled to summary disposition with respect to this claim.

V

Plaintiff's claim for discriminatory/retaliatory termination based on the elimination of her position are time-barred because they were not timely filed. Plaintiff's claims based on defendant's denial of other employment opportunities arising after December 19, 2000, are not time-barred. However, because plaintiff failed to establish a question of fact regarding the prompt care position and the M-Works plant assignment, summary disposition was appropriate on those claims. Plaintiff did present sufficient evidence to establish a question of fact regarding the M-Works open shifts to withstand summary disposition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto