

STATE OF MICHIGAN
COURT OF APPEALS

MITCHELL J. NICHOLS, RICHARD PORTIS, and
TERRY PORTIS,

UNPUBLISHED
December 21, 1999

Plaintiffs-Appellants,

v

GRAND TRUNK WESTERN RAILROAD, INC.
and GRAND TRUNK WESTERN RAILROAD
CO.,

No. 204901
Wayne Circuit Court
LC No. 95-516646 CZ

Defendants-Appellees.

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Summary disposition was granted in favor of defendants on plaintiffs' claims of racial discrimination brought pursuant to the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*¹ Plaintiffs appeal as of right, and we affirm.

Plaintiffs are African-American males who worked as car men in defendant's Port Huron car shop. While employed by defendant, they were allegedly subjected to racial harassment, which included a cross burning, Ku Klux Klan signs on company property, Caucasian employees who came to work on Halloween in black face and chains, and daily racial jokes and slurs.

On November 12, 1991, plaintiff Nichols was discharged for failing to comply with company policy. Plaintiff Nichols had been injured at work on October 31, 1990. He underwent a routine physical examination in order to return to work, and a drug screen performed at this time tested positive for the presence of cocaine. Company policy required that plaintiff Nichols enter into an employee assistance program or submit a negative drug screen within forty-five days. Plaintiff Nichols did not timely submit a negative drug screen, which resulted in his discharge. Plaintiff Portis was injured at work and was unable to perform his normal duties. Plaintiff Portis allegedly sought to return to work in a limited capacity, but his request was denied when defendant asserted that there was no light duty available. Plaintiff Portis was never officially discharged. Plaintiffs filed suit alleging employment discrimination. Specifically, plaintiffs alleged that they were treated differently than similarly situated

Caucasian employees. Defendant moved for summary disposition based on the timeliness of plaintiffs' complaint, plaintiffs' ability to establish the elements of their discrimination claims and collateral estoppel. The trial court granted defendant's motion for summary disposition.

Plaintiffs first argue that the trial court erred in holding that the statute of limitations had expired prior to the filing of their complaint. We agree. Whether a claim is within a statutory period of limitation is a question of law that is reviewed de novo. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997). An employment discrimination action brought under ELCRA must be brought within three years after the cause of action accrued. *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1991). 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 the present case, plaintiff Nichols was discharged on November 12, 1991. A federal action was filed by plaintiffs on February 18, 1994, which was dismissed, without prejudice, on June 13, 1995. This complaint was filed on June 9, 1995. Defendant does not dispute that the statute of limitations was tolled during the pendency of the federal action. Accordingly, plaintiffs' complaint was timely filed within the statutory three year period of limitation.² *Meek, supra*.

Plaintiffs next argue that the trial court erred in granting summary disposition on plaintiff Portis' claim of disparate treatment. We disagree. This Court reviews a decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition in this case was properly granted pursuant to MCR 2.116(C)(10). In ruling on a motion brought under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

MCL 37.2202(1); MSA 3.548(202)(1) prohibits an employer from discharging or otherwise discriminating against an individual based on race. A plaintiff may establish a prima facie case of discrimination by establishing that the plaintiff incurred adverse employment action under circumstances which give rise to an inference of discrimination. Once a prima facie case is established, the employer must come forward with a legitimate nondiscriminatory reason for the adverse employment action. Once that burden is met, the plaintiff must prove that the employer's stated reason is merely a pretext for discrimination. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999). A plaintiff may establish pretext by demonstrating that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; but (4) the adverse employment action occurred under circumstances which give rise to an inference of unlawful discrimination. *Id.* at 361. Circumstances give rise to an inference of discrimination when the plaintiff was treated differently than persons of a different class for the same or similar conduct. *Id.*

In the present case, plaintiff Portis alleged that his injury was treated differently than injuries sustained by similarly situated Caucasian employees. In support of this assertion, plaintiff Portis

submitted documentary evidence in which various co-workers opined that Caucasian employees were permitted to return to light duty work following an injury, while plaintiff Portis was denied that opportunity. However, representatives for defendant noted that light duty work is not available for every department and is contingent upon the classification of the permanence of the injury.

Affidavits filed in support of or in opposition to a motion for summary disposition must be based on personal knowledge and set forth with particularity facts which would be admissible as evidence to establish or deny the grounds stated in a dispositive motion. *SSC Associates Limited Partnership v Detroit General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Opinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy a party's burden. A disputed fact must be established by admissible evidence. *Id.* In the present case, plaintiff Portis failed to provide admissible evidence setting forth specific facts to establish that similarly situated employees were treated differently. *Id.* Furthermore, plaintiff Portis recovered monetary damages from defendant for permanent injuries sustained from an act of negligence which occurred at defendant's facility. Plaintiff Portis contends that he is also entitled to recover for the emotional injuries which occurred due to the racially charged hostile work environment. However, a hostile work environment claim is actionable only when the conduct is sufficiently severe and persistent to affect the psychological well being of the employee. *Langlois v McDonald's Restaurants of Michigan, Inc.*, 149 Mich App 309, 317; 385 NW2d 778 (1986). Plaintiff Portis presented no evidence of the injuries sustained as a result of the allegedly hostile work environment. Accordingly, the trial court did not err in granting defendant's motion for summary disposition of plaintiff Portis' complaint.³

Plaintiffs next argue that the trial court erred in granting summary disposition of plaintiff Nichols' claim of disparate treatment. We disagree. Plaintiff Nichols also failed to demonstrate that he was treated differently than similarly situated employees with admissible documentary evidence. *SSC Associates, supra*. Lastly, plaintiffs assert that the trial court erred in compelling defendant to produce documentary evidence regarding the employment records of co-workers which plaintiffs were not permitted to examine. However, plaintiffs have failed to cite authority in support of their position. A statement of a position without citation to authority is insufficient to raise an issue before this Court. *Mann v Mann*, 190 Mich App 526, 536-537; 476 NW2d 439 (1991). "A party may not leave it to this Court to search for authority to sustain or reject a position." *Id.* In any event, the trial court conducted an in camera review of the discovery and advised plaintiffs of the content of the discovery without divulging confidential information regarding plaintiffs' co-workers.⁴ Accordingly, the trial court did not err in failing to allow plaintiffs to examine the discovery. *Mann, supra*.

Affirmed.

/s/ Harold Hood

/s/ Kathleen Jansen

¹ Because plaintiff Terry Portis' claim of loss of consortium is derivative of her husband's claims, the term "plaintiffs" refers to Mitchell Nichols and Richard Portis. The singular term "defendant" is used to refer to plaintiffs' employer, Grand Trunk Western Railroad.

² As previously stated, plaintiff Portis was never officially discharged from employment. However, assuming that the date of his injury, March 25, 1991, could be construed as the date of discharge, the allegations by plaintiff Portis are timely. *Meek, supra*.

³ In fact, plaintiffs' complaint does not contain a prayer for relief seeking an award of economic as well as non-economic damages regarding plaintiff Portis.

⁴ Our review of the confidential personnel files of similarly situated employees confirms that there was no evidence contained therein which would have demonstrated that plaintiff Nichols was treated differently.