STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellants,

v

GRAND TRUNK WESTERN RAILROAD INCORPORATED and GRAND TRUNK WESTERN RAILROAD COMPANY,

Defendants-Appellees.

UNPUBLISHED
December 21, 1999

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

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

WHITE, P.J. (concurring).

I agree with the majority's disposition to affirm, but would add the following. Plaintiff Nichols argued below and continues to argue on appeal that in determining whether he was treated differently than similarly situated employees, the trial court should not have looked to employees who failed drug tests and did not timely obtain re-tests, but rather, should have looked to employees who were insubordinate. Nichols supports his argument on appeal with a single citation, to an affidavit of another employee, Greg McGregor, in which McGregor averred

> that white employees were often insubordinate and remain employed. For example, Jerry Watson, with whom I worked, flatly refused to take a drug test when requested by supervisor [sic]. Similarly, Roger Hawker, another white employee, refused a direct order to work from his supervisor, and was not terminated.

I agree with plaintiffs that similarly situated employees need not be in all relevant aspects identical to the plaintiff. See *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 369-370; 597 NW2d 250 (1999); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645; 513 NW2d 441 (1994), *Wolff v Automobile Club*, 194 Mich App 6, 12; 486 NW2d 75 (1992). However, Nichols did not present sufficient evidence from which one could infer that his alleged "insubordination" was similar to the conduct of the employees referred to in McGregor's affidavit, about which the record reveals next to nothing. Importantly, Nichols did not dispute below that defendant, as a railroad, is

subject to Federal Railroad Administration regulations prohibiting alcohol and drug use,[1] as evidenced in the employee manual, and did not dispute that the root of his discharge was his failure to comply with those regulations. Defendant submitted the work records of other employees that had failed drug tests to the circuit court for in camera inspection. The records show that eight other employees were discharged who had tested positive for drugs or alcohol and then did not comply with the directive to re-test within forty-five days or enter the employee assistance program. Of the eight, two employees were not African-American, and both of them were discharged. In contrast, Nichols presented no evidence regarding the circumstances of Watson's alleged refusal to take a drug test. Under these circumstances, Nichols failed to present sufficient evidence of pretext to rebut the legitimate, non-discriminatory reason defendant articulated for discharging him, and his discriminatory discharge claim was thus properly dismissed.[2]

I agree that Portis also failed to show that others who were given light work were similarly situated.

Plaintiffs also appeal the dismissal of their hostile environment racial harassment claims. Plaintiffs testified at deposition, in response to questioning about each individual allegation of racial harassment in the complaint, that the incidents began around the time they were hired (in 1969 and 1976) and continued through 1990. After defendant argued below that plaintiffs' claims were barred by the statute of limitation, plaintiffs submitted affidavits stating that "racially offensive pictures were placed on the employee bulletin boards and work area . . . and racially offensive slogans contained on box cars continued to exist periodically until my last day of work."

Apart from Nichols' discharge and Portis' not being permitted to return to work, which occurred in late February and March 1991 (within the three-year limitations period), and were for legitimate non-discriminatory reasons, the affidavits contain the only allegations of racial harassment[3] within the three-year limitations period, i.e., occurring on or later than February 18, 1991. The deposition testimony excerpts before us do not contain testimony, and plaintiffs did not submit affidavits, describing the racially offensive pictures or slogans addressed in the affidavits or stating when or how often they appeared. Plaintiffs' affidavits concerning the activity within the limitations period did not establish hostile environment racial harassment.

Regarding the continuing violations theory, plaintiffs testified that around 1981 a cross was burned at the car shop. Plaintiffs testified that they spoke to a member of the NAACP about the cross burning because defendant did nothing about it. Plaintiffs testified that around 1986 or 1987 a Ku Klux Klan sign was painted on a shed in the sandblast area and remained there for a few days. Portis testified that he told the union about it. Nichols testified that for about five years from 1985 to and including 1990, pictures depicting black men as monkeys and other insulting pictures were hung in the work area. Plaintiffs testified that they would complain to a supervisor about the pictures and that they would be taken down. Nichols also testified that he complained to his union representative when an employee repeatedly told him racial jokes.

The continuing violation doctrine may be applied only where the conduct occurring outside the three-year statute of limitations was such that the plaintiff had no reason to assume that he or she could

file an action based on that conduct. See *Sumner*, *supra* at 538. On the record before us, the alleged acts had the degree of permanence which should have triggered plaintiffs' awareness and the duty to assert their rights. While the events alleged to have occurred beyond the limitations period are egregious, offensive and inexcusable, the trial court did not err in granting summary disposition under the circumstances.

/s/ Helene N. White

[1] The lower court record contains regulations entitled "Control of Alcohol and Drugs use in Railroad Operations," 49 CFR Part 219, that are included as part of defendants' field manual. Defendants' answer asserted that Nichols was fired for insubordination and for using drugs in violation fo the Federal Railway Administration, and pleaded as an affirmative defense that Nichols failed to get a second, drug-free urine test within the time frame set by the Federal Railway Administration.

[2] I agree with the majority that plaintiffs' claim that the trial court erred in not allowing them to review the employment records submitted for in camera inspection is unsupported by authority, and would add that plaintiffs neither addressed or rebutted the court's determination that under the Federal Public Health Service Act, 42 USC 290dd, the contents of the employee records could not be disseminated to plaintiffs.

[3] Plaintiffs also submitted an affidavit from another employee stating that "there was a particular incident in late 1991, or early 1992 when a hangman's noose was left in my work area. At this point I was the only black among 200 or so employees." Plaintiffs cite no authority to support the proposition that they could support their racial harassment claims with incidents occurring when plaintiffs were no longer in the workplace and the terms or conditions of their employment were not affected thereby.