STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE Y. POWELL,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellant,

and

ROBIN PRATT, a/k/a ROBIN PRATT-STEPHENS, BURNIE STEPHENS, and DARYL TERRY,

Defendants.

UNPUBLISHED
July 21, 2000

No. 218367
Jackson Circuit Court
LC No. 98-088818-NO

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In this hostile work environment sexual harassment action, defendant Michigan Department of Corrections, appeals by leave granted the trial court's denial of its motion for partial summary disposition with respect to plaintiff's economic damage claims of reinstatement and front pay. Defendant contends that plaintiff's claims are barred after the date it acquired evidence that she engaged in misconduct during her employment which would have led to her termination. We reverse and remand.

Plaintiff began her employment with defendant as a corrections officer on August 20, 1989. Defendant's employee handbook contains a work rule prohibiting improper or overly familiar conduct with prisoners, parolees, or probationers, including cohabitation and sexual contact. The policy also requires employees to report any unauthorized contacts to the

administration.[1]

In compliance with departmental policy, plaintiff submitted a memorandum to the warden dated March 11, 1997. In the memorandum, plaintiff informed the administration that ten years prior (before she was hired by defendant) she had a relationship with a recent parolee named Willie Brown and that they had a son named Oterias together. Approximately three months later, defendant began receiving anonymous reports that plaintiff and Brown were living together in violation of departmental policy. In response, defendant conducted an investigation, but was unable to substantiate the allegations. As part of the investigation, plaintiff completed a questionnaire dated December 15, 1997 in which she stated that while she had contact with Brown since his release from prison in February 1997, she only saw him to facilitate the visitation of their son and that she had reported this contact to defendant. Plaintiff also stated that she and Brown were not living together, and that although she was pregnant with another child, Brown was not the father. Plaintiff subsequently gave birth to a son named Malik on March 16, 1998.

On June 10, 1998, plaintiff filed a complaint against defendant, two male supervisors, and the assistant deputy warden for hostile work environment sexual harassment and assault and battery. On or about July 8, 1998, plaintiff's employment was terminated because she failed to return to work after exhausting her worker's compensation supplemental benefits and her leave entitlement under defendant's leave of absence policy.[2] Plaintiff later filed a second amended complaint, alleging hostile work environment sexual harassment against defendant, and assault and battery and intentional infliction of emotional distress against the remaining defendants. In support of her sexual harassment claim against defendant, plaintiff alleged that she "has suffered and continues to suffer damages to include but not limited to . . . financial hardship [and] and lost earning[s]."

On December 16, 1998, plaintiff testified in a criminal case involving her eldest son that Brown was Malik's father and that she and Brown were engaged and had been living together for "roughly a year." Defendant obtained this information and on February 1, 1999 filed a motion for partial summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant argued that plaintiff's claim for economic damages, which included reinstatement and front pay, were barred after December 16, 1998 – the date it acquired evidence that plaintiff engaged in misconduct during her employment which would have led to her dismissal. In response, plaintiff maintained that there was a genuine issue of fact regarding whether her alleged cohabitation and sexual contact with Brown would have resulted in dismissal since she had informed defendant, during her employment, that there was a prior relationship and a child between them. The trial court agreed, noting that defendant knew that plaintiff and Brown were going to have contact, "and when people have contact, it doesn't take very long to get pregnant."

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[1] Plaintiff received a copy of the handbook in 1989. The relevant policy was later revised in 1996, before plaintiff's termination, to include more specific language regarding prohibited conduct. Plaintiff does not dispute that she received the revised policy, which she submitted and referenced in support of her position below.

[2] Plaintiff was apparently on a leave of absence from April 27, 1997 until her termination.

Defendant argues on appeal that the trial court erred in denying its motion for partial summary disposition with respect to reinstatement and front pay based on the after-acquired evidence doctrine. We agree.

This Court reviews a decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 565 NW2d 877 (1999). Although the trial court did not state under which subrule of MCR 2.116(C) summary disposition was denied, it is clear that the court relied upon MCR 2.116(C)(10) because it looked to materials outside the pleadings. When reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Id.*; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith*, *supra* at 454-455; *Quinto*, *supra*.

This Court has adopted the after-acquired evidence rule set forth by the United States Supreme Court in *McKennon v Nashville Banner Publishing Co*, 513 US 352; 115 S Ct 879; 130 L Ed 2d 852 (1995). *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 113; 532 NW2d 889 (1995). The rule was recently summarized by this Court as follows:

> . . . [A]n employee discharged in violation of the Civil Rights Act is not barred from all relief when, after his discharge, the employer discovers evidence of wrongdoing that would have led to the employee's termination on lawful and legitimate grounds. *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 109-110; 532 NW2d 889 (1995) (citing *McKennon v Nashville Banner Publishing Co*, 513 US 352; 115 S Ct 879; 130 L Ed 2d 952 (1995)), see also *Horn v Dep't of Corrections*, 216 Mich App 58; 548 NW2d 660 (1996) . . . . Rather, any wrongdoing on the employee's part may be reflected in the relief awarded. *Id.* at 111-112. Where evidence of employee misconduct is subsequently discovered in a discriminatory discharge case, reinstatement and front pay are generally not appropriate remedies. *McKennon, supra*; *Wright*, *supra* at 111-113. With respect to an award of back pay in such cases, "[t]he beginning point in the trial court's formulation of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered." *McKennon*, *supra*; *Wright*, *supra* at 112. [*Smith v Union Charter Township (On Rehearing)*, 227 Mich App 358, 362-363; 575 NW2d 290 (1998) (footnote omitted). See also *Grow v WA Thomas Co*, 236 Mich App 696, 708-709; 601 NW2d 426 (1999).]

Applying these principles to the present case, we conclude that the trial court erred in determining that a factual issue remained regarding whether plaintiff would have been dismissed for cohabitating and engaging in sexual contact with a parolee. Plaintiff's sworn testimony in an unrelated criminal case established that she was cohabitating with parolee Brown and had given birth to his son while she was still employed with defendant, even though she had denied these facts during defendant's internal investigation. There is no dispute that plaintiff received defendant's employee handbook which clearly prohibits overly familiar conduct, including cohabitation and sexual contact, between employees and parolees. Consistent with the handbook's statement that such conduct would result in disciplinary

action up to and including termination, defendant's Special Assistant to the Director submitted an affidavit stating that plaintiff would have been dismissed had defendant known that she violated the work rule prohibiting improper relationships. The affidavit further provided that defendant had terminated fifty-five employees within a twenty-month period for violating the same rule. Although plaintiff argues that this evidence is untrue, she presented no evidence to raise a genuine factual issue regarding whether she committed the misconduct or whether defendant would not have dismissed her for the misconduct. Plaintiff's unsubstantiated allegations to this effect are insufficient to raise a genuine issue of material fact regarding whether defendant would have dismissed her for the misconduct. MCR 2.116(G)(4).

Therefore, to the extent defendant is liable for plaintiff's claim under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, plaintiff is not entitled to reinstatement and front pay under the circumstances of this case, *Horn*, *supra* at 68. We further conclude that an award of back pay is limited to "the date of the unlawful discharge to the date the new information was discovered." *Smith*, *supra* at 363. Although defendant states that it acquired evidence of plaintiff's wrongdoing on December 16, 1998, the date plaintiff's testimony was taken in the criminal proceeding, it submitted no documentary evidence in support of this assertion. We therefore remand to the trial court for a determination regarding the exact date defendant discovered the evidence of misconduct.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot