STATE OF MICHIGAN

COURT OF APPEALS

DARLENE KRUSINSKI,

Plaintiff-Appellant,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 19, 2004

No. 239873
Macomb Circuit Court
LC No. 2000-002173-CL

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the opinion and order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff filed the present suit after defendant refused to hire her. Plaintiff claimed that defendant unlawfully discriminated against her on the basis of a perceived disability and that defendant retaliated against her by refusing to hire her because she made a sexual harassment complaint against a plant doctor who conducted a pre-employment physical examination.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion, and may grant the motion if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff contends that the trial court erred in determining that the six-month period of limitation contained in the employment application that she signed was a valid contractual provision and a reasonable restriction of the statutory period of limitation.[1] Plaintiff argues that

[1] Immediately above plaintiff's signature, the employment application contained the following provision:

(continued…)

the limitation did not apply because no valid contract existed between the parties, that any contract was an invalid adhesion contract, and that plaintiff's employment claim is based on a continuing series of acts and therefore was timely filed.

Contracting parties may agree to limit the time in which a lawsuit may be brought to a period shorter than the applicable statute of limitations. *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 124-125; 301 NW2d 275 (1981). "The boundaries of what is reasonable under the general rule require that the claimant have sufficient opportunity to investigate and file an action, that the time not be so short as to work a practical abrogation of the right of action, and that the action not be barred before the loss or damage can be ascertained." *Id.*; see also *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 19-20; 564 NW2d 857 (1997) (contracting parties may limit the period of limitation in an employment contract, but may not utilize a vague and ambiguous savings clause to preserve a shortened limitation period when the period specified in the contract is found unreasonable).

Relying on this Court's decision in *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001), the trial court concluded "that plaintiff has had a sufficient opportunity to investigate and file an action, that the six-month period is not so short as to work a practical abrogation of the right of action, and the action is not barred before the damage could be ascertained." Based on *Timko*, the court also rejected plaintiff's claim that there was a lack of consideration to support the contract and that the agreement was a contract of adhesion. We agree.

(…continued)

> **READ CAREFULLY BEFORE SIGNING:**
>
> * * *
>
> 8. In consideration of Chrysler's review of my application, I agree that any claim or lawsuit arising out of my employment with, or my application for employment with, Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I **WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY.** Should a court determine in some future lawsuit that this provision allows an unreasonably short period of time to commence a lawsuit, the court shall enforce this provision as far as possible and shall declare the lawsuit barred unless it was brought within the minimum reasonable time within which the suit should have been commenced.

Plaintiff acknowledged that she was given the opportunity to read this, and admitted that she read "most" of the material in this section.

In this case, plaintiff immediately recognized that the plant doctor's alleged behavior was inappropriate; in fact, she claimed that she refused to comply with his request that she close the door to the examining room and remove her blouse. After learning of the incident, plaintiff's father, a Chrysler employee, even contacted the labor relations manager at the plant to complain that plaintiff had not been hired and to suggest that the doctor had retaliated against her for her refusal to remove her clothes. Moreover, defendant has conceded that the limitation period began to run – at the very latest – when plaintiff was informed in September 1998 that she would not be hired. Accepting this concession, plaintiff had over 2 ½ years from the time of the physical examination, and over 1 ½ years from the time her father asserted the examination constituted sexual harassment, to investigate and file the lawsuit before the shortened period of limitation ran out. Plaintiff waited until May 25, 2000, to file suit. Under the circumstances, we conclude that plaintiff failed to establish the first prong of the *Camelot/Herweyer* test.

Likewise, plaintiff has failed to demonstrate that she could not have filed her lawsuit within six months of being informed that she would not be hired. By that time she had participated in defendant's internal investigation into her claim of sexual harassment, she had submitted doctor's letters indicating she had no work restrictions, she had submitted to an independent medical examination, and she had been informed that she would not be hired that year. Plaintiff was fully capable of filing a sexual harassment and retaliation discrimination lawsuit within six months of the September 1998 hiring decision. Thus, plaintiff failed to establish the second prong of the *Camelot/Herweyer* test.

Finally, with regard to the third prong of the *Camelot/Herweyer* test, plaintiff fails to explain why she was unable to ascertain the damages resulting from her alleged sexual harassment or retaliatory "non-hiring," or how additional time was required to ascertain those damages. Moreover, this Court in *Timko, supra,* and the federal courts generally, have found the identical six-month limitation reasonable. See *Wright v DaimlerChrysler Corp*, 220 F Supp 2d 832, 839-840 (ED Mich, 2002), and cases cited therein. Accordingly, plaintiff failed to satisfy the three-part test to establish that the six-month period of limitation was unreasonable.

Plaintiff next contends that even if the shortened period of limitation was a valid contractual condition, the employment application did not constitute a valid contract because it was not supported by consideration.

> To have consideration there must be a bargained for exchange. *Higgins v Monroe Evening News*, 404 Mich 1, 20-21; 272 NW2d 537 (1978). There must be "'a benefit on one side, or a detriment suffered, or service done on the other.'" *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949). Courts do not generally inquire into the sufficiency of consideration, *Harris v Bond & Mtg Corp*, 329 Mich 136, 145; 45 NW2d 5 (1950). It has been said "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Whitney v Stearns*, 16 Me 394 (1839). [*General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002).]

Here, plaintiff argues that defendant incurred no obligation in return for plaintiff's agreement to the shortened period of limitation. The employment application specified: "*In consideration of Chrysler's review of my application*, I agree that any claim or lawsuit arising

out of my employment with, or my application for employment with, Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit." (Emphasis supplied.)

In *Timko*, *supra* at 244, this Court observed that "the terms of an employment application constituted part of the employee's and employer's contract of employment." We likewise conclude that the terms of the employment application herein constituted part of the contract between plaintiff and defendant. Because courts generally do not inquire into the sufficiency of consideration, *General Motors Corp*, *supra* at 239, defendant's agreement to review plaintiff's employment application (and, implicitly, to place her in the pool of applicants considered for employment,) constituted consideration to support the contract. Therefore, the employment application was supported by consideration and constituted a valid contract between the parties.

Plaintiff also contends that even if the employment application constituted a contract, it was an invalid contract of adhesion because the bargaining strength of the parties was unequal and plaintiff's only real choice was to sign the application or forego employment. While relative economic strength and bargaining power are considerations in determining whether an agreement is an adhesion contract, "[r]easonableness is the primary consideration in deciding whether a contract clause is enforceable." *Sands Appliance Services v Wilson*, 231 Mich App 405, 419; 587 NW2d 814 (1998), rev'd on other grounds 463 Mich 231; 615 NW2d 241 (2000), citing *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 43-44; 466 NW2d 325 (1991).

This Court in *Timko*, *supra* at 244-245, relying on its decision in *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 157; 596 NW2d 208 (1999) ("Courts will not invalidate contracts as adhesion contracts where the challenged provision is reasonable"), held that because it found the six-month period of limitation reasonable, the adhesion contract claim was meritless. The six-month limitation in this case is reasonable under the *Camelot/Herweyer* test. Therefore, the *Timko* finding applies with equal force in this case.

Moreover, plaintiff was interested in full-time employment, the position offered by defendant was "summer" employment, and plaintiff stated that although she was not interested in "summer" employment and would not accept such a position, she might have accepted "temporary" employment in the hope that if she did a good job she would be offered a full-time position. This indicates that plaintiff did not feel that she had no choice but to accept defendant's conditions; she was perfectly prepared to turn down a summer job and continue working at her present employment if the proffered job was not to her liking. In fact, she admitted she had previously turned down a 1995 offer of summer employment from defendant as a security guard. Therefore, because the shortened six-month contractual period of limitation in this case is reasonable and plaintiff was not in a position of unacceptable disadvantage with regard to defendant, the employment application was not an adhesion contract.

Plaintiff finally contends that defendant's discrimination is continuing and therefore, even if this Court determines that the employment application is a valid contract and that the six-month limitation period is enforceable, it should still conclude that plaintiff did not violate that limitation because the time restriction had not commenced. Plaintiff relies on *Summer v Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986), where the Supreme Court held that a plaintiff may file a discrimination complaint outside the period of limitation if the plaintiff demonstrates either a policy of discrimination or a continuing course of

discriminatory conduct. Plaintiff argues that she is the victim of a discriminatory refusal to hire that is part of a continuing course of conduct. She therefore asserts that, under *Summer,* she is within the relevant contractual *and* statutory limitation periods.

The Court in *Summer*, *supra* at 538, quoted the following statement from *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983), for a description of the factors that should be considered in determining whether a continuing course of discriminatory conduct exists:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Applying these factors to this case, plaintiff claims that defendant's repeated refusals to hire her all stemmed from discrimination against her perceived disability and from retaliation for her claim of sexual harassment against the plant doctor. Accordingly, we conclude that plaintiff satisfies the first factor because all of the claimed discrimination is of the same type: a discriminatory refusal to hire.

Regarding the second factor, plaintiff contends that the continuing refusals to hire occurred on a more or less yearly basis. This allegation does not satisfy the frequency requirement because the alleged refusals to hire – even if occurring on a more or less yearly basis – were in the nature of isolated employment decisions; that is, each alleged "refusal" was a discrete employment decision and the time between these decisions was quite lengthy. This last consideration is important because the example given by the court in *Berry*, *supra* at 981, that was quoted by our Supreme Court in *Summer*, *supra* at 538, was *a biweekly paycheck.* Random House Webster's College Dictionary (2000), defines "frequent" as "happening or occurring at short intervals" and "constant, habitual, or regular." Considered in conjunction with the example given in *Berry*, this indicates that the discrimination must occur repeatedly or constantly at short intervals. A hiring decision that occurs without regularity at widely separated times is not "frequent."

Nevertheless, even if we were to conclude that plaintiff has satisfied the second factor, she has not satisfied the final factor – degree of permanence. Each hiring decision was a *refusal* to hire. This suggests a "degree of permanence which should trigger [plaintiff's] awareness of and duty to assert . . . her rights, or which should indicate to [plaintiff] that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate." *Berry*, *supra* at 981.

While plaintiff might not have recognized that the first refusal was related to a perception of a disability or to retaliation for bringing the sexual harassment charge against the plant doctor, she certainly should have recognized that after she had learned that her medical evaluation

indicated that, in defendant's judgment, certain medical conditions existed that restricted her ability to perform any of the available positions. After plaintiff learned this, she submitted letters from two physicians that indicated she was qualified to work without restrictions, and she submitted to a medical examination at defendant's direction. Therefore, when she was again informed in September 1998 that she was not going to be hired, she was alerted to the duty to assert her rights.

Given our disposition of this issue, it is unnecessary to consider plaintiff's other claims.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra