STATE OF MICHIGAN

COURT OF APPEALS

JANE MORTIMER,

Plaintiff-Appellant,

v

ALPENA COUNTY PROBATE COURT and ALPENA COUNTY,

Defendants-Appellees.

UNPUBLISHED
May 25, 2010

No. 290958
Alpena Circuit Court
LC No. 08-002309-CD

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Plaintiff Jane Mortimer appeals as of right the trial court's order granting defendants Alpena County Probate Court and Alpena County summary disposition pursuant to MCR 2.116(C)(7) on Mortimer's claim under the Whistleblowers' Protection Act.[1] We reverse and remand for further proceedings. We have decided this appeal without oral argument.[2]

I. BASIC FACTS AND PROCEDURAL HISTORY

Mortimer was employed as the probate register for the Alpena County Probate Court. She averred that she was terminated in retaliation for challenging a judge's practice of appointing "standby" guardians in adult guardian proceedings, which she claimed violated the Estates and Protected Individual's Code.[3]

It is undisputed that Mortimer was suspended with pay on May 19, 2008, and that on that date she cleaned out her office and never returned to work. Further, it is undisputed that on that date, Mortimer was advised that she would no longer be serving as probate register and that she would be given until June 9, 2008, to sign an employment departure agreement that would allow her to resign with certain financial benefits but subject to certain conditions. The period to

[1] MCL 15.361 *et seq*.

[2] MCR 7.214(E).

[3] MCL 700.5301 *et seq.*

accept the employment departure agreement was extended pursuant to Mortimer's request. When the deadline passed, a June 23, 2008 letter notified Mortimer that she had been terminated, effective June 21, 2008.

Mortimer filed her Whistleblower's violation complaint on September 11, 2008. However, defendants moved for summary disposition, arguing that Mortimer's claim actually accrued on May 19, 2008, and that, therefore, the applicable 90-day statute of limitations period had expired. Mortimer countered that her complaint was timely because she filed her complaint within 90 days of June 21, 2008. The trial court agreed with defendants, stating that Mortimer was told she was being terminated on May 19, 2008, and was simply given additional time to determine whether her departure would be by resignation or termination. Accordingly, the trial court granted summary disposition in favor of defendants. Mortimer now appeals.

II. STATUTE OF LIMITATIONS

A. STANDARD OF REVIEW

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by the statute of limitations. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[4] The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[5] Absent disputed issues of fact, we review de novo whether the cause of action is barred by a statute of limitations.[6]

B. ANALYSIS

The Whistleblowers' Protection Act provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee

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[4] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[5] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[6] *Colbert v Conybeare Law Office*, 239 Mich App 608, 609 NW2d 208 (2000).

> is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.[7]

An employee seeking to bring a claim for violation of the above provision, however, is subject to a 90-day statute of limitations: "A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act."[8]

In *Parker v Cadillac Gage Textron, Inc*,[9] the plaintiffs were notified that they would be laid off as part of a reduction in force on December 3, 1990. Their last day of work was December 21, 1990, but the employer's records showed that January 7, 1991, was their effective date of separation.[10] The *Parker* Court held that the date of discharge was the last day worked, stating:

> A claim of discriminatory discharge accrues on the date the plaintiff is discharged. The last day worked is the date of discharge. Subsequent severance or vacation pay does not affect the date of discharge. In this case, [the] plaintiffs filed their case more than three years after the date they were discharged. Despite the fact that January 7, 1991, may have been [the] plaintiffs' "effective" date of separation, it is undisputed that the last day they actually worked was December 21, 1990. Even if we accept the mistaken notation in [the] defendant's records that January 4, 1991, was the last day worked, the three-year statute of limitations[11] bars [the] plaintiffs' suit.[12]

In *Collins v Comerica Bank*,[13] the plaintiff was investigated for employee misconduct and was suspended, apparently for failing to cooperate with the investigation. She was subsequently terminated, and filed suit within three years of her termination date.[14] The *Collins* Court held:

> 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

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[7] MCL 15.362.

[8] MCL 15.363(1).

[9] *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 289; 542 NW2d 365 (1995).

[10] *Id*.

[11] Referring to MCL 600.5805(8), which sets forth a three-year period of limitations for claims brought under the Civil Rights Act, MCL 37.2101 *et seq*.

[12] *Parker*, 214 Mich App at 290 (internal citations omitted).

[13] *Collins v Comerica Bank*, 468 Mich 628, 629; 664 NW2d 713 (2003).

[14] *Id*. at 630.

> 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.
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> In the present case, even though [the] plaintiff was suspended on September 5, 1996, and in retrospect that date represents the last day she *actually worked*, it was not until September 25, 1996 that she was *actually discharged*, or terminated, from employment. Unlike the plaintiffs in *Parker* who knew on the last day they worked that their employment had been terminated and that they were being discharged as employees on that date, on September 5, 1996, [the] plaintiff in this case only knew that she had been suspended indefinitely.[15]

Here, Mortimer was advised on May 19, 2008, that she would be *suspended* with pay from her employment and that this was non-negotiable. However, unlike the plaintiff in *Parker*, it had not yet been determined that Mortimer would be *terminated*. "'Suspended' does not equate with 'terminated' or 'discharged.' Thus, being suspended does not create a cause of action for discharge or termination."[16] Moreover, as of the last day Mortimer worked, she still had the option of resigning. Thus, while action had been taken against her, the actual discharge had yet to occur. Since "a claim for discriminatory discharge cannot arise until a claimant has been discharged,"[17] we conclude that Mortimer's claim accrued on the effective date of her termination, June 21, 2008. Accordingly, Mortimer's complaint filed on September 11, 2008, within 90 days of the effective date of termination, was timely.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Stephen L. Borrello

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[15] *Id.* at 633.

[16] *Id*. at 634.

[17] *Id*. at 633.