[Cite as *Zindroski v. Parma City School Dist. Bd. of Edn.*, 2010-Ohio-3188.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93583

BARBARA ZINDROSKI

PLAINTIFF-APPELLANT

vs.

PARMA CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-600531

BEFORE: Boyle, P.J., Celebrezze, J., and Cooney, J.

RELEASED: July 8, 2010

JOURNALIZED:

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MARY J. BOYLE, P.J.:

{¶ 1} Plaintiff-appellant, Barbara Zindroski, appeals from a trial court's order granting summary judgment to defendant-appellee, Parma City School District Board of Education ("Board"), after finding that her claims were barred by the statute of limitations. She raises two assignments of error for our review, i.e., that the trial court erred in granting summary judgment to the Board after finding that her (1) promissory estoppel and (2) gender discrimination claims were barred by a six-year statute of limitations.

{¶ 2} Finding merit to her appeal, we reverse and remand.

Procedural and Factual Background

{¶ 3} Zindroski was hired by the Board in 1979 as a dental assistant vocational teacher. Although she did not have a bachelor's degree, she was certified in the field and had eight years of experience. Based on her experience, the Board hired Zindroski as a Class II teacher, which meant that she would receive a starting salary commensurate with having a bachelor's degree.

{¶ 4} According to Zindroski, the Board promised her when she was hired that if she obtained a bachelor's degree, then she would be moved to the master's salary level. Zindroski claims that based on the Board's promise, she entered college in 1980. When she obtained her bachelor's degree in 2002, she notified

Superintendent Kurt Stanic of her attainment and requested that she be advanced to the master's degree pay schedule.

{¶ 5} The Board formally denied her reclassification request on September 24, 2002, informing her that a 1993 class action grievance filed by the Parma Education Association ("PEA") conclusively settled the matter. According to the Board, the PEA agreed in 1994 that vocational teachers would advance to the master's salary only upon actual attainment of a master's degree, and that the terms of the settlement were incorporated into the 1996 to 1999 Collective Bargaining Agreement ("CBA").

{¶ 6} In September 2006, four years after Zindroski's request for salary advancement was denied, she filed an action against the Board alleging claims of promissory estoppel and gender discrimination.

{¶ 7} Rather than answer Zindroski's complaint, the Board moved to dismiss the complaint and/or stay the proceedings pending arbitration. The trial court granted the motion to stay the proceedings pending arbitration in February 2007.

{¶ 8} In October 2007, Zindroski moved to vacate the stay and/or to show cause because the Board had refused her requests to arbitrate the matter. On February 8, 2008, the trial court vacated the stay and returned the case to the active docket. The Board appealed the vacation to this court. We dismissed the case for want of a final appealable order. The Board further appealed our

dismissal to the Ohio Supreme Court, which declined jurisdiction in October 2008.

{¶ 9} With the case remanded to the trial court, the Board answered Zindroski's complaint on December 2, 2008. In its answer, the Board asserted 35 affirmative defenses, but not that the claims were barred by the statute of limitations.

{¶ 10} The Board moved for summary judgment in February 2009. Zindroski opposed the Board's motion. The Board replied to Zindroski's opposition brief, raising, for the first time, the statute of limitations issue (as well as several others). Because the Board raised new issues in its reply brief, Zindroski filed a surreply brief with leave of court, responding to the Board's new arguments.

{¶ 11} In June 2009, the trial court granted summary judgment to the Board, finding that Zindroski's claims were barred by the statute of limitations.

{¶ 12} It is from this judgment that Zindroski appeals.

Standard of Review

{¶ 13} In reviewing a trial court's ruling on a motion for summary judgment, this court applies the same standard a trial court is required to apply in the first instance, i.e., whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. In applying this standard, evidence is construed in favor of the nonmoving party, and

summary judgment is appropriate if reasonable minds could only conclude that judgment should be entered in favor of the movant. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-87, 653 N.E.2d 1196. Before the trial court may consider whether the moving party is entitled to judgment as a matter of law, however, it must determine whether there are genuine issues of material fact for trial. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶12.

{¶ 14} Under Civ.R. 56, the moving party "'bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.'" *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The nonmoving party then has a reciprocal burden to set forth specific facts, by affidavit or as otherwise provided by Civ.R. 56(E), which demonstrate that there is a genuine issue for trial. *Byrd* at ¶10.

Statute of Limitations

{¶ 15} In this case, there is no dispute that the statute of limitations on both of Zindroski's claims, promissory estoppel and sex discrimination, is six years. The issue is when the six-year limitations period commenced.

{¶ 16} The Board argues, and the trial court agreed, that Zindroski's claims accrued on September 1, 1996, the date the 1996 to 1999 CBA went into effect. Zindroski maintains that the time to file her claims began to run on September 24, 2002, the date the Board formally denied her advancement to the master's salary schedule.

A. Pleading an Affirmative Defense

{¶ 17} The record reveals that the Board never raised the affirmative defense of statute of limitations in its answer. Nor did the Board raise the defense in its summary judgment motion. It was not until its reply to Zindroski's brief opposing summary judgment where the Board *first* argued that Zindroski's claims were barred by the statute of limitations.

{¶ 18} The law in Ohio is clear: the defense of statute of limitations is an affirmative defense that must be raised in a responsive pleading under Civ.R. 8(C), or it will be considered waived. *BP Communications Alaska, Inc. v. Cent. Collection Agency* (2000), 136 Ohio App.3d 807, 813, 737 N.E.2d 1050, citing *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, 320 N.E.2d 668. It is also established that "Ohio law prohibits a defendant from asserting an affirmative defense for the first time in a motion for summary judgment." *Eulrich v. Weaver Brothers, Inc.*, 165 Ohio App.3d 313, 2005-Ohio-5891, 846 N.E.2d 542, ¶12, citing *Carmen v. Link*, 119 Ohio App.3d 244, 250, 695 N.E.2d 28.

{¶ 19} Zindroski, however, did not raise waiver with the trial court, nor does she argue it here. She did request leave to file a surreply brief, which the trial court granted, where she responded to the Board's new arguments set forth in its reply brief. Accordingly, we find there was no prejudice to Zindroski as a result of the Board's failure to raise the affirmative defense in its answer.

B. Accrual Date

1. *Sex Discrimination under R.C. 4112*

{¶ 20} The Board cites *Delaware State College v. Ricks* (1980), 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431, in support of its contention that the accrual date in this case was in 1996 when the 1996 to 1999 CBA went into effect.

{¶ 21} In *Ricks*, the plaintiff was a university professor who had been denied tenure. The college, like many colleges and universities, had a policy that junior faculty members who were not offered tenure were not immediately discharged, but were offered "terminal contracts" to teach for one additional year. The plaintiff accepted the college's offer of a one-year terminal contract, and sued for age discrimination shortly after his last day of employment. The plaintiff alleged that his cause of action did not accrue until that time. The college maintained that the allegedly discriminatory action was its denial of tenure, not the ultimate expiration of the plaintiff's one-year terminal contract.

{¶ 22} The United States Supreme Court agreed with the college, characterizing the termination of the plaintiff's employment as "a delayed, but

inevitable, consequence of the denial of tenure." Id. at 257-258. The court went on to explain that, in order for the limitations period to commence at the date of discharge, "Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure." Id. at 258. The court found that the only alleged discrimination occurred, and the limitations period therefore commenced, at the time of the tenure decision, "even though one of the *effects* of the denial of tenure — the eventual loss of a teaching position — did not occur until later." Id. (Emphasis sic.)

{¶ 23} But five months later, the Ohio Supreme Court addressed *Ricks* in *Lordstown Bd. of Edn. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 252, 421 N.E.2d 511. In *Lordstown*, the plaintiffs were two teachers whose yearly contracts were not renewed following the plaintiffs' announcements that they had become pregnant. The nonrenewal decisions were made in April 1975 and affected the contracts under which the two plaintiffs would have worked for the 1975-1976 school year. The court held that the teachers' cause of action for sex discrimination accrued not when the board announced its nonrenewal decision, but when that decision became effective, which was the natural expiration date of the teachers' 1974-1975 contracts.

{¶ 24} The Ohio Supreme Court distinguished *Ricks*, recognizing that in *Ricks* the discriminatory act was the denial of tenure, while the discriminatory act

before it was the nonrenewal of teaching contracts. Id. at 255. The Ohio Supreme Court held that the statute of limitations began to run when the teaching contracts expired. Id. at paragraph one of the syllabus. In so holding, the Supreme Court of Ohio explained:

{¶ 25} "'Normally, a cause of action does not accrue until such time as the infringement of a right arises. It is at this point that the time within which a cause of action is to be commenced begins to run. The time runs forward from that date, not in the opposite direction, and thus when one's conduct is not presently injurious a statute of limitations begins to run against an action for consequential injuries resulting from such act only from the time that actual damage ensues.'" *Lordstown* at 256, quoting *State ex rel. Local Union 377 v. Youngstown* (1977), 50 Ohio St.2d 200, 203-204, 364 N.E.2d 18.

{¶ 26} The Ohio Supreme Court further reasoned:

{¶ 27} "*Ohio Civil Rights Commission v. Lysyj* (1974), 38 Ohio St.2d 217, 313 N.E.2d 3, and R.C. 4112.08 indicate both a legislative and judicial intent that the July 23, 1976, amendment to R.C. 4112.05(B), be applied so as to extend the limitations period for a pre-existing cause of action. R.C. 4112.08 states as follows:

{¶ 28} "'The provisions of sections 4112.01 to 4112.08 of the Revised Code, shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provision hereof shall not apply.'

{¶ 29} "In *Lysyj*, at page 220, 313 N.E.2d 3, this court states:

{¶ 30} "'*** courts, upon review, are to construe *** (the Ohio laws against discrimination) liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation.'"[1]

{¶ 31} The Ohio Supreme Court concluded in *Lordstown* that the final discriminatory act occurred on August 31, 1975 — when the teaching contracts expired and the plaintiffs' employment terminated. Id.

{¶ 32} More recently, the Ohio Supreme Court addressed the statute of limitations issue again in *Oker v. Ameritech Corp.*, 89 Ohio St.3d 223, 2000-Ohio-139, 729 N.E.2d 1177. In this case, the plaintiff was employed as an in-house attorney for Ameritech when the company announced that the entire legal department would be abolished and replaced by a newly created department. The plaintiff was informed that his position would be eliminated but

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[1] R.C. 4112.08 is substantively the same today. It provides for "liberal construction" and states:

"This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply. Nothing contained in this chapter shall be considered to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, sex, military status, familial status, disability, national origin, age, or ancestry, except that any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code, with respect to the unlawful discriminatory practices complained of, is barred from instituting a civil action under section 4112.14 or division (N) of section 4112.02 of the Revised Code."

that he could apply for a position in the newly formed legal department. The plaintiff did apply for a new position but was told in November 1994 that he would not be hired. He remained in his former position until January 7, 1995. Upon his termination from his attorney position, he accepted work as a customer service representative, which he occupied until he found employment elsewhere.

{¶ 33} After a younger attorney was hired to handle litigation for Ameritech, the plaintiff sued for age discrimination. The trial court found the claim was barred by the 180-day statute of limitations. This court affirmed, finding that the cause of action accrued in November 1994, when the plaintiff was informed he would not be hired. The Ohio Supreme Court reversed, finding that the cause of action accrued not when the appellant was informed he would not be hired, but on January 7, 1995, the last day of the plaintiff's employment in his former position. The court treated the November 1994 action not as a discriminatory failure-to-hire, but as advance notice of a future discriminatory termination. In the high court's view, there was no present, palpable violation of R.C. Chapter 4112 until the plaintiff in *Oker* was terminated from his attorney position.

{¶ 34} The Ohio Supreme Court reiterated: "The plain language of R.C. Chapter 4112, and the reasoning applied by this court in our *Lordstown* decision, support our conclusion that the statute of limitations period for an age-discrimination claim brought pursuant to R.C. Chapter 4112 begins to run on

the date of the employee-plaintiff's termination from the defendant-employer." *Oker* at 226.

{¶ 35} In the present case, the alleged discriminatory act occurred when Zindroski was formally denied a master's degree salary in September 2002. It was then that the Board's conduct was "presently injurious" and "actual damage ensue[d]." *Lordstown* at 256, quoting *Local Union 377*, 50 Ohio St.2d, at 203-204. Regarding her sex discrimination claim, it is irrelevant whether she knew, or should have known, in 1994 or 1996 of the grievance settlement or the subsequent CBA. See *Lordstown*, supra, and *Oker,* supra (accrual date was not when plaintiffs were notified, but when actual discriminatory act occurred). Accordingly, since the date Zindroski was formally denied advancement to the master's pay level is not disputed, i.e., September 2002, then her sex discrimination claim arose at that time as a matter of law.

{¶ 36} Zindroski's second assignment of error is sustained.

2. *Promissory Estoppel*

{¶ 37} Both parties agree that a claim of promissory estoppel accrues when the promisee discovers the wrong or breach of promise. They disagree, however, when Zindroski discovered, or should have discovered, the alleged breach in this case. The Board claims that Zindroski should be charged with knowledge of the 1996 CBA, which it argues incorporated the 1994 grievance settlement into it. But Zindroski avers that she was not aware of the 1994 grievance, and further, that the

terms of the grievance settlement are not apparent on the face of the master's classification in the 1996 CBA. After a thorough review of the record, we agree with Zindroski that genuine issues of material fact exist as to whether she could be charged with imputed knowledge.

{¶ 38} First, not only did Zindroski not take part in the actual grievance brought in 1993, she does not even appear to fall within the class of grievants. The 1993 grievance indicates that the substance of the grievance was that:

{¶ 39} "The Board violated, misinterpreted and/or misapplied the provisions of Article XXXVI and any other pertinent provisions of the negotiated agreement when it compensated some vocational teachers in the district *with bachelor's degrees* on the master's degree column and other vocational teachers *with bachelor's degrees* were not compensated in such a manner. The Association is asking that *all vocational teachers who have bachelor's degrees* be placed on the master's degree column and all vocational teachers with master's degrees be placed on the doctorate column and all vocational teachers so moved be provided all back pay and emoluments to make them whole." (Emphasis added.)

{¶ 40} The grievance further stated the following "pertinent" information:

{¶ 41} "The Board and/or the administration for years has hired vocational teachers without bachelor's degrees and placed them on the bachelor's degree column. When those vocational teachers received a bachelor's degree, the teachers were moved to the master's degree column. Other teachers with

bachelor's degrees were hired as vocational teachers but were not placed on the master's degrees column. Some of those teachers earned master's degrees and should have been moved to the doctorate column."

{¶ 42} Zindroski did not have a bachelor's degree in 1993. Thus, she did not fall within the category of grievants as set forth in the 1993 class action grievance. We further agree with Zindroski that it is not clear from the face of the 1996 CBA that the terms of the 1994 grievance settlement were incorporated into it.

{¶ 43} The 1994 grievance settlement states unequivocally that the "grievance challenged the placement on the salary schedule of *certain* [i.e., not all] vocational teachers." (Emphasis added.) It later provides that it "represents the full and complete agreement between the Board and Association, on its own behalf and behalf of the members of the bargaining unit it represents." We agree this is conflicting as to who the settlement actually covers: certain vocational teachers or all members of the bargaining unit.

{¶ 44} We find further provisions just as troubling. The settlement states that the Board and the PEA "agree that all vocational teachers shall maintain their current placements on the salary schedule, with no reduction or advancement, subject to *** the following:

{¶ 45} "Section 36.01 shall be amended to provide that all vocational teachers shall advance to the master's column of the schedule in the future only

upon actual attainment of a master's degree in accordance with the requirement of Article 36."

{¶ 46} Although that settlement provision seems clear, it was not as transparent when it was incorporated in the 1996 CBA.

{¶ 47} The 1993 to 1996 CBA set forth four classes of teachers:

"Class I Non-Degree - Those teachers who have less than the B.A. degree or its equivalent. In this class, blocks of credit are not granted below a base of 90 semester hours.

"Class II B.A. - Those teachers who possess a baccalaureate degree.

"Class IV M.A. - This class shall include:

1. Those teachers (1974-75) classified in Class IV.

2. Those teachers receiving master's degrees no later than September 15, 1977.

3. Those new or reclassified teachers holding master's degrees in the area of assignment or in teaching arts. (Effective with new hires for the 1975-76 school year and reclassifications processed in September 1977.)

"Class V Ph.D - Doctor of Philosophy or Doctor of Education Degrees

The salary for teachers holding these degrees will be greater than the master's degree (Class IV) at each step of the schedule by an amount equal to sixteen percent (16%)."

{¶ 48} The 1996 to 1999 CBA modified the classifications as follows:

“Class II B.A. - Those teachers who possess a baccalaureate degree or its equivalent to meet the standards established by the Department of Education to be a certified teacher.

“Class IV - This class shall include:

1. Those teachers (1974-75) classified in Class IV.

2. Those teachers receiving master’s degrees no later than September 15, 1977.

> 3. Those new or reclassified teachers holding master's degrees *from universities or colleges approved by the Ohio Department of Education* in the area of assignment or in teaching arts. (Effective with new hires for the 1975-76 school year and reclassifications processed in September 1977.) *This provision shall not impact adversely on any teacher employed by the Parma City Schools who earned a master's degree prior to September 1, 1996.* [Emphasis added.]
>
> "Class V - Doctor of Philosophy or Doctor of Education degrees earned from a university or college approved by the Ohio Department of Education. This provision shall not impact adversely on any teacher employed by the Parma City Schools who earned a Ph.D or EDE prior to September 1, 1996.
>
> "Ph.D - The salary for teachers holding these degrees will be greater than the master's degree (Class IV) at each step of the schedule by an amount equal to sixteen percent (16%)."

{¶ 49} The 1994 grievance settlement clearly stated that teachers will only be paid at the master's level upon actual attainment of a master's degree. But the 1996 CBA does not unambiguously state that change. It merely added the language that the master's degree must be obtained from an approved university or college. Reading the 1996 master's provision without reference to the same provision in the 1993 CBA, one could easily determine that a teacher had to actually have a master's degree before he or she would receive master's pay. But — and this is imperative — the 1993 CBA states that teachers classified at the master's salary level are "[t]hose new or reclassified teachers holding master's degrees." Reading the 1993 provision alone, one would also believe you actually

had to hold a master's degree under that CBA. And it is undisputed that some teachers were paid at the master's level — *without actually having a master's degree* — under the 1993 agreement. Thus, we agree with Zindroski that she was not part of the class action grievance, and further, that the modification to the master's classification in the 1996 CBA was ambiguous.

{¶ 50} We therefore find that genuine issues of material fact remain as to when Zindroski discovered the wrong here, i.e., in 1996 or 2002. If it was 2002, then her promissory estoppel claim is not barred by the statute of limitations.

{¶ 51} Zindroski's first assignment of error is sustained.

Remaining Summary Judgment Issues

{¶ 52} Since our review on a summary judgment motion is de novo, we will review the Board's summary judgment arguments below to determine if there was another basis to grant the summary judgment motion.

A. Validity of Promissory Estoppel Claim

{¶ 53} The Board argues that Zindroski's promissory estoppel claim fails as a matter of law because her employment is governed by a CBA. The Board cites *Dixon v. Cuyahoga Dept. of Human Servs.* (July 25, 1991), 8th Dist. No. 58823, in support of its argument.

{¶ 54} The plaintiff in *Dixon*, whose employment was governed by a CBA, was fired for allegedly stealing from his employer. He was later charged with, and then found not guilty by a jury of, theft in office and grand theft.

He attempted to file a grievance, but failed to properly initiate it. He then brought suit against his employer for breach of contract, promissory estoppel, malicious prosecution, and defamation.

{¶ 55} This court stated:

{¶ 56} "Appellant's second cause of action asserts a claim of promissory estoppel as an alternative argument that his rights are governed by the terms of the collective bargaining agreement. The doctrine of promissory estoppel applies to oral at-will employment agreements. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 261, 483 N.E.2d 150. Since it is undisputed that appellant's employment, as a classified civil servant, was governed by the collective bargaining agreement and was not an employment at-will situation, appellant's claim of promissory estoppel fails as a matter of law."

{¶ 57} But we find the facts here to be distinguishable. Zindroski is not asserting a violation of an oral promise made to her in 2002, which would have occurred under her then-existing CBA. If so, that CBA would bar her promissory estoppel claim under *Dixon*, supra. Rather, she is alleging that the Board breached a promise that was made to her in 1979 — *prior to* her being subject to *any* CBA.

{¶ 58} The Board asserts that Zindroski's employment has always been covered by a CBA. Attached to its summary judgment reply, it submitted cover

sheets from agreements between it and the PEA from 1973 through 1981. But without knowing the contents of the agreements, we cannot say they have any affect on Zindroski's claims.

{¶ 59} Accordingly, we cannot say that Zindroski's promissory estoppel claim fails as a matter of law.

B. Promissory Estoppel Elements

{¶ 60} Promissory estoppel provides an equitable remedy for a breach of an oral promise, absent a signed agreement. *Olympic Holding Co. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, 909 N.E.2d 93, ¶40. In order to succeed on a claim for promissory estoppel:

{¶ 61} "'The party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading.'" Id. at ¶39, quoting *Shampton v. Springboro*, 98 Ohio St.3d 457, 2003-Ohio-1913, 786 N.E.2d 883, ¶34.

{¶ 62} The elements necessary to prove a claim for promissory estoppel are: (1) a clear, unambiguous promise, (2) the person to whom the promise is made relies on the promise, (3) reliance on the promise is reasonable and foreseeable, and (4) the person claiming reliance is injured as a result of reliance on the

promise. *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶55.

{¶ 63} The Board does not raise any issues with respect to three of the four elements. It only finds fault with the third element of Zindroski's promissory estoppel claim. It argues that Zindroski "knew or should have known that she would not receive master's pay until she obtained a master's degree," because it "is specifically set forth in the September 1, 1996 collective bargaining agreement." Thus, the Board maintains that Zindroski's "alleged reliance can be neither reasonable nor foreseeable," and fails as a matter of law. We disagree.

{¶ 64} As we previously stated, we find that the September 1996 CBA is ambiguous on its face. At a minimum, genuine issues of material fact remain as to whether Zindroski's continued reliance on the Board's promise when she was hired was reasonable in light of the 1996 modifications.

C. Prima Facie Case of Sex Discrimination

{¶ 65} Finally, the Board maintains that Zindroski has not established a prima facie case of sex discrimination and thus, it argues, her claim fails as a matter of law.[2]

[2]In its summary judgment below, the Board only argued that Zindroski failed to establish a prima facie case (it did not address the burden shifting that must take place once a plaintiff establishes a prima facie case). Further, in its summary judgment motion below, the Board only argued that Zindroski failed to establish two of the four requirements necessary to establish the prima facie case. Thus, we will only address the arguments raised by the Board below.

{¶ 66} Zindroski brought her sex discrimination claim pursuant to the Ohio Civil Rights Act, which is set forth in Chapter 4112 of the Ohio Revised Code. The Ohio Supreme Court has held that discrimination cases brought in state courts should be construed and decided in accordance with federal guidelines and requirements. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 147, 451 N.E.2d 807.

{¶ 67} R.C. 4112.02(A) provides that "it shall be an unlawful discriminatory practice *** for any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

{¶ 68} Because discrimination is seldom evidenced by overt actions or direct evidence, an employee may raise a presumption of discrimination through circumstantial evidence. The analytical framework for proving discrimination based on circumstantial evidence was set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. This framework was adopted by the Ohio Supreme Court in *Plumbers &*

Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm. (1981), 66 Ohio St.2d 192, 421 N.E.2d 128. *Barker*, supra, at 147.

{¶ 69} Under this basic framework, employees must establish a prima facie case of discrimination. In order to do so, they must show that (1) they were a member of a statutorily-protected class; (2) they suffered an adverse employment action; (3) they were qualified for the position; and (4) they were replaced by a person who is not a member of the protected class or that similarly situated, nonprotected employees were treated more favorably. *Barker* at paragraph one of the syllabus.

{¶ 70} In *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, 837 N.E.2d 1169, at _11, the Ohio Supreme Court explained:

{¶ 71} "Establishing a prima facie case 'creates a presumption that the employer unlawfully discriminated against the employee.' *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207. 'If the trier of fact believes plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' Id.; see, also, *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407, quoting 1 D. Louisell & C. Mueller, Federal Evidence (1977) 536, Section 67[.]"

A. Zindroski's Qualifications

{¶ 72} The Board argues that Zindroski was not qualified because she did not have a master's degree. We find this to be a circular argument. When Zindroski was hired, she was promised — as it was the Board's policy at the time — that she would be moved to the master's salary level upon attaining a bachelor's degree. If a fact finder determines that the 1996 CBA (and all others after it since they mirrored the language of the 1996 version) was ambiguous, and that it was reasonable for Zindroski to continue to rely on that policy after deciphering the 1996 CBA, then she was certainly qualified in 2002 to receive the master's pay when she obtained her bachelor's degree.

B. Similarly Situated Male Employee

{¶ 73} The Board maintains that "[t]he settlement of the grievance was universal. No one would be placed on the master's degree pay schedule unless they had actually obtained a master's degree." It further claims that Zindroski has "no evidence that a male vocational teacher after the settlement of the grievance was rendered received master's pay while holding only a bachelor's degree." The Board's assertions are misplaced.

{¶ 74} Section 2 of the 1994 settlement agreement provided in pertinent part that the "Board and Association agree that all vocational teachers shall maintain their current placements on the salary schedule, with no reduction or advancement, subject to the following:

{¶ 75} "***

{¶ 76} "(b) Section 36.01 shall be amended to provide that vocational teachers shall advance to the master's column of the schedule in the future only upon actual attainment of a master's degree in accordance with the requirement of Article 36.

{¶ 77} "(c) This agreement shall have no impact upon, and not be referred to, in any subsequent proceeding involving either Keith Taylor or Steve Caleris. This agreement shall have no bearing whatsoever on such claims regarding salary schedule placement as Caleris or Taylor may make, now or hereafter.

{¶ 78} "*** It is understood that Messers, DeAngelis, Swisher, and Corbin may elect, on their own, to pursue a legal challenge to their salary schedule placement."

{¶ 79} According to Zindroski's Exhibit No. 15, which is a list of vocational education teachers (although there is no date on it), at least one of those males excepted from the 1994 settlement, Keith Taylor, was similarly situated to Zindroski. Taylor was a (1) vocational teacher, (2) without a degree, and (3) was paid at the bachelor's degree salary level. Further, he was explicitly excepted from the settlement agreement, preserving his right to pursue legal action regarding his salary. Zindroski's rights were not similarly preserved.

{¶ 80} Thus, we find that Zindroski has established a prima facie case of sex discrimination to survive summary judgment. Accordingly, we find no other basis to affirm the trial court's granting of the Board's summary judgment motion.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
COLLEEN CONWAY COONEY, J., DISSENTS WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 81} I respectfully dissent. I would affirm the trial court's finding that the six-year statute of limitations bars Zindroski's claim.

{¶ 82} As the majority correctly notes, a cause of action normally does not accrue until such time as the infringement of a right arises. Here, Zindroski's right to master's pay was infringed by the 1996 CBA. She had been pursuing her bachelor's degree for sixteen years by that point with the expectation of master's pay once she completed her bachelor's program. When she was denied that pay level in 2002, she should have acted immediately to preserve her rights. But she failed to bring her complaint until 2006, well beyond the six-year statute of limitations.

{¶ 83} I would find the instant case analogous to the plaintiff-professor's claim in *Delaware State College v. Ricks* (1980), 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431, because the denial of tenure is similar to denial of the master's pay Zindroski sought. Her 1996 CBA was the equivalent of Professor Ricks's tenure decision. The United States Supreme Court found that the limitations period commenced at the time of the tenure decision even though one of the ultimate effects of the denial of tenure did not occur until later. Here, the period commenced at the latest at the start of the 1996 CBA even though one of its effects — denial of master's pay — did not occur until Zindroski actually received her bachelor's degree.

{¶ 84} Therefore, I would affirm the trial court's decision.