

FILED: November 27, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

VERONICA HERNANDEZ-NOLT,
Plaintiff-Appellant,

v.

WASHINGTON COUNTY,
Defendant-Respondent.

Washington County Circuit Court
C108326CV

A151555

D. Charles Bailey, Jr., Judge.

Submitted on October 02, 2013.

Manuel C. Hernandez and Hernandez and Associates, LLC, filed the briefs for appellant.

William G. Blair filed the brief for respondent.

Before Ortega, Presiding Judge, and Hadlock, Judge, and Edmonds, Senior Judge.

HADLOCK, J.

Reversed and remanded.

1 HADLOCK, J.

2 Plaintiff appeals a general judgment in this wrongful discharge case,
3 assigning error to the trial court's grant of summary judgment in favor of defendant
4 Washington County. The trial court entered judgment for the county based on its
5 determination that plaintiff's claim was untimely because it had accrued in April 2003,
6 more than two years before plaintiff filed her claim. We conclude that the summary
7 judgment record includes evidence from which a factfinder could determine that
8 plaintiff's claim did not accrue until after the pertinent date in April 2003; as a result, the
9 county did not establish that it was entitled to summary judgment on the ground that the
10 claim was untimely. Accordingly, we reverse and remand.

11 Because the parties' arguments focus on when plaintiff's wrongful discharge
12 claim accrued, we describe the elements of such a claim at the outset. An allegedly
13 wrongful discharge can be either actual or "constructive." *Sheets v. Knight*, 308 Or 220,
14 226-28, 779 P2d 1000 (1989). A plaintiff can prove that a constructive discharge
15 occurred by showing that

16 "(1) the employer intentionally created or intentionally maintained specified
17 working condition(s); (2) those working conditions were so intolerable that
18 a reasonable person in the employee's position would have resigned
19 because of them; (3) the employer desired to cause the employee to leave
20 employment as a result of those working conditions or knew that the
21 employee was certain, or substantially certain, to leave employment as a
22 result of those working conditions; and (4) the employee did leave the
23 employment as a result of those working conditions."

24 *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841 (1995) (footnotes and emphasis
25 omitted). The fourth element itself consists of two separate requirements--that "the

1 employee did leave the employment" and that he or she did so "as a result of those
2 working conditions." Thus, the determination of *when* an employee was constructively
3 discharged depends on a finding about when that employee left the employment. A
4 wrongful discharge claim does not accrue, and the statute of limitations does not begin to
5 run, until the discharge happens. *Stupek v. Wyle Laboratories Corp.*, 327 Or 433, 438,
6 963 P2d 678 (1998) ("[T]here is no claim until the discharge occurs.").

7 The facts pertinent to our analysis relate to that last point: the date on
8 which any constructive discharge occurred, *i.e.*, when plaintiff left her employment with
9 the county. In analyzing whether the county was entitled to summary judgment, we view
10 those facts in the light most favorable to plaintiff, the nonmoving party, drawing all
11 reasonable inferences in her favor. *Jones v. General Motors Corp.*, 325 Or 404, 408,
12 420, 939 P2d 608 (1997). The following description of the facts is presented in that light.

13 Plaintiff worked for the county for over 10 years, in various departments.
14 In 2002, while working in the county's Department of Housing Services (DHS), she
15 began to suspect that her supervisors were retaliating against her because she had
16 communicated with a federal compliance officer about her role at DHS. Plaintiff
17 expressed her concerns to her supervisors and the DHS director but did not notice an
18 improvement in her working conditions. She felt that, "[b]ecause of the stress of the
19 hostile work environment at DHS, [she] was forced to look for other employment."
20 Consequently, plaintiff applied for a position in the county's Department of Disability,
21 Aging and Veterans' Services (DAVS). She got the job and started working at DAVS in

1 April 2003.

2 According to plaintiff's supervisor at DAVS, because plaintiff was "in the
3 career service of Washington County, but hired into a new position within the County's
4 service," a county personnel rule provided that plaintiff was subject to a one-year
5 probationary period and would automatically be reinstated to her former position if her
6 probationary position at DAVS was terminated. That rule was triggered in August 2003,
7 when plaintiff's probationary position at DAVS was terminated, and she was reinstated to
8 her former position at DHS. Instead of returning to work at DHS, however, plaintiff
9 sought and was granted leave under the federal Family and Medical Leave Act (FMLA).
10 The day before plaintiff's leave ended, her attorney contacted the county to determine
11 whether she could obtain additional leave without pay or a position in a different
12 department so she would not have to return to DHS. The county responded by asking for
13 plaintiff's justification for additional leave and stating that plaintiff would have to apply
14 for another position if she wanted to be considered for one; the county also stated that
15 plaintiff's supervisors at DHS were willing to work with her if she returned.

16 Although plaintiff's FMLA leave ended in late December 2003, she did not
17 return to work. In January 2004, the county sent plaintiff a letter stating that, unless an
18 unavoidable situation prevented her from obtaining authorization for her absence, she
19 would be considered to have voluntarily resigned her position as of December 29, 2003.
20 Plaintiff did not return to work.

21 Plaintiff sued the county on December 27, 2005, raising various claims

1 associated with the termination of her employment. The trial court granted summary
2 judgment to the county on each of plaintiff's claims except a common-law wrongful
3 discharge claim, which was set for trial. The court subsequently dismissed the claim for
4 want of prosecution, pursuant to ORCP 54 B. Plaintiff filed an appeal, then dismissed it
5 and refiled her wrongful discharge claim in December 2010.

6 The county moved for summary judgment against the wrongful discharge
7 claim. The county acknowledged that, under ORS 12.220, the timeliness of the claim
8 should be analyzed based on the date on which it *initially* was filed--December 27, 2005,
9 not the date on which plaintiff later refiled it in 2010.¹ That original filing was untimely,
10 according to the county, because it occurred after the end of the two-year limitations
11 period established by ORS 30.275(9).² The county reasoned that, if plaintiff had been
12 wrongfully discharged, that discharge had happened on April 11, 2003, the date on which

¹ ORS 12.220 provides, in relevant part:

"[I]f an action is filed with a court within the time allowed by statute, and the action is involuntarily dismissed without prejudice on any ground not adjudicating the merits of the action * * * and the statute of limitations for the action expired, the plaintiff may commence a new action based on the same claim or claims against a defendant in the original action if the defendant had actual notice of the filing of the original action not later than 60 days after the action was filed."

² ORS 30.275(9) provides:

"Except as provided in [statutes not applicable here], but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury."

1 plaintiff left DHS to go work at DAVS--which was more than two years before she filed
2 her claim.

3 The county did not base that argument on a contention that DHS and
4 DAVS were different employers; to the contrary, it has at least implicitly acknowledged
5 throughout this litigation that the county was plaintiff's employer both while she worked
6 at DHS and while she worked at DAVS. Instead, the county argued that plaintiff had
7 terminated her employment with the county by resigning her DHS position before she
8 *again* became a county employee when she started working at DAVS. According to the
9 county, therefore, any wrongful discharge occurred--and plaintiff's claim accrued--when
10 plaintiff's first period of employment by the county (with DHS) ended in April 2003.³

11 Plaintiff responded that no discharge occurred in April 2003 because her
12 employment with the county did not end at that time; rather, plaintiff argued, she merely
13 had transferred from one county job to another. In plaintiff's view, no discharge occurred
14 until January 2004, when she received notice that her employment with the county was
15 being terminated, or--at the very earliest--in late December 2003, the third day after her
16 FMLA leave ended, pursuant to a county rule applicable in such situations. Accordingly,
17 plaintiff argued, her claim was timely.

18 The trial court granted the county's summary judgment motion, reasoning
19 that, even viewed in the light most favorable to plaintiff, the record established that

³ The county also argued below that plaintiff's claim would have been untimely even if her discharge had not occurred until later in 2003. The county does not renew that argument on appeal.

1 plaintiff's wrongful discharge claim had accrued in April 2003.

2 On appeal, plaintiff reiterates her contention that her wrongful discharge
3 claim did not accrue when she moved from DHS to DAVS in April 2003. In plaintiff's
4 view, that move did not involve a resignation of her employment with the county, but
5 rather was "a 'transfer' to a new position within the county." In response, the county also
6 renews the argument that it made below, challenging plaintiff's characterization of her
7 move from DHS to DAVS as a "transfer." The county contends that plaintiff's wrongful
8 discharge claim accrued on April 11, 2003, when she "*resigned* her position, [and] sought
9 and obtained new, different and better-paid employment in an entirely different job
10 classification with another agency." (Emphasis added.) We understand the county to
11 argue, in essence, that every reasonable factfinder would be compelled to find that
12 plaintiff's move from DHS to DAVS involved a resignation from employment, not
13 merely a transfer from one county agency to another.

14 Thus framed, the parties' arguments raise a single question for our
15 consideration: does the summary judgment record in this case include evidence from
16 which a rational factfinder could determine that plaintiff did not leave her employment
17 with the county on April 11, 2003? That question is dispositive because the trigger for
18 the applicable two-year limitations period is the occurrence of "the alleged loss or
19 injury." ORS 30.275(9). For a constructive wrongful discharge claim like plaintiff's, that
20 loss or injury is the discharge. *Moustachetti v. State of Oregon*, 319 Or 319, 325, 877
21 P2d 66 (1994); *see Stupek*, 327 Or at 438 ("[T]here is no claim until the discharge

1 occurs."). Accordingly, we consider whether the record creates a genuine dispute about
2 whether any constructive discharge occurred in April 2003, *i.e.*, whether that is when
3 plaintiff left her employment with the county. *See McGanty*, 321 Or at 557 (to establish a
4 "discharge" for purposes of a constructive discharge claim, the plaintiff must establish
5 that he or she "did leave the employment as a result of" intolerable working conditions).

6 For purposes of a wrongful discharge claim, a discharge does not occur--
7 that is, the employee does not "leave the employment"--until "the employment
8 relationship between the employee and the employer ends." *Stupek*, 327 Or at 439.
9 Accordingly, a discharge does not necessarily occur when an employee transfers from
10 one of the employing entity's departments to a position in another department within the
11 same employer. *Mekkam v. Oregon Health Sciences Univ.*, 126 Or App 484, 493, 869
12 P2d 363, *vac'd*, 319 Or 623, 879 P2d 180 (1994), *on remand*, 132 Or App 470, 473, 888
13 P2d 1093 (reaffirming prior decision on that point), *rev den*, 321 Or 137, *cert den*, 516
14 US 916 (1995). Rather, as we emphasized in our original decision in *Mekkam*, the
15 pertinent question is whether that move caused the employee's "employment relationship"
16 with the employer to "end[]." 126 Or App at 492-93.

17 In this case, the record includes evidence from which a rational factfinder
18 could determine that plaintiff's employment with the county did not end in April 2003.
19 Plaintiff could have chosen to remain working at DHS, but instead voluntarily sought and
20 obtained a position in another department. At least some of the paperwork associated
21 with her change of positions characterized the move as a transfer: in completing an April

1 11, 2003, personnel action form, a DHS supervisor checked a box for "Transfer Out," not
2 other available boxes labeled "Resignation" or "Dismissal." A note on the comment
3 section of that form states, "Transfer out effective 4/11/03 [at] 5:00 p.m." In addition, as
4 the county acknowledges on appeal, plaintiff retained the right, when she started working
5 at DAVS, to return to her previous position at DHS if her probationary position at DAVS
6 was terminated. A factfinder could infer from that evidence that plaintiff's employment
7 relationship with the county was not interrupted on April 11, 2003, when she left DHS
8 and then went to work at DAVS. Put differently, a factfinder could conclude that
9 plaintiff was continually employed with the county from long before April 11, 2003, until
10 several months after that date, when she declined to return to work following the
11 exhaustion of her FMLA leave. Accordingly, the record creates a genuine dispute
12 regarding whether plaintiff was discharged in April 2003 or not until months later and,
13 therefore, a genuine dispute regarding whether plaintiff's wrongful discharge claim was
14 timely filed. The trial court erred in granting summary judgment to the county on the
15 ground that plaintiff's claim was untimely.

16 In arguing that the trial court's judgment should, nonetheless, be affirmed,
17 the county also argues that the record includes no evidence that intolerable working
18 conditions persisted in December 2003, "when plaintiff chose not to return to work." But
19 any dispute on that point--whether the allegedly intolerable working conditions still
20 existed when plaintiff's employment with the county ended--is not material to the sole
21 question before us, *viz.*, whether plaintiff's wrongful discharge claim was timely filed.

1 That is, the date on which plaintiff stopped experiencing any such conditions is not
2 relevant to determining when plaintiff ended her employment with the county and when,
3 therefore, a discharge occurred--a necessary occurrence to the accrual of a wrongful
4 discharge claim. *Stupek*, 327 Or at 438. Rather, the date on which plaintiff stopped
5 experiencing an intolerable working environment could be relevant only to determining
6 whether plaintiff had established one element of her wrongful discharge claim, *i.e.*, that
7 she left her employment *as a result of* that environment. But the county did not move for
8 summary judgment on the ground that plaintiff could not establish that element of her
9 claim. Moreover, the record might have developed differently had the county moved for
10 summary judgment on the merits. Accordingly, the county's alternative argument does
11 not provide a basis for affirming the award of summary judgment in its favor. *See*
12 *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 660, 20 P3d 180 (2001).

13 Reversed and remanded.