STATE OF MICHIGAN

COURT OF APPEALS

ERNEST M. TIMKO, Plaintiff-Appellant, v OAKWOOD CUSTOM COATING, INC., d/b/a OAKWOOD TOOL & MOLD and THE OAKWOOD GROUP, Defendants-Appellees.	FOR PUBLICATION January 2, 2001 9:00 a.m. No. 212927 Wayne Circuit Court LC No. 98-806774-CZ Updated Copy March 16, 2001

Before: McDonald, P.J., and Gage and Talbot, JJ.

MCDONALD, P.J. (*dissenting*).

Plaintiff claims the 180-day period set forth in the employment application is an unreasonably short period for bringing a civil rights claim. I agree.

Our Supreme Court in *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 24; 564 NW2d 857 (1997), held:

> By enacting a statute of limitations, the Legislature determines the reasonable maximum period a plaintiff can take to file a claim. *Neilsen v Barnett*, 440 Mich 1, 8; 485 NW2d 666 (1992). Courts should defer to the statutory period unless the period in the parties' contract is specific and reasonable.

The majority relies on *Herweyer, supra*, and the factors stated in *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118, 127; 301 NW2d 275 (1981), in determining whether the shortened period of limitation herein is reasonable.

However, the *Herweyer* Court unanimously agreed with Justice Levin's concurrence in *Camelot, supra* at 141, where he stated:

> The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings.
>
> In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable.

The *Herweyer* Court went on to decide that employment contracts differ from the bond contracts that were the subject in *Camelot* and that an employer and employee often do not deal at arm's length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer, or (2) lose the job. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion and at least deserves close judicial scrutiny. *Herweyer, supra* at 21; *Bobo v Thorn Apple Valley, Inc*, 459 Mich 892; 587 NW2d 501 (1998).

Justice Kelly framed the issue in *Herweyer, supra* at 15, as follows:

> In this wrongful termination case, the single issue is what limitation period for filing suit is appropriate where the period written into the employment contract is unreasonably short.

Despite disavowing any expression of opinion concerning the reasonableness of the six-month limitation period later in the opinion the Court's disposition of the case suggests that the shortened limitation period would have been found unenforceable. The Court recognized that "neither the trial court nor this Court of Appeals upheld the six-month period of limitation in the contract." *Id*. at 21. In fact, neither the trial court nor this Court explicitly ruled regarding the reasonableness of the period. Both courts determined that it was unnecessary to rule regarding

the reasonableness of the shortened term because, even if it were unenforceable, the saving clause effectively barred the plaintiff's claim. Once the Supreme Court determined that the saving clause was ineffective, there was no longer a basis to avoid ruling on the reasonableness of the shortened term. However, rather than remanding for a ruling on the reasonableness of the shortened term by the trial court, the Supreme Court concluded its opinion by stating "the limitation period for each of plaintiff's claims is the applicable statutory period" and remanded the case to the trial court for further proceedings. *Id.* at 24. By this statement, the Court indicated by implication that the shortened six-month period in the employment contract did not preclude the plaintiff's action, even though the trial court, this Court, and the Supreme Court itself had avoided directly ruling with respect to the issue.

Contrary to the majority opinion, I believe *Herweyer* is supportive of plaintiffs position. The shortened limitation period under the facts of this case was unreasonable. The plaintiff and defendant did not negotiate the contract's terms on an equal footing. The seventy-one-year-old plaintiff had no negotiating leverage and was merely given the choice of signing the agreement or losing the job.

I would reverse and remand for trial.

/s/ Gary R. McDonald