STATE OF MICHIGAN

COURT OF APPEALS

BARBARA MERRIOTT and GAYE BREUKER,

Plaintiffs-Appellants,

v

MICHIGAN STATE UNIVERSITY, BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, JOHN DiBIAGGIO, JOHN LEWIS, DAVID MARQUETTE and WILLIAM ATKINSON,

Defendants-Appellees.

UNPUBLISHED
August 5, 1997

No. 188064
Ingham Circuit Court
LC No. 93-074153

Before: Michael J. Kelly, P.J., and Wahls, and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition to defendants pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10) in this sexual discrimination, harassment, and retaliation case. We affirm.

I

Plaintiffs Breuker and Merriott, both females, began working for Michigan State University ("MSU") Printing Division in 1973 and 1981, respectively. By 1981, both plaintiffs had attained the position of Printing Press Operator II (PPO-II). Plaintiffs allege that, throughout their tenure in the Printing Division, David Marquette, the former Director of the Printing Division, created a hostile work environment through his remarks and treatment of women. Additionally, plaintiffs allege that Marquette discriminated against them by promoting less qualified men in their places. Plaintiffs further allege that John Lewis, University Services Director, William Atkinson, Printing Division Supervisor, and MSU acquiesced and contributed to Marquette's decisions and behavior.

In May, 1990, allegedly after years of repeatedly being passed over for promotions by male employees and enduring discrimination and harassment, plaintiffs filed a complaint of sex discrimination with the Anti-Discrimination Judicial Board ("ADJB") of MSU, an internal board created to deal with

complaints of discrimination and harassment. On October 18, 1990, the ADJB found in favor of plaintiffs, holding that plaintiffs were subjected to a pattern of gender-based discrimination and harassment. The fact finders recommended that plaintiffs receive, inter alia, back pay, promotions, and attorney fees. This decision was upheld by an internal appellate panel.

On May 14, 1991, the president of MSU, John DiBiaggio, concurred in part and denied in part the appellate panel's recommendations. DiBiaggio ordered that plaintiffs receive back pay from 1990, instead of 1985 when plaintiffs allegedly were first forced to take demotions. In addition, DiBiaggio's decision denied the recommendation that plaintiffs receive attorney fees. Plaintiffs filed this complaint asserting claims of discrimination, harassment, and retaliation under Michigan's Civil Rights Act ("CRA"), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

II

Plaintiffs argue that the trial court erred in summarily dismissing their sexual discrimination claim on statute of limitations grounds. We agree in part, and disagree in part.

The applicable standard of review pursuant to MCR 2.116(C)(7) requires this Court to accept all well-pleaded allegations as true and to construe them most favorably to plaintiff. *Jones v State Farm Mutual Auto Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993). This Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. *Id.*, pp 396-397. The motion should not be granted unless no factual development could provide a basis for recovery. *Id.*, p 397.

Here, plaintiffs filed their first complaint in this matter on March 4, 1993. In general, the statute of limitations for CRA claims mandates that a plaintiff bring her discrimination cause of action within three years from the time of the alleged discrimination. MCL 600.5805(8); MSA 27A.5805(8); *Florence v Dep't of Social Services*, 215 Mich App 211, 216; 544 NW2d 723 (1996). Our Supreme Court in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), recognized an exception to the statute of limitations for continuing violations. *Meek v Michigan Bell Tel Co*, 193 Mich App 340, 343-344; 483 NW2d 407 (1992). This exception exists where an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern where only one of the acts occurred within the limitations period. *Sumner*, *supra*, p 428; *Meek*, *supra*, p 344.

In determining whether a continuing course of discriminatory conduct exists, the following factors should be considered:

> 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. [*Sumner*, *supra*, p 538; *Meek*, *supra*, p 344.]

In *Bell v Chesapeake & Ohio Ry Co*, 929 F2d 220, 223, 224 (CA 6, 1991),[1] the Court explained the permanence element of the continuing violations doctrine:

> The facts of [*Berry v Bd of Supervisors of Louisiana State Univ*, 715 F2d 971 (CA 5, 1983) show the need for the [permanence] rule and illustrate its application. The case involved a female university professor who had a heavier workload than her male counterparts. She was permitted to sue on the basis of actions that occurred outside the limitations period because it was not obvious that she was the victim of a discriminatory policy until she had been on the payroll for a few years with a heavy course load while those of her male counterparts were lighter. In other words, the worker did not – and could not – become aware of the need to take legal action to vindicate her rights until a period of time had elapsed. Hence, application of the third element of the continuing violation doctrine requires the court to determine when the plaintiff discovered he was a victim of a continuing policy or pattern of discrimination.

In this case, the facts set forth by plaintiffs indicate that Merriott filed a union grievance on October 11, 1989, with regard to defendants' discriminatory behavior. Additionally, Breuker stated in her ADJB complaint, that prior to March 3, 1990, she "didn't file a discrimination complaint because [she] thought [she] might leave the University. [She] didn't think at that time anybody would hire [her] with a sex discrimination complaint on [her] record."

We believe that plaintiffs were aware that they were being subjected to discriminatory treatment prior to March 3, 1990, which was the cut-off date for purposes of the statute of limitations. Here, as with the decision of the plaintiff in *Bell*, *supra*, p 225, plaintiffs' failure to bring a timely suit as to those acts occurring prior to March 3, 1990, was a result of their own decisions to pursue other methods of recovery -- not the result of their failure to apprehend injury. Contrast *Meek*, *supra*, p 345 (the discriminatory "acts did not have such a degree of permanence that [the] plaintiff should have asserted her rights earlier."). Accordingly, the continuing violations exception does not apply. *Bell*, *supra*, p 225. The trial court did not err in granting defendants' motion for summary disposition pursuant to the statute of limitations as to those acts which occurred prior to March 3, 1990.

Although the continuing violations doctrine does not apply to the facts of this case, two of the allegedly discriminatory acts occurred within three years of the filing of plaintiffs' complaint. Plaintiffs alleged that defendants' promotion of Nathaniel Terry on March 5, 1990, and DiBiaggio's May 14, 1991, decision not to provide them with compensation for their attorney fees constituted actionable discrimination. As to these two claims, to the extent that the trial court granted summary disposition on statute of limitations grounds, it was in error.

III

The trial court granted summary disposition of plaintiffs' sexual discrimination claim alternatively pursuant to MCR 2.116(C)(8). Plaintiffs argue that this was in error. Because we disagree, reversal is not required as to those acts occurring after March 4, 1990.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal basis of the claim and is granted if the claim is so manifestly unenforceable as a matter of law that no factual progression could possibly support recovery. *Dolan v Continental Airlines*, 454 Mich 373, 380; ___ NW2d ___ (1997). Motions for summary disposition are examined on the pleadings alone, absent consideration of supporting affidavits, depositions, admissions, or other documentary evidence, and all factual allegations contained in the complaint must be accepted as true. *Id.*, pp 380-381.

As to defendants' promotion of Terry, by the time plaintiffs filed this complaint, they had been promoted to positions equivalent to Terry's and granted back pay. Thus, plaintiffs were made whole for the misconduct surrounding Terry's promotion. Accepting all the factual allegations in plaintiffs' complaint as true, no factual progression could possibly support recovery. The trial court did not err in granting defendants' motion for summary disposition as to this allegation. MCR 2.116(C)(8); *Dolan*, *supra*, pp 380-381.

Similarly, as to DiBiaggio's May 14, 1991, decision not to provide plaintiffs with compensation for their attorney fees, plaintiffs failed to allege how such behavior was discrimination based on gender. Accepting all the factual allegations in plaintiffs' complaint as true, no factual progression could possibly support recovery. The trial court did not err in granting defendants' motion for summary disposition as to this allegation. MCR 2.116(C)(8); *Dolan*, *supra*, pp 380-381.

IV

Plaintiffs argue that the trial court erred in summarily dismissing their claim of sexual harassment due to a hostile work environment, MCL 37.2102; MSA 3.548(102). Assuming arguendo that the trial court erred in granting defendants' motion pursuant to MCR 2.116(C)(8), the trial court nevertheless reached the correct result. This Court will not reverse where the right result is reached for the wrong reason. *Phinney v Perlmutter*, 222 Mich App 513, 532; ___ NW2d ___ (1997).

Here, plaintiffs' sexual discrimination claim was subject to the CRA's three-year statute of limitations period. MCL 600.5805(8); MSA 27A.5805(8); *Florence*, *supra*, p 216. The existence of continuing harassment is insufficient if none of the relevant conduct occurred within the limitations period. *Sumner*, *supra*, p 539. All of the incidents which comprised plaintiffs' allegation of harassment occurred prior to March 4, 1990. After reviewing the record, we are unable to find any instances of inappropriate remarks or touchings made after March 4, 1990. Accordingly, plaintiffs' claim of sexual harassment was barred by the statute of limitations. We affirm the trial court's dismissal of plaintiffs' sexual harassment claim.

V

Plaintiffs argue that the trial court erroneously dismissed their case based upon its finding that they failed to appeal the ADJB's final decision. Additionally, plaintiffs argue that the trial court erroneously failed to recognize the ADJB findings as binding admissions of defendants' liability. However, plaintiffs failed to cite any authority in support of their arguments and this Court will not search for authority to sustain or reject a party's position. *Roberts v Vaughn*, 214 Mich App 625, 630; 543 NW2d 79 (1995). Accordingly, these issues have been abandoned.

VI

Plaintiffs argue that the trial court erred in summarily dismissing their retaliation claim, MCL 37.2701; MSA 3.548(701). We disagree.

A motion for summary disposition under MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the nonmoving party is entitled to judgment or partial judgment as a matter of law. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 377-378; 512 NW2d 86 (1994). The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Id.*, p 378. The party opposing the motion has the burden of showing the existence of a genuine issue of material fact. *Id.* Giving the benefit of any reasonable doubt to the nonmoving party, the lower court must determine whether a record might be developed which would leave open an issue upon which reasonable minds might differ. *Id.*

The CRA prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701; MSA 3.548(701); *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). To establish a prima facie case of unlawful retaliation under the CRA, a plaintiff must establish: 1) that she opposed violations of the CRA or participated in activities protected by the CRA; and, 2) that the opposition or participation was a significant factor in an adverse employment decision. *Booker v Brown & Williamson Tobacco Co*, 879 F 2d 1304, 1310 (CA 6, 1989).

Adverse job action is not limited solely to loss or reduction of pay or monetary benefits. *Smart v Ball State Univ*, 89 F3d 437, 441 (CA 7, 1996). It can encompass other forms of adversity as well. *Id.* The question whether a change in an employee's job or working conditions is materially adverse, rather than essentially neutral, is generally one of fact. *Williams v Bristol-Myers Squibb Co*, 85 F3d 270, 273 (CA 7, 1996). However, not every employment decision can give rise to a retaliation claim. As the *Williams* Court stated in the context of a lateral transfer:

> Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a

> discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial. [*Id.*, p 274; citations omitted.]

Here, plaintiffs have failed to show the existence of a genuine issue of material fact that defendants' allegedly retaliatory actions adversely affected plaintiffs' employment in any significant manner. Giving the benefit of any reasonable doubt to plaintiffs, reasonable minds could not differ that plaintiffs failed to show a significant adverse action sufficient to form a prima facie case of unlawful retaliation. See *Smart*, *supra*, pp 442-443; *Williams, supra*, p 274. Accordingly, the trial court did not err in granting defendants' motion for summary disposition. *SCD Chemical Distributors*, *supra*, pp 377-378.

VII

Because the trial court properly granted summary disposition on each of plaintiffs' claims, the remaining issues are moot.

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage

[1] When construing the CRA, Michigan courts may properly consider federal precedent construing analogous provisions of Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*. *Barbour v Dep't of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993). Although federal civil rights cases are not binding authority on this Court, they are considered persuasive authority. *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424, 428; 390 NW2d 732 (1986).