STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM WASHINGTON and YVONNE WASHINGTON, Plaintiffs-Appellants, v CHRYSLER CORPORATION, a/k/a DAIMLER CHRYSLER CORPORATION, Defendant-Appellee.	UNPUBLISHED December 21, 2001 No. 226390 Wayne Circuit Court LC No. 98-810057-CZ

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's judgment granting defendant's motion for summary disposition based on the statute of limitations. We affirm.

Plaintiff, William Washington,[1] worked as a pipefitter repairing spray guns in the paint shop in defendant's Jefferson North Assembly Plant. During his time working for defendant, plaintiff filed numerous civil rights complaints with the Equal Employment Opportunity Commission (EEOC) and the Michigan Department of Civil Rights (MDCR), alleging race discrimination, sexual harassment, and retaliatory discrimination based on plaintiff's filing of the civil rights complaints. In March 1993, plaintiff was cleaning spray guns on a scaffold when he slipped and fell and injured himself. Plaintiff does not dispute that he was certified as disabled and unable to work from March 1993 to January 1995. In January 1995, plaintiff's family doctor opined that he could return to work without restrictions, but defendant's plant doctor disagreed. The collective bargaining agreement provided that, where there was a difference in medical opinions, the employee would be evaluated by an independent doctor. An independent doctor opined that plaintiff could return to work, but that he should avoid heavy lifting and repetitive bending. Defendant's medical department classified plaintiff as PQX 51 and 61 under defendant's Physical Qualification Code [code], meaning that plaintiff could not lift anything over twenty pounds, and he could only do stooping, squatting, bending, or twisting intermittently

[1] For the remainder of this opinion, reference to plaintiff in the singular will refer to William Washington.

and for not more than half of the work shift. Defendant's agents determined that, with plaintiff's physical limitations, he would not be able to return to work as a pipefitter.

Based on defendant's determination that plaintiff could not return to work, plaintiff was placed on layoff status on February 6, 1995. Plaintiff was notified that he was on layoff status, at the latest, on March 2, 1995, when he received a letter from his life insurance company. While he was laid off, defendant hired several pipefitters at the Jefferson North Assembly Plant. Plaintiff was later diagnosed with severe hypertension and was assigned PQX 190 by plant doctors, meaning that there was a "[c]ondition found on physical examination which does not allow work at present time but may after surgical or medical treatment." Plaintiff was later told by a plant doctor that he would not be able to return to work without restrictions until he brought a letter from his family doctor stating that he was able to return to work without restrictions at a specified date. In 1996 and 1997, plaintiff brought several letters from his family doctors stating that he could return to work without restrictions, but none of the letters gave a date that he could return. On August 19, 1997, plaintiff brought a letter to the plant doctor from his family doctor stating that he could return to work without restrictions on August 15, 1997. Defendant recalled plaintiff to work in August or September 1997.

Plaintiffs filed a complaint against defendant on March 31, 1998. In their subsequent amended complaint, plaintiffs alleged that defendant's determination not to immediately recall plaintiff to work violated the Handicappers' Civil Rights Act (HCRA),[2] MCL 37.1101 *et seq.*, because plaintiff's physical limitations did not prevent him from doing his former job (Count I) and that defendant's determination not to immediately recall plaintiff to work was in retaliation for plaintiff having filed prior civil rights charges, in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq.* (Count II). Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that: (1) plaintiffs' claims were time-barred by the statute of limitations, (2) plaintiff was not a "handicapped person" within the meaning of the HCRA because he was not "disabled" and his inability to do a particular job was insufficient to define him as "disabled," and (3) plaintiffs' retaliation claim under the CRA lacked merit because there was no evidence that defendant refused to recall plaintiff to work because of its actual knowledge of plaintiff's civil rights complaints. The trial court granted defendant's motion for summary disposition, finding that plaintiffs' claims were time-barred. Although the trial court did not specify whether it granted summary disposition under MCR 2.116(C)(7) or (C)(10), it granted defendant's motion based on the statute of limitations. Accordingly, we will review the trial court's grant of summary disposition under MCR 2.116(C)(7).

Pursuant to MCR 2.116(G)(5), when reviewing a motion for summary disposition based on MCR 2.116(C)(7), this Court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Id.* Under MCR 2.116(C)(7), the moving party is not required to file supporting documentation, and the opposing party need not reply with supportive material. *Id.* If none of the facts are in dispute

[2] The "Handicappers' Civil Rights Act" is now called the "Persons With Disabilities Civil Rights Act." 1998 PA 20; MCL 37.1101.

and reasonable minds could not differ concerning the legal effect of those facts, whether a plaintiff's claim is barred by the statute of limitations is a question of law for the court to decide. *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238; 625 NW2d 101 (2001). A trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). Further, a trial court's decision whether a plaintiff's claim is statutorily time-barred is a question of law that is reviewed de novo. *Id.* at 47.

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition because their claims were not statutorily time-barred. Plaintiffs argue, in part, that their claims are not barred by the statute of limitations because they alleged a continuing violation that extended the limitations period. We disagree. "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(9). An action alleging employment discrimination under the CRA must be brought within three years after the cause of action accrued. *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1992). The parties do not dispute that plaintiffs' claims in the instant case are governed by the three-year statute of limitations. Plaintiffs filed their complaint on March 31, 1998. Therefore, the acts of employment discrimination must have occurred after March 31, 1995, in order for plaintiffs' claims to fall within the statute of limitations. Plaintiffs do not dispute the trial court's finding that the statute of limitations began to run when plaintiff was laid off; however, they argue that defendant's actions constituted continuous violations, which violations occurred after the layoff and after March 31, 1995, thereby providing an exception to the statute of limitations.

Plaintiffs' argument is that, because defendant continued to deny plaintiff's requests to return to work after March 31, 1995, defendant's discriminatory actions were continuous and the limitations period was extended past March 31, 1998, when they filed the complaint. In *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986), our Supreme Court recognized an exception to the statute of limitations under a continuing violations doctrine. Under the continuing violations doctrine, "an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred." *Id.* at 510. In *Phinney v Perlmutter*, 222 Mich App 513, 546-547; 564 NW2d 532 (1997), this Court, citing *Sumner* and addressing the continuing violations doctrine, concisely stated:

> In *Sumner*, the Court noted that there were three distinct subtheories under the continuing violations doctrine. The "policy of discrimination" subtheory involves "allegations that an employer has engaged in a continuous policy of discrimination." The "continuing course of conduct" subtheory involves a situation "where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period." Finally, the "present effects of past discrimination" subtheory involved the situation where "a party suffered timely effects or injury from a past untimely act of discrimination." This subtheory ceased to be actionable following the United States Supreme Court's decision in *United Air Lines, Inc v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977). [Citations omitted.]

Here, plaintiffs argue that the "policy of discrimination" and "continuing course of conduct" subtheories support their position. The "policy of discrimination" exception exists where the plaintiff alleges that he is challenging not only the discriminatory conduct which has affected him, but also, or alternatively, the underlying employment system which has harmed or which threatens to harm him and other members of his class. *Sumner, supra* at 528. The "continuing course of conduct" exception exists where an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern. *Id.* Under this exception, only one of the allegedly discriminatory acts needs to have occurred within the limitations period. *Id.*

As to the "policy of discrimination" exception, plaintiffs argue that defendant's code discriminated against employees with minor limitations by labeling them as being more severely disabled than they really were. A "policy of discrimination" violation can be established based on company rules or guidelines. *Phinney, supra* at 547. The continued existence of a discriminatory policy can constitute a present violation each moment it is in effect and is a basis for a continuing violation. *Sumner, supra* at 536. A continuously maintained illegal employment policy implemented by an employer may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy. *Id.* at 534.

We find that there is not sufficient evidence in the present case to support plaintiffs' "policy of discrimination" theory. Defendant's code did not constitute a discriminatory policy. An independent doctor (not employed by defendant) recommended that plaintiff could return to work, but that he should avoid heavy lifting and repetitive bending. A doctor in defendant's medical department signed a medical form stating that plaintiff was qualified for work with physical limitations. Defendant's personnel then made an *individual assessment* that plaintiff could not perform his former job or another similar job with his physical restrictions. There is no evidence that the code was implemented to discriminate against injured employees by preventing them from returning to work by labeling them as more injured than they really were. Plaintiffs' argument lacks merit because a review of the various classifications under the code indicates that several different categories as to weight, movement, and other restrictions existed. Therefore, plaintiffs' argument, in essence, is that he was improperly placed into particular classifications under the code or policy. Accordingly, we find that the code was not discriminatory and did not extend the limitation period under the "policy of discrimination" exception to the statute of limitations.

Plaintiffs also argue that the "continuing course of conduct" exception to the statute of limitations applies to this case. Plaintiffs argue that defendant's continuous refusals to return him to work amounted to a continuing violation that occurred within the limitation period. In *Sumner, supra* at 538, our Supreme Court, quoting with approval *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983), noted the three factors traditionally analyzed in determining whether a continuing course of discriminatory conduct exists:

> 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 that 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?

We find it unnecessary to address the first two factors cited above, because plaintiffs' argument does not withstand scrutiny under the third factor, i.e., degree of permanence. We find that defendant's alleged discriminatory act in laying plaintiff off had such a degree of permanence that plaintiff should have asserted his rights earlier. Although defendant's decision to lay plaintiff off was not permanent, as he was recalled to work in August or September 1997, defendant's decision to lay him off should have triggered his awareness of his duty to assert his rights. Defendant's decision to lay plaintiff off, allegedly because his physical limitations would not allow him to perform his former job, should have indicated to plaintiff that defendant would not recall him to work as a pipefitter as long as the physical limitations could be asserted to defend defendant's actions. This should have indicated to plaintiff that the continued existence of the adverse consequences of the act was to be expected without being dependent on a continuing intent to discriminate. *Sumner, supra* at 538. Defendant's decision was permanent to the extent that it would not allow plaintiff to return to work at the pipefitter position until he brought a letter from a doctor stating that he no longer had the physical limitations that would prevent him from performing a pipefitter's work and that he could return to work on a specified date. When plaintiff did fulfill these conditions, he was returned to work almost immediately. Plaintiffs' amended complaint itself indicates the importance plaintiffs placed on the factual circumstances existing in February 1995, when plaintiff was laid off, which circumstances allegedly supported their causes of action. The allegations contained in the amended complaint at paragraph nine alleged that "[i]n February 1995, all doctors cleared plaintiff to return to work, yet he was not returned to work," and in paragraph fifteen alleged that "[p]laintiff did have some physical limitations in his file, but as of February 1995, no doctors supported those limitations and/or the limitations were not such that they would have precluded him from working at his old job." We can only conclude that plaintiff was aware that the layoff had such a degree of permanence, that plaintiff should have asserted his rights to seek legal redress earlier. Therefore, the "continuing course of conduct" exception to the statute of limitations is not applicable.

Outside the context of the continuing violations doctrine, plaintiffs finally argue that defendant's actions in failing to recall plaintiff, subsequent to the layoff, were independent actions giving rise to a cause of action each time plaintiff's requests to be returned to work were rejected. We disagree.

We find particularly instructive the following passage from *Sumner, supra* at 529, in which our Supreme Court stated:

> Even where no continuing violation is claimed, if the alleged independent act was in fact only an effect of a prior discriminatory act, there is no cause of action. An "independent violation" is no different in its make-up than an ordinary timely violation. It is termed "independent" only in response to an argument that the alleged violation is merely an inactionable effect of an untimely violation. A true independent violation would, of course, trigger the running of a new period of limitation for that violation and that one only.

The *Sumner* Court referenced a footnote directly after the above-cited passage, wherein the Court added:

> We also note that plaintiff maintains that the timely refusals to reinstate and the doctors' reaffirmations of his lack of qualifications in and of themselves constitute sufficient allegations of handicap discrimination act violations to provide jurisdiction. Defendant is correct in pointing out that mere requests for reconsideration do not revive an untimely cause of action. [*Id.* at 537 n 11.]

Plaintiffs argue that defendant's acts of hiring other people as pipefitters to fill openings in plaintiff's former position when plaintiff was physically able to work at his former position constituted a discriminatory act giving rise to a cause of action. Plaintiffs argue that additional post-layoff actions also constituted independent discriminatory acts, including defendant's rejection of a grievance, in which the union urged defendant to place plaintiff in a position, and defendant's rejection to recall plaintiff after he made medical visits to the plant and presented letters from family doctors.

The grievance action, the claim concerning the hiring of other pipefitters, the medical visits, and the doctor's letters were, at their core, efforts to change defendant's position, held at the time of the layoff, that plaintiff had physical limitations, and that those limitations prevented plaintiff from working for defendant. Therefore, because plaintiff's actions were merely attempts to have defendant reconsider its earlier decision made in February 1995, plaintiffs' action was not revived by subsequent rejections by defendant to recall plaintiff. The trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ Joel P. Hoekstra