

STATE OF MICHIGAN
COURT OF APPEALS

VIRGINIA JOLIET,

Plaintiff-Appellee,

v

GREGORY E. PITONIAK and FRANK BACHA,

Defendants-Appellants,

and

JAMES ARANGO,

Defendant.

UNPUBLISHED

August 31, 2004

No. 247590

Wayne Circuit Court

LC No. 01-140733-CZ

Before: Neff, P.J., and Smolenski and Zahra, JJ.

Zahra, J. (*concurring*).

I concur in the result reached by because I am bound to so by *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 321; 577 NW2d 881 (1998).¹ I write separately to express my agreement with Justice Taylor's dissent in *Jacobson*. 457 Mich at 330. But for the majority opinion in *Jacobson, supra*, I would hold that it is the employer's adverse action, not the date an

¹ I respectfully submit that the majority's reliance on *Collins v Comerica Bank*, 468 Mich 628, 632; 664 NW2d 713 (2003), is misplaced. *Collins* did not involve a "constructive discharge." "Constructive discharge is a defense against the employer's argument that the employee is precluded from bringing suit because he voluntarily terminated his employment. *Jacobson, supra* at 321 n 9, citing *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). In *Collins*, the employer fired the plaintiff. Here, plaintiff resigned. *Collins* did not interpret when plaintiff's claim "accrued" in the context of the defense of "constructive discharge," and therefore is not applicable to the instant case. Nonetheless, because I am bound to follow *Jacobson, supra*, and I conclude that *Jacobson* requires me to affirm the judgment of the trial court, I concur in the majority opinion.

employee unilaterally chooses to resign, that triggers the limitation period in an employment case involving a constructive discharge.

The statute of limitation at issue MCL 600.5808, states in relevant part:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(9) 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.^[2]

The statute clearly commences the limitation period from the date plaintiff's claim first "accrued," under MCL 600.5805(9).

In *Jacobson*, however, our Supreme Court held that a claim of employment discrimination, in the context of a "constructive discharge," generally accrues at the moment of resignation. *Jacobson, supra* at 321. The *Jacobson* Court expressed concern that an employee, by controlling the date of resignation, controls the date her cause of action accrues. *Id.* at 328-329 n 22. And while the majority in *Jacobson* recognized the potential for abuse when plaintiffs control the accrual of a cause of action, it concluded that the abuse would be mitigated in practice: "[o]bviously a person claiming 'intolerable' working conditions for some number of years will be hard pressed to convince a trier of fact, or even raise a question of fact, that such conditions were unreasonably 'intolerable.'" *Id.* at 330 n 24.³

However, it is legally irrelevant that "[t]he hypothetical tardy plaintiff . . . is more likely to harm, rather than help, her cause by delaying action." *Jacobson, supra*. Statutes of limitation define the time frame in which a plaintiff can file suit, not whether a plaintiff would be hard pressed to prove the claim. "A rule that allows plaintiffs to determine when a statute of limitations begins to run, e.g. by deciding when to resign, undermines the[] primary purposes of statutes of limitation." *Jacobson, supra* at 339 (Taylor, J., dissenting). I agree with Justice Taylor that "it is the adverse employment action leading to the employee's decision to leave that constitutes the 'discharge' giving rise to the cause of action." *Jacobson, supra* at 335 (Taylor, J., dissenting). "Mere continuity of employment, without more, is insufficient to prolong the life of

² This statute has since been amended and, effective March 31, 2003, this provision is cited as MCL 600.5805(10).

³ Simply put, *Jacobson* permits a plaintiff to postpone bringing a cause of action long after any discriminatory act occurred. Applied to the facts of this case, plaintiff effectively "controlled" the accrual of her cause of action by resigning after taking a brief vacation, during which no event occurred that supports a "constructive discharge."

a cause of action for employment discrimination.” *Id.* (Taylor, J., dissenting), citing *Delaware State College v Ricks*, 449 US 250, 257; 101 S Ct 498; 66 L Ed 2d 431 (1980).

Although I agree with the dissenting opinion in *Jacobson*, I am duty bound to follow the rule of law established by the majority opinion in *Jacobson*. I therefore concur in the result reached by the majority opinion in this case.

/s/ Brian K. Zahra