STATE OF MICHIGAN

COURT OF APPEALS

RICK KINSEY,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT FORMING INC.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
January 15, 2009

No. 282042
Oakland Circuit Court
LC No. 2007-080879-CD

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

In this racial discrimination case, plaintiff appeals as of right the trial court's order granting summary disposition for defendant and defendant appeals the trial court's order denying defendant's motion for sanctions. We affirm.

I. Facts and Procedural Background

Defendant Detroit Forming, Inc. (DFI) is a designer and manufacturer of plastic packaging, which employs over 2000 employees. In July 1996, DFI hired plaintiff as a shop assistant. Plaintiff was the first African-American male hired in the tool shop. Plaintiff's job responsibilities included clean up, such as sweeping the shop floor and cleaning the bathrooms, as well as shipping and receiving duties. Initially, plaintiff's job duties fell under numerous supervisors.

Sometime in 2000, plaintiff became dissatisfied with his position and requested in a July 5, 2000 letter to his supervisors, and again in a 2002 letter, that his job duties be changed because he did not like the cleaning aspect of his employment. At his deposition, plaintiff indicated that he came to feel demeaned by having to clean the bathroom because of name-calling and racial slurs being directed at him. Plaintiff did not mention in either letter, however, that he wished to be relieved of these duties because of derogatory treatment. Despite plaintiff's requests, defendant did not change plaintiff's duties.

In November 2003, Mr. Mike Szymanski, DFI's corporate purchasing manager, became defendant's sole supervisor. Mr. Szymanski required plaintiff to meet him every morning so plaintiff could provide him with a "game plan" for the day. Plaintiff, however, had difficulty providing a detailed plan because his duties could change depending on what was happening on

the shop floor. Therefore, plaintiff often told Mr. Szymanski that his duties would be "shipping and cleaning."

Because Mr. Szymanski expected a more detailed report of plaintiff's planned tasks than plaintiff was providing, he met with plaintiff to address the matter on January 6, 2004. Mr. Syzmanksi memorialized this discussion in a disciplinary conference from,[1] dated January 9, 2004, which plaintiff signed and noted, "Comments to follow." On January 12, 2004, Mr. Szymanski held another conference meeting with plaintiff, in which Mr. Szymanski addressed plaintiff's failure to abide by his work schedule and start time. Plaintiff signed this form and wrote on the form, "Comments to follow."

At their morning meeting on January 23, 2004, Mr. Szymanski again asked plaintiff for more detail regarding his daily plan. Plaintiff became angry, accused Mr. Szymanski of harassing him, and approached Mr. Szymanski in a threatening manner. Mr. Dave Ryan, DFI's vice president, spoke to plaintiff about this incident and plaintiff indicated that he would resolve the conflict and would not lose his temper again.

Soon after, on January 26, 2004, plaintiff responded to the January 9th conference form, by placing a written letter on the desks of Mr. Ryan, the company president, and the chairmen of the board. In this letter, plaintiff alleged five instances of discriminatory conduct where co-workers, including Mr. Ryan on one occasion, called plaintiff racially charged names. Plaintiff indicated that this letter was to be considered a "formal complaint." On the same date, plaintiff also responded to the January 12th conference form.

The next day, January 27, 2004, Mr. Szymanski held another conference with plaintiff and provided plaintiff with a conference form dated January 26, 2004. The purpose of this meeting was to clarify what is to happen in the morning meetings. Mr. Szymanski provided in the conference form, in pertinent part:

> Rick, as I mentioned in a pervious conference, I will need your <u>full</u> cooperation for this to work. We truly believe that the [morning] meeting[s] will only help your job. Be aware that refusal to do tasks assigned will be considered insubordination. Outbursts (as in last Fridays [sic] meeting) will not be tolerated in the future. [Emphasis in original.]

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[1] DFI uses a "disciplinary conference form" to address employee performance concerns, as indicated in DFI's employee handbook. If an employee receives a disciplinary conference form, the employee and the supervisor are required to discuss the issue, including possible consequences and future actions, and then both are required to sign the form acknowledging that the matter has been addressed. An employee may write an explanation on the form if he or she disagrees with the supervisor's assessment of the situation. If the employee refuses to sign the form, the employee could be excused from work until he or she signs the form.

Plaintiff refused to sign the form and Mr. Szymanski sent plaintiff home pursuant to DFI's policy. Mr. Szymanski swears in his affidavit that he had not seen plaintiff's January 26, 2004 responses to either the January 9th or January 12th conference forms before he sent plaintiff home.

The next day, January 28, 2004, plaintiff called in sick to work and informed defendant that he would be taking a medical leave of absence from January 29, 2004 through February 23, 2004. Upon returning to work on February 23, 2004, Mr. Szymanski provided plaintiff with responses to plaintiff's January 26, 2004 responses to the January 9th and 12th conference forms. In his response, Mr. Szymanski requested that plaintiff provide "specifics" regarding the discriminatory incidents and that an investigation would be pursued if plaintiff wished.

While plaintiff was reviewing Mr. Szymanski's response, Mr. Szymanski gave plaintiff two additional disciplinary conference forms, the former regarding plaintiff's defiance and the latter placing plaintiff on attendance probation, both of which resulted from infractions before plaintiff's medical leave. Plaintiff refused to sign these conference forms and tore them up, in the alleged belief that they were retaliation for reporting discrimination. While doing so, plaintiff allegedly yelled obscenities at Mr. Szymanski. Mr. Szymanski then asked plaintiff to leave and punched plaintiff's time card out, but plaintiff refused to leave. Mr. Ryan then escorted plaintiff from DFI's premises. The next day, February 24, 2004, DFI sent a letter to plaintiff terminating his employment due to plaintiff's "gross insubordination and . . . direct violation of the company rulebook."

Plaintiff then instituted this lawsuit, alleging in a two-count complaint that defendant violated the Elliot-Larson Civil Rights Act (ELCRA) when defendant (1) subjected plaintiff to wrongful and discriminatory treatment because of plaintiff's race and (2) retaliated against plaintiff because plaintiff complained about defendant's discriminatory employment practices. In his complaint, plaintiff alleges the five instances of racially discriminatory conduct that he complained of in his January 26th letter to management, recounted in more complete detail. First, in November 2001, Mr. Ryan said to plaintiff, while trying to remove plaintiff's hat, "I guess I should get my hair cut like Leroy here." Mr. Szymanski witnessed the incident and told plaintiff he would say something to Mr. Ryan, but plaintiff indicated that he did not wish Mr. Szymanski to do so. Second, in May 2002, a co-worker, Mr. Steve Premo, saw plaintiff sweeping the shop floor, and called out, "Black man with a broom." Plaintiff did not respond. Third, in July 2003, Mr. Premo went to hand plaintiff his paycheck and said, "Here you go George." This time, plaintiff responded, "Don't call me George . . . I never hear you call a white person George." Nonetheless, Mr. Premo called plaintiff "George" once again in August 2003. Lastly, in September 2003, another co-worker, who was pushing a cart to plaintiff, said, "Here you go buckwheat."

Defendant moved for summary disposition alleging that the three year statute of limitations barred plaintiff's claim, MCR 2.116(C)(7), that plaintiff failed to state a claim of racial discrimination, MCR 2.116(C)(8), and that no genuine question of fact exists and that defendant is entitled to judgment as a matter of law, MCR 2.116(C)(10). Defendant also filed a motion for actual costs and attorneys fees, alleging that plaintiff's claim is frivolous. The trial court granted defendant's motion for summary disposition, but denied defendant's motion for sanctions. This appeal followed.

II. Standards of Review

We review a trial court's determination regarding a motion for summary disposition de novo.[2] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(10) is proper if no genuine issue of material facts exists and the moving party is entitled to judgment as a matter of law. *Id.* at 120. Summary disposition under MCR 2.116(C)(7) is properly granted if the claim is barred by the relevant statute of limitations. Under this subrule, we consider all admissible evidence, such as affidavits, depositions, and admissions, offered in support of the motion, as well as the pleadings so long as they are not contradicted by admissible documentary evidence. *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309, 313; __ NW2d __ (2008). "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Id.* (citation and quotation marks omitted). "Whether a claim is barred by a statute of limitations is a question of law that this Court reviews de novo." *Vanslembrouck v Halperin*, 277 Mich App 558, 560; 747 NW2d 311 (2008) (citation and quotation marks omitted). Further, we review a trial court's decision to deny sanctions for clear error. *Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 485; __ NW2d __ (2008).

III. ELCRA

Plaintiff alleges that defendant subjected plaintiff to wrongful and discriminatory treatment because of plaintiff's race, MCL 37.2202, and retaliated against plaintiff because plaintiff complained about the alleged discriminatory treatment, MCL 37.2701. According to plaintiff, the trial court erred by granting summary disposition for defendant because the adverse treatment and retaliatory acts occurred within the statute of limitations. We disagree.

Under the ELCRA, an employer must not engage in discriminatory treatment of an employee. MCL 37.2202(1)(a) provides, in pertinent part, that "[a]n employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment . . . because of . . . race . . . ." To establish a prima facie claim of racial discrimination under this provision, a plaintiff must establish by a preponderance of the evidence that "(1) []he was a member of the protected class; (2) []he suffered an adverse employment action, in this case, [discipline and eventually discharge]; (3) []he was qualified for the position; but (4) []he was discharged under circumstances that give rise to an inference of unlawful discrimination." *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). The ELCRA also prohibits a person from retaliating against another for engaging in an activity protected by the act. MCL 37.2701(a) provides, in relevant part, that "a person shall not . . . [r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because

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[2] Defendant motioned for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), and the trial court granted the motion without specifying which subrule it relied upon. However, because the trial court considered evidence outside the pleadings and explicitly indicated that plaintiff's claim was barred by the limitations period, we will consider the court's decision as based upon MCR 2.116(C)(7) and (C)(10).

the person has . . . filed a complaint . . . ." To make a prima facie showing of retaliation, a plaintiff must show:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

In addition, a plaintiff alleging racial discrimination and retaliation must file his complaint within the limitations period. The relevant statute of limitations "requires a plaintiff to commence an action within three years of each adverse employment act by a defendant." *Garg v MaComb Co Community Mental Health*, 472 Mich 263, 282; 696 NW2d 646 (2005); MCL 600.5805. MCL 600.5827 provides that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Thus, "a person must file a claim under the [ELCRA] within three years of the date his or her cause of action accrues . . . ." *Garg*, *supra* at 284. Adverse employment acts accruing outside this period are barred by the statute of limitations. *Id.*

Plaintiff filed his complaint on February 16, 2007, and thus, his claims must be based upon wrongs accruing within three years of that date, or between February 16, 2004 and February 16, 2007. However, the adverse employment actions forming the basis of plaintiff's complaint occurred in November 2001, May 2002, and July, August, and September of 2003. Because plaintiff did not commence his lawsuit within three years of from the date of these alleged wrongful actions, and instead waited until February 16, 2007 to file his complaint, plaintiff's claim is not timely filed and it is barred by the statute of limitations. *Garg*, *supra* at 282. Accordingly, plaintiff cannot rely upon these allegedly adverse employment actions to establish his claims of race discrimination and retaliation and summary disposition for defendant pursuant to MCR 2.116(C)(7) was appropriate.

Plaintiff, however, argues that sufficient evidence of race discrimination and retaliation occurred on February 23, 2004, the only day plaintiff worked within the limitations period, based on a disparate treatment theory of discrimination.[3] Specifically, plaintiff contends that an inference of unlawful discrimination arose on this date because defendant rejected his racial discrimination complaint, and plaintiff was simultaneously given two disciplinary conference

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[3] Michigan courts have recognized two approaches to establishing a race discrimination claim: intentional discrimination and disparate treatment. Under the former, a "plaintiff must show that he was a member of the affected class, that he was discharged, and that the person discharging him was predisposed to discriminate against persons in the affected class and had actually acted on that disposition in discharging him." *Jenkins v American Red Cross*, 141 Mich App 785, 793-794; 369 NW2d 223 (1985). The facts plaintiff posits here do not allege a theory of intentional discrimination. Therefore, we consider plaintiff's claim with respect to the events on February 23, 2004, under the disparate treatment theory of race discrimination.

forms, was asked to leave the premises, and was fired the next day. We cannot agree. To establish a prima facie case of disparate treatment "a plaintiff must show that [he] was a member of the class entitled to protection under the act and that, for the same or similar conduct, [he] was treated differently than one who was a member of a different race." *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994) (citation and quotation marks omitted). It is undisputed that plaintiff is a member of a protected class. However, plaintiff has failed to produce evidence showing that Mr. Szymanski or Mr. Ryan treated him differently than an employee of a different race for the same conduct: violation of DFI's employment policies, insubordination, and destruction of DFI property. In fact, plaintiff produced no evidence whatsoever regarding how other employees were disciplined for the same continuous and escalating acts of insubordination. Thus, plaintiff has failed to establish a prima facie claim of racial discrimination based on the events February 23, 2004 and his subsequent discharge on February 24, 2004.

With respect to plaintiff's retaliation claim, in absence of the evidence of the previous acts barred by the statute of limitations, the evidence is insufficient to establish the necessary causal connection between plaintiff's protected activity, his formal complaint, and plaintiff's termination. MCL 37.2701; *DeFlaviis, supra* at 436. Were we to find otherwise, as plaintiff urges this Court to do, our decision would extend the statute of limitations amounting to an application of the continuous violation doctrine, which our Supreme Court squarely rejected in *Garg*, *supra* at 266. For these reasons, we conclude that summary disposition under MCR 2.116(C)(7) and (C)(10) was appropriate for defendant.

IV. Sanctions

Defendant argues that it is entitled to sanctions on the basis that plaintiff filed a frivolous lawsuit pursuant to MCL 600.2591(1) and MCL 2.114(D) and (E). We disagree. Although the trial court did not indicate on what basis it denied defendant's motion, we are not "left with a definite and firm conviction that a mistake has been made." *Hansen Family Trust*, *supra* at 486 (citation and quotation marks omitted). Simply because we must ultimately reject plaintiff's claims does not mean that plaintiff filed a frivolous complaint. *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). After our review of the record and plaintiff's appellate brief, we are of the view that plaintiff filed a claim sufficiently based on law and fact. Accordingly, it was proper for the trial court to deny defendant's motion for sanctions.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio