STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA DZURKA,

Plaintiff-Appellant,

v

MIDMICHIGAN MEDICAL CENTER-MIDLAND,

Defendant-Appellee.

UNPUBLISHED
January 22, 2019

No. 343162
Midland Circuit Court
LC No. 17-005082-NZ

Before: BOONSTRA, P.J., and SAWYER and TUKEL, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition under MCR 2.116(C)(7) (statute of limitations) in favor of defendant on plaintiff's claim alleging retaliatory discharge in violation of MCL 333.20176a(1).[1] We affirm.

[1] MCL 333.20176a(1) provides as follows:

> (1) A health facility or agency shall not discharge or discipline, threaten to discharge or discipline, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee or an individual acting on behalf of the employee does either or both of the following:
>
> (a) In good faith reports or intends to report, verbally or in writing, the malpractice of a health professional or a violation of this article, article 7, article 8, or article 15 or a rule promulgated under this article, article 7, article 8, or article 15.

Plaintiff was hired by defendant as an assistant surgical technician in 2007. Plaintiff was discharged on November 10, 2015. The parties disagree on the basis for the discharge. Plaintiff claims that it was done in retaliation for her making reports of her concerns about operating room practices that jeopardized patient safety. Defendant, on the other hand, states that the discharge was based upon its Corrective Action Policy, which sets out "Action Steps" for various rule violations and provides for termination if four Action Steps are accumulated within a 12-month period and that plaintiff reached that level on November 10, 2015, because she accumulated more than eight "attendance occurrences." Ultimately, however, the reason for plaintiff's discharge is not relevant to this appeal as the question presented is whether plaintiff's suit was filed in a timely manner in light of a contractual provision that shortened the statutory period of limitations.

Plaintiff initially filed suit in federal district court, raising a federal claim under the Family and Medical Leave Act (FMLA), 29 USC § 2601 *et seq*., and requesting that the federal court exercise pendant jurisdiction over her state law claim. The federal court dismissed plaintiff's FMLA claim on its merits and declined to exercise pendant jurisdiction over the state law claim. *Dzurka v Midmichigan Medical Center-Midland*, unpublished opinion and order (ED MI, docket no. 16-cv-11718, 10/30/2017, 2017 WL 4883561). Plaintiff then filed the instant action on her state law claim in Midland Circuit Court. Defendant moved for summary disposition, arguing that her filing was untimely under a contractual provision that required all claims arising out of her employment be filed within 180 days.

The application for employment filed by plaintiff in 2007 included the following provision:

> **Limitations on Claims**. I agree that any lawsuit against MidMichigan Health and/or its agents arising out of my employment or termination of employment, including but not limited to claims arising under State or Federal civil rights statutes, must be brought within the following time limits or be forever barred: (a) for lawsuits requiring a Notice of Right to Sue from the EEOC, within 90 days after the EEOC issues that Notice, or (b) for all other lawsuits, within (i) 180 days of the event(s) giving rise to the claim or (ii) the time limit specified by statutes, whichever is shorter. I waive any statute of limitations that exceeds this time limit.

Plaintiff filed her federal lawsuit on May 13, 2016, 185 days after her discharge. She did not file her complaint in circuit court until December 5, 2017, 756 days after her discharge (and 36 days after the dismissal of the federal lawsuit). The trial court concluded that the agreement for a shortened period of limitations was enforceable and determined that the suit was untimely.

We review a grant of summary disposition de novo. *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 517; 847 NW2d 657 (2014). This Court summarized the standard for motions brought under MCR 2.116(C)(7) in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff,

> unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate.

Although plaintiff acknowledges that Michigan law permits parties to agree to a shortened period of limitations,[2] plaintiff argues that there was not an enforceable contract in this case because of a lack of mutuality of obligation and consideration. We disagree.

The essence of plaintiff's argument is that the Limitations on Claims clause appeared in the application for employment and not in an employment contract and the application is not itself a contract. This argument was clearly rejected by this Court in *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 244; 625 NW2d 101 (2001):

> Plaintiff next argues that the 180–day period of limitation cannot be enforced because defendant is "attempting to enforce the provisions contained in the employment application as if it is a contract, a contract where the Defendants have absolutely no obligation." "The enforceability of a contract depends, however, on consideration and not mutuality of obligation." *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579, 600; 292 NW2d 880 (1980); 1 Restatement Contracts, 2d, § 79, p 200. This Court previously has recognized that the terms of an employment application constituted part of an employee's and employer's contract of employment. *Butzer v Camelot Hall Convalescent Centre, Inc,* 183 Mich App 194, 200; 454 NW2d 122 (1989); *Eliel v Sears, Roebuck & Co,* 150 Mich App 137, 140; 387 NW2d 842 (1985). Here, defendant clearly provided plaintiff consideration to support enforcement of the terms of the application, specifically employment and wages. 1 Restatement Contracts, 2d, § 71, p 172 (consideration may constitute a return promise or a performance, including an act, a forbearance, or "the creation, modification, or destruction of a legal relation"); Black's Law Dictionary (7th ed), p 300 (defining consideration as "[s]omething of value [such as an act, a forbearance, or a return promise] received by a promisor from a promisee").

Plaintiff presents an exhaustive, but ultimately unpersuasive, argument that the *Timko* Court's reliance on *Toussaint* is misplaced. Ultimately, however, *Toussaint* did state that enforceability of a contract is based on consideration, not mutuality of obligation. And, as *Timko* discusses, the

[2] See, e.g., *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005) ("an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provisions would violate law or public policy.").

grant of employment establishes the consideration. In short, we are not persuaded that *Timko* was incorrectly decided.[3]

Plaintiff also argues that the clause in the application is unenforceable due to an ambiguity. Specifically, plaintiff refers to the following language in paragraph 9 in the application: "except as provided above, all compensation, benefits, programs, rules, and policies of MidMichigan Health are subject to exception or change at any time as decided by MidMichigan Health in its sole discretion." Plaintiff argues that this is ambiguous because, on the one hand, it provides that all policies may be changed, while, on the other hand, it also states "except those provided above" which cannot be changed and fails to identify which policies those are. Any ambiguity is created, not by the contract, but by selectively quoting only part of paragraph 9. Paragraph 9, in its entirety, provides as follows:

> **Consideration for Employment:** I agree to the above terms of employment if I am employed by MidMichigan Health. Should I be employed, I understand and agree that these provisions of my employment can be revised only by a signed contract authorized by a written resolution of MidMichigan Health, and that no person in MidMichigan Health has any authority to offer employment other than on an at-will basis as described above. I understand and agree that, except as provided above, all compensation, benefits, programs, rules, and policies of MidMichigan Health are subject to exception or change at any time as decided by MidMichigan Health in its sole discretion.

Clearly, the term "provided above" means those provisions which precede that phrase. For example, an exception cannot be granted to an applicant to offer just-cause employment instead of at-will employment. In sum, no ambiguity exists.

Finally, plaintiff argues that the trial court erred in failing to consider and reject defendant's motion for summary disposition based on MCR 2.116(C)(10). The trial court did not reach that argument because it dismissed plaintiff's complaint under (C)(7) and it was unnecessary to reach the (C)(10) argument.

Affirmed. Defendant may tax costs.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jonathan Tukel

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[3] Potentially, plaintiff's argument might have validity in a case where suit is brought on a claim of discrimination in a failure to hire case. In such a case, there would be no grant of employment to establish the consideration. But that is clearly not the case here, where plaintiff was given a grant of employment and, in fact, worked for defendant for eight years.