STATE OF MICHIGAN

COURT OF APPEALS

ANTOINETTE DENISE WRIGHT,

Plaintiff-Appellant,

v

HARK ORCHID CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 11, 2021

No. 351667
Kalamazoo Circuit Court
LC No. 2017-000480-NO

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

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant operates a "propagation laboratory" that processes orchid plantlets in a sterile environment. Plaintiff began working for defendant as a production line worker in July 2014. Plaintiff's doctor diagnosed her with carpal tunnel syndrome in her left wrist in May 2015. Plaintiff filed a worker's compensation claim related to this diagnosis later that month.[1] According to plaintiff, she was then subjected to retaliatory actions by defendant's employees, including Anja Barnard (Barnard), an administrative assistant, and Frank Rinderspacher (Rinderspacher), the general manager. These actions allegedly included threats of losing her job and of a delay in medical treatment. According to plaintiff, she was told by Barnard that she needed to see "a company doctor" before having surgery, although Rinderspacher later told her that there was no company doctor.

Plaintiff was treated by a doctor at Western Michigan University's medical school on May 6, 2015; plaintiff stated that she provided Barnard with a "disability slip" the next day that stated that plaintiff could return to work with no restrictions if she wore a splint on her left wrist.

[1] This claim was settled in 2017.

Plaintiff later provided Barnard with a doctor's note dated May 28, 2015 that also stated that plaintiff could return to work unrestricted if she wore a brace, and diagnosing plaintiff's injury as being a repetitive motion injury caused by plaintiff's work.

Plaintiff consulted a hand surgeon, Dr. Todd Ruitter, on June 23, 2015, and agreed to try non-operative treatment for four weeks before deciding whether to have surgery. The surgeon's notes from the June 23 consultation said that he would "continue [plaintiff's] current work restrictions of no lifting > 15 lbs for the time being."

Plaintiff's last day of work for defendant was June 25, 2015. According to plaintiff, she told employees of defendant that she was leaving and would not be returning to work until after surgery because of the "restriction note" the surgeon had sent to defendant. A doctor from Western Michigan University sent defendant a letter, dated June 29, 2015, stating that plaintiff had been diagnosed with carpal tunnel syndrome and was receiving treatment; the letter stated, "I would like to ask you, her employer, that she is [sic] excused from work that involves using her left wrist as indicated on the Work Restriction Form signed by another physician that my patient will provide you with." Plaintiff left two voicemails with Barnard on July 1, 2015, stating that she would be off work until her surgery. Plaintiff left another voicemail with Barnard on July 5, 2015, stating that she would be "bringing in [her] doctor's note later today." However, according to plaintiff, she did not bring in a doctor's note, but instead contacted Dr. Ruitter's office and was told that a note would be sent by facsimile. Plaintiff also testified at her deposition that Barnard told her to "keep calling in" until defendant was provided with a doctor's note saying that she was restricted from working until she had surgery, and that Barnard further told plaintiff that she "didn't have to fill out anything."

Defendant terminated plaintiff's employment on July 14, 2015. Rinderspacher sent plaintiff a letter stating in relevant part: "Section 2.b in our employee handbook states that if you fail to call in for 3 consecutive days, you will be considered to have quit. We therefore deem your termination as voluntary, as we have not heard from you since July 5."

Plaintiff filed suit on October 25, 2017, alleging that she was subjected to retaliatory employment action for exercising her rights under the worker's disability compensation act of 1969, MCL 481.101 *et seq*., as well as racial discrimination in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., and further alleging that defendant and its employees had subjected her to the intentional infliction of emotional distress. The parties conducted discovery. Over the next year, Barnard's deposition was rescheduled several times; Barnard was ultimately deposed by plaintiff on December 20, 2018. After Barnard's initial deposition, plaintiff sought to depose Barnard again, but Barnard, who was independently represented, moved for a protective order, which the trial court granted on February 8, 2019. The order stated that plaintiff could only depose Barnard again if the trial court granted its permission.

Plaintiff did not seek the court's permission for several months. On August 5, 2019, defendant filed a motion for summary disposition under MCR 2.116(C)(7) (claim barred by release or statute of limitations) and MCR 2116(C)(10) (no genuine issue of material fact). On August 29, 2019, plaintiff filed a motion seeking permission to further depose Barnard. On September 13, 2019, the parties entered a stipulation adjourning their settlement conference and scheduling

Barnard's continued deposition for September 19, 2019. This stipulation noted that the hearing on defendant's motion for summary disposition would still be held on October 1, 2019.

Plaintiff re-deposed Barnard on September 19, 2019. Plaintiff filed a response to defendant's motion for summary disposition on the morning of the October 1, 2019 hearing. At the hearing, defendant's counsel made an oral motion to strike plaintiff's response brief as untimely filed, under MCR 2.116(G)(1)(a)(ii), which requires a response to a summary disposition motion to be filed and served at least 7 days before the hearing unless the trial court has set a different time. Plaintiff's counsel responded that the timing of Barnard's deposition had "made it a little more difficult to get the transcript" and asked that the trial court exercise its discretion to either excuse the late filing or adjourn the matter to allow defendant's counsel additional time to read the response and file a reply. Plaintiff's counsel also argued that defendant had not provided an "absence history report" or other evidence showing the specific three days of work plaintiff was alleged to have missed. The trial court held that plaintiff's response was untimely filed and that the court would therefore not consider it in rendering its decision. The trial court then held that plaintiff had not raised a genuine issue of material fact regarding her claims against defendant and granted defendant's motion for summary disposition under MCR 2.116(C)(10). The trial court subsequently denied plaintiff's motion for reconsideration. (ROA, 4).

This appeal followed.

II. STRIKING OF PLAINTIFF'S RESPONSE

Plaintiff argues that the trial court erred by holding that her response to defendant's motion for summary disposition was untimely filed and by not considering her response in deciding defendant's motion. We disagree. We review for an abuse of discretion a trial court's decision to entertain briefs filed after an applicable deadline. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978); *Kemerko Clawson LLC v RXIV, Inc*, 269 Mich App 347, 352; 711 NW2d 801 (2005). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.116(G)(1)(a)(ii) provides that "any response to [a summary disposition] motion must be filed and served at least 7 days before the hearing" unless the court has set a different timetable. When a party fails to respond to a motion for summary disposition within that time period, a trial court may exclude any response and supporting evidence from consideration. *Prussing*, 403 Mich at 369.

Plaintiff argues that the trial court abused its discretion by excluding her response because it failed to consider that plaintiff's counsel deposed Barnard on September 19, 2019 and immediately ordered the transcript, but that counsel did not receive the transcript until September 26, 2019, thereby making it impossible to file a response to defendant's motion seven days before the hearing. We disagree. Plaintiff did not explicitly make this argument to the trial court, stating only that the timing of Barnard's deposition had "made it a little more difficult to get the transcript." Plaintiff's statements on appeal concerning the exact time counsel received the transcript are also an impermissible expansion of the record on appeal. See MCR 7.210; *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Moreover, plaintiff does not

explain why counsel did not attempt to inform the trial court that the brief would be untimely filed, seek an adjournment, or even communicate with opposing counsel concerning the transcript issue; nor does plaintiff explain why the brief was not filed until the very morning of the hearing when the transcript was admittedly received five days earlier. Under these circumstances, the trial court's refusal to consider plaintiff's extremely untimely response, especially when litigation had been ongoing for nearly two years, was within the range of principled outcomes. *Prussing*, 403 Mich at 369-370; *Maldonado*, 476 Mich at 388.

III. SUMMARY DISPOSITION

Plaintiff also argues that the trial court erred by granting defendant's motion for summary disposition under MCR 2.116(C)(10). We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick*, Inc, 284 Mich App 25, 29; 772 NW2d 801 (2009). When a movant's motion is properly supported with documentary evidence, the opposing party must submit a responsive brief with documentary evidence creating a genuine issue for trial. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 1999. If an opposing party does not respond to a properly supported motion for summary disposition, "judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(4).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 N.W.2d 741 (1993). [*Smith*, 460 Mich at 455.]

Plaintiff argues that defendant did not carry its initial burden of supporting its position, because defendant did not produce the portion of the employee handbook containing the "no show, no call" attendance policy referenced in Rinderspacher's letter to plaintiff informing her of her termination. We disagree. Attached to defendant's motion was plaintiff's deposition testimony admitting that defendant's policy required employees to call in for every work day for which they

would be absent. Plaintiff also agreed that she had read about these procedures in the employee handbook, and that she was aware that employees would receive "points" for days on which they failed to call in, and would be "terminated after so many points." Finally, plaintiff admitted that Barnard told her to "keep calling in." Defendant also attached earlier correspondence from Rinderspacher to plaintiff informing her of the absentee policy found in the employee handbook.

This evidence was sufficient to meet defendant's initial burden to support its position that its employment actions were taken for a legitimate, nondiscriminatory or retaliatory reason. See *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001). Defendant carried its initial burden of supporting its motion with documentary evidence. See MCR 2.116(G)(3). Once defendant met this initial burden, it was plaintiff's responsibility to respond with documentary evidence of her own. *Id*., see also *Smith*, 460 Mich at 457 n 3. As stated earlier, the trial court properly refused to entertain plaintiff's extremely untimely response. Defendant was therefore not required to submit additional evidence. *Smith*, 460 Mich at 457 n 3. Because plaintiff failed to satisfy her burden under MCR 2.116(G)(4) of responding to defendant's properly supported motion, the trial court did not err by granting defendant's motion for summary disposition under MCR 2.116(C)(10). *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725; 691 NW2d 1 (2005); *Smith*, 460 Mich at 455.

Affirmed.

/s/ James Robert Redford
/s/ David H. Sawyer
/s/ Mark T. Boonstra