STATE OF MICHIGAN

COURT OF APPEALS

TIMIKA RAYFORD,

Plaintiff-Appellant,

v

AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE,

Defendant-Appellee.

UNPUBLISHED
December 16, 2021

No. 355232
Macomb Circuit Court
LC No. 2020-001548-CD

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition in favor of defendant under MCR 2.116(C)(7) and (8) because a contractual statute of limitations barred plaintiff's claims and plaintiff otherwise failed to state a claim for abuse of process. We affirm.

I. BACKGROUND

Plaintiff is a certified nursing assistant hired by defendant, a nursing care facility, on February 14, 2017. Approximately a week into her employment, plaintiff signed a document titled, "Employee Handbook Acknowledgment." The Acknowledgment stated in relevant part:

> In consideration of my employment, I agree that any claim or lawsuit arising out of my employment with the Company, or my application for employment with the Company, **must be filed no more than 180 days** after the date of the employment action that is the subject of the claim or lawsuit unless the applicable statute of limitations period is shorter than 180 days in which case I will continue to be bound by that shorter limitations period. While I understand that the statute of limitations for claims arising out of an employment action may be longer than 180 days, I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY, unless state, federal or local law prohibits such waiver.

According to the allegations in her complaint, a few months later, plaintiff became aware of inappropriate sexual behavior between defendant's upper management and other nursing assistants wherein staff were allegedly given preferential treatment in exchange for sexual acts. Plaintiff reported this behavior to defendant's human resources division and the state of Michigan.

On July 1, 2017, plaintiff finished her shift and, upon leaving the building, realized that she had accidentally left her purse in a locked room. Plaintiff was unable to access the room until the next day, when she discovered her purse had been stolen. Plaintiff reported the theft to defendant, as well as the police department. Defendant, however, accused plaintiff of lying, and defendant allegedly showed the police a false video recording of plaintiff leaving with her purse. The police then charged plaintiff, on July 3, 2017, with making a false report. Defendant terminated plaintiff's employment shortly thereafter on July 7, 2017 Ultimately, the criminal charge was dismissed when defendant could not produce footage of plaintiff leaving with her purse on the day of the alleged theft.

Nearly three years later, in May 2020, plaintiff filed the instant seven-count complaint. Plaintiff pleaded claims for harassment based on race and sex or gender, retaliation, and hostile work environment in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. (Counts I through IV); wrongful discharge in violation of public policy (Count V); malicious prosecution (Count VI); and abuse of process (Count VII). In lieu of answering the complaint, defendant moved for summary disposition under MCR 2.116(C)(7) and (8). Defendant argued, in part, that because all of plaintiff's claims arose out of her employment, and she filed them more than two years after they accrued, all her claims were barred by the contractual six-month (180-day) limitations period contained in the Acknowledgment. Plaintiff countered that the Acknowledgment was unenforceable as an unconscionable contract of adhesion and, alternatively, that defendant should be estopped from relying on it because defendant did not provide her the Acknowledgment in violation of the Bullard-Plawecki Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*

Ultimately, the circuit court agreed with defendant and dismissed all of plaintiff's claims under MCR 2.116(C)(7). The circuit court reasoned that the Acknowledgment "clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to suit," and that plaintiff failed to provide any authority that the Acknowledgment was unconscionable. Regarding plaintiff's claim that defendant should be estopped from relying on the Acknowledgment under the ERKA, the circuit court found that the statute was not triggered because plaintiff had not requested her personnel file. Additionally, the circuit court dismissed plaintiff's abuse-of-process claim under MCR 2.116(C)(8), finding that plaintiff failed to plead facts that defendant abused the criminal process for an ulterior motive *after* its initiation. Plaintiff moved for reconsideration as to the abuse-of-process claim only, and the circuit court denied her motion. This appeal followed.

II. STANDARD OF REVIEW

A motion under MCR 2.116(C)(7) is properly granted when a claim is barred by a statute of limitations. Such a motion is reviewed de novo and may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). We accept "[t]he allegations of the complaint . . . as

true unless contradicted by documentary submissions." *Id*. Further, we must consider the documentary evidence to determine whether there is a genuine issue of material fact regarding whether a claim is statutorily barred under MCR 2.116(C)(7). *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Id*.

III. ANALYSIS

On appeal, plaintiff argues that the circuit court erred by dismissing her claims under MCR 2.116(C)(7) on the basis that the Acknowledgment's six-month limitations period bars her claims. Plaintiff does not contest that she entered into a contract under the Acknowledgment agreeing to a six-month limitations period for all claims arising from her employment. Rather, plaintiff argues that the Acknowledgment is not enforceable because it is unconscionable and, alternatively, defendant should be estopped from relying on it because defendant violated the ERKA. We disagree.

A. SHORTENED LIMITATIONS PERIOD

Michigan courts have long recognized that parties to a contract are free to agree to a shortened limitations period. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009). "An unambiguous contractual provision providing for a shortened limitations period is to be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability." *Id*. These same principles apply in the context of employment contracts. See *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005).

At the outset, plaintiff questions this well-established law by suggesting that contracts of adhesion (a take-it-or-leave-it agreement), like the Acknowledgment, deserve "close judicial scrutiny" and may be voided by a judicial assessment of "reasonableness" under *Herweyer v Clark Highway Servs*, 455 Mich 14; 564 NW2d 857 (1997), overruled by *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Plaintiff recognizes that the Michigan Supreme Court overruled *Herweyer* in *Rory*, but posits that an "open question" exists whether *Herweyer*'s "close judicial scrutiny" or reasonableness standard applies in the context of employment contracts because *Rory* did not involve an employment contract. Plaintiff does not adequately explain how, were her understanding of the jurisprudence correct, application of *Herweyer*'s "close judicial scrutiny" rubric would change the outcome in this case or, otherwise, benefit her. Notwithstanding plaintiff's failure in this regard, *Rory* made it clear that "an adhesion contract is simply a type of contract and is to be enforced according to its plain terms just as any other contract" consonant with traditional contract principles that have been historically followed in Michigan. *Rory*, 473 Mich at 488 (emphasis omitted). Moreover, given that *Rory* viewed *Herweyer* as an aberration that strayed from traditional contract rules in favor of judicial whims of reasonableness, we cannot conclude that *Rory* left open a question whether such traditional rules would apply in the context of an employment agreement.

Turning to the Acknowledgment and applying the above-referenced principles, it is plain that plaintiff and defendant agreed to a limitations period of six months for any claim arising out of plaintiff's employment. Plaintiff does not contest that all of her claims, except her abuse-of-process claim, arise out of her employment with defendant and that they accrued approximately in July 2017. Under the Acknowledgment, then, plaintiff was required to file her claims no later than January 2018. Plaintiff, however, did not file her claims until May 2020. Therefore, absent an applicable contract defense, the Acknowledgment's six-month limitations period bars plaintiff's claims.

Furthermore, we conclude that plaintiff's abuse-of-process claim is subject to the Acknowledgment. Plaintiff asserts that the Acknowledgment does not apply to her abuse-of-process claim because defendant's pursuit of criminal charges was not an "employment action," given that her claim did not accrue until after her termination. The language of the Acknowledgment is broad—it applies to "any claim or lawsuit arising out of [her] employment . . . with defendant[;]" the term "employment action" that plaintiff relies on does not define the claims to which the shortened limitations period applies, but rather, relates to the accrual date of the claim. Further, plaintiff's own argument belies that the abuse-of-process claim did not arise out of her employment with defendant: she argues that defendant's ulterior purpose of the criminal proceedings was to justify plaintiff's termination and create a pretext to obscure that her termination was retaliatory. Because the factual allegations of plaintiff's abuse-of-process claim are related to, and result from, her employment with defendant, the abuse-of-process claim is a claim arising out of her employment with defendant. Consequently, the Acknowledgment's shortened statute of limitations also applies to her abuse-of-process claim and, absent an applicable defense, this claim would also be barred under the Acknowledgment's six-month limitations period.

B. UNCONSCIONABILITY

As noted, plaintiff argues that a contract defense exists in this case—that the Acknowledgment is not enforceable because it is unconscionable. For a contract or contract provision to be unconscionable, both procedural and substantive unconscionability must exist. *Clark*, 268 Mich App at 143. "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id*. at 144. "If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability." *Id*. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Liparoto Constr, Inc*, 284 Mich App at 30 (quotation marks and citation omitted). "[A] term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience[;]" it is not sufficient that a term is advantageous to one party and foolish for the other. *Clark*, 268 Mich App at 144.

In this matter, plaintiff signed the agreement approximately one week after her employment began. There is no evidence to support that, at that time, plaintiff had no realistic alternative to employment with defendant. While plaintiff's bargaining power may have been less than defendant's—accepting her claim that she could not negotiate the terms—nothing in the record demonstrates that plaintiff was not free to accept or reject the terms of employment that defendant offered. These circumstances do not support a determination of procedural unconscionability.

Additionally, plaintiff cites no law in support of her argument that procedural unconscionability exists because no "consideration" existed for the Acknowledgment, i.e., because she had already started working, her employment could not be sufficient consideration. Failure to cite authority constitutes waiver of the argument. *Badiee v Brighton Area Schs*, 265 Mich App 343, 378-379; 695 NW2d 521 (2005). Even if plaintiff had not abandoned this argument by failing to cite authority, the question whether consideration existed is legally irrelevant to the procedural unconscionability inquiry because the inquiry focuses on the freedom to accept or reject a term. In any case, consideration did exist for the agreement—plaintiff's employment. That plaintiff had already commenced her employment at the time that she signed the agreement does not obviate that consideration existed in the form of her employment. The Acknowledgment's reference to "employment" as consideration refers to employment as an ongoing, present situation. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "employment," in part, as the "state of being employed"). Therefore, even if "consideration" was relevant, we conclude that plaintiff did not establish procedural unconscionability.

Next, there is also nothing in the record to establish that the Acknowledgment was substantively unconscionable. Michigan courts have recognized that employment agreements that shorten limitations periods are neither inherently unreasonable, nor so gross as to shock the conscious. See *Clark*, 268 Mich App at 144. Plaintiff argues that she did not knowingly waive the statutory limitations period. However, this Court has rejected this argument as grounds for establishing substantive unconscionability, noting that "one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement." *Id*. at 144-145. Consequently, plaintiff has failed to demonstrate that the Acknowledgment was unconscionable.[1] Accordingly, we conclude that the circuit court did not err by determining that the Acknowledgment was not unconscionable.

C. ESTOPPEL

Plaintiff alternatively argues that defendant should be estopped from relying on the Acknowledgment because defendant allegedly violated the ERKA. Specifically, plaintiff cites MCL 423.502 and MCL 423.503, arguing that because defendant never responded to her written request for her "employment file," defendant should be estopped from relying on the Acknowledgment. We disagree.

MCL 423.503 requires an employer, upon written request describing the personnel record, to provide the employee with the opportunity to review the employee's personnel record.[2] In turn,

---

[1] Plaintiff's argument in her reply brief that she was coerced into signing the Acknowledgment is not supported by facts or citation to legal authority. Therefore, she has waived the argument. *Badiee*, 265 Mich App at 378-379.

[2] MCL 423.503 states, in part:

> An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable

MCL 423.502 precludes an employer from using in a judicial proceeding "personnel record information" that was not included in the personnel record, but should have been.[3]

On July 5, 2017, near the time of termination, plaintiff sent defendant a letter requesting that she be allowed to view the video footage related to the alleged theft of her purse. The handwritten letter provided:

> To whom it may concern, My name is Tamika Rayford[.] I am an [sic] former employee of [defendant] under the administration of Will Crowell located in Roseville[,] Michigan.
>
> On July 5, 2017[,] I met with Will Crowell, Joel Woods, and another administrator by the name of Renne (who's last name I don't have at the moment)[.] [A]t this meeting[,] Mr. Woods stated to me that I was terminated[.] Mr. Woods also stated to me that he review [sic] camera footage that was recorded July 1, 2017[,] that determined my termination. When I asked to review said footage[,] Mr. Woods violated my rights under "the Bullard-Palwecki Employee Right To Know Act," which states that an employee has the right to view any and all said documents . . . written, verbally, or recorded that led to a decision of termination by denying me access to review said footage.
>
> Under this act I am requesting that all footage on July 1, 2017[,] from 9pm until July 2, 2017[,] 3pm be presented and reviewed by me Timika Rayford.
>
> I am also requesting that if needed in the future that said footage will also be accessible to all attorney's [sic] obtained and representing myself in this matter[.]

Additionally, plaintiff's counsel sent defendant a letter in March 2018, apparently indicating plaintiff's intent to file suit. Defendant's response did not reference the Acknowledgment and denied retaliatory discharge.

Plaintiff cites no law and makes no argument that a request for video footage is synonymous with the personnel record required to be provided upon written request under MCL 423.503. Absent a written request for her personnel record, or a cogent argument why a request

---

> intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. . . .

[3] MCL 423.502 provides, in relevant part:

> Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding. . . .

for video footage is the same as a request for a personnel file, plaintiff has failed to show that the statute applies and operates to estop defendant from relying on the Acknowledgment.

Plaintiff also complains that defendant failed to provide a copy of the Acknowledgment in response to her counsel's letter. However, plaintiff proffered no evidence that counsel made a written request for her personnel record, let alone the Acknowledgment, because plaintiff did not include counsel's letter as an exhibit. Plaintiff only included defense counsel's response, but this letter does not establish that such a request was made as to trigger the ERKA. Yet, even if plaintiff had made the request, plaintiff has not demonstrated that the Acknowledgment was part of her personnel file subject to MCL 423.502 and MCL 423.503. Consequently, we agree with the circuit court that plaintiff failed to show that defendant should be estopped from relying on the Acknowledgment for violating the ERKA.

In sum, because the Acknowledgment applies to all of plaintiff's claims and plaintiff filed suit outside the six-month period, the circuit court properly concluded that the Acknowledgment bars plaintiff's claims and dismissed plaintiff's suit under MCR 2.116(C)(7). Accordingly, we need not consider plaintiff's additional argument on appeal that the circuit court erred by additionally dismissing her abuse-of-process claim under MCR 2.116(C)(8). We briefly note, however, having reviewed the pleadings most favorable to plaintiff, that plaintiff failed to plead facts supporting an abuse-of-process claim. Plaintiff's complaint alleged that defendant's ulterior purpose in "initiating" the criminal proceedings was termination of plaintiff's employment. However, absent from plaintiff's complaint are any factually specific allegations that defendant improperly used the criminal prosecution itself *after* its initiation. Such allegations are insufficient to support an abuse-of-process claim. See *Lawrence v Burdi*, 314 Mich App 203, 211-212; 886 NW2d 748 (2016) (indicating that to establish an abuse-of-process claim a plaintiff must plead, in part, an act *in the use of process* that is improper in the regular prosecution of the proceeding *after* the initiation of suit); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).[4]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick

[4] Relatedly, we reject plaintiff's request to amend the pleadings with respect to her abuse-of-process claim. Such amendment would be futile because the claim was properly dismissed on statute-of-limitations grounds under MCR 2.116(C)(7). Further, even if that subrule did not apply, plaintiff did not identify any specific facts on appeal sufficient to support an abuse-of-process claim.