

STATE OF MICHIGAN
COURT OF APPEALS

GWENDOLYN HUBBARD,

Plaintiff-Appellant,

v

MCI TELECOMMUNICATION, CHRIS FABER,
GARY WILSON, and JAMES STAHLER,

Defendants-Appellees.

UNPUBLISHED

January 24, 1997

No. 182968

LC No. 93-465927

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants, MCI Telecommunication ("MCI") and James Stahler's, motion for summary disposition pursuant to MCR 2.116(C)(7) finding that no genuine issue of fact remained for trial and that plaintiff's claims of sex and race discrimination were barred by the statute of limitations for acts alleged prior to November 15, 1990. Plaintiff also appeals as of right from the trial court's order granting defendants, MCI, Chris Faber and Gary Wilson's, motion for summary disposition pursuant to MCR 2.116(C)(10), finding that no genuine issue of fact remained for trial and that defendants' articulated, legitimate reasons for their actions were not a mere pretext for discrimination. We affirm.

Plaintiff argues that the statute of limitations should not bar her claim for conduct which occurred prior to the statutory period, by claiming that it was part of a continuing violation. We disagree.

When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. *Baker v DEC International and Tri County Dairy Equipment, Inc*, 218 Mich App 248, 252-253; ___ NW2d ___ (1996). This Court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. *Id.* If no facts are in dispute, and reasonable minds could not differ on the legal effects of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. *Id.* However, if a

* Circuit judge, sitting on the Court of Appeals by assignment.

material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.*

Pursuant to MCL 600.5805(8); MSA 27A.5808(8), an action alleging employment discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, must be brought within three years after the cause of action accrued. *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1992). In *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 538; 398 NW2d 368 (1986), our Supreme Court recognized an exception to the statute of limitations for continuing violations in this type of claim. An exception exists where an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern where only one of the acts occurred within the limitation period. *Sumner, supra* at 528. Quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983), with approval, the *Sumner* Court set forth the factors to be considered in determining whether a continuing course of discriminatory conduct exists:

The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of an duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [*Sumner, supra* at 538 (citation omitted).]

The mere existence of some vague or undefined relationship between the timely and untimely acts is an insufficient basis upon which to find a continuing violation. *Sumner, supra* at 539.

Here, we conclude that plaintiff's continuing violation claim fails in that the frequency of the conduct, namely four alleged racially inappropriate comments in four years, was more in the nature of isolated events, rather than recurring practices. *Sumner, supra* at 538. We also conclude that, while plaintiff claimed that she found these comments and acts offensive, she failed to assert her rights. Therefore, her continuing violation claim fails under the third *Sumner* factor as well. *Id.* Further, plaintiff provided no nexus between the alleged timely and untimely acts. *Id.* Accordingly, we hold that the trial court did not err in granting MCI and Stahler's motion for summary disposition as barred by the statute of limitations. *Baker, supra* at 2-3.

Next, plaintiff argues that the trial court erred in granting MCI, Faber and Wilson's motion for summary disposition pursuant to MCR 2.116(C)(10), because genuine issues of fact remained for trial as to whether defendants' proffered reasons for their actions were a mere pretext for discrimination. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition brought pursuant to MCR 2.116(C)(10) de novo to determine whether a genuine issue of material fact remains

for trial, *Horn v Dep't of Corrections*, 216 Mich App 58, 66; 548 NW2d 660 (1996). In doing so, this Court considers the pleadings, affidavits, depositions, admissions, and other evidence in favor of the opposing party and grants any reasonable doubt to the opposing party. *Horn, supra* at 66.

Once a plaintiff demonstrates a prima facie case of discrimination under the Civil Rights Act, the burden shifts to the defendant to articulate some nondiscriminatory reasons for the discharge. *York v 50th District Court*, 212 Mich App 345, 349; 536 NW2d 891 (1995); *Reisman v Regents of Wayne State University*, 188 Mich App 526, 538; 470 NW2d 678 (1991). The plaintiff then has the burden of showing that the defendant's proffered reasons were merely a pretext for discrimination. *York, supra* at 350; *Reisman, supra* at 539.

Here, in response to plaintiff's claim of race and sex discrimination, defendants explained that plaintiff's unacceptable level of absenteeism and declining performance were the legitimate reasons for her discharge and alleged failure to advance. We agree with the trial court that plaintiff failed to come forward with evidence to show that these reasons were a mere pretext for defendants' alleged discrimination. While plaintiff relied upon her favorable performance evaluations to support her position, a review of the evaluations indicates that the ratings continually declined to the point that plaintiff had to be put on a performance plan. In addition, unlike plaintiff, defendants supported their position with affidavits and various documents indicating that plaintiff's performance continually declined, and that plaintiff was counseled about her performance and absenteeism, but that the conduct continued. Further, defendant submitted evidence that an employee (a white male) who was unsuccessful in completing his performance plan was discharged. Therefore, because plaintiff failed to come forward with evidence to prove that defendants' actions were a mere pretext, we conclude that the trial court properly granted defendants' motion. See *York, supra* at 350.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber