

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LARRY BELIN,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION, a foreign  
corporation, GMC SERVICE PARTS  
OPERATIONS,

Defendant-Appellee.

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UNPUBLISHED  
February 4, 1997

No. 182813

Genesee Circuit Court  
LC No. 93-022306

Before: Corrigan, P.J., and J.B. Sullivan \* and T.G. Hicks,\*\* J.J.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant on his claims of racial discrimination and retaliation in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, constructive discharge, and refusal to honor his rights under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.*; MSA 17.62(1) *et seq.* We affirm.

Plaintiff filed a complaint against defendant in 1991, in which he alleged the same factual background and causes of action. That lawsuit was dismissed with prejudice by the trial court. Plaintiff's instant complaint, filed in 1993, alleges that some time in 1985 he filed an employment-related complaint with the Michigan Department of Civil Rights (MDCR) and as a result was denied access to defendant's Open Door Policy internal resolution process. Plaintiff was on a disability leave of absence in January through March, 1986. Plaintiff alleges that after his doctor approved his return to work, defendant's medical director advised him to comply with a letter from defendant's vice-president, dismiss his civil rights complaints, and utilize only defendant's Open Door Policy to resolve his

\* Former Court of Appeals Judge, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

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

grievances. When plaintiff refused to comply, the medical director allegedly would not approve his return to work and plaintiff was barred from defendant's facilities pending the outcome of a complete medical evaluation. Plaintiff underwent three independent psychiatric evaluations. All three health providers determined that plaintiff was not able to return to work. Plaintiff was officially placed on medical disability in January 1987 and never returned to work for defendant.

In the instant action, the trial court granted summary disposition on plaintiff's Elliott-Larsen claims because they were time-barred. Because plaintiff's cause of action accrued in 1986 and plaintiff did not file the instant complaint until 1993, the court found his claims barred by the applicable three-year statute of limitations, MCL 600.5805; MSA 27A.5805. His retaliation claim, brought under the same act, was similarly time-barred. Moreover, the court found that plaintiff had presented no evidence that race played any role whatsoever in the matters of which he complained or that he was retaliated against. Regarding plaintiff's claim of constructive discharge, the trial court noted that plaintiff could not establish this claim because he had not resigned, and dismissed the claim as a matter of law. The trial court further found that defendant had fully complied with the Bullard-Plawecki Employee Right to Know Act, and that plaintiff had no evidence to support his subjective belief that he did not receive a complete copy of his medical documentation. Finally, the trial court found that plaintiff's instant complaint raised the "identical issues that were addressed in Plaintiff's previous lawsuit" and were therefore barred by the doctrine of res judicata.

Plaintiff first argues that the trial court erred in holding that the only alleged discriminatory act occurred in 1986, when defendant refused to allow him to return to work and subsequently placed him on disability status, and the limitations period had therefore run by June 1993, when plaintiff filed this suit. The limitations period on a cause of action for employment discrimination "commences when the person knows of the act which caused his injury and has good reason to believe that the act was improper or done in an improper manner." *City of Huntington Woods v Wines*, 122 Mich App 650, 652; 332 NW2d 557 (1983). Plaintiff's discrimination and retaliation claims are based on defendant's refusal to allow him to return to work and his subsequent placement on a disability leave of absence. Thus, the limitations period on his claim began either on April 9, 1986, when plaintiff was approved to return to work by his own physician, or on or about January 15, 1987, when defendant officially placed plaintiff on disability leave. Therefore, the trial court properly granted summary disposition on this basis.

Plaintiff contends that another limitations period began to run on June 8, 1993, when Federal District Judge Wayne R. Andersen found that defendant's practice of excluding employees who had filed claims with the EEOC from utilizing its Open Door Policy resolution process was discriminatory and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* *United States Equal Employment Opportunity Comm v General Motors Corp*, Case No. 92-C2669 (ND Ill, 1993). However, plaintiff was not a party to that action and was not part of the class affected since he had no pending EEOC claim. Moreover, the decision created no new injury to plaintiff and did not mark a point where plaintiff should have discovered a discriminatory act. Plaintiff also contends that another limitations period began with the June 28, 1990 letter from defendant's medical director informing plaintiff that he no longer had to submit medical evidence of his disability to defendant's insurer in order to retain his benefits. However, we do not find that this was a discriminatory act which harmed

plaintiff because he had been on disability leave for more than three years when the letter was sent, and defendant's action served to ensure his continuing reception of disability payments from defendant's insurer. Therefore, plaintiff's arguments have no merit.

Plaintiff further contends that defendant was guilty of a continuing violation of the Elliott-Larsen Civil Rights Act, and therefore the limitations period should be tracked from the last occurrence of the discriminatory practice. In *Sumner v Goodyear Co*, 427 Mich 505, 538; 398 NW2d 368 (1986), the Michigan Supreme Court articulated the factors to be considered in determining whether a continuing course of discriminatory conduct existed:

The first is the 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 and 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?

The mere existence of a continuing violation, however, is insufficient if none of the relevant conduct occurred within the limitations period. *Id.* at 539. Moreover, the relevant conduct cannot merely be the "present effect of past discrimination." *Id.* at 544. That is to say, if the relevant conduct is not in and of itself discriminatory but has a discriminatory effect only because of a prior discriminatory act, it cannot sustain a cause of action. *Id.* at 530.

Plaintiff contends that the relevant conduct occurring within the limitations period was the June 28, 1990 letter from defendant's medical director. As we previously stated, we fail to see how sending this letter was a discriminatory act. Moreover, if defendant's placement of plaintiff on medical disability was a discriminatory or retaliatory act, this letter would have a discriminatory effect only because of that prior act and this evidence could not sustain a continuing violation theory of recovery for employment discrimination.

Plaintiff next argues that the trial court erred in granting summary disposition to defendant because the Social Security Administration had determined on August 30, 1988, pursuant to plaintiff's application for benefits, that plaintiff was not totally disabled and was therefore ineligible for benefits. Plaintiff contends this finding had preclusive effect on defendant and the trial court. However, defendant was not a party to those proceedings and the issue of defendant's disability policies or its placement of plaintiff on extended disability were not actually litigated. Therefore, the prior determination had no preclusive effect on plaintiff's present action against defendant.

Plaintiff next argues that defendant should be barred from asserting his disability in judicial proceedings under the Bullard-Plawecki Employee Right to Know Act or the operation of laches or

estoppel, and therefore the grant of summary disposition was inappropriate. We find that the trial court did not err in granting defendant summary disposition on this claim. Plaintiff presented no evidence that he had not received his complete personnel records, as defined by the act, or any medical record kept by defendant to which he would not otherwise have access. MCL 423.501; MSA 17.62(1). Plaintiff has not preserved for our review his equitable estoppel and laches arguments, but these doctrines would not preserve plaintiff's claims.

Plaintiff next argues that defendant committed medical fraud, negligence, misrepresentation, or incompetence under Michigan's Public Health Code. This argument is not preserved for our review because it was not raised and addressed below. *Allen v Keating*, 205 Mich App 560, 565 (1994). Furthermore, the argument is completely without merit.

Finally, plaintiff claims that the trial court erred in determining that his claims were barred by res judicata. The doctrine of res judicata "bars a subsequent action between the same parties when the essential facts or evidence are identical." *Board of County Road Comm'rs for the County of Eaton v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). "The doctrine requires that: (1) the first action be decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id.* at 375-376. Plaintiff contends that his earlier complaint mentioned that he had filed a motion for reconsideration of his Elliott-Larsen claims with the MDCR, but that he did not have a full hearing on this MDCR complaint. Plaintiff did not argue his MDCR case to the trial court in the instant action and has not presented this Court with any facts showing that the trial court's order in the prior hearing was in error. Therefore, the trial court properly ruled that res judicata was an alternate grounds for dismissing plaintiff's instant complaint.

Affirmed.

/s/ Maura D. Corrigan

/s/ Joseph B. Sullivan

/s/ Timothy G. Hicks