STATE OF MICHIGAN

COURT OF APPEALS

MARTIN NOLAN, II, and AMY L. NOLAN,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF MENTAL HEALTH, THOMAS WATKINS, JAMES K. HAVEMAN, RICHARD WARNER, ALLEN SIPES and THOMAS ADAMS,

Defendants-Appellees.

UNPUBLISHED
April 1, 1997

181512
Ingham Circuit Court
LC No. 4-76899-NO

MARTIN J. NOLAN, II, and AMY LOUISE NOLAN,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF MENTAL HEALTH and THOMAS WATKINS,

Defendants-Appellees,

and

C. PATRICK BABCOCK,

Defendant.

189312
Ingham Circuit Court
LC No. 91-068366-CZ

Before: White, P.J., and Griffin, and D.C. Kolenda,* JJ.

PER CURIAM.

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

In docket no. 181512, plaintiffs appeal the circuit court's order granting defendants summary disposition pursuant to MCR 2.116(C)(4), (C)(7) and (C)(8) and dismissing plaintiffs' amended complaint. Plaintiffs filed the original and amended complaints at issue in 1994, alleging employment discrimination under the Civil Rights Act (CRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., violations of 42 USC § 1983, wrongful discharge, fraud/misrepresentation, intentional infliction of emotional distress, loss of consortium and breach of contract,[1] arising out of plaintiff Martin Nolan, II, (plaintiff)'s termination from employment with defendant Department of Mental Health (DMH), and defendants' conduct thereafter.

In docket no. 189312, plaintiffs appeal by leave granted the circuit court's order granting defendants' motion for summary disposition and dismissing a separate complaint, filed in 1990, which involved plaintiff's employment with DMH from 1985 through 1989—during which plaintiff was terminated in 1986, reinstated, terminated in 1987, reinstated, went on a medical leave of absence in November 1988, and was terminated in November 1989. We affirm in both cases.

I. Docket No. 181512

A

Plaintiff first challenges the circuit court's dismissal of his CRA and tort claims on statute of limitations grounds.

Plaintiff argues that the circuit court abused its discretion in dismissing his CRA and tort claims on statute of limitations grounds where the record indicated that plaintiffs' amended complaint, filed on June 7, 1994, should relate back to the filing of the original complaint, on March 8, 1994, because the complaint was amended only to correct a clerical error, i.e., to change the date of plaintiff's termination from 1989 to 1991, and stated no new claims. We cannot agree under the circumstances presented here.

Plaintiffs' original complaint set forth CRA and tort violations arising out of plaintiff's 1989 termination and adverse employment treatment following the 1989 termination up until and including February 1991, but not including the March 8, 1991 termination. Neither the original complaint's general allegations nor its tort and CRA counts refer to plaintiff's March 1991 termination or to any facts surrounding the 1991 termination, which are distinct from the facts surrounding plaintiff's 1989 termination and events following that termination. Plaintiff's November 1989 termination followed his transfer to Northville in April 1988 and his going on a medical leave of absence in November 1988. One year later plaintiff requested an extension of the leave, the extension was denied and his employment was terminated in November 1989 for failure to return to work from the leave of absence. In contrast, the 1991 termination occurred after plaintiff had collected workers compensation benefits for more than one hundred weeks. As to his 1991 termination, plaintiff argued in his brief below only that:

On March 8, 1991, a separation conference was held at which Mr. Nolan was terminated from state employment allegedly due to his having been on Worker's Compensation in excess of 100 weeks. Mr. Nolan did not receive official notice of this conference until the afternoon following the morning it occurred.

MCR 2.118(D) states:

> An amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth in the original pleading.

Plaintiffs' amended complaint differed from the original complaint only in that it substituted "1991 termination" for "1989 termination" in paragraphs fifteen and twenty-six. However, neither paragraph states or implies that plaintiff's March 8, 1991 termination was violative of the CRA or involved tortious conduct. Rather, these two paragraphs allege that plaintiff should have been notified and returned to his previous position prior to his 1991 termination, i.e., prior to March 8, 1991. We thus agree with the circuit court's conclusion, stated on the record at the summary disposition hearing, that:

> The complaint clearly refers to a termination in 1989. That is not the same as a termination in 1991, and I do not think that one can conceivably use the relation-back theory to change the actual incident to which the statute of limitation applies.

The claims thus do not relate back to the filing of the original complaint and are time-barred, and were properly dismissed pursuant to MCR 2.116(C)(7).[2]

B

Plaintiffs next argue that the circuit court erred in granting summary disposition of plaintiff's breach of contract claim under MCR 2.116(C)(8) where defendants claim that plaintiff was dismissed in accordance with the DMH policy of terminating employees after one-hundred weeks of disability and where plaintiff presented affidavits stating that such had never been the policy of DMH.

Plaintiffs' amended complaint stated under the breach of contract claim that under Civil Service Commission rules 2-10 and 2-10.2, which were part of plaintiff's employment contract, defendants agreed not to terminate plaintiff after one hundred weeks of his being on workers disability, and that defendant's violated this agreement when they terminated plaintiff after he had been on workers disability for one hundred weeks.

Defendants argued below, and we agree, that §§ 2-10 and 2-10.2 do not address or refer to receipt of workers compensation benefits. Section 2-10 states in its entirety:

DISMISSAL OR SUSPENSION

> 2-10.1 Notice. – Whenever it is considered necessary to dismiss or suspend an employee, the appointing authority shall notify the employee in writing giving specific reasons for the action.
>
> 2-10.2 Causes. – An employee in the classified service may be dismissed or suspended for any of the following reasons:

2-10.2a Failure to carry out the duties and obligations imposed by these Rules and by agency management.

2-10.2b Conduct unbecoming a state employee.

2-10.2c Unsatisfactory service.

2-10.3 Suspension for Investigation. – An appointing authority may suspend an employee while felony charges relating to conduct outside employment are pending against the employee.

Plaintiffs' argument that § 2-10 prohibits defendant from terminating an employee after one hundred weeks of disability is thus insufficient to withstand defendants' motion for summary disposition.

Further, DMH's policy of terminating employees after they have received one hundred weeks of workers compensation benefits has been litigated several times, rendering plaintiffs' argument that no such policy existed meritless. See *Generou v Kalamazoo Regional Psychiatric Hospital*, 192 Mich App 295, 304-305; 480 NW2d 638 (1991); *Alston v Northville Regional Psychiatric Hospital*, 189 Mich App 257, 261; 472 NW2d 69 (1991); and *Pringle v Ypsilanti Regional Psychiatric Hospital*, 185 Mich App 446, 457; 463 NW2d 144 (1990).

II. Docket No. 189312

A

Plaintiffs first argue that the Wayne Circuit Court erred in transferring venue from Wayne County to the Court of Claims and the Ingham Circuit Court. We review a circuit court's decision on a motion for change of venue for abuse of discretion. *Chilingirian v City of Fraser*, 182 Mich App 163, 165; 451 NW2d 541 (1989).

The Court of Claims has exclusive jurisdiction over tort and contract claims against the state, its agencies and officers. MCL 600.6419(1)(a); MSA 27A.6419(1)(a); *Martin v Stine*, 214 Mich App 403, 416; 542 NW2d 884 (1995). As to plaintiff's CRA claim, the Wayne Circuit Court did not abuse its discretion in transferring that claim to Ingham Circuit Court, where defendants had their principal of business. MCL 37.2801(2); MSA 3.548(801)(2).[3] We find no abuse of discretion. Even if there was error, however, it was harmless because the cases were consolidated.

B

Plaintiffs next argue that the Ingham Circuit Court erred in dismissing plaintiff's CRA claim for failure to state a claim within the statute of limitations. We disagree.

To establish a prima facie case of unlawful retaliation under the CRA, the plaintiff must show that he engaged in a protected activity, was the subject of adverse employment action, and that there was a causal link between the protected activity and the adverse employment action. *Kroll v Disney Store, Inc*, 899 F Supp 344, 348 (ED Mich 1995).

We agree with the circuit court's determination that any cause of action based on plaintiff's 1986 termination was time-barred and that plaintiff failed to establish a continuing violation. The only alleged conduct falling within the limitations period was plaintiff's July 27, 1987 suspension, his September 27, 1987 termination, and his transfer to Northville around April 1988. On plaintiff's urging, the parties stipulated, and the circuit court entered an order, that the findings of fact and conclusions of law made by the hearing officers in plaintiff's administrative appeals be taken as established for the purposes of this case. Those findings do not support the claim that plaintiff's civil rights activities were a significant factor in these adverse employment actions, nor do they support the claim that defendant's reasons for taking these actions were pretextual. Nor has plaintiff provided other factual support sufficient to withstand defendants' summary disposition motion.

We conclude that plaintiff failed to establish that there was a causal link between the activity and the adverse employment actions. Further, plaintiff failed to show that his opposition or participation in protected activity was a significant factor in the adverse employment decisions. *Id.* Assuming, however, that plaintiff established a prima facie case, summary disposition was still proper because plaintiff failed to establish that defendants' reasons for taking the adverse employment actions, plaintiff's act of misconduct, were pretextual. *Livington v State of Michigan,* __ F Supp ___ (WD Mich 1996) ;1996 US Dist LEXIS 18860. Defendants' reasons find ample support in the record.

C

Plaintiffs next argue that the Wayne Circuit Court erred in dismissing plaintiff's § 1983 claims against Watkins and Babcock. We disagree.

The uncontroverted evidence shows that Babcock was director of DMH until December 31, 1986, and was not subsequently employed by DMH. Plaintiffs' complaint was filed on July 26, 1990. Babcock's tenure with DMH ended more than three years before the filing of the complaint; thus all claims against him were properly dismissed.

Plaintiff's claims against Watkins were properly dismissed because plaintiff failed to plead any facts against Watkins outside his actions taken in an official capacity. *Kell v Johnson*, 186 Mich App 562, 563-564; 465 NW2d 26 (1990).

D

Plaintiffs' final argument, that the circuit court erred in precluding plaintiff from introducing evidence of plaintiffs' medical disability which resulted from his employment, is without merit.

Plaintiff argues that the circuit court erred when it ordered plaintiff to submit to an independent medical examination, because relitigation of the issue of plaintiff's disability was barred by the doctrine of res judicata.

A court may order a party to submit to a mental or physical examination when the mental or physical condition of that party is in issue and good cause is shown. MCR 2.113(A). The Worker's

Disability Compensation Act does not bar damages for injuries caused by discrimination prohibited by a Michigan statute. *Boscaglia v Michigan Bell Telephone Co*, 420 Mich 308, 316; 362 NW2d 642 (1984). A plaintiff in a CRA suit is entitled to seek recovery for those damages—physical, mental or emotional—which he or she can prove were unrelated to the disability already compensated under workers' compensation. *McCalla v Ellis*, 180 Mich App 372, 387; 446 NW2d 904 (1989). Because defendants sought the independent medical examination to determine what injuries, if any, plaintiff suffered in addition to those compensated under the workers' compensation award, the circuit court properly ordered plaintiff to submit to an examination.

Plaintiff also argues that the circuit's order was overly broad and intrusive because it permitted in addition to a battery of psychological and psychiatric tests "such other tests and examinations as may be indicated by test and examinations set forth above," and that the court should not have precluded him from introducing evidence of his medical condition after he failed to appear for the court-ordered independent medical examination. We cannot agree. Had plaintiff submitted to the examination and had he later been asked to submit to additional testing he deemed excessive, he could have moved for a protective order. The circuit court had warned plaintiff that, if he failed to submit to the court ordered examination, he would be precluded from introducing evidence of the workers' compensation determination of disability. Under these circumstances the circuit court did not abuse its discretion in precluding the introduction of such evidence. *Massey v City of Ferndale,* 206 Mich App 698, 702; 522 NW2d 734 (1994).

We affirm the circuit courts orders dismissing plaintiffs' claims in both docket nos. 181512 and 189312.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

[1] A ninth claim, for slander (count V), was dismissed by stipulation of the parties on statute of limitations grounds and is not at issue here.

[2] We note that although plaintiffs' original and amended complaints included a breach of contract claim involving plaintiff's March 8, 1991 termination, plaintiffs presented no facts below, either in their amended complaint, their brief in response to defendants' motion, or at the hearing on defendants' motion, to support that the 1991 termination violated the CRA or was tortious.

[3] Plaintiffs do not argue that venue with regard to their § 1983 claim was improper in the Court of Claims. In any case, any error was harmless because the Ingham Circuit Court claims and Court of Claims claims were consolidated.