STATE OF MICHIGAN

COURT OF APPEALS

DALE FURBY,

Plaintiff-Appellant,

v

UNITED AUTO WORKERS and CHRYSLER CORPORATION,

Defendants-Appellees.

UNPUBLISHED
May 30, 1997

No. 190429
Wayne Circuit Court
LC No. 94-418945-CL

Before: Smolenski, P.J., and Michael Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant Chrysler Corporation ("Chrysler") pursuant to MCR 2.116(C)(7) and (C)(10) and an order granting summary disposition to defendant United Auto Workers ("UAW") pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10). We affirm.

In 1972, plaintiff began working at Chrysler's Sterling Stamping Plant. In 1986, plaintiff entered Chrysler's toolmaking apprenticeship program. In 1987, plaintiff's supervisors commented in monthly evaluations that he had performance difficulties. During a reduction in force in August 1987, plaintiff was laid off from the apprenticeship program and given an unskilled trade reassignment. Plaintiff was reassigned to the apprenticeship program in March 1991, but again received poor evaluations. In June 1991, Chrysler removed defendant from the program and returned him to his former plant position, citing poor performance as its reason.

Plaintiff appealed this decision pursuant to the grievance procedure set forth in the Chrysler/UAW collective-bargaining agreement. His appeal was denied. In late 1992, plaintiff filed charges with the Michigan Civil Rights Commission ("MCRC") and the Equal Opportunity Employment Commission ("EEOC"), alleging that Chrysler removed him from the apprenticeship program because he is Caucasian. In July 1993, the EEOC determined that plaintiff's removal was based on poor performance.

In February 1994, plaintiff was suspended for failing to be at his assigned job. In April 1994, plaintiff was verbally warned for tardiness. In either May or June 1994, plaintiff was told to work faster, and then chided for working too quickly and endangering others. In August 1994, plaintiff was suspended for allegedly making racial slurs and using abusive language. Plaintiff also contends that Chrysler coerced him to undergo psychological examinations.

On June 17, 1994, plaintiff, acting in pro per, filed a claim against the UAW under the Michigan Handicappers' Civil Rights Act ("MHCRA"), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, alleging that the union failed to represent him when Chrysler accused him of having a handicap. On August 30, 1994, plaintiff filed a two-count amended complaint against Chrysler and the UAW under the MHCRA, alleging (1) that Chrysler and the UAW discriminated against him in administering the apprenticeship program because he had a "general anxiety disorder" and (2) that Chrysler retaliated against plaintiff for filing his administrative complaints. The trial court disposed of plaintiff's claims against Chrysler, concluding that plaintiff failed to timely file his discrimination claim and further failed to provide support for his retaliation claim. The trial court also disposed of plaintiff's claim against the UAW on the ground that it was preempted by federal labor law.

Plaintiff first argues that the trial court erred in granting Chrysler's motion for summary disposition pursuant to MCR 2.116(C)(7), because he timely filed his discrimination claim. We disagree.

MCR 2.116(C)(7) permits summary disposition of a claim where it is barred by the applicable statute of limitations. *Home Ins Co v Detroit Fire Extinguisher Co*, 212 Mich App 522, 527; 538 NW2d 424 (1995). When this Court reviews a motion for summary disposition under MCR 2.116(C)(7), it accepts as true the allegations in the well-pleaded complaint and construes them in the plaintiff's favor. *Kuebler v Equitable Life Assurance Soc*, 219 Mich App 1, 5; 555 NW2d 496 (1996). The burden of establishing that a claim is barred by the applicable statute of limitations normally rests with the party asserting the defense. *Id.* This Court reviews the decision to grant summary disposition under MCR 2.116(C)(7) de novo. *Id.*

The applicable statute of limitations mandates that a plaintiff file his cause of action under the MHCRA within three years of the alleged discrimination. MCL 600.5805(8); MSA 27A.5805(8); *Janikowski v Bendix Co*, 603 F Supp 1284, 1294 (ED Mich, 1985).[1] Chrysler removed plaintiff from the apprenticeship program on June 21, 1991. Plaintiff filed his discrimination claim against Chrysler on August 20, 1994, approximately two months after the limitations period expired. Therefore, the trial court did not err in granting Chrysler's MCR 2.116(C)(7) motion for summary disposition as to plaintiff's discrimination claim, because it was barred by the applicable statute of limitations. *Home Ins, supra*.

Plaintiff offers additional arguments concerning this issue that deserve cursory attention. First, plaintiff contends that his complaint against the UAW, which he filed on June 17, 1994, tolled the statutory limitations period with regard to his handicap discrimination claim against Chrysler. However, plaintiff failed to name Chrysler as a party in his first complaint. Thus, commencement of plaintiff's action against the UAW did not toll the statute of limitations period as to his claim against Chrysler,

because plaintiff had yet to name Chrysler as a defendant and effect proper service against the corporation when he filed suit against the union. See MCL 600.5856(a); MSA 27A.5856(a); *Rodgers v Washtenaw Co*, 209 Mich App 73, 75; 530 NW2d 118 (1995).

Second, plaintiff argues, without providing any support, that Chrysler was or should have been put on notice of his claim against it when he filed suit against the UAW. We refuse to search out authority to sustain or reject plaintiff's unsupported argument. See *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).

Third, plaintiff advances that his amended complaint against Chrysler and the UAW should relate back to the date on which he filed his original complaint against the UAW. An amendment to a pleading generally relates back to the date of the original filing if the claim or defense asserted in the amended pleading arose out of the same transaction, conduct, or occurrence set forth in the original pleading. MCR 2.118(D); *Hurt v Michael's Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996). However, the relation back doctrine does not extend to the addition of new parties. *Id.* Therefore, the doctrine does not apply here, because Chrysler was not named as a party in plaintiff's original complaint.

Fourth, plaintiff advances that the trial court should have considered Chrysler's alleged discriminatory acts as part of a "continuing violation" of the MCHRA. Plaintiff acknowledges that his termination from the apprenticeship program took place outside the limitations period, but contends that Chrysler's subsequent refusals to reinstate him to this program, which occurred within the limitations period, amounted to an ongoing pattern of discrimination, thus making his filing timely. We do not agree.

Pursuant to the continuing violations theory of employment discrimination, a plaintiff may seek damages for violations that occurred outside the statutory limitations period if the violations are "continuing in nature" and at least one of the discriminatory acts fell within the limitations period. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986), reh den 428 Mich 1206 (1987). To show a continuing violation, the plaintiff must show (1) a policy of discrimination, (2) a continuing course of conduct, and (3) the present effects of past discrimination. *Bell v Chesapeake & Ohio Railway Co*, 929 F2d 220, 223 (CA 6, 1991). Before making this showing, however, a plaintiff must also establish a present violation, i.e. a discriminatory act within the limitations period. *Id.*

Here, plaintiff has not made the preliminary showing of a present violation. Plaintiff claims that he made repeated request for reinstatement to the apprenticeship program that Chrysler repeatedly denied. However, he does not allege that Chrysler denied his requests for reinstatement because of his alleged handicap. Indeed, by the terms of the Chrysler/UAW collective bargaining agreement, plaintiff was not eligible for reinstatement to the apprenticeship program for a neutral reason, i.e. because he was terminated for cause. Because plaintiff has not shown a present violation, he is unable to invoke the continuing violations theory to circumvent the three-year statute of limitations for his handicap discrimination claim against Chrysler. *United Air Lines, Inc v Evans*, 431 US 553, 558; 97 S Ct 1885, 1889; 52 L Ed 2d 571, 578-579 (1977); *Sumner*, *supra* at 527.

Next, plaintiff argues that the trial court erred in granting Chrysler's motion for summary disposition pursuant to MCR 2.116(C)(10), because he succeeded in establishing the existence of genuine issues of material fact regarding his retaliation claim against the corporation. We disagree.

MCR 2.116(C)(10) permits summary disposition of a claim where except to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In reviewing a trial court's decision regarding an MCR 2.116(C)(10) motion for summary disposition, this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmoving party. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 214; 559 NW2d 61 (1996). We then determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Id.* We review de novo the trial court's grant or denial of a motion for summary disposition. *Id.*

The Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*,[2] prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701; MSA 3.548(701); *McLemore v Detroit Receiving Hospital*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). To establish a prima facie case of retaliation under the ELCRA, the plaintiff must establish: (1) that he opposed violations of the ELCRA or participated in activities protected by the act, and (2) that the opposition or participation was a "significant factor" in the adverse employment decision. *Booker v Brown & Williamson Tobacco Co*, 879 F2d 1304, 1310 (CA 6, 1989). For the protected activity engaged in by a plaintiff to be considered a "significant factor," the plaintiff must show that it was one of the reasons motivating the adverse treatment. See *Polk v Yellow Freight Systems, Inc*, 876 F2d 527, 531 (CA 6, 1989). The mere fact that adverse treatment follows the employee's protected act, however, is insufficient to establish retaliation under the ELCRA. *Booker*, *supra* at 1314.

Here, plaintiff based his claim of retaliation on the mere fact that he received adverse treatment after he lodged complaints of racial discrimination with the EEOC and the MCRC. This is insufficient to establish retaliation under the ELCRA. *Id.* Further, although plaintiff testified at his deposition that Chrysler subjected him to unprecedented disciplinary action because he was "making waves," plaintiff merely supported this assertion with his own speculation and conjecture, which is insufficient to oppose an MCR 2.116(C)(10) motion for summary disposition. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Accordingly, we conclude that the trial court did not err in granting Chrysler's motion for summary disposition as to plaintiff's claim of retaliation under the ELCRA, because plaintiff failed to submit evidence to support his assertion that Chrysler retaliated against him for filing complaints under the act.

Finally, plaintiff argues that the trial court erred in granting the UAW's motion for summary disposition pursuant to MCR 2.116(C)(4) on the ground that federal law preempted his employment discrimination claim against the union, because the union was actually plaintiff's "employer" in the apprenticeship program and, thus, resolution of his claim does not require our interpretation of the collective-bargaining agreement between Chrysler and the UAW. We do not agree.

This Court reviews de novo as a question of law an order granting or denying summary disposition pursuant to MCR 2.116(C)(4). *Steele v Department of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996). When reviewing a motion for summary disposition under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate the plaintiff is entitled to a judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. *Id.*

The authority of Congress to preempt state law is rooted in the Supremacy Clause of the United States Constitution. US Const, Art VI, § 2; *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). Generally, federal law preempts MHCRA claims brought against unions for their failure to adequately represent handicapped employees. See 29 USC 185(A); *Lowe v Ford Motor Co*, 186 Mich App 675, 677-678; 465 NW2d 59 (1990). Application of state law in the area of labor relations is preempted where the application requires the interpretation of a collective bargaining agreement. *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 413; 108 S Ct 1877, 1884; 100 L Ed 2d 410, 423 (1988).

Here, plaintiff does not allege that the union failed in its duty of representation on the basis of his alleged handicap. Rather, plaintiff claims that the UAW jointly administered the apprenticeship program with Chrysler, acted as the equivalent of plaintiff's employer, and thus violated the MHCRA by excluding him from the program because of his alleged handicap. Therefore, plaintiff contends, whether the union discriminated against him in violation of the MHCRA involves a mere factual determination applicable to any other employment discrimination action, and not interpretation of the collective bargaining agreement. However, plaintiff has not submitted evidence to support his assertion that the union acted as his employer in the apprenticeship program. Indeed, we can only decide this issue by interpreting the collective-bargaining agreement between Chrysler and the UAW, which we may not do. *Id.* Because plaintiff has failed to establish that federal law does not preempt his handicap discrimination claim against the union, we conclude that the trial court did not err in granting the UAW's motion for summary disposition pursuant to MCR 2.116(C)(4).

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ Roman S. Gribbs

[1] We acknowledge that federal cases are not binding on this Court. However, we do consider them to be persuasive authority with regard to discrimination cases. See *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995), lv gtd 451 Mich 920; 550 NW2d 535 (1996).

[2] Although plaintiff's complaint asserts that Chrysler retaliated against him for filing complaints concerning alleged handicap discrimination with the EEOC and the MCRC, plaintiff actually filed

complaints with these agencies for alleged racial discrimination. Therefore, we address this issue as arising under the ELCRA, and not the MHCRA.