

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY SWICK,

Plaintiff-Appellant,

v

DENNIS HOPKINS and KENNETH MCGINNIS,

Defendants-Appellees.

UNPUBLISHED

October 3, 1997

No. 192553

Ingham Circuit Court

LC No. 95-80435-NZ

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

In this case involving allegations of employment discrimination, plaintiff appeals by right the order granting defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm.

Plaintiff, a former corrections officer at the Michigan Department of Corrections' Lakeland Facility, brought this action against Kenneth McGinnis, Director of the Michigan Department of Corrections, and Dennis Hopkins, Personnel Director of the Lakeland Facility. She alleged sex discrimination under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and constitutional violations under 42 USC 1983.¹ The circuit court dismissed with prejudice the one count against defendant McGinnis as *res judicata*. The court also dismissed the two counts against defendant Hopkins because the allegations in the complaint occurred beyond the three year limitations period. Plaintiff subsequently filed an amended complaint against only Hopkins. The court dismissed the amended complaint because plaintiff alleged nothing that brought the matter within the three year statutory period.

Plaintiff first argues that the statute of limitations did not bar her claim because defendants discriminated against her within three years of her suit. Plaintiff alleged that she applied for, and was denied, a new job with the Department of Corrections in the fall of 1992, which was within three years of her May 1995 action. Plaintiff contends that defendants discriminated against her because they hired men instead of her for corrections officer positions.

In ruling on a motion under MCR 2.116(C)(7), the court considers the facts pleaded by the plaintiff and the reasonable inferences therefrom most favorably toward the plaintiff. *Hearn v*

Rickenbacker, 428 Mich 32, 33-34; 400 NW2d 90 (1987). This Court reviews de novo a court's ruling on a motion for summary disposition to determine whether the pleadings demonstrated that a party was entitled to judgment as a matter of law. *International Business Machines v Dept of Treasury*, 220 Mich App 83, 86; 558 NW2d 456 (1996).

Plaintiff's claim that Hopkins' failure to hire her in the fall of 1992 constitutes a discriminatory act within the limitations period lacks merit. Contrary to plaintiff's contention on appeal, she did not allege in her complaint that defendants hired men instead of her. Rather, plaintiff's complaint states: "That Defendants have hired new corrections officers after September 1992, to avoid returning Plaintiff to work." To establish a prima facie case of sex discrimination, plaintiff must prove that she is a member of a protected class, was qualified for an available position, and applied for the position, but was rejected under circumstances giving rise to an inference of unlawful discrimination. *York v 50th District Court*, 212 Mich App 345, 349-350; 536 NW2d 891 (1995). Plaintiff failed to allege facts that gave rise to an inference of unlawful discrimination: she simply did not allege that defendants hired males instead of her. Accordingly, plaintiff presented no evidence that defendants discriminated against her within the statutory period.

Plaintiff next argues that she sufficiently alleged a continuing tort exception to the statute of limitations. Plaintiff alleged that defendants ordered her to take a waived rights leave of absence in April 1992, but promised that she would receive the first available job after she could return to work. Plaintiff admitted that she refused to sign the waived rights leave of absence form, but argued that defendants "simply unilaterally and secretly terminate[d] her between April 1992 and September 1992." Plaintiff argues that because defendants did not tell her until September 1992 that she would not be rehired, the circuit court erred in determining that the three year period of limitations had expired.

Although our Supreme Court has recognized an exception to the statute of limitations in discrimination actions for continuing violations, *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986), a claim of discriminatory discharge accrues on the date the plaintiff is discharged. *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 290; 542 NW2d 365 (1995). Plaintiff contends that the court should have tolled the statute of limitations because defendants represented that a job would be waiting when she returned to work, but reneged in September 1992. Plaintiff, however, acknowledged in her complaint that she had notice that defendants would terminate her employment if she did not sign a waived rights leave of absence form within five days of March 31, 1992. Although plaintiff also alleged that defendant never submitted a termination letter to her other than an unsigned claim of resignation, she further alleged that she "was [told] on or about March 31, 1992 [that] she had to return to full duty with in five days or she would be terminated," that "the Defendant told the Plaintiff she would have to violate her doctor's instructions and return to work within five (5) days or be terminated," and that "Personnel Director Hopkins advised the Plaintiff that she could either take a Waived Leave of Absence or be terminated." Further, plaintiff stated in her complaint that she requested a waived rights leave of absence form in April 1992, but then refused to sign the release. On the basis of the facts alleged in plaintiff's complaint, plaintiff had notice that she would be terminated in April 1992 because she had not signed a waived rights leave of absence form. Thus, when plaintiff filed her complaint on May 11, 1995, the three year limitations period already had

expired. MCL 600.5805(8); MSA 27A.5805(8). See also *Mair v Consumers Power Co*, 419 Mich 74; 348 NW2d 256 (1984).

Affirmed.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman

¹ See related docket no. 186673.