STATE OF MICHIGAN

COURT OF APPEALS

DANIEL R. YAKE,

Plaintiff-Appellant,

v

MICHIGAN STATE POLICE,

Defendant-Appellee.

UNPUBLISHED
November 21, 1997

No. 199083
Mackinac Circuit Court
LC No. 96-004017-NO

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(I)(2) on plaintiff's claim of employment discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. The trial court granted summary disposition based on the statute of limitations. We affirm.

Plaintiff, a retired white male state trooper, alleged that defendant discriminated against white males in promoting applicants to sergeant positions. Plaintiff took the sergeant promotional examination from the middle 1970s through 1989, and was eligible for promotion based on his scores until 1991. In 1991, he was informed that he had been promoted to sergeant, but that the promotion had been revoked in favor of a minority applicant with a lower examination score. Plaintiff asserted that defendant used an augmentation policy that, in some circumstances, allowed minority and women applicants to be considered for promotion even if they had lower examination scores than white males. Plaintiff further maintained that, even apart from this policy, minorities and women were favored in defendant's promotional process. Plaintiff did not take the promotional examination after 1989, because he believed that it was futile to do so. Plaintiff's complaint was filed on March 27, 1996.

There is a three-year statutory limitation period for claims brought under the Civil Rights Act. See MCL 600.5805(8); MSA 27A.5805(8); *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 289; 542 NW2d 365 (1995). However, discriminatory policies may constitute violations each moment that they are in effect. *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 536; 398 NW2d 368 (1986). Under the continuing violation doctrine, an action based on an allegation of a

discriminatory policy is "timely so long as it is filed within three years after the cessation of a deprivation *proximately caused* by such a policy and there is an application of that policy within the period of limitation." *Id.* at 510, 536 (emphasis added); see also *Meek v Michigan Bell Telephone Co,* 193 Mich App 340, 343-345; 483 NW2d 407 (1992). Thus, to avoid the bar imposed by the statute of limitations, plaintiff must show that he suffered a deprivation on or after March 27, 1993 (three years before he filed his complaint) that was proximately caused by the challenged race and gender conscious policies of defendant. We conclude that plaintiff cannot do so. Due to his own decision not to take the sergeant examinations in and after 1991, he became ineligible for promotion to sergeant without regard to his race or sex.

Plaintiff contends that, but for defendant's allegedly discriminatory policies, he might have taken the sergeant examination in 1991 and when it was subsequently offered. However, plaintiff has not established proximate cause. "Proximate cause is distinguished from cause in fact, i.e. whether 'but for' the defendant's course of action the plaintiff's injury would not have occurred." *Wechsler v Wayne Co Rd Comm,* 215 Mich App 579, 596; 546 NW2d 690 (1996); see also *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994) (proximate cause entails proof of two separate elements, [1] cause in fact, and [2] legal cause). A proximate cause is a cause that "operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Babula v Robertson,* 212 Mich App 45, 54; 536 NW2d 834 (1995).

In the present case, the majority of troopers promoted to sergeant positions were white males. Accordingly, even if defendant's race and gender conscious policies may have unfairly reduced the chances of a white male being promoted, they did not prevent white males from being seriously considered for sergeant positions. Thus, we conclude, as a matter of law, that it was not reasonably foreseeable that these policies would cause white males to decide not to take the requisite examinations. Plaintiff's failure to take the sergeant examinations after 1989 was an independent cause of his ineligibility for promotion to sergeant on and after March 27, 1993. Therefore, defendant's allegedly discriminatory policies were not the proximate cause of plaintiff's not being considered for a promotion as of that date. *Id.;* see also *Berry v J & D Auto Dismantlers, Inc,* 195 Mich App 476, 483-484; 491 NW2d 585 (1992). Accordingly, the trial court correctly granted summary disposition to defendant.

We further note that a finding of proximate causation involves a determination that the nexus between wrongful acts or omissions and the injury sustained is of such a nature that it is socially and economically useful to hold the wrongdoer liable. *Adas v Ames Color-File,* 160 Mich App 297, 301; 407 NW2d 640 (1987). It would not be socially and economically useful to create an incentive for members of a group, here white males who may have been unfairly disadvantaged due to their race and sex, to cease seeking promotions where they plainly have a substantial chance of being promoted despite any illegal discrimination. Rather, it is useful to encourage them both to continue to seek promotions, so that the pool of qualified applicants is not diminished, and to seek redress for any illegal discrimination in a timely manner so that discriminatory policies may be dismantled at an earlier date.

We note that one that might conceivably contend that the augmentation policy made it futile for certain white males to apply for promotion. Specifically, some may have believed they would score well enough on the examinations to be promoted to sergeant absent race and gender favoritism, but would somehow be confident they would not have scored well enough to be promoted in the face of such favoritism. However, this possibility would not be sufficient to create an issue regarding proximate causation because it would depend on speculation. Without taking the examination, an individual white male could not know with reasonable certainty how he would have performed and therefore could not know whether the effort would have been futile. Furthermore, the evidence indicated that the majority of officers who were promoted to sergeant between 1993 and 1995 were white males. Accordingly, the possibility that plaintiff's application for promotion might be futile did not preclude summary disposition. See *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (conjecture and speculation do not establish a genuine issue of material fact).

While plaintiff cites many federal cases applying federal civil rights statutes, we find it unnecessary to consider those cases because this case involves only a claim under the Michigan Civil Rights Act and our analysis of Michigan law is dispositive.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage