

STATE OF MICHIGAN
COURT OF APPEALS

CLEMEL MARIA BROWN,

Plaintiff-Appellant,

v

COMERICA,

Defendant-Appellee.

UNPUBLISHED

May 18, 2006

No. 259661

Wayne Circuit Court

LC No. 03-320437-NO

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court order dismissing plaintiff’s complaint alleging sexual harassment, hostile work environment, gender harassment, and retaliation based on plaintiff’s failure to respond timely to defendant’s motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff began working for defendant in June 2000. An employment application dated April 27, 2000, and purportedly signed by plaintiff, states that plaintiff’s employment is “at will” and that, “in partial consideration for my employment, I shall not commence any action OR other legal proceeding relating to my employment or the termination thereof more than six months after the event complained of and agree to waive any statute [sic] of limitations to the contrary.”

After plaintiff began working for defendant, she complained that she was treated unfairly and that her department manager stared at her breasts and legs. She was initially transferred to a different shift with a different supervisor, and then, on March 8, 2002, she was transferred to a different department with a different manager but at the same pay grade. In May 2002, plaintiff went on medical leave for “emotional stress and depression.” After plaintiff returned to work on October 28, 2002, she complained about technical problems with her computer and fax machine, which she thought might be related to her previous complaints to the human resources department. Plaintiff was given a different computer. On April 25, 2003, plaintiff complained that she was exposed to an unknown inhalant in defendant’s mailroom. Plaintiff was medically examined, and nothing was found. Plaintiff returned to work on May 5, 2003, and she was placed on a six-month probation. Plaintiff then took another medical leave from May 9, 2003, until November 4, 2003, when her medical leave expired. Plaintiff subsequently did not return to work with defendant. Defendant terminated plaintiff’s employment.

Plaintiff filed this lawsuit on June 24, 2004, alleging sexual harassment, hostile work environment, gender harassment, and retaliation. On August 31, 2004, defendant moved for summary disposition under MCR 2.116(C)(7) on the basis of the contractual six-month limitation period in the employment application and under MCR 2.116(C)(10) on the basis that plaintiff's claims of harassment and retaliation were not sufficiently serious to be actionable and that defendant took adequate remedial action. The motion was scheduled for hearing on October 26, 2004.

On October 21, 2004, the trial court informed plaintiff's counsel's office that the court had not received plaintiff's response to defendant's motion for summary disposition. On October 22, 2004, the trial court's clerk informed defendant's counsel that plaintiff's counsel was preparing a response and planned to file it. By Monday, October 25, 2004, neither the trial court nor defendant's counsel had received plaintiff's response to defendant's motion for summary disposition. The trial court directed defendant to submit a proposed order of dismissal. When plaintiff and her counsel appeared for the settlement conference on October 26, 2004, they were advised that the case had been dismissed. After defendant submitted a proposed order, plaintiff's counsel filed objections to the proposed order and included a proposed response to defendant's motion. Plaintiff's counsel maintained that his office had been contacted by the trial court informing him that the hearing on defendant's motion for summary disposition would be rescheduled, that he should file a response, and that the settlement conference was rescheduled to October 26, 2004. On November 19, 2004, the trial court entered an order dismissing plaintiff's complaint with prejudice noting, "Plaintiff failed to file a response brief."

Plaintiff appeals as of right arguing that her attorney believed in good faith that defendant's motion for summary disposition had been rescheduled and that he could file plaintiff's responsive brief before the rescheduled hearing. Plaintiff also argues that defendant's motion for summary disposition was premature because defendant failed to comply with plaintiff's discovery requests. Plaintiff further contends that substantial questions of material fact exist because she denied that she signed a six-month, contractual limitation period for claims arising out of her employment.

Plaintiff undisputedly failed to comply with MCR 2.116(G)(1)(a)(ii), which provides that "any response to the motion [for summary disposition] (including brief and any affidavits) must be filed and served at least 7 days before the hearing." When the motion is a properly supported summary disposition motion under MCR 2.116(C)(10), the responsive brief and factual support creating a genuine issue for trial are crucial to the case's survival. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Plaintiff's failure to submit a brief more than seven days before the hearing allowed the trial court, in its discretion, to reject the brief and its attachments. *Prussing v General Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978). Although plaintiff argues that her counsel honestly believed more time was available, the record reflects that the trial court was not persuaded by this argument, especially in light of the fact that the court had alerted counsel to the lack of a response without effect. Furthermore, plaintiff's proposed response merely argued that defendant's motion was premature and alleged, without any testimonial support, that plaintiff denied signing the limitations agreement. Plaintiff failed to demonstrate how more discovery would lead to any documentary evidence indicating that she did not sign the agreement or otherwise creating a genuine issue of fact regarding her claims' other unproven particulars. Because plaintiff's proposed response was as devoid of

documentary evidence as her lack of response, the trial court did not abuse its discretion by rejecting the response as untimely.

The lack of response left unchallenged defendant's factually supported assertions that plaintiff's testimony did not support her claims of sexual harassment or other sex discrimination, and that she absolutely failed to demonstrate defendant's notice of harassment or retaliation. Defendant also demonstrated, without contradiction, its prompt remedial response to plaintiff's claims, so summary disposition was appropriate even without the unchallenged limitations agreement. Under the circumstances, the trial court did not err when it granted defendant's motion for summary disposition after plaintiff failed to demonstrate a genuine factual issue.¹

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

¹ It should be noted that disposition for lack of contrary documentary evidence under MCR 2.116(C)(10) is completely different from a sanction of dismissal. The first is an adjudication of the case's merits, and the second is a type of penalty. The only similarity is that the failure to accept a tardy brief in response to a MCR 2.116(C)(10) motion will almost invariably lead to summary disposition. However, in cases where the trial court sanctions a party for failing to appear or follow its orders, the court has several alternative sanctions available. Therefore, it makes sense to require a trial court to consider and expound on alternative remedies before ordering dismissal. *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995). The sanctions available for penalizing a tardy brief are much more limited and the reasons for the rejection are generally, as in this case, obvious. Ultimately, the sanction of rejecting any given brief should be considered on the basis of the circumstances surrounding the brief's tardiness and the propriety of levying the sanction in the particular situation. Because the trial court's analysis was much more limited in this situation, we see no reason to extend *Vicencio's* rule to its rejection of plaintiff's responsorial brief in this case.