

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN FLANAGAN,

Plaintiff-Appellant,

v

COMAU PICO, WISNE AUTOMATION  
ENGINEERING, CO., JAMES HAAS and  
GEORGE BILLS,

Defendants-Appellees.

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UNPUBLISHED

June 4, 2009

No. 282983

Oakland Circuit Court

LC No. 2003-047238-CZ

Before: Servitto, P.J., and O’Connell and Zahra, JJ.

PER CURIAM.

In this wrongful discharge case, plaintiff appeals as of right an order granting summary disposition in favor of defendants, Comau Pico and Wisne Automation Engineering, Co. (“Wisne”).<sup>1</sup> Because plaintiff’s claims were time-barred under the applicable statute of limitations and defendants did not waive a defense based upon the statute of limitations, we affirm.

Defendants terminated plaintiff’s employment in March 2001. He filed the wrongful discharge action on February 4, 2003. Approximately, one month later, defendants filed an answer including the general assertion that the claim was barred by the statute of limitations. Defendants subsequently moved for summary disposition pursuant to MCR 2.116(C)(10). Applying Michigan law, they claimed that plaintiff failed to prove he was a just cause employee. In response, plaintiff similarly applied Michigan law to argue that the Wisne Shop Employee Handbook was a contract for just cause employment and other practices and assurances also created legitimate expectations of just cause employment. The trial court applied Michigan law to grant summary disposition to defendants. It determined that plaintiff failed to overcome the presumption of at-will employment.

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<sup>1</sup> Plaintiff made additional claims against Comau Pico, Wisne, James Haas and George Bills in his complaint, but they were dismissed previously and are not relevant to this appeal.

Plaintiff appealed the trial court's order. This Court did not address plaintiff's claim, but rather, suggested that the handbook may be a collective bargaining agreement, which is "not generally subject to ordinary contract principles grounded in state law." *Flanagan v Comau Pico*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2005 (Docket No. 253078), slip op, p 2. It reversed and remanded for the trial court to consider whether § 301(a)<sup>2</sup> of the Labor-Management Relations Act, 29 USC 185(a), preempted Michigan law in this matter. *Id.* It also urged the trial court to consider whether § 301(a) was waived. *Id.*

On remand, defendants argued that preemption under § 301(a) is an affirmative defense, which was waived by failing to raise it earlier in the litigation. Under defendant's theory, Michigan law applied. Plaintiff countered that § 301(a) could not be waived. Under plaintiff's theory, federal labor law applied. The trial court agreed with defendants and, again, dismissed plaintiff's claim under Michigan law because plaintiff failed to overcome the presumption of at-will employment.

On appeal, this Court reversed. *Flanagan v Comau Pico*, 274 Mich App 418, 431; 733 NW2d 430 (2007). It resolved that the handbook constituted a collective bargaining agreement and Wisne was an "industry affecting commerce." *Id.*, p 425. Thus, this Court concluded that § 301(a) governed plaintiff's wrongful discharge claim. *Id.* Further, it held "that if a dispute is governed by § 301, federal law preempts state law, and a party may not waive its application." *Id.*, p 429. This Court also noted that the trial court had concurrent jurisdiction over the claim. *Id.*, p 431. Therefore, it remanded for the trial court to apply federal labor law. *Id.*

On remand, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(7). They claimed that plaintiff failed to exhaust available administrative remedies and failed to file his complaint within the six-month statute of limitations applicable to claims governed by § 301(a). See *Del Costello v Int'l Brotherhood of Teamsters*, 462 US 151, 159; 103 S Ct 2281; 76 L Ed 2d 476 (1983); *Romero v Paragon Steel Div*, 129 Mich App 566; 341 NW2d 546 (1983). The trial court denied defendants' motion for summary disposition pursuant to MCR 2.116(C)(4). However, because plaintiff filed his complaint nearly 19 months after he was discharged, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).

In the instant appeal, plaintiff contends that the trial court erred when it granted defendants' motion pursuant to MCR 2.116(C)(7). Plaintiff alleges that defendants waived the limitations defense. He maintains that defendants were aware that federal labor law governed his wrongful discharge claim from the outset. However, he claims that they strategically delayed its

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<sup>2</sup> Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

application by relying on Michigan law and arguing that § 301(a) could be waived. Plaintiff notes that during the years since he filed his claim, he completed discovery and case evaluation, prepared for trial, and responded to two motions for summary disposition and two appeals. Thus, he claims that it is inequitable to dismiss based on a federal labor law affirmative defense at this late date.

Plaintiff fails to cite Michigan authority regarding waiver to support his claim. Therefore, it is abandoned on appeal. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).<sup>3</sup> However, even if we were to consider this claim, defendants' initial reliance on Michigan law and delayed assertion under federal labor law was not "an intentional and voluntary relinquishment of a known right." *Walters v Nadell*, 481 Mich 377, 384 n 14; 751 NW2d 431 (2008). Plaintiff filed this matter in state court, not once referencing federal law in his complaint. The parties then proceeded as though state law was applicable and, in fact, defendants filed their first motion for summary disposition citing only Michigan law. Defendants aggressively maintained that Michigan, not federal law, governed this case until a panel of this Court determined that §301(a) governed plaintiff's wrongful discharge claim and held that a party may not waive application of § 301. Notably, it was then that *plaintiff* insisted that federal law applied. Now that plaintiff has been determined to be correct in his assertion, he nevertheless is dissatisfied with the actual application of federal law to the case at hand.

Initially, the application of federal labor law was unclear. Following this Court's second remand, ordering the application of federal labor law, defendants promptly argued that because claims governed by § 301(a) are subject to a six-month statute of limitations period, plaintiff's wrongful discharge claim was time-barred. In light of both parties' confusion as to the application of federal law, there is no indication that defendants' actions amounted to a voluntary relinquishment of a known right. Because plaintiff failed to file his complaint within the six-month statute of limitations set forth in *Del Costello*, summary disposition was proper pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Peter D. O'Connell  
/s/ Brian K. Zahra

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<sup>3</sup> Plaintiff's reliance on authority from lower federal courts is not binding on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).