

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY HILL,

Plaintiff-Appellant,

v

PBG MICHIGAN, L.L.C.,

Defendant-Appellee,

UNPUBLISHED

October 10, 2006

No. 268692

Wayne Circuit Court

LC No. 04-405843-CZ

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the August 22, 2005, order granting defendant summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) of plaintiff's hostile work environment claim under the Michigan Civil Rights Act (CRA), MCL 37.2101, *et seq.* We affirm.

Plaintiff is an African-American male, employed by defendant as a production technician from 1993 to May 9, 2001. Plaintiff left work on May 9, 2001, and did not return to employment with defendant, following the discovery of a "noose" in a separate work area by another African-American employee. The "noose" incident was reported to defendant's management personnel on-site, resulting in a temporary shutdown of production to conduct an investigation. That same afternoon defendant's management discovered the perpetrator and terminated his employment the following day.

Plaintiff contends a racially hostile work environment was pervasive throughout his employment with defendant. Plaintiff asserts his failure to receive promotions during his 8-year employment tenure was due to racial discrimination, but acknowledges on appeal that these claims of discrimination are precluded by the applicable statute of limitations. Plaintiff alleges various incidents of disparate treatment, purportedly based on race, that occurred involving being subjected to the sporadic use of the "N word" by white coworkers and disparate and harsher disciplinary treatment for African-American employees compared to their white counterparts. Several of the discriminatory events alleged by plaintiff were not experienced by him directly, but rather were based on incidents he was told about by other African-American coworkers. Many of the alleged events occurred years previously and plaintiff was often unable to identify a time period when many of the alleged incidents occurred or demonstrate the failure of defendant to investigate or act upon complaints by plaintiff or his coworkers. Although plaintiff points to an acknowledgement by defendant's production manager, Ehssan Jedeon, regarding the existence of a palpable sense of "tension" within the work environment, Jedeon's testimony fails

to support plaintiff's claims of racial harassment because Jedeon averred, despite amorphous assertions of discrimination or disparate treatment by African-American employees, that neither plaintiff, nor any of his coworkers brought specific claims of such treatment to him for action or investigation.

Plaintiff filed his complaint on February 27, 2004. Defendant moved for summary disposition on December 15, 2004, asserting the three-year statute of limitation barred plaintiff's claims. In addition, defendant argued that the continuing violations doctrine was not applicable because the incidents delineated by plaintiff were too infrequent and disjointed to constitute a "severe or pervasive" atmosphere of racial harassment and that plaintiff had failed to demonstrate the requisite respondeat superior element because defendant had investigated and taken appropriate remedial action for any complaints encompassing racial issues. The parties briefed the issues and the trial court heard oral argument on April 22, 2005, taking defendant's motion under advisement. Before the issuance of the trial court's opinion, the Michigan Supreme Court abolished the continuing violations doctrine in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005).

On August 22, 2005, the trial court issued an opinion, acknowledging the abolishment of the continuing violations doctrine and determining that all of plaintiff's claims accruing three years before the filing of his complaint, or before February 27, 2001, were "prima facie" barred by the statute of limitations. Although plaintiff asserted the applicability of tolling for insanity, pursuant to MCL 600.5851, the trial court noted that insufficient evidence had been submitted of such condition until after plaintiff's claims had accrued. As a result, all of plaintiff's claims accruing before February 27, 2001, were barred by the statute of limitations from consideration by the trial court. The trial court granted defendant's motion for summary disposition on plaintiff's claim of racial discrimination for denial of training and promotional opportunities based on plaintiff's failure to allege any specific incidents occurring during the relevant limitations period. In reference to plaintiff's claim of racial harassment, the trial court indicated that the only incident alleged within the applicable limitations period comprised the "noose incident" on May 9, 2001. However, based on defendant's prompt and adequate remedial action in the termination of the offending employee the trial court granted defendant summary disposition on this final claim.

Plaintiff sought relief from the trial court's judgment, asserting error in placing the burden of proof on plaintiff to prove insanity at the time of the accrual of his claims. Relying on an unpublished case by this Court, plaintiff asserted that the question of insanity was a factual determination for the jury and that the burden of proof rested with defendant to demonstrate that plaintiff was not insane at the time of the accrual of his claim. On February 13, 2005, the trial court issued an opinion and order denying the motion based on plaintiff's failure to provide evidence of the existence of any disability until months after the accrual of his claim and noting the lack of precedential value of the case cited and relied upon by plaintiff.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Likewise, we review de novo whether a party's claim is time-barred. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 436; 684 NW2d 864 (2004).

Plaintiff first argues that the trial court erred in granting summary disposition on his hostile work environment claim. To establish a prima facie case of hostile work environment, a plaintiff must demonstrate that: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Ryman v Baergen*, 262 Mich App 274, 312; 686 NW2d 241 (2004). While there exists no dispute that plaintiff is a member of a protected group or that the placement of a noose within the work environment constituted an overtly hostile and racially provocative act, plaintiff cannot overcome the respondeat superior element necessary to maintain his claim. An employer may only be liable for hostile work environment claims on a demonstration of fault, meaning, "the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment." *Chambers v Trettco, Inc*, 463 Mich 297, 312-313; 614 NW2d 910 (2000). The "relevant inquiry" regarding the adequacy of an employer's response is whether the action taken "reasonably served to prevent future harassment of the plaintiff." *Chambers, supra*, p 319. In response to the incident, defendant immediately ceased production and called a meeting of employees to initiate an investigation. By the end of the workday, defendant had identified the perpetrator and within 24-hours of the incident had terminated his employment. As such, defendant's actions were sufficient to prevent "future harassment," thus, supporting the trial court's grant of summary disposition.

Plaintiff also takes issue with the trial court's application of the relevant statute of limitation, suggesting its improper usage as an evidentiary rule to preclude consideration of events of racial discrimination or harassment occurring before February 27, 2001. Neither party disputes the applicability of the three-year limitations period required by MCL 600.5805, which provides, in relevant part:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Plaintiff incorrectly asserts the viability of the continuing violations doctrine in establishing the existence of a hostile work environment. Plaintiff argues that prior events should be considered in support of his hostile work environment claim because they served to lead up to the culminating event on May 9, 2001, and are, therefore, inextricably intertwined and related. Plaintiff contends defendant was aware of the existence of a hostile work environment, but failed to act until events escalated on May 9, 2001. In support of his contention, plaintiff relies on the affidavit of another employee, Connie Russell, containing allegations similar to those of plaintiff, but which suffers from the same deficiencies as her assertions lack specificity, are not anchored by a time reference or occurred outside the applicable limitations period.

Plaintiff misconstrues the statute of limitations and applicable case law. As determined by the trial court, plaintiff's claim was timely because it was filed within the three-year period encompassing the noose incident that occurred on May 9, 2001. However, plaintiff attempts to apply the statute of limitations in a manner to maintain the application of the continuing violations doctrine. Contrary to plaintiff's assertion, the *Garg* Court held that "a person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues, as required by § 5805(10)." *Garg, supra*, pp 283-284. Further, "[a]n employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period, because the Legislature has determined that such claims should not be permitted." *Id.*, p 284. Hence, the alleged discriminatory conduct upon which plaintiff relies to establish his hostile work environment claim must have occurred within the three-year period immediately preceding the filing of his complaint. *Magee v DaimlerChrysler Corp*, 472 Mich 108, 109; 693 NW2d 166 (2005). Accordingly, the trial court correctly determined that any acts or events alleged by plaintiff to have occurred outside the three-year limitations period could not be considered.

Finally, plaintiff contends the trial court erred in failing to toll the applicable limitation period due to insanity, in accordance with MCL 600.5805. We disagree. MCL 600.5851(1), provides, in relevant part:

[I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

For purposes of the statute, insanity is "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MCL 600.5851(2). A pertinent requirement for application of the statute is that the alleged insanity must exist at the time the claim accrues, not come into existence after accrual of the claim. MCL 600.5815(3). To successfully avoid summary disposition, a plaintiff must submit documentary evidence that creates a question of fact regarding whether the plaintiff was deranged at the time his claim accrued. *Asher v Exxon Co, USA*, 200 Mich App 635, 641; 504 NW2d 728 (1993).

Plaintiff's assertion regarding the imposition of the burden of proof for tolling of the limitations period is in error. Contrary to plaintiff's contention, when the statute of limitations bars a cause of action, the burden of proof is on the party seeking to enforce the cause of action to demonstrate facts removing the case from the operation of the statute of limitations. *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). Therefore, the burden was properly on plaintiff to demonstrate the existence of a question of fact regarding his sanity.

Plaintiff bases his assertion for the necessity of tolling for insanity on his diagnosis, subsequent to May 9, 2001, of acute stress disorder, paranoia and schizophrenia. Plaintiff further relies upon his receipt of long-term and social security disability benefits to substantiate his claim for tolling. Notably, MCL 600.5851(3) denotes:

To be considered a disability, the infancy or insanity must exist at the time the claim accrues. If the disability comes into existence after the claim has accrued, a court shall not recognize the disability under this section for the purpose of modifying the period of limitations.

What is problematic for plaintiff is his failure to submit evidence of his disability at the time of accrual of his claim. The Social Security Administration did not deem plaintiff to be disabled until July 26, 2001. Psychological evaluations conducted for determination of long-term disability benefits on October 25, 2001, and January 7, 2002, while confirming the existence of diagnostic conditions, failed to opine or demonstrate that such conditions existed at the time of the accrual of plaintiff's claim. Although defendant asserted further evidence submitted by plaintiff on the issue of his disability and insanity was untimely, even consideration of these affidavits fails to support plaintiff's contention of disability within the requisite time period. The affidavit of Michael Abramsky, Ph.D. merely provides a general assertion that a diagnosis of acute stress disorder "could impair an individual's ability to comprehend his . . . legal rights," but fails to render an opinion regarding plaintiff's insanity due to the unavailability of plaintiff's medical records for review. The affidavit of Paula I. Christian-Kliger, Ph.D., while diagnosing plaintiff on June 5, 2001, with acute stress disorder fails to definitively assert the existence of that, or any other disabling, condition prior to that date. Under MCL 600.5827, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." Thus, in order for plaintiff to successfully invoke the insanity tolling provision, he was required to demonstrate that he was insane at the time the alleged discriminatory conduct occurred.

Further, plaintiff's attempt to demonstrate the existence of a disability on May 9, 2001, or subsequently, is irrelevant because events spanning forward from that date are included within the limitations period and tolling is unnecessary. Instead, in order to permit consideration of precursor events to support plaintiff's claim of a hostile work environment, he was required to demonstrate the existence of a disability before the event of May 9, 2001, to benefit from any tolling provision. Because plaintiff has failed to demonstrate any such existent condition, tolling was not applicable.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael J. Talbot