# STATE OF MICHIGAN

# COURT OF APPEALS

LAKISHA MCMILLON,

Plaintiff-Appellant,

v

CITY OF KALAMAZOO,

Defendant-Appellee.

UNPUBLISHED
January 21, 2021

No. 351645
Kalamazoo Circuit Court
LC No. 2019-000252-CD

Before: REDFORD, J.J., and MARKEY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Lakisha McMillon, appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(8) to defendant, the City of Kalamazoo, and denying plaintiff's motion for leave to amend her complaint. The trial court granted summary disposition because a nine-month period of limitations, to which plaintiff agreed in plaintiff's employment application, barred plaintiff's claims. Plaintiff also argues that the trial court abused its discretion when it denied leave to amend. The trial court denied leave to amend because plaintiff's proposed amendments failed to state a claim and were futile. We affirm.

## I. FACTUAL BACKGROUND

During 2004, plaintiff applied for a position in the Kalamazoo Department of Public Safety (KDPS). She filled out and signed an employment application that, among other things, provided:

> I agree that any lawsuit against the City of Kalamazoo, it's agents, officials and employees, arising out of my employment or termination of employment, including but not limited to federal or state civil rights claims, must be filed within 9 months of the event giving rise to the claims or be forever barred. I waive any limitations periods to the contrary.

Plaintiff made it through the hiring process to the last interview but the KDPS declined to offer her a position on July 21, 2004. The KDPS retained her application, written exam, agility test results, and other information pursuant to its document retention policy. In mid-2005, the KDPS

contacted plaintiff to interview for a position after which it offered her employment in September 2005.

In May 2019, plaintiff sued the City of Kalamazoo alleging six counts of various forms of discrimination, retaliation, and harassment. Plaintiff also alleged wrongful discharge despite the fact that she remained employed by defendant. In lieu of filing an answer, defendant moved for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8). In support of its motion under MCR 2.116(C)(7), defendant relied on plaintiff's agreement to the terms of her employment application's nine-month period of limitations. As to its motion under MCR 2.116(C)(8), defendant argued that each of plaintiff's allegations failed to state a claim upon which relief could be granted. In response, plaintiff argued that the employment application that defendant relied on was not binding because defendant denied her employment in 2004 and did not hire her until approximately 18 months later. Plaintiff argued that the application should have been discarded before her hiring date. Plaintiff also moved for leave to amend her complaint, alleging further retaliatory and harassing conduct that allegedly occurred less than nine months before she filed her complaint.

The trial court granted defendant's motion under both MCR 2.116(C)(7) and MCR 2.116(C)(8), and denied plaintiff's motion for leave to amend. Plaintiff then moved for reconsideration. Plaintiff argued that her employment application was inadmissible because although, as she argued, it was a personnel record under the Bullard-Plawecki Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*, defendant did not provide it to her when she requested her personnel file in 2017. The trial court denied the motion, reasoning that plaintiff presented the same issues upon which the court had already ruled and that plaintiff failed to demonstrate palpable error by which the court and the parties had been misled. Plaintiff now appeals.

## II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). As discussed, defendant brought its motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8). In *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006) (citations omitted; ellipsis in original), this Court explained:

> Although, generally, when considering a motion brought under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone, when considering a motion brought under both MCR 2.116(C)(7) and (8), it is proper for the court to review all the material submitted in support of, and in opposition to, the plaintiff's claim. Neither party is required to file supportive material, but any documentation that is provided to the court must be admissible evidence. Further, the plaintiff's well-pleaded factual allegations, affidavits, and other admissible documentary evidence are accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. Additionally, "where material facts are not in dispute . . . , the MCR 2.116(C)(7) analysis parallels the MCR 2.116(C)(10) analysis and is a question of law for the trial court."

We review for an abuse of discretion a trial court's decision denying a motion for reconsideration. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). "Where an issue is first presented in a motion for reconsideration, it is not properly preserved[,]" and we may only review an unpreserved issue "if it is an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009) (citations omitted).

## III. ANALYSIS

Plaintiff argues that her employment application did not bind the parties because, after conducting its full hiring process in 2004, defendant rejected her application and the terms therein. Plaintiff also maintains without supporting evidence that defendant customarily discarded applications within a year and should have discarded her application. She contends that defendant did not consider it a binding agreement because the employment file that she received from defendant in December 2017, almost two years before she filed this lawsuit, did not contain the pertinent page of the application. Plaintiff admits, however, that when defendant hired her in late 2005 she signed no further documents and defendant did not require her to undergo any further background checks or examinations. According to plaintiff, defendant asked her if she was willing to "re-start the hiring process" in 2005. In support of her argument, plaintiff cites one case, *Minneapolis & SL R v Columbus Rolling Mill*, 119 US 149, 151; 7 S Ct 168; 30 L Ed 376 (1886), in which the United States Supreme Court explained that a rejection of an offer "leaves the matter as if no offer had ever been made." *Id*. However, *Minneapolis* simply stands for the proposition that, as a matter of basic contract law, if an offer has been made a rejection terminates such offer. See *id*. Plaintiff presents no caselaw that supports her broader theory that an extended duration of time and a decision not to hire nullifies the terms of an employment application to which one has agreed.

The record also does not support plaintiff's argument. Plaintiff's averments regarding her hiring process contain an inherent contradiction. Although plaintiff asserts that defendant required her to "restart" the hiring process and that she "repeated all requirements for employment," she nonetheless concedes that defendant did not require her to complete a new employment application, nor require her to undergo the various requirements imposed upon applicants. Presumably, if plaintiff "repeated all requirements for employment," she would have also completed a new employment application, defendant would have conducted a second background check on her, and she would have been required to submit to the same previously completed tests. But she did not.

The record also reflects that defendant submitted retired officer Ken Colby's unrebutted affidavit testimony which established that, while serving as Major of the KDPS Office of Professional Standards, he had direct involvement in and oversight of plaintiff's 2005 hiring. He attested that defendant used plaintiff's 2004 application and background investigation when it hired her in 2005, and defendant did not require plaintiff to "repeat the process and started where she left off in 2004, which was the interview portion of the application process."

Plaintiff's contentions regarding defendant's retention and disposal policy for employment applications lack evidentiary support. The record reflects that plaintiff merely speculated that KDPS kept applications on file for only one year. Defendant, however, submitted its record retention and disposal policy which specified that applications for employment were retained for a three-year period. At the motion hearing, plaintiff's counsel indicated that plaintiff learned about the supposed one-year retention policy from a human resources employee. As such, plaintiff sought to rely on inadmissible hearsay which the trial court had no obligation to consider. See MRE 801; see also MRE 802. Further, the record evidence plainly rebutted her representations. Accordingly, plaintiff failed to establish the existence of a genuine issue of material fact as to whether the employment application, and the period of limitations contained therein and agreed upon by plaintiff, did not bind her. See *Linton*, 273 Mich App at 111.

Plaintiff did not advance her argument under the ERKA until her motion for reconsideration, even though she had ample opportunity to do so earlier. Therefore, this argument is unpreserved, and we decline to review it. See *Vushaj*, 284 Mich App at 521. However, we note that plaintiff had notice of the nine-month period of limitations. The record reflects that plaintiff signed her employment application agreeing to the pertinent limitation period provision. Further, plaintiff fails to argue that any of the claims in her original complaint survive the nine-month period of limitations, irrespective of whether she otherwise validly stated any claims upon which relief may be granted. Accordingly, we affirm the trial court's grant of summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(8).

Plaintiff also argues that the trial court abused its discretion by denying her motion for leave to amend her complaint because amendment would be futile. We disagree.

"A trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion." *Long v Liquor Control Comm*, 322 Mich App 60, 67; 910 NW2d 674 (2017). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Taylor*, 279 Mich App at 315. "A trial court should freely grant leave to amend a complaint when justice so requires." *Sanders v Perfecting Church*, 303 Mich App 1, 9; 840 NW2d 401 (2013), citing MCR 2.11(A)(2). When determining whether to grant leave to amend, a trial court may not evaluate the merits of the case. *Commodities Export Co v Detroit*, 116 Mich App 57, 71; 321 NW2d 842 (1982). "Amendment is generally a matter of right rather than of grace," and "[l]eave to amend should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *In re Kostin Estate*, 278 Mich App 47, 51-52; 748 NW2d 583 (2008).

In *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citations omitted), this Court summarized three ways an amendment can be futile: "(1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." Put another way: "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Shah v State Farm Mut Automobile Ins Co*, 324 Mich App 182, 209; 920 NW2d 148 (2018) (quotation marks and citation omitted).

In *Quinto v Cross and Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996) (citations omitted, alterations in original), our Supreme Court stated the elements necessary to establish a

prima facie case of discrimination based on hostile work environment under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of [her protected status]; (3) the employee was subjected to unwelcome . . . conduct or communication [involving her protected status]; (4) the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior.

In *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000) (citation omitted), our Supreme Court clarified the elements of a hostile work environment claim based on sex:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior.

In this case, the trial court did not abuse its discretion when it determined that the proposed amendments would be futile and, therefore, denied plaintiff's motion. Each of plaintiff's new proposed allegations failed to state a claim under the Elliott-Larsen Civil Rights Act. Regarding the allegations respecting an alleged incident involving a K-9 handler who called his dog a racial slur in the presence of someone other than plaintiff, the trial court reasonably determined that plaintiff was not the subject of the unwanted communication and that the officer who made the communication was not a superior. Plaintiff's allegation regarding other statements persons told her were made by others were not directed toward plaintiff. The trial court also reasonably noted that plaintiff's supervisor did not sanction her after another officer filed an internal complaint against plaintiff. Further, regarding allegations related to the assignment of a department vehicle, plaintiff did not allege that her superior reassigned her vehicle because of her status in a protected group. Accordingly, in each instance, plaintiff failed and could not allege the necessary elements to support a viable claim. Therefore, the trial court's decision that each of the new proposed allegations failed to state a claim for hostile workplace environment fell within the range of principled outcomes. See *id*.; see also *Taylor*, 279 Mich App at 315.

Affirmed.

/s/ James Robert Redford
/s/ Jane E. Markey
/s/ Mark T. Boonstra