Order

Michigan Supreme Court
Lansing, Michigan

January 11, 2023

Elizabeth T. Clement,
Chief Justice

162680

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

LAKISHA McMILLON,
Plaintiff-Appellant,

v

SC: 162680
COA: 351645
Kalamazoo CC: 2019-000252-CD

CITY OF KALAMAZOO,
Defendant-Appellee.

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On October 13, 2022, the Court heard oral argument on the application for leave to appeal the January 21, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals affirming summary disposition for defendant based on the shortened limitations period in the employment application, VACATE the remainder of the judgment of the Court of Appeals, and REMAND this case to the Kalamazoo Circuit Court for further proceedings that are consistent with this order.

Plaintiff, Lakisha McMillon, filled out an employment application for a position with defendant, the city of Kalamazoo, in 2004 but was not hired. The employment application contained a clause through which applicants like plaintiff agreed to file any employment-related lawsuits against defendant within nine months of the accrual of such claims, waiving any contrary limitations period. More than a year later, defendant hired plaintiff to fill a different job opening, and plaintiff did not complete a new application. The issue before us is whether plaintiff is bound by the shortened limitations period contained in the employment application and whether the trial court properly granted summary disposition on that basis. We hold that summary disposition was inappropriate because a genuine issue of material fact remains as to whether the parties had reached a mutuality of agreement regarding the shortened limitations period.[1]

[1] In our January 28, 2022 order granting oral argument on the application, we asked the parties to brief other issues, including whether *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held that limitations clauses in employment applications are part of the binding employment contract and whether contractual limitations clauses

Plaintiff applied for work as a public safety officer with defendant in March 2004. She filled out an application and interviewed for the position. The application she completed included the following statement shortening the limitations period for employment claims:

> I agree that any lawsuit against the City of Kalamazoo, it's [sic] agents, officials and employees, arising out 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 limitation periods to the contrary.

Plaintiff was not hired to fill the position she applied for.

More than a year later, in mid-2005, defendant reached out to plaintiff inquiring if she was still interested in employment as a public safety officer. Plaintiff was interested and filled out some of the same employment paperwork as she had the year prior, but she did not fill out a new employment application. Plaintiff started the application process where she had left off in 2004: at the interview stage. Plaintiff was subsequently hired in September 2005. On the record before us, none of the materials provided to plaintiff in 2005—for the job she was ultimately hired for—attempted to shorten the statute of limitations for bringing lawsuits. Fourteen years later, plaintiff filed a lawsuit alleging that defendant had engaged in discrimination on the basis of race and sex in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., and on the basis of a disability in violation of the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. The factual basis for her claims arose between 24 and 36 months before she filed her lawsuit. Defendant moved for summary disposition under MCR 2.116(C)(7)[2] based on the 2004

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that restrict civil rights claims violate public policy. However, we need not decide those issues today. Regardless of whether *Timko* was correctly decided, this case is distinguishable. In *Timko*, the shortened statute of limitations was included in an "application" filled out after the employee began employment and was thus supported by consideration in the form of "employment and wages." *Id*. at 244. In addition, plaintiff's application raises other issues that we need not decide in light of our holding that the grant of summary disposition was premature.

[2] Defendant sought summary disposition under MCR 2.116(C)(7) based on the employment application's shortened statute of limitations. Defendant made separate arguments for dismissal of the original complaint for failure to state a claim under MCR 2.116(C)(8). The latter claims do not appear to have been addressed by the trial court. Although the lower courts purported to base their rulings on both provisions, since those rulings are based on the statute of limitations, we believe the lower court's judgments in this case are properly evaluated under (C)(7).

employment application's shortened nine-month limitations period.[3] The trial court granted defendant's motion, and the Court of Appeals affirmed. Plaintiff then sought leave to appeal in this Court.

The five basic elements of a contract are "(1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 101 (2016) (quotation marks and citation omitted). At issue here is the "mutuality of agreement." Mutuality of agreement requires a valid offer and an acceptance. See Restatement Contracts, 2d (1981), § 22.

Defendant argues that it offered plaintiff the opportunity to apply for a job and that plaintiff accepted by completing the application. But defendant did not hire plaintiff for the position for which she applied. It considered plaintiff's application, interviewed her for the position, and ultimately rejected her application. Whether plaintiff had notice that defendant intended to reuse her prior application materials or that plaintiff intended or agreed to be bound by the initial contractual application process remain genuine issues of material fact. Thus, once defendant rejected plaintiff in 2004, it is not clear whether plaintiff had notice that when she began the hiring process in 2005 at the interview stage and ultimately accepted employment, she was agreeing to be bound by the employment application she had completed the year prior. Plaintiff may not be bound by those terms without evidence of such an agreement. Although a subsequent contract may incorporate a writing which need not be a contract, such incorporation must be explicit. See *Whittlesey v Herbrand Co*, 217 Mich 625, 628 (1922) (" '[A] contract must be construed as a whole, effect must be given to writings incorporated in the contract by reference.' "), quoting 4 Page, Contracts, § 2044.

In short, there is a genuine issue of material fact whether plaintiff had notice of the use of the prior application materials' future employment-related terms and whether she agreed to be bound by those materials. Consequently, defendant has not sufficiently demonstrated that the parties had mutuality of agreement to be entitled to summary disposition. Without mutuality of agreement, there can be no contract. See, e.g.,

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[3] Plaintiff's lawsuit was filed within the usual three-year limitations period applicable to Elliott-Larsen Civil Rights Act and Persons with Disabilities Civil Rights Act claims but outside the shortened period set forth in the employment application. See *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 281-282 (2005) (limitations period for Elliott-Larsen Civil Rights Act claims is three years under MCL 600.5805); *Olivares v Performance Contracting Group*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2005 (Docket No. 255346), p 4 (limitations period for Persons with Disabilities Civil Rights Act claims is three years under MCL 600.5805).

McInerney v Detroit Trust Co, 279 Mich 42, 46 (1937). With this material fact still in dispute, summary disposition under MCR 2.116(C)(7) is inappropriate.

We do not retain jurisdiction.

WELCH, J. (*concurring*).

This case involves a clause in an employment application that, if found to constitute a contract, will shorten the period for plaintiff Lakisha McMillon to bring civil-rights claims under Michigan law from three years to nine months. I agree with the majority order that a question remains as to whether plaintiff ever agreed to carry forward the shortened statute-of-limitations language from her rejected 2004 application into her 2005 hiring process.

The Court's resolution of this case still leaves open the other questions we asked in our order: (1) whether employment agreements should be permitted to shorten the time to file lawsuits under civil-rights statutes such as those at issue in this case—the Elliott-Larsen Civil Rights Act[4] and the Persons with Disabilities Civil Rights Act,[5] and (2) whether *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held that limitations clauses in employment applications are part of a binding employment contract. *Timko* was a nine-page decision issued by the Court of Appeals holding that a six-month shortened statute of limitations incorporated into an employment application was reasonable and contractually bound the employee to bring his age-discrimination claim within six months of his termination. This Court denied leave to appeal. *Timko v Oakwood Custom Coating, Inc*, 464 Mich 875 (2001). Other states have recently found that contractual agreements to shorten the period to bring discrimination lawsuits are invalid. See, e.g., *Ellis v US Security Assoc*, 224 Cal App 4th 1213, 1226 (2014) (holding that a shortened limitations period in plaintiff's job application was unreasonable and against public policy where the plaintiff filed her sexual-harassment claims within one year of receiving her right-to-sue letter from the California Department of Fair Employment and Housing and two years of the incident for the common-law claims—within the statutory

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[4] MCL 37.2101 *et seq*.; *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 281-282 (2005) (statute of limitations for Elliott-Larsen Civil Rights Act claims is three years under MCL 600.5805).

[5] MCL 37.1101 *et seq*.; *Olivares v Performance Contracting Group*, unpublished per curiam opinion of the Court of Appeals, issued December 20, 2005 (Docket No. 255346) (statute of limitations for Persons with Disabilities Civil Rights Act claims is three years under MCL 600.5805).

limitations period for both types of claims); *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016) (holding that parties may not shorten the statutory limitations period of the state's antidiscrimination law because it violates public policy); *Croghan v Norton Healthcare, Inc*, 613 SW3d 37, 43 (Ky App, 2020) (simultaneously finding that a contractual six-month period to bring claims for age and disability discrimination, hostile work environment, and retaliation under the Kentucky Civil Rights Act violated a statutory limitation on contracts shortening a statute of limitations more than 50%, and that a six month period is unreasonable because it requires a claimant to sue prematurely or without adequate investigation and placed an undue burden on the courts, which effectively abrogated the rights sought to be vindicated).

The validity of contractually shortened limitations periods is an important issue to both employers and employees. Given that this Court never weighed in on the merits of the Court of Appeals decision in *Timko*, I believe it should do so if presented with the opportunity in the future.

BOLDEN, J., did not participate.