IN THE SUPREME COURT OF THE STATE OF MICHIGAN

On Appeal from the 9th Circuit Court for the County of Kalamazoo
Hon. Alexander C. Lipsey

LASKISHA MCMILLON,

APPELLANT,

VS.

CITY OF KALAMAZOO,

APPELLEE.

Circuit Court Case No.: 2019-0252-CD

Court of Appeals: 351645

Michigan Supreme Court Case No.:

APPELLANT'S BRIEF IN SUPPORT OF CLAIM OF APPEAL TO THE MICHIGAN SUPREME COURT

ORAL ARGUMENTS REQUESTED

The Appeal Involves A Ruling That A Provision of The Constitution, a Statute, Rule or Regulation, or other State Governmental Action is Invalid

Dated: March 4, 2021

Respectfully Submitted by:

CARLA D. AIKENS, P.C.

/s/ Carla D. Aikens
Carla D. Aikens (P69530)
615 Griswold St., Ste. 709
Detroit, MI 48226
Tel: (844) 835-2993
Fax: (877) 454-1680

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STATEMENT OF JURISDICTION AND STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED

On September 24, 2019, the 9th Circuit Court for the County of Kalamazoo heard oral argument related to Defendant-Appellee City of Kalamazoo's Motion for Summary Disposition, as well as, Plaintiff-Appellant's Motion to Amend. *See Exhibit A: Motion for Summary Disposition Hearing Transcript.* A little over a week later, on October 3, 2019, the trial court granted Defendant-Appellee City of Kalamazoo's Motion for Summary Disposition and further denied Plaintiff-Appellant Lakisha McMillon's Motion to Amend her Complaint. *See Exhibit B: Trial Court's October 3, 2019 Order Granting Defendant's Motion for Summary Disposition and Denying Plaintiff's Motion to Amend.* On October 24, 2019, Plaintiff-Appellant filed with the trial court a motion for reconsideration. *See Exhibit C: Plaintiff-Appellant's Motion for Reconsideration.*[1] However, on November 5, 2019 the trial court entered an Order that Denied Plaintiff's Motion for Reconsideration. *Exhibit D: Trial Court's November 5, 2019 Order Denying Plaintiff's Motion for Reconsideration.*

Thereafter, Plaintiff-Appellant timely appealed the trial court's decision and filed her appellate brief on March 2, 2020, and filed her Reply to Defendant-Appellee's brief on appeal on May 19, 2020. On January 8, 2021, oral arguments were heard at the Court of Appeals.[2] About two weeks after that, the panel of judges sitting on the Michigan Court of Appeals entered an unpublished opinion denying Plaintiff-Appellant's appeal, and affirming the trial court's decision to deny Plaintiff-Appellant the opportunity to amend her complaint, deny Plaintiff-Appellant's

[1] Plaintiff-Appellant attached two exhibits to this motion for reconsideration: (1) the smaller employee file given to Plaintiff by Defendant prior to litigation and without the agreement; and (2) the employee file provided to Plaintiff in Defendant's reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition with the contractual language included. Those are Exhibits G and I, respectively, to this brief.

[2] As of the date of this filing, Plaintiff-Appellant has been unable to obtain the transcript for the hearing at the Court of Appeals. If and when Plaintiff-Appellant is able to procure that transcript, she will provide the same to this Honorable Court.

motion for reconsideration, and grant Defendant-Appellee's Motion for Summary Disposition. *See Exhibit E: McMillon v. City of Kalamazoo*, Appeal No. 351645 (unpublished).

Accordingly, in the case at bar, Plaintiff-Appellant is appealing: (1) the trial court's October 3, 2019 order that (a) granted Defendant-Appellee's Motion for Summary Disposition and (b) denied Plaintiff-Appellant's motion to amend her complaint (*Attached hereto as Exhibit A)*; (2) the trial court's November 5, 2019 order denying Plaintiff-Appellant's Motion for Reconsideration (*Attached hereto as Exhibit D)*; and (3) the Court of Appeals opinion and order denying Plaintiff-Appellant's appeal and affirming the trial court's rulings (attached hereto as *Exhibit E*).

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court err when it failed to make all inferences in favor of Appellant, and consider the competing evidence related to Appellant's lack of notice of the 9-month statute of limitations period which Defendant is attempting to impose?

Appellant answers: "Yes."
Appellee would answer "No."

2. Did the trial court err when it held as a matter of law that the 9-month statute of limitations period applied to Appellant's claims, despite the fact that the document Appellee relies upon is not an employment agreement and Plaintiff was never provided this document with her personnel file requests?

Appellant answers: "Yes"
Appellee would answer: "No."

3. Did the trial court err when it held that it would be futile to allow Appellant to amend her complaint?

Appellant answers: "Yes
Appellee would answer: "No."

4. Did the panel of judges sitting on the Michigan Court of Appeals err when they held that denial of an offer does not terminate the offer?

Appellant answers: "Yes
Appellee would answer: "No."

5. Did the panel of judges sitting on the Michigan Court of Appeals err when it held Appellant waived her argument related to the ERK because she did not raise that argument until reconsideration?

Appellant answers: "Yes
Appellee would answer: "No.

CONCISE STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

On March 24, 2004, Plaintiff-Appellant Lakisha McMillon, applied for employment with Defendant-Appellee for the Kalamazoo Department of Public Safety. *See Exhibit F: Affidavit of Plaintiff-Appellant, Lakisha McMillon* at ¶ 1. In May of 2004, Plaintiff-Appellant was declined an employment opportunity with Defendant-Appellee. *Id.* at ¶ 3. Pursuant to declining to employ Plaintiff-Appellant, and according to what is believed to be Defendant-Appellee's retention policy, Defendant-Appellee was to have discarded Plaintiff-Appellant's application for hire a year after it was submitted. *Id.* at ¶ 4. In June of 2005, more than a year after Plaintiff-Appellant allegedly signed the application and was rejected for employment, Plaintiff-Appellant was contacted by an agent of Defendant-Appellee in order to re-enter her into the hiring process. *Id.* at ¶¶ 5-6. During this time, Plaintiff-Appellant was asked to, and did, repeat all of the requirements for employment eligibility but was never asked to fill out a similar application and was never offered any other agreement containing any language related to a truncated statute of limitations. *Id.* at ¶¶ 6-8. Pursuant to re-starting the hiring process, Plaintiff-Appellant was offered a job with Defendant-Appellee as a Public Safety Officer ("PSO") on September 26, 2005. *Id.* at ¶ 9.

Throughout Plaintiff-Appellant's employment with Defendant-Appellee, Plaintiff-Appellant has been subjected to continuous forms of discrimination and harassment, the specifics of which are not at issue in this appeal. On December 20, 2017, Plaintiff-Appellant requested a full copy of her employment file which was provided to Plaintiff-Appellant on December 22, 2017. *Id.* at ¶¶ 10-11. The employment file that was provided to Plaintiff-Appellant is 145 pages and included her employment action, however, it did not include the 2 pages that Defendant-Appellee claims shorten Plaintiff-Appellant's statute of limitations for employment

matters to nine months. *See Exhibit G: 145 Page Personnel File Defendant-Appellee Provided to Plaintiff-Appellant*; *see also Exhibit F* at ¶ 13. Plaintiff-Appellant later learned that Defendant-Appellee kept various employment files, and requested copies of those files; however, none of the records provided to Plaintiff-Appellant contained any mention of a nine-month statute of limitations period. *Exhibit F* at ¶ 14.

Pursuant to the continued harassment that Plaintiff-Appellant was forced to endure, she filed a lawsuit against Defendant-Appellee on May 22, 2019. *See Exhibit H: Plaintiff-Appellant's Original Complaint.*

Instead of filing an answer, Defendant-Appellee filed a Motion for Summary Disposition, claiming that Plaintiff-Appellant was bound by language contained in her May 2004 employment application. According to Defendant-Appellee, and provided to Plaintiff-Appellant for the first time attached to Defendant-Appellee's Motion, Plaintiff-Appellant's 2004 application contained a provision that stated that "any lawsuit against the City of Kalamazoo . . . arising out of [Plaintiff-Appellant's] 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," and Plaintiff-Appellant was bound by this language despite the fact that Defendant-Appellee did not hire her pursuant to this application and it was never provided to Plaintiff-Appellant upon her request for her employee file. *See Exhibit I: 159 Page Personnel File Defendant-Appellee Provided to Court with its Motion for Summary Disposition.* It is also important to note that the personnel file that was provided to the Court by Defendant-Appellee contained 14 additional pages that were not included in the personnel file provided to Plaintiff-Appellant, which totaled 159 pages of total documents. *Id.*

On September 17, 2019, Plaintiff-Appellant filed with the trial court a motion to amend her complaint and attached to the complaint her proposed amended complaint. *See Exhibit J: Plaintiff-Appellant's Motion to Amend and Proposed Amended Complaint*.

On September 24, 2019, the court heard oral arguments related to Defendant-Appellee's Motion for Summary Disposition, and while the court directly acknowledged that the allegations stated could form a claim under Eliot Larsen Civil Rights Act, the court decided "to grant summary disposition under C(7) and C(8) with regard to the complaint that has been filed in this matter." *See Exhibit A* at 18-20; *see also Exhibit B*. The court reasoned:

> [T]he Plaintiff-Appellant was advised of and aware of the 9-month limitation periods, and that that carried over, not only from the 2004 document which remained in her file, but also, I believe, is satisfactory established that the second document likewise contains the language which gives notice to the Plaintiff-Appellant. The court will find that the Plaintiff-Appellant had notice of the limitations.

See Exhibit A at 19.

The court then went on to analyze Plaintiff-Appellant's request to amend, and held that, "while the court believes that leave should be granted to amend, the court adopts the position of the Defendant that such amendment as proposed in this matter would be futile, and there would not be a cause of action based upon the proffered additional claims." *Id.* at 30. After Plaintiff-Appellant's Motion for Reconsideration was denied, Plaintiff followed with her appeal to the Michigan Court of Appeals. *See Exhibit D; See also Exhibit E.*

Unfortunately, the Court of Appeals agreed with the trial court, and affirmed the trial court's decisions to deny Plaintiff-Appellant's motion to amend and to grant Defendant-Appellee's Motion for Summary Disposition. *See Exhibit E.*

even though she alleged that she re-signed the same documents a second time with the exception of certain documents including the one at issue here, the panel first found that

Plaintiff-Appellant had accepted Defendant-Appellee's offer of employment in 2005, and that the same documents that she had signed in 2004 applied to her later offer of employment. *Id.* at 3.

The panel further found that Plaintiff-Appellant "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." *Id.* at 4. The panel went on to state that "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." *Id.* This position, however, does not factor in that Plaintiff-Appellant had not been provided those documents **until** Defendant-Appellee filed its Reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Disposition. *See Exhibit A* at 8:25-9:2. Finally, after review of the transcript, it is clear that Plaintiff-Appellant brought the issue to the Court's attention before Plaintiff-Appellant's motion for reconsideration:

> The document that Mr. Cherry might have there is not what was given to her. That's the issue. When she asked for her employment file, and again, we gave you—we gave the court what she was given, and then the documents that counsel presented with the reply are again documents that she had never--she never received. I didn't even get those with respect to--when we asked for the employment file. So, I don't know what's in there. I think at this point it would be premature, because there's no way for us to know--actually--actually speak to somebody and say, okay, that's what the actual policy was and that's what she signed, and--and she didn't have to do anything additional. I think that was also said in the affidavit.

Id. at 8:22-9:9.

Moreover, the Court of Appeals opined on why Plaintiff-Appellant's motion to amend was properly denied. The panel held: "[I]n 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." *Id.* at 5. The panel ended their opinion with their analysis as to why they believed Plaintiff-Appellant's amendment would have been futile:

> 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.

Id.

Accordingly, this appeal followed.

ARGUMENT

I. The Trial Court and Court of Appeals Should Have Found The Additional Documents Filed By Defendant-Appellee Inadmissible In Violation of M.C.L 423.502.

Under M.C.L. 423.502, "[p]ersonnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding." Mich. Comp. Laws Ann. § 423.502.

Personnel records, as stated by the Michigan Court of Appeals, are any records that "include[] a record that identifies the employee and is used or has been used, or may affect or be used relative to that employee's disciplinary action." *Wright v. Kellogg Co.*, 795 N.W.2d 607,

610 (2010) (internal quotations omitted). It is undisputed that the documents Plaintiff-Appellant received from Defendant-Appellee are considered personnel files.

Plaintiff-Appellant has attached the full and complete personnel file that she was given by Defendant-Appellee when she requested the same as *Exhibit G.* In this instance, some documents that Defendant-Appellee filed as included in Plaintiff-Appellant's personnel file, were not included in the file that Defendant-Appellee gave to Plaintiff-Appellant when she requested her file. *Compare Exhibit G with Exhibit I.* The file given to Plaintiff-Appellant contained 145 pages, while Defendant-Appellee's file, that Defendant-Appellee filed with the Court, contained 159 pages. *Compare Exhibit I: 159 Page Personnel File Defendant-Appellee Provided to Court with its Motion for Summary Disposition* wit *Exhibit G: 145 Page Personnel File Defendant-Appellee provided to Plaintiff-Appellant.* Specifically, pages 1 through 10, 36, 37, 43, 59, 61 and pages 157 through 159 in Defendant-Appellee's personnel file that was filed with the Court were not included in the file that Plaintiff-Appellant received. Furthermore, pages 141 through 143 and page 145 in the file that Plaintiff-Appellant received were not included in the personnel file that Defendant-Appellee filed with the Court. *Id.* All of these above referenced documents should have been excluded from the court proceedings and should have been deemed inadmissible evidence due to the fact that "[i]nformation intentionally excluded from a personnel record that is statutorily required to be included in the record may not be used by the employer in a judicial proceeding." *Exhibit K: Cofessco Fire Prot., L.L.C. v. Bruce Steele, Vanguard Fire & Supply Co*., 2010 WL 3928724, at *4 (Mich. Ct. App. Oct. 7, 2010).

It should be noted that any additional material that was not intentionally excluded from the personnel file "may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the

information." *Id.* In this case, Plaintiff-Appellant never agreed to allow Defendant-Appellee to include the additional documents nor was Plaintiff-Appellant able to review the same. Had she been able to do so, perhaps she would have been aware that Defendant-Appellee believed the statute of limitations had been shortened, as the Court ruled. Plaintiff-Appellant was surprised when Defendant-Appellee introduced the additional documents to the Court as neither she, nor her attorney, had ever viewed the documents that Defendant-Appellee presented to the Court. Further, Defendant-Appellee attempted to argue to the Court of Appeals that she had time to review the information in the trial court, but this would obviously not have been a reasonable amount of time given that she did not have them in time to act upon them given the shortened statute of limitations. Defendant-Appellee has provided no basis for its definition of "reasonable time," but it cannot possibly be after the time period in which the employee is required to act in accordance with the omitted documents.

II. The Additional Documents Do Not Fall Under the Exclusionary Portion of M.C.L. 423.501.

Under M.C.L. 423.501, an employer may exclude documents that are not considered to be parts of a personnel record if those records are used for grievance investigations and are not used for any of the purposes that are provided in the subsections of the same. Mich. Comp. Laws Ann. § 423.501.

The purpose of the Employee Right to Know Act ("ERKA"), which includes M.C.L. 423.501 and 423.502, is "to establish an individual employee's right to examine the employee's personnel records, i.e. the documents that are being kept by the employer concerning that employee … but certain materials and information are identified that are excluded from the definition, and are not available to the employee." *Wright*, 795 N.W.2d at 609-10. Furthermore,

"the exclusion for grievance-investigation records is a specific statutory provision that controls only the grievance process." *Id.* at 610.

The documents that Defendant-Appellee filed with the Court do not fall within this exclusion and, therefore, should not have been kept from Plaintiff-Appellant. Due to the fact that the additional documents do not fall within this exception, Defendant-Appellee has no adequate reason for failing to include these additional documents. Thus, the Court should find that Defendant-Appellee is not entitled to rely on them in support of its motion to dismiss, and Plaintiff-Appellant's claim should be reinstated.

Moreover, the case law and statute clearly treat all employment records, including applications, as "[p]ersonnel records" for the purposes of the BPA. As a result, Plaintiff-Appellant should have been provided her employment application when she requested it multiple times. As a result of Defendant-Appellee's violation of the BPA,Plaintiff-Appellant has been prejudiced.

M.C.L. § 423.501(c) defines the word "personnel record" pursuant to the BPA. The definition can be found in two parts of the act. In the first, the language is unlimited and states:

> (c) "Personnel record" means a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. A personnel record shall include a record in the possession of a person, corporation, partnership, or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision…

Because this definition is broad, M.C.L. 423.501(c) concludes by defining the term "[p]ersonnel record" with some limitations, on which Appellee seems to primarily focus. The limiting language states:

> A personnel record shall not include:

> (i) Employee references supplied to an employer if the identity of the person making the reference would be disclosed.
> (ii) Materials relating to the employer's staff planning with respect to more than 1 employee, including salary increases, management bonus plans, promotions, and job assignments.
> (iii) Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.
> (iv) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
> (v) Information that is kept separately from other records and that relates to an investigation by the employer pursuant to section 9.
> (vi) Records limited to grievance investigations which are kept separately and are not used for the purposes provided in this subdivision.
> (vii) Records maintained by an educational institution which are directly related to a student and are considered to be education records under section 513(a) of title 5 of the family educational rights and privacy act of 1974, 20 U.S.C. 1232g.
> (viii) Records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, and are not accessible or shared with other persons. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known.

The only logical reading of the BPA's definition of "[p]ersonnel record" is a record, as defined in the first part of M.C.L. 423.501(c), that is not included in any of the eight listed exceptions.

In fact, a panel of this court found exactly that, in *Wright v. Kellogg Co*., 289 Mich. App. 63, 67(2010), when defining "personnel file.":

> [T]he purpose of the ERKA is to establish an individual employee's right to examine the employee's personnel records, i.e. the documents that are being kept by the employer concerning that employee. In the ERKA, ***the term "personnel record" is generally defined, but certain materials and information are identified that are excluded from the definition, and are not available to the employee.***

Id. (emphasis added); *see also Newark Morning Ledger Co v. Saginaw Co Sheriff*, 204 Mich. App. 215, 221 (1994). As a result, because Plaintiff-Appellant was never provided with her

employment application which allegedly limited all statutes of limitations to nine months, Defendant-Appellee was not allowed to use this document in these proceedings, pursuant to M.C.L. § 423.502,

Finally, any argument related to where the application was kept by Defendant-Appellee is not relevant. The court in *Beauchamp v. Great W. Life Assurance* Co., 918 F. Supp. 1091, 1099 (E.D. Mich 1996), explained that the analysis into where the records are stored is not relevant to a plaintiff's ability to access their personnel files. In *Beauchamp*, the court held that the documents that were not originally included were admissible in the proceedings because they were merely delayed, not withheld. Id. Here, however, Plaintiff-Appellant was not denied the record due to some delay in processing; instead, it was withheld, by Defendant-Appellee's own admission, because it claims the record was not a personnel file. The timing of when Defendant-Appellee did finally "locate" the pertinent document – after it had already filed the motion for summary disposition – is suspicious, at best, if the matter of its intentions were actually a relevant area of inquiry. In all, Defendant-Appellee should not have been permitted to use information provided in contravention of the BPA to support dismissal of Plaintiff-Appellant's claims, and the trial court's failure to find the same should be reversed.

III. Plaintiff -Appellant Should Have Been Allowed to Amend Her Complaint.

The nine-month time bar that Defendant-Appellee cites would not be an issue if this Court had accepted Plaintiff-Appellant's proposed amended complaint. *See Exhibit G; see also Exhibit F* at ¶¶ 15-25. Based on the facts in the proposed amended complaint, Plaintiff-Appellant was subjected to discrimination on September 25, 2018, when Chief Vanderweire revoked Plaintiff-Appellant's car privileges and when Plaintiff-Appellant was targeted by complaints in order to paint her in a bad light. Plaintiff-Appellant presented numerous instances

of harassment and discrimination that occurred in the nine-month period before Plaintiff-Appellant filed her complaint; however, the trial court made improper determinations of fact and improperly held that the instances outlined in Plaintiff-Appellant's amended complaint failed to state a claim. *Exhibit H* at 30. However, there are factual developments that could show that the instances Plaintiff-Appellant pled are retaliatory and discriminatory. Moreover, this would be an error because with competing versions of the facts, Plaintiff-Appellant, as the non-moving party, should have been apprised all reasonable inferences. As a result, the Court's holding that Plaintiff-Appellant's amendment would be futile was reversible error that has prejudiced Plaintiff-Appellant and must be corrected.

Moreover, the Appellate Court's analysis highlights one of Plaintiff's main issues: she did not receive her proper inferences from the trial court at that stage. The appellate Court's analysis simply explains how the Court found reasonable facts that would contradict Plaintiff's allegations that those employer actions were instead discriminatory. This, again, was without providing Plaintiff any opportunity to discover. Instead, the panel of judges sitting on the appellate court agreed with the trial court's improper interpretation of law. For example, the panel of judges sitting on the court of appeals stated:

> 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.

Here, without any discovery, the trial court found that the remark, with other allegations, is not actionable because the remark was not directed at Plaintiff and the individual was not Plaintiff's superior. First, the court is clearly making a factual analysis, and, making that analysis in a vacuum when the correct analysis is a totality of the circumstance's analysis.

Berryman v. SuperValu Holdings, Inc., 669 F.3d 714 (6th Cir. 2012). The precedent is clear that this is not proper. "To determine whether a work environment is 'hostile' or 'abusive,' courts look at the totality of the circumstances. The factfinder must evaluate the conduct at issue by both an objective and subjective standard." Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 333 (6th Cir. 2008).

Even worse, the trial court's factual conclusions provide every inference to Defendant-Appellee. A reasonable juror could find more culpability of racial animus in the fact that Plaintiff-Appellant's co-worker was using the n-word related to his dog, when, the Court found this as a mitigating factor. Which also highlights, again, how Plaintiff-Appellant never received her proper inferences. However, worst of all is the fact that the trial court found are clearly contradictory to the law: "[w]e have also credited evidence of racial harassment directed at someone other than the plaintiff when the plaintiff knew a derogatory term had been used. *Jackson v. Quanex Corp.,* 191 F.3d 647, 661 (6th Cir. 1999) citing *Moore v. Kuka Welding Sys*., 171 F.3d 1073, 1079 (6th Cir. 1999). It does not matter who the n-word was directed towards, it should still be analyzed, and, at the very least provide Plaintiff-Appellant with the opportunity to discover facts related to the circumstances. The obvious implication being that if this is what someone will do in public, worse behavior could be found if Plaintiff-Appellant was provided with the benefits of legal discovery.

"The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result; amendment is generally a matter of right rather than grace." *Ben P Fyke & Sons v Gunter Co*, 390 Mich. 649, 659 (1973). An amendment would be futile if (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. *P.T. Today, Inc. v. Comm'r of the Office of Fin. & Ins. Servs.*, 270 Mich. App. 110, 114 (2006).

In the case at bar, the trial court and Court of Appeals erred when it held that Plaintiff-Appellant's proposed amended complaint was legally insufficient on its face. Plaintiff-Appellant believes that even her original claims were legally sufficient; however, at the very least, the additional facts would only add strength to her hostile workplace and retaliation claims. The trial court and the Court of Appeals' decisions are especially improper when considering that a hostile work environment can be established by a **single event** if that event is "extremely serious" or severe enough, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Williams v. CSX Transp. Co.,* 643 F.3d 502, 512 (6th Cir. 2011), and, when considering the fact that, "[w]hether harassing conduct is sufficiently severe or pervasive to establish hostile work environment is quintessentially a question of fact." *Hawkins v. Anheuser-Busch, Inc*., 517 F.3d 321, 333 (6th Cir. 2008).

As a result, it appears that the nine-month statute of limitations analysis was used as a threshold to determine whether Plaintiff-Appellant could even bring her amended claim. Plaintiff-Appellant further asserted additional retaliation, scrutiny, and unnecessary supervision and investigations which she was forced to endure. Plaintiff-Appellant is still facing a hostile workplace and working less shifts because of her treatment. Plaintiff-Appellee was denied an opportunity to even discover facts related to her claim. As a result, the trial court erred when it did not allow her to present relevant facts to her hostile workplace environment claims that occurred within Defendant-Appellee's proposed, shortened, nine-month statute of limitations, and dismissal of her claims should be reversed.

IV. The Employment Application Is Not Binding Against The Parties As It Was Not In Effect When Defendant-Appellee Hired Plaintiff-Appellant

Michigan courts have held that employment applications containing reasonable provisions can be used as an agreement between the parties. *Timko v. Oakwood Custom Coating, Inc*., 244 Mich. App. 234 (2001). In this particular instance, Defendant-Appellee states that Plaintiff-Appellant's 2004 application does contain such provisions; however, Defendant-Appellee fails to mention that the application cited was not used to hire Plaintiff-Appellant. The application was allegedly signed when Plaintiff-Appellant was denied employment with Defendant-Appellee in 2004. As stated more than 100 years ago by the United States Supreme Court, "rejection or withdrawal [of an offer] leaves the matter as if no offer had ever been made." *Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 151 (1886).

Plaintiff-Appellant should not have been bound by documents provided to her 18 months prior to the time she was hired. The Court of appeals held that "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." *Id.* at 3.

However, interestingly, in the very next paragraph the panel stated, "[p]resumably, 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." *Id.* The panel, however, did not address the contradiction in this logic, as this is explicitly stating that Plaintiff-Appellant would have contracted again so Defendant-Appellee could hold her to the terms of this speculative contract. The panel went on to cite, in the next paragraph, Defendant-Appellee's affidavit of retired officer Ken Colby and his alleged use of Plaintiff-Appellant's previous employment contract. *Id.* This, however, highlights the issue with this

analysis, as contracts are analyzed for consideration only at the time the contract is made. *Groh v Broadland Builders, Inc*, 120 Mich App 214, 217 (1982) (holding that "the general rule is that damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made."). There was no consideration flowing back to Plaintiff-Appellant at the time of contract in Defendant-Appellee's affidavit, and no mutuality of acceptance.

Next, from the affidavit, it was admitted that Defendant-Appellee denied Plaintiff-Appellant's application in 2004, and, accordingly, in contract terms, denied Plaintiff-Appellant's offer of employment. However, under Michigan law, it has long been held that rejection of an offer terminates the offeree's right to accept said offer. *DaimlerChrysler Corp. v. Wesco Distribution*, 281 Mich. App. 240, 247 (2008). This point was emphatically stated by the Michigan Court Appeals in *DaimlerChrysler Corp.*:

> Rather, Chrysler's purchase order constituted a rejection of Wesco's offer, and instead was a counteroffer. Harper Bldg Co v Kaplan, 332 Mich 651, 655; 52 NW2d 536 (1952); see also 2 Williston, Contracts (4th ed), § 6.11, pp 110-117 ("[B]ecause the offeror is entitled to receive what it is it has bargained for, if any provision is added to which the offeror did not assent, the consequence is not merely that the addition is not binding and that no contract is formed, but that the offer is rejected, and that the offeree's power of acceptance is thereafter terminated.").

Id. This is exactly the situation at bar, and what Defendant-Appellee has been successfully arguing throughout these proceedings: Defendant-Appellee rejected Plaintiff-Appellant's offer for employment in 2004, and, then in 2005, unilaterally attempted to bind her to a contract that was allegedly offered in 2004 that had already been denied. This flows logically from other seminal areas of Michigan contract law: "[b]efore a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Kloian v. Dominos Pizza,* L.L.C., 273 Mich. App. 449, 452; 733

NW2d 766 (2006).

This exact argument was raised by Plaintiff-Appellant in the Court of Appeals; however, confusingly, the panel held:

> 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*.

See Exhibit E at 3. This is essentially the Supreme Court's holding in *Minneapolis & S. L. Ry.*:

> A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it.

119 U.S. 149, 151, 7 S. Ct. 68, 169-70 (1886) (citing *Eliason v. Henshaw*, 4 Wheat. 225; *Carr v. Duval*, 14 Pet. 77; *National Bank v. Hall*, 101 U.S. 43, 50; *Hyde v. Wrench*, 3 Beavan, 334; *Fox v. Turner*, 1 Bradwell, 153). The most confusing piece of the panel's analysis, which was not explained in their opinion, is how they reasoned that "*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," when combined with their statement a few lines prior that Plaintiff-Appellant was incorrect in her position that a "rejection of an offer 'leaves the matter as if no offer had ever been made." *Exhibit C* at 3. It is undisputed that Defendant-Appellee rejected Plaintiff-Appellant's offer of employment in 2004, and it is undisputed that Defendant-Appellee attempted to bind her to a portion of that same offer of employment that was previously rejected. Accordingly, it is the clear and longstanding precedent that those actions do not constitute a legal and binding contract to which Defendant-Appellee can hold Plaintiff-Appellant.

In this instance, the Court should view Defendant-Appellee's original rejection of Plaintiff-Appellant as a rejection of Plaintiff-Appellant's offer to be employed by Defendant-Appellee, and therefore, the rejection of the provisions in the application. Construing the facts in a light most favorable to Plaintiff-Appellant, this Court should view this denial of employment as a denial of the application. Alternatively, if the Court is not satisfied with this reasoning, it should still reject the 2004 application as a binding agreement due to the fact that Plaintiff-Appellant was not hired when she first would have completed the application, and she was not asked to sign any such document when she was hired eighteen months later. As noted above, it is Defendant-Appellee's regular practice to discard documents related to employment within a year.

Again, construing the facts in a light most favorable to Plaintiff-Appellant, it is reasonable to believe that an applicant would assume that an application is not binding once they have not only been rejected by the potential employer, but also, once a significant amount of time has elapsed since the applicant applied, was not hired, and had to sign new documents and re-complete the hiring process in order to be hired. In this instance, Plaintiff-Appellant was not hired by Defendant-Appellee until eighteen months after her application was submitted. The duration of time should sever any employment relationship between the parties due to an individual's need to find work elsewhere if not hired immediately by the potential employer. Defendant-Appellee's actions support this reasoning. Over a year after rejecting Plaintiff-Appellant, Defendant-Appellee contacted her to see if she was still interested in working for Defendant-Appellee and if she would be willing to re-start the hiring process, not simply to pick up where it left off in the process. This suggests that the application, as well as other documents and tests that the Defendant-Appellee uses while considering a potential employee, was no

longer accepted by Defendant-Appellee, as all other formalities in the hiring process had to be redone.

Furthermore, as alleged by Plaintiff-Appellant, Defendant-Appellee, through its regular practice, should have discarded Plaintiff-Appellant's application once Plaintiff-Appellant was not hired within a year. Further supporting this retention policy, when Plaintiff-Appellant requested her employment file, it did not contain page 2 of the application, which contained the limitation-of-claims shortening provisions. This shows that Defendant-Appellee not only had actually discarded this portion of Plaintiff-Appellant's 2004 application from her personnel file, but also that page 2 of the application was not considered a binding agreement as it was not an application used by Defendant-Appellee when they hired Plaintiff-Appellant. The fact that it allegedly resurfaced only after Plaintiff-Appellant filed her lawsuit should cast doubt on Defendant-Appellee's entire position.

V. No Analysis Into Plaintiff-Appellant's Retaliatory Hostile Workplace Environment Claim Was Ever Done With Regard To Plaintiff-Appellant's Motion To Amend Complaint.

"Like the Sixth Circuit, the Michigan Supreme Court accepts retaliatory hostile work environment claims." *See Exhibit L: Schmitt v. Solvay Pharmaceuticals, Inc.,* Case No. 06-11791, *Amended Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment,* (E.D. Mich. 2007) (unpublished) (citing *Kuta v. GMC*, 2006 U.S. Dist. LEXIS 74909, at *29 (citing *Meyer v. City of Centerline*,, 242 Mich. App. at 570). "We consider a retaliatory hostile work environment claim as a variety of retaliation." *Morris v. Oldham Cnty Fiscal Court*, 201 F.3d 784, 792 (6th Cir.2000). As the Sixth Circuit has stated:

> Consequently, the prima facie elements for this claim are a modified version of those four elements recognized in a typical retaliation claim: 1) the plaintiff engaged in a protected activity; 2) the defendant knew this; 3) the defendant subjected the plaintiff to

> severe or pervasive retaliatory harassment; and 4) the protected activity is causally connected to the harassment.

Khamati v. Sec'y of Dept. of the Treasury, 557 Fed. Appx. 434, 443 (6th Cir. 2014). In the case at bar, and relevant to the analysis below, neither the trial court nor the Court of Appeals addressed Plaintiff's position regarding her retaliatory hostile workplace environment claim. This alone is clear error, and Plaintiff-Appellant is entitled to a review of the same, considering the serious nature of her allegations against a municipality charged with serving and protecting the citizens of Kalamazoo.

STATEMENT OF RELIEF SOUGHT

For the reasons set forth herein, because Defendant-Appellee never provided Plaintiff with the alleged contract when she requested, Plaintiff-Appellant respectfully requests that this Honorable Court: (1) reverse Appellate Court's affirmation of the Circuit Court's grant of summary disposition, (2) reverse the Circuit Court's grant of summary disposition, (3) remand this matter back to the circuit court without the shortened limitations period, and (4) grant Plaintiff-Appellant any relief that this Honorable Court deems equitable and just.

Dated: March 4, 2021

Respectfully Submitted by:

CARLA D. AIKENS, P.C.

/s/ Carla D. Aikens
Carla D. Aikens (P69530)
615 Griswold Street, Ste. 709

Detroit, MI 48226
Tel: (844) 835-2993
Fax: (877) 454-1680

PROOF OF SERVICE

On March 4, 2021, the undersigned served a copy of the foregoing instrument on all of the parties to this matter via the Court of Appeals E-Service System at the email addresses provided to the Court of Appeals.

Dated: March 4, 2021 */s/ Carla Aikens*