STATE OF MICHIGAN

IN THE SUPREME COURT

JASMIN ADILOVIC,

Plaintiff-Appellant,

v.

MONROE, LLC,

Defendant-Appellee.

SC No. 164750
COA No. 357342
L.C. No. 20-03233-CZ
(Kent County Circuit Court)

/

INDEX OF EXHIBITS TO
DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF ON APPLICATION

EXHIBIT NO.	DESCRIPTION
A.	Employment Application
B	*Skaan v Fed Exp Corp,* No. W2011-01807-COA-R3-CV, 2012 WL 6212891 (Tenn Ct App December 13, 2012)
C	*Evans v Fed Exp,* No. W2013-01717-COA-R3-CV, 2014 WL 309351 (Tenn Ct App Jan 29, 2014)
D	*Johnson v DaimlerChrysler Corp,* No. CA 02–69GMS, 2003 WL 1089394, *2–3 (D Del March 6, 2003)

EXHIBIT A

MONROE LLC

Monroe LLC
4490 44th Street SE
Grand Rapids, MI 49512

EXHIBIT
tabbies
2

DATE: 03/15/17

APPLICATION FOR EMPLOYMENT
An Equal Opportunity Employer

PERSONAL INFORMATION

Name ADILOVIC (Last) JASMIN (First) YASKO (Middle)

Present Address 4256 OAK FOREST CT SE G-11 (Street) GRAND RAPIDS (City) MI (State) 49546 (Zip)

Permanent Address _____ (Street) _____ (City) _____ (State) _____ (Zip)

Phone No. 616-375-3651 Are you 18 years or older? Yes ✓ No ____

Describe any U.S. Military Service:
branch, rank, nature and date of discharge. _____

Are you presently in the United States armed forces, active or reserve? If so, identify unit and any service obligations.
_____

Have you ever been convicted of a crime or are you presently charged with a felony? If so, where and when, and explain circumstances.
NO

EMPLOYMENT DESIRED

Position Inventory Auditor Date you can start 03/15/17 Salary desired _____ Shift Desired (1) 2 3

Are you employed now? _____ If so, may we inquire of your present employer? _____

Have you ever applied to this Company before? _____ Where? _____ When? _____

Have you ever worked for this Company before? _____ Where? _____ When? _____

Relatives employed by Company? Yes ____ Who? _____ No ____

Do you have any activities, commitments or responsibilities (for example, school, other employment, etc.) that might interfere with your ability to work full time, including overtime, in the position for which you are applying? If so, explain. _____

FORMER EMPLOYMENT - List below last four employers, starting with the most recent.

Date (Month & Year)	Name and Address of Employer	Salary	Position	Reason for Leaving
From 02/15/15	EXPRESS			
To 03/15/17				
From				
To				
From				
To				
From				
To				

SUPPLEMENT 1

READ CAREFULLY AND SIGN BELOW IF YOU AGREE TO THESE TERMS OF EMPLOYMENT

I agree that my employment with the Company will be at will and may be terminated by me or the Company at any time, with or without cause. I agree that no one other than the president of the Company in a written contract has any authority to limit the Company's right to terminate employment at will, or to offer employment other than on an at-will basis.

I agree that the contents of any office, locker or desk or equipment or other Company property I may use, and any of my own property I bring onto the Company's premises (including, without limitation, cars, packages, and purses), may be inspected by the Company at any time, and I waive any claims against the Company or its agents relating to such inspection.

I agree that I will not disclose to anyone or use for my own purposes any of the Company's confidential or proprietary information, either during or after my employment, except at the request and for the benefit of the Company. I agree that information about the Company's customers, vendors, sources of supply, pricing, costs, and other financial information, products, services, methods of operation, marketing, engineering methods, production, and the like is confidential and proprietary information that belongs to the Company. If my employment with the Company ends, I will not retain any copies or summaries of any such information, but will promptly return all such information to the Company. I also agree that I will disclose and assign to the Company any invention, design or process that I conceive or develop while employed by the Company relating to the Company's business or to any product or service offered or being developed by the Company, and that all such inventions. designs or processes belong to the Company.

I agree to submit to physical examinations permitted by law before and during my employment, at the request and expense of the Company, and I agree to disclose all information lawfully requested at such examinations about my physical and mental condition and medical history. I also agree that before and during my employment, at the request and expense of the Company, I will cooperate in such lawful medical tests (including blood, urine or other testing) as the Company requests to check for drugs or alcohol in my system. I waive any claims against the Company or its agents or any testing agency retained by the Company or its agents relating to any such testing, or from lawful decisions made regarding my employment or termination of employment based upon the results of such testing or analysis.

I agree that except as prohibited by statute the Company may, during or after my employment, disclose or discuss any information or opinions relating to me or my employment to employees of the Company or third parties. I waive written or other notice of any such disclosure, including disclosure of disciplinary matters, and I waive any claims against the Company or its agents relating to any such disclosure or discussion.

I agree that I will not commence any action or lawsuit relating to my employment with the Company, or the termination of my employment, more than 6 months after the the date of the employment action that is the subject of the claim or lawsuit, and I agree to waive any statute of limitations to the contrary. I understand that this means that even if the law would give me the right to wait a longer time to make a claim, I am freely and knowingly waiving that right, and that any claims not brought within 6 months after the date of the employment action that is the subject of the claim or lawsuit will be barred. I waive any right to a jury trial if I ever sue the Company relating to my employment with the Company. I understand that this means that even if the law would give me the right to have a jury decide my claims, I am freely and knowingly waiving that right and agree to have my claims heard and decided by a judge instead.

I agree to the above terms of employment. I agree that if any of the above terms is ever found to be legally unenforceable as written, such invalidity will not affect the validity of the rest of this agreement, and such term shall be limited to allow its enforcement as far as legally possible. I agree that no one other than the president of the Company, by a written directive, has any authority to modify the above terms of employment, or to make any exception to them, or to offer employment on any other terms.

I agree that I will be bound by and will adhere to any other rules and policies issued by the Company, including all rules and policies contained in the Company's employee handbook.

Date: 03/15/17 Signature of Applicant J. Adilović

EXHIBIT B

2012 WL 6212891
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Karim SKAAN
v.
FEDERAL EXPRESS CORPORATION.

No. W2011–01807–COA–R3–CV.
|
August 14, 2012 Session.
|
Dec. 13, 2012.

An Appeal from the Circuit Court for Shelby County, No. CT–005300–06; Gina Carol Higgins, Judge.

Attorneys and Law Firms

Michael C. Skouteris and Donnie Allen Snow, Memphis, Tennessee, for the Plaintiff/Appellant Karim Skaan.

John W. Campbell, Memphis, Tennessee, for the Defendant/Appellee Federal Express Corporation.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

OPINION

HOLLY M. KIRBY, J.

***1** This appeal involves a claim of retaliatory discharge. The plaintiff was employed by the defendant shipping company, working in a job position that required physical labor. The plaintiff seriously injured his back in the course of his employment. As a result, he underwent surgery and took an extended leave of absence. After his leave of absence, the plaintiff returned to his former position with no restrictions. A month later, he suffered another back injury that necessitated another leave of absence. Pursuant to its medical leave policy, the defendant company terminated the plaintiff's employment. Eight months after his employment was terminated, the plaintiff filed this lawsuit, alleging that he was discharged in retaliation for his workers' compensation claim. The plaintiff's employment contract included a contractual six-month limitations period. The defendant company filed a motion for summary judgment based on the six-month contractual limitations period, and also asserting that it was entitled to judgment on the merits based on the undisputed facts. The trial court declined to grant the company's motion for summary judgment based on the six-month limitation period, but it granted summary judgment in favor of the company on the merits. The plaintiff now appeals. We reverse in part but affirm the trial court's grant of summary judgment on a different basis than that upon which the trial court relied, holding that the plaintiff employee's lawsuit is time-barred under the contractual limitations period in the plaintiff's employment contract.

Facts and Proceedings Below [1]

[1] This is Mr. Skaan's second appeal in this case. The first appeal was dismissed by this Court because the trial court's order was not a final, appealable judgment. *See Skaan v. Fed. Express Corp.,* No. W2009–02506–COA–R3–CV, 2010 WL 5140627 (Tenn.Ct.App. Dec. 14, 2010). Some of the facts recited herein are taken from the Court's opinion in the first appeal.

On August 11, 1999, Plaintiff/Appellant Karim Skaan ("Mr.Skaan") submitted an application for employment with the Defendant/Appellee Federal Express Corporation ("FedEx"). As part of the application, Mr. Skaan signed an Employment Agreement ("Agreement") in which he agreed to certain terms of employment in the event he was hired by FedEx. On September 2, 1999, FedEx hired Mr. Skaan as a permanent, part-time cargo handler. Upon Mr. Skaan's hire, the Agreement Mr. Skaan had signed was executed by a FedEx representative on behalf of FedEx.

In October 2004, in the course of performing his work duties as a cargo handler, Mr. Skaan suffered an injury to his back. As a result of this injury, in May 2005, Mr. Skaan underwent a lumbar diskectomy. Following a medical leave of 385 days, he returned to work at FedEx on November 8, 2005, in the same job position, with no restrictions. On November 11, 2005, FedEx advised Mr. Skaan by letter that, under FedEx's

policies on medical leave, he was permitted medical leave of 365 days for any single injury, and he had exhausted the allowable medical leave. Although FedEx's November 11 letter to Mr. Skaan is not in the appellate record, the parties do not dispute that Mr. Skaan was advised by FedEx that, under FedEx policies, no further leave was available to him should he experience a recurrence of the same condition within 180 days.

***2** On December 8, 2005, less than 180 days after he returned to work, Mr. Skaan suffered another work-related injury to his back. This injury necessitated that Mr. Skaan take another medical leave of absence. Mr. Skaan took the position that this second back injury was a new injury, and so he was entitled to additional medical leave under FedEx policies. After investigation, and upon receiving the opinion of Mr. Skaan's treating physician, FedEx took the position that Mr. Skaan's second back injury was a recurrence of his previous injury, so no further medical leave was available to him. Accordingly, on February 3, 2006, FedEx notified Mr. Skaan that his employment with FedEx was terminated.

Lawsuit

On October 10, 2006, over eight months after his employment with FedEx was terminated, Mr. Skaan filed this lawsuit against FedEx in the Circuit Court of Shelby County, Tennessee. The complaint alleged breach of Mr. Skaan's employment contract and/or wrongful termination. In March 2007, he amended his complaint, incorporating by reference his breach of contract claim and adding a claim of retaliatory discharge, asserting that FedEx discharged him in retaliation for his workers' compensation claim.

In response, FedEx filed an answer in which it denied Mr. Skaan's allegations and also asserted an affirmative defense that his lawsuit was barred by the "applicable statute of limitations, including the contractual limitation period contained in Plaintiff's employment application." The contractual limitation period to which FedEx referred in its answer is found in Paragraph 15 of the Employment Agreement Mr. Skaan signed as part of his job application to FedEx. This provision states:

> To the extent the law allows an employee to bring legal action against Federal Express Corporation, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first.

On June 26, 2009, FedEx filed a motion for summary judgment, asserting that it was entitled to summary judgment on all of Mr. Skaan's claims. As to the breach-of-contract claim, FedEx argued that Mr. Skaan was an employee at will and thus there was no contract to be breached. On the retaliatory discharge claim, FedEx argued that Mr. Skaan could present no evidence that his termination was motivated by a retaliatory animus based on his workers' compensation filings, because FedEx had produced undisputed evidence that Mr. Skaan's termination was based on FedEx's medical leave policies. Finally, FedEx argued that Mr. Skaan's entire lawsuit was barred by the six-month contractual limitation period quoted above, because the lawsuit was filed over eight months after Mr. Skaan's employment was terminated.

In August 2009, the trial court conducted a hearing on the summary judgment motion. The appellate record does not include a transcript of that hearing. On November 2, 2009, the trial court entered an order on the summary judgment motion. The trial court declined to grant summary judgment to FedEx based on the six-month limitation period contained in the Employment Agreement, finding that there were genuine issues of disputed fact that were material to that affirmative defense:

> ***3** With respect to the second issue on the contractual limitations period contained in the Employment Agreement, the court finds that there are genuine issues of material fact which preclude summary judgment. There is conflicting testimony concerning whether [Mr. Skaan] could read and write English sufficiently at the time he signed the application. Genuine issues of fact exist as to whether he appreciated and understood the import of what he had signed. While the court is aware that the first issue disposes of the case, this

> issue is decided in the event that this matter is appealed.

The trial court reviewed the evidence on Mr. Skaan's claim of retaliatory discharge at length and concluded that FedEx had negated an essential element of Mr. Skaan's claim, namely, the element of improper motive for the discharge. The trial court found that, because FedEx had produced undisputed evidence that it did not terminate Mr. Skaan's employment until it received a letter from Mr. Skaan's treating physician that Mr. Skaan's back pain was related to his prior injury, FedEx had established that the termination of Mr. Skaan's employment was not related to the filing of a workers' compensation claim. On this basis, the trial court granted summary judgment in favor of FedEx on the retaliatory discharge claim. The trial court's order did not address the motion for summary judgment as it related to Mr. Skaan's breach-of-contract action. Mr. Skaan appealed this order. [2]

[2] This order on FedEx's motion for summary judgment was issued by Circuit Court Judge Lorrie Ridder. The subsequent orders were issued by Judge Ridder's successor, Circuit Court Judge Gina Higgins.

On December 14, 2010, this Court dismissed Mr. Skaan's first appeal for lack of a final order, because the trial court had not disposed of Mr. Skaan's breach-of-contract claim. *Skaan v. Fed. Express Corp.,* No. W2009–02506–COA–R3–CV, 2010 WL 5140627, at *2–3 (Tenn.Ct.App. Dec. 14, 2010). The case was remanded to the trial court for further proceedings. On remand, the trial court entered an order dismissing the breach-of-contract claim. The trial court stated: "The parties have agreed and represented that Plaintiff's [claim based on] breach of contract is without merit and should be dismissed and the Court is in agreement." In addition, the trial court determined that the order was final and appealable, as all matters before the court had been resolved. Mr. Skaan now appeals the grant of summary judgment in favor of FedEx on his retaliatory discharge claim.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Mr. Skaan raises one issue, whether the trial court erred in granting FedEx summary judgment on his claim of retaliatory discharge based on its determination that no genuine issues of material fact existed for trial. Specifically, he claims that sufficient evidence was submitted from which a reasonable jury could have concluded that FedEx's proffered reason for terminating him was a mere pretext for discharging him in retaliation for his workers' compensation claims, thus preventing a grant of summary judgment in favor of FedEx under the standard set forth in *Gossett v. Tractor Supply Co.,* 320 S.W.3d 777 (Tenn.2010).

***4** FedEx also raises an issue on appeal. [3] It claims that the trial court erred in denying its motion for summary judgment based on the contractual six-month limitation period for filing such lawsuits set forth in Mr. Skaan's Employment Agreement. It argues that, even if the record contains conflicting testimony about whether Mr. Skaan could read and write English sufficiently when he signed the application, this fact is immaterial, because one who signs a contract is presumed to know the contents thereof and is bound by the contract. For this reason, FedEx maintains, Mr. Skaan's lawsuit was not timely filed and FedEx is entitled to summary judgment.

[3] Mr. Skaan asserts in his appellate brief that "the [contractual] limitations argument is not before this Court for review" because FedEx had "declined to appeal [the] ruling." Mr. Skaan, however, misapprehends the rules of appellate procedure. Rule 13(a) of the Tennessee Rules of Appellate Procedure provides that the scope of the Court's review on appeal extends to "any question of law brought up for review and relief by any party," and that "[c]ross-appeals, separate appeals, and separate adjudications for permission to appeal are not required." Therefore, this issue was properly raised by FedEx, and it was fully addressed in FedEx's appellate brief. Accordingly, we will consider the issue in this opinion.

Our review of the trial court's decision to either grant or deny a motion for summary judgment is a question of law, subject to *de novo* review, with no presumption of correctness in the trial court's decision. *Gossett,* 320 S.W.3d at 780; *see also Kinsler v. Berkline, LLC,* 320 S.W.3d 796, 799 (Tenn.2010). "Generally speaking, a defendant moving for summary judgment may avail itself of one of two avenues: it may negate an essential element of the nonmoving party's claim, or it may establish an affirmative defense, such as the statute of limitations, that defeats the claim." *Allied Sound, Inc. v. Neely,* 909 S.W.2d 815, 820 (Tenn.Ct.App.1995) (citing *Byrd v. Hall,* 847 S.W.2d 208, 215 n. 5 (Tenn.1993)). In

this case, FedEx chose both avenues; it filed a motion for summary judgment both on the merits and on its affirmative defense based on the six-month contractual limitation in the Employment Agreement. Under either avenue, summary judgment is to be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.03.

The summary judgment standard to be applied in this case is the standard announced in *Hannan v. Alltel Pub. Co.,* 270 S.W.3d 1 (Tenn.2008). *See Gossett,* 320 S.W.3d at 781–83 (rejecting the *McDonnell–Douglas* framework at the summary judgment stage in discriminatory and retaliatory discharge cases and applying the standard in *Hannan*).[4] Under this standard, to be entitled to summary judgment, the movant employer must negate an essential element of the employee's claim or defense or show by undisputed evidence that the employee cannot prove an essential element of the claim or defense at trial. *Id.; see also Martin v. Norfolk S. Ry. Co.,* 271 S.W.3d 76, 83–84 (Tenn.2008) (citing *Hannan,* 270 S.W.3d at 5); *McCarley v. W. Quality Food Serv.,* 960 S.W.2d 585, 588 (Tenn.1998); *Byrd,* 847 S.W.2d at 215. If there are disputed facts, we must ascertain whether the facts in dispute are material to an essential element of the employee's claim or to an element of the affirmative defense upon which the employer seeks to rely. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd,* 847 S.W.2d at 215. A disputed fact presents a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.*

4 The Tennessee General Assembly has enacted legislation providing for a different summary judgment standard than the standard set forth in both *Gossett* and *Hannan,* but the new statutes only apply to cases filed on or after June 10, 2011 and July 1, 2011, respectively. *See* Tenn.Code Ann. § 4–21–311(e), 50–1–304(g) (setting forth burden of proof in discrimination cases); Tenn.Code Ann. § 20–16–101 (setting forth a new summary judgment standard in other cases).

***5** In determining whether the employer has established an affirmative defense at the summary judgment stage, we must view all of the evidence in favor of the employee and draw all reasonable inferences in favor of the employee. *Staples v. CBL & Assocs.,* 15 S.W.3d 83, 89 (Tenn.2000). Summary judgment should be granted only when a reasonable person could reach but one conclusion based on the facts and the inferences drawn from those facts. *Id.; see also Gossett,* 320 S.W.3d at 784 (citing *Staples,* 15 S.W.3d at 89).

ANALYSIS

Retaliatory Motive for Termination

Mr. Skaan argues that the trial court erred in holding that he cannot establish an essential element of his retaliatory discharge claim at trial, that is, the element of retaliatory motive for the discharge. The trial court held that FedEx had met this standard by producing undisputed evidence that it did not terminate Mr. Skaan's employment until it received the opinion of Mr. Skaan's treating physician that Mr. Skaan's December 2005 injury was related to his 2004 back injury. Based on this, the trial court found that Mr. Skaan cannot show at trial that FedEx had a retaliatory motive for discharging Mr. Skaan.

We note that the standard for summary judgment under the Tennessee Supreme Court's decision in *Gossett v. Tractor Supply Co* . is high indeed. The *Gossett* Court's application of the standard under the facts of that case is instructive. In *Gossett,* the Court noted that the employer had produced undisputed evidence that the plaintiff, Mr. Gossett, was discharged as part of the company's reduction in workforce. *Gossett,* 320 S.W.3d at 782–83. The Court stated that this evidence showed only that the reduction in workforce was "one reason" for the plaintiff's discharge. It explained that, in the context of a summary judgment motion on a claim of retaliatory discharge, the employer is in effect required to prove a negative, that is, to "show an absence of retaliatory motive" by undisputed evidence. *Id.* at 783. Thus, even if the employer's evidence on the stated reason for the discharge were taken as true and the plaintiff has no evidence to rebut it, the Court stated, for summary judgment purposes, there would remain a disputed issue of fact as to whether the retaliatory motive alleged by the plaintiff employee was a substantial factor in the decision to terminate the plaintiff's employment.[5] *Id.*

5 In *Gossett,* in response to concerns raised in the separate opinion filed by the minority, the majority opinion stated: "[O]ur holding does not

> exclude the possibility of summary judgment when an employer presents undisputed evidence that a legitimate reason was the exclusive motivation for discharging the employee. In such a case, the employer has demonstrated that the employee cannot show that a discriminatory or retaliatory reason was a substantial factor in the discharge decision and therefore has met its burden of production for summary judgment. Because no genuine issue of material fact exists on an essential element, either summary judgment or directed verdict may be granted." *Gossett,* 320 S.W .3d at 786. Respectfully, this assertion is difficult to square with the Court's application of its standard to Mr. Gossett, inasmuch as the Court stated that the employer had to do more than present undisputed evidence of its reason for discharge, it had to also prove the negative—the absence of a retaliatory motive—by undisputed evidence. *Id.* at 783. The majority in *Gossett* did not offer an example of how an employer might meet the standard it enunciated.

In the case at bar, the trial court noted that, prior to terminating Mr. Skaan's employment, FedEx knew that Mr. Skaan was of the opinion that the second back injury was unrelated to the first. Other than that, the trial court reasoned, Mr. Skaan had produced no evidence of improper motive. Because it was undisputed that FedEx did not proceed with the termination until it received confirmation that Mr. Skaan's treating physician believed that his December 2005 back problems were related to the 2004 back injury, the trial court reasoned, FedEx had "successfully negated an essential element of Plaintiff's case" by establishing by undisputed evidence that the "termination [of Mr. Skaan's employment] is not related to the filing of a workers' compensation claim."

***6** Respectfully, we must conclude that the evidence presented by FedEx on this prong of its summary judgment motion is not sufficient to meet the high standard set forth in *Gossett.* The *Gossett* Court explained that it is not sufficient for the employer to present undisputed evidence supporting its stated reason for terminating the plaintiff's employment. To obtain summary judgment on a claim of retaliatory discharge, the employer must also present undisputed evidence showing "an absence of retaliatory motive." *Id* at 783. FedEx has not done so. Therefore, respectfully, we must conclude that the trial court erred in granting summary judgment in favor of FedEx on this basis.

Contractual Limitation Period

FedEx argues on appeal that the trial court erred in declining to grant its motion for summary judgment based on the six-month limitation period contained in the Employment Agreement signed by Mr. Skaan when he applied for the job with FedEx. The trial court decided that granting summary judgment on this basis would be inappropriate because "[t]here is conflicting testimony concerning whether [Mr. Skaan] could read and write English sufficiently at the time he signed the application," and "[g]enuine issues of fact exist as to whether he appreciated and understood the import of what he had signed." As indicated above, under our standard of review, we examine this issue *de novo* on the record, giving no deference to the trial court's decision.

On appeal, FedEx argues that the undisputed facts establish that the Employment Agreement required Mr. Skaan to file this lawsuit within six months after the termination of his employment. As the lawsuit was filed over eight months after his discharge, FedEx argues, the lawsuit must be deemed untimely filed unless Mr. Skaan can show that the six-month contractual limitation provision is unenforceable. Referring to the trial court's ruling, FedEx argues that the enforceability of the contractual six-month limitation period is unaffected by either Mr. Skaan's inability to read or write in English or his inability to appreciate the importance of the document, because it is well-settled that "one who enters into a written contract ... is presumed to know the contents of the writing and is bound thereby." *DeFord v. Nat'l Life & Accident Ins. Co.,* 185 S.W.2d 617, 621 (Tenn.1945). FedEx notes that Mr. Skaan "accepted, executed, and availed himself of the Employment Agreement," and argues that he is therefore bound by its terms. Parties to a contract are free to agree to a limitation period that is shorter than the limitation period provided for by statute, FedEx contends, and a six-month time limitation for bringing suit is neither unreasonable nor unconscionable. Consequently, FedEx insists, based on the undisputed facts, Mr. Skaan's lawsuit is untimely, and it is entitled to judgment as a matter of law.

Mr. Skaan's appellate brief did not include a substantive response to FedEx's argument on this issue.[6] Nevertheless, this Court exercised its discretion and permitted Mr. Skaan to make a substantive argument on the issue at oral argument. In oral argument, Mr. Skaan asserted that the six-month limitation provision in the Employment Agreement was unconscionable, so the trial court's denial of summary

judgment on this basis should be upheld on appeal. Asked whether the "unconscionability" argument was raised in the first instance to the trial court below, Mr. Skaan asserted that it was argued orally at the trial court's hearing on FedEx's summary judgment motion. This Court invited Mr. Skaan to submit after oral argument any citations to the record demonstrating that the issue of unconscionability was raised to the trial court. In response to the Court's invitation, after oral argument, Mr. Skaan sent the Court a letter, but it cited only the trial court's written decision on the summary judgment motion, which did not allude to unconscionability, and the Employment Agreement itself. The letter included no citations to the record showing that Mr. Skaan argued to the trial court that the six-month contractual limitation period was unconscionable.

6 In his appellate brief, Mr. Skaan relied on the argument that FedEx is not permitted to challenge the trial court's denial of summary judgment based on the limitation period because it did not file a notice of appeal. As noted previously in this opinion, this argument is without merit. Mr. Skaan would have been permitted to include in his appellate brief an alternative argument on this issue, or to file a reply brief to address the issues raised on appeal by appellee FedEx. Rule 27(c) of the Tennessee Rules of Appellate Procedure permits the appellant to file such a reply brief. *See* Tenn. R.App. P. 27(c) ("The appellant may file a brief in reply to the brief of the appellee.").

***7** It is well settled that a party waives an issue on appeal that was not first raised in the trial court. *Powell v. Cmty. Health Sys., Inc.,* 312 S.W.3d 496, 511 (Tenn.2010). As the party asserting waiver, FedEx has the burden of showing that the issue was not raised to the trial court. *Id.* "Determining whether parties have waived their right to raise an issue on appeal should not exalt form over substance," and this Court "must carefully review the record to determine whether a party is actually raising an issue for the first time on appeal." *Id.*

As we have indicated, the appellate record does not include a transcript of the hearing on FedEx's motion for summary judgment.[7] Likewise, Mr. Skaan's written response to FedEx's motion for summary judgment is not included in the appellate record. We can surmise from the record, however, that Mr. Skaan filed such a written response. The appellate record contains FedEx's reply and supplemental reply to Mr. Skaan's response to FedEx's motion for summary judgment, in which FedEx summarizes the arguments apparently made in Mr. Skaan's response. In this summary, FedEx refers to Mr. Skaan's argument "that enforcement [of the six-month contractual limitation provision] is prohibited because the terms of the agreement are unconscionable." The FedEx reply refers to an affidavit, apparently filed by Mr. Skaan, in which Mr. Skaan claims that he "could not read or write English at the time of the execution of this agreement," that he was "rushed through [the application] process," that he attempted to read the Employment Agreement but could not do so, and that "no one explained the documents to me." Once again, Mr. Skaan's affidavit is not included in the appellate record. We note that the FedEx reply also refers to deposition testimony given by Mr. Skaan that contrasts with Mr. Skaan's affidavit. In his deposition, Mr. Skaan testified that his cousin "who used to work for Federal Express" filled out the FedEx job application with him, and that Mr. Skaan read the Employment Agreement before he signed it. Mr. Skaan also admitted in his deposition that he signed the Employment Agreement on August 11, 2006, and had several weeks to review it before he was hired on September 2, 2006. The relevant portions of Mr. Skaan's deposition testimony are in the appellate record as attachments to FedEx's supplemental reply to Mr. Skaan's response to FedEx's summary judgment motion.

7 On December 12, 2011, Mr. Skaan filed a "Notice of No Transcript or Statement of Evidence."

Thus, it appears from the record that Mr. Skaan argued to the trial court that the Employment Agreement, or portions of it, are unconscionable. Under these circumstances, Mr. Skaan is not precluded from arguing unconscionability on appeal based on a failure to raise the issue in the trial court below.

This, however, is not the only hurdle to this Court's consideration of Mr. Skaan's substantive argument on the six-month contractual limitation period. As noted above, Mr. Skaan's appellate brief filed in this appeal did not include a substantive argument on the enforceability of the six-month limitation period. This Court exercised its discretion to allow him to address the issue in oral argument, but reserved the issue of whether it would take his argument under consideration. On appeal, a party's failure to argue an issue in the body of its brief constitutes a waiver of that argument on appeal. *See Newcomb v. Kohler Co.,* 222 S.W.3d 368, 401 (Tenn.Ct.App.2006) (failure "to cite to any authority or to construct an argument regarding [a] position on appeal constitutes waiver of that issue"); *Bean v. Bean,* 40 S.W.3d

52, 55–56 (Tenn.Ct.App.2000) ("Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief constitutes a waiver of the issue."). Here, Mr. Skaan's appellate brief provides the Court with neither the legal nor the factual basis for his argument that the six-month limitation period in the Employment Agreement is unconscionable. "[I]t is not incumbent upon this Court to sift through the record in order to find proof to substantiate the factual allegations of the parties." *Brooks v. Collinwood Church of God,* No. 846, 1989 WL 73232, at * 1 (Tenn.Ct.App. July 6, 1989). Under these circumstances, we will consider the issue raised by FedEx on appeal based only on FedEx's arguments and on the appellate record.

***8** The record reflects, and it is undisputed on appeal, that FedEx terminated Mr. Skaan's employment in February 2006, and that Mr. Skaan filed the instant lawsuit in October 2006, over eight months after the termination of his employment. This is well beyond the six-month limitation period set forth in the Employment Agreement executed by Mr. Skaan as part of his job application with FedEx. Thus, Mr. Skaan's lawsuit against FedEx arising out of the termination of his employment is untimely unless the record shows that the six-month limitation in the Employment Agreement is unenforceable.

The trial court below declined to grant summary judgment based on the contractual limitation period because it determined that genuine issues of material fact existed regarding whether Mr. Skaan could read or write in English and whether he could understand the importance of the agreement that he was signing. While this may be a disputed issue of fact, respectfully, it is not material to the enforceability of the contractual limitation period. It is well established in Tennessee that a person who signs a contract is presumed to understand the terms of the agreement that he has signed. In *DeFord v. Nat'l Life & Accident Ins. Co.,* the Court explained:

> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." *Upton v. Tribilcock,* 91 U.S. 45, 50, 23 L.Ed. 203 [(1875)].
>
> ...
>
> "A party's mere ignorance, occasioned by his limited intelligence and understanding of the language and of the contents of the contract which he voluntarily executes, is not, in the absence of fraud, a ground for avoiding it, although it is different from what he supposed. So, where a person cannot read the language in which a contract is written, it is ordinarily as much his duty to procure some person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able so to do, and his failure to obtain a reading and an explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents." [17 C.J.S., Contracts, § 13.9.] Many cases are cited.
>
> It is further said that the fact that a person is unable to read creates no presumption that he was ignorant of the contents of a contract signed by him.

DeFord, 185 S.W.2d at 621–22. This is a bedrock principle of Tennessee law: "Tennessee has strong public policy in favor of upholding contracts. Written contracts would be worthless if the law allowed a party to enter into a contract and then seek to avoid performance because he or she did not read the agreement or know its contents." *Mathews Partners, LLC v. Lemme,* No. M2008–01036–COA–R3–CV, 2009 WL 3172134, at *7 (Tenn.Ct.App. Oct. 2, 2009) (citations omitted). Thus, "[a]bsent fraud or duress, the law generally holds parties responsible for what they sign." *Id.* The record contains no indication that Mr. Skaan alleged either fraud or duress in the signing of the Employment Agreement during his job application process.

***9** Mr. Skaan argued to the trial court that there were disputed issues of fact that were material to his contention that the Employment Agreement is unconscionable. We disagree. "The question of whether a contract or provision thereof is unconscionable is a question of law" for the court to decide. *Taylor v. Butler,* 142 S.W.3d 277, 285 (Tenn.2004). Generally, a contract is unconscionable "where the 'inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.' " *Taylor,* 142 S.W.3d at 285 (quoting *Haun v. King,* 690 S.W.2d 869, 872 (Tenn.Ct.App.1984) (quoting *In re Friedman,* 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978))). Under the circumstances of this case, the fact that Mr.

Skaan lacked skills in English is not material to the issue of unconscionability. The Employment Agreement was signed by Mr. Skaan as part of his application to FedEx; simply put, it was part of the terms on which FedEx would consider hiring him. Mr. Skaan agreed to the terms in order to be considered for a position at FedEx, and FedEx hired Mr. Skaan based on his execution of the Employment Agreement. Overall, we see nothing in these facts that are either oppressive or shocking.

Moreover, it is well established that a contractual provision setting a time limitation for bringing a legal action arising out of that contract is not inherently unconscionable. The United States Supreme Court has explained: "[A] provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period." *Order of United Commercial Travelers of Am. v. Wolfe,* 331 U.S. 586, 608 (1947); *Harris v. Provident Life and Accident Ins. Co.,* No. E2007–00157–COAR3–CV, 2008 WL 1901110, at *9 (Tenn.Ct.App. Apr. 30, 2008) (stating that "[p]arties are free ... to contract for a *shorter* [limitation] period, unless a statute specifically forbids them from doing so").

FedEx cites several cases specifically holding that a contractual six-month time limitation for filing a lawsuit is reasonable. *Myers v. Western–Southern Life Ins. Co.,* 849 F.2d 259, 262 (6th Cir.1988) (holding that "[t]here is nothing inherently unreasonable about a six-month limitations period"); *see Thurman v. DaimlerChrysler, Inc.,* 397 F.3d 352, 357 (6th Cir.2004) (same); *AMOCO Canada Petroleum Co. v. Lakehead Pipe Line Co.,* 618 F.2d 504, 506 (8th Cir.1980) (stating that "courts almost invariably uphold contractual limitation periods of six months or more").

Indeed, this Court has held that a contractual limitation period of less than six months is enforceable. *See Morgan v. Town of Tellico Plains,* No. E2001–02733–COA–R3–CV, 2002 WL 31429084, at *5 (Tenn.Ct.App. Oct. 30, 2002) (upholding a 60–day contractual limitation period).

***10** Thus, the only conclusion that may be reached from the undisputed facts in the record is that the six-month time limitation in the Employment Agreement is enforceable. FedEx has established an affirmative defense by undisputed facts, meeting the high standard for summary judgment set forth in *Gossett.* We must agree with FedEx that Mr. Skaan's lawsuit was untimely, and that the trial court erred in declining to grant summary judgment in favor of FedEx on that basis.

We may affirm the trial court's grant of summary judgment on a different basis than the basis upon which the trial court relied. *See Hill v. Lamberth,* 73 S.W.3d 131, 136 (Tenn.Ct.App.2001). We affirm the grant of summary judgment in favor of FedEx on the basis of the six-month contractual time limitation in the Employment Agreement, holding that Mr. Skaan's lawsuit is time-barred.

CONCLUSION

The decision of the trial court is reversed in part, and the judgment in favor of Appellee FedEx is affirmed. Costs on appeal are taxed to Appellant Karim Skaan and his surety, for which execution may issue, if necessary.

All Citations

Not Reported in S.W.3d, 2012 WL 6212891

End of Document

EXHIBIT C

2014 WL 309351
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Alvin EVANS
v.
FEDEX EXPRESS.

No. W2013–01717–COA–R3–CV.
|
Jan. 22, 2014 Session.
|
Jan. 29, 2014.
|
Application for Permission to Appeal
Denied by Supreme Court June 20, 2014.

Direct Appeal from the Chancery Court for Shelby County, No. CH–12–1385–3; Kenny W. Armstrong, Chancellor.

Attorneys and Law Firms

Travis Edgar Davison, III, Memphis, Tennessee, for the appellant, Alvin Evans.

Terrence O'Neal Reed, Memphis, Tennessee, for the appellee, FedEx Express.

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

MEMORANDUM OPINION [1]

[1] Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.)

DAVID R. FARMER, J.

***1** Plaintiff filed an action against his employer alleging discrimination in violation of the Tennessee Human Rights Act. The trial court awarded summary judgment to Defendant employer on the basis that the action was barred by the contractual limitations period contained in the employment agreement executed by the parties. We affirm.

This action arises from a complaint alleging employment discrimination in violation of the Tennessee Human Rights Act ("THRA") filed by Alvin Evans (Mr. Evans) against FedEx Express ("FedEx") in the Chancery Court for Shelby County on September 4, 2012. In his complaint, Mr. Evans alleged that he was an African–American employee of FedEx for more than 20 years and that he "was terminated for supposedly failing to report an incident with an aircraft." He further alleged that he was more than 40 years of age and that he was terminated so that FedEx could employ a person younger than 40 years of age. Mr. Evans alleged that Fed Ex intentionally and deliberately discriminated against him due to his age and asserted a claim of age discrimination in violation of the THRA. He also alleged that FedEx "intimidated [him] in response to his efforts to properly train an individual and counseling them on what they needed to improve on and such counseling being reported to management [,]" and asserted a claim of hostile work environment. Mr. Evans also asserted claims of retaliation in violation of Tennessee Code Annotated § 4–21–301 and race discrimination. He prayed for compensatory damages in an amount to be determined at trial, punitive damages, cost and attorneys fees, and injunctive relief.

FedEx answered in October 2012, generally denying any allegation of wrongdoing and averring that Mr. Evans was terminated for causing damage to a fuel hose nozzle by moving a fuel truck away from an aircraft before disconnecting the fuel hose and for failing to notify management of the incident. FedEx also asserted that it issued a termination letter to Mr. Evans on September 2, 2011, and that Mr. Evans was notified that he was terminated before that date. FedEx asserted 14 affirmative defenses, including the statute of limitations applicable to the THRA, [2] and the contractual limitations period contained in the employment agreement executed by the parties. Mr. Evans filed his response to FedEx's first set of requests for admissions

on January 3, 2013, and on January 22 FedEx moved for summary judgment on the basis of the contractual limitations period contained in the employment agreement that Mr. Evans undisputedly signed in 1994. Following a hearing on April 10, 2013, the trial court awarded summary judgment to FedEx by order entered May 15, 2013. Mr. Evans filed a timely notice of appeal to this Court.

[2] Tennessee Code Annotated § 4–21–311(d) provides: A civil cause of action under this section shall be filed in chancery court or circuit court within one (1) year after the alleged discriminatory practice ceases, and any such action shall supersede any complaint or hearing before the commission concerning the same alleged violations, and any such administrative action shall be closed upon such filing).

Issue Presented

The only issue presented for our review is whether the trial court erred by awarding summary judgment to FedEx on the basis that Mr. Evans' action was barred by the six-month contractual limitations period.

Standard of Review

***2** Summary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn.1993). We review an award of summary judgment *de novo,* with no presumption of correctness for the determination of the trial court. *Martin v. Norfolk S. Ry. Co.,* 271 S.W.3d 76, 84 (Tenn.2008).

Discussion

The employment agreement executed by the parties contains the following provision:

> To the extent the law allows an employee to bring legal action against Federal Express, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first.

It is undisputed that Mr. Evans did not bring his action within the proscribed six-month period. In his brief to this Court, however, Mr. Evans asserts that the contractual limitations period is unenforceable where it is overly broad and constitutes an unknowing waiver of his statutory rights under the THRA; because it is against public policy where it abridges the one-year limitations period contained in the THRA; because it is unconscionable as a contract of adhesion; and where "the employment agreement that [he] signed is in tiny print and full of jargon and legalese." FedEx, on the other hand, asserts that Mr. Evans did not argue that the contract provision is overly broad or ambiguous in the trial court, and that he cannot raise it for the first time on appeal. FedEx also asserts that Mr. Evans' did not allege that he did not understand the provision or that he was compelled to sign it until after FedEx filed its motion for summary judgment, and that Mr. Evans' discovery responses contradict these assertions. It asserts the provision is not unconscionable, and that it is valid and enforceable. Mr. Evans did not file a reply brief in this Court.

Upon review of the record, we observe that, in his memorandum in response to FedEx's motion for summary judgment, Mr. Evans asserted,

> Fed Ex will not deny that the employment agreement was a form and that Evans had to either accept it or be denied the job opportunity at FedEx. FedEx is a very large corporation and Mr. Evans was a lower level employee, without the assistance of an attorney at the time he signed the contract. Furthermore, the print pertaining to the statute of limitations is very small and well hidden in the contract. Evans had no choice but to sign the contract and did not understand that he was signing a right away at the time.

He also asserted that the contract provision was against public policy where it "prevented [him] from taking advantage of

statutory rights provided for in the [THRA].” Mr. Evans' argument in the trial court, as we perceive it, is that the contractual limitations period is not enforceable because the contract is an unconscionable contract of adhesion; that it violates public policy where it decreases the limitations period contained in the THRA; and that it should not be enforced where Mr. Evans did not understand that he was “signing away” the right to file suit within one year under the THRA.

***3** The limitations period contained in FedEx's employment agreement has been litigated previously, and Mr. Evans' arguments are not novel. In *Skaan v. Federal Express Corp.,* we recently held that the plaintiff's assertion that he did not understand the importance of the identical provision contained in the plaintiff's employment agreement with FedEx did not preclude summary judgment in that case. *Skaan v. Federal Express Corp.,* No. W2011–01807–COA–R3–CV, 2012 WL 6212891, at *8 (Tenn.Ct.App. Dec.13, 2012). We noted that, although whether the plaintiff understood the provision constituted a disputed issue of fact, the issue was not material to whether the contractual limitations period was enforceable. *Id.* We stated in *Skaan,* “it is well established in Tennessee that a person who signs a contract is presumed to understand the terms of the agreement that he has signed[,]” and ignorance or a lack of understanding of the language or contents of a voluntarily executed contract will not, absent fraud or duress, excuse a party from its terms. *Id.* (citations omitted). We observed in *Skaan* that Tennessee's “ ‘strong public policy in favor of upholding contracts' “ is “a bedrock principle of Tennessee law[.]” *Id.* (quoting *Mathews Partners, LLC v. Lemme,* No. M2008–01036–COA–R3–CV, 2009 WL 3172134, at *7 (Tenn.Ct.App. Oct.2, 2009) (citations omitted)). We further observed, “ ‘[w]ritten contracts would be worthless if the law allowed a party to enter into a contract and then seek to avoid performance because he or she did not read the agreement or know its contents.’ “ *Id.* (quoting *id.*)

We additionally held in *Skaan* that FedEx's six-month contractual limitations period is not unconscionable as a matter of law, and that the provision, “simply put, ... was part of the terms on which FedEx would consider hiring [the plaintiff].” *Id.* at *9. Mr. Evans, like the plaintiff in *Skaan,* “agreed to the terms in order to be considered for a position at FedEx, and FedEx hired [him] based on his execution of the Employment Agreement. Overall, we see nothing in these facts that are either oppressive or shocking.” *Id.* As we stated in *Skaan:*

> Moreover, it is well established that a contractual provision setting a time limitation for bringing a legal action arising out of that contract is not inherently unconscionable. The United States Supreme Court has explained: “[A] provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.” *Order of United Commercial Travelers of Am. v. Wolfe,* 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947); *Harris v. Provident Life and Accident Ins. Co.,* No. E2007–00157–COAR3–CV, 2008 WL 1901110, at *9 (Tenn.Ct.App. Apr.30, 2008) (stating that “[p]arties are free ... to contract for a *shorter* [limitation] period, unless a statute specifically forbids them from doing so”).
>
> ***4** ... Indeed, this Court has held that a contractual limitation period of less than six months is enforceable. *See Morgan v. Town of Tellico Plains,* No. E2001–02733–COA–R3–CV, 2002 WL 31429084, at *5 (Tenn.Ct.App. Oct.30, 2002) (upholding a 60–day contractual limitation period).

Id.

We next turn to Mr. Evans' assertions that the contract is one of adhesion and that he signed it under duress. A contract of adhesion is a standardized contract that is offered on a “take it or leave it” basis without a realistic opportunity to bargain and under circumstances such that the desired product or services cannot be obtained absent acquiescence to the form contract. *Taylor v. Butler,* 142 S.W.3d 277, 286 (Tenn.2004); Black's Law Dictionary 40 (6th ed.1990). Whether a contract of adhesion is enforceable “generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. Courts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party.” *Id.* “Duress is defined as “ ‘a condition of mind produced by the improper external pressure or influence that practically destroys the free agency of a party, and causes him to do and act or make a contract not of his own volition, but under such wrongful external pressure.’ “ “ *Barnes v. Barnes,* 193 S.W.3d 495, 500 (Tenn.2006) (quoting *Rainey v. Rainey,* 795 S.W.2d 139, 147 (Tenn.Ct.App.1990) (quoting *Simpson v. Harper,* 21 Tenn.App. 431, 111 S.W.2d 882, 886 (1937))).

Even if we assume that a position with FedEx is sufficiently unique so as to render the employment agreement a contract of adhesion, we previously have held that the contractual limitations provision contained in FedEx's

standard employment agreement is neither unconscionable nor oppressive so as to render it unenforceable as a matter of law. *Skaan,* 2012 WL 6212891, at *9. Mr. Evans' assertion that he signed it under "duress," moreover, rests on the contention that, had he refused to sign the employment agreement, he would not have been employed by FedEx. Although there can be little doubt that FedEx was in a superior bargaining position in this case, Mr. Evans offers no evidence to suggest that FedEx exerted wrongful pressure on him such that he did not sign the employment agreement on his own volition. There is no dispute that Mr. Evans commenced this action beyond the applicable six-month contractual limitations period contained in the employment agreement. We accordingly affirm summary judgment in favor of FedEx.

Holding

In light of the foregoing, we affirm the judgment of the trial court. Costs of this appeal are taxed to the Appellant, Alvin Evans, and his surety, for which execution may issue in necessary. This matter is remanded to the trial court for enforcement of the judgment and the collection of costs.

All Citations

Not Reported in S.W.3d, 2014 WL 309351

End of Document

EXHIBIT D

2003 WL 1089394
Only the Westlaw citation is currently available.
United States District Court, D. Delaware.

Charlene JOHNSON, Plaintiff
v.
DAIMLERCHRYSLER CORPORATION, Defendant.

No. C.A. 02–69 GMS.
|
March 6, 2003.

MEMORANDUM AND ORDER

SLEET, J.

I. INTRODUCTION

***1** Charlene Johnson filed the above-captioned suit against DaimlerChrysler Corporation ("DaimlerChrysler") on January 29, 2002, alleging racial discrimination and sexual harassment. On October 24, 2002, the court dismissed all of the plaintiff's claims except her Title VII racial discrimination claim. At that time, the court denied the defendant's motion for summary judgment as to that claim, but granted the parties leave to file further dispositive motions regarding the claim. Presently before the court is the defendant's Motion to Dismiss the Plaintiff's First Amended Complaint or, in the Alternative, Motion for Summary Judgment (D.I.33). For the reasons that follow, the court will grant the motion.

II. STANDARD OF REVIEW

The defendant moves to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Dismissal is appropriate pursuant to this Rule if the complaint fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In this inquiry, the court must accept as true and view in the light most favorable to the non-movant the well-pleaded allegations of the complaint. *Doug Grant, Inc. v. Greate Bay Casino Corp.,* 232 F.3d 173, 183–84 (3d Cir.2000). The court 'need not accept as true "unsupported conclusions and unwarranted inferences." ' *Id.* (quoting *City of Pittsburgh v. West Penn Power Co.,* 147 F.3d 256, 263 n. 13 (3d Cir.1998)) (quoting *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.,* 113 F.3d 405, 417 (3d Cir.1997)). However, it is the duty of the court 'to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable.' *Id.* at 184 (quoting *City of Pittsburgh,* 147 F.3d at 263).

Alternatively, the defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56, and to the extent the court relies upon matters outside the scope of the pleadings, it treats the present motion as such. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Boyle v. County of Allegheny Pa.,* 139 F.3d 386, 392 (3d Cir.1998). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *Boyle,* 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id.; see also Assaf v. Fields,* 178 F.3d 170, 173–74 (3d Cir.1999).

III. DISCUSSION

***2** The defendant moves for dismissal or summary judgment because it contends the plaintiff's Title VII racial discrimination claim is untimely due to a limitations clause in Johnson's employment contract with DaimlerChrysler. The plaintiff responds with three arguments. First, she asserts that the defendant has waived the affirmative defense of untimeliness because the defendant failed to raise it in its Answer or first responsive pleading. Second, she argues that the contractual limitations period of six months is unreasonable. Third, Johnson urges that the limitations clause violates public policy as applied to a Title VII discrimination claim. The court will address each of these arguments in turn.

A. Waiver of the Defense

The court cannot agree that the defendant has waived the right to raise the contractual limitations period as an affirmative defense. In its Answer, filed on April 22, 2002, the defendant asserted the statute of limitations as its third affirmative defense. The defense reads: "Plaintiff's claims are barred by

the appropriate statute of limitations." This may have sufficed to put the plaintiff on notice that the defendants intended to challenge the timeliness of the plaintiff's claims. To the extent the third affirmative defense did not raise the issue of the *contractual* limitations period, however, the court does not ground its ruling solely on this pleading.

Federal Rule of Civil Procedure 8(c) requires all affirmative defenses to be pleaded in the defendant's answer. Nonetheless, courts have permitted defendants to raise affirmative defenses in a motion for summary judgment when no prejudice to the plaintiff results. In this context, prejudice does not exist if the non-movant has "fair notice" of the defense and is afforded the opportunity to respond. *See, e.g., Pantzer v. Shields Dev. Co.,* 660 F.Supp. 56, 61 (D.Del.1986) (deeming defendant's affirmative defense, raised in motion for summary judgment, as included in answer where plaintiff had fair notice of the defense and responded to it). As one court explained, "this approach 'is more in keeping with the general purpose of the Federal Rules to avoid decisions based on pleading technicalities rather than the merits of the case." ' *Id.* (quoting 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE at 8–207 to 8–208 (1986)). Thus, "[w]here there is no genuine issue of material fact regarding the affirmative defense, *Moore's* indicates that the summary judgment is proper even when the defense was not originally pleaded." *Id.* Indeed, in some contexts, the Third Circuit has permitted an affirmative defense to be raised in an appeal even when it was not pled at trial. *See, e.g., Prinz v. Greate Bay Casino Corp.,* 705 F.2d 692, 694–95 (3d Cir.1983) (holding that affirmative defense could be raised on appeal when "the facts underlying the affirmative defense [were] pleaded").

In the present case, the defendant raised the issue of the contractual limitations period in its Reply in Support of its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (D.I.28), filed on October 22, 2002. The court, on October 24, 2002, declined to dismiss the plaintiff's Title VII race discrimination claim on the basis of the contractual limitations period because this defense was raised for the first time in the defendant's reply brief and only two days prior to the conference. To afford the plaintiff adequate notice and sufficient time to respond to such a defense, the court permitted the parties to raise the issue in further dispositive motions. Such defense, of course, was raised in the present motion, filed November 5, 2002.

***3** The plaintiff has had fair notice of the defendant's position that Johnson's claims are time-barred. The plaintiff also was afforded a renewed opportunity to respond to the defense. The court finds that the affirmative defense has not been waived and may be raised through a motion for summary judgment.

B. The Contractual Limitations Period

It is well-settled under Delaware and federal law that parties may validly contract to limit the time period for filing a federal cause of action. *See, e.g., Missouri, Kansas & Texas R.R. Co. v. Harriman Bros.,* 227 U.S. 657, 672–73 (1913) ("The policy of statutes of limitations is to encourage promptness in the bringing of actions.... [T]here is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period the time is not unreasonably short."); *Order of United Commercial Travelers of America v. Wolf,* 331 U.S. 586, 608 n. 20 (1947) ("[I]t is well established that ... a provision in a contract may validly limit, between the parties, the time for bringing an action ... to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period."); *Shaw v. Aetna Life Ins. Co.,* 395 A.2d 384, 386 (Del.Super.1978) ("[A]n express provision in a contract which *abbreviates* the time for filing a claim, so long as it remains a reasonable time, hastens the enforcement and complements the policy behind the statute of limitations.") (citing 1A CORBIN ON CONTRACTS § 218 (1963); 20 APPLEMAN, INSURANCE LAW AND PRACTICE § 11601).

When the plaintiff applied for employment with DaimlerChrysler, she signed and dated an Employment Application Agreement. The agreement states, in relevant part:

> In consideration of Chrysler's review of my application, I agree that any claim or lawsuit arising out of my employment with, or my application for employment with, Chrysler Corporation or any of its subsidiaries must be filed on more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than

> six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein, and I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY. Should a court determine in some future lawsuit that this provision allows an unreasonably short period of time to commence a lawsuit, the court shall enforce this provision as far as possible and shall declare the lawsuit barred unless it was brought within the minimum reasonable time within which the suit should have been commenced.

Application for Employment, Ex. A to Defendant's Motion to Dismiss (emphasis in original). The plaintiff has acknowledged that she read the agreement before signing it. *See* Deposition of Charlene Johnson at 16, lns. 12–21. There is no dispute that the plaintiff was discharged from DaimlerChrysler on January 7, 2000, and that she filed the instant action alleging discriminatory discharge on January 18, 2002. Thus, there is no dispute that, on its face, the present claim is time-barred by the contractual limitations period.

1. Reasonableness of the Contractual Limitation

***4** The plaintiff argues, however, that the contractual limitation period of six months is "patently unreasonable in its application to a Title VII claim for discrimination." Memorandum in Support of Plaintiff Charlene Johnson's Response at 2. This is true, Johnson argues, because a Title VII discrimination claimant must receive a "Notice of Right to Sue" from the Equal Employment Opportunity Commission before filing suit in court. In Johnson's case, the EEOC investigated her claim and issued the right to sue letter some 15 months later. Thus, the plaintiff argues, because she did not receive such letter until many months after the contractual limitations period had expired, the contractual limitations period should be deemed unreasonable.

The plaintiff cites no authority for her assertion that a six-month limitations period is unreasonable, either generally or in the context of a Title VII discrimination claim. In fact, the caselaw points to the opposite conclusion. Indeed, several courts have upheld identical six-month limitation periods contained in other DaimlerChrysler employment contracts. *See Wright v. DaimlerChrysler Corp.,* 220 F.Supp.2d. 832 (E.D.Mich.2002) (citing cases). As those courts noted, six months is ample time to investigate one's legal rights and obligations and to file an action. The time is not so short as to work a practical abrogation of Johnson's right of action, nor did it bar the plaintiff's right to sue before she was able to ascertain that a loss or damage had occurred. It is undisputed that Johnson was discharged on January 7, 2000. The plaintiff alleges that this discharge was discriminatory. Thus, Johnson believed on January 7, 2000 that a loss or damage had occurred. Beyond her public policy objection, discussed below, the plaintiff has presented no evidence or argument as to why she could not reasonably have been expected to file her discrimination claim within six months of that date. The court declines to find the contractual limitations clause unreasonable.

Moreover, even assuming that six months is an unreasonably short period of time in which Johnson could be contractually required to bring her claim, the court certainly could not find a one year limitations period unreasonable. There is no reason to believe that one year is not sufficient to institute an employment discrimination claim, either generally, or in the present case. Indeed, cases abound in which courts have approved a contractual limitations period of one year, even when this period is shorter than the relevant statute of limitations. *See, e.g., John M. Kelley Contracting Co. v. United States Fidelity & Guaranty Co.,* 278 F. 345, 347 (3d Cir.1922) (upholding as reasonable indemnity contract provision requiring party to file default action within one year); *Closser v. Penn Mut. Fire Ins. Co.,* 457 A.2d 1081, 1083 (Del.1983) ("It is well-settled Delaware law ... that a one year limitation on suit on an insurance contract is reasonable and binding on an insured."); *Goodyear v. Fleece,* 1988 WL 130470 (Del.Super.1988) (two-year contractual limitations period reasonable despite statutory limitations period of three years); *see also Ciccarelli v. Carey Canadian Mines, Ltd.,* 757 F.2d 548, 555 (3d Cir.1985) (holding statute of limitations does not violate due process because it was reasonable, and noting that such statutes are valid even when they "in effect extinguish rights before they accrue").

***5** In the present case, however, Johnson did not file her Title VII claim within even one year of her discharge. As noted above, the plaintiff filed the present lawsuit almost two years after she was discharged from DaimlerChrysler. Furthermore, it is undisputed that the plaintiff received the EEOC right to sue letter on October 19, 2001, and then waited nearly three additional months before filing the present action. Thus,

even substituting a contractual limitation period of one year, Johnson's claim would be time-barred.

2. Violation of Public Policy

The plaintiff also contends that the six-month limitation period violates public policy because it would require her to file suit before having received a right to sue letter from the EEOC. This precise argument has been rejected by at least one court of appeals. In *Taylor v. Western & Southern Life Ins. Co.,* the plaintiff argued that the six-month limitation clause in his employment contract would require him to initiate Title VII claims before receiving his right to sue letter from the EEOC and that the contractual limitation clause therefore violated public policy. *Taylor,* 966 F.2d 1188, 1205–06 (7th Cir.1992). The court disagreed, finding that "Title VII provides no public policy contrary to the six-month limitation of actions clause." *Id.* at 1206; see also *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975) (holding that statute of limitations governing 42 U.S.C. § 1981 claim is not tolled while Title VII claim arising from same events is pending before EEOC). Furthermore, as the lower court in Taylor indicated, the plaintiff could have filed suit and moved the court for a stay pending receipt of a right to sue letter. The same is true in the present case.

This conclusion is not altered by the fact that Johnson was acting *pro se* at the time she initiated the EEOC administrative complaint procedure. Again, the plaintiff cites no caselaw that would support a contrary proposition. Further, the court is not persuaded that Johnson's *pro se* status at the time she filed the EEOC complaint somehow renders the contractual limitations period unreasonable, violative of public policy, or otherwise invalid. *See, e.g., James v. United States Postal Serv.,* 835 F.2d 1265, 1267 (8th Cir.1988) (declining to equitably toll statutory filing requirement for appellant who was "unassisted by counsel, unable to find a lawyer, and unfamiliar with the legal process"). This is particularly true because Johnson was free to seek legal advice during the six months after she was discharged. Her failure to do so or to otherwise pursue her contractual and statutory rights is not grounds to completely disregard the contractual limitations period to which she agreed.

IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Because the court has granted the defendant's Motion to Dismiss Plaintiff's First Amended Complaint or, in the Alternative, Motion for Summary Judgment, the defendant's pending Motion for Summary Judgment (D.I.47) is denied as moot.

V. CONCLUSION

***6** In sum, the court finds no valid justification for stripping the contractual limitations period, to which the plaintiff knowingly agreed, of all meaning and purpose. Even if the court were to substitute a one-year limitation for the filing of the plaintiff's claims, Johnson's claims would be untimely. Although she was required to await the conclusion of the EEOC's investigation and receipt of a right to sue letter, the plaintiff had other reasonable courses of action available to her. As noted above, Johnson could have filed suit within the six month period after she was discharged and then asked the court to stay the proceeding pending the outcome of the EEOC investigation. If Johnson had filed the instant suit within one year of her discharge, or perhaps if she had initiated the case immediately after receiving her right to sue letter, the court may have taken a different view of her present predicament. These are not the facts, however. The court cannot conclude that the contract the plaintiff entered was unreasonable, repugnant to public policy, or otherwise appropriate for judicial modification. As such, the plaintiff's present claim is untimely.

For these reasons, IT IS HEREBY ORDERED that:

1. The defendant's Motion to Dismiss Plaintiff's First Amended Complaint or, in the Alternative, Motion for Summary Judgment (D.I.33) is GRANTED.

2. The defendant's Motion for Summary Judgment (D.I.47) is DENIED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 1089394

End of Document