## INDEX OF APPENDIX

# EXHIBIT 1

Original - Court
1st copy - Defendant
2nd copy - Plaintiff
3rd copy - Return

| STATE OF MICHIGAN<br>16 JUDICIAL DISTRICT<br>JUDICIAL CIRCUIT<br>COUNTY PROBATE | SUMMONS | CASE NO.<br>20- 1548 -CD |
|---|---|---|

Court address
40 N Main St., Mt. Clemens, MI 48043

Court telephone no.
586-469-7171

Plaintiff's name(s), address(es), and telephone no(s).
Timika Rayford

v

Defendant's name(s), address(es), and telephone no(s).
American House Roseville I LLC d/b/a American House East I

FILED
20 APR 24 PM 12:17
CLERK
MT. CLEMENS, MICHIGAN

Plaintiff's attorney, bar no., address, and telephone no.
Carla D. Aikens P69530
615 Griswold St., Suite 709
Detroit, MI 48226

**Instructions:** Check the items below that apply to you and provide any required information. Submit this form to the court clerk along with your complaint and, if necessary, a case inventory addendum (form MC 21). The summons section will be completed by the court clerk.

**Domestic Relations Case**

☐ There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.
☐ There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint. I have separately filed a completed confidential case inventory (form MC 21) listing those cases.
☑ It is unknown if there are pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person(s) who are the subject of the complaint.

**Civil Case**

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.
☐ MDHHS and a contracted health plan may have a right to recover expenses in this case. I certify that notice and a copy of the complaint will be provided to MDHHS and (if applicable) the contracted health plan in accordance with MCL 400.106(4).
☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.
☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in ☐ this court, ☐ _____ Court, where it was given case number _____ and assigned to Judge _____.

The action ☐ remains ☐ is no longer pending.

Summons section completed by court clerk.

**SUMMONS**

**NOTICE TO THE DEFENDANT:** In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. **YOU HAVE 21 DAYS** after receiving this summons and a copy of the complaint to **file a written answer with the court** and serve a copy on the other party **or take other lawful action with the court** (28 days if you were served by mail or you were served outside this state).
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.
4. If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

| Issue date | Expiration date* | Court clerk |
|---|---|---|
| APR 24 2020 | JUL 24 2020 | |

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB**

TIMIKA RAYFORD

Plaintiff

Case No. 20-1548-CD

v.

Hon.

AMERICAN HOUSE ROSEVILLE I, LLC,
d/b/a AMERICAN HOUSE EAST I and
AMERICAN HOUSE

Defendant

_____/

CARLA D. AIKENS, P.C.
CARLA D. AIKENS (P69530)
ASHLEY J. BURRESS (P79614)
*Attorneys for* Plaintiff
615 Griswold Street, Suite 709
Detroit, Michigan 48226
carla@aikenslawfirm.com
ashley@aikenslawfirm.com
Phone: (844) 835-2993
Fax: (877) 454-1680

_____/

*There is no another civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court.*

## COMPLAINT

NOW COMES, Plaintiff, TIMIKA RAYFORD, by and through her attorneys, CARLA D. AIKENS, PC, and states as follows in support of her claims:

## JURISDICTION

1. At all relevant times, Plaintiff, Timika Rayford, was a resident of Macomb County.

2. Defendant(s) is a nursing care facility located in Macomb County and has a place of continuous and systematic place of business at 17255 Common Road, Roseville, Michigan 48066.
3. All relevant actions giving rise to this complaint took place in Macomb County, Michigan.
4. Jurisdiction is proper pursuant to the Elliot-Larsen Civil Rights Act ("ELCRA"), MCL 37.2801.

**VENUE**

5. Venue is proper in this Circuit Court because the unlawful employment discrimination giving rise to Plaintiff's claims occurred in Macomb County, and it is the county in which all parties are located.

**STATEMENT OF FACTS**

1. Plaintiff is a certified nurse's assistant who was hired by Defendant on February 14, 2017.
2. Plaintiff was successful at her job and was promoted to a supervisor prior to her termination.
3. Within a few months of her promotion, Plaintiff noticed began to notice inappropriate behaviors between upper management (majority white/Caucasian and male) and the CNA and LPNs (all or almost all of whom, at that time, were African American and/or female).
4. Plaintiff noticed that staff members (CNAs and LPNs) were not providing thorough care to the patients and were not completing their job duties in a responsible manner.
5. Patients would be left unattended and soiled for entire shifts and managers would ignore patient complaints.

6. Plaintiff became aware that her manager, Mr. Crowell, was having a sexual relationship with one of the staff members in exchange for receipt of preferential shifts/hours and special treatment.
7. It became well known amongst staff members that in order to advance or receive better treatment, sexual acts needed to be exchanged.
8. Plaintiff reported these incidents to the Human Resources department. The Human Resources department failed to take any actions.
9. Plaintiff reported her concerns, including the sexual relationship, to the State of Michigan.
10. In May, Plaintiff informed Mr. Crowell that she had witnessed another employee/supervisor, Juaneeka Anderson, fail to properly count patient medications and complete patient checks before she ended her shift.
11. The following day, Mr. Crowell scheduled a meeting with Plaintiff and Ms. Anderson to discuss the inaccuracies in the medicine count.
12. Ms. Anderson blamed Plaintiff for all inaccuracies, and Mr. Crowell sided with Ms. Anderson's incorrect rendition of the facts.
13. After the meeting, Ms. Anderson began retaliating against Plaintiff. She would initiate verbal disagreements on a daily basis and would intentionally make the workplace difficult and uncomfortable.
14. Plaintiff reported Ms. Anderson's negative treatment towards her. She also made a complaint regarding the negative way Ms. Anderson would treat patients in the facility.
15. Mr. Crowell did nothing to remedy the situation.
16. Mr. Crowell often ignored Plaintiff's concerns.

17. In late June or early July, Plaintiff was threatened by a patient who stated that he was going to "f*** her up." She immediately reported it to Mr. Crowell. He told Plaintiff to write a letter detailing the incident. However, the next day when Plaintiff returned, Mr. Crowell stated that the letter was gone. Upon knowledge and belief, Mr. Crowell took no further actions.
18. Plaintiff continued to deal with the hostile work environment.
19. Ms. Anderson was aware that a supervisor needed to be on the premises at all times. She would intentionally clock into her shift, but leave the premises for 5-10 minutes, forcing Plaintiff to stay until she returned. This would cause Plaintiff to be late for her second job, a position Ms. Anderson and Mr. Crowell knew she held.
20. When Plaintiff reported Ms. Anderson, Mr. Crowell ignored her concerns and instead called a meeting with Plaintiff and his supervisor, Renee Lotito, and wrongfully accused Plaintiff of not doing her job properly.
21. Mr. Crowell and Ms. Lotito accused Plaintiff of leaving a patient unclean/soiled. However, it was confirmed that the patient was soiled during the previous shift and that shift should have cleaned the patient, not Plaintiff nor her staff. Despite this clear determination, Mr. Crowell and Ms. Lotito placed the blame solely on Plaintiff. They wrote her up for two counts: not cleaning a patient and failure to supervise her staff.
22. By this time, it was clear that management was aware that Plaintiff reported Mr. Crowell's sexual acts to the State of Michigan. Management began looking for any reason to terminate Plaintiff.
23. On July 1, 2017, Plaintiff finished her shift and left the building. She realized she had left her purse in a locked room that was only accessible by supervisors and coordinators.

24. Plaintiff called Ms. Anderson, the supervisor on duty, but Ms. Anderson rejected her calls.

25. By the time Plaintiff arrived back to work, her purse had been stolen. She reported the theft to the Roseville Police Department and to management.

26. Management did nothing to remedy the situation. Instead, Mr. Crowell, Ms. Lotito, and Joel Woods, head of security, wrongfully and falsely accused Plaintiff of lying about the theft and accused her of falsifying a police report.

27. An officer from the Roseville Police Department was sent out to investigate the theft. This involved looking at tapes of Plaintiff leaving the premises.

28. Defendant provided the police officer with false information and documents.

29. Defendant, by and through its management, falsely produced a tape of Plaintiff leaving with her purse. She was thereupon charged with making a false police report and was terminated.

30. Defendant knew or should have known that providing false and inaccurate information to a police officer could potentially lead to criminal charges against Plaintiff.

31. At the hearing on Plaintiff's charges, it was revealed that the video footage Defendant provided was inaccurate, as it was not footage from the day her purse was actually stolen.

32. Plaintiff's charges were thereupon dismissed.

33. Despite the dismissal of charges, Plaintiff was terminated on July 5, 2017.

34. That Plaintiff sustained damages as a result of Defendant's actions and conduct.

35. Plaintiff requests relief as described below.

**COUNT I**
**HARASSMENT BASED ON RACE IN VIOLATION OF**

**THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

36. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

37. At all material times, Plaintiff was an employee, and Defendant her employer covered by, and within the meaning of, the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

38. A respondeat superior relationship existed because Mr. Crowell and Ms. Lotito had the ability to undertake or recommend tangible decisions affecting Plaintiff, and the authority to direct Plaintiff's daily work activity as alleged in the statement of facts.

39. Plaintiff, as an African-American woman, is a member of a protected class.

40. Plaintiff was subjected to discrimination on the basis of her membership in this protected class.

41. Defendant's conduct, as alleged more fully in the statement of facts, violated Michigan, Elliott-Larsen Civil Rights Act MCL 37.2101 et seq., which makes it unlawful to harass or discriminate against an employee because of that employee's race and or the color of their skin.

42. This conduct was unwelcomed.

43. The unwelcomed conduct was intended to or in fact did substantially interfere with the Plaintiff's employment and/or created an intimidating, hostile, or offensive work environment as alleged in the statement of facts.

44. Plaintiff notified Defendant of the unwelcomed conduct and Defendant failed to remedy the situation.

45. As a direct and proximate result of the Defendant's wrongful acts and omissions, Plaintiff

sustained loss of earnings, earning capacity, and fringe benefits and has suffered mental anguish, emotional distress, humiliation and embarrassment, and loss of professional reputation.

46. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT II**
**HARASSMENT BASED ON SEX AND GENDER IN VIOLATION OF THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

47. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

48. At all material times, Plaintiff was an employee, and Defendant was and employer covered by, and within the meaning of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

49. Defendant's conduct, as alleged herein, violated the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., which makes it unlawful to discriminate or harass a person on the basis of their sex or gender.

50. A respondeat superior relationship existed because Mr. Crowell and Ms. Lotito had the ability to undertake or recommend tangible decisions affecting Plaintiff, and the authority to direct Plaintiff's daily work activity as alleged in the statement of facts.

51. Plaintiff, as a female, is a member of a protected class.

52. Unlike her coworkers, Plaintiff refused to exchange sexual favors with management to receive favorable treatment.

53. Plaintiff was subjected to communication and conduct on the basis of her status as a member of this protected class including, but not limited to, incorrect pay, failure to remedy harassment from other employees, address threats from patients, and providing false information to the police prior to terminating her.

54. The communication and conduct was unwelcomed.

55. The unwelcomed conduct or communication was intended to and in fact did substantially interfere with Plaintiff's employment or created an intimidating, hostile, or offensive work environment as alleged in the statement of facts.

56. Plaintiff notified Defendant and its agents of the unwelcomed conduct and communication and Defendant failed to remedy the unwelcomed conduct or communication.

57. As a proximate result of Defendant's discriminatory actions, Plaintiff has suffered losses in compensation, earning capacity, humiliation, mental anguish, and emotional distress.

58. As a result of those actions and consequent harms, Plaintiff has suffered such damages in an amount to be proven at trial.

59. Plaintiff requests relief as described in the Prayer for Relief below.

## COUNT III
## HOSTILE WORKPLACE ENVIRONMENT IN VIOLATION OF THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")

36. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

37. At all material times, Plaintiff was an "employee" and Defendant was an "employer" covered by, and within the meaning of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

38. Defendant's conduct, as alleged throughout this complaint, violated Michigan's Elliott-Larsen Civil Rights Act MCL 37.2101 et seq., which makes it unlawful to create a work environment that a reasonable person would consider intimidation, hostile, or abusive.

39. A respondeat superior relationship existed because Defendant, and its agents, had the ability to undertake or recommend tangible decisions affecting Plaintiff, and the authority to direct Plaintiff's daily work activity.

40. Plaintiff was subjected to offensive communication or conduct by Defendant and its agents.

41. The unwelcomed conduct or communication was intended to, or in fact did, substantially interfere with Plaintiff's employment, and created an intimidating, hostile, or offensive work environment, as alleged throughout this complaint.

42. As a proximate result of Defendant's discriminatory actions, Plaintiff has suffered losses in compensation, earning capacity, humiliation, mental anguish, and emotional distress.

43. As a result of those actions and consequent harms, Plaintiff has suffered such damages in an amount to be proven at trial.

44. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT IV**
**RETALIATION IN VIOLATION OF**
**THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

45. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

46. At all material times, Plaintiff was an "employee," and Defendant was an "employer" covered by, and within the meaning of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

47. Defendant's conduct, as alleged herein, violated the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., which makes it unlawful to retaliate against an employee because she engaged in protected activity.

48. Plaintiff engaged in protected activity when she reported the multiple acts of harassment she consistently experienced from Defendant's employees and the inappropriate sexual relationship between her immediate supervisor and coworker.

49. Defendant and its agents were aware of the complaints filed by Plaintiff.

50. After Plaintiff engaged in protected activity, Defendant, by and through its agents, thereafter harassed Plaintiff and took several adverse employment actions against Plaintiff, including but not limited to:

    a) ostracizing Plaintiff;

    b) writing-up Plaintiff with false information;

    c) criticizing Plaintiff's work performance;

    d) subjecting Plaintiff to a hostile work environment;

    e) disciplining her;

    f) refusing to respond to Plaintiff's complaints of continued retaliation;

    g) making up false allegations against Plaintiff; and

    h) terminating Plaintiff's employment.

51. Defendant and its agents' unlawful actions were intentional, willful, malicious and/or done with reckless disregard for Plaintiff's rights.

52. Plaintiff notified Defendant and its agents of the unwelcomed conduct or communication and Defendant failed to remedy.

53. As a proximate result of Defendant's discriminatory actions, Plaintiff has suffered losses in compensation, earning capacity, humiliation, mental anguish, and emotional distress.

54. As a result of those actions and consequent harms, Plaintiff has suffered such damages in an amount to be proven at trial.

55. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT V**
**WRONGFUL DISCHARGE IN VIOLATION OF MICHIGAN PUBLIC POLICY AS TO DEFENDANT**

56. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

57. It is the longstanding public policy of the State of Michigan that there are three exceptions to the employment at-will doctrine, and an employer can be found to be liable for wrongful discharge, where:

a) Explicit legislative statements prohibiting the discharge, discipline or other adverse treatment of employees who act in accordance with a statutory right or duty;

b) The alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course or employment; and

c) The reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment.

58. Plaintiff's discharge resulted from her complaints and reports of harassment from employees.

59. These rights are conferred to Plaintiffs by well-established legislative enactments, specifically including, but not limited to, ELCRA.

60. Moreover, ELCRA, has explicit language that prohibits the discharge, discipline, or other adverse treatment of Plaintiff.

61. Despite these protections, Defendant retaliated against Plaintiff for attempting to protect her statutory rights.

62. As a result of Defendant's actions, and consequent harms caused, Plaintiff has suffered such damages in an amount to be proven at trial.

63. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT VI**
**MALICIOUS PROSECUTION**

64. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

65. On July 1, 2017, Plaintiff's purse was stolen from Defendant's property.

66. Unable to receive resolution from Defendant, Plaintiff reported the theft to the Roseville Police Department.

67. When Plaintiff reported the theft, Defendant, by and through its agents, falsely accused Plaintiff of "lying" about the theft.

68. Joel Woods, head of security, told Plaintiff that he had spoken to the police and that she would be charged "criminally for lying to the police" and would soon be arrested.

69. Plaintiff was not arrested, but a criminal investigation regarding filing a false police report was initiated.

70. Defendant initiated criminal investigation against Plaintiff when it provided the police with false footage and false information regarding the theft.

71. Upon information and belief, Defendant supplied the false information in an effort to:

    a) cause damage to Plaintiff's professional reputation,

b) cause damage to Plaintiff's community reputation,

c) retaliate against Plaintiff for reporting harassment and a hostile work environment.

72. The criminal proceeding initiated by Defendant was undertaken with malice or for a purpose other than to bring Plaintiff to justice.

73. Defendant lacked probable cause to institute or maintain its allegations and actions.

74. The criminal proceeding arising from Defendant's false information was resolved in Plaintiff's favor.

75. As a direct result of Defendant's malice in making allegations that initiated the criminal investigation, Plaintiff has suffered damage, including but not limited to, harm to her professional reputation and reputation in the community.

76. Plaintiff has been unable to be employed in a similar position with similar wage since her termination.

77. Plaintiff requests the relief as described in the Prayer for Relief below.

## COUNT VII
## ABUSE OF PROCESS

78. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

79. Defendant initiated criminal proceedings against Plaintiff in effort to have her terminated and to damage her professional and community reputation.

80. Plaintiff had to appear in Court for the criminal proceedings arising from Defendant's false allegations.

81. The above actions constitute an ulterior purpose for the criminal proceedings.

82. The allegations and misuse of the criminal investigation process was improper since Defendant knew, or should have known, that the allegations were false.

83. Defendant's abuse of the criminal investigation process has caused Plaintiff to suffer damages, including but not limited to, mental anguish.

84. Plaintiff requests the relief described in the Prayer of Relief below.

**PRAYER FOR RELIEF**

WHEREFORE PLAINTIFF, Timika Rayford, respectfully requests that this Court enter judgment against Defendant as follows:

1. Compensatory damages;
2. Exemplary damage;
3. An award of lost wages and the value of fringe benefits, past and future;
4. An award of interest, costs, and reasonable attorney fees, and equitable relief; and
5. Any other relief permitted as set forth in the Acts hereunder.

Respectfully Submitted,

/s/ Ashley J. Burress
CARLA D. AIKENS, P.C.
CARLA D. AIKENS (P69530)
ASHLEY J. BURRESS (P79614)
*Attorneys for* Plaintiff
615 Griswold Street, Suite 709
Detroit, Michigan 48226
carla@aikenslawfirm.com
ashley@aikenslawfirm.com
Phone: (844) 835-2993
Fax: (877) 454-1680

# EXHIBIT 2

American House
SENIOR LIVING COMMUNITIES



# Employee Handbook Acknowledgement

The American House Employee Handbook describes important information about American House Senior Living Communities; I acknowledge that this Handbook is neither a contract of employment nor a legal document. I have received the American House Employee Handbook. I agree to be bound by the policies and procedures described in this Handbook and, in consideration for my employment, I agree to follow them.

I understand that it is my responsibility to read and comply with the policies contained in this Handbook and any revisions made to it. I understand that I should consult my Executive Director or the Human Resources Department regarding any questions not answered in the Handbook.

I have entered into my employment relationship with American House voluntarily and acknowledge that there is no specified length of employment. Accordingly, either American House or I can terminate the relationship at will, with or without cause, for any or no reason and with or without notice, at any time.

Since the information, policies, and benefits described herein are subject to change, I acknowledge that revisions to the Handbook may occur, except to American House's policy of employment-at-will. All such changes will be communicated through official notices, and I understand that revised information may supersede, modify, or eliminate existing policies. Only members of the Board of Directors of American House have the ability to adopt any revisions to the policies in this Handbook.

In consideration of my employment, I agree that any claim or lawsuit arising out of my employment with the Company, or my application for employment with the Company, **must be filed no more than 180 days** after the date of employment action that is the subject of the claim or lawsuit, unless the applicable statute of limitations period is shorter than 180 days in which case I will continue to be bound by that shorter limitations period. While I understand that the statute of limitations for claims arising out of an employment action may be longer than 180 days, I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY, unless state, federal or local law prohibits such waiver.

Employee's Name (printed) Tinika Walls

Employee's Signature: Tinika Walls

Date: 2-20-17

**Handbook Amendment Acknowledgement**

| Updated Policy Name: | Version Date: | Employee Initials: |
|---|---|---|
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# EXHIBIT 3

SEPTEMBER 30, 2016
DATE OF APPLICATION

DATE CERTIFICATE FILED

STATE FILE NO.
1869152
LOCAL FILE NO.

# Marriage License
## State of Michigan

To any person legally authorized to solemnize marriage, the marriage must be solemnized in the State of Michigan on or before NOVEMBER 01, 2016
DATE

COUPLE

| | |
|---|---|
| STANFORD ARTIST RAYFORD JR | and TIMIKA SHANEL WALLS |
| FULL NAME (First, Middle, Last) [X] MALE [ ] FEMALE | FULL NAME (First, Middle, Last) [ ] MALE [X] FEMALE |
| SURNAME ON BIRTH CERTIFICATE, IF DIFFERENT | SURNAME ON BIRTH CERTIFICATE, IF DIFFERENT |
| 31 / PRESENT AGE; 5/26/1985 / DATE OF BIRTH | 32 / PRESENT AGE; 6/24/1984 / DATE OF BIRTH |
| DETROIT MICHIGAN / BIRTHPLACE – CITY AND STATE | DETROIT MICHIGAN / BIRTHPLACE – CITY AND STATE |
| 8158 ALMONT / RESIDENCE NO. STREET | 8158 ALMONT / RESIDENCE NO. STREET |
| DETROIT, MICHIGAN 48234 / CITY, STATE, AND ZIP CODE | DETROIT, MICHIGAN 48234 / CITY, STATE, AND ZIP CODE |
| WAYNE / RESIDENCE COUNTY; ZERO / TIMES PREVIOUSLY MARRIED | WAYNE / RESIDENCE COUNTY; ZERO / TIMES PREVIOUSLY MARRIED |

PARENTS

| | |
|---|---|
| STANFORD ARTIST RAYFORD SR | NOT RECORDED |
| FULL NAME (First, Middle, Last) | FULL NAME (First, Middle, Last) |
| MICHIGAN / SURNAME AT BIRTH; BIRTHPLACE | UNKNOWN / SURNAME AT BIRTH; BIRTHPLACE |
| TONYA LANISE MATTISON | JULIA ANN LEASTER |
| FULL NAME (First, Middle, Last) | FULL NAME (First, Middle, Last) |
| GARNER / SURNAME AT BIRTH; MICHIGAN / BIRTHPLACE | LEASTER / SURNAME AT BIRTH; ALABAMA / BIRTHPLACE |

Affidavit filed in this office, I hereby grant this marriage license on SEPTEMBER 30TH 2016
(Month, Day, Year)

Cathy M. Garrett — COUNTY CLERK
WAYNE — COUNTY

DEPUTY CLERK

# Certificate of Marriage

I certify that, in accordance with the above license, the persons herein mentioned were joined in marriage by me, in Detroit, CITY, VILLAGE, TOWNSHIP, County of Wayne Michigan, on the 1st day of October A.D. 2016, in the presence of —

| | |
|---|---|
| Bishop Julius Walker Sr. | Bishop Julius Walker Sr. |
| SIGNATURE OF OFFICIANT | NAME AND TITLE OF OFFICIANT (TYPE OR PRINT) |
| 11650 Plymouth Road Detroit MI, 48227 | |
| FULL MAILING ADDRESS OF OFFICIANT | |
| Tonya L Mattison | Julia Leaster |
| SIGNATURE OF WITNESS | SIGNATURE OF WITNESS |
| Tonya L. Mattison | Julia Leaster |
| NAME OF WITNESS (TYPE OR PRINT) | NAME OF WITNESS (TYPE OR PRINT) |
| Stanford Rayford Jr | Timika Rayford |
| SIGNATURE OF SPOUSE | SIGNATURE OF SPOUSE |
| STANFORD A RAYFORD JR | Timika Rayford |

021b

# EXHIBIT 4

# American House Senior Living Communities

## Employee Handbook

# Table of Contents

## Table of Contents (cont.)

# EXHIBIT 5

American House
SENIOR LIVING COMMUNITIES

On 7/7/17 Tamika Rayford was terminated by Joel Woods at American House Freedom place Roseville. This was done after video was reviewed and showed Tamika not punching out and leaving the facility and after returning, she spent approximately a half hour sitting in her car after she returned. She continued to go back and forth to her car multiple times throughout the day and night.

Also it was brought to my attention there had been an incident where Tamika was heard shouting "I'm the queen of getting a bitch fired".

7-7-17

William R Howell

# EXHIBIT 6

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

TIMIKA RAYFORD,

Plaintiff, Case No. 20-001548-CD

v Hon. Michael E. Servitto

AMERICAN HOUSE ROSEVILLE I, LLC,
d/b/a AMERICAN HOUSE EAST I and
AMERICAN HOUSE,

Defendant.

CARLA D. AIKENS, P.C.
Carla D. Aikens (P69530)
Ashley J. Burress (P79614)
Attorneys for Plaintiff
615 Griswold St., Ste. 709
Detroit, MI 48226
(844) 835-2993
carla@aikenslawfirm.com
ashley@aikenslawfirm.com

STARR, BUTLER, ALEXOPOULOS & STONER, PLLC
Joseph A. Starr (P47253)
William R. Thomas (P77760)
Attorneys for Defendant
20700 Civic Center Dr., Ste. 290
Southfield, MI 48076
(248) 554-2700
jstarr@starrbutler.com
wthomas@starrbutler.com

**DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

NOW COMES Defendant American House Roseville I, LLC, d/b/a American House East I and American House, through its attorneys, Starr, Butler, Alexopoulos & Stoner, PLLC, for its Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (C)(8). For the reasons set forth in the attached brief and exhibits, Defendant respectfully requests that this Court **GRANT** its Motion for Summary Disposition.

STARR, BUTLER, ALEXOPOULOS & STONER, PLLC

By: /s/ William R. Thomas
Joseph A. Starr (P47253)
William R. Thomas (P77760)
Attorneys for Defendant
20700 Civic Center Dr., Ste. 290
Southfield, MI 48076
(248) 554-2700
jstarr@starrbutler.com
wthomas@starrbutler.com

Dated: July 17, 2020

{00074071.DOCX}

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

## I. INTRODUCTION

Defendant, American House Roseville I, LLC, d/b/a American House East I and American House ("American House") hired Plaintiff Timika Rayford ("Plaintiff") in February 2017. As consideration for her employment with American House, Plaintiff contractually agreed to a six (6) month limitations period for any claims arising out of her employment. Plaintiff alleges that between **February and July 2017**, she experienced harassment and a hostile work environment while working for American House. She also alleges than in **July 2017**, she was charged with making a false police report allegedly based on false information provided by American House (the charges were dropped days later). After those events allegedly took place, American House terminated Plaintiff's employment on or about **July 7, 2017**.

Plaintiff filed this lawsuit against American House in **April 2020** – more than **two years and nine months** after her allegations occurred. Plaintiff alleges seven claims arising out of her employment with American House: harassment (race and gender), hostile work environment, and retaliation under the Michigan Elliot-Larsen Civil Rights Act ("ELCRA"), MCL § 37.2101 *et seq* (Counts I, II, III, IV); wrongful discharge in violation of public policy (Count V); malicious prosecution (Count VI); and abuse of process (Count VII). Critically, all of Plaintiff's claims accrued before her employment with American House ended in July 2017. Meaning, at the latest, Plaintiff was required to assert her claims by January 2018, which she failed to do.

Plaintiff's claims are time barred pursuant to the six-month contractual limitations provision. Likewise, Plaintiff's malicious prosecution claim is also time barred under Michigan's traditional two-year statute of limitations. Additionally, even if all of her claims were not time barred, Plaintiff's public policy claim (Count V) and abuse of process claim (Count VII) fail as a matter of law because both claims are dispositively precluded under binding Michigan law.

Therefore, for the reasons set forth below, this Honorable Court should grant American House's Motion for Summary Disposition pursuant to MCR 2.116(C)(7) as to all of Plaintiff's claims, and MCR 2.116(C)(8) as to Counts V and VII.

## II. STATEMENT OF FACTS

American House hired Plaintiff on or about February 14, 2017 (**Ex. 1**, Complaint, ¶ 1).[1] As consideration for her employment, Plaintiff signed an Employee Handbook Acknowledgement agreement (**Ex. 2**, 2/20/2017 Acknowledgment).[2] The Acknowledgement Plaintiff signed is a standalone agreement that is independent of the Handbook (*See* **Ex. 4**, Handbook Table of Contents). By signing this agreement, Plaintiff agreed to a six (6) month limitations period for any claims arising out of her employment with American House:

> In consideration of my employment, I agree that any claim or lawsuit arising out of my employment with the Company, or my application for employment with the Company, **must be filed no more than 180 days** after the date of employment action that is the subject of the claim or lawsuit, unless the applicable statute of limitations period is shorter than 180 days in which case I will continue to be bound by that shorter limitations period. While I understand that the statute of limitations for claims arising out of an employment action may be longer than 180 days, I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY, unless state, federal or local law prohibits such waiver.

(*Id.*) (emphasis in original).

Plaintiff alleges that she experienced harassment and a hostile work environment while working for American House between **February and July 2017** (Ex. 1, ¶¶ 3-22 & pp. 5-9). She also alleges than in **July 2017**, certain employees of American House provided false information and documents to the Roseville Police Department regarding Plaintiff's purse allegedly being stolen (*Id.*, ¶¶ 23-28). As a result, Plaintiff asserts she was charged with making a false police

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[1] Plaintiff erroneously renumbered paragraph 6 of her Complaint under "Statement of Facts" as paragraph 1 (*See* Ex. 1, pp. 1-2). To avoid confusion, all subsequent references to Plaintiff's Complaint will refer to the paragraphs as numbered by Plaintiff under the "Statement of Facts" and the subsequent counts.

[2] Plaintiff's maiden name is Walls and her married name is Rayford (**Ex. 3**, Marriage Certificate).

report (*Id.*, ¶ 29). Plaintiff states the charges were dismissed shortly thereafter at a preliminary hearing (*Id.*, ¶¶ 31-32). After those events took place, American House terminated Plaintiff's employment on or about **July 7, 2017** (*Id.*, ¶ 33; **Ex. 5**, 7/7/2017 Termination Notice).

Plaintiff filed this lawsuit against American House on or about **April 24, 2020** – more than **two years and nine months** after her allegations occurred and her employment with American House ended (Ex. 1, Summons). Plaintiff's Complaint alleges seven claims arising out of her employment with American House: harassment (race and gender), hostile work environment, and retaliation under the ELCRA (Counts I, II, III, IV); wrongful discharge in violation of public policy (Count V); malicious prosecution (Count VI); and abuse of process (Count VII) (Ex. 1, pp. 5-14). Plaintiff's claims are based solely on allegations that occurred before her employment with American House ended in July 2017 (*Id.*).

Based on the arguments presented below, summary disposition as to all of Plaintiff's claims is warranted pursuant to MCR 2.116(C)(7), and (C)(8) as to Counts V and VII.

## III. STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred by the statute of limitations. *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008). For motions brought under this subrule, courts "consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001). Whether summary disposition is proper under MCR 2.116(C)(7) is a question of law. *Terlecki*, at 649.

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *York v 50th Dist. Court*, 212 Mich App 345, 347-48; 536 NW2d 891 (1995). All factual allegations in support of the claim are accepted as true,

including any reasonable inferences or conclusions that can be drawn from the facts. *Id.* at 347-48. Summary disposition should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

## IV. ARGUMENT

### A. Summary Disposition is warranted as to All of Plaintiff's Claims Because They Are Time Barred Pursuant to the Six-Month Contractual Limitations Period.

It is well-established in Michigan that parties are free to contractually limit and shorten the period of limitations for bringing a claim:

> [A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions.

*Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).[3] Michigan courts hold that a six-month limitations period for claims arising out of an employment relationship is enforceable and have upheld dismissals on the basis that a plaintiff's claims were barred by the shortened limitations period. *See Clark v. DaimlerChrysler Corp.*, 268 Mich App 138; 706 NW2d 471 (2005).

Here, Plaintiff's claims are time barred. Plaintiff signed an Employee Handbook Acknowledgment whereby she contractually agreed to a six-month limitations period for any claims arising out of her employment (*See* Ex. 2). Plaintiff's claims are based solely on allegations that occurred before Plaintiff's employment with American House ended on or about July 7, 2017 (Ex. 1, pp. 2-14). Plaintiff needed to file these claims no later than **January 3, 2018**. Plaintiff did not file this lawsuit until **April 2020**. Thus, Plaintiff's claims are time barred.

[3] The Court of Appeals subsequently discussed and held that shortened contractual limitation provisions are not contrary to Michigan law and do not violate public policy. *See Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005).

In *Posselius v Springer Pub Co*, 2014 WL 1514633 (Mich App Apr 17, 2014), the Court of Appeals enforced a virtually identical agreement and held the plaintiff's claims were time barred.[4] There, the plaintiff signed a form acknowledging her receipt of the employee handbook, which included a six-month contractual limitations provision that provided:

> I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day 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.

*Id.*, at *1. The plaintiff's "employment ended in July 2008", and she "filed suit a year later in July 2009." *Id.* The defendants moved for summary disposition asserting *inter alia* that "plaintiff's action was barred by the six-month contractual limitations period." *Id.* The trial court denied the defendants' motion for summary disposition and later defendants' motion for a directed verdict. *Id.* The defendants appealed. *Id.*

The Court of Appeals reversed the trial court's rulings. *Id.*, at *8. Relying on *Rory* and *Clark*, *supra*, the *Posselius* Court held that the "acknowledgement form clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to the suit." *Id.*, at *2. Moreover, the acknowledgment form was separate from the handbook and constituted an independent, enforceable agreement. *Id*, at *5. The plaintiff's claims were time barred and defendants were entitled to judgment as a matter of law. *Id.*, at *8.

*Posselius* is directly on point and Plaintiff's claims are time barred. Therefore, summary disposition under MCR 2.116(C)(7) is warranted as to all of Plaintiff's claims.

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[4] All unpublished cases are attached hereto as **Exhibit 6**. Although not binding, unpublished opinions are instructive and persuasive, especially if they are "dispositive" on an issue. *See Genesis Ctr, PLC v Blue Cross & Blue Shield of Michigan*, 243 Mich App 692, 696; 625 NW2d 37 (2000).

**B. Plaintiff's Malicious Prosecution Claim (Count VI) Should Be Dismissed Because It is Time Barred under Michigan's Traditional Statute of Limitations.**

Even if Plaintiff's malicious prosecution claim is not time barred pursuant to the six-month contractual limitations period (which it is), her claim should still be dismissed because it is time barred by Michigan's traditional statute of limitations.

The traditional statute of limitations for a claim of malicious prosecution is two years. MCL § 600.5805(7). Such a "claim accrues at the time the wrong upon which the claim is based was done" MCL § 600.6827. Malicious prosecution claims accrue when the underlying criminal proceeding is terminated in the plaintiff's favor. *See Cowan v Dep't of Corr*, 2019 WL 6720228, at *4 (Mich App Dec 10, 2019); *Wolfe v Perry*, 412 F3d 707, 715 (CA 6 2005) (Michigan law). Michigan courts have defined "termination of the criminal proceedings in favor of the accused" to include "the formal abandonment of the proceedings by the public prosecutor." *Cox v Williams,* 233 Mich App 388, 391-92; 593 NW2d 173 (1999).

Plaintiff's malicious prosecution claim is based on events that occurred and concluded in July 2017. Plaintiff alleges she was charged with making a false police report based on false information provided by American House employees regarding the alleged theft of Plaintiff's purse (Ex. 1, ¶ 29 & p. 12). The charges were dismissed days later at a preliminary hearing (*Id.*, ¶¶ 31-32). Then, after the charges were dismissed, American House terminated Plaintiff's employment on or about July 7, 2017 (*Id.*, ¶ 33; Ex. 5). At the latest, Plaintiff needed to assert her claim no later than two years after the prosecutor decided not to press charges – or before July 7, 2019. Plaintiff did not file this lawsuit until April 2020. As a result, Plaintiff's claim is time barred.

Therefore, summary disposition under MCR 2.116(C)(7) is warranted as to Plaintiff's malicious prosecution claim (Count VI).

**C. Even if Plaintiff's Claims Are Not Time Barred by the Six-Month Contractual Limitations Period, Plaintiff's Public Policy Claim (Count V) and Abuse of Process Claim (Count VII) Should Be Dismissed Pursuant to MCR 2.116(C)(8) Because Both Fail as a Matter of Law.**

As set forth above, all of Plaintiff's claims should be dismissed because they are time barred. But, even if that were not the case, Plaintiff's public policy claim (Count V) and abuse of process claim (Count VII) should be dismissed because they fail as a matter of law.

***1. Plaintiff's Public Policy Claim (Count V) is Not Actionable.***

Plaintiff alleges that she complained of and/or reported harassment based on her race and gender during her employment (Ex. 1, ¶¶ 8-9, 22, 44, 48). She asserts that her termination "resulted from her complaints and reports of harassment" and that such actions were prohibited under the ELCRA (*Id.*, pp. 11-12).[5] As such, Plaintiff alleges she was wrongfully discharged in violation of public policy based solely on the "explicit language" of the ELCRA (*Id.*, p. 12).

Michigan law recognizes "an exception to the at-will employment doctrine 'based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.'" *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 523; 854 NW2d 152 (2014) (citing *Suchodolski v Mich Consol Gas Co,* 412 Mich 692, 695; 316 NW2d 710 (1982)). Our Supreme Court in *Suchodolski*

> opined that the only grounds that have been recognized as so violative of public policy that they serve as an exception to the general rule of at-will employment are: (1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty … (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment … and (3) where the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment …

*Landin*, at 524.

[5] Plaintiff's public policy claim appears to be plead in the alternative to her retaliation claim under the ELCRA (Count IV) (Ex. 1, pp. 9-11).

"The first prong involves an express cause of action, while the second and third prongs involve implied causes of action." *Lewandowski v Nuclear Mgt*, 272 Mich App 120, 127; 724 NW2d 718 (2006). However, "a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue." *Id.* (citing *Dudewicz v Norris–Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993)). This is true for claims brought under the first type of claim, *see Dudewicz*, at 79-80, or the third type. *Lewandowski*, at 128-29.

The ELCRA specifically prohibits retaliation against an employee who "has opposed a violation of this act" or "filed a complaint" for a violation of that act. MCL § 37.2701(a). As Plaintiff admits, this prohibition includes retaliation for complaining of and/or reporting harassment based on a protected classification. *See Garg v Macomb Cty Cmty Mental Health Servs*, 472 Mich 263, 272; 696 NW2d 646, 653 (2005).

Plaintiff's public policy claim is based on either the first or third type of claim,[6] which she asserts is supported solely by the ELCRA's prohibition against retaliation for complaining of and/or reporting harassment (Ex. 1, pp. 11-12). But, as noted above, **our Supreme Court and Court of Appeals hold such a claim is not actionable under either type of claim because the ELCRA specifically provides a cause of action for such conduct**. *See Dudewicz*, at 79-80; *Lewandowski*, at 128-29. Thus, Plaintiff's claim is not actionable.

Therefore, Plaintiff public policy claim (Count V) fails as a matter of law and summary disposition is warranted pursuant to MCR 2.116(C)(8).

[6] Plaintiff does not allege that she was retaliated against for her refusal or failure to violate the law in the course of her employment with American House (*See* Ex. 1, pp. 11-12). Therefore, her public policy claim is not based on the second type of claim.

***2. Plaintiff's Abuse of Process Claim (Count VII) is Not Actionable.***

Plaintiff's abuse of process claim is based solely on her allegation that American House "initiated criminal proceedings against Plaintiff" in order to *inter alia* terminate her employment (Ex. 1, p. 13).

"Abuse of process is the wrongful use of the process of a court." *Lawrence v Burdi*, 314 Mich App 203, 211; 886 NW2d 748 (2016). The "gravamen of the misconduct" for such a claim "'is not the wrongful procurement of legal process ***or the wrongful initiation of criminal or civil proceedings***; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.'" *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981) (emphasis added). In other words, an "action for the abuse of process lies for the improper use of process ***after*** it has been issued, not for maliciously causing it to issue." *Lawrence*, at 211 (emphasis added).

Plaintiff's abuse of process claim is based solely on her allegations that American House employees provided false information to police regarding the alleged theft of Plaintiff's purse, which allegedly *led to* a criminal investigation against Plaintiff for filing a false police report (Ex. 1, pp 12-13). Thus, Plaintiff asserts that her claim is based solely on the "misuse of the criminal investigation process" (*id.*, p. 14), not for the improper use of process after the fact. As set forth above, a claim for abuse of process is not actionable on such grounds. *See Friedman*, 412 Mich at 30 n 18; *Lawrence*, 314 Mich App at 211.

Therefore, Plaintiff abuse of process claim (Count VII) fails as a matter of law and summary disposition is warranted pursuant to MCR 2.116(C)(8).

***3. Plaintiff Should Not Be Allowed to Amend Her Complaint as to Counts V and VII Because Doing So Would Be Futile.***

Where summary disposition is warranted under MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, ***unless*** the

evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). Such justification exists where "the record indicates that any amendment would [be] futile." *Allegheny Ludlum Corp v Dep't of Treasury*, 207 Mich App 604, 605; 525 NW2d 512 (1994).

Plaintiff should not be allowed to amend her Complaint as to Counts V and VII because doing so would be futile. Plaintiff's lengthy Complaint sets forth detailed allegations to support her claims. Plaintiff's public policy and abuse of process claims do not fail for lack of detail, but simply because Plaintiff's allegations are squarely precluded by binding Michigan law. If allegations existed that could sustain either claim, Plaintiff would have pled them originally. Plaintiff should not be given an opportunity to invent facts where none exist in order to circumvent binding Michigan law.

Therefore, Plaintiff's public policy claim (Count V) and abuse of process claim (Count VII) should be dismissed pursuant to MCR 2.116(C)(8) and Plaintiff should not be given leave to amend her Complaint.

## V. CONCLUSION

WHEREFORE, American House respectfully request that this Court GRANT its Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and/or (C)(8) and award costs and attorney's fees, as the premises permit to American House, and award such other relief as this Honorable Court deems just and appropriate.

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Dated: July 17, 2020

# EXHIBIT 7

**STATE OF MICHIGAN**
**IN THE MACOMB COUNTY CIRCUIT COURT**

TIMIKA RAYFORD,

Plaintiff,

Case No.: 20-001548-CD
HON. Michael E. Servitto

vs.

AMERICAN HOUSE ROSEVILLE I, LLC,
d/b/a AMERICAN HOUSE EAST I and
AMERICAN HOUSE

Defendants.

_____/

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_____/

**PLAINTIFF'S RESPONSE IN OPPOSITION OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION**

NOW COMES, Plaintiff Timika Rayford, by and through her attorneys, and in opposition to Defendants' Motion for Summary Disposition, responds as follows:

## A. STATEMENT OF FACTS

As set forth in her complaint, Plaintiff, Timika Rayford, is a certified nurse's assistant who was hired by Defendant on February 14, 2017. She was placed in a position of Patient Care

Professional where she was very successful. She was ultimately promoted to supervisor position.

As a supervisor, Ms. Rayford began noticing the lack of thorough care and mismanagement of the patients by staff members. This irresponsible conduct was seen in upper management as well. Plaintiff became aware that her manager, Mr. Crowell was having a sexual relationship/affair with one of the staff members. In return, that staff member was given preferential shifts/hours and special treatment. It became well known amongst staff members that in order to advance or receive better treatment, sexual acts needed to be exchanged. Plaintiff reported these incidents to the Human Resources department. The Human Resources department failed to take any actions. Plaintiff reported her concerns, including the sexual relationship, to the State of Michigan.

After her reporting, Mr. Crowell began to retaliate against Ms. Rayford. If Ms. Rayford had an incident with a patient or staff member, Mr. Crowell would ignore her concerns and fail to take any action. Mr. Crowell failed to fulfil his duties as a manager, and purposely chose not to provide support to Ms. Rayford. Mr. Crowell would blame Ms. Rayford, instead of the correct staff member, for actions, such as failure to clean a patient or leaving a patient unattended. He would then give Ms. Rayford a "write-up" even though it was clear that another staff member was at fault. Mr. Crowell's failure to take action or seek remedies furthered the hostile environment Ms. Rayford was forced to endure.

On July 1, 2017, Plaintiff finished her shift and left the building. She realized she had left her purse in a locked room that was only accessible by supervisors and coordinators. By the time Plaintiff arrived back to work, her purse had been stolen. She reported the theft to management. However, management did nothing to remedy the situation. Ms. Rayford then reported the theft to Roseville Police Department. Instead of management actually providing assistance, they used the

situation as a means to further retaliate against Ms. Rayford. Ms. Rayford was called into a meeting with members of management, including Mr. Crowell, Ms. Lotito from human resources, and Joel Woods, the head of security. During that meeting, management wrongfully and falsely accused Ms. Rayford of lying about her purse being stolen and accused her of falsifying a police report. Ms. Rayford was informed that she was being terminated for filing a false police report. Thereafter, Defendants wrongfully terminated Ms. Rayford on July 5, 2017. Following her termination, on July 5, 2017, Ms. Rayford wrote a letter requesting that she see the security footage and any documentation that determined her termination, citing the Bullard-Plawecki Employee Right to Know Act. (**Exhibit A –** Letter from Timika Rayford). However, Defendants never provide the footage nor any documentation to her.

As a result of Defendants' wrongful actions, Ms. Rayford was charged with making a false larceny report. (**Exhibit B –** Citation). Ms. Rayford had to appear for a hearing for the charge on September 7, 2017. *Id*. Defendants knew or should have known that providing false and inaccurate information to a police officer could potentially lead to criminal charges against Ms. Rayford. At the hearing on Ms. Rayford's charges, it was revealed that the video footage Defendants provided was incorrectly date-stamped and made to appear to be the day her purse was stolen. However, it was actually footage from a few days prior. Ms. Rayford's charges were thereupon dismissed.

Defendants bring the current motion requesting that the Court dismiss Plaintiff's claims, citing an employment agreement that Defendant has not made Plaintiff aware of until the filing of this motion. Plaintiff respectfully requests that this Honorable Court deny Defendants' requests and allow her to proceed with her claims.

**B. STANDARD OF REVIEW**

When considering a motion brought under MCR 2.116(C)(7), the court may consider all of the affidavits, pleadings, and other documentary evidence filed or submitted by the parties. *Haywood v Fowler*, 190 Mich App 253, 255-256 (1991). All well-pleaded allegations must be accepted as true and construed in a light most favorable to the plaintiff. *Id.*

MCR 2.116(C)(8) provides that summary disposition is proper when the opposing party has failed to state a claim upon which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id*., quoting *Wade v Dept of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

## C. LAW AND ARGUMENT

### I. The Shortened Limitations Period is Invalid and an Unconscionable Contract of Adhesio

A contract of adhesion exists when the contractual provision at issue left the plaintiff with no realistic choices or options considering the parties' relative bargaining power and strength and alternate source of supply. *General Motors v Paramount Metal Products Co*., 90 F Supp 2d 861 (ED Mich 2000). A contract of adhesion is frequently found where a contract is offered to consumers on a standardized form on a take it or leave it basis. *USAA Group v. Universal Alarms,* 158 Mich App 633 (1987).

In *Herweyer v Clark Hwy Services, Inc,* 455 Mich. 14 (1997). The Supreme Court of Michigan discussed adhesion contracts in employment contracts. The *Herweyer* Court held:

> The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings. In the case

> of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable.

*Id*. at 20-21. The Herweyer Court further noted the difference in employment contracts and contracts for good and services, holding:

> Employment contracts differ from bond contracts. An employer and employee often do not deal at arms' length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike in *Camelot*[1] where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny.

*Id.* at 21. In *Rory v Continental Ins. Co.*, 473 Mich. 457 (2005), the Michigan Supreme Court declined to take the view in *Herweyer* and recognized that there is a difference between employment contracts and contracts for goods or services. *Rory* overruled *Herweyer* and harmfully made all contracts equal to one another. However, the *Rory* court did state "[a] party may avoid enforcement of an 'adhesive' contract only by establishing one of the traditional contract defenses, such as fraud, duress, unconscionability, or waiver." *Rory*, 473 Mich. at 489.

In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. *Northwest Acceptance Corp v Almont Gravel*, *Inc*, 162 Mich. App. 294, 302; (1987). Procedural unconscionability exists where the weaker party had no realistic alternative but to accept the term. *Allen v Mich. Bell Tel Co*, 18 Mich. App. 632, 637 (1969). A term is substantively unreasonable where the inequity of the term

[1] *Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich. 118, 127; 301 N.W.2d 275 (1981).

is so extreme as to shock the conscience. *Gillam v Michigan Mortgage-Investment Corp*, 224 Mich. 405, 409 (1923).

In the present case, Defendants base their motion on an alleged "Employee Handbook Acknowledgement Sheet" (hereby referred to as the "Acknowledgment Sheet") that they have offered as their Exhibit 4. The Acknowledge Sheet proffered states that:

> I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day 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."

(Def. Mot. for Summ. Disp. at Ex. 4).

Defendants allege that the Acknowledgment Sheet they produced is a standalone agreement that is separate from the Employee Handbook, (*See* Def. Mot. for Summ. Disp. at 2). Ms. Rayford began her employment with Defendant on February 14, 2014. The Acknowledgment Agreement was executed on February 20, 2014. Therefore, the alleged agreement was signed *after* Ms. Rayford was hired. This is a necessary distinction because it goes to the procedural and substantive unconscionability of the Acknowledgment Sheet. Procedurally, the agreement was unconscionable because Ms. Rayford did not have the ability to negotiate the terms and was provided no additional consideration for the alleged Acknowledgment Sheet, because she was already employed. *Allen, supra,* at 687. Therefore, she could not provide her employment as consideration since it had already been offered by Defendants and accepted.

Substantively, the agreement was unconscionable because the inequity shocks the conscious. *Gilliam, supra*, at 409. There was a lack of consideration for this adhesion contract, which makes it procedural and substantively unconscionable.

Plaintiff respectfully requests that Defendant's Motion for Summary Disposition is denied. The Acknowledgment Agreement that shortens the statutory statute of limitation period for the Elliot Larsen Civil Rights Act is an unconscionable adhesion contract.

## II. The Acknowledgement Sheet was Never Provided to Ms. Rayford

As noted above, on July 5, 2017, Ms. Rayford sent a letter to Defendant requesting that she be allowed to view any video footage that related to her termination and supporting documents. (**Exhibit A –** Letter from Timika Rayford). She specifically referenced the Bullard-Plawecki Employee Right to Know Act ("ERKA"). Pursuant to the Act, MCL 423.500 et seq.:

> An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee.

MCL 423.503. Defendants failed to respond to Ms. Rayford's written request. Defendants never provided Ms. Rayford with her employment file nor made it available for review. Moreover, on March 12, 2018, counsel for Ms. Rayford sent a letter to Defendant explaining the discrimination that Ms. Rayford had experienced and her intent to file suit if a remedy could not be reached, and counsel for Defendants responded and never mentioned an alleged Acknowledge Agreement or the 180-day time limitation, which would have expired by the time the letter was received by Defendants. (**Exhibit C –** Defendants' Demand Response).

Under MCL 423.502(2), "[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."

Personnel records are any documents 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). "Information 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 D** – *Cofessco Fire Prot., L.L.C. v. Bruce Steele, Vanguard Fire & Supply Co*., 2010 WL 3928724, at *4 (Mich. Ct. App. Oct. 7, 2010) (unpublished)).

In this case, Defendants failed to uphold their statutory duty to provide Ms. Rayford's employee file, as proscribed by the ERKA. Defendants further failed to note the alleged shortened period or provide a copy of the Acknowledgement Agreement to Ms. Rayford and when corresponding with counsel. Because Defendants have intentionally withheld material information for Ms. Rayford that has adversely affected her rights, and Ms. Rayford was wholly unaware of this Acknowledgement Agreement until Defendants filed the present motion, Defendants should be estopped from now using the withheld information as a defense.

### III. Plaintiff's Properly Pled A Claim For Abuse Of Process In Her Complaint

To recover upon a theory of abuse of process, a party must plead and prove an ulterior purpose and an act in the use of process that is improper in the regular prosecution of the proceeding. *Young v. Motor City Apartments Ltd. Dividend Housing Asso*. *No. 1 & No. 2*, 133 Mich. App. 671 (1984). "[A] plaintiff making out a claim for abuse of process must allege a use

of process for a purpose outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive." *Id*., at 681.

In the present case, Defendants, by and through their management, had an **ulterior motive** in using the criminal court proceedings outside the given purpose. Defendants knew (or should have known) that the allegations that Ms. Rayford stole her own purse were false, particularly given that the alleged video was not even from the proper date. Defendant provided false information to he Roseville police and used the charge of "Filing a False Larceny Report" as justification for terminating Ms. Rayford.

In their motion for summary disposition, Defendants go through great lengths to draw a distinction between initiating the wrongful criminal process and taking actions after the process. (*See, e.g*., Def. Mot. for Summ. Disp. at 10). The distinction is illogical. Ms. Rayford's termination occurred after Roseville police cited her for allegedly making a false report. The citation was initiated because **Defendants** provided false information to the officers. Thus, Defendants abused the criminal investigation for a reason outside the intended purpose of the process, and then terminated her after the process ensued. Ms. Rayford, the actual victim, was not relieved from the charges until after September 7, 2017, when she had to appear for a hearing and plead her innocence. Defendants' argument should be denied. But for Defendants providing false statements and video footage to the Roseville police, Ms. Rayford would have never been charged.

Plaintiff has properly pled claims of abuse of process. The injury complained of in an action is one to the person and the applicable statute of limitations is three years. *Moore v. Michigan Nat'l Bank*, 368 Mich. 71 (1962). MCL 600.5805(2). In addition, this is not an employment related action, and it did not accrue until after she was terminated. To wit, the agreement itself indicates that the statute of limitations is shortened to six months of the "employment action." As Plaintiff

was not employed at the time this cause accrued, pursuing criminal charges could not be considered an "employment action," and Plaintiff's abuse of process claim should be permitted to proceed.

## D. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court DENY Defendant's Motion and grant any other relief this Court deems equitable and just.

Respectfully submitted,
CARLA D. AIKENS, P.C.

Date: August 10, 2020

By: /s/ Carla D. Aikens
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on August 10, 2020 via E-File.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Patricia Ramirez

# EXHIBIT 8

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

TIMIKA RAYFORD,

Plaintiff,

v

AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE,

Defendant.

Case No. 20-001548-CD

Hon. Michael E. Servitto

**Date and Time of Hearing: August 17, 2020 at 8:30 a.m.**

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## DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

### A. The Employee Handbook Acknowledgement and the Six-Month Contractual Limitations Provision Are Not Unconscionable and Should be Enforced.

Plaintiff's primary argument for why the six-month contractual limitations provision should not be enforced is that the Employee Handbook Acknowledgment (the "Acknowledgment") and the limitations provision are allegedly unconscionable (Plt. Resp., pp. 4-7).[1] Plaintiff's argument lacks merit and is contrary to established Michigan law.

A shortened contractual limitations provision must be enforced unless *inter alia* it is "unenforceable under recognized traditional contract defenses", such as unconscionability. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142 & n 1; 706 NW2d 471 (2005). For a "contract

[1] Plaintiff makes several passive references inferring that the Acknowledgment is an "adhesion contract" (Plt. Resp., pp. 4-5, 7). That assertion is a misnomer as our Supreme Court holds that adhesion contracts are not recognized in Michigan. *See Rory v Continental Ins Co*, 473 Mich 457, 477-490; 703 NW2d 23 (2005). Instead, a so-called "adhesion contract is imply a type of contract *and* is to be enforced according to its plain terms just as any other contract." *Id.*, at 488 (emphasis in original).

provision to be considered unconscionable, both procedural and substantive unconscionability must be present." *Id.*, at 143-144 (emphasis added). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.*, at 144. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* A "term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Id.* A contract or contract provision "is not invariably substantively unconscionable" simply because it is "very advantageous" to one party. *Id.*

Plaintiff asserts that the Acknowledgment and its terms are procedurally unconscionable because she (1) "did not have the ability to negotiate the terms"; and (2) "was provided no additional consideration" for entering into the agreement "because she was already employed." (Plt. Resp., p. 6). Both arguments fail. First, Plaintiff provides no factual support for her unfounded assertion that she was unable to negotiate the terms of her employment (*See, id.*). The Court of Appeals in *Clark* held such unfounded assertions are insufficient to establish unconscionability, and rejected a similar argument in that case. *Clark*, 268 Mich App at 144. Second, the "continuation of employment" **is** sufficient consideration for a contact. *QIS, Inc v Industrial Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004). Thus, sufficient consideration for the Acknowledgment exists and it is not procedurally unconscionable.

Plaintiff's only basis for asserting the Acknowledgment is substantively unconscionable is the alleged lack of consideration (Plt. Resp., p. 7). But, as shown above, the continuation of Plaintiff's employment is sufficient consideration to create a binding and enforceable agreement. Moreover, a "six-month period of limitations is neither inherently unreasonable … nor so extreme that it shocks the conscience." *Clark*, at 144 (citations omitted).

Therefore, the Acknowledgment and the six-month contractual limitations provision are enforceable and Plaintiff's claims are time barred. Summary disposition is warranted.

**B. The Employee Handbook Acknowledgment Should Not Be Excluded Pursuant to the Michigan Bullard-Plawecki Employee Right to Know Act.**

Plaintiff also argues that American House should be estopped from using the Acknowledgment because American House *allegedly* failed to provide Plaintiff a copy of her personnel file and to remind her and/or her counsel as to the existence of this agreement after she was terminated (Plt. Resp., pp. 7-8). Plaintiff's assertions are baseless.

Plaintiff's argument is based on Michigan's Bullard-Plawecki Employee Right to Know Act ("BPERKA"), MCL § 450.500 *et seq*. Specifically, a provision of that act that holds "[p]ersonnel record information which is 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." MCL § 450.502. This provision, however, is only applicable if three prerequisites are met: (1) the employee makes a "written request" to review or obtain a copy of his or her personnel file, MCL §§ 450.503, 504; (2) the employer either makes the file available for review or produces a copy of the file to the employee, *see, id*; and (3) the employer "intentionally excluded" the information in question from the employee's file prior to the review or production, MCL § 450.502. *See Cofessco First Protection, LLC v Bruce Steel, Vanguard Fire & Supp Co*, 2010 WL 3928724, at *4 (Mich App Oct 7, 2010) (attached as Plt. Ex. D).

None of the foregoing prerequisites took place in order to trigger the exclusion provision under MCL § 450.502. First, Plaintiff never made a written request to review or obtain a copy of her personnel file. Instead, Plaintiff only requested access to video camera footage (Plt. Ex. A, pp. 1-2).[2] Plaintiff's July 5, 2017 letter never mentions, let alone requests, access to or a copy of her personnel file (*Id.*). In turn, American House was never required to provide Plaintiff a copy of her personnel file under the BPERKA, and it certainly did not intentionally exclude the

[2] Plaintiff's letter states: "Under the [BPERKA] I am requesting that all footage on July 1, 2017 from 9pm until July 2, 2017 3pm be presented and reviewed by me Timika Rayford." (Plt. Ex. A, p. 2).

Acknowledgement from any non-existent review or production of Plaintiff's personnel file. Thus, Plaintiff's baseless argument fails.

Plaintiff also criticizes American House's former attorneys for not reminding her or advising her attorneys regarding the existence of the Acknowledgement (Plt. Resp., p. 7). This criticism is without merit because there is no legal basis (nor does Plaintiff cite any) that required American House's attorneys to do so. Instead, if Plaintiff or her attorneys wished to know the contents of her employment records, either could have made a request under the BPERKA. *See* MCL §§ 450.503, 504. And, as outlined above, neither Plaintiff nor her attorneys did so. Therefore, Plaintiff's argument fails and should be disregarded.

**C. Plaintiff's Abuse of Process Claim is Time Barred and Legally Deficient.**

Plaintiff's final argument is that her abuse of process claim should not be dismissed because: (1) it is not subject to the six-month contractual limitations provision because it is not an "employment action"; and (2) Plaintiff states a cognizable claim (Plt. Resp., pp. 8-10). Plaintiff is incorrect on both fronts and her abuse of process claim should be dismissed.

Initially, the six-month contractual limitations provision is not limited solely to employment claims, but covers "**any claim or lawsuit arising out of my employment**" with American House (Def. Ex. 2) (emphasis added). Plaintiff admits the basis for her abuse of process claim stems from American House's alleged actions that resulted in Plaintiff being cited for allegedly making a false report on July 3, 2017, or while she was still employed with American House (Plt. Resp., p. 9; Plt. Ex. B). Meaning, Plaintiff's claim stems from alleged actions taken by American House during her employment and, therefore, arise out of her employment. Thus, this claim is subject to the six-month limitations period and is time barred.

Even if that weren't the case, Plaintiff's claim still fails as a matter of law because her claim is based solely on the misuse of the criminal investigation process, not for the improper

use of process after the fact (Def. Motion, p. 9). Plaintiff criticizes this dispositive distinction and calls it "illogical" (Plt. Resp., p. 9). Our Supreme Court disagrees. As American House established in its Motion, "the wrongful initiation of criminal or civil proceedings" is not a valid basis for an abuse of process claim. *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981). Instead, an "action for the abuse of process lies for the improper use of process ***after*** it has been issued, not for maliciously causing it to issue." *Lawrence v Burdi*, 314 Mich App 203, 211; 886 NW2d 748 (2016) (emphasis added).

As her response reiterates, Plaintiff's claim is based solely on American House providing allegedly false information that resulted in Plaintiff being issued a citation for filing a false police report (Plt. Resp., p. 9). Neither Plaintiff's Complaint, nor her response, assert that American House or its agents improperly used the civil or criminal processes of this State after that process was issued and did so for some improper reason. Therefore, Plaintiff's abuse of process claim fails as a matter of law and should be dismissed.

STARR, BUTLER, ALEXOPOULOS & STONER, PLLC

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Dated: August 13, 2020

# EXHIBIT 9

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

TIMIKA RAYFORD,

Plaintiff,

vs. Case No. 2020-1548-CD

AMERICAN HOUSE ROSEVILLE I, LLC,
dba AMERICAN HOUSE EAST I and
AMERICAN HOUSE,

Defendant.

_____/

PROCEEDING

BEFORE THE HONORABLE MICHAEL E. SERVITTO

MOUNT CLEMENS, MICHIGAN - MONDAY, AUGUST 17, 2020

APPEARANCES:

FOR THE PLAINTIFF: ASHLEY J. BURRESS - P79614
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FOR THE DEFENDANT: WILLIAM R. THOMAS - P77760
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**MARY T. NADER-CIMINI, CSR-2643**
**Official Court Reporter**
**Macomb County Circuit Court**
**40 North Main Street**
**Mount Clemens, MI 48043**
**(586) 469-5356**

I N D E X



E X H I B I T S

August 17, 2020

Mount Clemens, Michigan

At about 10:12 a.m.

(REPORTER'S NOTE: "Inaudible" means a word or words were not heard well enough to be able to discern a proper interpretation either because of shuffling of papers, or the speaker did not amplify loud enough or was not picked up by a microphone.)

* * *

THE COURT: Calling the case of Timika Rayford versus American House Roseville, case number 2020-1548-CD. Appearances for the record.

MS. BURRESS: Good morning, Your Honor. Ashley Burress for the plaintiff, Timika Rayford.

MR. THOMAS: And good morning, Your Honor. Will Thomas on behalf of defendant.

THE COURT: All right. This is the time and date set for a motion for summary disposition. This is defendant's motion. Anything that you wanted to say to add or supplement your – or highlight in your brief?

MR. THOMAS: Your Honor, defendant is fine to stand on its briefs and we'll answer any of the Court's

questions if they have any.

THE COURT: All right. Anything from plaintiff?

MS. BURRESS: Plaintiff will stand on her brief as well, Your Honor.

THE COURT: All right. Defendant claims that an employment acknowledgement form of receipt of an employee handbook precludes these claims because the form contractually bound the plaintiff to a six-month period of limitation to file a claim arising out of her employment. The defendant cites Posselius versus Springer Publishing Company, and it seems to be exactly on point where the employee signed and acknowledged a form pertaining to a revised handbook after she was initially hired. The Court found that the form was a contract, not the – the revised handbook but the form itself was a contract. And that's docket number 306318, 2014 Westlaw 1514633. And the Court notes that this is an unpublished opinion, but it is persuasive authority, and the Court can't find any distinction between our instant facts and the Posselius case. The court in its opinion says "this Court has upheld a contractual six-month limitations period in employment discrimination cases, rejecting arguments that the shortened period violated public policy and was unconscionable." That's Clark versus DaimlerChrysler Corp., 268 Mich. App. 138, 142-144, a 2005 case. The

acknowledgement form clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to suit. Plaintiff does not deny this but contends that the acknowledgement form did not create a valid and enforceable contract.

And again, the Posselius court going through whether the six-month – the six-month statute of limitations or preclusion of a suit was unconscionable the court found that it was not and it seems from the Court's research of caselaw that there are no courts that have held that that six-month period is unconscionable or shocks the conscience, and the Court isn't going to revise, I guess, or to set a precedent in regard to caselaw and find that the six-month period is - under this contract is somehow unconscionable. In fact, this – there's just no authority to affect and I would note that plaintiff hasn't provided any authority which would find that the six-month statute or six-month limitation period would be unconscionable.

Plaintiff also contends that there was a lack of consideration due to this being signed after her initial hire date, and the fact is the Posselius case specifically addressed this, and I realize that there is some dissent, however, the Posselius case says "the promise of continued employment even if the continued employment is merely at will employment constitutes consideration adequate to form

a contract and is not illusory." And the Court's adopting that rationale from the Posselius case that in fact although this contract was signed after the initial hire date, it still constitutes consideration.

Plaintiff argues that there is tolling by grounds of estoppel. Plaintiff contends that the acknowledgement contract should not be considered under estoppel grounds because she requested to view video footage that related to her termination and supporting documents. And defendant points out that the – the only request that occurred was for videos that lead to her termination, not to the personnel file as required under the Employee Right to Know Act under MCL 423.500. The Court had an opportunity to look at that exhibit and the exhibit submitted by plaintiff it shows that the plaintiff does not ask for documents, but says "that the Act states that an employee has the right to – right to view any and all said documents." But again, it doesn't reference specifically a personnel file or anything about the personnel file. It only relates to documents pertaining to the video footage, which was requested, nothing specifically in regard to documents or the personnel file. So, even if the – even if tolling was appropriate or estoppel was appropriate due to the failure to turn over documents, that just wasn't done. There was no written request that was submitted to her employer for

those documents.

So, based on the fact that there is this contractual provision limiting suit after six months, the Court is going to grant the motion for summary disposition.

Defendant also contends that the count of abuse of process must be dismissed because it requires an act after the process has begun. In this case the defendant allegedly only initiated the criminal investigation, and it seems that the plaintiff agrees that there was only – or that the defendant only initiated this criminal investigation. Lawrence versus Burdi, 314 Mich. App. 203, pages 211-212, 2016, addresses – is cited by the defendant for this proposition, and in that case the court found abuse of process is the wrongful use of a process of a court. This action for the abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it. In Friedman versus Dozorc, 412 Mich. 1, page 312, a 1981 case, the gravamen of the misconduct for which liability stated in the section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings, it is the mute misuse of process no matter how properly obtained for any purpose other than which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the

course of proceedings that were brought with probable cause and for a proper purpose. That's a little bit distinguishable in that it was a proper purpose for which the process was initiated.

I'd also cite Spear versus Pendill, 164 Mich. 620, page 623, a 1911 case. The court found the only question determined upon the record is whether the defendant was guilty of malicious abuse of process. Abuse of process is the wrongful use in the process of the court. This action for the abuse of process lies for the improper use of process after it has been issued, not from the maliciously causing it to issue.

This isn't a wrongful prosecution case or a malicious destruction – or malicious prosecution case. This is an abuse of - the count is for abuse of process, and it seems clear from the caselaw that this has to be the misuse of the process after its been initiated, not prior to – not the initiation of the process. Plaintiff has cited no authority to the contrary. Plaintiff in her brief says that it is illogical, but this Court's not going to say that its illogical or not. The fact is there's caselaw and jurisprudence on this specific issue in regard to the abuse of process, and in light of that the Court is going to grant the motion for summary disposition as to that count as well.

All right. Thank you.

MR. THOMAS: Your Honor, one question is would you like us to submit an order or will the Court submit an opinion or an order?

THE COURT: Please e-file the order. Thank you.

MR. THOMAS: Okay. Thank you, Your Honor.

MS. BURRESS: Thank you, Judge. Have a good day.

(At about 10:21 a.m. proceedings concluded.)

* * *

STATE OF MICHIGAN )

COUNTY OF MACOMB )

CERTIFICATE OF REPORTER

I, MARY T. NADER-CIMINI, Official Court Reporter for the Sixteenth Judicial Circuit, State of Michigan, do hereby certify that this transcript, consisting of 10 pages, is a true and accurate transcription, to the best of my ability, of the video proceeding in this case before the Honorable Michael E. Servitto on August 17, 2020, as recorded.

Videotape proceedings were recorded and were provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceedings, or for the content of the videotape provided.

/s/ Mary T. Nader-Cimini, CSR-2643

Official Court Reporter

Date: December 7, 2020

Mount Clemens, Michigan

# EXHIBIT 10

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

TIMIKA RAYFORD,

Plaintiff,

Case No. 20-001548-CD

v

Hon. Michael E. Servitto

AMERICAN HOUSE ROSEVILLE I, LLC,
d/b/a AMERICAN HOUSE EAST I and
AMERICAN HOUSE,

Defendant.

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**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

At a session of said Court
held in the City of Mt. Clemens,
County of Macomb, State of Michigan,
On August 17, 2020

PRESENT: MICHAEL E SERVITTO
Circuit Court Judge

Defendant, American House Roseville I, LLC, d/b/a American House East I and American House ("Defendant"), having filed its Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and 2.116(C)(8), Plaintiff having filed a response to Defendant's motion, the parties having participated in a hearing on Defendant's motion on August 17, 2020, and with the Court being otherwise fully advised in the premises:

IT IS HEREBY ORDERED that for the reasons stated on the record during the hearing on Defendant's Motion for Summary Disposition held on August 17, 2020, Defendant's Motion for Summary Disposition is **GRANTED**, and Plaintiff's Complaint is dismissed with prejudice.

**This order resolves all pending claims and closes the case.**

CIRCUIT COURT JUDGE

/S/ MICHAEL SERVITTO
CIRCUIT COURT JUDGE, P66434

08/18/2020

Approved as to Form:

/s/ William R. Thomas
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/s/ Ashley J. Burress (with consent)
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# EXHIBIT 11

Approved, SCAO

Original - Court of Appeals/Circuit court
1st copy - Trial court

JIS CODE: COA
2nd copy - Appellee
3rd copy - Appellant



| STATE OF MICHIGAN<br>JUDICIAL ☑ CIRCUIT ☐ DISTRICT<br>Macomb COUNTY<br>☐ IN THE COURT OF APPEALS | CLAIM OF APPEAL | CASE NO.<br>CIRCUIT 2020-001548-CD<br>DISTRICT<br>PROBATE |
|---|---|---|

**Court address** **Court telephone no.**

| Plaintiff's/Petitioner's name(s) and address(es) ☑ Appellant ☐ Appellee | | Defendant's/Respondent's name(s) and address(es) ☐ Appellant ☑ Appellee |
|---|---|---|
| Timika Rayford | v | American House Roseville I, LLC,<br>d/b/a American House East I and American House |
| Plaintiff's attorney, bar no., address, and telephone no.<br>Carla D. Aikens PC<br>Carla D. Aikens (P69530)<br>Ashley J. Burres (P79614)<br>615 Griswold St., Suite 709, Detroit, MI 48226<br>(844) 835-2993 | | Defendant's attorney, bar no., address, and telephone no.<br>Starr, Butler, Alexopoulous & Stoner, PLLC<br>Joseph A. Starr (P47253)<br>William R. Thomas (P77760)<br>20700 Civic Center Dr., Ste. 290, Southfield, MI 48076<br>(248) 554-2700 |

☐ Probate In the matter of _____

Other interested party(ies) of probate matter

1. Timika Rayford (Name) claims an appeal from a final judgment or order entered on 8/18/2020 and 10/02/2020 (Date) in the Macomb (Court name and number or county) Court of the State of Michigan,

by ☐ district judge ☑ circuit judge ☐ probate judge ☐ district court magistrate

Hon. Michael E. Servitto (Name of judge or district court magistrate) P66434 (Bar no.).

2. Bond on appeal is ☐ filed. ☐ attached. ☐ waived. ☐ not required.
3. ☑ a. The transcript has been ordered.
   ☐ b. The transcript has been filed.
   ☐ c. No record was made.
4. ☐ THIS CASE INVOLVES
   - ☐ a. A CONTEST AS TO THE CUSTODY OF A MINOR CHILD.
   - ☐ b. AN ADULT OR MINOR GUARDIANSHIP UNDER THE ESTATES AND PROTECTED INDIVIDUALS CODE OR UNDER THE MENTAL HEALTH CODE.
   - ☐ c. AN INVOLUNTARY MENTAL HEALTH TREATMENT CASE UNDER THE MENTAL HEALTH CODE.
   - ☐ d. A RULING THAT A PROVISION OF THE MICHIGAN CONSTITUTION, A MICHIGAN STATUTE, A RULE OR REGULATION INCLUDED IN THE MICHIGAN ADMINISTRATIVE CODE, OR ANY OTHER ACTION OF THE LEGISLATIVE OR EXECUTIVE BRANCH OF STATE GOVERNMENT IS INVALID.

10/23/2020
Date

/s/ Ashley J. Burress
Appellant/Attorney signature

**PROOF OF SERVICE**

I certifiy that copies of this claim of appeal and bond (if required) were served on

_____ (Name) on _____ (Date) by ☐ personal service. ☐ first-class mail.

_____ (Name) on _____ (Date) by ☐ personal service. ☐ first-class mail.

_____ (Name) on _____ (Date) by ☐ personal service. ☐ first-class mail.

_____
Date

_____
Signature

# EXHIBIT 12

**STATE OF MICHIGAN**
**IN THE MACOMB COUNTY CIRCUIT COURT**

TIMIKA RAYFORD,

Plaintiff,

Case No.: 20-001548-CD
HON. Michael E. Servitto

vs.

AMERICAN HOUSE ROSEVILLE I, LLC,
d/b/a AMERICAN HOUSE EAST I and
AMERICAN HOUSE

Defendants.

_____/

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_____/

**PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S AUGUST 17, 2020 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

NOW COMES, Plaintiff Timika Rayford, by and through her attorneys, and for her Motion for Reconsideration, states as follows:

## A. STATEMENT OF FACTS RELATING TO ABUSE OF PROCESS

Plaintiff, Timika Rayford, was hired by Defendant on February 14, 2017 and terminated on July 5, 2017.

A few days prior to her termination, Plaintiff's purse was stolen from a locked room that was only accessible to supervisors and coordinators. The theft occurred on July 1, 2017. Because the purse was in a locked room, it was clear to Plaintiff that her purse had been taken by an employee of Defendants. Despite her requests, Defendants failed to investigate or assist Plaintiff in retrieving her purse. Plaintiff had to seek the assistance of the Roseville Police Department. When an officer from Roseville Police Department questioned Defendants' management, they provided false information to the officer. Defendants intentionally and fraudulently provided a video of Plaintiff allegedly leaving with her purse on a different date. Based on Defendants' malicious and fraudulent actions, Plaintiff was criminally charged with making a false larceny report. Plaintiff had to appear for a hearing for the charge on September 7, 2017. It was determined at the hearing that Defendant has falsified the video, and produced a video that had been timestamped to appear as if it was taken on the date of the theft, when in reality, it was from a prior date. Defendants knew, or should have known, that providing false and inaccurate information to a police officer could lead to criminal charges against Plaintiff. Only July 5, 2017, after Plaintiff was criminally charged, Defendants used the pending charges as the reason or justification for her termination.

On August 17, 2020, this Court granted Defendants' Motion for Summary Disposition, finding that Plaintiff had failed to properly plead an abuse of process claim. However, Plaintiff properly raised a claim of abuse of process against Defendants. Plaintiff alleged that not only had Defendants abused the criminal process as a means of retaliation, they wrongfully used the pending criminal proceeding after it was initiated.

Plaintiff brings the present motion asking this Court to reconsider its decision to grant Defendants' Motion for Summary Disposition, as it pertains to the dismissal of Plaintiff's abuse of process claim.

**B. STANDARD OF REVIEW**

Motions for reconsideration are governed by MCR 2.119(F), which states in relevant part, "(1) Unless another rule provides a different procedure for reconsideration of a decision…a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." To prevail on a motion for reconsideration, "[t]he moving party must demonstrate a palpable error by which the court the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). A palpable error is an error that is "`[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.'" *Luckow Estate v Luckow*, 291 Mich App. 417, 426 (2011) (quoting *Stamp v Mill Street Inn*, 152 Mich App 290, 294; 393 NW2d 614 (1986), lv den 426 Mich 882 (1986)). The trial court has "considerable discretion" to revisit an issue to correct an error. *Macomb Cty. Dept of Human Svcs. v Anderson*, 304 Mich App 750,754 (2014).

**C. LAW AND ARGUMENT**

**1. Plaintiff Properly Pled A Claim For Abuse of Process.**

To recover upon a theory of abuse of process, a party must plead and prove an ulterior purpose and an act in the use of process that is improper in the regular prosecution of the proceeding. *Young v. Motor City Apartments Ltd. Dividend Housing Asso. No. 1 & No. 2*, 133 Mich. App. 671 (1984). "[A] plaintiff making out a claim for abuse of process must allege a use

of process for a purpose outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive." *Id*. at 681.

As the Court of Appeals stated in *Bonner v. Chicago Title Ins. Co*., 194 Mich. App. 462, 472 (1992), "a meritorious claim of abuse of process [is] a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure." Further, "there must be some corroborating act that demonstrates the ulterior purpose." *Id* (citing *Vallance v Brewbaker,* 161 Mich. App. 642, 646 (1987).

In Defendants' Motion for Summary Disposition, they called attention to *Lawrence v. Burdi*[1] and *Friedman v Dorzoc*[2]. Defendants used these cases to emphasize the fact that an "action for the abuse of process lies for the improper use of a process *after* it has been issued, not for maliciously causing it to issue.[3]" Plaintiff does not dispute the law. She instead requests that the Court takes a closer look at the facts of this case, particularly the phrase "improper use after initiation."

In this case, the criminal "process" was initiated when Plaintiff was charged with making a false larceny report on July 3, 2017. On July 5, 2017, Defendants, after the process was initiated, used the pending criminal prosecution as justification for Plaintiff's termination, and Plaintiff was further summoned to appear in court on the criminal charges. *See* **Exhibit A -** Plaintiff's Compl. ¶¶ 25-33; 79-80. Therefore, Defendants clearly and improperly used a process of the court *after* it had been initiated. *Lawrence*, 314 Mich. App. at 211.

In *Three Lakes Ass'n v Whiting.* 75 Mich App 564, 574-75 (1986), the Michigan Court of Appeals upheld the plaintiff's abuse of process claim. The court found that the defendant had a

[1] *Lawrence v Burdi*, 314 Mich. App. 203 (2016).
[2] *Friedman v Dorzoc*, 412 Mich. 1 (1981).
[3] *Friedman*, 412 Mich. at 31; Lawrence, 214 Mich. App. at 211 (quoting *Friedman*) (emphasis added).

collateral objective outside the litigation process. The primary objective for the litigation should have been money damages. But the court found that defendant's primary objective was to coerce plaintiff to end all opposition to defendants' condominium project.

Like the defendant in *Three Lakes*, Defendants in this case had an ulterior motive and collateral objective outside of the criminal process. The primary objective for the criminal prosecution should have been to seek justice for Plaintiff's alleged false larceny complaint. "The gravamen of the misconduct for which the liability stated in this section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." *Id*. at 571 (emphasis added). The reality is that Defendants knew they were retaliating against Plaintiff. Defendants wanted a way to cover their tracks and create a "smokescreen" for their conduct. Whether Plaintiff was convicted of larceny appeared to be of no importance to Defendants. Defendants not only falsified video footage that caused the criminal process to be initiated, but they also used the process *after it was initiated* for a collateral objective; i.e., the reason for Plaintiff's termination.

Plaintiff has properly pled claims of abuse of process. Defendants clearly abused the criminal process and used the process for a collateral objective outside the intended use, and Plaintiff suffered damages in the form of having to appear for criminal charges.

**2. Plaintiff Should Be Allowed to Amend Her Complaint**

Pursuant to MCR 2.118(A)(2), leave to amend pleadings should be freely given where justice so requires. "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure

deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Miller v. Chapman Contr.*, 477 Mich. 102, 104 (2007).

Although Plaintiff believes that her Complaint sufficiently pleads abuse of process, to the extent that the Court does not agree, Plaintiff submits that there are sufficient facts to support such a claim and would respectfully request the opportunity to amend her Complaint to plead the same.

**D. CONCLUSION**

WHEREFORE, Plaintiff prays that her motion for reconsideration is granted for the reasons set forth herein, and that her claim for abuse of process is reinstated.

Respectfully submitted,
CARLA D. AIKENS, P.C.

Date: September 5, 2020

By: /s/ Carla D. Aikens
Carla D. Aikens (P69530)
Ashley J. Burress (P79614)
Attorneys for Plaintiff
615 Griswold Street, Suite 709
Detroit, MI 48226
Tel: (844) 835-2993
Fax:(877) 454-168093
carla@aikenslawfirm.com

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on September 5, 2020 via E-File.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Carla D. Aikens

# EXHIBIT A

**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB**

TIMIKA RAYFORD

Plaintiff

Case No. 20- -CD

v.

Hon.

AMERICAN HOUSE ROSEVILLE I, LLC,
d/b/a AMERICAN HOUSE EAST I and
AMERICAN HOUSE

Defendant

_____/

CARLA D. AIKENS, P.C.
CARLA D. AIKENS (P69530)
ASHLEY J. BURRESS (P79614)
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Fax: (877) 454-1680

_____/

*There is no another civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court.*

**COMPLAINT**

NOW COMES, Plaintiff, TIMIKA RAYFORD, by and through her attorneys, CARLA D. AIKENS, PC, and states as follows in support of her claims:

**JURISDICTION**

1. At all relevant times, Plaintiff, Timika Rayford, was a resident of Macomb County.

2. Defendant(s) is a nursing care facility located in Macomb County and has a place of continuous and systematic place of business at 17255 Common Road, Roseville, Michigan 48066.
3. All relevant actions giving rise to this complaint took place in Macomb County, Michigan.
4. Jurisdiction is proper pursuant to the Elliot-Larsen Civil Rights Act ("ELCRA"), MCL 37.2801.

**VENUE**

5. Venue is proper in this Circuit Court because the unlawful employment discrimination giving rise to Plaintiff's claims occurred in Macomb County, and it is the county in which all parties are located.

**STATEMENT OF FACTS**

1. Plaintiff is a certified nurse's assistant who was hired by Defendant on February 14, 2017.
2. Plaintiff was successful at her job and was promoted to a supervisor prior to her termination.
3. Within a few months of her promotion, Plaintiff noticed began to notice inappropriate behaviors between upper management (majority white/Caucasian and male) and the CNA and LPNs (all or almost all of whom, at that time, were African American and/or female).
4. Plaintiff noticed that staff members (CNAs and LPNs) were not providing thorough care to the patients and were not completing their job duties in a responsible manner.
5. Patients would be left unattended and soiled for entire shifts and managers would ignore patient complaints.

6. Plaintiff became aware that her manager, Mr. Crowell, was having a sexual relationship with one of the staff members in exchange for receipt of preferential shifts/hours and special treatment.
7. It became well known amongst staff members that in order to advance or receive better treatment, sexual acts needed to be exchanged.
8. Plaintiff reported these incidents to the Human Resources department. The Human Resources department failed to take any actions.
9. Plaintiff reported her concerns, including the sexual relationship, to the State of Michigan.
10. In May, Plaintiff informed Mr. Crowell that she had witnessed another employee/supervisor, Juaneeka Anderson, fail to properly count patient medications and complete patient checks before she ended her shift.
11. The following day, Mr. Crowell scheduled a meeting with Plaintiff and Ms. Anderson to discuss the inaccuracies in the medicine count.
12. Ms. Anderson blamed Plaintiff for all inaccuracies, and Mr. Crowell sided with Ms. Anderson's incorrect rendition of the facts.
13. After the meeting, Ms. Anderson began retaliating against Plaintiff. She would initiate verbal disagreements on a daily basis and would intentionally make the workplace difficult and uncomfortable.
14. Plaintiff reported Ms. Anderson's negative treatment towards her. She also made a complaint regarding the negative way Ms. Anderson would treat patients in the facility.
15. Mr. Crowell did nothing to remedy the situation.
16. Mr. Crowell often ignored Plaintiff's concerns.

17. In late June or early July, Plaintiff was threatened by a patient who stated that he was going to "f*** her up." She immediately reported it to Mr. Crowell. He told Plaintiff to write a letter detailing the incident. However, the next day when Plaintiff returned, Mr. Crowell stated that the letter was gone. Upon knowledge and belief, Mr. Crowell took no further actions.
18. Plaintiff continued to deal with the hostile work environment.
19. Ms. Anderson was aware that a supervisor needed to be on the premises at all times. She would intentionally clock into her shift, but leave the premises for 5-10 minutes, forcing Plaintiff to stay until she returned. This would cause Plaintiff to be late for her second job, a position Ms. Anderson and Mr. Crowell knew she held.
20. When Plaintiff reported Ms. Anderson, Mr. Crowell ignored her concerns and instead called a meeting with Plaintiff and his supervisor, Renee Lotito, and wrongfully accused Plaintiff of not doing her job properly.
21. Mr. Crowell and Ms. Lotito accused Plaintiff of leaving a patient unclean/soiled. However, it was confirmed that the patient was soiled during the previous shift and that shift should have cleaned the patient, not Plaintiff nor her staff. Despite this clear determination, Mr. Crowell and Ms. Lotito placed the blame solely on Plaintiff. They wrote her up for two counts: not cleaning a patient and failure to supervise her staff.
22. By this time, it was clear that management was aware that Plaintiff reported Mr. Crowell's sexual acts to the State of Michigan. Management began looking for any reason to terminate Plaintiff.
23. On July 1, 2017, Plaintiff finished her shift and left the building. She realized she had left her purse in a locked room that was only accessible by supervisors and coordinators.

24. Plaintiff called Ms. Anderson, the supervisor on duty, but Ms. Anderson rejected her calls.

25. By the time Plaintiff arrived back to work, her purse had been stolen. She reported the theft to the Roseville Police Department and to management.

26. Management did nothing to remedy the situation. Instead, Mr. Crowell, Ms. Lotito, and Joel Woods, head of security, wrongfully and falsely accused Plaintiff of lying about the theft and accused her of falsifying a police report.

27. An officer from the Roseville Police Department was sent out to investigate the theft. This involved looking at tapes of Plaintiff leaving the premises.

28. Defendant provided the police officer with false information and documents.

29. Defendant, by and through its management, falsely produced a tape of Plaintiff leaving with her purse. She was thereupon charged with making a false police report and was terminated.

30. Defendant knew or should have known that providing false and inaccurate information to a police officer could potentially lead to criminal charges against Plaintiff.

31. At the hearing on Plaintiff's charges, it was revealed that the video footage Defendant provided was inaccurate, as it was not footage from the day her purse was actually stolen.

32. Plaintiff's charges were thereupon dismissed.

33. Despite the dismissal of charges, Plaintiff was terminated on July 5, 2017.

34. That Plaintiff sustained damages as a result of Defendant's actions and conduct.

35. Plaintiff requests relief as described below.

**COUNT I**
**HARASSMENT BASED ON RACE IN VIOLATION OF**

**THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

36. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

37. At all material times, Plaintiff was an employee, and Defendant her employer covered by, and within the meaning of, the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

38. A respondeat superior relationship existed because Mr. Crowell and Ms. Lotito had the ability to undertake or recommend tangible decisions affecting Plaintiff, and the authority to direct Plaintiff's daily work activity as alleged in the statement of facts.

39. Plaintiff, as an African-American woman, is a member of a protected class.

40. Plaintiff was subjected to discrimination on the basis of her membership in this protected class.

41. Defendant's conduct, as alleged more fully in the statement of facts, violated Michigan, Elliott-Larsen Civil Rights Act MCL 37.2101 et seq., which makes it unlawful to harass or discriminate against an employee because of that employee's race and or the color of their skin.

42. This conduct was unwelcomed.

43. The unwelcomed conduct was intended to or in fact did substantially interfere with the Plaintiff's employment and/or created an intimidating, hostile, or offensive work environment as alleged in the statement of facts.

44. Plaintiff notified Defendant of the unwelcomed conduct and Defendant failed to remedy the situation.

45. As a direct and proximate result of the Defendant's wrongful acts and omissions, Plaintiff

sustained loss of earnings, earning capacity, and fringe benefits and has suffered mental anguish, emotional distress, humiliation and embarrassment, and loss of professional reputation.

46. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT II**
**HARASSMENT BASED ON SEX AND GENDER IN VIOLATION OF THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

47. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

48. At all material times, Plaintiff was an employee, and Defendant was and employer covered by, and within the meaning of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

49. Defendant's conduct, as alleged herein, violated the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., which makes it unlawful to discriminate or harass a person on the basis of their sex or gender.

50. A respondeat superior relationship existed because Mr. Crowell and Ms. Lotito had the ability to undertake or recommend tangible decisions affecting Plaintiff, and the authority to direct Plaintiff's daily work activity as alleged in the statement of facts.

51. Plaintiff, as a female, is a member of a protected class.

52. Unlike her coworkers, Plaintiff refused to exchange sexual favors with management to receive favorable treatment.

53. Plaintiff was subjected to communication and conduct on the basis of her status as a member of this protected class including, but not limited to, incorrect pay, failure to remedy harassment from other employees, address threats from patients, and providing false information to the police prior to terminating her.

54. The communication and conduct was unwelcomed.

55. The unwelcomed conduct or communication was intended to and in fact did substantially interfere with Plaintiff's employment or created an intimidating, hostile, or offensive work environment as alleged in the statement of facts.

56. Plaintiff notified Defendant and its agents of the unwelcomed conduct and communication and Defendant failed to remedy the unwelcomed conduct or communication.

57. As a proximate result of Defendant's discriminatory actions, Plaintiff has suffered losses in compensation, earning capacity, humiliation, mental anguish, and emotional distress.

58. As a result of those actions and consequent harms, Plaintiff has suffered such damages in an amount to be proven at trial.

59. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT III**
**HOSTILE WORKPLACE ENVIRONMENT IN VIOLATION OF THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

36. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

37. At all material times, Plaintiff was an "employee" and Defendant was an "employer" covered by, and within the meaning of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

38. Defendant's conduct, as alleged throughout this complaint, violated Michigan's Elliott-Larsen Civil Rights Act MCL 37.2101 et seq., which makes it unlawful to create a work environment that a reasonable person would consider intimidation, hostile, or abusive.

39. A respondeat superior relationship existed because Defendant, and its agents, had the ability to undertake or recommend tangible decisions affecting Plaintiff, and the authority to direct Plaintiff's daily work activity.

40. Plaintiff was subjected to offensive communication or conduct by Defendant and its agents.

41. The unwelcomed conduct or communication was intended to, or in fact did, substantially interfere with Plaintiff's employment, and created an intimidating, hostile, or offensive work environment, as alleged throughout this complaint.

42. As a proximate result of Defendant's discriminatory actions, Plaintiff has suffered losses in compensation, earning capacity, humiliation, mental anguish, and emotional distress.

43. As a result of those actions and consequent harms, Plaintiff has suffered such damages in an amount to be proven at trial.

44. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT IV**
**RETALIATION IN VIOLATION OF**
**THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT ("ELCRA")**

45. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

46. At all material times, Plaintiff was an "employee," and Defendant was an "employer" covered by, and within the meaning of the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

47. Defendant's conduct, as alleged herein, violated the Michigan Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., which makes it unlawful to retaliate against an employee because she engaged in protected activity.

48. Plaintiff engaged in protected activity when she reported the multiple acts of harassment she consistently experienced from Defendant's employees and the inappropriate sexual relationship between her immediate supervisor and coworker.

49. Defendant and its agents were aware of the complaints filed by Plaintiff.

50. After Plaintiff engaged in protected activity, Defendant, by and through its agents, thereafter harassed Plaintiff and took several adverse employment actions against Plaintiff, including but not limited to:

    a) ostracizing Plaintiff;

    b) writing-up Plaintiff with false information;

    c) criticizing Plaintiff's work performance;

    d) subjecting Plaintiff to a hostile work environment;

    e) disciplining her;

    f) refusing to respond to Plaintiff's complaints of continued retaliation;

    g) making up false allegations against Plaintiff; and

    h) terminating Plaintiff's employment.

51. Defendant and its agents' unlawful actions were intentional, willful, malicious and/or done with reckless disregard for Plaintiff's rights.

52. Plaintiff notified Defendant and its agents of the unwelcomed conduct or communication and Defendant failed to remedy.

53. As a proximate result of Defendant's discriminatory actions, Plaintiff has suffered losses in compensation, earning capacity, humiliation, mental anguish, and emotional distress.

54. As a result of those actions and consequent harms, Plaintiff has suffered such damages in an amount to be proven at trial.

55. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT V**
**WRONGFUL DISCHARGE IN VIOLATION OF MICHIGAN PUBLIC POLICY AS TO DEFENDANT**

56. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

57. It is the longstanding public policy of the State of Michigan that there are three exceptions to the employment at-will doctrine, and an employer can be found to be liable for wrongful discharge, where:

a) Explicit legislative statements prohibiting the discharge, discipline or other adverse treatment of employees who act in accordance with a statutory right or duty;

b) The alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course or employment; and

c) The reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment.

58. Plaintiff's discharge resulted from her complaints and reports of harassment from employees.

59. These rights are conferred to Plaintiffs by well-established legislative enactments, specifically including, but not limited to, ELCRA.

60. Moreover, ELCRA, has explicit language that prohibits the discharge, discipline, or other adverse treatment of Plaintiff.

61. Despite these protections, Defendant retaliated against Plaintiff for attempting to protect her statutory rights.

62. As a result of Defendant's actions, and consequent harms caused, Plaintiff has suffered such damages in an amount to be proven at trial.

63. Plaintiff requests relief as described in the Prayer for Relief below.

**COUNT VI**
**MALICIOUS PROSECUTION**

64. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

65. On July 1, 2017, Plaintiff's purse was stolen from Defendant's property.

66. Unable to receive resolution from Defendant, Plaintiff reported the theft to the Roseville Police Department.

67. When Plaintiff reported the theft, Defendant, by and through its agents, falsely accused Plaintiff of "lying" about the theft.

68. Joel Woods, head of security, told Plaintiff that he had spoken to the police and that she would be charged "criminally for lying to the police" and would soon be arrested.

69. Plaintiff was not arrested, but a criminal investigation regarding filing a false police report was initiated.

70. Defendant initiated criminal investigation against Plaintiff when it provided the police with false footage and false information regarding the theft.

71. Upon information and belief, Defendant supplied the false information in an effort to:

a) cause damage to Plaintiff's professional reputation,

b) cause damage to Plaintiff's community reputation,

c) retaliate against Plaintiff for reporting harassment and a hostile work environment.

72. The criminal proceeding initiated by Defendant was undertaken with malice or for a purpose other than to bring Plaintiff to justice.

73. Defendant lacked probable cause to institute or maintain its allegations and actions.

74. The criminal proceeding arising from Defendant's false information was resolved in Plaintiff's favor.

75. As a direct result of Defendant's malice in making allegations that initiated the criminal investigation, Plaintiff has suffered damage, including but not limited to, harm to her professional reputation and reputation in the community.

76. Plaintiff has been unable to be employed in a similar position with similar wage since her termination.

77. Plaintiff requests the relief as described in the Prayer for Relief below.

**COUNT VII**
**ABUSE OF PROCESS**

78. Plaintiff hereby incorporates by reference the preceding paragraphs as if fully set forth herein.

79. Defendant initiated criminal proceedings against Plaintiff in effort to have her terminated and to damage her professional and community reputation.

80. Plaintiff had to appear in Court for the criminal proceedings arising from Defendant's false allegations.

81. The above actions constitute an ulterior purpose for the criminal proceedings.

82. The allegations and misuse of the criminal investigation process was improper since Defendant knew, or should have known, that the allegations were false.

83. Defendant's abuse of the criminal investigation process has caused Plaintiff to suffer damages, including but not limited to, mental anguish.

84. Plaintiff requests the relief described in the Prayer of Relief below.

**PRAYER FOR RELIEF**

WHEREFORE PLAINTIFF, Timika Rayford, respectfully requests that this Court enter judgment against Defendant as follows:

1. Compensatory damages;
2. Exemplary damage;
3. An award of lost wages and the value of fringe benefits, past and future;
4. An award of interest, costs, and reasonable attorney fees, and equitable relief; and
5. Any other relief permitted as set forth in the Acts hereunder.

Respectfully Submitted,

/s/ Ashley J. Burress
CARLA D. AIKENS, P.C.
CARLA D. AIKENS (P69530)
ASHLEY J. BURRESS (P79614)
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# EXHIBIT 13

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

TIMIKA RAYFORD,

Plaintiff,

vs.

Case No. 2020-1548-CD
Hon. Michael E. Servitto

AMERICAN HOUSE ROSEVILLE I LLC, et al,

Defendant.
_____/

OPINION AND ORDER

The Plaintiff moves this Court to reconsider its 8/17/2020 order granting the Defendant's motion for summary disposition. The Plaintiff contends the Court erred when it ruled that the Defendant's alleged use of a "pending criminal prosecution as justification for the Plaintiff's termination" of employment did not constitute a meritorious claim of abuse of process.

The Plaintiff claims the Defendant provided false information to police with the intention that a criminal prosecution be initiated. After a criminal charge was levied against the Plaintiff, the Defendant terminated the Plaintiff's employment. "To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v. Dozorc*, 412 Mich. 1, 30 (1981). The Plaintiff contends that the Defendant used the criminal prosecution for the ulterior purpose of justifying her termination. *Plaintiff's Motion for Reconsideration*, pg. 4. Assuming the Defendant acted with an ulterior purpose, the question before the Court is whether

the Defendant's use of the existence of a criminal prosecution to justify the Plaintiff's termination of employment constituted an "act in the use of process."

In support of her motion for reconsideration, the Plaintiff cites *Three Lakes Ass'n v Whiting* in which the Court of Appeals reversed a trial court order that summarily dismissed an abuse of process cause of action. 75 Mich. App. 564, 574 (1977). In *Three Lakes Ass'n*, the Court found the plaintiff sufficiently pled an abuse of process claim when it alleged the defendants proceeded with civil claims for damages for the "ulterior and collateral purpose of coercing plaintiff to end all opposition to defendants' condominium project." *Three Lakes Ass'n*, 75 Mich. App. at 574. The Court emphasized that the "identifiable act" alleged was the offer "to dismiss the damage action for tortious conduct upon the ending … [of] all opposition to the project, be it proper or tortious." *Id*. at 574. Importantly, the "identifiable act" was the defendant actively using the lawsuit to extort an ulterior purpose from the plaintiff after it was filed.

The Court of Appeals distinguished the *Three Lakes Ass'n* facts from a Michigan Supreme Court case that presented circumstances analogous to the matter before this Court. *See Spear v Pendill*, 164 Mich 620 (1911). In *Spear*, the defendant signed a criminal complaint against plaintiff for the ulterior purpose of causing "trouble" for plaintiff due to monies owed. 164 Mich at 621. In *Three Lakes* Ass'n, the Court noted that in *Spear*, "once the warrant had been issued the defendant had no further connection with the [criminal] proceedings." 75 Mich. App. at 572. Nevertheless, the Court recognized criminal proceedings could be used for ulterior purposes. *Three Lakes Ass'n*. at 574 (citing *Marlatte v* Weickganant, 147 Mich 266 (1907)). *Id*. at 574. As in *Spear*, the defendant in *Marlatte* caused the issuance of a criminal warrant against the plaintiff due to an unpaid debt. 147 Mich at 268. Yet, in *Marlatte*, the defendant offered to dismiss the warrant if the plaintiff paid the debt. Thus, Michigan jurisprudence establishes that "an act in the

use of process" entails the manipulation or threatened manipulation of proceedings that already have been initiated.

As in *Spear*, the Plaintiff alleges no further connection between the Defendant and the criminal proceedings after the prosecution was initiated. Further, in contrast to both *Three Lakes Ass'n* and *Marlatte*, the Plaintiff makes no allegation that the Defendant leveraged dismissal of the criminal prosecution or used any other mechanism of the proceedings to secure the ulterior purpose of justifying employment termination. Rather, the Plaintiff claims that the criminal proceeding itself provided the justification. In other words, the Plaintiff only pleads that the Defendant accomplished the justification for terminating the Plaintiff's employment by merely initiating the criminal proceedings and not by committing acts after the filing of the criminal complaint. As such, the Plaintiff committed the act to achieve an ulterior purpose before charges were filed and this motion for reconsideration must be dismissed.

As such, this motion for reconsideration has failed to demonstrate a palpable error by which this Court has been misled or shown that a different disposition of the motion must result and is therefore DENIED. MCR 2.119(F)(3).

IT IS SO ORDERED.

Dated: 10/2/2020

/s/ Michael E. Servitto
Hon. Michael E. Servitto, Circuit Judge

MES/AEE

COUNTY OF MACOMB
STATE OF MICHIGAN

# EXHIBIT 14

In The Court of Appeals for the State of Michigan

On Appeal from the Circuit Court for the County of Macomb
Hon. Michael E. Servitto, Presiding

| | |
|---|---|
| TIMIKA RAYFORD,<br><br>PLAINTIFF-APPELLANT,<br>VS.<br><br>AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE,<br><br>DEFENDANTS-APPELLEES. | Macomb County Case No.: 20-001548-CD<br><br>Court of Appeals Case No.: 355232 |

**APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

Dated: March 9, 2021

Respectfully Submitted,

CARLA D. AIKENS, P.C.

*/s/ Carla D. Aikens*
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carla@aikenslawfirm.com
*Attorneys for Plaintiff-Appellant*

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## STATEMENT OF JURISDICTION

On or about July 17, 2020, Defendants filed a Motion for Summary Disposition; and, Plaintiff- Appellant thereafter timely responded by filing her response. ***See* Exhibit A: Pl.'s Resp. to Defs.' Mot. for Summ. Disp.**

On August 17, 2020, the trial court heard oral argument related to Defendants' motion for summary disposition. *See* **Exhibit B: August 17, 2020 Hearing Tr. on Defs.'Mot. for Summ. Disp**. At the hearing, the trial court rendered its ruling dismissing Plaintiff-Appellant's claims in full. *Id.* at 4:5-8:25.

Shortly thereafter, on August 18, 2020, the trial court entered its order granting Defendants' Motion for Summary Disposition. ***See* Exhibit C: Order Granting Defs.' Mot. For Summ. Disp**.[1]

On September 7, 2020, Plaintiff timely filed a motion requesting that the trial court reconsider its ruling. ***See* Exhibit D: Pl.'s Mot. for Recon**. However, on October 2, 2020, the trial court entered an opinion and order denying Plaintiff-Appellant's Motion for Reconsideration. **Exhibit E: Order Denying Pl.'s Mot. for Recon**.

Thereafter, Plaintiff timely filed this claim of appeal on October 23, 2020. Plaintiff-Appellant is pursuing this appeal as to the grant of Defendants' motion for summary disposition. This Court has jurisdiction over Plaintiff's appeal pursuant to MCL 600.308(1)(a), which provides that parties may appeal to the Michigan Court of Appeals "all final judgments from the Circuit Court shall be appealable as of right," MCR 7.203(B), and MCR 7.205.

[1] The Order is dated August 17, 2020, but the Order was not electronically served on the parties until the following morning, on August 18, 2020.

## QUESTIONS PRESENTED

1. Did the trial court err in dismissing Plaintiff-Appellant's abuse of process claim, where she alleged that she had been terminated as a result of the improper criminal charge that Defendants-Appellees' pursued?

**Plaintiff-Appellant answers:** **"Yes."**

**Defendant-Appellee would answer:** **"No."**

2. Did the trial court err in not providing Plaintiff-Appellant with an opportunity to amend her complaint to plead facts relative to her abuse of process claim, to the extent the same were alleged to not be legally sufficient?

**Plaintiff-Appellant answers:** **"Yes."**

**Defendant-Appellee would answer:** **"No."**

3. Did the trial court err in finding that the document provided to Plaintiff – that was not provided in response to her request for her employment file – contractually limited her to a shortened six-months statute of limitations, where no discovery has taken place regarding the document or any of the facts alleged?

**Plaintiff-Appellant answers:** **"Yes."**

**Defendant-Appellee would answer:** **"No."**

4. Did the trial court err in finding that Plaintiff-Appellant was not entitled to estoppel and/or tolling where Defendants-Appellees did not provide her with her employment file or the document in question, as required under the Employee Right to Know Act?

**Plaintiff-Appellant answers:** **"Yes."**

**Defendant-Appellee would answer:** **"No."**

## STATEMENT OF FACTS

As set forth in her complaint, Plaintiff-Appellant, Timika Rayford, is a certified nurse's assistant who was hired by Defendants-Appellees on February 14, 2017. **Exhibit A: Pl.'s Resp. to Defs.' Mot. for Summ. Disp.** at 1. She was placed in a position of Patient Care Professional where she was very successful. She was ultimately promoted to supervisor position. ***Id.*** at 2.

As a supervisor, Ms. Rayford began noticing the lack of thorough care and mismanagement of the patients by staff members. ***Id.*** This irresponsible conduct was seen in upper management, as well. ***Id.*** Plaintiff-Appellant became aware that her manager, Mr. Crowell was having a sexual relationship/affair with one of the staff members. ***Id.*** In return, that staff member was given preferential shifts/hours and special treatment. ***Id.*** It became well known amongst staff members that in order to advance or receive better treatment, sexual acts needed to be exchanged. Plaintiff-Appellant reported these incidents to the Human Resources department. ***Id.*** The Human Resources department failed to take any actions. ***Id.*** Plaintiff-Appellant reported her concerns, including the sexual relationship, to the State of Michigan. ***Id.***

After her reporting, Mr. Crowell began to retaliate against Ms. Rayford. ***Id.*** If Ms. Rayford had an incident with a patient or staff member, Mr. Crowell would ignore her concerns and fail to take any action. ***Id.*** Mr. Crowell failed to fulfil his duties as a manager, and purposely chose not to provide support to Ms. Rayford. ***Id.*** Mr. Crowell would blame Ms. Rayford, instead of the correct staff member, for actions, such as failure to clean a patient or leaving a patient unattended. ***Id.*** He would then give Ms. Rayford a "write-up" even though it was clear that another staff member was at fault. ***Id.*** Mr. Crowell's failure to take action or seek remedies furthered the hostile environment Ms. Rayford was forced to endure. ***Id.***

On July 1, 2017, Plaintiff-Appellant finished her shift and left the building. ***Id.*** She realized she had left her purse in a locked room that was only accessible by supervisors and coordinators. ***Id.*** By the time Plaintiff arrived back to work, her purse had been stolen. ***Id.*** She reported the theft to management. ***Id.*** However, management did nothing to remedy the situation. ***Id.*** Ms. Rayford then reported the theft to Roseville Police Department. ***Id.*** Instead of management actually providing assistance, they used the situation as a means to further retaliate against Ms. Rayford. ***Id.*** at 2-3. Ms. Rayford was called into a meeting with members of management, including Mr. Crowell, Ms. Lotito from human resources, and Joel Woods, the head of security. ***Id.*** at 3. During that meeting, management wrongfully and falsely accused Ms. Rayford of lying about her purse being stolen and accused her of falsifying a police report. ***Id.*** Ms. Rayford was informed that she was being terminated for filing a false police report. ***Id.*** Thereafter, Defendants wrongfully terminated Ms. Rayford on July 5, 2017. ***Id.*** Following her termination, on July 5, 2017, Ms. Rayford wrote a letter requesting that she see the security footage and any documentation that determined her termination, citing the Bullard-Plawecki Employee Right to Know Act. ***Id.*** at Exhibit A – Letter from Timika Rayford. However, Defendants never provide the footage nor any documentation to her. ***Id.***

As a result of Defendants' wrongful actions, Ms. Rayford was charged with making a false larceny report. ***Id.*** at Exhibit B – Citation. Ms. Rayford had to appear for a hearing for the charge on September 7, 2017. ***Id.*** at 3. Defendants knew or should have known that providing false and inaccurate information to a police officer could potentially lead to criminal charges against Ms. Rayford. ***Id.*** At the hearing on Ms. Rayford's charges, it was revealed that the video footage Defendants provided was incorrectly date-stamped and made to appear to be the day her

purse was stolen. ***Id.*** However, it was actually footage from a few days prior. Ms. Rayford's charges were thereupon dismissed. ***Id.***

On or about April 24, 2020, Plaintiff-Appellant filed a complaint against Defendants-Appellees, alleging: harassment (race and gender), hostile work environment, and retaliation under the Michigan Elliot-Larsen Civil Rights Act ("ELCRA"), MCL § 37.2101et seq (Counts I, II, III, IV); wrongful discharge in violation of public policy (Count V); malicious prosecution (Count VI); and abuse of process (Count VII). ***See generally*** **Exhibit A: Pl.'s Resp. to Defs.' Mot. for Summ. Disp. at Exhibit A – Pl.'s Compl.**

On July 17, 2020, Defendants-Appellees filed a motion requesting that the trial court dismiss Plaintiff's claims, stating that Plaintiff-Appellant's claims were either time-barred, or in the case of the abuse of process claim, that her complaint was not legally sufficient. Plaintiff-Appellant filed a response to said motion on August 10, 2020.

On August 17, 2020, the trial granted Defendants-Appellees' Motion for Summary Disposition, finding that Plaintiff-Appellants' employment-related claims were all time-barred due to an agreement that Plaintiff-Appellant was alleged to have signed but that was not provided to her when she requested her employment file. **Exhibit B: August 17, 2020 Hearing Tr. on Defs.'Mot. for Summ. Disp**.; **Exhibit C: Order Granting Defs.' Mot. For Summ. Disp**. The trial court also held that Plaintiff-Appellant had failed to properly plead an abuse of process claim. ***See generally*** **Exhibit B**.

Plaintiff-Appellant filed a motion for reconsideration of the Court's ruling, which was denied on October 2, 2020. ***See*** **Exhibit D: Pl.'s Mot. for Recon**.; **Exhibit E: Order Denying Pl.'s Mot. for Recon**. Plaintiff filed the instant appeal on October 23, 2020.

## STANDARD OF REVIEW

This Honorable Court reviews de novo the grant or denial of a motion for summary disposition. *Saffian v. Simmons*, 477 Mich. 8, 12 (2007); *Kreiner v. Fischer*, 471 Mich. 109, 129 (2004). A court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Kokx v. Bylenga*, 241 Mich App 655, 658-59 (2000).

## LAW AND ARGUMENT

### I. The Shortened Limitations Period is Invalid and an Unconscionable Contract of Adhesion

A contract of adhesion exists when the contractual provision at issue left the plaintiff with no realistic choices or options considering the parties' relative bargaining power and strength and alternate source of supply. *General Motors v. Paramount Metal Products Co*., 90 F Supp 2d 861 (ED Mich 2000). A contract of adhesion is frequently found where a contract is offered to consumers on a standardized form on a take it or leave it basis. *USAA Group v. Universal Alarms,* 158 Mich App 633 (1987).

In *Herweyer v. Clark Hwy Services, Inc,* 455 Mich. 14 (1997), the Michigan Supreme Court discussed adhesion contracts in employment contracts:

> The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period **is a bargained-for term of the contract**. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings. **In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable**.

*Id*. at 20-21 (emphasis added). The *Herweyer* court further noted the difference between employment contracts and contracts for good and services:

> Employment contracts differ from bond contracts. An employer and employee often do not deal at arms' length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike in *Camelot*[2] where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny.

*Id.* at 21. In *Rory v. Continental Ins. Co.*, 473 Mich. 457 (2005), the Michigan Supreme Court declined to take the view in *Herweyer* and recognized that there is a difference between employment contracts and contracts for goods or services. *Rory* overruled *Herweyer*, in part, but the *Rory* court did state "[a] party may avoid enforcement of an 'adhesive' contract only by establishing one of the traditional contract defenses, such as fraud, duress, unconscionability, or waiver." *Rory*, 473 Mich. at 489. Importantly, *Rory* did not involve an employment agreement, so there is an open question of whether it should be applied to an employment situation which is inherently one-sided, particularly where the employee has already commenced work at the time they are requested to sign the alleged agreement.

In the context of contracts of adhesion, in order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. *Northwest Acceptance Corp v. Almont Gravel*, *Inc*, 162 Mich. App. 294, 302 (1987). Procedural unconscionability exists where the weaker party had no realistic alternative but to accept the term. *Allen v. Mich. Bell Tel Co*, 18 Mich. App. 632, 637 (1969). A term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. *Gillam v. Michigan Mortgage-Investment Corp*, 224 Mich. 405, 409 (1923).

[2] *Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich. 118, 127 (1981).

In the present case, Defendants-Appellees based their motion for summary disposition on an alleged "Employee Handbook Acknowledgement Sheet" (hereinafter referred to as the "Acknowledgment Sheet") that they offered as Exhibit 4 to their motion for summary disposition in the trial court, which provides that:

> I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day 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."

**Exhibit F: Defs.' Mot. for Summ. Disp. at Exhibit 4**.

Defendants-Appellees allege that the Acknowledgment Sheet they produced is a standalone agreement that is separate from the Employee Handbook. *See Defs.' Mot. for Summ. Disp. at 2*. Ms. Rayford began her employment with Defendant on February 14, 2014. The Acknowledgment Agreement was executed on February 20, 2014. Therefore, the alleged agreement was signed **after** Ms. Rayford was hired. This is a necessary distinction, because it goes to the procedural and substantive unconscionability of the Acknowledgment Sheet. Procedurally, the agreement was unconscionable because Ms. Rayford did not have the ability to negotiate the terms and was provided no additional consideration for the alleged Acknowledgment Sheet. *Allen, supra,* at 687. Therefore, she could not provide her employment as consideration since it had already been offered by Defendants, accepted by Plaintiff-Appellant, and she had been working for nearly a week. Because no discovery was undertaken, Plaintiff-Appellant further could not contest any of the terms under which the document was even provided to her.

Substantively, the agreement was unconscionable because the inequity could be deemed to shock the conscious. *Gilliam, supra*, at 409. Plaintiff-Appellant should not have a three year statute of limitations for Michigan state law employment discrimination claims shortened to six months without it being clear that she knowingly waived such a right. There is no evidence that she understood what she was signing, even if it is found that this document constituted a separate agreement. On the present facts, there was a complete lack of consideration for this adhesion contract, which made it procedurally and substantively unconscionable.

Plaintiff-Appellant respectfully requests that this Court reverse the circuit court and find that Defendants-Appellees' Motion for Summary Disposition should have been denied, as the Acknowledgment Agreement that purported to shorten the statute of limitation period for the Elliot Larsen Civil Rights Act constituted an unconscionable contract of adhesion.

## II. The Acknowledgement Sheet was Never Provided to Ms. Rayford.

As noted above, on July 5, 2017, Ms. Rayford sent a letter to Defendants-Appellees requesting that she be allowed to view any video footage that related to her termination and supporting documents. **Exhibit A: Pl.'s Resp. to Defs.' Mot. for Summ. Disp. at Exhibit A – Letter from Timika Rayford**. In this letter, she specifically referenced the Bullard-Plawecki Employee Right to Know Act ("ERKA" or "the Act"). Pursuant to the Act:

> An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee.

MCL 423.503. Defendants-Appellees failed to respond at all to Ms. Rayford's written request. Defendants-Appellees never provided Ms. Rayford with her employment file nor made it available for review. Moreover, on March 12, 2018, counsel for Ms. Rayford sent a letter to

Defendant explaining the discrimination that Ms. Rayford had experienced and her intent to file suit if a remedy could not be reached, and counsel for Defendants responded and never mentioned an alleged Acknowledge Agreement or the 180-day time limitation, which would have expired by the time the letter had been received by Defendants-Appellees. **Exhibit A: Pl.'s Resp. to Defs.' Mot. for Summ. Disp. at Exhibit C – Defendants' Demand Response**.

Under MCL 423.502(2) "[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." Personnel records are any documents 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). "Information 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." *Cofessco Fire Prot., L.L.C. v. Bruce Steele, Vanguard Fire & Supply Co.,* 2010 WL 3928724, at *4 (Mich. Ct. App. Oct. 7, 2010) (unpublished) (attached hereto as **Exhibit A: Pl.'s Resp to Def. Mot. for Summ. Disp. at Exhibit D**).

In this case, Defendants-Appellees failed to uphold their statutory duty to provide Ms. Rayford's employee file, as proscribed by the ERKA. Defendants-Appellees further failed to note the alleged shortened period or provide a copy of the Acknowledgement Agreement to Ms. Rayford and when corresponding with her counsel. Because Defendants-Appellees have withheld material information for Ms. Rayford that has adversely affected her rights, and Ms. Rayford was wholly unaware of this Acknowledgement Agreement until Defendants filed the present motion, Defendants should be estopped from now using the withheld information to dismiss her claims.

### III. Plaintiff Properly Pled A Claim For Abuse Of Process

To recover upon a theory of abuse of process, a party must plead and prove an ulterior purpose and an act in the use of process that is improper in the regular prosecution of the proceeding. *Young v. Motor City Apartments Ltd. Dividend Housing Asso*. *No. 1 & No. 2*, 133 Mich. App. 671 (1984). "[A] plaintiff making out a claim for abuse of process must allege a use of process for a purpose outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive." *Id*., at 681.

As the Court of Appeals stated in *Bonner v. Chicago Title Ins. Co*., 194 Mich. App. 462, 472 (1992), "a meritorious claim of abuse of process [is] a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure." Further, "there must be some corroborating act that demonstrates the ulterior purpose." *Id* (citing *Vallance v. Brewbaker,* 161 Mich. App. 642, 646 (1987).

Defendants-Appellees' Motion for Summary Disposition called attention to *Lawrence v. Burdi*[3] and *Friedman v. Dorzoc*[4] to emphasize the fact that an "action for the abuse of process lies for the improper use of a process *after* it has been issued, not for maliciously causing it to issue.[5]" Plaintiff-Appellant does not dispute the law. Rather, she respectfully requests that this Court find what happened here to constitute "improper use after initiation."

In this case, the criminal "process" was initiated when Plaintiff-Appellant was charged with making a false larceny report on July 3, 2017. On July 5, 2017, Defendants-Appellees, after the process was initiated, used the pending criminal prosecution as justification for Plaintiff-Appellant's termination, and Plaintiff-Appellant was further summoned to appear in court on the

[3] *Lawrence v. Burdi*, 314 Mich. App. 203 (2016).
[4] *Friedman v. Dorzoc*, 412 Mich. 1 (1981).
[5] *Friedman*, 412 Mich. at 31; *Lawrence*, 214 Mich. App. at 211 (quoting *Friedman*, 412 Mich. at 31) (emphasis added).

criminal charges. *See* **Exhibit A: Pl.'s Resp. to Summ. Disp. at Exhibit A - Plaintiff's Compl. ¶¶ 25-33; 79-80**. Therefore, Defendants-Appellees clearly and improperly used a process of the court **after** it had been initiated. *Lawrence*, 314 Mich. App. at 211.

In *Three Lakes Ass'n v. Whiting*. 75 Mich App 564, 574-75 (1986), the Michigan Court of Appeals upheld the plaintiff's abuse of process claim. The court found that the defendant had a collateral objective outside the litigation process. The primary objective for the litigation should have been money damages. But the court found that defendant's primary objective was to coerce plaintiff to end all opposition to defendants' condominium project. *Id.*

Like the defendant in *Three Lakes*, Defendants-Appellees in this case had an ulterior motive and collateral objective outside of the criminal process. The primary objective for the criminal prosecution should have been to seek justice for the alleged false larceny complaint. "The gravamen of the misconduct for which the liability stated in this section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." *Id*. at 571 (emphasis added). The reality is that Defendants-Appellees knew they were retaliating against Plaintiff-Appellant. Defendants-Appellees wanted a way to cover their tracks and create a "smokescreen" for their conduct. Whether Plaintiff-Appellant was convicted of larceny appeared to be of no import to Defendants. Defendants-Appellees not only falsified video footage that caused the criminal process to be initiated, but they also used the process **after it was initiated** for a collateral objective: to terminate Plaintiff-Appellant's employment.

Plaintiff-Appellant has properly pled claims of abuse of process. Defendants-Appellees clearly abused the criminal process and used the process for a collateral objective outside the

intended use, and Plaintiff-Appellants suffered damages in the form of having to appear for criminal charges.

In the present case, Defendants-Appellees, by and through their management, had an ulterior motive in using the criminal court proceedings outside the given purpose. Defendants-Appellees knew or should have known that the allegations that Ms. Rayford stole her own purse were false, particularly given that the alleged video was not even from the proper date. Defendants-Appellees provided false information to the Roseville Police Department and used the charge of "Filing a False Larceny Report" as justification for terminating Ms. Rayford.

In their motion for summary disposition, Defendants-Appellees go through great lengths to draw a distinction between initiating the wrongful criminal process and taking actions after the process. *See, e.g.*, Defs.' Mot. for Summ. Disp. at 10. This distinction is without merit. Ms. Rayford's termination occurred **after** the Roseville police cited her for allegedly making a false report. The citation was initiated because Defendants-Appellees provided false information to the officers. Thus, they abused the criminal investigation for a reason outside the intended purpose of the process, and then terminated her after the process had ensued. Ms. Rayford, the actual victim, did not have the charges dropped until after September 7, 2017, when she had to appear for a hearing and plead her innocence – another damage she suffered and alleged because of Defendants-Appellees abuse of the court system. Defendants-Appellees' argument to the contrary should have been rejected by the trial. But for Defendants providing false statements and video footage to the Roseville police, Ms. Rayford would have never been charged, appeared in court to defend herself, and fired for being charged for filing a false police report.

Defendant-Appellees attempt to ignore the fact that Plaintiff-Appellant's current complaint states that she was terminated as a result of the charges. *See* **Exhibit A: Pl.'s Resp. to**

**Summ. Disp. at Exhibit A - Plaintiff's Compl. ¶** 29. While Plaintiff-Appellant should have been allowed to amend her complaint to make this clear to the extent that it was not, the termination constitutes damages beyond just causing the process to issue. Plaintiff properly pled claims of abuse of process. The injury complained of in an action is one to the person and the applicable statute of limitations is three years. *Moore v. Michigan Nat'l Bank*, 368 Mich. 71 (1962); MCL 600.5805(2). In addition, this is not an employment related action, and it did not accrue until after she was terminated. To wit, the agreement itself indicates that the statute of limitations is shortened to within six months of the "employment action." As Plaintiff-Appellant was not employed at the time this cause accrued, pursuing criminal charges could not be considered an "employment action," and Plaintiff's abuse of process claim should have been permitted to proceed, if this Honorable Court agrees with the trial court with respect to the applicability of the six-month statute of limitations.

## IV. Plaintiff Should Have Been Allowed to Amend Her Complaint.

Pursuant to MCR 2.118(A)(2), leave to amend pleadings should be freely given where justice so requires. "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Miller v. Chapman Contr.*, 477 Mich. 102, 104 (2007).

Although Plaintiff-Appellant believes that her Complaint sufficiently pled abuse of process, and other employment claims, to the extent that this Honorable Court does not agree, Plaintiff-Appellant submits that there are sufficient facts to support such a claim and would respectfully request the opportunity to amend her Complaint to plead the same in the trial court.

## CONCLUSION

WHEREFORE, Plaintiff-Appellant prays that the judgment granting summary disposition to Defendants-Appellees' be overturned for the reasons set forth herein.

Respectfully submitted,
CARLA D. AIKENS, P.C.

Date: March 9, 2021

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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on March 9, 2021 via E-File.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Patricia Ramirez

# EXHIBIT 15

STATE OF MICHIGAN
IN THE COURT OF APPEALS

TIMIKA RAYFORD,

Plaintiff/Appellant,

v

AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE,

Defendant/Appellee.

Court of Appeals
Docket No. 355232

Macomb County Circuit Court
Case No. 20-001548-CD

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**DEFENDANT/APPELLEE AMERICAN HOUSE ROSEVILLE I, LLC d/b/a AMERICAN HOUSE EAST I AND AMERICAN HOUSE'S RESPONSE BRIEF TO PLAINTIFF/APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

Defendant/Appellee, American House Roseville I, LLC, d/b/a American House East I and American House agrees that this Court has jurisdiction to hear Plaintiff's appeal.

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Trial Court erred by dismissing Plaintiff's claims as time barred because Plaintiff contractually agreed to a six-month limitations period for all claims arising out of her employment with American House and all of her claims fall within the scope of that agreement?

   Defendant/Appellee contends the answer is "No"

   Plaintiff/Appellant contends the answer is "Yes"

   The Trial Court answered "No"

2. Whether the Trial Court erred by rejecting Plaintiff's arguments that the contractually-shortened limitations period was unconscionable and/or should be excluded pursuant to the Bullard-Plawecki Employee Right to Know Act?

   Defendant/Appellee contends the answer is "No"

   Plaintiff/Appellant contends the answer is "Yes"

   The Trial Court answered "No"

3. Whether the Trial Court erred by dismissing Plaintiff's abuse of process claim (in the alternative) for failing to state a claim, and for denying Plaintiff's Motion for Reconsideration as to the same, because Plaintiff's allegations fail to assert a proper abuse of process claim as a matter of law?

   Defendant/Appellee contends the answer is "No"

   Plaintiff/Appellant contends the answer is "Yes"

   The Trial Court answered "No"

4. Whether Plaintiff should be permitted to amend her Complaint to allegedly assert unspecified allegations to support her abuse of process claim when she failed to respond to American House's argument in its Motion for Summary Disposition as to the same, she improperly made her request for the first time in her Motion for Reconsideration, and any amendment would be futile?

   Defendant/Appellee contends the answer is "No"

   Plaintiff/Appellant contends the answer is "Yes"

   The Trial Court did not answer

5. Whether, in the alternative, American House was entitled to summary disposition as to Plaintiff's malicious prosecution and public policy claims because the former is barred by Michigan's traditional statute of limitations and the former is preempted by binding Michigan law?

Defendant/Appellee contends the answer is "Yes"

Plaintiff/Appellant presumably contends the answer is "No"

The Trial Court did not answer

6. Whether Plaintiff forfeited her right to oral argument on appeal when she failed to timely file her brief on appeal even if she is granted an extension of time to file her brief?

Defendant/Appellee contends the answer is "Yes"

Plaintiff/Appellant presumably contends the answer is "Yes"

## INTRODUCTION

Defendant/Appellee, American House Roseville I, LLC, d/b/a American House East I and American House ("American House") hired Plaintiff/Appellant Timika Rayford ("Plaintiff") in February 2017. As consideration for her employment with American House, Plaintiff contractually agreed to a six-month limitations period for any claims arising out of her employment. Plaintiff alleges that between **February and July 2017**, she experienced harassment and a hostile work environment while working for American House. She also alleges than in **July 2017**, she was cited for making a false police report (about her purse being stolen at work) allegedly based on false information provided by American House employees. These alleged charges were dropped days later. After those events allegedly took place, American House terminated Plaintiff's employment on or about **July 7, 2017**.

Plaintiff filed this lawsuit against American House in **April 2020** – more than **two years and nine months** after her allegations occurred. Plaintiff asserts seven claims arising out of her employment with American House: harassment (race and gender), hostile work environment, and retaliation under the Michigan Elliot-Larsen Civil Rights Act ("ELCRA"), MCL § 37.2101 *et seq* (Counts I, II, III, IV); wrongful discharge in violation of public policy (Count V); malicious prosecution (Count VI); and abuse of process (Count VII). Critically, all of Plaintiff's claims accrued before her employment with American House ended in July 2017. Meaning, at the latest, Plaintiff was required to assert her claims by January 2018, which she failed to do.

American House moved for summary disposition asserting *inter alia* Plaintiff's claims were time barred pursuant to the contractual six-month limitations period and, in the alternative, various claims (including her abuse of process claim) failed on their face as a matter of law.

On August 17, 2020, the Trial Court entered an Order granting American House's motion and dismissing Plaintiff's claims. The Trial Court correctly held that Plaintiff's claims were time

barred because she voluntarily agreed to a six-month limitations period for any claims arising out of her employment and all of her claims fell within the scope of that agreement. The Trial Court also held (in the alternative) that Plaintiff failed to properly state a claim for abuse of process. Plaintiff filed a Motion for Reconsideration as to her abuse of process claim only, which the Trial Court properly denied on October 2, 2020.

Plaintiff does not dispute that she contractually agreed to a six-month limitations period for any claims arising out of her employment or that her lawsuit was untimely pursuant to that agreement. Instead, Plaintiff argues on appeal that the agreement should not be enforced because it is unconscionable and is precluded under the Bullard-Plawecki Employee Right to Know Act ("BPERKA"), MCL § 423.501 *et seq*. The Trial Court addressed and correctly dismissed these arguments because: (1) this Court has repeatedly held that a contractually-shortened limitations period is not unconscionable and Plaintiff advances the same arguments this Court has consistently rejected; and (2) the BPERKA is inapplicable because it is undisputed Plaintiff never requested a copy of her personnel file.

Plaintiff also asserts on appeal that she properly pled a claim for abuse of process. The Trial Court disagreed because Plaintiff does not allege American House improperly used a court process for an ulterior purpose. Plaintiff erroneously believes extra-judicial actions without the use of any court process is sufficient to state a claim for abuse of process. Plaintiff is incorrect and her position is directly contrary to more than 100 years of binding Michigan law.

Finally, Plaintiff asserts she should be allowed to amend her Complaint to add unspecified allegations to her abuse of process claim. Plaintiff waived this request by failing to properly raise it below and any amendment would be futile.

Therefore, as set forth more fully below, American House respectfully requests that this Court affirm the Trial Court's rulings and the dismissal of Plaintiff's claims.

## COUNTER-STATEMENT OF FACTS

### A. Plaintiff is Hired By American House and She Agrees to a Contractually-Shortened Limitations Period For Any Claims Arising Out of Her Employment.

American House hired Plaintiff on or about February 14, 2017 (**Ex. 1**, Complaint, ¶ 1).[1] As consideration for her employment, Plaintiff signed an Employee Handbook Acknowledgement agreement (**Ex. 2**, 2/20/2017 Acknowledgment).[2] The Acknowledgement Plaintiff signed is a standalone agreement that is independent of the Handbook (*See* **Ex. 4**, Handbook Table of Contents). This standalone agreement includes an independent provision, whereby Plaintiff agreed to a six-month limitations period for any claims arising out of her employment:

> In consideration of my employment, I agree that any claim or lawsuit arising out of my employment with the Company, or my application for employment with the Company, **must be filed no more than 180 days** after the date of employment action that is the subject of the claim or lawsuit, unless the applicable statute of limitations period is shorter than 180 days in which case I will continue to be bound by that shorter limitations period. While I understand that the statute of limitations for claims arising out of an employment action may be longer than 180 days, I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY, unless state, federal or local law prohibits such waiver.

(*Id.*) (emphasis in original).

### B. Plaintiff's Allegations and the Termination of Her Employment.

Plaintiff alleges that she experienced harassment and a hostile work environment while working for American House between February and July 2017 (Ex. 1, ¶¶ 3-22 & pp. 5-9). She also alleges than in July 2017, certain employees of American House provided false information and documents to the Roseville Police Department regarding Plaintiff's purse allegedly being stolen (*Id*., ¶¶ 23-28). As a result, Plaintiff asserts she was cited for making a false police report

[1] Plaintiff erroneously renumbered paragraph 6 of her Complaint under "Statement of Facts" as paragraph 1 (*See* Ex. 1, pp. 1-2). To avoid confusion, all subsequent references to Plaintiff's Complaint will refer to the paragraphs as numbered by Plaintiff under the "Statement of Facts" and the subsequent counts.

[2] Plaintiff's maiden name is Walls and her married name is Rayford (**Ex. 3**, Marriage Certificate).

on July 3, 2017 (*Id.*, ¶ 29; **Ex. 5**, 7/3/2017 Citation). Plaintiff states the charges were dismissed shortly thereafter at a preliminary hearing (Ex 1, ¶¶ 31-32).

After all of the foregoing events took place, American House terminated Plaintiff's employment on or about July 7, 2017 (*Id.*, ¶ 33; **Ex. 6**, 7/7/2017 Termination Notice).

**C. Plaintiff's Request for Video Footage.**

On July 5, 2017, Plaintiff allegedly sent a letter to American House following a meeting with her superiors (**Ex. 7**, 7/5/2017 Rayford Letter). Plaintiff's letter states in relevant part:

> On July 5, 2017 I met with Will Crowell, Joel Woods, and another administrator by the name of Renee (who's last name I don't have at the moment) at this meeting Mr. Woods stated to me that I was terminated. Mr. Woods also stated to me that he review camera footage that was recorded July 1, 2017 that determined my termination. When I asked to review said footage Mr. Woods violated my rights under 'The Bullard-Plwecki Employee Right to Know Act'.
>
> …
>
> **Under this act I am requesting that all footage on July 1, 2017 from 9pm until July 2, 2017 3pm be presented and reviewed by me Timika Rayford.**

(*Id.*) (emphasis added). But for this request, Plaintiff does not allege, and there is no record of, Plaintiff requesting a copy of her personnel file with American House.[3]

**D. Plaintiff Files Her Untimely Lawsuit and American House Moves for Summary Disposition.**

On April 24, 2020 – more than two years and nine months after her allegations occurred and her employment with American House ended – Plaintiff filed this lawsuit in the Macomb County Circuit Court against American House (Ex. 1, Summons).

Plaintiff's Complaint alleges seven claims arising out of her employment with American House: harassment (race and gender), hostile work environment, and retaliation under the ELCRA (Counts I, II, III, IV); wrongful discharge in violation of public policy (Count V);

[3] Plaintiff's Brief on Appeal asserts that her July 5, 2017, letter requested "any documentation that determined her termination" under the Bullard-Plawecki Employee Right to Know Act (Plt. Brief, p. 7). However, that is not true as the letter plainly shows Plaintiff only requested video footage (Ex. 7).

malicious prosecution (Count VI); and abuse of process (Count VII) (Ex. 1, pp. 5-14). Plaintiff's claims are based solely on events that arose from her employment and that occurred before her employment with American House ended in July 2017 (*Id.*).

As its first responsive pleading, American House moved for summary disposition asserting that Plaintiff's claims should be dismissed pursuant to MCR 2.116(C)(7) and/or (C)(8) for the following reasons:

1. All of Plaintiff's claims are time barred because her allegations and claims arise solely from events that arose out of her employment, that occurred on or before the termination of her employment, and she failed to assert those claims within six months of the events giving rise to the same; and, in the alternative,

2. Plaintiff's malicious prosecution claim (Count VI) is barred by Michigan's traditional statute of limitations;

3. Plaintiff's public policy claim (Count V) fails as a matter of law because it is preempted by the ELCRA; and

4. Plaintiff's abuse of process claim (Count VII) fails as a matter of law because Plaintiff's allegations are legally deficient to state a claim.

(**Ex. 8**, American House Motion for Summary Disposition, pp. 4-10). American House also asserted that Plaintiff should not be allowed to amend her Complaint as to her public policy and abuse of process claims because doing so would be futile (*Id.*, pp. 9-10).

In her response, Plaintiff argued that her signed agreement shortening the limitations period for her claims should not be enforced because: (1) it was unconscionable; and (2) American House should be estopped from using that agreement pursuant to the BPERKA (Plt. Appx. Ex. A, pp. 4-8). Plaintiff also argued that her abuse of process claim was legally cognizable (*Id.*, pp. 8-10). However, Plaintiff did not address American House's alternative arguments that her malicious prosecution claim was untimely under Michigan law; that her public policy claim was preempted; or that she should not be permitted to amend her Complaint (*See, id*). American House filed a timely reply (**Ex. 9**, American House Reply).

On August 17, 2020, the Trial Court (via the Honorable Michael E. Servitto) held a hearing on American House's motion and issued a ruling from the bench granting American House's Motion for Summary Disposition in full (Plt. Appx. Ex. B).

**E. The Trial Court Properly Granted American House's Motion for Summary Disposition and Dismissed Plaintiff's Claims.**

Initially, the Trial Court agreed with American House that Plaintiff's claims were barred by the contractually-shortened limitations period (Plt. Appx. Ex. B, pp. 4-7). The Trial Court held that Plaintiff's signed agreement "clearly and unambiguously required plaintiff to file suit within six months" of the events giving rise to her claims and that "Plaintiff does not deny this" (*Id.*, pp. 4-5). The Trial Court cited to and relied on this Court's decisions in *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005) and *Posselius v Springer Pub Co*, No. 306318, 2014 WL 1514633 (Mich App Apr 17, 2014), regarding the enforceability of agreements like the one Plaintiff signed in this case (*Id.*, p. 4). The Trial Court found that *Posselius* was "exactly on point" and supported the dismissal of Plaintiff's claims (*Id.*).

The Trial Court then turned to Plaintiff's response arguments (*Id.*, pp. 5-6). First, the Trial Court rejected Plaintiff's unconscionability argument because there is no authority holding that a six-month limitations period is unconscionable or "shocks the conscience" (*Id.*, p. 5).[4] Conversely, the Trial Court observed that the *Posselius* Court held that an identical agreement and limitations period was not unconscionable, and the *Posselius* Court squarely rejected the same arguments Plaintiff asserted (*Id.*, pp. 5-6).

As for Plaintiff's estoppel argument, the Trial Court agreed with American House that Plaintiff's argument failed, at a minimum, because she never requested a copy of her personnel file (*Id.*, pp. 6-7). The Trial Court, while not acknowledging Plaintiff's estoppel argument was

[4] In fact, as noted below, this Court holds that a six-month limitations period is not unconscionable, does not shock the conscience, and is not contrary to public policy. *See Clark v. DaimlerChrysler Corp.*, 268 Mich App 138, 142, 144; 706 NW2d 471 (2005).

legally sound, opined that

> the exhibit submitted by plaintiff it shows that the plaintiff does not ask for documents, but says 'that the Act states that an employee has the … right to review any and all said documents.' **But again, it doesn't reference specifically a personnel file or anything about the personnel file. It only relates to documents pertaining to the video footage, which was requested, nothing specifically in regard to documents or the personnel file.** So, even if … estoppel was appropriate due to the failure to turn over documents, that just wasn't done. There was no written request that was submitted to her employer for those documents.

(*Id.*, pp 6-7) (emphasis added). Accordingly, the Trial Court held that Plaintiff's claims were time barred and granted American House's Motion for Summary Disposition (*Id.*, p. 6).

Alternatively, the Trial Court also agreed with American House that Plaintiff failed to state a claim for abuse of process (*Id.*, pp. 7-8). The Trial Court noted that Plaintiff agreed with American House that her claim was based solely on the allegation that American House personnel initiated a criminal investigation (*Id.*, p. 7). However, in relying on *Friedman v Dozorc*, 412 Mich 1; 312 NW2d 585 (1981) and *Lawrence v Burdi*, 314 Mich App 203; 886 NW2d 748 (2016), the Trial Court observed that a claim for "abuse of process is the wrongful use of a process of a court" and "not for maliciously causing it." (*Id.*). Based on this authority, and the fact "Plaintiff has cited no authority to the contrary", the Trial Court also granted summary disposition to American House on this alternative ground (*Id.*).

On August 17, 2020, the Trial Court entered an Order granting American House's Motion for Summary Disposition for the reasons stated on the record (Plt. Appx. Ex. C).

**F. The Trial Court's Opinion and Order Properly Denying Plaintiff's Motion for Reconsideration.**

On September 5, 2020, Plaintiff filed a Motion for Reconsideration regarding the Trial Court's dismissal of Plaintiff's abuse of process claim on the alternative grounds that Plaintiff failed to plead a cognizable claim (Plt. Appx. Ex. D, pp. 2-3). Therein, Plaintiff admitted that she "does not dispute" that an "'action for the abuse of process lies for the improper use of process

*after* it has been issued, not for maliciously causing it to issue'" (*Id.*, p. 4) (quoting *Friedman v Dozorc*, 412 Mich 1; 312 NW2d 585 (1981)) (emphasis in original). Plaintiff asserted that the alleged after-the-fact process at issue was American House terminating her employment after she was cited for making a false police report (*Id.*, pp. 4-5). Plaintiff also made an improper request to amend her Complaint to allegedly add unspecified allegations to her claim (*Id.*, pp. 5-6).

On October 2, 2020, the Trial Court entered an Opinion and Order denying Plaintiff's Motion for Reconsideration (Plt. Appx. Ex. E). In relevant part, the Trial Court focused on whether American House's alleged use of the citation against Plaintiff to terminate her employment "constituted an 'act in the use of process.'" (*Id.*, pp. 1-2). Initially, the Trial Court distinguished Plaintiff's reliance on *Three Lakes Ass'n v Whiting*, 75 Mich App 564; 255 NW2d 686 (1977), because "the 'identifiable act'" in that case "was the defendant actively using the lawsuit to extort an ulterior purpose from the plaintiff after it was filed." (*Id.*, p. 2). In other words, the defendant actually used a process of court (i.e., lawsuit and settlement offer) for an improper purpose (*see id.*), which Plaintiff does not allege here.

The Trial Court reiterated that "Michigan jurisprudence establishes that 'an act in the use of process' entails the manipulation or threatened manipulation of proceedings that already have been initiated." (*Id.*, pp. 2-3). But, in this case,

> Plaintiff makes no allegation that the Defendant leveraged dismissal of the criminal prosecution or used any other mechanism of the proceedings to secure the ulterior purpose of justifying employment termination. Rather, the Plaintiff claims that the criminal proceeding itself provided the justification. In other words, the Plaintiff only pleads that the Defendant accomplished the justification for terminating the Plaintiff's employment by merely initiating the criminal proceedings and not by committing acts after the filing of the criminal complaint.

(*Id.*, p. 3). Accordingly, the Trial Court denied Plaintiff's motion because she failed to demonstrate a palpable error pursuant to MCR 2.119(F)(3) (*Id.*). The Trial Court did not address Plaintiff's improper and untimely request to amend her Complaint (*See, id.*).

## G. Procedural History on Appeal and Plaintiff's Untimely Brief on Appeal.

On October 23, 2020, Plaintiff filed her Claim of Appeal as to the Trial Court's August 17, 2021 Order granting American House's Motion for Summary Disposition and the October 2, 2020 Opinion and Order denying her Motion for Reconsideration (10/23/2020 Claim of Appeal).

On December 2, 2020, Plaintiff's counsel filed the Reporter/Recorder Certificate of Ordering of Transcript on Appeal (**Ex. 10**, 12/2/20 Certificate and Proof of Service). Therein, the court reporter represented that the "transcript has been filed with the court and furnished" to Plaintiff's counsel (*Id.*, No.3). Meaning, pursuant to MCR 7.212, Plaintiff's brief on appeal was due 56 days thereafter, or no later than January 27, 2021. *See* MCR 7.212 (A)(1)(a)(iii). Plaintiff did not file her brief on appeal by that deadline.

Instead, on February 8, 2021, Plaintiff filed a Motion for an Extension of 28-Days to File Brief on Appeal (2/8/2021 Motion for Extension). Therein, Plaintiff admits she did not file her brief on time – although she erroneously claimed it was due February 3, 2021 – and requested an extension until March 3, 2021, to file her brief (*Id.*, p. 2). American House filed an answer to Plaintiff's motion opposing her request (2/12/2021 Answer to Motion for Extension). This Court has yet to rule on Plaintiff's Motion for Extension.

Plaintiff finally filed her brief on appeal on March 9, 2021 (3/9/2021 Plt. Brief on Appeal). Meaning, even with the extension of time Plaintiff requested – which was erroneously calculated – Plaintiff's brief on appeal was *still* untimely.

For the reasons set forth below, the Trial Court's grant of summary disposition in favor of American House and denial of Plaintiff's Motion for Reconsideration should be affirmed.

## COUNTER-STANDARD OF REVIEW

### A. Motions for Summary Disposition.

This Court reviews *de novo* a trial court's grant of summary disposition. *City of Fraser v Almeda Univ*, 314 Mich App 79, 85; 886 NW2d 730 (2016).

Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred by the statute of limitations. *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008). Under this subrule, courts "consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001).

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *York v 50th Dist. Court*, 212 Mich App 345, 347-48; 536 NW2d 891 (1995). All factual allegations in support of the claim are accepted as true, including any reasonable inferences or conclusions that can be drawn from the facts. *Id*. at 347-48. Summary disposition should be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

### B. Motions for Reconsideration.

This Court reviews for an abuse of discretion a trial court's ruling on a motion for reconsideration. *Sanders v McLaren-Macomb*, 323 Mich App 254, 264; 916 NW2d 305 (2018). "'An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes.'" *Id.* Pursuant to MCR 2.119, a party moving for reconsideration must demonstrate a palpable error. MCR 2.119(F)(3). "The trial court has 'considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties.'" *Sanders,* at 264-65 (quoting *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006)).

## ARGUMENT

### A. The Trial Court Correctly Dismissed All of Plaintiff's Claims Because They Are Time Barred Pursuant to the Six-Month Contractual Limitations Period.

#### *1. Plaintiff's Claims Are Time Barred.*

It is well-established in Michigan that parties are free to contractually limit and shorten the period of limitations for bringing a claim:

> [A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions.

*Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). Michigan courts hold that a six-month limitations period for claims arising out of an employment relationship is enforceable and have upheld dismissals on the basis that a plaintiff's claims were barred by the shortened limitations period. *See Clark v. DaimlerChrysler Corp.*, 268 Mich App 138; 706 NW2d 471 (2005). Moreover, a six-month, contractually-shortened limitations provision is not contrary to Michigan law and does not violate public policy. *Id.*, at 142.

As set forth above, Plaintiff contractually agreed to a six-month limitations period for any claims arising out of her employment (Ex. 2). Plaintiff's claims are based solely on allegations that arose from her employment and that occurred before Plaintiff's employment with American House ended on July 7, 2017 (Ex. 1, pp. 2-14). Meaning, Plaintiff was contractually required to assert her claims no later than **January 3, 2018**. Plaintiff did not file this lawsuit until **April 2020**. Therefore, the Trial Court correctly held that Plaintiff's claims are time barred.

Additionally, the Trial Court's reliance on *Posselius v Springer Pub Co*, No. 306318, 2014 WL 1514633 (Mich App Apr 17, 2014), was also appropriate. In that case, this Court

enforced a virtually identical agreement and held the plaintiff's claims were time barred.[5] There, the plaintiff signed a form acknowledging her receipt of the employee handbook, which included a six-month contractual limitations provision that provided:

> I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day 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.

*Id*., at *1. The plaintiff's "employment ended in July 2008", and she "filed suit a year later in July 2009." *Id.* The defendants moved for summary disposition asserting *inter alia* that "plaintiff's action was barred by the six-month contractual limitations period." *Id.* The trial court denied the defendants' motion for summary disposition and later defendants' motion for a directed verdict. *Id.* The defendants appealed. *Id.*

This Court reversed the trial court's rulings. *Id.*, at *8. Relying on *Rory* and *Clark*, *supra*, the *Posselius* Court held that the "acknowledgement form clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to the suit." *Id.*, at *2. Moreover, the acknowledgment form was separate from the handbook and constituted an independent, enforceable agreement. *Id*, at *5. Thus, the plaintiff's claims were time barred and defendants were entitled to judgment as a matter of law. *Id.*, at *8.

As the Trial Court acknowledged, *Posselius* is directly on point and Plaintiff's claims are time barred. Therefore, summary disposition under MCR 2.116(C)(7) was properly granted as to all of Plaintiff's claims and the Trial Court's ruling should be affirmed.

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[5] All unpublished cases are attached hereto as **Exhibit 11**. Although not binding, unpublished opinions are instructive and persuasive, especially if they are "dispositive" on an issue. *See Genesis Ctr, PLC v Blue Cross & Blue Shield of Michigan*, 243 Mich App 692, 696; 625 NW2d 37 (2000).

### *2. Plaintiff's Arguments on Appeal Fail and the Trial Court Should Be Affirmed.*

Plaintiff does not dispute that she voluntarily signed the Acknowledgment, that the six-month limitations period is enforceable under Michigan law, that all of her claims fall within the scope of that agreement, or that her claims are untimely pursuant to that agreement (*See* Brief on Appeal). Instead, Plaintiff's brief on appeal asserts the Trial Court erred by enforcing the Acknowledgment and dismissing all of Plaintiff's claims as time barred for two reasons: (1) the Acknowledgment is unconscionable; and (2) American House should be estopped from using the Acknowledgment pursuant to the BPERKA (Brief on Appeal, pp. 9-13). Plaintiff's arguments lack merit and are contrary to established Michigan law.

#### **a. The Contractually-Shortened Limitations Period is Not Unconscionable.**

Plaintiff asserts that the Acknowledgment and its terms are both procedurally and substantively unconscionable because she (1) "did not have the ability to negotiate the terms"; (2) "was provided no additional consideration" for entering into the agreement because she was already employed by American House; and (3) there is no evidence Plaintiff understood what she was signing (Brief, pp. 11-12).[6] Each argument fails.

A shortened contractual limitations provision must be enforced unless *inter alia* it is "unenforceable under recognized traditional contract defenses", such as unconscionability. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142 & n 1; 706 NW2d 471 (2005). For a "contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present." *Id.*, at 143-144. "Procedural unconscionability exists where the weaker party

[6] Plaintiff makes several passing references inferring that the Acknowledgment is an "adhesion contract" (Brief, pp. 9-12). That assertion is a misnomer as our Supreme Court holds that adhesion contracts are not recognized in Michigan. *See Rory v Continental Ins Co*, 473 Mich 457, 477-490; 703 NW2d 23 (2005). Instead, a so-called "adhesion contract is simply a type of contract *and* is to be enforced according to its plain terms just as any other contract." *Id.*, at 488 (emphasis in original). Plaintiff also asserts that "*Rory* did not involve an employment agreement, so there is an open question on whether it should be applied to an employment situation" (Brief, p. 10). That assertion is incorrect as the *Clark* Court did exactly that. *See Clark*, 268 Mich App at 142-143. Therefore, *Rory* applies.

had no realistic alternative to acceptance of the term." *Id.*, at 144. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* A "term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Id.*

A contract or contract provision "is not invariably substantively unconscionable" simply because it is "very advantageous" to one party. *Id.* And, as is relevant here, a "**six-month period of limitations is neither inherently unreasonable … nor so extreme that it shocks the conscience**." *Id.* (citations omitted, emphasis added).

First, Plaintiff provides no factual support for her unfounded assertion that she was unable to negotiate the terms of her employment (*See* Brief, p. 11). This Court in *Clark* held such unfounded assertions are insufficient to establish unconscionability, and rejected a similar argument in that case. *Clark*, 268 Mich App at 144. This Court recently followed *Clark* on this point and dismissed the same argument. *See Sams v Common Ground*, No. 329600, 2017 WL 430233, at *3 (Mich App Jan 31, 2017). Plaintiff's unfounded assertion should also be rejected.

Second, Plaintiff is incorrect that the Acknowledgment lacks consideration. Not only does the Acknowledgment state that Plaintiff agreed to the contractually-shortened limitations period in "consideration of my employment" (*see* Ex. 2), but the "continuation of employment" **is** sufficient consideration for a contact. *QIS, Inc v Industrial Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004); *see also Posselius*, at *3 (observing the same). Thus, as the Trial Court correctly held, sufficient consideration for the Acknowledgment exists.

Third, Plaintiff's argument that there is no evidence she understood what she was signing is also contrary to established Michigan law. Again, the *Clark* Court rejected this same argument: "The law is clear that one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement." *Clark*, at 144-145. This Court has recently

reaffirmed this principle more than once. *See, e.g.*, *Sams v Common Ground*, at *4; *Lebenbom v UBS Fin Servs, Inc*, 326 Mich App 200, 219; 926 NW2d 865 (2018).

Here, Plaintiff admits she signed the Acknowledgment. She also makes no assertions or provides any proof that she was coerced into signing, that she made a mistake, or that there was any fraud associated with her signing. As such, Plaintiff's after-the-fact assertion of alleged ignorance is unavailing and should be rejected. Further, it "is not the job of this Court to save litigants from … their failure to read and understand the terms of a contract." *Wells Fargo Bank, NA v Cherryland Mall Ltd P'ship*, 295 Mich App 99, 126; 812 NW2d 799 (2011).

Accordingly, Plaintiff's unconscionability argument fails, the Trial Court correctly rejected Plaintiff's same argument below, and Plaintiff's claims were properly dismissed. Therefore, the Trial Court's ruling should be affirmed.

**b. Plaintiff's Estoppel Argument Fails as a Matter of Fact and Law.**

Plaintiff next argues that American House should be estopped from using the Acknowledgment because American House *allegedly* failed to provide Plaintiff a copy of her personnel file and to remind her and/or her counsel as to the existence of this agreement after she was terminated (Brief on Appeal, pp. 12-13). Plaintiff's assertions are baseless.

Plaintiff's argument is based solely on a provision in the BPERKA that holds: "Personnel record information which is 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." MCL § 450.502. But, this provision is only applicable if three prerequisites are met: (1) the employee makes a "written request" to review or obtain a copy of his or her personnel file, MCL §§ 450.503, 504; (2) the employer either makes the file available for review or produces a copy of the file to the employee, *see, id*; and (3) the employer "intentionally excluded" the information in question from the employee's file prior to the review or production, MCL § 450.502.

None of the foregoing prerequisites took place in order to trigger the exclusion provision under MCL § 450.502. First, Plaintiff never made a written request to review or obtain a copy of her personnel file. Instead, as the Trial Court correctly observed, Plaintiff only requested access to video camera footage (*See* Ex. 7, 7/5/2017 Rayford Letter). Plaintiff's July 5, 2017 letter never mentions, let alone requests, access to or a copy of her personnel file (*Id.*). In turn, American House was never required to provide Plaintiff a copy of her personnel file under the BPERKA, and it certainly did not intentionally exclude the Acknowledgement from any non-existent review or production of Plaintiff's personnel file.

Plaintiff also criticizes American House's former attorneys for not reminding her or advising her attorneys regarding the existence of the Acknowledgement (Brief, p. 13). This criticism is without merit because there is no legal basis (nor does Plaintiff cite any) that required American House's attorneys to do so. Instead, if Plaintiff or her attorneys wished to know the contents of her employment records, either could have made a request under the BPERKA. *See* MCL §§ 450.503, 504. And, as outlined above, neither Plaintiff nor her attorneys did so.

Accordingly, Plaintiff's estoppel argument fails and the Trial Court correctly rejected Plaintiff's same argument below. Therefore, the Trial Court's ruling should be affirmed.

**B. The Trial Court Correctly Dismissed Plaintiff's Abuse of Process Claim As Untimely and that Plaintiff Alternatively Failed to State a Claim.**

Plaintiff argues on appeal that her abuse of process claim should not have been dismissed because: (1) it was not barred by the contractually-shortened limitations period; and (2) her claim is legally cognizable because she was terminated after being cited for providing false information to the police (Brief on Appeal, pp. 14-17). Plaintiff is incorrect on both fronts and the Trial Court correct dismissed her claim and denied her Motion for Reconsideration.

### *1. Plaintiff's Abuse of Process Claim is Time Barred and Was Correctly Dismissed.*

Initially, Plaintiff argues that her abuse of process claim is not subject to the contractual six-month limitations period because it is not an employment claim and it did not accrue until after she was terminated (Brief, p. 17). Plaintiff is wrong as to both.

First, the six-month contractual limitations provision is not limited solely to employment claims, but covers "**any claim or lawsuit arising out of my employment**" with American House (Ex. 2) (emphasis added). Plaintiff admits the basis for her abuse of process claim stems from American House's alleged actions that resulted in Plaintiff being cited for allegedly making a false report on July 3, 2017, or while she was still employed with American House (Brief, p. 14). Further, American House's alleged actions culminated with Plaintiff being terminated on or about July 7, 2017 (*Id.*). Meaning, Plaintiff's claim stems from alleged actions taken by American House during and up to the termination of her employment. Thus, these actions arise out of her employment and are within the scope of the contractual limitation period. Therefore, the Trial Court correctly dismissed this and all of Plaintiff's claims as untimely.

But, even if that was not the case, Plaintiff's claim was still properly dismissed because it is legally deficient.

### *2. Plaintiff's Alleged Abuse of Process Claim is Legally Deficient.*

"Abuse of process is the wrongful use of the process of a court." *Lawrence v Burdi*, 314 Mich App 203, 211; 886 NW2d 748 (2016). "In a case alleging abuse of process, the pleadings must allege with specificity an act committed in the use of process 'that is improper in the regular prosecution of the proceeding.'" *Dalley v Dykema Gossett*, 287 Mich App 296, 322; 788 NW2d 679 (2010) (quoting *Early Detection Ctr, PC v New York Life Ins Co,* 157 Mich App 618, 629; 403 NW2d 830 (1986)). "A claim asserting nothing more than an improper motive in properly obtaining process does not successfully plead an abuse of process." *Id.*

Instead, the "gravamen of the misconduct" for such a claim "'is not the wrongful procurement of legal process ***or the wrongful initiation of criminal or civil proceedings***; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.'" *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981) (emphasis added). In other words, an "action for the abuse of process lies for the improper use of process ***after*** it has been issued, not for maliciously causing it to issue." *Lawrence*, at 211 (emphasis added). As this Court recently noted, this point "is what distinguishes abuse of process from malicious prosecution, i.e., 'abuse of process is concerned with the wrongful use of process after it has been issued, while the tort of malicious prosecution is concerned with the wrongful issuance of process.'" *Reffitt v Mantese*, No. 346471, 2019 WL 5204542, at *5 (Mich App Oct 15, 2019) (quoting 54 CJS, Malicious Prosecution, § 4, p 738).[7]

Plaintiff "does not dispute" that the foregoing law governs her claim (Brief, p. 14). She asserts, however, that her abuse of process claim is proper because: "the criminal 'process' was initiated" when Plaintiff was cited for making a false larceny report on July 3, 2017, and then American House allegedly used that pending process to justify Plaintiff's termination (Brief, p. 14). In other words, Plaintiff asserts that the termination of her employment was the improper act at issue (*Id.*, p. 15).[8]

The fatal flaw with Plaintiff's position is that the termination of her employment was not the "use of the process of a court", *Lawrence*, at 211, or otherwise "'improper in the regular prosecution'" of a court proceeding. *Dalley*, at 322. Simply put, the termination of Plaintiff's

[7] *See also Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998) (noting the elements of a claim for malicious prosecution).

[8] Plaintiff makes various unfounded allegations in her Brief regarding her termination and American House's alleged motive for her termination (Brief, pp. 15-17). Plaintiff allegations are unfounded, have no merit, and appear to have been included in order to unjustifiably smear American House in the eyes of the Court. As such, these allegations should be disregarded.

employment occurred outside of any legal process that was allegedly ongoing at that time, and it was not an act of process of any court. Instead, it was a business decision made by a private employer committed wholly independent of our judicial system. Thus, Plaintiff's allegations do not state a claim for abuse of process.

Additionally, Plaintiff's attempt to liken her allegations to those in *Three Lakes Ass'n v Whiting*, 75 Mich App 564; 255 NW2d 686 (1977), is also incorrect. In *Three Lakes*, the defendants initiated a civil lawsuit against the plaintiff ("Action 926"), and then used that lawsuit for the "collateral purpose of coercing plaintiff to end all opposition to defendants' condominium project." *Id.*, at 569, 574. The linchpin act alleged by plaintiff was "that defendants offered to dismiss Action 926 in return for an end to all opposition by plaintiff to their condominium project". *Id.*, at 574. As a result, this Court held there was a question of fact regarding defendants' "use of Action 926 as a club to obtain a purpose collateral to its proper purpose." *Id.*

The dispositive difference between *Three Lakes* and Plaintiff's allegations is that the former included the defendants improperly using the actual process of a court after it was initiated (i.e., settlement and dismissal of claims) to achieve a collateral objective (ending the plaintiff's opposition to the condominium project). Here, however, American House did nothing of the like and it did not improperly use any court process after Plaintiff was cited by the police to achieve a collateral purpose. Therefore, as the Trial Court correctly held, *Three Lakes* is distinguishable and does not support Plaintiff's argument.

At its core, Plaintiff erroneously believes initiating a judicial process to justify an extra-judicial act outside of that process is sufficient to state a claim for abuse of process. Michigan's jurisprudence holds otherwise. Without more, all Plaintiff asserts is an alleged "improper motive" by American House employees for calling the police and having Plaintiff cited for larceny, but such allegations do "not successfully plead an abuse of process." *Dalley*, at 322.

Therefore, Plaintiff's claim for abuse of process is legally deficient and was properly dismissed by the Trial Court on this alternative ground.

***3. The Trial Court Correct Denied Plaintiff's Motion for Reconsideration.***

Based on the foregoing, the Trial Court correctly dismissed Plaintiff's abuse of process claim on the alternative grounds that she failed to state a claim pursuant to MCR 2.116(C)(8). For the same reasons, the Trial Court correctly denied Plaintiff's Motion for Reconsideration and its ruling should be affirmed.

**C. Plaintiff Should Not Be Allowed to Amend Her Complaint as to Her Abuse of Process Claim Because She Waived Her Request and Any Amendment Would Be Futile.**

Plaintiff's final argument on appeal is that she should be allowed to amend her Complaint with respect to her abuse of process claim because she alleges "there are sufficient facts to support such a claim" (Brief on Appeal, p. 17). Plaintiff's request should be denied because she waived this argument below and any amendment would be futile.

An argument "is not properly preserved" for appellate review when the asserting party "raised it for the first time in its motion for rehearing or reconsideration." *Farmers Ins. Exch v Farm Bureau Ins Co*, 272 Mich App 106, 117-18; 724 NW2d 485 (2006). *See also Dep't of Env't Quality v Morley*, 314 Mich App 306, 316; 885 NW2d 892 (2015) (same).

American House asserted in its Motion for Summary Disposition – as an alternative argument to those asserted under MCR 2.116(C)(8) – that Plaintiff should not be allowed to amended her Complaint because doing so would be futile (Ex. 8, pp. 9-10). Plaintiff failed to address this argument in her response (Plt. Appx. Ex. A). Plaintiff did not address this issue at oral argument, and the Trial Court did not rule upon the same (*see* Plt. Appx. Ex. B). Plaintiff then improperly raised her request for the first time in her Motion for Reconsideration (Plt. Appx. Ex. D, pp. 5-6). The Trial Court did not address her request (Plt. Appx. Ex. E).

Plaintiff waived her request to amend her Complaint because she failed to address this issue in response to American House's Motion for Summary Disposition, she did not address it during oral argument, and she raised it for the first time in her Motion for Reconsideration. Accordingly, Plaintiff's request is not properly preserved for appeal and should be denied. But, even if Plaintiff's request was proper, any amendment would be futile.[9]

Where summary disposition is warranted under MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). Such justification exists where "the record indicates that any amendment would [be] futile." *Allegheny Ludlum Corp v Dep't of Treasury*, 207 Mich App 604, 605; 525 NW2d 512 (1994). Futility is also a basis to deny a traditional request for leave to amend a pleading. *See Bennett v Russell*, 322 Mich App 638, 647; 913 NW2d 364 (2018).

Plaintiff should not be allowed to amend her Complaint because doing so would be futile. Plaintiff's lengthy Complaint sets forth detailed allegations to support her claims. Plaintiff's abuse of process claim does not fail for lack of specificity, but simply because Plaintiff's allegations are squarely precluded by binding Michigan law. Suffice it to say, if allegations existed that could sustain her claim, Plaintiff would have pled them originally.

Instead, just like in her Motion for Reconsideration, Plaintiff alleges on appeal that unspecified and unpled allegations exist that would allow her claim to legally pass muster (*See* Plt. Appx. Ex. D, pp. 5-6; Brief on Appeal, p. 17). However, Plaintiff has failed to articulate

[9] The fact the Trial Court did not address American House's argument is understandable considering the Trial Court's ruling that Plaintiff's abuse of process claim failed as a matter of law was in the alternative and Plaintiff failed to address this issue in her response brief or during oral argument. Nevertheless, American House's argument is sufficiently preserved if this Court reaches this issue because American House properly asserted the same: "So long as issues are brought to the trial court's attention, they are preserved for our review irrespective of whether the trial court rules on, or even recognizes, them." *West v Dep't of Nat Res*, No. 348452, -- Mich App --, *available at* 2020 WL 4555034, at *1 (Mich App Aug 6, 2020) (citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994)).

what these allegations are or explain how these unknown allegations would properly state a claim for abuse of process. Plaintiff's failure to fill in the blanks is also fatal to her claim because "[t]his Court will not search the record for factual support for a party's claim." *McRoberts v Ferguson*, 322 Mich App 125, 137; 910 NW2d 721 (2017).

Therefore, Plaintiff's improper and futile request to amend her Complaint should be denied.

**D. Summary Disposition Was Also Appropriate on Alternative Grounds as to Plaintiff's Malicious Prosecution Claim (Count VI) and Public Policy Claim (Count V).**

"[T]his Court may affirm for reasons other than those stated by the court below when there is sufficient support in the record." *Groves v Dep't of Corr*, 295 Mich App 1, 13 n 6; 811 NW2d 563 (2011). Even if Plaintiff's malicious prosecution and public policy claims are not time barred pursuant to the six-month contractual limitations period (which they are), summary disposition was still warranted on independent grounds with respect to both.

***1. Plaintiff's Malicious Prosecution Claim is Barred by the Traditional Statute of Limitations.***

The traditional statute of limitations for a claim of malicious prosecution is two years. MCL § 600.5805(7). Malicious prosecution claims accrue when the underlying criminal proceeding is terminated in the plaintiff's favor. *See Cowan v Dep't of Corr*, 2019 WL 6720228, at *4 (Mich App Dec 10, 2019); *Wolfe v Perry*, 412 F3d 707, 715 (CA 6 2005) (Michigan law); MCL § 600.6827. Michigan courts have defined "termination of the criminal proceedings in favor of the accused" to include "the formal abandonment of the proceedings by the public prosecutor." *Cox v Williams,* 233 Mich App 388, 391-92; 593 NW2d 173 (1999).

Plaintiff's malicious prosecution claim is based on events that occurred and concluded in or about July 2017. Plaintiff alleges she was cited for making a false police report (Ex. 1, ¶ 29 & p. 12), and the charges were dismissed shortly thereafter at a preliminary hearing (*Id.*, ¶¶ 31-32).

Then, after the charges were dismissed, American House terminated Plaintiff's employment on or about July 7, 2017 (*Id.*, ¶ 33; Ex. 6). At the latest, Plaintiff needed to assert her claim no later than two years after the prosecutor decided not to press charges – or before July 7, 2019. Plaintiff did not file this lawsuit until April 2020. As a result, Plaintiff's claim is untimely.[10]

Therefore, summary disposition under MCR 2.116(C)(7) was also warranted as to Plaintiff's malicious prosecution claim (Count VI).

***2. Plaintiff's Public Policy Claim is Preempted and Fails as a Matter of Law.***

Plaintiff alleges that she complained of and/or reported harassment based on her race and gender during her employment (Ex. 1, ¶¶ 8-9, 22, 44, 48). She asserts that her termination "resulted from her complaints and reports of harassment" and that such actions were prohibited under the ELCRA (*Id.*, pp. 11-12).[11] As such, Plaintiff alleges she was wrongfully discharged in violation of public policy based solely on the "explicit language" of the ELCRA (*Id.*, p. 12).

Michigan law recognizes "an exception to the at-will employment doctrine 'based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.'" *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 523; 854 NW2d 152 (2014) (quoting *Suchodolski v Mich Consol Gas Co,* 412 Mich 692, 695; 316 NW2d 710 (1982)). Our Supreme Court in *Suchodolski*

> opined that the only grounds that have been recognized as so violative of public policy that they serve as an exception to the general rule of at-will employment are: (1) explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty … (2) where the alleged reason for the discharge was the failure or refusal of the employee to violate a law in the course of employment … and (3) where the reason

[10] Plaintiff now asserts on appeal – without any support – that the charges were allegedly dropped on September 7, 2017 (Brief on Appeal, p. 16). This is a distinction without a difference because that still means her claim was required to be asserted on or before September 7, 2019. Plaintiff did not file her lawsuit until April 2020. Accordingly, her malicious prosecution claim is still untimely.

[11] Plaintiff's public policy claim appears to be plead in the alternative to her retaliation claim under the ELCRA (Count IV) (*See* Ex. 1, pp. 9-11).

> for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment …

*Landin*, at 524.

"The first prong involves an express cause of action, while the second and third prongs involve implied causes of action." *Lewandowski v Nuclear Mgt*, 272 Mich App 120, 127; 724 NW2d 718 (2006). However, "a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue." *Id.* (citing *Dudewicz v Norris–Schmid, Inc,* 443 Mich 68, 80; 503 NW2d 645 (1993)). This is true for claims brought under the first type of claim, *see Dudewicz*, at 79-80, or the third type. *Lewandowski*, at 128-29.

The ELCRA specifically prohibits retaliation against an employee who "has opposed a violation of this act" or "filed a complaint" for a violation of that act. MCL § 37.2701(a). As Plaintiff admits, this prohibition includes retaliation for complaining of and/or reporting harassment based on a protected classification. *See Garg v Macomb Cty Cmty Mental Health Servs*, 472 Mich 263, 272; 696 NW2d 646, 653 (2005).

Plaintiff's public policy claim is based on either the first or third type of claim,[12] which she asserts is supported solely by the ELCRA's prohibition against retaliation for complaining of and/or reporting harassment (Ex. 1, pp. 11-12). But, as noted above, our Supreme Court and this Court hold such a claim is not actionable under either type of claim because the ELCRA specifically provides a cause of action for such conduct. *See Dudewicz*, at 79-80; *Lewandowski*, at 128-29. Accordingly, Plaintiff's claim is not actionable.

Therefore, Plaintiff's public policy claim (Count V) fails as a matter of law and summary disposition was also warranted pursuant to MCR 2.116(C)(8).

[12] Plaintiff does not allege that she was retaliated against for her refusal or failure to violate the law in the course of her employment with American House (*See* Ex. 1, pp. 11-12). Therefore, her public policy claim is not based on the second type of claim.

**E. Plaintiff Forfeited Her Right to Oral Argument Because Her Brief on Appeal Was Not Timely Filed.**

MCR 7.212 states that for general civil cases, an appellant's brief on appeal is due "56 days after the claim of appeal is filed" or "the transcript is filed with the trial court or tribunal … whichever is later". MCR 7.212(A)(1)(a)(iii). A "party failing to timely file and serve a brief required by this rule forfeits the right to oral argument." MCR 7.212(A)(4).

As set forth above, Plaintiff admits she missed the original deadline to file her brief on appeal and she then missed her proposed deadline as set forth in her Motion for an Extension of 28-Days to File Her Brief on Appeal. Accordingly, with respect to both deadlines, Plaintiff's brief on appeal was not timely filed. Therefore, she has forfeited her right to oral argument.

## CONCLUSION

WHEREFORE, based on the foregoing, Defendant/Appellee American House Roseville I, LLC, d/b/a American House East I and American House respectfully requests that this Honorable Court affirm the Trial Court's grant of summary disposition in favor of American House and the denial of Plaintiff's Motion for Reconsideration.

STARR, BUTLER, ALEXOPOULOS & STONER, PLLC

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Dated: April 12, 2021

# EXHIBIT 16

In The Court of Appeals for the State of Michigan

On Appeal from the Circuit Court for the County of Macomb
Hon. Michael E. Servitto, Presiding

| | |
|---|---|
| TIMIKA RAYFORD,<br><br>PLAINTIFF-APPELLANT,<br>VS.<br><br>AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE,<br><br>DEFENDANTS-APPELLEES. | Macomb County Case No.: 20-001548-CD<br><br>Court of Appeals Case No.: 355232 |

**APPELLANT'S REPLY BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

Dated: May 3, 2021

Respectfully Submitted,

CARLA D. AIKENS, P.C.

*/s/ Carla D. Aikens*
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## LAW AND ARGUMENT

### I. Plaintiff's Claims Are Not Time Barred Because Defendant's Contractual Limitation Should Not Supersede the Limitation Period for Plaintiff Bringing Suit to Protect Her Civil Rights

The Sixth Circuit has held that an employer should not be able to contractually limit an employee's time to bring a Title VII claim. *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824 (6th Cir. 2019). The Court held that the contractual limitation abrogated the plaintiff's substantive rights. *Id.* Under the ECLRA, employment is a civil right. Similar to Title VII, the purpose of ELCRA is to eliminate workplace discrimination. Allowing employers to alter the statutory period provides additional protection to the employer by barring valid discrimination claims and discourages employers to adhere to ELCRA. This should not be the law.

#### *A. The Contract Was Unconscionable*

The contract was procedurally unconscionable because Plaintiff-Appellant had no realistic alternative to acceptance of the term. Defendant presented the contract as a "take it or leave it proposition." Plaintiff-Appellant needs income to provide basic necessities of life for herself and her family. The contract was substantively unconscionable because Defendant preyed upon the vulnerability and weakness of its employees. Defendant should not be able to capitalize on Plaintiff-Appellant's basic needs in order to shield itself from legal liability for violating her civil rights.

#### *B. No Consideration Between the Parties Existed for the Shortened Limitations Period*

Consideration is a bargained for exchange of value between parties of a contract. In other words, both parties need to agree to do something. Here, Plaintiff-Appellant agreed to perform job duties in exchange for Defendant paying her. She began working on February 14, 2014.

However, on February 20, 2014, Plaintiff-Appellant received nothing in return for shortening her limitation period to bring suit.

*C. The Contract Should Be Nullified Due to Coercion*

Finally, this alleged employment agreement constituted coercion. But for Plaintiff-Appellant signing the document, Defendant would not have hired Plaintiff-Appellant. As mentioned above, Plaintiff-Appellant needed the job to provide basic life necessities.

**II. Defendant Should be Estopped From Arguing the Acknowledgement Form Barred Plaintiff's Claims Because Defendant Completely Ignored Plaintiff's Request.**

Defendant's argument regarding specifically what Plaintiff-Appellant's letter requested and did not request fails because Defendant failed to respond at all. If Defendant had not ignored Plaintiff-Appellant entirely, she would have been on notice that Defendant misconstrued Plaintiff-Appellant's request for her personnel file. Because Defendant failed to uphold its statutory duty and withheld information that adversely affected her rights, Defendant should be estopped from now using this information to dismiss her claims.

**III. Defendant's Altered Video Footage is Circumstantial Evidence of Defendant Abusing the Criminal Justice System to Retaliate Against Plaintiff; Therefore, Her Abuse of Process Claim was Properly Pled**

The gravamen of Plaintiff-Appellant's abuse of process claim is that Defendant provided altered video footage in an attempt to file frivolous criminal charges against Plaintiff-Appellant in an effort to justify terminating her after she had reported instances of misconduct to the State of Michigan. This is not a simple "business decision," as Defendant alleges. Defendant does not dispute that it falsified video footage, nor does it acknowledge the true pursuit for filing its claim. Thus, Plaintiff-Appellant is left with the logical and common sense reason, particularly when the facts are viewed in a light most favorable to her: that Defendant abused the criminal court

process to humiliate, retaliate against, and terminate Plaintiff-Appellant's employment. This was a collateral objective outside the intended use of the criminal justice system.

Defendant attempts to distinguish this case from *Three Lakes*, 75 Mich App.564, 574-75 (1986), at pages 18 – 19 of its response brief. However, Defendant fails to support its analysis with any law or facts, instead relying upon bare assertions. Without explanation, Defendant states that it did "not improperly use any process of the court." To the contrary, Defendant improperly used the process of the court (*i.e.*, submitting altered video footage leading to Plaintiff-Appellant being charged with falsifying a larceny report) to achieve a collateral objective (fabricating a legitimate business reason to terminate Plaintiff-Appellant). Therefore, while Plaintiff-Appellant has not argued that the facts in *Three Lakes* are identical to the case at bar, Plaintiff-Appellant has alleged that Defendant utilized the process for an improper purpose, as did the plaintiff in *Three Lakes*.

Finally, Defendant's proposition, *i.e.*, that there exists a private business exception to abuse of process claims for employers to improperly use the court system to justify the termination of employees, is not supported by any case law. The cases cited by Defendant do not involve the termination of employees by private employers, nor do they state that private employers cannot be held liable for providing false evidence to the police during an investigation. All that is required to find a valid abuse of process claim is that a defendant utilize the judicial system for "something else." In this case, the "something else" was an alleged legitimate purpose for terminating Plaintiff-Appellant, who had reported it to state authorities for misconduct. On these facts, Plaintiff-Appellant's abuse of process claim should have been allowed to proceed to a jury.

## CONCLUSION

WHEREFORE for all of the foregoing reasons, Plaintiff-Appellant respectfully requests that her appeal be granted and that her claims be reinstated so that she may have her claims heard by a jury of her peers.

Dated: May 1, 2021

Respectfully Submitted,

/s/ Carla D. Aikens
Carla D. Aikens, (P69530)
Carla D. Aikens, P.C.
*Attorneys for Plaintiff-Appellant*

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein via email on May 3, 2021.

*/s/ Carla D. Aikens*

# EXHIBIT 17

# STATE OF MICHIGAN

# COURT OF APPEALS

TIMIKA RAYFORD,

Plaintiff-Appellant,

v

AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE,

Defendant-Appellee.

UNPUBLISHED
December 16, 2021

No. 355232
Macomb Circuit Court
LC No. 2020-001548-CD

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition in favor of defendant under MCR 2.116(C)(7) and (8) because a contractual statute of limitations barred plaintiff's claims and plaintiff otherwise failed to state a claim for abuse of process. We affirm.

## I. BACKGROUND

Plaintiff is a certified nursing assistant hired by defendant, a nursing care facility, on February 14, 2017. Approximately a week into her employment, plaintiff signed a document titled, "Employee Handbook Acknowledgment." The Acknowledgment stated in relevant part:

> In consideration of my employment, I agree that any claim or lawsuit arising out of my employment with the Company, or my application for employment with the Company, **must be filed no more than 180 days** after the date of the employment action that is the subject of the claim or lawsuit unless the applicable statute of limitations period is shorter than 180 days in which case I will continue to be bound by that shorter limitations period. While I understand that the statute of limitations for claims arising out of an employment action may be longer than 180 days, I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY, unless state, federal or local law prohibits such waiver.

According to the allegations in her complaint, a few months later, plaintiff became aware of inappropriate sexual behavior between defendant's upper management and other nursing assistants wherein staff were allegedly given preferential treatment in exchange for sexual acts. Plaintiff reported this behavior to defendant's human resources division and the state of Michigan.

On July 1, 2017, plaintiff finished her shift and, upon leaving the building, realized that she had accidentally left her purse in a locked room. Plaintiff was unable to access the room until the next day, when she discovered her purse had been stolen. Plaintiff reported the theft to defendant, as well as the police department. Defendant, however, accused plaintiff of lying, and defendant allegedly showed the police a false video recording of plaintiff leaving with her purse. The police then charged plaintiff, on July 3, 2017, with making a false report. Defendant terminated plaintiff's employment shortly thereafter on July 7, 2017 Ultimately, the criminal charge was dismissed when defendant could not produce footage of plaintiff leaving with her purse on the day of the alleged theft.

Nearly three years later, in May 2020, plaintiff filed the instant seven-count complaint. Plaintiff pleaded claims for harassment based on race and sex or gender, retaliation, and hostile work environment in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. (Counts I through IV); wrongful discharge in violation of public policy (Count V); malicious prosecution (Count VI); and abuse of process (Count VII). In lieu of answering the complaint, defendant moved for summary disposition under MCR 2.116(C)(7) and (8). Defendant argued, in part, that because all of plaintiff's claims arose out of her employment, and she filed them more than two years after they accrued, all her claims were barred by the contractual six-month (180-day) limitations period contained in the Acknowledgment. Plaintiff countered that the Acknowledgment was unenforceable as an unconscionable contract of adhesion and, alternatively, that defendant should be estopped from relying on it because defendant did not provide her the Acknowledgment in violation of the Bullard-Plawecki Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*

Ultimately, the circuit court agreed with defendant and dismissed all of plaintiff's claims under MCR 2.116(C)(7). The circuit court reasoned that the Acknowledgment "clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to suit," and that plaintiff failed to provide any authority that the Acknowledgment was unconscionable. Regarding plaintiff's claim that defendant should be estopped from relying on the Acknowledgment under the ERKA, the circuit court found that the statute was not triggered because plaintiff had not requested her personnel file. Additionally, the circuit court dismissed plaintiff's abuse-of-process claim under MCR 2.116(C)(8), finding that plaintiff failed to plead facts that defendant abused the criminal process for an ulterior motive *after* its initiation. Plaintiff moved for reconsideration as to the abuse-of-process claim only, and the circuit court denied her motion. This appeal followed.

## II. STANDARD OF REVIEW

A motion under MCR 2.116(C)(7) is properly granted when a claim is barred by a statute of limitations. Such a motion is reviewed de novo and may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). We accept "[t]he allegations of the complaint . . . as

true unless contradicted by documentary submissions." *Id*. Further, we must consider the documentary evidence to determine whether there is a genuine issue of material fact regarding whether a claim is statutorily barred under MCR 2.116(C)(7). *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred is an issue of law for the court." *Id*.

## III. ANALYSIS

On appeal, plaintiff argues that the circuit court erred by dismissing her claims under MCR 2.116(C)(7) on the basis that the Acknowledgment's six-month limitations period bars her claims. Plaintiff does not contest that she entered into a contract under the Acknowledgment agreeing to a six-month limitations period for all claims arising from her employment. Rather, plaintiff argues that the Acknowledgment is not enforceable because it is unconscionable and, alternatively, defendant should be estopped from relying on it because defendant violated the ERKA. We disagree.

### A. SHORTENED LIMITATIONS PERIOD

Michigan courts have long recognized that parties to a contract are free to agree to a shortened limitations period. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009). "An unambiguous contractual provision providing for a shortened limitations period is to be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability." *Id*. These same principles apply in the context of employment contracts. See *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005).

At the outset, plaintiff questions this well-established law by suggesting that contracts of adhesion (a take-it-or-leave-it agreement), like the Acknowledgment, deserve "close judicial scrutiny" and may be voided by a judicial assessment of "reasonableness" under *Herweyer v Clark Highway Servs*, 455 Mich 14; 564 NW2d 857 (1997), overruled by *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). Plaintiff recognizes that the Michigan Supreme Court overruled *Herweyer* in *Rory*, but posits that an "open question" exists whether *Herweyer*'s "close judicial scrutiny" or reasonableness standard applies in the context of employment contracts because *Rory* did not involve an employment contract. Plaintiff does not adequately explain how, were her understanding of the jurisprudence correct, application of *Herweyer*'s "close judicial scrutiny" rubric would change the outcome in this case or, otherwise, benefit her. Notwithstanding plaintiff's failure in this regard, *Rory* made it clear that "an adhesion contract is simply a type of contract and is to be enforced according to its plain terms just as any other contract" consonant with traditional contract principles that have been historically followed in Michigan. *Rory*, 473 Mich at 488 (emphasis omitted). Moreover, given that *Rory* viewed *Herweyer* as an aberration that strayed from traditional contract rules in favor of judicial whims of reasonableness, we cannot conclude that *Rory* left open a question whether such traditional rules would apply in the context of an employment agreement.

Turning to the Acknowledgment and applying the above-referenced principles, it is plain that plaintiff and defendant agreed to a limitations period of six months for any claim arising out of plaintiff's employment. Plaintiff does not contest that all of her claims, except her abuse-of-process claim, arise out of her employment with defendant and that they accrued approximately in July 2017. Under the Acknowledgment, then, plaintiff was required to file her claims no later than January 2018. Plaintiff, however, did not file her claims until May 2020. Therefore, absent an applicable contract defense, the Acknowledgment's six-month limitations period bars plaintiff's claims.

Furthermore, we conclude that plaintiff's abuse-of-process claim is subject to the Acknowledgment. Plaintiff asserts that the Acknowledgment does not apply to her abuse-of-process claim because defendant's pursuit of criminal charges was not an "employment action," given that her claim did not accrue until after her termination. The language of the Acknowledgment is broad—it applies to "any claim or lawsuit arising out of [her] employment . . . with defendant[;]" the term "employment action" that plaintiff relies on does not define the claims to which the shortened limitations period applies, but rather, relates to the accrual date of the claim. Further, plaintiff's own argument belies that the abuse-of-process claim did not arise out of her employment with defendant: she argues that defendant's ulterior purpose of the criminal proceedings was to justify plaintiff's termination and create a pretext to obscure that her termination was retaliatory. Because the factual allegations of plaintiff's abuse-of-process claim are related to, and result from, her employment with defendant, the abuse-of-process claim is a claim arising out of her employment with defendant. Consequently, the Acknowledgment's shortened statute of limitations also applies to her abuse-of-process claim and, absent an applicable defense, this claim would also be barred under the Acknowledgment's six-month limitations period.

## B. UNCONSCIONABILITY

As noted, plaintiff argues that a contract defense exists in this case—that the Acknowledgment is not enforceable because it is unconscionable. For a contract or contract provision to be unconscionable, both procedural and substantive unconscionability must exist. *Clark*, 268 Mich App at 143. "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id*. at 144. "If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability." *Id*. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Liparoto Constr, Inc*, 284 Mich App at 30 (quotation marks and citation omitted). "[A] term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience[;]" it is not sufficient that a term is advantageous to one party and foolish for the other. *Clark*, 268 Mich App at 144.

In this matter, plaintiff signed the agreement approximately one week after her employment began. There is no evidence to support that, at that time, plaintiff had no realistic alternative to employment with defendant. While plaintiff's bargaining power may have been less than defendant's—accepting her claim that she could not negotiate the terms—nothing in the record demonstrates that plaintiff was not free to accept or reject the terms of employment that defendant offered. These circumstances do not support a determination of procedural unconscionability.

Additionally, plaintiff cites no law in support of her argument that procedural unconscionability exists because no "consideration" existed for the Acknowledgment, i.e., because she had already started working, her employment could not be sufficient consideration. Failure to cite authority constitutes waiver of the argument. *Badiee v Brighton Area Schs*, 265 Mich App 343, 378-379; 695 NW2d 521 (2005). Even if plaintiff had not abandoned this argument by failing to cite authority, the question whether consideration existed is legally irrelevant to the procedural unconscionability inquiry because the inquiry focuses on the freedom to accept or reject a term. In any case, consideration did exist for the agreement—plaintiff's employment. That plaintiff had already commenced her employment at the time that she signed the agreement does not obviate that consideration existed in the form of her employment. The Acknowledgment's reference to "employment" as consideration refers to employment as an ongoing, present situation. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "employment," in part, as the "state of being employed"). Therefore, even if "consideration" was relevant, we conclude that plaintiff did not establish procedural unconscionability.

Next, there is also nothing in the record to establish that the Acknowledgment was substantively unconscionable. Michigan courts have recognized that employment agreements that shorten limitations periods are neither inherently unreasonable, nor so gross as to shock the conscious. See *Clark*, 268 Mich App at 144. Plaintiff argues that she did not knowingly waive the statutory limitations period. However, this Court has rejected this argument as grounds for establishing substantive unconscionability, noting that "one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement." *Id*. at 144-145. Consequently, plaintiff has failed to demonstrate that the Acknowledgment was unconscionable.[1] Accordingly, we conclude that the circuit court did not err by determining that the Acknowledgment was not unconscionable.

C. ESTOPPEL

Plaintiff alternatively argues that defendant should be estopped from relying on the Acknowledgment because defendant allegedly violated the ERKA. Specifically, plaintiff cites MCL 423.502 and MCL 423.503, arguing that because defendant never responded to her written request for her "employment file," defendant should be estopped from relying on the Acknowledgment. We disagree.

MCL 423.503 requires an employer, upon written request describing the personnel record, to provide the employee with the opportunity to review the employee's personnel record.[2] In turn,

[1] Plaintiff's argument in her reply brief that she was coerced into signing the Acknowledgment is not supported by facts or citation to legal authority. Therefore, she has waived the argument. *Badiee*, 265 Mich App at 378-379.

[2] MCL 423.503 states, in part:

> An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable

MCL 423.502 precludes an employer from using in a judicial proceeding "personnel record information" that was not included in the personnel record, but should have been.[3]

On July 5, 2017, near the time of termination, plaintiff sent defendant a letter requesting that she be allowed to view the video footage related to the alleged theft of her purse. The handwritten letter provided:

> To whom it may concern, My name is Tamika Rayford[.] I am an [sic] former employee of [defendant] under the administration of Will Crowell located in Roseville[,] Michigan.
>
> On July 5, 2017[,] I met with Will Crowell, Joel Woods, and another administrator by the name of Renne (who's last name I don't have at the moment)[.] [A]t this meeting[,] Mr. Woods stated to me that I was terminated[.] Mr. Woods also stated to me that he review [sic] camera footage that was recorded July 1, 2017[,] that determined my termination. When I asked to review said footage[,] Mr. Woods violated my rights under "the Bullard-Palwecki Employee Right To Know Act," which states that an employee has the right to view any and all said documents . . . written, verbally, or recorded that led to a decision of termination by denying me access to review said footage.
>
> Under this act I am requesting that all footage on July 1, 2017[,] from 9pm until July 2, 2017[,] 3pm be presented and reviewed by me Timika Rayford.
>
> I am also requesting that if needed in the future that said footage will also be accessible to all attorney's [sic] obtained and representing myself in this matter[.]

Additionally, plaintiff's counsel sent defendant a letter in March 2018, apparently indicating plaintiff's intent to file suit. Defendant's response did not reference the Acknowledgment and denied retaliatory discharge.

Plaintiff cites no law and makes no argument that a request for video footage is synonymous with the personnel record required to be provided upon written request under MCL 423.503. Absent a written request for her personnel record, or a cogent argument why a request

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> intervals, generally not more than 2 times in a calendar year or as otherwise provided by law or a collective bargaining agreement, the employee's personnel record if the employer has a personnel record for that employee. . . .

[3] MCL 423.502 provides, in relevant part:

> Personnel 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. . . .

for video footage is the same as a request for a personnel file, plaintiff has failed to show that the statute applies and operates to estop defendant from relying on the Acknowledgment.

Plaintiff also complains that defendant failed to provide a copy of the Acknowledgment in response to her counsel's letter. However, plaintiff proffered no evidence that counsel made a written request for her personnel record, let alone the Acknowledgment, because plaintiff did not include counsel's letter as an exhibit. Plaintiff only included defense counsel's response, but this letter does not establish that such a request was made as to trigger the ERKA. Yet, even if plaintiff had made the request, plaintiff has not demonstrated that the Acknowledgment was part of her personnel file subject to MCL 423.502 and MCL 423.503. Consequently, we agree with the circuit court that plaintiff failed to show that defendant should be estopped from relying on the Acknowledgment for violating the ERKA.

In sum, because the Acknowledgment applies to all of plaintiff's claims and plaintiff filed suit outside the six-month period, the circuit court properly concluded that the Acknowledgment bars plaintiff's claims and dismissed plaintiff's suit under MCR 2.116(C)(7). Accordingly, we need not consider plaintiff's additional argument on appeal that the circuit court erred by additionally dismissing her abuse-of-process claim under MCR 2.116(C)(8). We briefly note, however, having reviewed the pleadings most favorable to plaintiff, that plaintiff failed to plead facts supporting an abuse-of-process claim. Plaintiff's complaint alleged that defendant's ulterior purpose in "initiating" the criminal proceedings was termination of plaintiff's employment. However, absent from plaintiff's complaint are any factually specific allegations that defendant improperly used the criminal prosecution itself *after* its initiation. Such allegations are insufficient to support an abuse-of-process claim. See *Lawrence v Burdi*, 314 Mich App 203, 211-212; 886 NW2d 748 (2016) (indicating that to establish an abuse-of-process claim a plaintiff must plead, in part, an act *in the use of process* that is improper in the regular prosecution of the proceeding *after* the initiation of suit); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).[4]

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick

[4] Relatedly, we reject plaintiff's request to amend the pleadings with respect to her abuse-of-process claim. Such amendment would be futile because the claim was properly dismissed on statute-of-limitations grounds under MCR 2.116(C)(7). Further, even if that subrule did not apply, plaintiff did not identify any specific facts on appeal sufficient to support an abuse-of-process claim.

# EXHIBIT 18

# STATE OF MICHIGAN

# COURT OF APPEALS

JULIE FRENCH,

Plaintiff-Appellant,

v

MIDMICHIGAN MEDICAL CENTER-GLADWIN,

Defendant-Appellee.

UNPUBLISHED
March 23, 2023

No. 360239
Gladwin Circuit Court
LC No. 20-010548-CD

Before: K. F. KELLY, P.J., and BOONSTRA and REDFORD, JJ.

PER CURIAM.

Plaintiff, Julie French, appeals by right the trial court's order granting summary disposition in favor of defendant, MidMichigan Medical Center-Gladwin, on the issue of whether plaintiff's claims brought under the Elliot-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*, were time-barred under a limitations period set forth in plaintiff's job application. Finding no errors warranting reversal, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

On December 16, 2012, plaintiff applied for a job as a registered nurse ("RN") with MidMichigan Physicians Group, a subsidiary of MidMichigan Health ("MMH"), which itself is the parent nonprofit corporation of defendant, as well as other medical centers in Michigan. Plaintiff had already worked for MMH since 2000 but quit her job in September 2012 to move out of state with her spouse. Plaintiff returned to Michigan three months later and applied with MMH to regain her position. As part of the application process, plaintiff signed a form entitled "Applicant's Certification and Agreement," in which plaintiff agreed, as relevant here, to the following provision:

> 3. **Limitation on Claims:** I agree that any lawsuit against MidMichigan Health and/or its agents arising out of my employment or termination of employment, including but not limited to claims arising under State or Federal civil rights statutes, must be brought within the following time limits or be forever barred: (a) for lawsuits requiring a Notice of Right to Sue from the EEOC, within 90 days after the EEOC issues that notice; or (b) for all other lawsuits, within (i) 180 days of the

> event(s) giving rise to the claim or (ii) the time limit specified by statute, whichever is shorter. I waive any statute of limitations that exceeds this time limit.

In June 2014, plaintiff applied for and was granted a transfer to defendant's hospital to be closer to home. As part of the process, plaintiff completed an MMH "Transfer Request" form in which she affirmed that she was a current employee of MMH. Plaintiff was subsequently terminated from this position on January 7, 2019, after a series of incidents concerning plaintiff's role as a supervisor occurred in late 2018, none of which are relevant to the issues raised in this appeal.

Plaintiff filed her complaint on September 8, 2020, 20 months after she was terminated. The trial court ultimately granted summary disposition in defendant's favor, concluding that the 180-day limitations period in plaintiff's job application barred plaintiff's claims under the ELCRA. This appeal followed.

## II. STANDARD OF REVIEW

The trial court's decision to grant summary disposition in defendant's favor under MCR 2.116(C)(7) on the basis of statute of limitations is reviewed by this Court de novo. *Zarzyski v Nigrelli*, 337 Mich App 735, 740; 976 NW2d 916 (2021). In a motion brought under this subrule,

> this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*Id*. (quotation marks and citation omitted).]

This Court also reviews de novo the proper interpretation of a contract. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005).

## III. ANALYSIS

On appeal, plaintiff contends the trial court erred when it granted summary disposition in defendant's favor because the limitations period did not apply to plaintiff because she was not an employee of MMH, but rather an employee of defendant. Plaintiff also argues that any attempt by an employer to shorten the limitations period under the ELCRA in an employment contract violates public policy as a matter of law. We find plaintiff's arguments unpersuasive and, therefore, affirm the trial court's order.

Under the ELCRA, a plaintiff has three years from the date of each adverse employment action to bring a claim. *Garg v Macomb Co Community Mental Health*, 472 Mich 263, 282; 696 NW2d 646 (2005); MCL 600.5805. However, "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). To

that end, "Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute." *Clark*, 268 Mich App at 142. Thus, a contractual limitations period, if unambiguous, is to be enforced as written and will not be invalidated as against public policy. See *id*.; *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

In *Rory*, the plaintiffs were insureds of the defendant-insurer who were injured in an automobile accident but had their claim denied because they filed it after the one-year contractual limitations period. *Rory*, 473 Mich at 461-462. The defendant moved for summary disposition on the basis of the limitations period, which the trial court denied and this Court affirmed. *Id*. at 462-463. The Michigan Supreme Court granted leave and reversed, concluding first that the "reasonableness doctrine" in Michigan no longer had validity:

> [A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of "reasonableness" is an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision. [*Id*. at 470.]

The Supreme Court also concluded that the defendant's one-year limitations period did not violate public policy because there were no general nor specific statutes or policy enactments that prevented a shorter contractual limitations period. *Id*. at 471-472.

Subsequently, in *Clark*, this Court concluded that contractual limitations periods in employment contracts were enforceable as well. *Clark*, 268 Mich App at 142-145. In that case, the plaintiff brought suit against his employer under the ELCRA for age discrimination. *Id*. at 140. The trial court granted the defendant's motion for summary disposition under MCR 2.116(C)(7), concluding the defendant's six-month limitations period was enforceable, and this Court affirmed. *Id*. at 141. This Court stated:

> Because there are no statutes explicitly prohibiting the contractual modification of limitations periods in the employment context, the contract provision is not contrary to law. Furthermore, the Court in *Rory* clarified that public policy must be clearly rooted in the law. Hence, this Court must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute. Likewise, even before *Rory*, provisions within an employment contract providing for a shortened period of limitations were held to be reasonable and, therefore, valid and enforceable. Consequently, we are unable to conclude that the limitations period provided in the contract violates public policy. [*Id*. at 142 (quotation marks and citations omitted).]

In this case, MMH had a provision in its job application that any lawsuit brought against it must be filed within 180 days:

> 3. **Limitation on Claims:** I agree that any lawsuit against MidMichigan Health and/or its agents arising out of my employment or termination of employment, including but not limited to claims arising under State or Federal civil rights statutes, must be brought within the following time limits or be forever barred: (a) for lawsuits requiring a Notice of Right to Sue from the EEOC, within 90 days after the EEOC issues that notice; or (b) for all other lawsuits, within (i) 180 days of the event(s) giving rise to the claim or (ii) the time limit specified by statute, whichever is shorter. I waive any statute of limitations that exceeds this time limit.

Plaintiff makes no argument that this provision is unambiguous. Accordingly, under *Rory* and *Clark*, defendant's limitations period is valid, enforceable, and does not violate public policy.

Plaintiff contends that *Rory* and *Clark* are distinguishable, however, because plaintiff was hired by MMH but terminated by defendant, both of which are distinct legal entities. Thus, plaintiff contends that when she was transferred to defendant's hospital in 2014, a new contractual agreement was entered into by the parties.

As an initial matter, plaintiff cites no authority for the proposition that when she transferred to defendant's hospital, a new contractual agreement was created. Plaintiff has, therefore, abandoned the argument. See *Movie Mania Metro, Inc v GZ DVD's Inc*, 306 Mich App 594, 605-606; 857 NW2d 677 (2014) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority.") (quotation marks and citation omitted). But even if not abandoned, the argument lacks merit.

In *Dzurka v MidMichigan Medical Center-Midland*, unpublished per curiam opinion of the Court of Appeals, issued January 22, 2019 (Docket No. 343162), p 2, this Court examined the identical language in MMH's job application in the context of a plaintiff who was terminated from MidMichigan Medical Center-Midland. This Court rejected the plaintiff's argument that there was no mutuality of obligation or consideration when she signed the application and concluded that the contractual limitations period in MMH's application was enforceable against the plaintiff in the context of her lawsuit. *Id*. at 2-4. Although *Dzurka* is unpublished, we find the reasoning persuasive.

Plaintiff also argues that the Michigan Supreme Court's recent decision in *McMillon v Kalamazoo*, ___ Mich ___; 938 NW2d 79 (2023), dictates reversal in this case. In *McMillon*, the plaintiff applied for a job with the defendant-city but was not hired. *McMillon*, ___ Mich at ___. In the application, she agreed to file any claim against the defendant within nine months. *Id*. The plaintiff was later hired for a different position and, when the plaintiff eventually sued the defendant for race, age, and disability discrimination, the defendant sought summary disposition on the basis of the limitations period from the plaintiff's initial application. *Id*. The Michigan Supreme Court reversed the trial court's order granting summary disposition in the defendant's favor, concluding that "[w]hether plaintiff had notice that defendant intended to reuse her prior application materials or that plaintiff intended or agreed to be bound by the initial contractual application process remain genuine issues of material fact." *Id*.

*McMillon* is distinguishable from this case, however, because unlike the plaintiff in *McMillon*, plaintiff here was hired initially by MMH and subsequently transferred within MMH's network of hospitals in 2014 to defendant. Thus, the question of whether there was notice that defendant would use plaintiff's application materials is irrelevant because plaintiff was hired immediately, always remained an employee of MMH and was, therefore, always bound by the terms she agreed to in 2012. Moreover, contrary to plaintiff's arguments that she was unaware of the limitations provision and had no notice of it, "one who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 59; 664 NW2d 776 (2003) (quotation marks and citation omitted). Likewise, plaintiff's assertion that she was unaware she was still bound by her application agreement is belied by the fact that when she transferred to defendant's hospital, she did so through an MMH "Transfer Request" form in which plaintiff affirmed she was a current employee of MMH.

Undaunted, plaintiff asks the Court to conclude that a limitations provision in an employment contract that shortens the time to file a claim under the ELCRA violates public policy as a matter of law. However, this issue has already been decided against plaintiff's position and this Court is bound by the Michigan Supreme Court's decision in *Rory* and by our own decision in *Clark*. *DC Mex Holdings LLC v Affordable Land LLC*, 320 Mich App 528, 540; 907 NW2d 611 (2017) ("This Court is bound by stare decisis to follow the decisions of our Supreme Court") (quotation marks and citation omitted); MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis"). Those cases stand for the proposition that such limitations periods are valid and enforceable and do not violate public policy.

Lastly, plaintiff argues that the trial court erred when it granted summary disposition because discovery was ongoing and plaintiff would have uncovered further evidence supporting her claims. This argument is not persuasive for two reasons. First, plaintiff was the party to the litigation that sought a decision on the statute of limitations issue when she moved for summary disposition under MCR 2.116(C)(9) as to defendant's statute of limitations affirmative defense. She should not now be heard to complain that the trial court erred because it made a decision on her motion. And second, plaintiff does not identify what evidence in discovery she may uncover that would be relevant to her claim not being time-barred. See MCR 2.116(H)(2) ("A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure."). Nor can she, as the application she signed unambiguously provided for a shorter limitations period than what is afforded by statute. See *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010) (stating that under the parol-evidence rule, extrinsic evidence is not admissible to interpret an unambiguous contract).

Affirmed. Defendant, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Mark T. Boonstra
/s/ James Robert Redford

2020 WL 1862676
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Cheryl MURPHY, Plaintiff,

v.

MAGNA SEATING OF AMERICA, INC., and International Union United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), Defendants.

Civil Action No. 19-CV-13252
|
Signed 04/13/2020

**Attorneys and Law Firms**

Marie T. Racine, Racine & Associates, Detroit, MI, for Plaintiff.

David Cessante, Robert Nathan Dare, Clark Hill PLC, Detroit, MI, for Defendants.

**OPINION AND ORDER GRANTING DEFENDANT MAGNA'S MOTION FOR PARTIAL DISMISSAL**

BERNARD A. FRIEDMAN, SENIOR UNITED STATES DISTRICT JUDGE

***1** This matter is presently before the Court on the motion of defendant Magna Seating of America, Inc. ("Magna" or "defendant") for partial dismissal of the complaint [docket entry 11]. Plaintiff has filed a response in opposition. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion without a hearing. For the reasons stated below, the Court shall grant the motion.

This is an employment discrimination case. Plaintiff alleges that she was employed by Magna at its Highland, Michigan, plant from June 2010 until she was discharged in December 2018. Am. Compl. ¶ 11. During the last year of her employment, plaintiff (who is Caucasian) alleges that her supervisors and Magna's human resources representatives disciplined her for taking bathroom breaks and for needing an excessive amount of time to assemble parts, while non-Caucasian employees were not similarly treated. Plaintiff alleges that Magna disciplined her unfairly, and eventually discharged her, because of her gender and/or race and that it retaliated against her for complaining about being treated unfairly. Plaintiff also alleges that Magna's actions violated her rights under its collective bargaining agreement ("CBA") with the United Automobile Workers ("UAW") of which plaintiff is a member.

In Counts I - III, plaintiff brings claims against Magna under Title VII (Count I), the Elliott-Larsen Civil Rights Act ("ELCRA") (Count II), and the CBA (Count III).[1] In the instant motion, defendant seeks the dismissal of Count I to the extent it claims gender discrimination, and the dismissal of Counts II and III entirely. Plaintiff opposes all aspects of defendant's motion.

Under Fed. R. Civ. P. 12(b)(6), the Court may dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his entitlement to relief requires more than labels and conclusions, and a

  

formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above a speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

***Plaintiff's Title VII Claims (Count I)***

Defendant first argues that plaintiff's Title VII claim should be dismissed insofar as it is based on allegations of gender discrimination because the charge plaintiff filed with the Equal Employment Opportunity Commission ("EEOC") alleged race discrimination, age discrimination, and retaliation, but not gender discrimination.[2] Defendant cites extensive authority for the proposition that a Title VII claim cannot be based on grounds that were not raised in a timely EEOC charge. Plaintiff acknowledges that she did not specifically claim gender discrimination in her EEOC charge, but she argues that she should nonetheless be permitted to pursue a Title VII gender discrimination claim "because the claim properly arises out of and/or relates to [her] EEOC charge." Pl.'s Resp. Br. at 12.

***2** Both sides cite *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359 (6th Cir. 2010), which stated:

> In designating the procedure for challenging prohibited employment discrimination under Title VII, Congress gave initial enforcement responsibility to the EEOC. Thus, an employee alleging employment discrimination in violation of the statute must first file an administrative charge with the EEOC within a certain time after the alleged wrongful act or acts. *See* 42 U.S.C. § 2000e–5(e)(1). The charge must be "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in his EEOC charge. *See* 42 U.S.C. § 2000e–5(f)(1); *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). This rule serves the dual purpose of giving the employer information concerning the conduct about which the employee complains, as well as affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion. *See id.* at 44, 94 S.Ct. 1011. Hence, allowing a Title VII action to encompass claims outside the reach of the EEOC charges would deprive the charged party of notice and would frustrate the EEOC's investigatory and conciliatory role. At the same time, because aggrieved employees–and not attorneys–usually file charges with the EEOC, their pro se complaints are construed liberally, so that courts may also consider claims that are reasonably related to or grow out of the factual allegations in the EEOC charge. *See Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 732 (6th Cir. 2006). As a result, "whe[n] facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Davis v. Sodexho*, 157 F.3d 460, 463 (6th Cir. 1998).

*Id.* at 361-62. The Sixth Circuit has further explained the "reasonably related" rule as follows:

> In *Weigel v. Baptist Hosp. of East Tennessee*, 302 F.3d 367 (6th Cir. 2002), we reiterated, "the general rule in this circuit ... that the judicial complaint must be limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *Id.* at 380 (internal citation omitted); *see also Bray v. Palm Beach Co.*, 907 F.2d 150, 1990 WL 92672, at *2 (6th Cir. June 29, 1990) (finding "the facts alleged in the body of the EEOC charge, rather than merely the boxes that are marked on the charge, are the major determinants of the scope of the charge"). We explained in *Weigel* that, "[p]ursuant to this rule, we have recognized that 'where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim.' " 302 F.3d at 380 (quoting *Davis*, 157 F.3d at 463). This principle became known as the "expected scope of investigation test." *Weigel*, 302 F.3d at 380.

***3** *Dixon v. Ashcroft*, 392 F.3d 212, 217 (6th Cir. 2004).

In the present case, no reasonable argument can be made that the facts plaintiff brought to the EEOC's attention should have prompted it to investigate whether plaintiff was the victim of gender discrimination. The EEOC charge itself, including the "particulars" plaintiff provided in the narrative section (*see supra* note 2), makes no mention of gender discrimination. Nor is any suggestion of gender discrimination contained in the "Inquiry Information" form plaintiff filled out at the EEOC's request before her in-person interview. *See* Am. Compl. Ex. CC. At the top of this form, under Reason for Complaint, plaintiff wrote: "Race, Age - I am 40 years of age or older, Color, Retaliation - I complained to my employer about job discrimination." In the narrative section, under Adverse Action(s), plaintiff wrote:

> As the only white woman on an assembly line of 33 employees, I suffered discrimination, including: suspension after my manager refused to let me use the restroom, although non-white employees are allowed to; discipline for leaving my station to put my hair up while non-white employees are not disciplined; multiple HR meetings for ?Over Cycles? ... when there was no time study on my station, yet I was disciplined and terminated allegedly for Over Cycles. I believe non-white employees on the same station experienced Over Cycles and were not disciplined or terminated like me. Recently, Magna began using new parts on my station 203. The parts require unwrapping. This increased the amount of time needed for assembly. I personally saw non-white employees receive help unwrapping parts on the same station, yet I was never offered nor permitted to receive help; despite my requests.

*Id.* Ex. CC. While plaintiff did refer to herself as a "white woman," it is apparent that she was complaining of race discrimination, not gender discrimination.

On another EEOC Inquiry Information form, plaintiff repeated, under Reason for Complaint: "Race, Age - I am 40 years of age or older, Color, Retaliation - I complained to my employer about job discrimination." Am. Compl. Ex. DD. Under Adverse Action(s), plaintiff repeated the above-quoted paragraph. Plaintiff added, under Supplemental Information, that during a five-day suspension "[m]y position was filled by a non-white employee"; that "I feel I was singled out because I am white and because I asked to have my union rep with me at meetings with HR"; that "I was the only white woman working on the line and I was replaced by a non-white individual"; and that "I told Laura Bryant, Magna HR that I felt that I was being discriminated again[st] because I[']m white." *Id.* Again, the clear gist of plaintiff's EEOC complaint was that she was a victim of race discrimination, not gender discrimination.

The same must be said of two other documents plaintiff cites in her response brief, i.e., an Investigation Report, apparently written by plaintiff's union representative, dated March 8, 2018 (Am. Compl. Ex. H), and the Pre-Charge Inquiry form plaintiff submitted to the EEOC on October 20, 2018 (Am. Compl. Ex. T). The first states:

> ***4** She says she had her relief light on at station 203 teamleader came over he works OM(B) shift and Desmond came over. Desmond said your light is on he ask was it a emergncy she said Desmond I need a relief. Cheryl said she feels uncomfortable with him and also Feels because she's a white woman! Desmond brushed up against her cutting through when he could have went around Cheryl want's no contact with him Desmond has people just walking around going to the restroom. Just now Desmond had her wait 15 mins to go to the restroom he came to her just before it was time for her to come up to the union office. Cheryl says this issue with Desmond saying she walked off the line and the first issue when he wouldn't let her go to the restroom. Laura says she wants going [illegible] white people Cheryl said she'll Bump if need be I said no your not going to Laura did admit that he needs to acknowledge the people when he's talking to them or when answering questions. Laura said we need to Find some happy medium with the two

On the Pre-Charge Inquiry form, plaintiff indicated that she believed Magna discriminated against her race, color, and age, stating "I'm the only white female on the line of 33 people, I feel I get treated different!"

Having considered all of these documents, the Court concludes that the clear gist of plaintiff's complaint to the EEOC was that Magna discriminated against her because of her race, and perhaps also because of her age, and that Magna retaliated against her for complaining of unfair treatment, particularly as regards bathroom breaks. But no plausible argument can be made that the EEOC should have thought, based on the information plaintiff submitted for its review, that she was complaining about gender discrimination. There is simply no way that, in this case, the "facts related with respect to the charged claim would prompt the EEOC to investigate" gender discrimination. *Weigel*, 302 F.3d at 380. Since plaintiff failed to include any semblance of gender discrimination in her EEOC charge, she is precluded from pursuing gender discrimination as part of her Title VII claim in this lawsuit.

***Plaintiff's ELCRA Claims (Count II)***

In Count II, plaintiff claims that defendant Magna discriminated against her on the basis of her age, gender, and race, and that it retaliated for complaining about being treated unfairly, in violation of the ELCRA. Defendant argues that these claims are

  

time-barred because they were filed after the 180-day limitations period to which plaintiff agreed as a condition of employment. Defendant points to the following paragraph on the employment application plaintiff signed on February 4, 2010:

> **Applicant: READ CAREFULLY BEFORE SIGNING**
>
> * * *
>
> I agree that any action or suit against the Company arising out of employment or termination of employment, including, but not limited to, claims arising under State of Federal civil rights statutes, must be brought within 180 days of the event giving rise to the claim or be forever barred. I waive any limitation to the contrary.

Def.'s Ex. 1. Defendant notes that plaintiff's claims accrued by the date of her discharge (December 20, 2018) and that she commenced this action more than 180 days later. Plaintiff argues that this shortened limitations period is unenforceable because it is unreasonably short, she did not knowingly agree to it, and it is superseded by the CBA.

In *Timko v. Oakwood Custom Coating, Inc.*, 244 Mich.App. 234, 625 N.W.2d 101 (Mich. Ct. App. 2001), plaintiff signed an employment application containing a shortened limitations period worded exactly as in the present case. The trial court enforced the provision and dismissed plaintiff's ELCRA claims as time-barred because he commenced suit more than 180 days after he was discharged. In affirming the trial court, the Michigan Court of Appeals stated that the parties to a contract may agree to shorten the limitations period applicable to ELCRA claims "provided that the abbreviated period remains reasonable." *Id.* at 104. It further held that such a period "is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained." *Id.* The court also stated that "no inherent unreasonableness accompanies a six-month period of limitation," *id.* at 105, and that plaintiff had not shown that the shortened period abrogated his claims or prevented him from ascertaining his damages. *Id.* at 106.

***5** Since *Timko* was decided, this Court has consistently enforced 180-day limitations periods contained in employment applications in ELCRA actions. *See, e.g., Evans v. Canal St. Brewing Co. LLC*, No. 18-CV-12631, 2019 WL 1491969, at *6 (E.D. Mich. Apr. 4, 2019); *Cerjanec v. FCA US, LLC*, No. 17-CV-10619, 2017 WL 6407337, at *8 (E.D. Mich. Dec. 15, 2017); *Smithson v. Hamlin Pub, Inc.*, No. 15-CV-11978, 2016 WL 465564, at *3 (E.D. Mich. Feb. 8, 2016); *Davis v. Landscape Forms, Inc.*, No. 1:13-CV-1346, 2015 WL 13173236, at *4 (W.D. Mich. Apr. 17, 2015), *aff'd*, 640 F. App'x 445 (6th Cir. 2016); *Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769, 774 (E.D. Mich. 2002). This Court shall do the same and dismiss plaintiff's ELCRA claims because they were filed after the 180-day limitations period contained in plaintiff's employment application had expired. This limitations period has repeatedly been found to be reasonable, and plaintiff has not shown that 180 days were insufficient for her to discover her ELCRA claims and file suit.[3]

***Plaintiff's CBA Claims (Count III)***

In this count, plaintiff claims that Magna breached various provisions of the CBA. Specifically, she alleges:

> 124. When Magna allowed Ms. Murphy to be disparately disciplined, suspended and terminated due to her race and/or gender and/or in retaliation for the Complaints, Magna breached its obligations to Ms. Murphy under the CBA, Charter, and/or Handbook, and in so doing, violated Section 301 of the LMRA.
>
> 125. When Magna did not follow the CBA dispute resolution procedures and Handbook progressive discipline policy, Magna breached its obligations to Ms. Murphy under the CBA and/or Handbook, and in so doing, violated Section 301 of the LMRA.
>
> 126. When Magna did not establish and validate that the production standards on the line(s) where Ms. Murphy worked were fair and equitable and did not give due consideration to fatigue, personal time, and delays, Magna breached its obligations to Ms. Murphy under the CBA and in so doing, violated Section 301 of the LMRA.

***6** Am. Compl. ¶¶ 124-26.

Plaintiff's breach of contract claims against Magna fail because the Court has dismissed plaintiff's claim against defendant International UAW for breach of its duty of fair representation ("DFR"). As the Supreme Court has explained,

> [i]t has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. *Smith v. Evening News Assn.*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *cf. Clayton v. Automobile Workers*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981) (exhaustion of intra-union remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement. *See W.R. Grace & Co. v. Local 759*, U.S. ——, at ——, 103 S.Ct. ——, at ——, 75 L.Ed.2d ——; *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In *Vaca* and *Hines*, however, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. *Vaca*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842; *Hines*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231; *Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732; *Bowen*, 459 U.S. 212, 103 S.Ct. 588, 74 L.Ed.2d 402; *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970). Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.' " *Mitchell*, 451 U.S. at 66-67, 101 S.Ct. at 1565-1566 (Stewart, J., concurring in the judgment), quoting *Hines*, 424 U.S. at 570-571, 96 S.Ct. at 1059. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

*DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 163-65, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (footnote omitted). Further, "[a] hybrid section 301 action involves two constituent claims: breach of a collective bargaining agreement by the employer and breach of the duty of fair representation by the union. Unless a plaintiff demonstrates both violations, he cannot succeed against either party." *Garrison v. Cassens Transp. Co.*, 334 F.3d 528, 538 (6th Cir. 2003) (citations and internal quotation marks omitted). *See also Garrish v. Int'l Union United Auto., Aerospace & Agric. Implement Workers of Am.*, 417 F.3d 590, 594 (6th Cir. 2005) ("To recover against a union under § 301, the union member must prove both (1) that the employer breached the collective bargaining agreement and (2) that the union breached its duty of fair representation. If both prongs are not satisfied, Plaintiffs cannot succeed against any Defendant."); *Simoneau v. Gen. Motors Corp.*, 85 F. App'x 445, 448 (6th Cir. 2003) ("To prevail in a hybrid § 301 action, an employee must prove both that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation of the employee. No liability can attach to the employer unless the employee establishes both of these elements.").

***7** In the present case, plaintiff cannot prevail on her breach-of-CBA claim against Magna because her DFR claim against the union has been dismissed. As the Court stated in its earlier opinion granting defendant International UAW's motion to dismiss in this matter,

> [d]efendant International UAW notes, and plaintiff concedes, that a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). But the claim in the present case that defendant International UAW breached this duty by "fail[ing] to process [her] grievances" cannot be maintained in light of the CBA's provision defining this defendant's role in the grievance process. Under Article 9 of the CBA (which plaintiff references at Am. Compl. ¶ 87(e) and attached to her amended complaint as an exhibit), the International UAW does not become involved in grievances until "Step 4," the last step in a four-step dispute resolution process.[1] *See* Am. Compl. Ex. C at 22. Under this process, it is not the International UAW's role to "process" grievances, but only to participate in them at the final step. Plaintiff does not allege that her grievances reached that step – or indeed that they ever advanced beyond Step 1. Under these

circumstances, plaintiff's allegations that defendant International UAW breached its DFR by failing to process her grievances fail to state a claim.

While plaintiff alleges that this defendant "also breached its duty of fair representation to Ms. Murphy by acting in an arbitrary manner with a reckless disregard for the interests of Ms. Murphy," this is precisely the sort of "unadorned, the-defendant-unlawfully-harmed-me accusation" that the Supreme Court has held to be insufficient to state a claim. *Ashcroft*, 556 U.S. at 678, 129 S.Ct. 1937. If this allegation is meant to refer to defendant International UAW's alleged failure to process plaintiff's grievances, it fails for the reasons stated above.

The Court concludes that the amended complaint fails to state a claim upon which relief can be granted against defendant International UAW.

[1] As set forth in Article 9, the first step of the dispute resolution process requires the employee to take up the grievance with her supervisor. At this step, the employee may ask the committeeperson to handle the grievance for her. A grievance that is not resolved at Step 1 must "be reduced to a 'verbal discussion form' and signed by the employee." The grievance then proceeds to Step 2, where the committeeperson meets with the employer's human resources manager or production manager. A grievance that is not resolved at Step 2 must "be reduced to writing on forms provided by the Company, and signed by the employee involved." The grievance then proceeds to Step 3, where the committeeperson meets with the employer's assistant general manager and human resources manager. If the grievance is not resolved at Step 3, the company must put its decision in writing and provide two copies to the committeeperson. Then the grievance "may be appealed to" Step 4. Only at this step does the International UAW become involved. At this step, "a meeting will be arranged ... between the International Union Representative, or designee and the General Manager," as well as "the Chairman and Human Resources Manager or designee who will attempt to resolve the grievance."

***8** Op. & Ord. Granting Def. Int'l UAW's Mot. to Dismiss at 3-4.

As plaintiff has failed to state a DFR claim, it is impossible for her to prevail on her claim that Magna breached the CBA. *See DelCostello, Garrison, Garrish*, and *Simoneau, supra.* Accordingly, the Court shall dismiss Count III of the amended complaint.

***Conclusion***

For the reasons stated above, the Court concludes that (1) plaintiff may not pursue a gender discrimination claim under Title VII because she did not allege gender discrimination in her EEOC charge, (2) plaintiff's ELCRA claims are time-barred, and (3) plaintiff may not pursue her § 301 claim against Magna because she has failed to state a DFR claim against her union. Accordingly,

IT IS ORDERED that defendant's motion for partial dismissal is granted as follows: Count I is dismissed insofar as it is based on gender discrimination, and Counts II and III are dismissed entirely.

**All Citations**

Not Reported in Fed. Supp., 2020 WL 1862676

Footnotes

1 Plaintiff also sued defendant International UAW for breaching its duty of fair representation. The Court has dismissed the amended complaint as to this defendant, leaving Magna as the sole defendant in this case.

2 Plaintiff has attached a copy of her EEOC charge to her amended complaint as Ex. EE. Plaintiff indicated by checking boxes that she was charging defendant with discrimination based on race, age, and retaliation. In the narrative portion of the charge, plaintiff stated:

  

I began working for the above-named employer on or about July 20, 2010. I was most recently employed as a Production Worker.

During my employment, I repeatedly complained to my Union and Human Resources about unfair treatment from the Second Row Supervisor; to no avail. On or about September 30, 2018, I was suspended. I know of similarly situated African American employees who engage in the same actions without consequence. In or around October 2018, I was disciplined and suspended for excessive over cycles. I know of a younger, African-American coworker who was also experiencing over cycles, however, she was not subjected to any corrective action. On or about December 20, 2018, I was discharged for excessive over cycles.

I believe I was disciplined, suspended and discharged due to my race, Caucasian; age, 44; and in retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended.

3 The Court finds plaintiff's arguments on this issue entirely unpersuasive. Plaintiff first argues that she could not file suit until after she obtained a right-to-sue letter from the EEOC. Pl.'s Resp. Br. at 17. But an EEOC right-to-sue letter is a prerequisite to filing suit under Title VII, not to filing suit under the ELCRA. Nor is the Court persuaded by plaintiff's contention that her employment application is "superseded by the Collective Bargaining Agreement (CBA)." *Id.* at 19. The CBA provisions plaintiff points to in support of this argument concern wages and "all other economic matters," not the time during which an employee may file suit over alleged discrimination. Finally, plaintiff argues that her agreement to the shortened limitations period was not knowing and voluntary. *Id.* at 20. The Court rejects this suggestion as well because plaintiff's signature appears directly below the quoted provision, which bears a boldfaced, capitalized, and underlined heading cautioning her to "**READ CAREFULLY BEFORE SIGNING**." The Michigan Court of Appeals rejected the identical argument in *Clark v. DaimlerChrysler Corp.*, 268 Mich.App. 138, 706 N.W.2d 471 (Mich. Ct. App. 2005), where plaintiff claimed he did not knowingly waive the three-year statutory limitations period applicable to ELCRA actions. The court disposed of this argument by noting: "This argument is unavailing. The law is clear that one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he or she has not read the agreement." *Id.* at 475.

**End of Document**

# STATE OF MICHIGAN

# COURT OF APPEALS

NANCY POSSELIUS,

Plaintiff-Counterdefendant-Appellee-Cross-Appellant,

v

SPRINGER PUBLISHING COMPANY, INC.,

Defendant-Counterplaintiff-Appellant-Cross-Appellee,

and

WILLIAM L. SPRINGER II,

Defendant-Appellant-Cross-Appellee.

UNPUBLISHED
April 17, 2014

No. 306318
Macomb Circuit Court
LC No. 2009-003401-CD

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Springer Publishing Company, Inc. ("SPC"), and its owner, defendant William L. Springer II, appeal as of right a judgment for plaintiff, following a jury trial, in this retaliation and employment discrimination lawsuit. Plaintiff cross appeals, challenging the trial court's ruling that any damages for lost wages were required to be reduced by the amount of unemployment benefits received by plaintiff. We conclude that plaintiff's gender discrimination claim was barred by a contractual six-month limitations period and that the retaliation claim, which was predicated on the filing of a counterclaim by SPC, fails as a matter of law. Accordingly, we reverse and remand.

Plaintiff began working for SPC in 2000. In 2005, plaintiff received SPC's revised policy book and signed a form acknowledging her receipt of the book. That form provided:

> [1] I hereby acknowledge that this Policy Book has been received, read and understood. . . .

> [2] I understand that this manual is not intended to be a contract, but is provided as a general explanation of policies which the Company uses as guidelines in its decision making process.
>
> [3] I understand it is my responsibility to update this guide as soon as replacement pages are distributed.
>
> [4] In the event that I am ever employed in a management capacity for the Company, I understand it is my responsibility to understand, execute and enforce the policies and procedures established in this Policy Book to the employees under my direction.
>
> [5] I agree to conform to the rules and regulations of the Company and understand that my employment can be terminated at any time . . . at the option of either the Company or myself. This at will employment relationship can be modified only through a written modification approved by the Publisher.
>
> [6] I agree that in consideration for my employment or continued employment that any claim or lawsuit arising out of my employment with, or my application for employment with, the Company or any of its principals or subsidiaries must be filed no more than six (6) months after the day 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.

Plaintiff's employment ended in July 2008. Plaintiff filed suit a year later in July 2009. Defendants moved for summary disposition on the ground that plaintiff's action was barred by the six-month contractual limitations period. The trial court denied the motion, ruling that the acknowledgment form was ambiguous because: (1) it was unclear whether the "Revised Policy Book" plaintiff submitted was the "Policy Book" referenced in the acknowledgement form;[1] (2) it was unclear whether the phrase "this manual" as used in the second paragraph of the acknowledgment form referred to the policy book, to the acknowledgment form, or to both; and (3) it was unclear whether the acknowledgement form was part of the revised policy book or was a separate document. The trial court denied defendants' motion for a directed verdict at trial for the same reasons. We note that the jury was not even asked to resolve those alleged ambiguities, and instead was asked to determine in general whether plaintiff agreed to be bound by the six-month statute of limitations rather than the time limit set forth under Michigan law, with the jury answering in the negative.

[1] The evidence at trial indicated that the policy book referenced in the acknowledgement form was the policy book admitted into evidence.

The trial court's ruling on a motion for a directed verdict is reviewed de novo on appeal. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499; 780 NW2d 900 (2009). This Court must review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* The motion should be granted only if the evidence so viewed fails to establish a claim as a matter of law. *Id.* "The interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

If the parties to a contract dispute its terms, the "court must determine what the parties' agreement is and enforce it." *G & A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). If the language of a contract, when given its plain and ordinary meaning, "fairly admits of but one interpretation, it may not be said to be ambiguous or, indeed, fatally unclear." *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). "If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide." *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999).

Language is not ambiguous simply because the parties dispute its meaning. *Gortney v Norfolk & W R Co*, 216 Mich App 535, 540; 549 NW2d 612 (1996). A contract is ambiguous if its language "is reasonably susceptible to more than one interpretation," *Rinke v Auto Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997), or if two provisions irreconcilably conflict with each other, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). Parol evidence is admissible to explain an ambiguity. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). If the contract language is ambiguous, "the ambiguous language presents a question of fact to be decided by a jury." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

"[A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). "Only recognized traditional contract defenses" such as duress, waiver, estoppel, fraud, or unconscionability "may be used to avoid the enforcement of the contract provision." *Id.* This Court has upheld a contractual six-month limitations period in employment discrimination cases, rejecting arguments that the shortened period violated public policy and was unconscionable. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142-144; 706 NW2d 471 (2005). The acknowledgement form clearly and unambiguously required plaintiff to file suit within six months after the date of the employment action giving rise to the suit. Plaintiff does not deny this, but contends that the acknowledgement form did not create a valid and enforceable contract.

In *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 408; 550 NW2d 243 (1996), the plaintiff sued the defendant for gender discrimination following termination of her employment. The defendant's employee handbook provided in part that any dispute arising out of "'employment related matters,'" including "'any and all claims relating to termination of employment,'" were to be resolved by binding arbitration. *Id.* at 409 n 3. The plaintiff signed an acknowledgment form in which she "'agreed to be bound by [the] terms and policies'" of the

handbook. *Id.* at 409. The trial court denied the defendant's motion for summary disposition. Although this Court reversed, the Supreme Court upheld the trial court's ruling. *Id.* at 410. It held that the arbitration provision in the handbook did not create a valid or enforceable agreement to arbitrate because the handbook also stated that its policies did "'not create any employment or personal contract, express or implied,'" and that the defendant reserved the right to modify any or all policies at its discretion, which indicated that "the defendant did not intend to be bound to any provision contained in the handbook." *Id.* at 413-414.

Our case is easily distinguishable from *Heurtebise*. In that case, the arbitration agreement was part of the employee handbook and the handbook stated that it was not intended to create a contract. One element of a valid contract is mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). This means "that both parties are bound to an agreement or neither is bound." *Bancorp Group, Inc v Mich Conference of Teamsters Welfare Fund*, 231 Mich App 163, 171; 585 NW2d 777 (1998). By signing the acknowledgement form, the plaintiff in *Heurtebise* agreed to be bound by the terms of the handbook, but the handbook, in which the arbitration provision at issue was found, indicated that the defendant was not likewise bound by its terms and thus there was no mutuality of obligation. This case is different because the provision regarding a shortened limitations period was part of the acknowledgment form *itself* and there is nothing to indicate that SPC did not intend to be bound by that agreement. The revised policy book stated that SPC "reserve[d] the right to amend, alter or otherwise modify this Policy Book." However, the six-month limitations period was not contained in the policy book. Further, an employment contract is invalid only if the lack of mutuality amounts to a lack of consideration. *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 600 n 7; 292 NW2d 880 (1980). And defendant provided valid consideration by agreeing to continue plaintiff's employment in exchange for plaintiff agreeing to the shortened limitations period. See *Id.* at 600 ("proper inquiry is whether the employee has given consideration for the employer's promise of employment").

This case is also distinguishable from *Stewart v Fairlane Community Mental Health Ctr (On Remand)*, 225 Mich App 410; 571 NW2d 542 (1997), and *Smith v Chrysler Fin Corp*, 101 F Supp 2d 534 (ED Mich, 2000), the other cases cited by plaintiff. In *Stewart*, the defendant's employee handbook contained an arbitration provision, but the acknowledgment form the plaintiff signed stated that the handbook was not an employment agreement or a contract of employment. *Stewart*, 225 Mich App at 411-413. Applying *Heurtebise*, the *Stewart* panel ruled that the handbook did not create an enforceable arbitration agreement, as the arbitration provision was found in the handbook, which handbook was not a contract. *Id.* at 419. In *Smith*, the defendant issued an Employee Dispute Resolution Process (EDRP) pamphlet to employees indicating that employment disputes were to be resolved by arbitration, but reserved the right to "amend, modify, suspend, or terminate all or part of th[e] EDRP at any time in its sole discretion." *Smith*, 101 F Supp 2d at 537-538. The federal court ruled that the provision giving the defendant the unilateral right to change or terminate the EDRP demonstrated the defendant's intent not to be contractually bound. *Id.* at 538-539.

Plaintiff argues that the acknowledgment form did not constitute a valid contract because of the language in the second paragraph stating that "this manual is not intended to be a contract." It is abundantly clear from paragraphs 1 - 4 that the terms "Policy Book," "manual," and "guide" were used interchangeably to refer to the same thing. The term "Policy Book"

undoubtedly referred to the revised policy book, receipt of which plaintiff acknowledged by signing the form. That book contained information about SPC's employment procedures and policies. The term "manual" is commonly defined in pertinent part as "a book easily held in the hand, esp. one giving information or instructions." *Random House Webster's College Dictionary* (1997). The term "guide" is similarly defined as "a book, pamphlet, or the like with information, instructions, or advice." *Id*. Thus, the term "manual" can only logically be interpreted as referring to the revised policy book, not to the acknowledgement form, a single sheet of paper which clearly was neither a booklet nor a pamphlet. Thus, there is no basis for concluding that the second paragraph is itself ambiguous or rendered the acknowledgment form ambiguous. Absent any ambiguity, plaintiff's subjective understanding of the meaning of the document is irrelevant. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604-605; 576 NW2d 392 (1997). Although the revised policy book did not create contractual rights, the provision regarding a shortened limitations period is not part of the revised policy book. Thus, there is no basis for concluding, based on the second paragraph alone, that the acknowledgment form did not constitute a valid contract.

Further, there is no basis for concluding that the acknowledgment form itself was part of the revised policy book. And this is the key distinguishing feature between this case and *Heurtebise*, *Stewart*, and *Smith*, where in all of those cases the provision sought to be enforced was part of the handbook, yet there was language indicating that the handbook provisions were not contractual. The policy book here consisted of 12 pages addressing 17 policies and ended on the 12th page. The page numbering was identified at the bottom of each page as follows: "Page 1 of 12" through "Page 12 of 12." On page 12 of the policy book after the conclusion of policy number 17, it was stated, "[END OF POLICY BOOK]." Neither the table of contents nor the policies referenced the acknowledgment form or the shortened limitations period, and the acknowledgement form did not contain any notation to indicate that it was part of the policy book. Plaintiff testified only that she received the policy book and acknowledgement form at the same time. The only indication that the two formed a single document was implied by the fact that they were presented as a single exhibit at trial and, because the acknowledgement form was the last page of the exhibit, plaintiff and her attorney both referred to it as "the last page" as if it were the last page of the policy book. However, none of the witnesses testified that the acknowledgement form was part of the policy book.

Because the acknowledgement form created an enforceable agreement and was not ambiguous, plaintiff was bound by the provision requiring claims to be brought within six months. Application of the six-month limitations period barred plaintiff's gender discrimination claim, which arose out of Springer's conduct during plaintiff's employment. And we conclude that the failure of the discrimination claim necessarily results in a failure of the retaliation claim as a matter of law. Because of the six-month limitations period, plaintiff's discrimination claim should not have been filed in the first place, and it was the filing of the discrimination claim that formed the underlying basis of plaintiff's retaliation theory, i.e., SPC filed the counterclaim in retaliation for plaintiff filing the discrimination claim. The time-barred filing of the discrimination claim set in motion the events that led to the counterclaim and then the retaliation claim, which claims never would have been pursued but for plaintiff's improperly filed lawsuit.

Finally, we find it necessary to respond to the dissenting opinion. We respectfully disagree with the dissent's reasoning, given that Michigan law does not currently support the

proffered analysis. The dissent essentially indicates that "continued employment" cannot constitute "consideration" for purposes of establishing a binding contract by way of the acknowledgment form itself, where employees are at-will employees, as the employer's promise of continued employment is illusory, e.g., the employer could terminate an employee the day after an agreement is executed. In *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001), the plaintiff employee had signed an employment application that contained language acknowledging an at-will employment relationship and agreeing to a 180-day statute of limitations. This Court addressed the issue of consideration, stating:

> Plaintiff next argues that the 180-day period of limitation cannot be enforced because defendant is "attempting to enforce the provisions contained in the employment application as if it is a contract, a contract where the Defendants have *absolutely no obligation*." "The enforceability of a contract depends, however, on consideration and not mutuality of obligation." *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 600; 292 NW2d 880 (1980); 1 Restatement Contracts, 2d, § 79, p 200. This Court previously has recognized that the terms of an employment application constituted part of an employee's and employer's contract of employment. *Butzer v Camelot Hall Convalescent Centre, Inc*, 183 Mich App 194, 200; 454 NW2d 122 (1989); *Eliel v Sears, Roebuck & Co*, 150 Mich App 137, 140; 387 NW2d 842 (1985). Here, defendant clearly provided plaintiff consideration to support enforcement of the terms of the application, *specifically employment and wages*. 1 Restatement Contracts, 2d, § 71, p 172 (consideration may constitute a return promise or a performance, including an act, a forbearance, or "the creation, modification, or destruction of a legal relation"); Black's Law Dictionary (7th ed), p 300 (defining consideration as "[s]omething of value [such as an act, a forbearance, or a return promise] received by a promisor from a promisee"). [*Timko*, 244 Mich App at 244 (emphasis added).]

Accordingly, the *Timko* panel rejected the plaintiff's argument that the defendant employer's act of employing the plaintiff as an at-will employee did not constitute consideration sufficient to create a contract. For purposes of identifying legally-adequate consideration, we can discern no relevant difference between a promise of at-will employment at the commencement of employment, which could be terminated on a whim the next day, and a promise of continued at-will employment. We do not see a sound basis for distinguishing *Timko*.

Moreover, in *QIS, Inc v Indus Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004), this Court, citing *Robert Half Int'l, Inc v Van Steenis*, 784 F Supp 1263, 1273 (ED Mich, 1991), stated, "Mere continuation of employment is sufficient consideration to support a noncompete agreement in an at-will employment setting." This is controlling precedent and undermines entirely the dissent's position. We do not read anything in *Heurtebise*, 452 Mich 405, as indicating that the promise of continued at-will employment does not constitute adequate consideration for purposes of forming a binding contract; the handbook in *Heurtebise* stated that the policies therein did not create a contract, express or implied. *Id.* at 413. The acknowledgment form here contains no such language as applicable to the form itself. We note that "[c]ourts will not ordinarily inquire into the adequacy of consideration[.]" *Moffit v*

*Sederlund*, 145 Mich App 1, 11; 378 NW2d 491 (1985). And, in our view, there is a difference between not having a job period and having a job, albeit at-will employment.

Further, in *In re Certified Question*, 432 Mich 438, 441; 443 NW2d 112 (1989), our Supreme Court answered the following certified question in the affirmative:

> "Once a provision that an employee shall not be discharged except for cause becomes legally enforceable under *Toussaint* . . ., as a result of an employee's legitimate expectations grounded in the employer's written policy statements, may the employer thereafter unilaterally change those written policy statements by adopting a generally applicable policy and alter the employment relationship of existing employees to one at the will of the employer in the absence of an express notification to the employees from the outset that the employer reserves the right to make such a change?"

In answering the certified question in the affirmative and allowing a change in the policy to an at-will employment arrangement, the Court stated:

> It has been suggested that if such a policy is revocable, it is of no value, and thus is the equivalent of an illusory promise. Of course, a permanent job commitment would be highly prized in the modern work force. However, it does not follow that anything less than a permanent job commitment is without meaning or value. Indeed, the prevalence of job security provisions in collective bargaining agreements that typically expire after only a few years attests to the fact that such commitments need not be permanent to have value. [*In re Certified Question*, 432 Mich at 455.]

We recognize that this language from *In re Certified Question* addresses a different factual and legal context, but it does lend some support for the idea that a promise of continued employment, even if the continued employment is merely at-will employment, constitutes consideration adequate to form a contract and is not illusory.

In glancing at caselaw in foreign jurisdictions, the states differ on whether continued at-will employment can constitute sufficient consideration. See *Fifield v Premier Dealer Services, Inc*, 373 Ill Dec 379, 383; 993 NE2d 938 (2013) ("Illinois courts analyze the adequacy of consideration in the context of postemployment restrictive covenants because it has been recognized that a promise of continued employment may be an illusory benefit where the employment is at-will."); *Sniezek v Kansas City Chiefs Football Club*, 402 SW3d 580, 586 n 2 (Mo App, 2013) ("Additionally, one of the cases cited . . . indicates that, unlike in Missouri, continued employment, even if it is only at-will, fulfills the consideration requirement under Pennsylvania law."); *Wright & Seaton, Inc v Prescott*, 420 So2d 623, 628 (Fla App, 1982) ("[W]here employment was a continuing contract terminable at the will of either the employer or employee, the Florida Courts have held continued employment constitutes adequate consideration to support a contract."). Thus, there is some legal merit, generally speaking, in the analysis suggested by the dissent, but it simply does not find any support in Michigan law.

In light of our rulings, it is unnecessary to consider the parties' remaining claims on appeal.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction. We decline to award taxable costs pursuant to our discretion under MCR 7.219(A).

/s/ William B. Murphy
/s/ Michael J. Kelly

2021 WL 5042993
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

LaVell ROCKYMORE, Plaintiff,

v.

CONTINENTAL MANAGEMENT, et al., Defendants.

Civil Action No. 21-10513
|
Signed 09/22/2021

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**REPORT AND RECOMMENDATION TO GRANT DEFENDANTS' MOTION TO DISMISS (ECF No. 9)**

DAVID R. GRAND, United States Magistrate Judge

***1** This is an employment discrimination case brought by *pro se* plaintiff LaVell Rockymore ("Rockymore") against his former employer, Continental Management, and five of its current or former employees (collectively "Defendants"). (ECF No. 1). In his complaint, Rockymore, who is African-American, appears to allege claims for both race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and certain unspecified state laws. (*Id.*, PageID.4, 5, 7). On May 17, 2021, an Order of Reference was entered, referring all pretrial matters to the undersigned pursuant to 28 U.S.C. § 636(b). (ECF No. 10).

On May 13, 2021, Defendants filed a motion to dismiss Rockymore's complaint in its entirety. (ECF No. 9). Rockymore filed a response in opposition to Defendants' motion, and Defendants filed a reply. (ECF Nos. 16, 17). Having reviewed the pleadings and other papers on file, the Court finds that the facts and legal issues are adequately presented in the parties' briefs and on the record, and it declines to order a hearing at this time.

## I. RECOMMENDATION

For the following reasons, the Court **RECOMMENDS** that Defendants' Motion to Dismiss **(ECF No. 9)** be **GRANTED.**

## II. REPORT

### A. The Allegations in Rockymore's Complaint

In his complaint, Rockymore alleges that he worked for Continental Management for more than eight years with "commitment and consistency." (ECF No. 1, PageID.1). He further asserts that, in July and August of 2019, he reported several racist and derogatory remarks allegedly made by a co-worker, John Sapien, to defendants Patrina Smith, Ruth Simpson, and others. (*Id.*, PageID.6, 8). Rockymore alleges that his employment was terminated on August 22, 2019, in retaliation for his complaints regarding his co-worker's use of racist and derogatory language. (*Id.*, PageID.6).

  

**B. Rockymore's Charge of Discrimination**

On January 14, 2020, Rockymore filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against Continental Management, alleging race discrimination and retaliation under Title VII. (ECF No. 9-1, PageID.73). On August 6, 2020, the EEOC dismissed Rockymore's charge and issued a Notice of Right to Sue ("RTS") letter informing him of the need to file his federal claims within 90 days of receipt of that document. (ECF No. 1, PageID.10-11, 14). Rockymore's federal court complaint, which is dated January 30, 2021 (*Id.*, PageID.12), was received by the Court on March 8, 2021 (*Id.*, PageID.19).

**C. Defendants' Motion to Dismiss**

In their motion to dismiss, Defendants argue that: (1) Rockymore's Title VII claims are barred because he failed to file suit within 90 days of receipt of the RTS letter issued by the EEOC; (2) Rockymore's state law claims are also untimely because they were filed more than six months after any claim or cause of action arose, in violation of the contractual limitations period to which he specifically agreed; and (3) Rockymore's Title VII claims against the individual defendants fail because Title VII does not allow for individual liability. (ECF No. 9, PageID.49). For the reasons set forth below, the Court finds merit to each of these arguments.

**D. Standard of Review**

***2** A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests a complaint's legal sufficiency. Because a plaintiff need not plead around affirmative defenses, that rule " 'is generally an inappropriate vehicle for dismissing a claim based upon a statute of limitations' " defense. *Engleson v. Unum Life Ins. Co. of America*, 723 F.3d 611, 616 (6th Cir. 2013) (quoting *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012)). "But, sometimes the allegations in the complaint affirmatively show that the claim is time-barred. When that is the case ...dismissing the claim under Rule 12(b)(6) is appropriate." *Cataldo*, 676 F.3d at 547.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. Put another way, the complaint's allegations "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*, 550 U.S. at 555-56).

In deciding whether a plaintiff has set forth a "plausible" claim, the Court must accept the factual allegations in the complaint as true. *Id.*; *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007). That tenet, however, "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," to prevent a complaint from being dismissed on grounds that it fails to comport sufficiently with basic pleading requirements. *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 555; *Howard v. City of Girard, Ohio*, 346 F. App'x 49, 51 (6th Cir. 2009). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Pleadings filed by *pro se* litigants are entitled to a more liberal reading than would be afforded to formal pleadings drafted by lawyers. *See Thomas v. Eby*, 481 F.3d 434, 437 (6th Cir. 2007). Nonetheless, "[t]he leniency granted to pro se [litigants] ... is not boundless[,]" *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004), and "such complaints still must plead facts sufficient to show a redressable legal wrong has been committed[.]" *Baker v. Salvation Army*, No. 09-11424, 2011 WL 1233200, at *3 (E.D. Mich. Mar. 30, 2011).

  

When a court is presented with a motion testing the sufficiency of a complaint, "it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008); *see also Jones v. ETS Staffing*, No. 09-14374, 2011 WL 1627634, at *1-2 (E.D. Mich. Apr. 28, 2011) (judicial notice taken of EEOC RTS letter appended to motion to dismiss *pro se* plaintiff's federal discrimination action). Here, under these principles, the Court may take judicial notice of Rockymore's EEOC charge and the RTS letter. Additionally, the Court may consider Continental Management's handbook and Rockymore's acknowledgement of the same to the extent the terms and conditions of these documents are central to Rockymore's claims. *See, e.g., Brown v. EQ Indus. Svcs., Inc.*, No. 18-11623, 2019 WL 1988565, at *3-4 (E.D. Mich. May 6, 2019).

**E. Analysis**

*1. Rockymore's Title VII Claims are Untimely*

***3** As set forth above, Rockymore's employment with Continental Management was terminated on August 22, 2019. (ECF No. 1, PageID.6). On January 14, 2020, Rockymore filed an EEOC charge against Continental Management, alleging race discrimination and retaliation under Title VII. (ECF No. 9-1, PageID.73). On August 6, 2020, the EEOC dismissed Rockymore's charge and issued a RTS letter that expressly informed him of the need to file his federal claims within 90 days of his receipt of that document. (ECF No. 1, PageID.10-11, 14 ("Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost.") (emphasis in original)). This instruction was consistent with the governing law, which provides that, in addition to exhausting administrative remedies in a timely fashion by filing an EEOC charge within the requisite time period, a plaintiff must file his federal Title VII claims within 90 days after the EEOC gives notice of the right to sue. *See* 42 U.S.C. § 2000e-5(f)(1); *Graham-Humphreys v. Memphis Brooks Museum*, 209 F.3d 552, 557 (6th Cir. 2000) ("The federal courts have strictly enforced Title VII's ninety-day statutory limit."). "As many courts have held, Title VII's [90] day period applies to pro se plaintiffs, and even one day's delay is fatal to a claim." *Hudson v. Genesee Intermediate Sch. Dist.*, No. 13-12050, 2013 WL 6163220, at *2 (E.D. Mich. Nov. 25, 2013) (internal citations omitted) (citing cases).

In light of the August 6, 2020 RTS letter issued by the EEOC, Rockymore was required to file suit related to his EEOC charge on or before **November 8, 2020** (assuming five days for mail delivery of the RTS letter).[1] Here, it is undisputed that Rockymore's complaint alleges Title VII claims (ECF No. 1, PageID.4), that he did not mail the complaint until, at the earliest, January 30, 2021[2], and that the complaint was not received by the Court and filed until March 8, 2021 (*id.*, PageID.19). Thus, Rockymore's complaint was filed some 215 days after issuance of the RTS letter – well outside the strictly enforced 90-day statutory limitation period.

In his complaint, Rockymore acknowledges that his lawsuit was not timely filed, blaming "the pandemic [which] has the whole world behind time ..." (*Id.*, PageID.15). In his response to Defendants' motion, Rockymore again blames his delay on the global COVID-19 pandemic, asserting for the first time that "all documents were mailed before [the] November 20, 2020 deadline[.]" (ECF No. 16, PageID.88). There are two problems with this assertion. First, Rockymore's complaint is signed and dated January 30, 2021; thus, it is impossible that it could have been filed at any point before then, let alone before November 20, 2020. *See, e.g., Romo v. Largen*, 723 F.3d 670, 674 n. 3 (6th Cir. 2013) (court need not accept allegations that are "blatantly contradicted by the record"). Second, as explained above, Rockymore's deadline was November 8, 2020, not November 20, 2020. Thus, even if Rockymore filed his complaint on November 20, 2020, it would still be untimely because it would have been filed twelve days after the actual deadline. *See Hudson*, 2013 WL 6163220, at *2 ("even one day's delay is fatal to a claim") (internal citations omitted).

While Rockymore's assertion that "life is behind" due to the COVID-19 pandemic (ECF No. 16, PageID.88) may be a fair characterization, the pandemic's general existence did not alter the 90-day limitations period in § 2000e-5(f)(1), which the Court must strictly enforce. *Graham-Humphreys*, 209 F.3d at 557. Nor did any state tolling provision that was put in place in the face

of the pandemic impact *federal* filing deadlines. *See Byrd v. Pepsico/Frito-Lay*, No. 5:20-CV-01923, 2021 WL 307662, at *3 (N.D. Ohio Jan. 29, 2021) (holding that state "temporary tolling rules adopted in response to the Covid-19 pandemic did not modify or toll federal deadlines, like the 90-day deadline set forth in Section 2000e-5(f)(1)").

***4** For all of the foregoing reasons, Rockymore's Title VII claims must be dismissed as untimely.[3]

*2. Rockymore's State Law Claims also are Barred by the Applicable Statute of Limitations*

In his complaint, Rockymore also purports to bring a retaliation claim under state law, presumably the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL § 37.2701 *et seq.* (ECF No. 1, PageID.5). However, on September 29, 2011, Rockymore executed a Receipt of Employee Handbook (the "Acknowledgement"), wherein he agreed:

> ... that, in partial consideration for employment of me by Continental Management, that I will not commence against Continental Management or any of its employees, representatives, or related entities, **any action, suit or other legal proceeding relating in any way to my employment[4] or termination thereof later than: (1) six months after any claim or cause of action arises**, or (2) the expiration of any shorter statute of limitations imposed by law.

(ECF No. 9-2, PageID.75) (footnote added) (emphasis added).

Courts have held that ELCRA claims are subject to contractual limitations periods. *See Harwood v. North American Bancard LLC*, No. 18-12567, 2020 WL 2065480, at *10 (E.D. Mich. Apr. 29, 2020). "Unambiguous provisions shortening the period of limitations are enforceable under Michigan law unless the contract is unconscionable or otherwise against public policy." *Id.* at *10 (citing *Clark v. DaimlerChrysler Corp.*, 268 Mich. App. 138, 142 (2005)). In *Clark*, the Michigan Court of Appeals specifically found a contractual six-month limitations period for employment claims enforceable. *Id.* at 144. Numerous other courts have reached the same conclusion. *See, e.g., Steward v. New Chrysler*, 415 F. App'x 632, 638-39 (6th Cir. 2011) (upholding six-month contractual limitations period on ELCRA race discrimination claim) (citing *Thurman v. DaimlerChrysler*, 397 F.3d 352, 356-57 (6th Cir. 2004)); *Timko v. Oakwood Custom Coating, Inc.*, 244 Mich. App. 234, 242 (2001) (finding "no inherent unreasonableness" in a 180-day period of limitations); *Dedivanaj v. DaimlerChrysler Corp.*, No. 266769, 2007 WL 1791709, at *1 (Mich. Ct. App. June 21, 2007) (affirming dismissal of race discrimination claims filed outside the 180-day contractual limitations period).[5]

***5** Rockymore was terminated on August 22, 2019, and the state law contractual limitations period began to run – at the very latest – on that date. (ECF No. 1, PageID.6). Rockymore did not file his state law claim until March 8, 2021, more than 18 months after his termination and far outside the 6-month contractual limitations period. Indeed, for Rockymore's state law claim to be timely, it must have been filed on or before February 22, 2020, in accordance with the controlling contractual statute of limitations period. And, even in his response brief, where he asserts that "all documents were mailed before [the] November 20, 2020 deadline" (ECF No. 16, PageID.88), Rockymore does not allege that his state law claim was filed prior to February 22, 2020. On the contrary, his complaint is signed and dated January 30, 2021 (ECF No. 1, PageID.12), establishing that it could not have been filed prior to that date. Thus, Rockymore's state law claim also should be dismissed as untimely.

## III. CONCLUSION

For the reasons set forth above, the Court **RECOMMENDS** that Defendants' Motion to Dismiss **(ECF No. 9)** be **GRANTED.**

### All Citations

Slip Copy, 2021 WL 5042993

Footnotes

1 In *Graham-Humphreys v. Memphis Brooks Museum*, 209 F.3d 552, 557 (6th Cir. 2000), the Sixth Circuit ("resolved that notice is *given*, and hence the ninety-day limitations term begins running, on the fifth day following the EEOC's mailing of an RTS notification to the claimant's record residential address, by virtue of a presumption of actual delivery and receipt within that five-day duration[.]") (emphasis in original).

2 Rockymore's initial paperwork was received by the Court in an envelope that had a postage stamp but no postmark. (*Id.*, PageID.19).

3 Defendants also argue that Rockymore's Title VII claims must be dismissed against the individual defendants because these individuals are not subject to liability under Title VII as a matter of law. (ECF No. 9, PageID.70). Specifically, Title VII's anti-discrimination provision makes it unlawful for an "employer" to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). The Sixth Circuit has clearly held that "Congress did not intend individuals to face liability under the definition of 'employer' it selected for Title VII." *Wathen v. General Elec. Co.*, 115 F.3d 400, 406 (6th Cir. 1997) (affirming summary judgment in favor of individual defendants in Title VII case where they could not unilaterally take the complained-of adverse action); *see also Hall v. State Farm Ins. Co.*, 18 F. Supp. 2d 751, 761-62 (E.D. Mich. 1998) (same). Here, where Rockymore has failed entirely to address Defendants' argument that there is no individual liability under Title VII in this case, even if the Court were to find that Rockymore's Title VII claims are timely – which they are not – his claims against the individual defendants should be dismissed.

4 Here, it cannot be disputed that Rockymore's claims relate to his employment and termination. His complaint contains allegations regarding actions taken while he was employed by Continental Management, disciplinary actions he received, and his termination from employment. (ECF No. 1, PageID.8-9). Thus, the Acknowledgement is applicable to Rockymore's state law claim.

5 Even if Rockymore argued that his vague state law claim is not being pled under the ELCRA – which he has not – it still would be subject to the contractual limitations period. As the *Clark* court recognized, "Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute." *Id.* at 142. For this reason too, Rockymore's state law claim must be dismissed.

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