

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sandra Williams,	:	
	:	
Plaintiff-Appellant,	:	No. 09AP-1076
	:	(C.C. No. 2008-03696)
v.	:	
	:	
Bureau of Workers' Compensation,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 8, 2010

Blakemore, Meeker & Bowler Co., L.P.A., and Michael B. Bowler, for appellant.

Richard Cordray, Attorney General, *Peter E. DeMarco* and *Emily M. Simmons*, for appellee.

APPEAL from the Court of Claims of Ohio.

BRYANT, J.

{¶1} Plaintiff-appellant, Sandra Williams, appeals from a judgment of the Court of Claims of Ohio granting the motion to dismiss of defendant-appellee, Bureau of Workers' Compensation. Because the trial court did not err in determining (1) the two-year statute of limitations in R.C. 2743.16 applies to plaintiff's discrimination claim, and (2) the date when plaintiff's claim for wrongful termination accrued, we affirm.

I. Facts and Procedural History

{¶2} In 1998, plaintiff began her employment with defendant. In June of 2000, plaintiff suffered a work-related injury, resulting in her receiving temporary total disability ("TTD") benefits beginning in September 2003. At the time plaintiff began receiving benefits, her doctor estimated she would be able to return to work in September 2004.

{¶3} In February of 2004, defendant began an internal affairs investigation to determine whether plaintiff, though receiving TTD compensation, was working as an independent beauty consultant for Mary Kay Cosmetics Co. ("Mary Kay") beginning in April of 2002. In August of 2004, defendant gave plaintiff the option either to return to work part-time with defendant or face termination. Plaintiff returned to work with defendant on August 25, 2004.

{¶4} Both parties, however, pursued claims against the other. In November of 2004, plaintiff filed a discrimination charge against defendant with the Ohio Civil Rights Commission ("OCRC"). Defendant filed a motion with the Industrial Commission of Ohio requesting the Industrial Commission find that plaintiff, due to her work for Mary Kay, was overpaid TTD benefits and fraudulently received them. Based on the results of the investigation, the state of Ohio indicted plaintiff in December 2004 on one count of workers' compensation fraud in violation of R.C. 2913.48, a fourth-degree felony. Defendant terminated plaintiff from her position of employment in March 2005; plaintiff unsuccessfully appealed her termination.

{¶5} On June 23, 2005, the state entered a nolle prosequi on the sole felony charge then pending against plaintiff, releasing plaintiff from all criminal liability. In the action before the Industrial Commission, a district hearing officer of the Industrial

Commission in August 2005 granted defendant's motion, finding plaintiff not only was overpaid TTD benefits, but she fraudulently received the benefits by concealing she worked for Mary Kay. On September 9, 2005, plaintiff filed a second complaint with the OCRC.

{¶6} Plaintiff appealed the decision of the district hearing officer. On December 5, 2005, a staff hearing officer of the Industrial Commission affirmed the district hearing officer's decision finding overpayment and fraud. The Industrial Commission denied plaintiff's request for an appeal. Unable to appeal from the Industrial Commission's decision, plaintiff filed a mandamus action in this court asserting the Industrial Commission abused its discretion in concluding plaintiff was overpaid TTD benefits and fraudulently obtained them. Based on the record from the Industrial Commission, this court concluded the evidence failed to demonstrate plaintiff was working for Mary Kay. Accordingly, we granted plaintiff's request for a writ of mandamus and ordered the Industrial Commission to vacate its finding of fraud and overpayment and to find instead that plaintiff was entitled to said compensation.

{¶7} On March 25, 2008, plaintiff filed a complaint against defendant and the Industrial Commission in the Court of Claims; plaintiff subsequently dismissed the Industrial Commission as a defendant pursuant to Civ.R. 41(A). In her complaint, plaintiff asserted claims for wrongful discrimination, retaliatory discharge, abuse of process, breach of contract, and wrongful termination. On April 29, 2008, defendant filed a Civ.R. 12(B)(6) motion to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted. The Court of Claims granted defendant's motion to dismiss on

October 13, 2009, finding the two-year statute of limitations for civil actions against the state set forth in R.C. 2743.16(A) barred all the claims of plaintiff's complaint.

II. Assignments of Error

{¶8} Plaintiff timely appeals, assigning the following errors:

ASSIGNMENT OF ERROR ONE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION TO DISMISS BECAUSE (1) THERE WAS A CONFLICT AS TO WHICH STATUTE OF LIMITATION[S] WAS APPLICABLE TO APPELLANT'S CLAIMS, SIX YEARS UNDER R.C. §2305.07 OR TWO-YEARS UNDER R.C. §2743.16, AND (2) THE COURT'S DECISION IN McFADDEN I SHOULD BE GIVEN PROSPECTIVELY-ONLY APPLICATION.

ASSIGNMENT OF ERROR TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION TO DISMISS BECAUSE APPELLANT'S CLAIMS DID NOT ACCRUE UNTIL MAY 24, 2007, WHEN THE TENTH DISTRICT COURT OF APPEALS AFFIRMED THE MAGISTRATE'S DECISION REINSTATING APPELLANT'S COMPENSATION AND A FINDING OF NO FRAUD.

III. Standard of Review

{¶9} In deciding whether to dismiss a complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of plaintiff. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recovery. *O'Brien v. Univ. of Community Tenants Union*

(1975), 42 Ohio St.2d 242, syllabus. We review de novo the dismissal of a complaint pursuant to Civ.R. 12(B)(6). *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, 94.

{¶10} The Court of Claims determined the applicable statute of limitations bars plaintiff's complaint. A complaint may be dismissed pursuant to Civ.R. 12(B)(6) as failing to comply with the applicable statute of limitations if the face of the complaint makes clear that the action is time-barred. *Steiner v. Steiner* (1993), 85 Ohio App.3d 513, 518-19; *Swanson v. Boy Scouts of Am.*, 4th Dist. No. 07CA663, 2008-Ohio-1692, ¶6, quoting *Doe v. Robinson*, 6th Dist. No. L-07-1051, 2007-Ohio-5746, ¶17, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11. Only where the complaint shows conclusively on its face that the action is time-barred should a Civ.R. 12(B)(6) motion to dismiss based upon the statute of limitations be granted. *Swanson*, supra, quoting *Jackson v. Sunnyside Toyota, Inc.*, 175 Ohio App.3d 370, 2008-Ohio-687, ¶15. As plaintiff's complaint plainly sets forth allegations of her five distinct claims as well as the dates when the allegedly wrongful actions took place, we may apply the appropriate statute of limitations to the dates in the complaint to determine whether plaintiff's complaint is timely.

IV. First Assignment of Error – Discrimination Claim

{¶11} Plaintiff's first assignment of error asserts the trial court erred in determining the statute of limitations that applies to plaintiff's discrimination claim. Plaintiff argues the trial court erroneously applied the two-year statute of limitations in R.C. 2743.16 to plaintiff's claims when the six-year statute of limitations under R.C. 2305.07 governs her action.

{¶12} To the extent set forth in the provisions of R.C. Chapter 2743, "the state 'waives its immunity from liability * * * and consents to be sued.' " *Rankin v. Ohio Reformatory for Women*, 10th Dist. No. 09AP-524, 2009-Ohio-6575, ¶15, quoting R.C. 2743.02(A)(1). Subject to limitations that do not apply here, R.C. 2743.16(A) provides the applicable statute of limitations for civil actions against the state, stating "[s]uch actions 'shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties.' " *Id.*, quoting R.C. 2743.16(A).

{¶13} Despite the two-year statute of limitations for civil claims against the state contained in R.C. 2743.16(A), plaintiff asserts the statute of limitations for her discrimination claim under R.C. 4112.02 is six years. See R.C. 4112.02(A) (making it an unlawful discriminatory practice "[f]or any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause"). Plaintiff relies on R.C. 2305.07, which states "an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

{¶14} Plaintiff asserts that at the time she filed her complaint, two cases from this court, when compared to more recent cases, created an intra-district conflict regarding the applicable statute of limitations. The cases, *Harris v. Ohio Dept. of Adm. Serv.* (1989), 63 Ohio App.3d 115, and *Senegal v. Ohio Dept. of Rehab. & Corr.* (Mar. 10, 1994), 10th Dist. No. 93API08-1161, both applied a six-year statute of limitations to discrimination claims brought against the state, not the two-year statute of limitations in R.C. 2743.16.

{¶15} Plaintiff concedes that, subsequent to *Harris* and *Senegal*, this court unequivocally concluded the two-year statute of limitations governs discrimination claims against the state under R.C. Chapter 4112. See *McFadden v. Cleveland State Univ.* ("*McFadden I*"), 10th Dist. No. 06AP-638, 2007-Ohio-298; *McCoy v. Toledo Correctional Inst.*, 10th Dist. No. 04AP-1098, 2005-Ohio-1848. In so concluding, *McFadden I* explicitly overruled *Senegal*. Plaintiff nonetheless contends that because she filed her discrimination claim while a conflict still existed concerning the applicable statute of limitations, the trial court should not have dismissed her complaint as time-barred under R.C. 2743.16.

{¶16} *McFadden I* was decided on January 25, 2007, more than one year before plaintiff filed her complaint in the Court of Claims on March 25, 2008. Accordingly, plaintiff's argument that *McFadden I* should not be applied retroactively is unpersuasive. See *McFadden v. Cleveland State Univ.* ("*McFadden II*"), 180 Ohio App.3d 810, 2009-Ohio-362 (rejecting the same argument plaintiff poses).

{¶17} *McFadden II* addressed whether this court should only prospectively apply *McCoy*, the case *McFadden I* expressly reaffirmed. We held prospective-only application of *McCoy* would be appropriate only if that case "actually announced a new principle of law when it found that the two-year statute of limitations applies to discrimination claims brought against the state." *McFadden II* at ¶13. Since "a number of cases decided after *Senegal*" rejected the application of the six-year statute of limitations in favor of the two-year statute, *McFadden II* held "appellant had no vested rights under *Senegal* at the time his cause of action accrued, and none of the factors for applying discretionary prospective

application apply in appellant's favor." *Id.* Similarly here, plaintiff presents no basis not to apply the two-year statute of limitations to her discrimination claim.

{¶18} Apart from her argument about retroactive application, plaintiff asserts *Harris* remains good law as no case has ever expressly overruled it. With that premise, plaintiff contends an intra-district conflict remains regarding the appropriate statute of limitations. In determining applicable precedent, courts apply a "principle that the more recent decision on a specific issue is controlling precedent." *McFadden II* at ¶4. Although *Harris* has not been expressly overruled, *McCoy* and *McFadden I* eliminated it as viable precedent.

{¶19} Accordingly, the trial court did not err in determining the statute of limitations that applies to plaintiff's discrimination claim is the two-year limitation contained in R.C. 2743.16. Plaintiff's first assignment of error is overruled.

V. Second Assignment of Error – Accrual Date

{¶20} Plaintiff's second assignment of error asserts her wrongful termination claim did not accrue until May 24, 2007, the date this court adopted the magistrate's decision concluding plaintiff was not overpaid TTD compensation and vacating the Industrial Commission's finding of fraud. She thus contends that even under a two-year statute of limitations, her complaint filed March 25, 2008 is timely.

{¶21} Determining the date a cause of action accrued is a question of law reviewed de novo on appeal. *Bowman v. Tyack*, 10th Dist. No. 08AP-815, 2009-Ohio-1331, ¶10, citing *Ruckman v. Zacks Law Group LLC*, 10th Dist. No. 07AP-723, 2008-Ohio-1108, ¶17. See also *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, paragraph one of the syllabus (stating that "[a]bsent legislative definition, it is left to the

judiciary to determine when a cause 'arose' for purposes of statutes of limitations"). "Ordinarily, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed." *DiNozzi v. Ohio State Dental Bd.*, 10th Dist. No. 08AP-609, 2009-Ohio-1376, ¶15, quoting *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507 (internal quotation marks omitted).

{¶22} Plaintiff relies on *Esselburne v. Ohio Dept. of Agriculture* (1990), 64 Ohio App.3d 578, which addressed the accrual date for a claim for wrongful exclusion from employment, to support her contention that her cause of action accrued when this court determined her mandamus action. In that case, the State Personnel Board of Review ("SPBR") affirmed Esselburne's layoff, but a mandamus action determined the layoff was unlawful and ordered Esselburne's reinstatement in August 1987. Although Esselburne ultimately filed his complaint for wrongful exclusion in the Ohio Court of Claims on November 7, 1989, the court granted a motion to dismiss based on Esselburne's failure to file within the statute of limitations. Applying the two-year statute of limitations in R.C. 2743.16, this court concluded "[a]n order of reinstatement issued by a court on appeal from a decision of the SPBR constitutes a determination that the exclusion was wrongful." *Id.* at 581. Because plaintiff's order of reinstatement occurred in August 1987, *Esselburne* decided plaintiff's claim for wrongful exclusion from employment accrued, at the latest, on the date of his reinstatement. *Id.*

{¶23} Plaintiff's reliance on *Esselburne* for the proposition that her claim did not accrue until this court's decision on May 24, 2007 is flawed. Initially, *Esselburne* addressed the accrual date for a claim of wrongful exclusion from employment, not an accrual date in general. Plaintiff does not assert a claim for wrongful exclusion from

employment but a claim for wrongful termination. Secondly, Esselburne's underlying mandamus action directly related to his cause of action: Esselburne relied upon that mandamus action to determine the exclusion from employment claim actually was wrongful. Here, plaintiff's mandamus action involved her receipt of workers' compensation benefits, but it did not address employment status in any way: whether plaintiff wrongfully or fraudulently received workers' compensation benefits is separate from plaintiff's employment status.

{¶24} A judicial decision generally is not necessary to trigger the applicable statute of limitations. See, e.g., *Bell v. Ohio State Bd. of Trustees*, 10th Dist. No. 06AP-1174, 2007-Ohio-2790, ¶27 (stating "[a] cause of action for breach of contract accrues when the breach occurs or when the complaining party suffers actual damages"); *Burden v. Lucchese*, 173 Ohio App.3d 210, 2007-Ohio-4497, ¶21 (finding "the statute of limitations begins to run" in medical malpractice action when "the injured party is put on notice of the need to pursue possible remedies and not when an attorney actually identifies the pertinent legal injury and remedy"); *Kozma v. AEP Energy Servs.*, 10th Dist. No. 04AP-643, 2005-Ohio-1157, ¶38 (finding cause of action for wrongful discharge accrues "when [the plaintiff] was unequivocally informed" of his discharge). As neither this court nor any other has expanded the narrow holding in *Esselburne* to apply to the accrual date of any cause of action but wrongful exclusion from employment, we decline plaintiff's invitation to do so. *Esselburne* is not controlling, and this court's decision on May 24, 2007 is not the accrual date of plaintiff's claim for wrongful termination.

{¶25} Although plaintiff's second assignment of error appears directed only to her wrongful termination claim, we also address the two-year statute of limitations as applied to her remaining claims.

A. Discriminatory Termination

{¶26} The first count of plaintiff's complaint asserts a claim for discriminatory termination pursuant to R.C. 4112.02. A claim of discrimination accrues "when the discriminatory act or practice occurs." *Tablack v. Wellman*, 7th Dist. No. 04-MA-218, 2006-Ohio-4688, ¶99. If, however, "the complaint alleges discrete discriminatory acts, each discrete act can trigger a new limitations period." *Id.*, citing *Natl. R.R. Passenger Corp. v. Morgan* (2002), 536 U.S. 101, 122, 122 S.Ct. 2061, 2077. Termination is an example of what may be a discrete discriminatory act. *Id.*, citing *Morgan* at 114.

{¶27} Plaintiff's complaint alleges she "was continuously treated differently than similarly situated non-minority employees." (Complaint, ¶37.) According to her complaint, the "proffered reason for terminating Plaintiff was nothing more than a pretext designed to mask the fact that the Plaintiff was terminated on the basis of her racial composition." (Complaint, ¶40.) The latest discrete discriminatory act plaintiff alleges is her termination from employment, which her complaint states occurred in March 2005. Her March 25, 2008 complaint thus was filed outside the two-year statute of limitations.

B. Retaliatory Discharge

{¶28} Plaintiff next asserts a claim for retaliatory discharge as a result of her filing a claim with the OCRC. According to plaintiff's complaint, the instances of alleged retaliation are defendant's initiating proceedings against her and discharging her from employment. As her complaint states her discharge occurred in March 2005 and her

discharge from employment was the later of two instances of alleged retaliation, her March 2005 discharge from employment is the latest possible accrual date for this claim. Her March 25, 2008 complaint thus was filed outside the two-year statute of limitations.

C. Abuse of Process

{¶29} Plaintiff's complaint also asserts a claim for abuse of process, stating defendant used the criminal proceedings instituted against plaintiff as a pretext to terminate her from employment. Under those allegations, plaintiff's claim accrued either on the date of her termination in March 2005 or when the state entered a nolle prosequi on the indictment pending against plaintiff on June 23, 2005. Even if we apply the later of those two dates, plaintiff's claim for abuse of process accrued on June 23, 2005. Her March 25, 2008 complaint thus was filed outside the two-year statute of limitations.

D. Breach of Contract

{¶30} Plaintiff's complaint alleges defendant breached its contract with her when it violated a clause in the employee handbook that required defendant to return plaintiff to the same position and worksite when it rehired her. According to the complaint, defendant instead transferred plaintiff to a new worksite and "forced plaintiff to travel to Canton to work," also violating a handbook provision precluding certain activities when the employee has restrictions from a physician. (Complaint, ¶63.) A claim for breach of contract accrues when the breach actually occurs. See *Bell* at ¶27. Plaintiff returned to work on August 25, 2004. The complaint does not specify on what date defendant required plaintiff to travel to Canton, but it necessarily occurred sometime prior to her termination in March 2005. The latest date at which plaintiff's claim for breach of contract

accrued is March 2005. Her March 25, 2008 complaint thus was filed outside the two-year statute of limitations.

E. Wrongful Termination

{¶31} Lastly, plaintiff asserts a claim for wrongful termination, arguing defendant had no cause to terminate plaintiff because she did not engage in any fraudulent behavior. A claim for wrongful termination accrues on the actual date of termination from employment. See *Gleason v. Ohio Army Natl. Guard* (2001), 142 Ohio App.3d 697, 703. Because we concluded plaintiff's *Esselburne* argument is unpersuasive, plaintiff's claim for wrongful termination accrued at the latest on March 31, 2005. Her March 25, 2008 complaint thus was filed outside the two-year statute of limitations.

{¶32} The trial court did not err in granting defendant's motion to dismiss based on plaintiff's failure to commence her action within the two-year statute of limitations set forth in R.C. 2743.16(A). Plaintiff's second assignment of error is overruled.

VI. Disposition

{¶33} Because the trial court did not err in determining the two-year statute of limitations contained in R.C. 2743.16(A) applied to plaintiff's claims, rendering all five of plaintiff's claims untimely, we overrule plaintiff's two assignments of error and affirm the judgment of the Court of Claims.

Judgment affirmed.

TYACK, P.J., and FRENCH, J., concur
