

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA KAPP,

Plaintiff-Appellant,

v

HARPER HOSPITAL, a Michigan corporation,

Defendant-Appellee.

UNPUBLISHED

April 1, 1997

No. 182670

Wayne Circuit Court

LC No. 94400694 NO

Before: Marilyn Kelly, P.J., and MacKenzie and J.R. Ernst,* JJ.

PER CURIAM.

In this handicap discrimination in employment case, plaintiff appeals as of right from a grant of summary disposition to defendant pursuant to MCR 2.116(C)(10). Plaintiff argues that she established a *prima facie* case under the Michigan Handicapper's Civil Rights Act (HCRA). MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We affirm.

Plaintiff, who suffers from a speech impediment, began her employment with defendant hospital in 1981. In 1993, she submitted two bids for two different job opportunities with defendant: (1) staff nurse in the radiology department, also known as the special procedures nurse; and (2) patient services coordinator. Plaintiff was passed over for both positions.

When defendant failed to choose plaintiff for either position, she filed suit, alleging handicap discrimination and retaliation in violation of MCL 37.1202; MSA 3.550(202), MCL 37.1602; MSA 3.550(602). On November 29, 1994, defendant filed a motion for summary disposition. Following oral argument, the trial judge dismissed the claim related to the special procedures nurse position. However, he denied the motion with respect to the patient services coordinator position, because he did not have key relevant facts before him with which to make an accurate decision.

On December 14, 1994, defendant filed a second motion for summary disposition. The trial judge granted the motion reasoning that the person in charge of hiring based his decision not to hire plaintiff on reasons other than her speech impediment.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that she established a prima facie case of handicap discrimination with respect to the job of special procedures nurse. We disagree.

In order to establish a prima facie case of handicap discrimination, a plaintiff must show that: (1) the plaintiff is “handicapped” as defined in the Act; (2) the handicap is unrelated to the plaintiff’s ability to perform the duties of a particular job; and (3) the plaintiff has been discriminated against in one of the ways set forth in the Act. *Doman v Grosse Pointe Farms*, 170 Mich App 536, 541; 428 NW2d 708 (1988). The HCRA defines the terms “handicap” as follows:

A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . substantially limits 1 or more of the major life activities of that defendant and is unrelated to the individual’s qualifications for employment or promotion. [MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A).]

Even if plaintiff has established that her speech impediment substantially limits a major life activity, she has failed to establish that it is not related to her ability to perform the duties of special procedures nurse. See *Koester v Novi*, 213 Mich App 653, 661-662; 540 NW2d 765 (1995).

According to deposition testimony, the job of special procedures nurse required strong communication skills, as the nurse conducts approximately fifty percent of his or her duties via telephone. It also requires a person who is able to quickly convey information to the patient. We acknowledge that the duties of a particular job are not determined solely by reference to the employer’s definition of the job. *Adkerson v MK-Ferguson Co*, 191 Mich App 129, 140; 477 NW2d 465 (1991). Here, however, the evidence presented by plaintiff does not contradict defendant’s description of the job. Therefore, because plaintiff’s disability is related to her ability to perform the duties of special procedures nurse, she is not handicapped within the meaning of the HCRA. *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504, 506; 476 NW2d 451 (1991). Consequently, the trial judge correctly dismissed her claim.

Unlike the job of special procedures nurse, it does not appear that her handicap was related to her ability to perform the job of patient services coordinator. Regardless, plaintiff has failed to establish that Lubotsky, the person in charge of hiring, denied her the position because of her handicap. *Doman, supra*.

Defendant identified by way of affidavits, depositions, and other documentary evidence, the reason upon which it based its decision not to hire plaintiff. While Lubotsky believed that plaintiff was qualified for the position, he felt that another applicant was better qualified, because of her superior interpersonal skills. Rather than rebut defendant’s argument with substantive proofs, plaintiff merely questioned the legitimacy of defendant’s business decision. We have previously held that a plaintiff cannot survive summary disposition merely by questioning the

soundness or wisdom of an employer's business judgment. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 566; 462 NW2d 758 (1990). Therefore, the trial judge properly granted summary disposition for defendant.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Marilyn Kelly

/s/ Barbara B. MacKenzie

/s/ J. Richard Ernst