STATE OF MICHIGAN

COURT OF APPEALS

ROSIE WILLIAMSON,

Plaintiff-Appellant,

v

CITY OF YPSILANTI and L. J. McKEOWN, jointly and severally,

Defendants-Appellees.

UNPUBLISHED
April 22, 1997

No. 183272
Washtenaw Circuit Court
LC No. 94-002215-CL

Before: Bandstra, P.J., and Hoekstra and S.F. Cox*, JJ.

PER CURIAM.

Plaintiff Rosie Williamson appeals as of right from the trial court's grant of summary disposition to defendants City of Ypsilanti, her former employer, and L.J. McKeown, her former supervisor. Plaintiff alleged handicap and age discrimination regarding her forced retirement. We affirm.

Plaintiff argues that the trial court erred in dismissing her claim under the Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*.[1] We disagree.

A trial court's grant of a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). All the evidence and reasonable inferences therefrom must be construed in favor of the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994). Once the moving party has offered evidence that no genuine factual dispute exists, as in this case where defendants offered evidence that they had good reason to discharge plaintiff, the opposing party must respond with evidence to show that a genuine issue of material fact exits for trial. *Id.* at 160.

The Michigan Handicappers' Civil Rights Act provides that an employer shall not discharge or otherwise discriminate against an employee on the basis of a handicap. MCL 37.1202; MSA 3.550(202). The act defines "handicap" as a "determinable physical or mental characteristic of an

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

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 individual and is unrelated to the individual's ability to perform the duties of a particular job or position ...." MCL 37.1103(e); MSA 3.550(103)(e). To prevail, plaintiff must show the following:

> (1) [s]he is handicapped; (2) h[er] handicap is unrelated to h[er] ability to perform h[er] job; (3) [s]he was discharged; and (4) there is some evidence that the employer acted with discriminatory intent. [*Brown v Sprint*, 891 F Supp 396, 399 (ED Mich, 1995).]

Plaintiff's claim fails for at least two reasons. First, assuming without deciding that plaintiff's recurrent brain tumor is a handicap, she cannot show that her handicap is unrelated to her ability to perform her job. Defendants offered the conclusion of Linda Forsberg, a licensed psychologist, that plaintiff's brain tumor impaired her ability to adequately and safely perform her job.[2] In light of this evidence, plaintiff had an obligation to come forward with documentary evidence or affidavits to rebut Forsberg's conclusion. Plaintiff did offer documentary evidence in the form of Dr. Farhat's December 20, 1993 letter to plaintiff's counsel; however, that letter does not rebut Forsberg's conclusion. Instead, in that letter Farhat expressly concedes that he was "not able to judge if she has any difficulty at the place of her work or what her capabilities are."

Second, plaintiff failed to present any evidence that her discharge was motivated by discriminatory intent. She expressly admitted in deposition that she knew of no one who would testify that defendants discriminated against her because of a handicap.

In sum, the trial court properly granted summary disposition to defendants regarding plaintiff's handicap discrimination claim.

Plaintiff next argues that the trial court erred in prematurely dismissing plaintiff's case prior to the close of discovery. Plaintiff claims to have submitted sufficient evidence to create a genuine issue of material fact as to whether defendants' motivation in discharging her was pretextual as opposed to a legitimate business decision. We disagree.

Generally, summary disposition is premature when granted prior to the close of discovery. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). In the present case, however, the period for discovery, as dictated by the scheduling order, was complete. Plaintiff filed her complaint on March 9, 1994. The scheduling order provided for discovery to close more than eight months later on November 16, 1994. On that same date, defendants filed their motion for summary disposition, and as of that date, plaintiff had not filed any motion for an extension of the discovery period. Thus, plaintiff's reliance on *Kortas v Thunderbowl & Lounge*, 120 Mich App 84; 327 NW2d 401 (1982) is misplaced because there, unlike here, "[d]iscovery was not yet complete." *Id.* at 88.

Plaintiff next asserts that "many depositions were yet to be taken" and that "the parties had agreed to allow deposition discovery to be done despite the closing of discovery." However,

defendants dispute these claims, and the record contains nothing to support them. Further, having failed to depose Forsberg within the discovery period and having failed to name an expert witness within the time parameters of the scheduling order, plaintiff cannot rebut Forsberg's testimony, which is fatal to her case.

In sum, the trial court's grant of summary disposition to defendants was not premature.

We affirm. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Sean F. Cox

[1] On appeal, with respect to the merits of her claims, plaintiff only makes arguments and cites precedents relating to whether summary disposition was properly granted against her handicap discrimination claim. We consider any claim that summary disposition was improperly granted with respect to plaintiff's age discrimination claim to be abandoned. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996); *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 643; 552 NW2d 671 (1996).

[2] While the trial court granted summary disposition to defendants on the basis that plaintiff is unable to establish that the brain tumor "is unrelated to her ability to perform the duties of the particular job," the court went on to note that the holding in *Dauten v Muskegon Co*, 128 Mich App 435; 340 NW2d 117 (1983), was consistent with the court's decision. We agree. We do not share plaintiff's view that the trial court misapplied *Dauten* because there the medical witness was subject to wide-ranging and heated cross-examination. *Id.* at 438-439. Here, Forsberg's opinions and conclusions are untested because plaintiff had not taken Forsberg's deposition. However, plaintiff failed to place on the record any justifiable excuse for her own failure to earlier depose Forsberg. The record reflects that the discovery period ran in excess of eight months, and that this period had expired at the time of the motion hearing. Thus, that Forsberg's conclusions are untested is a state of affairs attributable to plaintiff as is her failure to meet her burden, imposed by MCR 2.116(G)(4), to rebut Forsberg's conclusions.