STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA GARCIA,

Plaintiff-Appellant,

v

ST. MARY'S MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
October 28, 1997

No. 191701
Saginaw Circuit Court
LC No. 92-051332-NZ

Before: Cavanagh, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition of her claim of intentional race and national origin discrimination under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, pursuant to MCR 2.116(C)(10). Plaintiff also challenges an earlier order dismissing her claims of handicap discrimination under the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and disparate treatment race and national origin discrimination under the CRA pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff, an Hispanic employee who suffered from a back injury, alleged that defendant medical center discriminated against her when it refused to allow her to return to work at her former position of patient transporter and when it did not hire her into one of four new clerk-type positions that did not require lifting in excess of twenty pounds.

Plaintiff first argues that the trial court erred in construing plaintiff's complaint as only alleging a failure to accommodate claim under the HCRA, when plaintiff also alleged a separate claim of intentional discrimination under the HCRA. Our review of the record indicates that, first, plaintiff failed to clearly articulate in her complaint that she was alleging a separate disparate treatment handicap discrimination claim, see MCR 2.113(D)(3), second, she did not properly preserve this issue for appeal by raising it in the trial court, and, third, she has not sought leave to file an amended complaint. Accordingly, we decline to review this issue further.

Plaintiff next argues that the trial court erred in dismissing her claim that defendant had a duty, pursuant to MCL 37.1202(f), (g); MSA 3.550(202)(f), (g), to make a reasonable accommodation to

her physical limitations. We disagree. In *Hall v Hackley Hosp,* 210 Mich App 48, 57; 532 NW2d 893 (1995), this Court explained:

> We also hold that defendant's duty to accommodate plaintiff did not require defendant to place plaintiff in another job in the hospital because "[t]he duty to accommodate imposed under the handicappers' act does not extend to new job placement." *Rancour v Detroit Edison Co,* 150 Mich App 276, 279; 388 NW2d 336 (1986); see also *Ashworth* [*v Jefferson Screw Products, Inc,* 176 Mich App 737, 744; 440 NW2d 101 (1989).] Despite our holding, we recognize as we did in *Rancour* that there are legitimate public policy arguments that favor requiring an employer to place a handicapped employee in a new job, and we are mindful that the HCRA is a remedial statute and that the duty to accommodate should therefore be liberally construed. *Rancour*, 284-285, 388 NW2d 336. However, we agree with our previous conclusion that the extent of the burden to be placed on employers to provide new jobs for employees with established handicaps "is a problem to be solved by the Legislature, not the judiciary." *Id.*, 286, 388 NW2d 336.

See also *Koester v City of Novi,* 213 Mich App 653, 662-663, 540 NW2d 765 (1995).

Here, plaintiff has conceded that the twenty-pound lifting restriction affected her ability to perform the job of patient transporter, and plaintiff has not presented any evidence that some type of adaptive device or aid exists to allow plaintiff to perform the duties of that job. Moreover, as the *Hall* Court explained, defendant was under no statutory duty to place plaintiff in a new position, therefore, she has not stated a viable claim under the HCRA with regard to placement in one of the four clerical positions at the hospital. Finally, plaintiff also argues that defendant discriminated against plaintiff on the basis of a "perceived" handicap because defendant in fact believed that the lifting restriction should have been removed. Even assuming this to be true, plaintiff concedes that her personal physician has steadfastly refused to remove the restriction so as to allow plaintiff to resume her patient transporter duties. Thus, we conclude that the trial court properly granted summary disposition of plaintiff's HCRA claim.

Plaintiff next argues that the trial court erred in dismissing her CRA claim based on race or national origin. Our review of the record indicates that both the trial court and plaintiff have misconstrued civil rights jurisprudence. A discrimination claim under the CRA may be based on two theories: disparate treatment (also labeled intentional discrimination) and/or disparate impact. See *Lytle v Malady,* 209 Mich App 179, 184-185; 530 NW2d 135 (1995), aff'd in part, rev'd in part on other grounds 456 Mich 1 (1997). The Michigan Supreme Court and this Court have repeatedly stated that the precise elements of a cause of action under the CRA will vary with the facts of the case. See *Matras v Amoco Oil Co,* 424 Mich 675, 684; 385 NW2d 586 (1986); *Lytle, supra* 209 Mich App at 185. Where, as here, plaintiff alleges disparate treatment of her as an individual on the basis of race and national origin discrimination, she must establish a prima facie case by proving that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in defendant's

adverse conduct toward the plaintiff." *Lytle*, *supra* 456 Mich at 29 (opinion of Riley, J). Here, plaintiff has not shown any evidence whatsoever that she was qualified for the four clerical positions or that discrimination on the basis of race or national origin was a determining factor in defendant's failure to place her in those positions. Accordingly, because plaintiff failed to present a prima facie case of disparate treatment, summary disposition was properly granted to defendant on this claim.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen