STATE OF MICHIGAN

COURT OF APPEALS

CLAUDIA MICHALSKI and MICHAEL J. MICHALSKI,

Plaintiffs-Appellants,

v

REUVEN BAR-LEVAV, M.D., and DR. REUVEN BAR-LEVAV & ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED
January 26, 1999

No. 204033
Oakland Circuit Court
LC No. 96-527349 NZ

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal from the orders of the trial court granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Plaintiff Claudia Michalski (hereinafter plaintiff)[1] alleges that defendant Dr. Reuven Bar-Levav[2] discriminated against her with regard to her employment based on her multiple sclerosis condition. Additionally, plaintiff asserts that defendant's discriminatory conduct was outrageous, entitling her to damages for the intentional infliction of emotional distress. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because she provided sufficient evidence to establish a prima facie case of handicap discrimination. We agree.

On appeal, this Court reviews a trial court's decision regarding a motion for summary disposition de novo as a matter of law. *Marcelle v Taubman*, 224 Mich App 215, 217; 568 NW2d 393 (1997); *Stevens v Inland Waters, Inc*, 220 Mich App 212, 214; 559 NW2d 61 (1996). When considering a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Marcelle, supra* at 216-217. If the affidavits or other documentary evidence fail to show that there is a genuine issue with

respect to any material fact, the moving party is entitled to judgment as a matter of law and the trial court may grant a motion for summary disposition under MCR 2.116(C)(10). *Id*. at 217.

The MHCRA provides that "[a]n employer shall not . . . [d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). To establish a prima facie case of handicap discrimination, a plaintiff must demonstrate that (1) he is handicapped as defined by the MHCRA, (2) the handicap is unrelated to his ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways described in the statute. *Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997).

Under the MHCRA, "handicap" is defined as 1 or more of the following:

> (i) 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:
>
> (A) . . . 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 or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> * * *
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> (ii) A history of a determinable physical or mental characteristic described in subparagraph (i).
>
> (iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [MCL 37.1103(e); MSA 3.550(103)(e).]

Whether plaintiff suffers from a handicap, as defined under the MHCRA, involves a determination regarding the construction of the statute and is a question of law for the court. *Sanchez v Lagoudakis*, 217 Mich App 535, 555; 552 NW2d 472 (1996), rev'd on other grounds 458 Mich 704; ___ NW2d ___ (1998).

In *Stevens*, *supra*, this Court adopted the ADA and the Rehabilitation Act's definition of "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Stevens*, *supra* at 217 (citing 29 CFR 1630.2[i]). "Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect." *Id*. at 218 (citing 29 CFR 1630.2[j][2][i]-[iii]).

In *Sanchez v Lagoudakis*, 440 Mich 496; 486 NW2d 657 (1992), the plaintiff worked as a waitress in the defendant's restaurant until rumors began circulating that she had AIDS. *Id*. at 497-498.

When patrons refused to allow the plaintiff to serve them, the defendant informed her that she would have to secure medical evidence that she was disease free before she could return to work. *Id*. at 498. The plaintiff refused to return to work, even after she tested negative for the AIDS virus because she was humiliated. *Id*. After the plaintiff sued the defendant for violations of the MHCRA, the trial court granted summary disposition in favor of the defendant because the plaintiff did not have AIDS and was not handicapped as defined by the act. *Id*. The Michigan Supreme Court reversed and remanded the case for a determination whether the condition the plaintiff was perceived to have was a physical characteristic resulting from disease unrelated to her ability to perform the duties of her job.[3] *Id*. at 506-507.

On remand, this Court determined that an individual with AIDS can be handicapped within the meaning of the MHCRA. *Sanchez, supra,* 217 Mich App 552-553. Even though the plaintiff did not in fact have AIDS, this Court concluded

> that defendant's suspension of plaintiff violated the HCRA because the suspension constituted an unlawful discriminatory act taken in response to a handicap that was unrelated to plaintiff's abilities to perform her duties as a waitress. Accordingly, we reject defendant's claim that plaintiff did not establish, as a matter of law, a prima facie case of discrimination under the HCRA and his corresponding claim that he was entitled to summary disposition with regard to plaintiff's HCRA claim. [*Id*. at 554.]

Plaintiff argues that a reasonable jury could determine that her condition while employed by defendant was a handicap as defined by the statute. Based on *Sanchez, supra*, 440 Mich 496, plaintiff asserts that the MHCRA prohibits discrimination, even when an individual does not exhibit symptoms of his handicap. If the act protects individuals who are regarded erroneously as handicapped and these individuals could not possibly exhibit symptoms of a condition which they do not have, plaintiff asserts that she was entitled to protection under the act because defendant knew she had multiple sclerosis, even though she was not exhibiting any symptoms of the disease.

In the instant case, plaintiff's deposition testimony established that she informed defendant that her doctors suspected that she had multiple sclerosis from the start of her employment. During September and October 1995, plaintiff periodically took time off of work to undergo testing for multiple sclerosis and to receive treatment to lessen the side effects of certain testing procedures. While plaintiff was employed by defendant, she was free of all symptoms of multiple sclerosis until December 27, 1995, when she lost vision in her left eye.

Under MCL 37.1103(e)(iii); MSA 3.550(103)(e)(iii), an individual is considered to be handicapped, if they are regarded as having a physical or mental characteristic which limits one or more major life activities. Although plaintiff was not definitively diagnosed with multiple sclerosis until after she terminated her employment, we believe, that based on *Sanchez*, there was sufficient evidence on the record to establish that defendant may have regarded plaintiff as handicapped. In *Sanchez*, the defendant based his suspension decision on nothing more than mere rumors that the plaintiff had AIDS.

There was no evidence that the plaintiff exhibited any symptoms of that disease. Yet, this Court on remand determined that the plaintiff established a prima facie case of handicap discrimination.

Defendant's brief places emphasis on the fact that plaintiff was free of all symptoms of her multiple sclerosis during her employment. According to defendant, he could not have regarded plaintiff as "handicapped" because she exhibited no signs during her employment that one or more of her major life activities were substantially limited. An individual with multiple sclerosis can lead a normal life until the next exacerbation, which occurs with varying frequency and degree. Similarly, individuals with handicaps such as epilepsy and asthma, may have periods of time where they are symptom-free between seizures or attacks. Therefore, we do not believe that the mere fact that plaintiff was symptom-free should preclude her cause of action for handicap discrimination. Furthermore, the Michigan Supreme Court has stated that the focus of the MHCRA is on the employer's conduct and belief or intent, and not on the employee's condition. *Sanchez, supra*, 217 Mich App 556 (citing *Sanchez, supra*, 440 Mich 502). "To shift the focus of the HCRA to the employee's condition, . . . not only would contradict the language employed in the HCRA, but also would result in an unreasonable and illogical application of the HCRA . . . ." *Id.*

Therefore, we find that the trial court erred as a matter of law in ruling plaintiff was not handicapped because there was evidence that the condition plaintiff was perceived to have was a condition that substantially limited one or more major life activities and that there was evidence that defendant may have regarded plaintiff as handicapped.

Next, plaintiff asserts that the trial court erred in granting defendant's motion for summary disposition with regard to her intentional infliction of emotional distress claim. We disagree.

To establish a prima facie case of the tort of intentional infliction of emotional distress, a plaintiff must prove four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228; 233-234; 551 NW2d 206 (1996); *Johnson v Wayne Co*, 213 Mich App 143, 161; 540 NW2d 66 (1995). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Haverbush, supra* at 234; *Johnson, supra* at 161. A plaintiff must allege more than mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). Whether a defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery is a question of law for the trial court. *Id.* at 92; *Sawabini v Desenberg*, 143 Mich App 373, 383; 372 NW2d 559 (1985).

In the instant case, plaintiff produced evidence that defendant was a demanding employer, who frequently yelled, and criticized many of plaintiff's mannerisms and work assignments. While defendant's alleged belittling was unfortunate and unprofessional, it could hardly be considered outrageous. Even defendant's comment that plaintiff's multiple sclerosis symptoms were a punishment from God, while disturbing, in the light of existing case law, it is insufficient to support a claim of intentional infliction of emotional distress. See *Khalifa v Henry Ford Hosp*, 156 Mich App 485, 500;

401 NW2d 884 (1986) (statements that all Arabs are barbarians and "you people are dumb and slow" not considered outrageous enough to support an intentional infliction of emotional distress claim.) Because plaintiff failed to allege more than mere insults, indignities, and annoyances, we believe that the trial court did not err in granting summary disposition with regard to plaintiff's intentional infliction of emotional distress claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction

/s/ Jane E. Markey
/s/ David H. Sawyer

[1] Because Michael J. Michalski's claim against defendants involves an alleged loss of consortium, for ease of reference, we will refer only to Claudia Michalski as plaintiff.

[2] For ease of reference, we will refer only to Dr. Reuven Bar-Levav as defendant. While plaintiff asserts a cause of action against Dr. Reuven Bar-Levav & Associates, P.C., its potential liability arises solely from the conduct of defendant.

[3] *Sanchez* was decided under an earlier version of the MHCRA and the underlined portion of the sentence provides the pre-amended definition of handicap. If *Sanchez* had been interpreted under the present version of the MHCRA, the Court's remand would most likely have been for a determination whether the condition plaintiff was perceived to have was a physical or mental characteristic which substantially limits one or more of the major life activities of the individual.