STATE OF MICHIGAN

COURT OF APPEALS

DANIEL FARMER,

Plaintiff-Appellee,

v

SEVEN PONDS NATURE CENTER,

Defendant-Appellant.

UNPUBLISHED
December 7, 1999

No. 213553
Lapeer Circuit Court
LC No. 97-024284 CL

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant Seven Ponds Nature Center appeals by leave granted from an order denying defendant's motion for summary disposition as to plaintiff's claims that defendant violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, and the Michigan Handicappers' Civil Rights Act (HCRA),[1] MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We reverse.

Defendant, a Michigan non-profit corporation, is a nature preserve and educational center that is open to the public. From January 1978 until his termination in April 1997, plaintiff worked for defendant as a naturalist, a position that required he help oversee the daily operations of the center and additionally provide security for the center. To accomplish this security task, as a condition of plaintiff's employment defendant required that he live in a house owned by defendant and located on the preserve. Plaintiff was not required to pay rent, and at no time during his employment did plaintiff sign a lease agreement with defendant.

On returning from a vacation on or about July 15, 1996, plaintiff realized that someone had been inside his house and he reported the entry to the police. A few days later defendant's director, Mike Champagne, informed plaintiff that he had entered the house while plaintiff was away in June in an attempt to retrieve an important package that he thought had been delivered to the house by mistake. According to the testimony of Champagne and Donald Naish, a former director of the center, at this time defendant had an unwritten housing policy which, under certain circumstances, allowed certain of defendant's senior employees to enter plaintiff's premises without prior consent. Plaintiff indicated to Champagne that despite the explanation he was upset about this entry and considered it unlawful.

Plaintiff testified that he subsequently made a second report to the police identifying Champagne as the intruder, but that to his knowledge nothing came of this report.

Plaintiff testified that, although defendant's employees had periodically entered and inspected the house during his long tenure, prior to this instance nobody had entered the house without his authorization. In a December 1996 meeting with defendant's personnel committee, in which plaintiff voiced his concerns over the unauthorized June entry, defendant indicated that it would resolve the matter in an updated personnel manual. Thereafter, in February and March 1997, defendant distributed to its employees both a written housing policy and an updated personnel manual that included references to the housing policy. Pursuant to the housing policy, under certain circumstances and at the director's discretion, defendant would be permitted to enter the defendant-owned houses without prior authorization of the employees residing therein. Champagne and Naish both testified that this written housing policy constituted nothing more than a reduction to writing of the then existing unwritten policy. Champagne also testified that the housing policy was put in writing because of plaintiff's concerns.

Defendant advised its employees that their continued employment was contingent on timely, unconditional agreement to the housing policy and updated personnel manual. In various correspondence exchanged during March 1997, plaintiff advised defendant that he required additional time to review the personnel manual and housing policy before he would accept, and defendant repeatedly requested plaintiff's swift agreement. Ultimately, in an April 3, 1997 letter, defendant notified plaintiff that he was suspended from work through April 24, 1997. Pursuant to this letter and a related meeting, defendant advised plaintiff that unless he tendered his unconditional agreement to the documents by April 24, 1997, his employment would be terminated on that date retroactive to April 3, 1997. In an April 8, 1997 letter, plaintiff informed defendant that he would not unconditionally agree to the housing policy and that he would not agree to those portions of the personnel manual related to the housing policy. As a result, defendant discharged plaintiff.

Plaintiff additionally testified that in October 1996 he was diagnosed with diabetes and that he informed defendant of this diagnosis requesting reasonable accommodation. He testified that defendant would not accommodate his condition, refusing to adjust his duties to allow more frequent breaks. However, plaintiff also testified that once he began taking medication subsequent to the diagnosis, the disease was under complete control and did not interfere with his ability to do his job.

On June 10, 1997 plaintiff filed a five-count complaint alleging (1) wrongful discharge, (2) fraud and misrepresentation, (3) trespass, (4) violation of the WPA, and (5) violation of the HCRA. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), and in a July 17, 1998, order the trial court granted the motion as to the first three counts, but denied summary disposition on the WPA and HCRA claims.

Defendant first contends that the trial court erred in denying summary disposition as to the handicapper claim, arguing that because medication controlled plaintiff's diabetes he was not "handicapped" as defined in the act. We agree.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion brought under MCR 2.116(C)(10), we must consider the affidavits, pleadings, depositions, admissions and other documentary evidence filed in the action in the light most favorable to the party opposing the motion. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Our task is to determine whether any genuine issue of material fact exists such that the moving party is not entitled to judgment as a matter of law. *Id.*

The HCRA prohibits discrimination against individuals because of their handicapped status. *Chmielewski v Zermac, Inc*, 457 Mich 593, 601; 580 NW2d 817 (1998). To establish a prima facie case of discrimination under the HCRA, a plaintiff must show (1) that the plaintiff is handicapped as defined in the act, (2) that the handicap is unrelated to the plaintiff's ability to perform his job duties, and (3) that the plaintiff has been discriminated against in one of the ways delineated in the statute. *Id.* at 602; MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A), MCL 37.1202(1); MSA 3.550(202)(1).

At the time this case was filed, in pertinent part subsection 103(e)(i)(A) defined "handicap" as:

> (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 . . .. [Emphasis added.]

Regarding the issue of whether to consider mitigating measures when determining an individual's handicapped status, *Chmielewski* was a case of first impression for our Supreme Court. *Id.* at 603. After analyzing several federal cases involving analogous claims brought under the Americans with Disabilities Act, the Court concluded that to give effect to the statute's requirement that an individual's condition substantially limit a major life activity, it is necessary to assess the individual's condition as it actually exists. *Id.* at 603-607. When applicable, in other words, an individual's condition as benefited by medication is the condition to be evaluated for the purpose of determining his handicapped status. The Court additionally noted that trial courts must carefully analyze claims brought under the HCRA on a case-by-case basis and must not categorically apply the definition to a given diagnosis. *Id.* at 611.

In this case, although his diabetes may be unrelated to his ability to perform his job, plaintiff's testimony indicates that following his October 1996 diagnosis, medication brought his diabetes under complete control. Once medicated, plaintiff testified, his blood sugar levels were controlled and he no longer suffered the previously problematic frequent urination. Plaintiff's condition as medicated, therefore, does not substantially limit a major life activity and he does not satisfy the definition of "handicapped" under the HCRA. Contrary to plaintiff's contention that he has established a prima facie case based on allegations that prior to his diagnosis and successful treatment, defendant exhibited displeasure regarding his requests for necessary accommodations, the point in time critical to this claim

is the date of the adverse employment action. By the time defendant dismissed plaintiff in April 1997, accommodations were no longer needed as plaintiff's diabetes was well under control.

Defendant next contends that because no causal connection exists between plaintiff's report to the police and his discharge, the trial court erred in denying summary disposition as to plaintiff's whistleblower claim. Again, we agree.

The WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362; MSA 17.428(2).]

To establish a prima facie violation of the WPA, a plaintiff must demonstrate (1) that the plaintiff was engaged in a protected activity as defined by the act, (2) that the plaintiff was discharged, and (3) that a causal connection existed between the protected activity and the discharge. *Henry v Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1999). By reporting to the police what he considered to be a breaking and entering, a suspected violation of a law, under the plain language of the statute, plaintiff was engaged in a protected activity. *Id.*[2] Thus, the only issue contested in this case is whether a causal connection existed between plaintiff's report of Champagne's entry to the police and his discharge.

Plaintiff contends that a causal connection is evidenced by the fact that following his report to the police defendant required him to agree to the written housing policy under a threat of dismissal that was eventually realized. Plaintiff argues that at a minimum, the evidence establishes a question regarding whether this written policy effected a change in the terms and conditions of his employment that reduced his rights. Plaintiff asserts that because defendant acknowledges that the housing policy was put in writing in response to plaintiff's concern over Champagne's entry, it can be shown that his eventual discharge for failure to agree to an unfavorable alteration of his rights was the result of his complaints to the police.

As defendant argues, however, the uncontested deposition testimony of Champagne and Naish indicates that the housing policy as written simply mirrored the terms of what was previously unwritten. Moreover, Daniel Hayes, another of defendant's employees, testified that he willingly agreed to the terms of the written policy understanding them to be nothing more than a reflection of the prior oral agreement pursuant to which defendant provided housing as a condition of employment. Attempting to counter this evidence, plaintiff asserts that he believed he possessed greater privacy rights than the written policy provided. However, the testimony plaintiff points to in furtherance of his argument fails to support this assertion as the referenced witnesses actually testified that they had no knowledge of any

previous unwritten housing policy. Thus, these witnesses testified that they had no facts on which to base a comparison of the terms of the respective policies.

Contrary to the trial court's conclusion that despite the lack of immediate cause and effect, it was possible that a trier of fact could find the requisite connection, we hold that on these facts there is an insufficient causal connection between plaintiff's police report and his termination, nine months later, for failure to unconditionally agree to a formal housing policy applicable to all current and future employees of defendant. We note that although the housing policy was formalized because of plaintiff's concerns, no part of the WPA suggests that defendant could not take such a step to protect itself from future disagreements, and potential criminal complaints, of a similar nature. Furthermore, given the absence of any evidence to the contrary, it appears that plaintiff was the only employee who took issue with terms of the written housing policy. The consequential fact that plaintiff, therefore, was the only employee terminated for failure to agree to the formal policy, is insufficient to establish a causal connection between his filing of the police report and his dismissal.

Reversed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin

[1] Pursuant to 1998 PA 20, the HCRA is now known as the Persons with Disabilities Civil Rights Act. For the purposes of this opinion, we reference the act as it was known at the time this controversy arose and we cite to the relevant provisions then in effect.

[2] See also *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 75; 503 NW2d 645 (1993), in which the Court noted that the language of the statute does not limit protected activities to those involving the report of violation of laws more closely connected with the employment setting, such as Health Code and safety violations or illegal labor practices, but rather encompasses even the report of a fellow employee's violation of the state's Criminal Code.