STATE OF MICHIGAN

COURT OF APPEALS

STACEY WEBB,

Plaintiff-Appellant,

v

SWARTZ CREEK COMMUNITY SCHOOLS and JEAN BOWMAN,

Defendants-Appellees.

UNPUBLISHED
January 16, 2001

No. 214038
Genesee Circuit Court
LC No. 97-054578-CL

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff Stacey Webb appeals as of right the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(10). At issue in this case is whether defendant Swartz Creek Community Schools' decision not to hire Webb as a school bus driver violated the Civil Rights Act (CRA)[1] and the Handicappers' Civil Rights Act (HCRA).[2] We affirm.

I. Basic Facts And Procedural History

Swartz Creek Community Schools (the District) maintains a list of bus drivers it uses as substitutes when its regular drivers are absent. To be placed on the substitute bus drivers list, an individual must have a commercial driver's license (CDL) issued by the state. As the supervisor of transportation and food services for the District, it was defendant Jean Bowman's responsibility to schedule interviews for individuals interested in being substitute bus drivers. According to Bowman, staff would then screen the interested individual before the District decided whether "to invest in their training."

In August 1996, Webb learned that the District was looking for additional substitute school bus drivers. At that time, Webb was five feet, eight inches tall and weighed between 320 and 330 pounds. Because Webb did not have a CDL, she obtained a CDL manual and an

[1] MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

[2] MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* Effective March 12, 1998, this became known as the Persons with Disabilities Civil Rights Act.

information sheet explaining how to obtain a CDL from the District. After studying the manual, Webb took and passed the written part of the CDL examination. When Webb informed the District that she had passed the written portion of the CDL examination, Bowman offered her "the opportunity to receive hands on training to become familiar with the proper operation of a school bus." This, evidently, was training the District routinely provided for unlicensed individuals who were interested in working as bus drivers.

The District assigned one of its bus drivers to familiarize Webb with a school bus as well as job procedures. On the first day of training, when Webb sat in the driver's seat in a bus, the steering wheel pressed against her abdomen. The next day, Bowman informed Webb that she could not continue training because she could not fit into the driver's seat.

Webb filed suit against defendants under two separate legal theories. First, she claimed that she was handicapped because her physicians had diagnosed her as morbidly obese, a condition that prevented her from standing for long periods of time, causing back pain and leg numbness. According to Webb, defendants violated the HCRA by failing to accommodate her handicap by adjusting the driver's seat in a school bus so that she could sit without the steering wheel touching her abdomen. Webb alleged that it would take a maintenance worker only minutes to make this adjustment because the driver's seat in the school buses the District used were attached to a pole that allowed it to be adjusted vertically. Second, Webb claimed that the District discriminated against her because of her weight when they failed to hire her, in violation of the CRA. Defendants moved for summary disposition, arguing that Webb was not entitled to protection under the HCRA or the CRA because she was not an employee or applicant for employment, nor was she qualified to be a bus driver because she lacked a CDL. The trial court granted defendants' motion after concluding that Webb was not qualified to be a school bus driver because she lacked a CDL, which was essential to the job. The trial court also concluded that defendants had no duty to train her because she did not have a CDL, making the question of discrimination based on her weight irrelevant.

On appeal, Webb challenges the trial court's order granting summary disposition by arguing that she was a qualified applicant for the bus driver position with the District, satisfying that element of the prima facie case under the HCRA and the CRA. Specifically, she contends that she did not need a CDL to be a job applicant protected under these two acts.

II. Standard of Review

This Court applies a de novo review to a trial court's order granting summary disposition.[3] De novo review is also appropriate in this case because the issues on appeal concern statutory interpretation and application.[4]

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[3] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] *Oakland Co Bd. of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

III. Legal Standard For Summary Disposition

Under MCR 2.116(C)(10), the trial court could summarily dispose of this case if "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and [defendants, as the moving parties, were] entitled to judgment or partial judgment as a matter of law." The trial court had to consider the pleadings as well as affidavits, depositions, admissions and other documentary evidence that appears in the record in the light most favorable to Webb, the nonmoving party.[5] However, Webb was obligated to produce evidence that demonstrated that there was a material dispute of fact left to be resolved at trial in order to survive this motion.[6]

IV. The HCRA Claim

A. Prohibited Conduct

The HCRA "was designed to prohibit discriminatory practices, policies and customs with respect to employment, public accommodations, services, educational institutions and housing."[7] With that goal in mind, the Legislature crafted MCL 37.1202(1); MSA 3.550(202)(1), which provides that an employer shall not:

> (a) Fail or refuse to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> (b) Discharge 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.
>
> (c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.[8]

As is apparent from the language in MCL 37.1202(1); MSA 3.550(202)(1), the meaning of the word handicap is critical to determining whether discrimination occurred and whether a

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[5] MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

[6] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[7] *Milnikel v Mercy-Memorial Medical Center*, 183 Mich App 221, 223; 454 NW2d 132 (1989).

[8] The more recent amendments to this statute are not relevant in this case and we refer to the statutory subsections as they appeared before 1998 PA 20.

particular plaintiff is a member of a class that the HCRA protects.[9] In the employment context, the HCRA defines the word "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 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.[10]

A characteristic is "unrelated to the individual's ability" when "with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position."[11]

B. The Prima Facie Case

In order for Webb to survive a motion for summary disposition on her claim that the District's failure or refusal to hire violated the HCRA, she had to establish that there was a remaining question of fact concerning each of the three separate elements of a prima facie case[12] of this sort of discrimination.[13] First, she had to prove that there was a question of fact concerning whether she is "handicapped" as defined above.[14] Second, she had to demonstrate that there was a factual dispute concerning whether her handicap is unrelated to her ability to perform the duties of a school bus driver, as defined in the HCRA.[15] Third, she had to establish that the facts had not been settled regarding the District's failure or refusal to hire her because she had this handicap.[16] We agree that there were unresolved questions of fact regarding the relationship between her alleged handicap and her ability to perform the duties of a school bus driver as well the District's motivation in not hiring her. However, as we explain below, she failed to raise a question of fact concerning whether her condition, obesity, was a handicap within the meaning of the statute.

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[9] See MCL 37.1103(g); MSA 3.550(103)(g).

[10] MCL 37.1103(e)(i); MSA 3.550(103)(e)(i).

[11] MCL 37.1103(l)(i); MSA 3.550(102)(l)(i).

[12] See *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997).

[13] Of course, if she could prove the elements of her case, she would be entitled to summary disposition in her favor. See MCR 2.116(I)(2).

[14] *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998).

[15] *Id*.

[16] *Id*.

Webb would be handicapped under the HCRA if her obesity substantially limits one or more of her "major life activities."[17] "Major life activities" are those "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[18] To determine whether an alleged impairment of a major life activity is substantial, we must examine the nature and severity of the impairment, its expected duration, and its expected permanence.[19]

According to Webb's affidavit, she could not stand for long periods because of her obesity. After standing for approximately one hour, she suffered lower back pain and her legs became numb. Webb also claimed difficulty climbing stairs and walking for more than ten minutes without becoming breathless. Although walking is considered a major life activity,[20] Webb did not claim that she was unable to walk. She merely stated that she became breathless after walking for ten minutes without providing any factual basis to suggest that this is equivalent to an impairment because, for example, ten minutes an unusually short period of time in which to become winded. Further, Webb offered no evidence regarding the duration or permanence of this alleged impairment. Whether this was an intermittent condition or a permanent condition is not clear from the record. Thus, it is impossible to determine from the record that this impairment was so severe it limited a major life activity for her.[21]

Under the HCRA, having a "handicap" also includes being perceived as having a condition that falls within the definition of a "handicap" provided in MCL 37.1103(e)(1)(A); MSA 3.550(103(e)(i)(A), whether or not a person actually is handicapped.[22] To qualify under this alternative definition of a handicap, others must perceive an individual as having a condition that substantially limits one or more of that individual's major life activities.[23] It is insufficient for others merely to view that individual as impaired.[24] In this case, there is no evidence in the record that the defendants believed Webb was unable to walk, work, or perform any other major life activity. They were concerned only that she was unable to fit behind the wheel of a school bus, which is not a major life activity. Therefore, Webb failed to establish that there was a question of fact regarding whether she was handicapped under the HCRA, making summary disposition on this claim appropriate.

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[17] MCL 37.1103(e)(i); MSA 3.550(103)(e)(i).

[18] *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218-219; 559 NW2d 61 (1996).

[19] *Chiles v Machine Shop, Inc*, 238 Mich App 462, 474; 606 NW2d 398 (1999).

[20] *Stevens, supra* at 218-219.

[21] *Chiles, supra* at 474.

[22] MCL 37.1103(e)(iii); MSA 3.550(103)(iii).

[23] *Sanchez v Lagoudakis*, 440 Mich 496, 502; 486 NW2d 657 (1992).

[24] *Chiles, supra* at 475.

V. Discrimination Under The CRA

A. Overview

In her CRA claim, Webb alleges that, when defendants discontinued her training, they violated MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), which provides that an employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . weight . . . ."[25] Accordingly, she contends, the trial court erred when it summarily disposed of this claim.

B. Evidence Of Weight Discrimination

A plaintiff may establish a claim of weight discrimination by presenting direct evidence that she was subjected to an adverse employment action due mainly to her weight.[26] The adverse employment action in this case was the District's decision to discontinue Webb's bus driving training and to make it clear that she could not then be hired as a substitute bus driver. As evidence of discriminatory animus, Webb alleges that Bowman told her that her weight was "the" problem and that this statement was made in connection with Bowman's decision not to train her further or to hire her as a substitute driver. However, Bowman only found Webb's weight to be a problem because it prevented Webb from driving the school bus safely. There is no evidence that Bowman, or any other District employee, made derogatory remarks about Webb's weight. In fact, Bowman suggested other employment for Webb within the school district, implying that Webb's weight was only a barrier to driving school buses.

Further, though Webb claims that the District simply had to lower her seat slightly to allow her to drive, she does not claim that defendants believed this would require only a minor accommodation. The evidence indicates that, at least at the time Bowman spoke to Webb, defendants believed that they would need to modify the structure of the buses, possibly in violation of safety standards, if they hired Webb. For instance, in his deposition, the employee supervising the mechanics said Bowman instructed him to make sure the seat could not be move further back. Webb presented no evidence that defendants have trained or hired other individuals requiring structural modifications to the buses for some reason other than weight. Thus, Webb's evidence demonstrates that the defendants ended her training because she could not safely drive the school buses, not because they did not want an overweight employee. She failed to establish a question of fact concerning defendants' discriminatory animus, making summary disposition on this claim proper.

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[25] Plaintiff does not specifically brief this issue, except to say that the arguments made with respect to her HCRA claim apply equally to her CRA claim and to put forth the specific CRA provision she believes applies to this case.

[26] *Lamoria v Health Care & Retirement Corp,* 230 Mich App 801, 808-809; 584 NW2d 589 (1998).

Because summary disposition was proper for both claims, we need not reach Webb's other arguments.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck