

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD T. SORANNO,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF TROY,

Defendant-Appellee/Cross-
Appellant,

and

PETER LETZMANN,

Defendant.

UNPUBLISHED

June 1, 2001

No. 215145

Oakland Circuit Court

LC No. 97-536140-CZ

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

PER CURIAM.

Plaintiff Richard T. Soranno appeals as of right from a judgment of no cause of action in this handicap discrimination suit. Defendant City of Troy cross-appeals, challenging various trial court rulings in favor of plaintiff.¹ We affirm.

Plaintiff filed a complaint against defendants alleging, among other things, that he was handicapped as defined by MCL 37.1101 *et seq*; MSA 3.550(101) *et seq.*, the Michigan Handicappers' Civil Rights Act (HCRA),² because he suffers from obstructive sleep apnea, that defendants discriminated against him on the basis of his handicap, that they failed to allow him a reasonable time to heal with respect to his condition, and that plaintiff's handicap was a determining factor in defendants' decision to terminate plaintiff's employment. A jury trial resulted in a judgment of no cause of action.

¹ Pursuant to stipulation by the parties, the circuit court dismissed defendant Peter Letzmann with prejudice at the close of proofs.

² The statute is now known as the Persons with Disabilities Civil Rights Act (PDCRA). 1998 PA 20.

Plaintiff argues on appeal that the trial court erred in failing to instruct the jury that the relevant date for assessing whether plaintiff's condition was unrelated to his ability to perform the duties of his job was plaintiff's termination date, and erred in submitting a verdict form that, contends plaintiff, inaccurately stated the law.

Assuming without deciding that the trial court erred in failing to give the requested instruction and in the wording of the verdict form, any error in that regard does not require reversal because failure to vacate the verdict would not be inconsistent with substantial justice. MCR 2.613(A); *Cacevic v Simplimatic Engineering Co*, 241 Mich App 717, 721; 617 NW2d 386 (2000). Because uncontroverted evidence showed that plaintiff's condition, with treatment, did not substantially limit one or more of his major life activities, plaintiff was not handicapped for purposes of the HCRA.

The HCRA, MCL 37.1103; MSA 3.550(103), as amended in 1990, defined handicap as follows:

(e) Except as provided under subdivision (f), "handicap" means one 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) For purposes of article 2, 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^[3]

The Supreme Court has explained that the HCRA definition of handicap "require[s] an individual to have a condition that substantially limits a major life activity." *Chmielewski v Xermac, Inc*, 457 Mich 593, 605; 580 NW2d 817 (1998).

These words have real meaning. They set the standard for determining which conditions will meet the definition and which will not. By limiting the HCRA's protection to individuals having conditions that actually impose substantial limitations, the standard preserves the high purpose of the act. [*Id.* at 609-610.]

Thus, the *Chmielewski* Court held that the condition of an individual claiming a handicap under the HCRA must be assessed as it actually exists, with the benefit of mitigating measures such as medication. *Id.* at 606-607.

Here, plaintiff's theory was that his sleep apnea constituted a handicap under the HCRA. Indeed, his treating physician provided an affidavit in which he averred that plaintiff's sleep apnea "substantially limited [plaintiff] in one or more of his major life activities, including the ability to breathe, to sleep and stay awake." Plaintiff also contended, however, that his sleep

³ The PDCRA's definition of "disability" is analogous. MCL 37.1103(d); MSA 3.550(103)(d).

apnea condition was *the reason* for his substandard performance at work, i.e., his tardy arrival to work, his falling asleep during the day, his failure to complete assignments on time, etc. Accordingly, at the time of his substandard work performance, plaintiff's condition was related to his ability to perform the duties of his job or position and, therefore, he was not handicapped for purposes of the HCRA.

Evidence presented at trial showed, however, that after treatment with the BiPap mask, plaintiff's condition was unrelated to his ability to perform his job. Plaintiff's treating physician testified that by June 7, 1994, all the effects of plaintiff's sleep apnea were gone. He found "no evidence of obstructive apnea" with the use of the BiPap mask. As defendants argue then, if there was no evidence of obstructive sleep apnea, it follows that no longer did plaintiff's condition substantially limit his ability to breathe, sleep, or stay awake and, therefore, plaintiff was not handicapped for the purposes of the HCRA at the time of his termination, June 20, 1994.

The *Chmielewski* Court noted that there may be circumstances where, even with the use of mitigating measures that allow a plaintiff to perform the duties of his job, a plaintiff's condition may still substantially limit one or more of his major life activities. *Id.* at 610. There was no evidence showing that such circumstances existed in this case. Here, while plaintiff asserted that the BiPap mask was uncomfortable to use, the evidence was uncontroverted that with the use of the mask, plaintiff suffered no effects of sleep apnea. Accordingly, at the time of his termination, plaintiff was not handicapped for purposes of the HCRA.⁴

Plaintiff further argues that even if he cannot establish that he was "handicapped" as defined in subsection 103(e)(i) of the HCRA, he is still entitled to the protection of the HCRA because he established, pursuant to subsection 103(e)(iii), that he was discharged on the basis that his supervisor *perceived* him as being handicapped. Under subsection 103(e)(iii) of the HCRA as amended in 1990, the definition of "handicapped" included "[b]eing regarded as having a determinable physical or mental characteristic described in subparagraph (i)."⁵ However, unlike the two cases on which plaintiff relies, *Sanchez v Lagoudakis*, 440 Mich 496;

⁴ The *Chmielewski* Court noted that *Hines v Grand Trunk Western Railroad Co*, 151 Mich App 585; 391 NW2d 750 (1985), which is relied on heavily by plaintiff,

interprets the pre-1990 definition of handicap, and actually stands for the proposition that one should consider an individual's mitigated state. *Hines* required analysis of whether an insulin-dependent diabetic met the pre-1990 definition of handicap. That definition did not require a substantial limitation of a major life activity. [*Chmielewski*, *supra* at 611-612, n 23.]

Here, plaintiff was required to show *both* that his alleged handicap was unrelated to his ability to perform the duties of his job, and that it substantially limited one or more of his major life activities. Accordingly, the *Hines* Court's conclusion that "plaintiff is a protected individual under the act," *Hines*, *supra* at 596, does not affect the analysis in this case.

⁵ The PDCRA has an analogous provision. MCL 37.1103(d)(iii); MSA 3.550(103)(d)(iii).

486 NW2d 657 (1992) and *Merillat v Michigan State University*, 207 Mich App 240; 523 NW2d 802 (1994), here, there is no evidence that plaintiff's supervisor was acting on an erroneous perception that plaintiff suffered from a condition that could substantially limit major life activities, or an erroneous perception that his condition affected his ability to do his job. Rather, the record shows that the City of Troy knew that plaintiff suffered from sleep apnea, and that before treatment that condition substantially affected major life activities *and* his ability to perform the duties of his job. Accordingly, plaintiff could not claim the protection of the HCRA on the basis that he was treated in a discriminatory manner because of a perception by his employer that he was handicapped.

Because uncontroverted evidence showed that plaintiff's condition, with treatment, did not substantially limit one or more of his major life activities, plaintiff was not handicapped for purposes of the HCRA. Accordingly, the trial court's failure to give plaintiff's requested instruction and any error in the wording of the verdict form did not result in prejudice to plaintiff and reversal is not required.

In light of our decision to affirm the lower court judgment, we need not address defendant's arguments on cross-appeal.

Affirmed.

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Jeffrey G. Collins