STATE OF MICHIGAN

COURT OF APPEALS

GINGER OLDHAM, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 5, 2002
v	No. 196747 Wayne Circuit Court
BLUE CROSS AND BLUE SHIELD OF MICHIGAN and DAVID BARTHEL, Defendants-Appellants/Cross-Appellees.	LC No. 94-407474-NO ON REMAND

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

As chronicled in *Oldham v Blue Cross & Blue Shield of Michigan*,[1] plaintiff Ginger Oldham sued her former employer, defendant Blue Cross and Blue Shield of Michigan (BCBS), and former supervisor, defendant David Barthel, for handicap discrimination contrary to the Handicappers' Civil Rights Act (HCRA).[2] The jury found in Oldham's favor with respect to her handicap discrimination claim.[3] On first appeal, this Court agreed with defendants that the trial court erred in allowing Oldham's direct handicap discrimination claim to go to the jury, but did not err in allowing the jury to decide whether defendants acted unlawfully toward Oldham because they perceived her to be disabled.

Defendants applied for leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded this case to this Court for reconsideration in light of *Michalski v Bar-Levav*,[4] with instructions to address whether Oldham's "perceived condition was regarded as being unrelated to the plaintiff's ability to perform the duties of a particular job or

[1] *Oldham v Blue Cross & Blue Shield of Michigan*, unpublished per curiam opinion of the Court of Appeals, issued June 8, 1999 (Docket No. 196747).

[2] MCL 37.1101 *et seq*. The HCRA is now known as the Persons with Disabilities Civil Rights Act. See 1998 PA 20.

[3] Although Oldham presented several other theories of recovery, none of them are relevant to this appeal.

[4] *Michalski v Bar-Levav*, 463 Mich 723; 625 NW2d 754 (2001).

position." Having allowed the parties to file supplemental briefs as the Supreme Court ordered, we now reverse the jury's verdict.

I. *Michalski*

In *Michalski*, three days after plaintiff Claudia Michalski signed her employment contract to work as an executive secretary for defendant Reuven Bar-Levav, but before she reported for work, she experienced numbness.[5] This numbness persisted for four days and Michalski consulted her family physician, who referred her to a neurologist.[6] Twelve days after she began work, the neurologist told Michalski that he suspected that she had multiple sclerosis, but could not give her a definitive diagnosis.[7] When the neurologist saw Michalski again approximately one month later, she apparently had no complaints about her health.[8] However, about two months after this consultation, slightly less than four months after beginning her new job, Michalski unexpectedly lost vision in one eye.[9] She was admitted to a hospital for three days, at which time the neurologist diagnosed her condition as multiple sclerosis.[10] Her vision improved, but she did not return to work, because, she evidently claimed, Bar-Levav perceived her as disabled and harassed her.[11]

Michalski sued her employer under the HCRA provision barring discrimination on the perception of disability.[12] The trial court, however, granted Bar-Levav's motion for summary disposition under MCR 2.116(C)(10).[13] The trial court reasoned that any condition Bar-Levav perceived Michalski to have limited one of her major life activities, as required in MCL 37.1103(e),[14] or that Bar-Levav knew that the condition limited a major life activity.[15]

On appeal, this Court disagreed with the trial court's decision to dismiss the HCRA claim.[16] However, Judge Whitbeck dissented, agreeing with the trial court that the HCRA required Bar-Levav "to perceive" Michalski "as having a characteristic that substantially limited

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[5] *Id*. at 726.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 727.

[10] *Id*.

[11] *Id*. 727, 731.

[12] *Id*. at 727-728; see also MCL 37.1103.

[13] *Michalski*, *supra* at 727.

[14] This provision now appears in MCL 37.1103(d). See 1998 PA 20. As in *Michalski*, the pre-amendment version of the statute applies to this action.

[15] *Michalski*, *supra* at 727.

[16] *Id*. at 728.

a major life activity."[17] Finding no such evidence in the record, Judge Whitbeck would have affirmed.[18]

The Supreme Court examined the statutory definition of a handicap in MCL 37.1103(e), which stated:

> (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:
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> (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 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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> (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). . . .[19]

Examining the text of this provision, the Supreme Court explained that

> to qualify for protection under subsection (iii), an employee must be "*regarded as having* a determinable physical or mental characteristic," as that characteristic is described in subsection (i) (emphasis added). Subsection (i)(A) describes the determinable physical or mental characteristic as one that "*substantially limits* 1 or more of the major life activities of that individual . . . ." (emphasis added). The characteristic must also be unrelated either to "the individual's ability to perform the duties of a particular job or position" or to "the individual's qualifications for employment or promotion."
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> Thus, while a plaintiff need not actually have a determinable physical or mental characteristic, to qualify as handicapped under subsection (iii), the plain statutory language does require that the plaintiff prove the following elements: (1) the plaintiff was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of the plaintiff's major life activities; and (3) the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to

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[17] *Id*. at 729.

[18] *Id*.

[19] *Michalski*, *supra* at 730-731.

> perform the duties of a particular job or position or to the plaintiff's qualifications for employment or promotion. . . .
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> [W]e note that the phrase "regarded as having," found in subsection (iii), and the phrases "substantially limits" and "is unrelated" found in subsection (i)(A), all appear in the present tense. Depending on whether a plaintiff is proceeding under the "actual" or "regarded as" portions of the statute, because of the Legislature's choice of present tense language in defining the term handicap, we must evaluate the physical or mental characteristic at issue either (1) as it actually existed at the time of the plaintiff's employment, or (2) as it was perceived at the time of the plaintiff's employment.
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> Thus, to qualify for coverage under subsection (iii), plaintiff must be regarded as presently having a characteristic that currently creates a substantial limitation of a major life activity. . . .[20]

The Supreme Court observed that Michalski failed to present evidence revealing that a question of fact existed concerning whether Bar-Levav perceived her to have a condition that substantially limited one of her major life activities at the time she was his employee.[21] At most, the Court noted, she presented evidence that Bar-Levav might have suspected that her diagnosis would limit her major life activities in the future.[22] Consequently, the Supreme Court concluded that the trial court had not erred in dismissing the HCRA claim.[23]

II. Oldham

On appeal, defendants now contend that the trial court erred in denying the motion for a directed verdict because their perception of Oldham as disabled was directly related to her ability to perform her position. Oldham claims, however, that she was fit to return to work and defendants did not have cause to conclude that any disability they perceived her to have affected her ability to work until six weeks after her attempt to return to work, when Dr. Samet examined her. This late evaluation, she claims, has no bearing on defendants' perceptions and her qualifications to return to work. Having reviewed the evidence, we agree with defendants that evidence of the second two elements under *Michalski* was lacking and, therefore, that there was no question of material fact for the jury to decide.[24]

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[20] *Id*. at 731-733 (footnotes omitted).

[21] *Id*. at 734.

[22] *Id*.

[23] *Id*. at 734-735.

[24] See *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

The first element *Michalski* directs us to examine is the evidence of whether Oldham was "regarded as having a determinable physical or mental characteristic."[25] The evidence at trial suggested that Barthel and most of Oldham's coworkers did not know all the details surrounding Oldham's illness during most of her absence from work in summer and fall 1991. However, this information did creep into the workplace. Two BCBS employees took it upon themselves to investigate Oldham's absence, contrary to company policy, resulting in discipline. Other employees learned about Oldham's psychiatric treatment from these two individuals. Further, regardless of his alleged role in provoking Oldham, Barthel had observed her outbursts on a number of occasions and was aware that she had been on extended leave. He also called her treating psychiatrist to report that Oldham had been escorted from the building and that some people were scared that she would hurt herself. At least one other employee also commented that she was not aware of the extent of Oldham's illness when Oldham attempted to return to work in December 1991, indicating that her past condition was known and suspected to be continuing. Over the next several weeks, while Oldham was told to take vacation leave and before she was discharged, BCBS directed Oldham to be evaluated by two other psychiatrists. Even if they could not put a name to her condition, this is strong evidence that defendants thought Oldham had mental difficulties of some sort. Assuming for the sake of analysis that she had recovered by the time she attempted to return to work on December 16, 1991, and giving her the benefit of all reasonable doubts,[26] the evidence as a whole presented a question of fact concerning whether defendants perceived Oldham as having a determinable mental characteristic, thus satisfying *Michalski's* first element.

Michalski next instructs us to examine whether defendants perceived Oldham's mental characteristic as substantially limiting one or more of Oldham's major life activities.[27] The evidence allows an inference that defendants perceived Oldham's condition as rendering her unable to work. Working is a major life activity.[28] "An impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working."[29] After Oldham's unsuccessful attempt to return to work in December 1991, Barthel, Oldham's union representative, and members of BCBS's human resources department evidently concluded that she was unfit to work at her assigned job. They assisted her in obtaining vacation leave until she could be evaluated. On January 31, 1992, Dr. Samet evaluated Oldham and contacted BCBS to report what he perceived to be Oldham's serious threats against Barthel. Though Drs. Klarman and Lingnurkar had indicated that they believed Oldham could return to work, Dr. Samet disagreed. Oldham's sick leave and short-term disability leave ran out the next day, which forced her to be placed on long-term disability (LTD). BCBS provides LTD as a leave of absence without pay. LTD benefits are only available if the employee applies for them and the LTD plan administrator determines that the employee

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[25] *Michalski*, *supra* at 735.

[26] See *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282; 608 NW2d 525 (2000).

[27] *Michalski*, *supra* at 732, 735.

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

[29] *Id*. at 218.

has a physical or mental disability that completely prevents the employee from working in any comparable job. Had Oldham applied for and received these LTD benefits at BCBS's urging, we might infer that a question of fact existed concerning defendants' perception of her ability to work at all, but that did not occur. The record paints a clear picture of defendants' perception that Oldham could not resume her job, especially because of her response to Barthel. However, it is not at all apparent that defendants had any opinion regarding whether Oldham was fit to work anywhere else, regardless of whether the job was comparable; defendants' perception of Oldham focused exclusively on her ability to work at BCBS. If Oldham presented evidence of any of her other major life activities that defendants perceived to be impaired, we do not know what they are. Thus, there was no question of fact regarding any substantial impairment of one or more of Oldham's major life activities to submit to the jury, making the trial court's decision to deny the motion for directed verdict erroneous.

Even assuming that defendants perceived that Oldham's mental characteristic substantially limited her major life activity of working, this proves a double-edged sword for her. *Michalski's* third element requires that "the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to perform the duties of a particular job or position . . . ."[30] As we suggested when analyzing the evidence under *Michalski's* second element, the record suggests only that defendants perceived Oldham's mental condition as making her unfit to work at BCBS. There is no evidence that defendants thought that this mental condition substantially impaired one of Oldham's major life activities that was unrelated to her ability to perform her work.

Oldham makes a good point in arguing that Dr. Samet's evaluation of her mental status six weeks after she attempted to return to work may be too remote in time to be at all probative of whether she was able to do her job when she reported to work. The implication is that Dr. Samet's opinion of her condition cannot serve as a basis for defendants' earlier perceptions of her determinable mental characteristic and its effect on her. The Supreme Court has encouraged just this sort of attention to the language of the HCRA and its emphasis on the perception of disability "at the time of the plaintiff's employment."[31] However, as valid as this observation is, it does not completely support her position.

Oldham's working environment and contact with Barthel appears to have triggered many of her behaviors that caused defendants to perceive her as having a mental condition. None of the psychiatrists who examined Oldham, including her expert witness at trial, examined her while she was working. If we were put in the place of the jury, we might not give any of the psychiatrists' reports significant value because of this same flaw. However, we are not put in the place of the jury; the jury must weigh the probative value of different pieces of evidence. Rather, we have the relatively easier task of looking at the evidence and construing all reasonable doubts in Oldham's favor.[32] Even when doing so, it is clear that the critical question here is not whether we should believe one psychiatrist's report over the others, or whether Oldham was

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[30] *Michalski*, *supra* at 732.

[31] *Id*. at 735.

[32] See *Roulston*, *supra* at 282.

actually able to return to work. To the contrary, the focus of our analysis must be whether the evidence as a whole left any question of fact for the jury to resolve concerning whether *defendants thought* that the mental condition they perceived Oldham to have was unrelated to her work.[33] As far as we can tell from this record, the evidence all pointed to defendants' perhaps erroneous perception that Oldham's mental condition directly affected her ability to do her job at the time she was still employed there. This manifestly fails to satisfy *Michalski's* third prong.

Reversed.

/s/ William C. Whitbeck

[33] See *Michalski*, *supra* at 732, 735.