STATE OF MICHIGAN

COURT OF APPEALS

MARY STEELE,

Plaintiff-Appellant,

v

MICOA MANAGEMENT CO,

Defendant-Appellee.

UNPUBLISHED
October 11, 2002

No. 231048
Ingham Circuit Court
LC No. 00-091171-NZ

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

In this wrongful discharge case, plaintiff appeals as of right from a judgment granting summary disposition to defendant. Plaintiff claims that defendant violated the Persons with Disabilities Civil Rights Act, MCL 37.1101, *et seq.* (PWDCRA), by firing her because of her disability. We affirm.

Plaintiff argues that the trial court should not have dismissed her claim because she presented genuine issues of material fact with respect to whether she was discharged in violation of the PWDCRA. We review de novo a trial court's ruling on a summary disposition motion. *Schuster Construction Services v Painia Dev Corp*, 251 Mich App 227, 230; ____ NW2d ____ (2002). Where the motion was granted under MCR 2.116(C)(10), we consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party. *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000).

Under the PWDCRA, an employer may not "[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). The act defines a disability as a physical or mental impairment that "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." MCL 37.1103(d). The disability exists if the person has the disabling characteristic, has a history of that characteristic, or is regarded as having that characteristic. *Id.*; *Michalski v Bar-Levav*, 463 Mich 723, 731; 625 NW2d 764 (2001); *Chmielewski v Xermac, Inc*, 457 Mich 593, 595; 580 NW2d 817 (1998). "'Unrelated to the

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

individual's ability' means, with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l).

In this case, plaintiff presented evidence that she suffered from multiple sclerosis, and she presented forms from her doctor that stated that she had a serious medical condition requiring ongoing treatment. She also showed that she notified her superiors about her medical concerns. In her deposition, she stated that she was having difficulties with her judgment, word pronunciation, and spelling, and that she suffered from chronic back pain. Defendant's own physician reported that plaintiff was able to work thirty hours a week but noted that plaintiff felt strongly she would run a risk of problem if she were to work more than thirty-two hours.

To ultimately succeed on this claim, a plaintiff must show that her condition affects not only her ability to do a particular job, but that it also affects her life outside work or affects her ability to work any type of job. *Lown v JJ Eaton Place*, 235 Mich App 721, 735; 598 NW2d 633 (1999). Here, plaintiff presented evidence that her illness makes it difficult for her to work a five-day week. Her condition was unrelated to her ability because she was able to do her job with accommodation. However, plaintiff presented no evidence that her illness affected any major life activity other than work, and she was able to do her job as long as she was on a four-day schedule. She did not show that she was unable to work any type of job. See *id*. Viewing the facts presented in the light most favorable to her, we believe plaintiff failed to present a genuine issue of material fact regarding whether she had a major life activity that was substantially limited by her disability.

Plaintiff also did not present a genuine issue of material fact regarding whether her employer perceived her as disabled and fired her for that reason. Whether an employer regards an employee as disabled "is a question embedded almost entirely in the employer's subjective state of mind[; t]hus, proving the case becomes extraordinarily difficult." *Ross v Campbell Soup Co*, 237 F3d 701, 709 (CA6 2001). Plaintiff introduced evidence that her employer was aware of her disability; however, their acknowledgement of her disease does not prove that they thought she was unable to do her job or that she was affected in any other major life activity.

Even if a plaintiff succeeds in presenting a prima facie case, that is not enough to survive summary disposition under PWDCRA; it only creates a rebuttable presumption of discrimination. *Rollert v Department of Civil Service*, 228 Mich App 534, 538; 571 NW2d 118 (1998). If the plaintiff establishes a prima facie case, the burden of production then shifts to the employer to articulate a nondiscriminatory rationale for the action. If the employer meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the supposedly legitimate reason offered by the defendant was a mere pretext. *Id.*; see also *Kerns v Dura Mech Components, Inc*, 242 Mich App 1, 12; 618 NW2d 56 (2000).

"[T]he defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel" but must introduce admissible evidence of reasons for its actions which would support a finding that unlawful discrimination was not the cause of the employment action. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001), citing *St. Mary's Honor Ctr v Hicks*, 509 US 502, 506-507 (1993). Defendant in this case presented an internal memorandum as evidence that it was undergoing a nationwide restructuring, purportedly to make its operations more efficient. That document identified employees thought to be most

valuable and those thought to be less efficient, including plaintiff. The employment of several people was to be terminated and some branch offices were to be closed or made smaller. Although the memorandum indicated that, at plaintiff's office, two of the people to be retained would be asked to give up their four-day work weeks, no evidence shows that this was a company-wide policy or that plaintiff's work schedule, rather than her inefficiency, was the reason she was discharged. Therefore, we find the evidence sufficient to show that defendant had a nondiscriminatory reason for terminating plaintiff's employment.

> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." . . . [A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination. [*Hazle, supra* at 463 (citations omitted).]

Here, plaintiff brings nothing in response, except to point to the memorandum as proof that flextime employees would not be tolerated and that was the real reason for firing her. However, the memorandum does not on its face say what plaintiff asserts; plaintiff cannot simply present her interpretation of the document. "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Thus, even if we were to assume that plaintiff presented a prima facie case of discrimination, we conclude that summary disposition was appropriate because she did not meet her burden of proving that the reason given by defendant for firing her was a pretext for discriminating against her.

As a final matter, we disagree with plaintiff's argument that the trial court erroneously relied on *Chiles v Machine Shop, Inc*, 238 Mich App 462; 606 NW2d 398 (1999). Plaintiff argues that the use of *Chiles*, *supra*, was improper because some facts in that case were different from those in plaintiff's case, and because that case involved a jury trial. However, the trial court merely used the standards set forth in *Chiles* to analyze plaintiff's claims under the PWDCRA, and the factual differences were irrelevant to its analysis.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Robert J. Griffin