STATE OF MICHIGAN

COURT OF APPEALS

AMY M. BOUCK, formerly known as AMY M. MAGLEY,

Plaintiff-Appellant,

v

CITY OF EAST LANSING and EAST LANSING POLICE DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED
November 12, 2002

No. 234774
Ingham Circuit Court
LC No. 00-091595-CZ

Before: Owens, P.J., and Talbot and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendants' motion for summary disposition that was brought pursuant to MCR 2.116(C)(8) and (10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

We review a trial court's decision granting summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court did not cite a particular subsection of MCR 2.116. Because defendants and the trial court relied on documentary evidence beyond the pleadings, this Court will consider defendants' motion as have been granted pursuant to MCR 2.116(C)(10). *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition of her discrimination claim under the Persons with Disabilities Civil Rights Act (PWCRA), MCL 37.1101 *et seq.* We disagree.

On appeal, plaintiff acknowledges that at the time of the alleged discrimination, she did not have a "disability," as that term is defined in MCL 37.1103(d)(i). Instead, plaintiff appears to contend that she is entitled to the protections of the PWDCRA because defendants perceived her as having a disability. MCL 37.1103(d)(iii). However, there is no evidence to support this contention. Rather than demonstrating that defendants regarded plaintiff as being disabled, the evidence at most suggests that defendants regarded plaintiff as being an able-bodied malingerer. Plaintiff presented no evidence that defendants regarded her as having an impairment that substantially limited a major life activity. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 475;

606 NW2d 398 (1999). Accordingly, her discrimination under the PWDRCA claim was properly dismissed.

Plaintiff argues that the trial court erred in dismissing her claim of unlawful retaliation under the PWDCRA, MCL 37.1602(a). Plaintiff contends that an employee may bring a retaliation claim under the PWDCRA even if the underlying claim fails because of the absence of a disability.

A prima facie case of unlawful retaliation under the PWDCRA requires proof that (1) the plaintiff engaged in protected activity; (2) that this was known by the defendant; (3) that the defendant took an action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse action. *Bachman v Swan Harbour Ass'n*, 252 Mich App 400; 651 NW2d 818 (2002). A person engages in "protected activity" by opposing a violation of the PWDCRA or by making a charge, filing a complaint, testifying, assisting or participating in an investigation, proceeding, or hearing under the PWDRCA. *Id*.; MCL 37.1602(a).

Plaintiff has not presented evidence that she engaged in a protected activity. Plaintiff complained to her supervisor that Lt. Hinz made statements "in a condescending and sarcastic fashion" to her about her knee injury. Lt. Hinz' statements do not amount to a violation of the PWDCRA by defendants, and therefore, plaintiff's complaint about them does not constitute opposition to a violation of the PWDCRA. As in *Bachman, supra,* and *Mitan v Neiman Marcus*, 240 Mich App 679; 613 NW2d 415 (2000), plaintiff has not shown that she engaged in protected activity. The court properly granted defendants summary disposition of her retaliation claim under the PWDCRA.

Lastly, plaintiff challenges the dismissal of her worker's compensation retaliation claim. MCL 418.310(11).

Pursuant to MCL 418.301(11), an employer is prohibited from discharging an employee because the employee "filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act." To establish a retaliatory discharge claim under § 301(11), plaintiff had the burden of proving that (1) she was engaged in a protected activity, (2) defendants knew of the protected activity; (3) defendants acted adversely to plaintiff, and (4) the protected activity caused the adverse action. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 818; 584 NW2d 589 (1998), vacated and reinstated in pertinent part 233 Mich App 560; 593 NW2d 699 (1999). "The burden is on plaintiff to show that there was a causal connection between the protected activity, i.e., the filing of [her] worker's compensation claim, and the adverse employment action." *Chiles, supra*, 470.

Defendants argued that plaintiff did not establish that defendants' stated reasons for her discharge were a pretext for retaliation. Assuming for the sake of argument that plaintiff

proffered sufficient evidence to establish a prima facie case of retaliation,[1] we agree that plaintiff failed to establish that defendants' stated reason for her discharge was pretextual. The evidence showed that plaintiff was perceived by other officers as having an "attitude problem" several months before her discharge. Her complaints of harassment by Lt. Hinz were considered to be further manifestations of this problem. Plaintiff failed to present evidence creating a genuine issue of material fact concerning a causal connection between her assertion of rights under the WDCA and her discharge. Therefore, summary disposition was proper under MCR 2.116(C)(10).

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

[1] It not clear how plaintiff claims to have been engaged in "protected activity" under the WDCA. Plaintiff did not allege and the record does not indicate that she filed a claim for worker's compensation concerning the June 20, 1998, injury before her discharge on August 11, 1998. If plaintiff did not file a worker's compensation claim before the discharge, then it appears that she was not engaged in "protected activity," for the purposes of this retaliation claim. See *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 668; 473 NW2d 790 (1991) (alleged retaliation for anticipated filing of a claim is not actionable). However, because the parties have not addressed this point, we will not rely on this apparent flaw in plaintiff's prima facie case as the basis for our decision.