STATE OF MICHIGAN

COURT OF APPEALS

SANDRA FERNANDEZ,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS,

Defendant-Appellee.

UNPUBLISHED
November 13, 2007

No. 275296
Washtenaw Circuit Court
LC No. 05-000296-NO

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant on plaintiff's Persons with Disabilities Civil Rights Act (PWDCRA) claim, MCL 37.1101 *et seq.* We affirm.

Plaintiff began as a student at the University of Michigan Medical School in 1997. After plaintiff's first semester at the medical school, the Basic Science Academic Review Board (BSARB) learned that plaintiff failed Anatomy 500. This failing grade required the BSARB to place plaintiff on Academic Warning status, but plaintiff was given the opportunity to remediate this grade by retaking Anatomy 500 during the summer.[1]

On February 14, 1998, the BSARB learned that plaintiff was "quite far below passing level in Histology, Embryology, MCB 501, and physiology." The BSARB, having received information that plaintiff might have "some cognitive learning difficulties that will need to be assessed," offered to allow plaintiff to defer her examinations in these classes until spring break, when it "anticipated that the results of neuropsychological testing will be completed prior to that time so that any further accommodations can be put into place."

[1] Plaintiff was advised that if she did not pass the course, a recommendation to drop her from registration would be forwarded to the Executive Committee "as students are allowed to repeat a course or sequence only once." Plaintiff retook Anatomy 500 in the fall of 1998.

In the spring of 1998, plaintiff was granted a leave of absence in order to address what appeared to be a visual impairment. Plaintiff was subsequently diagnosed as having an "instability of the muscle of the ocular muscles of accommodation," a condition that caused her to have difficulty focusing and refocusing her eyes.[2] The BSARB granted plaintiff a further deferment of her examinations to ensure that she was not required to take them until she had time to deal with her visual difficulties.

When plaintiff returned to the school in the fall of 1998, she was required to take two of the examinations she had deferred during her first year. Before taking these exams, plaintiff requested that the BSARB remove her grades of "Incomplete" in Embryology and MCB 501 and permit her to retake those two courses entirely in lieu of sitting for those examinations. She noted that, because her grades in those courses were so low prior to the examinations, she would have to "earn scores in the upper 80 and 90%" in order to pass the courses. She stated that she had not been able to "assimilate fully the information" presented in those courses due to the effect of depression on her "cognitive functions."

In response, Dr. Rachel Glick, the Associate Dean for Student Programs, informed plaintiff that the BSARB lacked the authority to remove grades from her transcript and that, pursuant to school policy, she was required to take her deferred examinations within three months after her return from leave. Glick informed plaintiff that she had two options under the school's policies: she could sit for her examinations within the required timeframe or she could accept grades of Withdraw/Fail for her spring 1998 courses and retake the courses. If she failed both examinations or chose to accept the W/F grades, she would be placed on Academic Warning +2 status – a position that meant that any subsequent failure would result in an automatic recommendation for dismissal from the school. However, Dr. Glick advised plaintiff:

> [G]iven your overall situation and the circumstances of a new diagnosis of a Learning Disability and visual problems, I, or a subsequent Dean of Student Services, would strongly support your appeal to the Executive Committee to

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[2] Dr. Howard Saulles, the Director of Eye Care & Specialty Clinics at University Health Services, stated in a May 18, 1998, letter:

> Examination of Ms. [Fernandez's] eyes found them to be healthy. Manifest and cyclopegic refraction did show that she was suffering from Pseudomyopia (accommodative myopia), which could cause problems with reading.
>
> I reviewed my findings with [her] and gave her a new prescription for glasses to be used for distance viewing only. I also reviewed with her ways to help her eyes work more efficiently while reading.

A May 30, 1998, Vision Evaluation Report prepared by the Ann Arbor Clinic for Vision Enhancement recommended that plaintiff "work on relaxing her focusing system with all near tasks" and that she "be allowed to take breaks and have extra time during examinations and reading text."

> continue in registration if because the unfortunate circumstances of an additional failure occurs, a recommendation is forwarded to the Executive Committee for your dismissal.

Plaintiff elected to sit for the examinations. She was given double time to complete each examination and passed both examinations.

Plaintiff eventually addressed each of the issues pending from her first year, completing deferred examinations and retaking Anatomy 500. Throughout the remainder of her second year, she was given double time for all examinations. She was also given special permission to review videotapes of each lecture, which was normally permitted only for those who missed class.

After completing her first and second year courses, plaintiff was ready to begin the clinical stage of her education. However, she could not begin her clinical rotations until she passed phase one of the United States Medical Licensing Exam, a test administered by the National Board of Medical Examiners (NBME). Plaintiff was required to seek permission from the NBME in order to use the testing accommodations she was routinely granted by the medical school. She therefore had to submit the necessary materials to the NBME and await their response before taking the exam and continuing her education. Plaintiff requested a second leave of absence to await word from the NBME on her request for accommodations. Defendant approved plaintiff's request and also extended financial assistance to her during her second leave of absence. In January 2001, the NMBE informed plaintiff that it approved her request for accommodations. Plaintiff passed phase one of the United States Medical Licensing Exam and began her surgery rotation in July 2001.

Plaintiff was given double time for the surgery written shelf examination[3] in September 2001, but failed the examination. She was given a grade of Incomplete/Exam Fail (I/E) for her surgical clerkship. Plaintiff missed her oral examination for the surgery clerkship due to illness unrelated to her alleged disability. The Clinical Academic Review Board (CARB) informed plaintiff that she would be permitted to repeat one month of general surgery, retake both exams, and, if she passed, replace her I/E grade with a passing grade. Plaintiff asked to take a month off to prepare for the examinations instead of repeating her rotation, and this request was granted.

Plaintiff also requested to switch from her obstetrics and gynecology (OB/GYN) clerkship to a neurology clerkship. Defendant granted this request. Plaintiff failed the neurology departmental examination, despite being given double time to take it, and was therefore assigned a grade of I/E for her neurology rotation. Defendant again offered her the opportunity to remediate this deficiency by taking the neurology written and oral shelf examination in lieu of the departmental examination and, if she passed both, to replace her failing grade with a passing grade.

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[3] A "shelf examination" is a comprehensive exam covering a specific clinical discipline that is composed by the NBME and provided to medical schools.

In the middle of her first year of clerkship rotations, plaintiff requested another leave of absence. She provided two reasons for this request: First, she "desire[d] to use this time to recover fully from recent illness as well as to adjust medications to a therapeutic level." Second, she "want[ed] to become proficient in the utilization of recently acquired Adaptive Technologies that [would] aid [her] in knowledge acquisition for the rest of [her] professional career." The CARB granted plaintiff's request for a leave of absence.

After being given an opportunity to retake her surgery shelf examination, plaintiff failed it again. The CARB, based on concerns about plaintiff's "fund of medical knowledge, as well as her clinical performance," approved a recommendation that she repeat two months of general surgery and retake the oral and shelf examinations upon completion of the clerkship. The CARB noted that plaintiff had taken a leave of absence to learn how to use new technologies to assist with her vision and therefore allowed her to repeat the surgery rotation for two months and take the examination a third time after she returned from her leave of absence. Plaintiff was advised that the "Surgery Fail grade placed you at Academic Warning +1, and that failure of a repeated clerkship will result in a recommendation for your dismissal from medical school." On May 20, 2002, the CARB approved plaintiff's request to return to the school on July 1, 2002, from her leave of absence. Plaintiff was reminded that she had to repeat two months of general surgery and retake the oral and shelf examination upon completion of the clerkship. She was also reminded that she was required to take the neurology shelf examination to remediate the Incomplete/Exam grade for the neurology clerkship. Plaintiff was given double time for her shelf exam. She failed both the oral and written portions of the surgery shelf examination in September 2002 and was given a grade of F for her junior year surgery rotation. Following this third failure of the surgical clerkship, the CARB recommended that the Executive Committee dismiss plaintiff from the medical school pursuant to medical school policy.[4]

Plaintiff was given the opportunity to appeal this decision. She continued her rotations in OB/GYN and pediatrics while this matter was pending, and requested and was permitted to delay her pediatrics shelf examination. Plaintiff was also informed that she was expected

> to complete the examination during the week after you finish your Obstetrics and Gynecology rotation . . . That will give you 4 – 5 full days to study Pediatrics with no other clinical responsibilities. This is more than all other students receive. I can also arrange for you to get personal tutoring and study help before the examination.

Plaintiff's appeal was presented to the Executive Committee on November 21, 2002. The committee did not accept the CARB's recommendation of dismissal and concluded that plaintiff should be given all accommodations recommended by the University's Services for Students with Disabilities (SSD) on "all remaining quizzes and examinations." These accommodations included double time for all examinations and frequent breaks at a suggested rate of a ten-minute

[4] According to the medical school's policy, "a student repeating a course, sequence, or clerkship must receive a satisfactory grade to remain in registration; no make-up examination or other form of remediation is permitted."

break per thirty minutes of examination time. The committee also gave plaintiff yet another opportunity to try to remediate her surgery clerkship. In January 2003, the CARB notified plaintiff that she was required to repeat two months of her surgery rotation pursuant to the committee's recommendation.

Plaintiff thereafter requested a deferral of her OB/GYN shelf examination. The director of the clerkship denied the request. However, plaintiff was informed that, if she failed the examination, she would likely be able to retake it as she had with other shelf examinations if she passed the clinical portion.

Plaintiff was given a grade of F in her OB/GYN clerkship based on her failure of both the shelf examination and the clinical portion of the rotation.[5] Her evaluations noted that residents had substantial concerns about plaintiff's ability as a physician, including her knowledge of anatomy, her ability to determine what information was clinically relevant, and her manner of interacting with patients.

On February 4, 2003, plaintiff notified defendant of her decision to withdraw from the medical school. On February 18, 2003, plaintiff was notified that the CARB learned that she was assessed a Fail grade for the OB/GYN clerkship due to a failure on the shelf examination and the clinical portion of the rotation. Plaintiff was advised that this Fail grade placed her at Academic Warning +3, a status that generates a recommendation of dismissal. The letter informed plaintiff she had a right to appeal this recommendation and could raise a request to withdraw in lieu of dismissal as part of this appeal.

The Executive Committee heard plaintiff's appeal on May 8, 2003. Plaintiff acknowledged that she was not performing adequately in the program and requested an opportunity to clean up her transcript so that she would then withdraw and transfer to another medical school. The committee concluded that it would not legitimately "reverse" plaintiff's failing grade in OB/GYN because plaintiff had failed both her shelf examination and the clinical portion, but that plaintiff could appeal that grade if she chose to do so. The committee discussed the fact that plaintiff had been given a last chance opportunity in her last dismissal appeals hearing, and that her performance warranted dismissal under the medical school's academic guidelines. However, the committee wanted to be as supportive as possible in assisting plaintiff in her desire to transfer to another medical school. Thus, the committee voted to offer plaintiff the chance to withdraw if she signed a written release. Plaintiff declined to sign a release acknowledging her withdrawal was voluntary and that the university had acted responsibly with regard to its evaluation of her performance and request for accommodations.

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[5] Plaintiff states in her brief that her failure of the OB/GYN shelf examination was the sole cause of her failure in the OB/GYN clerkship and the second recommendation of dismissal. However, the record reveals that she failed both the shelf examination and the clinic. A failing grade in the clinical portion of the OB-GYN rotation automatically meant a failing grade in the overall clerkship.

On September 12, 2003, plaintiff was advised that "the Medical School Executive Committee further discussed the recommendation for your dismissal from Medical School that was based on overall academic performance that culminated in your reaching Academic Warning +3 and the policies governing academic warnings and dismissal." The Executive Committee voted to deny plaintiff's appeal of the dismissal recommendation. Plaintiff was dismissed from the medical school effective September 11, 2003.

Plaintiff filed her complaint in this action on March 14, 2005.[6] She alleged that defendant violated the PWDCRA by denying plaintiff "the use of adaptive devices and aides and other reasonable accommodations, which would have allowed her to successfully complete her medical education and benefit from defendant's programs and facilities."[7] Defendant moved for summary disposition of the failure to accommodate claim under the PWDCRA. Following a hearing on the motion, the trial court issued an opinion and order granting defendant's motion for summary disposition on December 7, 2006. The court held that plaintiff's failure to accommodate claim was unfounded because defendant had granted reasonable accommodations and had only refused unreasonable requests for accommodation. The court also held that plaintiff had failed to establish a claim of disability discrimination because the evidence showed that plaintiff was not qualified to remain in medical school and that she was treated "within the academic guidelines applied to all students."

Plaintiff argues that a genuine issue of material fact existed with regard to whether her dismissal from medical school was the result of defendant's failure to reasonably accommodate her disability and, therefore, the trial court erred by granting summary disposition in favor of defendant.

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any

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[6] Plaintiff also alleged that defendant discriminated against her on the basis of her national origin, color, and disability. In particular, she alleged that her Ecuadorian and Mexican heritage and her Hispanic appearance led to intentional discrimination and/or disparate treatment by defendant in violation of the Elliott-Larsent Civil Rights Act. However, plaintiff voluntarily dismissed this claim after defendant filed a motion for summary disposition.

[7] For purposes of the motion for summary disposition only, defendant conceded that plaintiff's visual impairment satisfied the statutory definition of "disability." MCL 37.1102.

material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

The PWDCRA provides that "a person shall accommodate a person with a disability for purposes of employment, public accommodation, public service, education, or housing unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102(2). Under the PWDCRA the plaintiff must prove that the defendant has failed to "accommodate" the disability. MCL 37.1210(1); *Hall v Hackley Hosp*, 210 Mich App 48, 54; 532 NW2d 893 (1995). Once this threshold requirement is satisfied, the burden of proof shifts to the defendant to show that the accommodation would impose an "undue hardship." *Id.* at 54-55. The PWDCRA does not impose a duty to accommodate every request for accommodation. *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 417; 653 NW2d 415 (2002). Rather, persons with disabilities are entitled only to reasonable accommodations. *Buck v Thomas M Cooley Law School*, 272 Mich App 93; 723 NW2d 485 (2006). Whether a requested accommodation is reasonable is determined on a case-by-case basis. *Bachman*, *supra* at 417.

Plaintiff presented evidence that she suffered from accommodative spasms that caused blurred or fluctuating vision, headaches, and eyestrain while reading. She provided documentation of a need for accommodation in the form of additional time for examinations. Defendant accommodated her condition by giving her double time to take all of her examinations, and subsequently also allowing her to take 10 minutes breaks every thirty minutes as needed during the examinations. Plaintiff did not present any evidence to support a finding that any further accommodations were recommended by her treating physicians. Nonetheless, defendant also gave plaintiff the opportunity to retake classes in which she received failing grades, to use the school's videotapes of lectures, to switch clinical rotations, and to take multiple leaves of absence.[8] A thorough review of the record reveals that defendant fulfilled the PWDCRA's mandate to provide plaintiff with equal access by making every reasonable accommodation requested by plaintiff.

Despite these accommodations, plaintiff claims that defendant improperly refused her request to defer OB/GYN shelf examination.[9] The record reveals that plaintiff would have been

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[8] Plaintiff declined to use other various accommodations offered by defendant, including a mentor, a personal tutor, and a reader for her examinations.

[9] A review of plaintiff's request reveals that her request for deferral was based on reasons not related to her vision disability. In her December 11, 2002, letter requesting a deferral two days before the examination, plaintiff offered the following reasons in support of her request: (1) she had been preoccupied with preparing her appeal through November, (2) she was in the process of appealing to the NBME to be allowed to use the adaptive technologies she was accustomed to using, (3) her "effective" study time is limited to when she can use the adaptive technology equipment, and (4) her time was split between preparing for the ob/gyn examination and the pediatrics examination. She stated that "Given the choice between to [sic] difficult positions, i.e., requesting for a deferral or likely failing the shelf exam, I am opting to request the former."

permitted to retake the shelf examination if she failed it but passed the clinical portion of the clerkship. Defendant concluded that plaintiff's request for deferment was not a necessary accommodation because a failing grade on the written exam, by itself, would not have led to any adverse consequences for plaintiff. However, plaintiff was allowed extra time off from her rotation to prepare for the examination. Plaintiff presented no evidence that the accommodations she required included deferral of examinations. Rather, plaintiff presented evidence that a recommendation was made that plaintiff "be allowed to take breaks and have extra time during examinations and reading text." Defendant provided these accommodations that were related to the crux of plaintiff's disability. See *Buck, supra*. Defendant did not fail to reasonably accommodate plaintiff's disability by refusing her request to defer her OB/GYN examination, particularly in light of the diagnosis and other accommodations made for her.

Plaintiff also argues that the trial court erred by determining that there was no genuine issue of material fact that plaintiff was not dismissed because of her disability but, rather, that "plaintiff was not qualified to continue medical school and was treated within academic guidelines applied to all students." Under the PWDCRA, an educational institution may not expel or otherwise discriminate against a student "because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution, or because of the use by an individual of adaptive devices or aids." MCL 37.1402.

To establish a prima facie claim under § 4 of the PWDCRA, a plaintiff must establish that 1) the plaintiff is a [person with a disability] under the [PWDCRA], 2) the plaintiff is qualified for the educational opportunity the plaintiff seeks despite the [disability], and 3) in spite of these qualifications, the plaintiff has not been given an equal opportunity to secure a similar education as other persons. *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004); *Crancer v Board of Regents*, 156 Mich App 790, 795; 402 NW2d 90 (1986); see also *Hoot by Hoot v Milan Area Schools*, 853 F Supp 243, 248 (1994).

Even assuming that plaintiff is disabled within the meaning of the PWDCRA, the record is replete with evidence that plaintiff was not qualified to remain at the medical school. This Court owes a certain amount of deference to academic standards imposed by institutions of higher learning. See, e.g., *Crancer, supra* at 796-797. Defendant determined that, despite receiving a host of accommodations and multiple chances at remediation, plaintiff was unable to master the fundamentals of the school's curriculum. It is apparent that plaintiff was dismissed from the medical school because of poor academic performance, and there is no evidence that she was dismissed because of her disability. No rational fact finder could conclude that plaintiff was dismissed from the medical school solely because of her disability.[10] Accordingly, the trial court did not err in granting summary disposition in favor of defendant with respect to the disability discrimination claim.

[10] Even if plaintiff could establish that she was qualified to remain at the medical school, she has failed to show that she was treated unequally. Plaintiff has failed to identify any individuals who were permitted to remain at the school after receiving grades and evaluations comparable to hers.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly