STATE OF MICHIGAN

COURT OF APPEALS

LAURA PARKS,

Plaintiff-Appellant,

v

NABCO, INC.,

Defendant-Appellee.

UNPUBLISHED
December 29, 1998

No. 202580
Osceola Circuit Court
LC No. 95-006937 NO

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). Plaintiff's complaint alleges handicap discrimination and retaliatory discharge relating to the filing of a worker's compensation claim. We affirm.

On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing such a motion, the test is set forth in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant 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 material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

I

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition with regard to her retaliatory discharge claim. Plaintiff alleges that there was sufficient evidence on the record to create a genuine issue of material fact that she was discharged for asserting her rights under the Worker's Disability Compensation Act (WDCA). Generally, to establish a prima facie case of unlawful retaliation, a plaintiff must show (1) that he or she engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. See *Deflaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). Once a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to articulate a legitimate reason for the adverse employment action. However, the plaintiff always retains the burden of persuasion to prove that he or she is entitled to the relief sought. See *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 399; 493 NW2d 441 (1992).

In the instant case, the evidence of record establishes that plaintiff was an individual entitled to protection against retaliation under the WDCA. The WDCA does not require an employee to file a formal complaint, but merely to exercise her rights to compensation as provided by the WDCA. Plaintiff was receiving voluntary benefits from defendant for her work-related carpal tunnel injury at the time her employment was terminated. Defendant had paid for plaintiff's medical expenses, including doctor's visits, mileage costs, and prescription expenses. Plaintiff accepted defendant's voluntary payment of her medical expenses and further exercised her rights under the WDCA by reminding defendant she was entitled to reimbursement for certain expenses.

We further conclude, based on the evidence submitted, that plaintiff established a prima facie case of retaliation. After plaintiff began receiving benefits from defendant to compensate her for her work-related injury, defendant terminated plaintiff's employment. Plaintiff produced evidence to support a causal connection between her termination and her receipt of worker's compensation benefits and contended that she was treated differently than similarly situated individuals with non-work related injuries for the same or similar conduct. Because plaintiff presented a prima facie case of retaliation, the burden of production shifted to defendant to provide a legitimate reason for plaintiff's termination.

Defendant, in response, asserted that plaintiff's employment was terminated because she violated its attendance policy. In support of its position, defendant provided the trial court with a copy of its attendance policy for its production employees and offered evidence establishing plaintiff's attendance violations. Plaintiff does not dispute the fact that she violated defendant's policy. Instead, she claims that defendant's attendance policy was used as a pretext for discrimination. In an effort to prove discriminatory pretext, plaintiff compares herself to three employees who had numerous absences but were not fired under defendant's attendance policy.

However, the evidence of record disproves that these employees were similarly situated to plaintiff. One of the employees was not governed by the same attendance policy as plaintiff because she was an office worker not subject to the attendance policy of production employees. The second employee was a high school co-op student who was granted more absences than a regular production employee so that he could attend school-related activities. The student employee injured his knee while

playing high school football and, because his injury was school related, he was not assessed points for his absences. The third employee was a production worker in a different plant who had her absence points reduced for reasons that defendant could not recall. However, this third employee was terminated two weeks after the reduction in points for attendance policy violations. Under these circumstances, this Court does not find the requisite parallels in these work situations to conclude that these employees were similarly situated and consequently, that plaintiff experienced differential, discriminatory treatment.

Moreover, plaintiff made no attempt to work within the guidelines of defendant's attendance policy. If plaintiff had obtained a note from her physician stating that any of her absences were related to her carpal tunnel syndrome, plaintiff would not have been assessed points for her absences. However, plaintiff made no effort to do so with regard to most of her absences and, although her treating physician's office was located approximately two hours away from plaintiff's home and work, nothing in defendant's attendance policy prohibited plaintiff from visiting a local physician to obtain a note requesting a leave of absence. Furthermore, even though plaintiff may have felt constrained to visit her treating physician, no attempt was made to call his office to request or discuss additional medical leave time and have such authorization forwarded to plaintiff's employer. Moreover, plaintiff never utilized defendant's internal complaint procedure to dispute any of the points assigned pursuant to the attendance policy. Instead, plaintiff accepted the assessed points and failed to report to work for three days because she assumed she had been fired.

Because plaintiff failed to provide any evidence that defendant's reason for her termination was a pretext for retaliation against plaintiff for her assertion of her rights under the WDCA, we conclude that the trial court did not err in granting defendant's motion for summary disposition with regard to plaintiff's retaliation claim.

II

Next, plaintiff asserts that the trial court erred in granting defendant's motion for summary disposition with regard to her handicap discrimination claim. We disagree.

The Michigan Handicappers' Civil Rights Act (HCRA) provides that "[a]n employer shall not . . . [d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). To establish a prima facie case of handicap discrimination, a plaintiff must demonstrate that (1) she is handicapped as defined by the HCRA, (2) the handicap is unrelated to her ability to perform the duties of a particular job, and (3) that she was discriminated against in one of the ways described in the statute. *Merillat v Michigan State Univ*, 207 Mich App 240, 244; 523 NW2d 802 (1994).

Although plaintiff admits that her disability was temporary in nature, she asserts that she is handicapped as defined by the statute. MCL 37.1103(e); MSA 3.550(103)(e); See, generally, *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504; 476 NW2d 451 (1991). Cf. *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 329; 535 NW2d 272 (1995). However, even assuming

arguendo that plaintiff was "handicapped" within the meaning of the HCRA, we conclude that plaintiff has not alleged sufficient evidence to establish that defendant discriminated against her because of her condition.

Plaintiff argues that defendant discriminated against her by failing to accommodate her handicap as required by the HCRA.[1] The burden of proof rests with a plaintiff to show that the defendant employer failed to accommodate her handicap, MCL 37.1210(1); MSA 3.550(210)(1). Once a prima facie case of discrimination has been established, the defendant bears the burden of producing evidence that an accommodation would impose an undue hardship. *Hall v Hackley Hosp*, 210 Mich App 48, 54-55; 532 NW2d 893 (1995). If this burden of production is met, the plaintiff then must prove by a preponderance of the evidence that an accommodation would not impose an undue hardship. *Id.* at 55.

An employer's duty to accommodate under the HRCA is "limited to the alteration of physical structures to allow access to the place of employment and the modification of peripheral duties to allow job performance," *Marsh v Dep't of Civil Service,* 173 Mich App 72, 80; 433 NW2d 820 (1988), and does not extend to placing the employee in a new job or providing vocational rehabilitation efforts. *Id.* However, the HCRA does require a handicapped employee to notify his or her employer in writing of his or her need for an accommodation within 182 days of the date in which the handicapped employee knew or reasonably should have known that an accommodation was needed. MCL 37.1210(18); MSA 3.550(210)(18).

In the instant case, plaintiff failed to provide any evidence that she made the requisite written request to defendant for an accommodation. The evidence does establish that defendant provided plaintiff with wrist splints and gloves when she first complained of pain in her wrists and hands. After plaintiff informed defendant that the wrist splints and gloves were not relieving her pain, defendant sent plaintiff to a hand specialist and paid all of her medical expenses, including the doctor's fee, mileage costs, and prescription payment reimbursement. When the hand specialist determined that plaintiff required surgery on both of her wrists, defendant paid for plaintiff's surgical expenses and granted plaintiff a medical leave of absence based on the doctor's recommendations. Between plaintiff's surgeries, she was reassigned to a screw sorting job which could be completed with one hand. The screw sorting job allowed plaintiff to rest the wrist and hand that had just undergone surgery. Although plaintiff stated that she was in pain following her second surgery, she never requested an additional leave of absence. Given these circumstances, there is a dearth of evidence supporting plaintiff's claim that defendant failed to accommodate her condition.

Next, plaintiff argues that she was terminated because of defendant's discriminatory animus. Plaintiff claims that she was discharged under defendant's attendance policy when similarly situated non-handicapped employees were retained after engaging in the same or similar conduct. "Once a plaintiff presents evidence that he or she is 'handicapped' and that the handicap does not affect his or her ability to perform the duties of a particular job, the burden of proof shifts to the defendant to show a legitimate, nondiscriminatory reason for its rejection of the plaintiff." *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989). If the defendant can offer a legitimate reason for the adverse employment action directed at the plaintiff, the burden of proof shifts back to the plaintiff to show that the defendant's reason was false or a mere pretext. *Id.* However, the plaintiff is not required to

establish that the defendant was motivated solely by a discriminatory intent. Instead, the plaintiff must merely produce evidence that discrimination was a determining factor behind the defendant's adverse employment decision. *Id.*

In the present case, defendant claims that plaintiff was discharged for violations of its attendance policy. To prove that defendant's legitimate reason behind its employment decision was pretextual, plaintiff asserts that similarly situated non-handicapped employees were treated differently for similar conduct. However, as noted above, plaintiff was unable to demonstrate that she was similarly situated to the employees named in her proofs. Because plaintiff failed to provide any evidence that defendant's reason for her termination was a pretext for handicap discrimination, we conclude that the trial court did not err in granting defendant's motion for summary disposition with regard to plaintiff's handicap discrimination claim.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Richard A. Bandstra

[1] MCL 37.1102(2); MSA 3.550(102)(2) provides:

> Except as otherwise provided in article 2, a person shall accommodate a handicapper for purposes of employment, public accommodation, public service, education, or housing unless the person demonstrates that the accommodation would impose an undue hardship.