STATE OF MICHIGAN

COURT OF APPEALS

JACK JOHNSON,

Plaintiff-Appellant,

and

MARK S. FARRELL,

Appellant,

v

GATEWAY TO MICHIGAN CORP., d/b/a C & N INDUSTRIES, INC.,

Defendant-Appellee.

UNPUBLISHED
April 28, 2000

No. 212715
Hillsdale Circuit Court
LC No. 97-027145 NZ

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Plaintiff Jack Johnson brought suit against his employer, defendant Gateway to Michigan Corp., alleging, among other things, violations of the Persons With Disabilities Civil Rights Act, (PWDCRA), MCL 37.1101 *et seq.*; MSA 3.550 (101) *et seq.*[1] Plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(10). Plaintiff and his attorney, Mark S. Farrell, appeal as of right the trial court's order awarding sanctions under MCR 2.114(E). We affirm the order dismissing plaintiff's claims, vacate the order awarding sanctions and remand for further proceedings consistent with this opinion.

Plaintiff was employed by defendant for approximately six years as a machine operator. He received only positive evaluations from defendant during that period; however, he was warned on at least one occasion about his excessive absenteeism. In April 1996, plaintiff received time off to visit his father, who was in a Tennessee hospital. While plaintiff was in Tennessee, he broke his foot. He was not released to return to work until August 30, 1996. When plaintiff returned to work with a doctor's

release, he was told that he was being discharged from his employment. The parties disagreed on what was said at the time plaintiff was discharged. Plaintiff testified during his deposition that Terry Cole, the human resources director for defendant, told him that plaintiff's "foot injury and their concrete floor don't mix," and that the company was afraid plaintiff would file a worker's compensation claim. In his deposition, Cole denied making any such statements, saying that he had told plaintiff he was being discharged because there was no work for him. Cole also said that plaintiff was actually discharged for excessive absenteeism.

Plaintiff filed suit against defendant, contending that it had: (1) discriminated against plaintiff by (a) discharging plaintiff because of either his handicap or defendant's perception that plaintiff was handicapped, (b) failing to give plaintiff reasonable time to heal, or (c) discharging plaintiff because of its fear that plaintiff would file a worker's compensation claim if he continued to work for defendant; and (2) given false information to a prospective employer of plaintiff stating that plaintiff had filed suit against defendant and that plaintiff had problems with his feet and other difficulties.[2] Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), claiming that plaintiff was not handicapped, that it had a legitimate business reason for discharging him, and that plaintiff had admitted that the information given to his prospective employer likely came from his father-in-law, not from defendant. The court denied relief under MCR 2.116(C)(8), but granted relief under MCR 2.116(C)(10).

Plaintiff contends that the court erred in granting summary disposition. We disagree. When deciding a motion for summary disposition brought under MCR 2.116(c)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the non moving party, to determine whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 23, 76; 597 NW2d 517 (1999). We review the trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The PWDCRA prohibits an employer from discharging or otherwise discriminating against an individual with respect to the terms, conditions, or privileges of employment because of a disability which is unrelated to the individual's ability to perform the duties of a particular job or position. MCL 37.1202(b); MSA 3.550(202)(b). For claims of employment discrimination under the act, a "disability" is a determinable physical or mental characteristic which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic substantially limits one or more of the major life activities of the individual and is unrelated to the individual's (a) ability to perform the duties of a particular job or position or (b) qualifications for employment or promotion. MCL 37.1103(d)(1)(A); MSA 37.1103(d)(1)(A). In order to establish a prima facie case of discrimination under the act, a plaintiff must demonstrate that (1) he is disabled as defined in the act,[3] (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job or position, and (3) he has been discriminated against in one of the ways provided in the act. *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998). The question of whether a person's condition constitutes a disability must be determined on a case-by-case basis. *Id.* at 610.

The act does not define the terms "substantially limits" or "major life activities." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216; 559 NW2d 61 (1996). This Court has defined "major

life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.* at 217. Whether an impairment substantially limits a major life activity is determined based on: (1) the nature and severity of the impairment; (2) its duration or expected duration; and (3) its permanent or long-term effect. *Chiles v Machine Shop, Inc*, ____Mich App ____; ____ NW2d ____ (Docket No. 207395, issued 11/5/99, slip op, p 8); *Stevens, supra* at 218. As aptly noted in *Chiles, supra*:

> Reading the statutory language plainly, an impairment cannot be "substantial" if it is of a merely temporary nature. The types of impairments that are generally temporary are often commonly shared by many in the general public – nearly everyone suffers temporary injuries or maladies at some point in his or her life. Yet the intent of the Legislature here, as well as with the federal disability discrimination statutes, was that disability discrimination claims be available only to those with characteristics that were *not* commonplace, but posed general disadvantages to employment that were not directly related to their ability to do the job. [citations omitted.]

Plaintiff's broken foot does not constitute a disability under the PWDCRA. Broken bones are temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact. *Chiles, supra.* See also *Vande Zande v Wisconsin Dep't of Administration*, 44 F3d 538, 544 (CA 7, 1995) ("Intermittent, episodic impairments are not disabilities, the standard example being a broken leg.") No evidence was offered in this case to show any conditions which would cause plaintiff's broken foot to rise to the level of a "disability." The temporary nature of the impairment causes us to conclude that plaintiff's broken foot was not a disability.

Plaintiff next argues that defendant did not give him reasonable time to heal from his injury. Plaintiff bases his argument on *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504, 507; 476 NW2d 461 (1991). However, this Court has since determined that *Rymer* was wrongly decided. *Lamoria v Health Care Corp*, 233 Mich App 560, 562; 593 NW2d 569 (1999). This state no longer recognizes that an employer must give an employee "reasonable time to heal." *Id.* Further, plaintiff admitted in his deposition that he was given reasonable time to heal and thus, he is bound by his admission. *Braman v Bosworth*, 112 Mich App 518, 520; 316 NW2d 255 (1982).

Plaintiff also contends that he had a "disability" within the meaning of the Act because he had a history of disability. MCL 37.1103(d)(ii); MSA 3.550(103)(d)(iii). We disagree. In order to be qualified under the "history" provision of the act, plaintiff would have to once have been disabled, or misclassified as disabled. As we have already discussed, plaintiff was not disabled within the meaning of MCL 37.1103(d)(i); MSA 3.550(103)(d)(i). He cannot have a history of disability if he did not have a disability.

Plaintiff also argues that he created a fact issue as to whether he was perceived as disabled by his employer. We again disagree. The facts of this case are strikingly similar to the facts of *Chiles, supra*. In *Chiles*, the plaintiff suffered from a back injury. When the plaintiff was cleared of physical work restrictions he was permanently laid off. The plaintiff's supervisor purportedly said that the plaintiff was not given certain jobs for which he was qualified because these jobs required a "strong

back." The plaintiff brought a claim under the PWDCRA claiming that his employer wrongfully perceived him as suffering from a disability. In rejecting the plaintiff's claim that the supervisor's reference to a "strong back" was sufficient to show that the employer perceived the plaintiff as disabled, this Court held:

> Although this claim may at first appear easier to establish since a plaintiff need not actually be disabled to fall within the PWDCRA, a plaintiff must still prove that the employer perceived that the employee was actually "disabled" within the meaning of the statute. See *Colwell v Suffolk Co Police Dpt*, 158 F3d 635, 646 (CA 2, 1998) (interpreting the ADA). In other words, showing that an employer thought that a plaintiff was somehow impaired is not enough; rather, a plaintiff must adduce evidence that a defendant regarded the plaintiff as having an impairment that substantially limited a major life activity - - just as with an actual disability. [*Chiles, supra* at 6.]

Because the plaintiff in *Chiles, supra* failed to present evidence that the employer actually believed that the plaintiff's back ailment was something more than temporary in nature, the plaintiff had failed to demonstrate that the employer perceived that the plaintiff was actually disabled as that term is defined under the PWDCRA. Similarly, in the present case plaintiff suffered from a temporary commonplace ailment. When considered in the greater scheme of potential ailments, a broken foot does not, as we have already found, pose a substantial limitation on any major life activity. No evidence presented by plaintiff supports the conclusion that plaintiff's employer viewed plaintiff's broken foot as an ailment that posed a substantial limitation on any of plaintiff's major life activities. Accordingly, we find that the trial court properly dismissed plaintiff's claim that he was discriminated against on the basis of a perceived handicap.

Plaintiff next contends that the trial court abused its discretion in denying his request for leave to amend his complaint to include an allegation that his discharge was contrary to public policy. We disagree. Under MCR 2.118(A)(2), a party may amend a pleading by leave of the court or by written consent of the defendant when made more than fourteen days after being served with a responsive pleading. A court should freely grant leave to amend a complaint when justice so requires. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). Amendment is generally a matter of right rather than grace. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). However, a motion to amend is properly denied for any one of the following reasons (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility. *Id*. at 656. The trial court found plaintiff's propose amendment to be futile. We agree.

Plaintiff claims that *Morris v Clawson Tank Co*, 221 Mich App 280, 285; 561 NW2d 469 (1997), rev'd on other grounds 459 Mich 256; 587 NW2d 253 (1998), provides a legal basis on which to assert a claim of wrongful termination in violation of Michigan public policy. More specifically, plaintiff contends that defendant discharged plaintiff in part because it was afraid plaintiff would file a worker's compensation claim in the future, which this Court found to be a violation of public policy in *Morris, supra*. Plaintiff has misconstrued our holding in *Morris*.

In *Morris*, unlike in this case, the plaintiff set forth a prima facie case showing that he was handicapped and the handicap was unrelated to his ability to perform the job. *Id*. at 284-285. The burden of proof then shifted to the defendant to articulate a legitimate, nondiscriminatory reason for its action. The defendant claimed that its legitimate, nondiscriminatory reason was fear of a future worker's compensation claim if the plaintiff injured his remaining good eye. *Id*. at 285. However, in this case, plaintiff failed to set forth a prima facie case under the PWDCRA and defendant did not assert that its legitimate, nondiscriminatory reason was a fear of future worker's compensation claims. Therefore, we find that plaintiff's reliance upon *Morris* is misplaced.

Plaintiff also argues that he had a legitimate claim under *Sventko v Kroger Co*, 69 Mich App 644, 647; 245 NW2d 151 (1976), in which this Court held that an employer could not discharge an employee in retaliation for filing a worker's compensation claim in violation of MCL 418.301(11); MSA 17.237(301)(11). The protections provided in *Sventko* apply only to employees who have actually instituted a proceeding; they have no application where an employee has never filed a worker's compensation claim. *Ashworth v Jefferson Screw Products*, 176 Mich App 737, 746; 440 NW2d 101 (1989). The trial court correctly concluded that plaintiff's proposed amendment had no legal basis.

Finally, plaintiff and Farrell contend that the trial court erred in assessing sanctions under MCR 2.114(E). We agree. MCR 2.114(D) imposes an affirmative duty on attorneys or parties to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Mkt, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 678 (1993). The reasonableness of the attorney's inquiry is measured by an objective standard. *Id*. The party's subjective good faith is irrelevant. *Lloyd v Avadenka*, 158 Mich App 623, 630; 405 NW2d 141 (1987). Sanctions shall be imposed by the court, either on motion of a party or its own initiative, if the party fails to make the inquiry required by MCR 2.114(D). MCR 2.114(E); *Kitchen v Kitchen*, 231 Mich App 15, 21; 585 NW2d 47 (1998). The court's finding that the pleading was signed in violation of MCR 2.114 is reviewed for clear error. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997).

The trial court provided no advance notice of its intent to impose sanctions. Rather, at the hearing on the motion for summary disposition, the trial court made a record that focused primarily upon plaintiff's claim that defendant gave false information to a prospective employer of plaintiff. The trial court relied upon the deposition of defendant's employee, Mr. Cole, who denied providing any adverse information to any prospective employer of plaintiff. It was subsequently determined that plaintiff was told by a prospective employer that someone gave plaintiff a bad reference and plaintiff assumed that it was defendant.

The trial court imposed sanctions pursuant to MCR 2.114 finding that both the lawsuit and the claim, presumably the false information claim, were frivolous. Plaintiff's counsel immediately informed the trial court that upon the taking of the deposition of Mr. Cole, he informed defense counsel that he would not pursue the false information claim. The trial court responded, "My order stands." The trial court imposed a sanction totaling $8,450.01, representing the total actual costs and attorney fees incurred by defendant to defend plaintiff's claims.

We find that plaintiff's claims under the PWDCRA were not legally frivolous when asserted in the trial court. Michigan courts have been slow in interpreting the meaning of a disability under the PWDRCA and judicial interpretations of this act have not displayed clarity and consistency. It was not until this Court's decision in *Chiles*, *supra*, which was decided approximately one and one-half years after the trial court declared plaintiff's claims frivolous, that a Michigan court interpreted the meaning of discrimination premised upon an employer's perception that an employee is disabled. We find that given the lack of clear law addressing the issue, plaintiff presented a good faith argument that his claim was cognizable under Michigan law. Thus, we find that the trial court clearly erred when it found plaintiff's lawsuit frivolous.

We do not find, however, that the trial court clearly erred to the extent it concluded that plaintiff's false information claim was not well grounded in fact. Plaintiff filed this claim based on information from a prospective employer that an unidentified person gave plaintiff a bad reference. Without more, we cannot find that the trial court clearly erred by finding that plaintiff failed to conduct a pre-filing investigation into the factual support for his claim. The record simply does not suggest that the defendant employer was the only reference provided by plaintiff to his prospective employer or that plaintiff or his counsel interviewed and eliminated all other persons who plaintiff may have identified as a reference to his prospective employer, thereby suggesting that the poor reference did in fact come from defendant.[4] Accordingly, MCR 2.114 requires that a sanction be imposed against plaintiff, his counsel or both.

Notwithstanding our finding that the trial court did not clearly err in finding that plaintiff or his counsel failed to sufficiently investigate this claim, we find that the trial court's sanction, which represents actual attorney's fees and costs to defend this lawsuit in its entirety, is excessive in light of our holding that plaintiff did not violate MCR 2.114 with regard to the claims under the PWDCRA. We therefore vacate the order imposing sanctions, originally imposed and remand for the trial court to impose a sanction that is consistent with this opinion. On remand, the trial court shall provide the litigants notice of a sanction hearing and a meaningful opportunity to be heard. The trial court shall make detailed factual and legal findings regarding the sanction that is imposed.

The amount of the sanction is left to the sound discretion of the trial court. In exercising its discretion, the trial court should consider that although a reasonable attorney's fee is a permissible sanction, it is not a required sanction. Sanctions serve two purposes: (1) deterrence of future violations of the court rules; and (2) restitution to a party that wrongfully incurred costs or fees as a result of the sanctioned party's failure to conform to the court rules. *In re Contempt of Dougherty*, 429 Mich 81, 126; 413 NW2d 392 (1987). If in the exercise of its discretion the trial court determines that deterrence is the main objective to be achieved in imposing a sanction, the court must impose the lowest sanction amount that would achieve this goal. A sanction imposed to provide restitution must be limited to restitution of reasonable costs and fees that arise as a direct consequence of the violation of MCR 2.114. A sanction must not result in a windfall under the guise of restitution.

On remand, if the court determines that the sanctions should provide defendant restitution for attorney's fees incurred as a result of plaintiff's claim that defendant wrongfully provided false information to plaintiff's prospective employer, then the court must limit the sanction to reasonable

attorney's fees incurred to defend only that claim. These fees would of course cease to accrue at the point in time plaintiff conceded to defendant that the claim was not supported in fact and would no longer be pursued by plaintiff.

Affirmed in part; reversed in part; and remanded for further proceedings consistent with this opinion.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] During the events which gave rise to this appeal, the act was known as the Handicappers Civil Rights Act. The act was amended in 1998 to change its name and to reorganize several subsections of the act. No substantive changes were made to the act as it is applied to this appeal. Accordingly, we will use the terminology and citations of the current act.

[2] Plaintiff identified this claim as a claim of "false information to a prospective employer," this Court is unaware of such a common law claim and the question of whether such a claim exists in the law is beyond the scope of this appeal. It appears, however, that this claim may in fact be a claim of tortious interference with advantageous business relations, which is recognized in Michigan. *Winiemko v Valenti*, 203 Mich App 411, 415-417; 513 NW2d 181 (1994); *Northern Plumbing & Heating, Inc v Henderson Bros Inc*, 83 Mich App 84, 93; 268 NW2d 296 (1978).

[3] This Court recently applied the three prong test to determine disability under the federal disability act to a case brought under the PWDCRA. *Chiles v Machine Shop, Inc*, ____Mich App ____; ____ NW2d ____ (Docket No. 207395, issued 11/5/99, slip op, p 6), citing *Bragdon v Abbott*, 524 US 624; 118 S Ct 2196, 2202; 141 L Ed 2d 540 (1998).

[4] After defendant's employer, Mr. Cole, was deposed plaintiff disclosed that the poor reference came from plaintiff's father-in-law.