STATE OF MICHIGAN

COURT OF APPEALS

ALFRED URBANSKI, Personal Representative of the Estate of NANCY URBANSKI, Deceased, VIRGINIA DRUCZ and AGNES HARRIS,

Plaintiffs-Appellants,

v

SEARS ROEBUCK & COMPANY, MARYANNA HARRINGTON and DANIEL HARTLEY,

Defendants-Appellees.

UNPUBLISHED
May 2, 2000

No. 211223
Wayne Circuit Court
LC No. 96-639075-NO

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' motions for summary disposition in this employment discrimination action. We affirm.

Plaintiffs,[1] former employees of defendant Sears, Roebuck & Co. brought this action alleging discrimination under both the Michigan Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., and the Handicapper's Civil Rights Act (HCRA),[2] MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., and alleging intentional infliction of emotional distress. In their first amended complaint, plaintiffs added a count alleging that defendants retaliated against plaintiff Nancy Urbanski for filing a claim under the Worker's Disability Compensation Act (WDCA), MCL 418.301(11); MSA 17.237(301)(11).

Plaintiffs Nancy Urbanski, Agnes Harris and Virginia Drucz began working for Sears in 1969, 1970 and 1973, respectively. Harris was sixty-five when she retired from Sears in September 1994, Harris was sixty-two when she retired in October 1994, and Urbanski was fifty-three when she took a medical leave of absence in 1995.

During the time period at issue, all three plaintiffs worked at Sears' Livonia Service Center. In the spring of 1993, the service center underwent a centralization process and some of the work performed at the Livonia Service Center was transferred to another service center. Most of the Livonia employees were transferred to another location, but plaintiffs and a few others remained. Defendant

Daniel Hartley became the Branch Manager of the service center in May 1993. He oversaw operations at the service center. Defendant Maryanna Harrington worked as a human resource specialist at the service center.

Plaintiffs allege that, after the centralization of the service center, defendants harassed them and made comments and engaged in conduct that constituted discrimination based on age and handicap. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs failed to establish a genuine issue of material fact with regard to any of their claims. The trial court ultimately granted those motions, dismissing plaintiffs' complaint in its entirety.

On appeal, plaintiffs abandon some of their claims. They appeal only the trial court's dismissal of their age discrimination claims, Harris' handicap discrimination claim and Urbanski's claim for retaliation.

In support of their claims, plaintiffs provided deposition testimony recounting their treatment after May 1993. Plaintiff Harris testified that she was assigned to answer the telephones and was permitted no assistance for about two weeks, even when she was unable to handle all of the telephone calls that came in at one time. She testified that defendants yelled at her, "Agnes, answer the phone," and that they were "loud and boorish". After returning from a vacation in September 1993, Harris discovered another employee, who was significantly younger, at her desk. She learned that her belongings had been moved to another desk. At this time, Harris claims, she decided that she had had enough. She did not discuss the matter with defendants, but became depressed and decided to retire to "get away from Sears, Roebuck and Dan and Maryanna, the harassment." Harris had not planned on retiring until she reached age seventy. Harris had never been disciplined or demoted and was never denied a promotion. Although she later heard from another plaintiff that defendants made comments about her age, no one ever said anything about her age in front of her.

Harris also testified that she was diagnosed with multiple sclerosis in 1988. She used a four-pronged cane to walk, and her hands shook. Although no one ever commented on her disability in her presence, she believed that some of the discriminatory treatment she experienced was based on this handicap.

Plaintiff Drucz was assigned to the service center's cash office in June 1993. She testified that she received little training. Drucz suffered medical problems and, because of the stress involved in the cash office work, she did not think she could perform the work. Defendant Hartley explained to her that she needed cross-training in the cash office duties so that the cash office would be covered if there were ever an involuntary layoff and less senior employees, who were experienced in the cash office, were laid off. Drucz disputed this reason, and testified that she was "set up."

In December 1993, Drucz began to suffer chest pains while at work. She apparently was hospitalized. She was to return to work in January 1994, but took a voluntary layoff until May 1994. When Drucz returned, she was assigned to Harris' former job of answering the telephones. As with Harris, Drucz claims that she was told that she was solely responsible for answering all telephone calls. Drucz alleges that defendants "hollered" "Virginia, get the phone," and "keep those fingers moving."

She was never disciplined or demoted and was never denied a promotion. Drucz never heard anyone make any comment about her age, but testified that Harrington talked down to her, treating her "like a two-year-old." In August or September 1994, Harrington told Drucz she was to work in the cash office or learn payroll. Drucz knew that these jobs would be stressful for her. She decided to retire because she was afraid the work would affect her health. She took a voluntary retirement in October 1994. She felt she was being discriminated against.

Urbanski testified that, on September 18, 1995, she was learning to complete time cards. A co-worker began to train her, but then apparently defendant Harrington took over. Harrington yelled at Urbanski to type a letter and, when Urbanski followed the instruction, Harrington hit a key to erase the letter and screamed the instruction again while beating her fist. According to Urbanski, Harrington yelled at her throughout the day and made comments about how long it was taking Urbanski to complete the job. Urbanski testified that there were other incidents where Harrington was rude to her and where she monitored the time Urbanski spent on her breaks. Urbanski testified that Harrington spoke to her in a belittling, degrading manner, although she could not recall specific words used by Harrington. Urbanski believed that Harrington's treatment of her was based on her age. Urbanski was never disciplined or demoted and was never denied a promotion or a pay raise to which she was entitled. Urbanski claims that she suffered a breakdown as a result of the September 1995 incident. She apparently went on medical leave at that time.

Urbanski also testified that she heard people in the office, including defendants, refer to plaintiffs Harris and Drucz as "old fuddy-duddies," "old codgers," and "old fogies." She testified that defendant Hartley said Harris and Drucz "can't cut the mustard," that he "needs a faster, go-getter team," "rah, rah, rah." One time, Hartley told Urbanski to "get it or get out." According to Urbanski, Hartley made comments about Harris when Harris walked slowly through the room with her cane. He made fun of Harris behind Harris' back. One time, he pointed at Harris and then pointed his thumb toward the door, laughing. He commented that Harris, the "old fogy" should retire. Urbanski testified that these comments were always made behind Harris' back. She estimated that she heard these sorts of comments approximately six times over a two year period.

All three plaintiffs testified that defendants treated two other, younger employees more favorably. These employees were permitted to take lunch breaks and then eat lunch at their desks, after their breaks, and take extended lunches. Plaintiffs did not believe they could have done the same. The other employees were not treated the same as plaintiffs.

The trial court granted defendants' motions for summary disposition on each of plaintiffs' claims. A decision on a motion for summary disposition is reviewed de novo. *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. *Id*. The court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

As an initial matter, in support of their argument that the trial court's decision should be affirmed, defendants argue that defendant Harrington does not fall within the definition of employer as used in the Civil Rights Act and, therefore, cannot be held liable in her individual capacity. We agree. The trial court did not reach this issue, but defendants raised it in their motions and this Court may consider it on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

The Civil Rights Act defines "employer" as a person who has one or more employees, and includes an agent of that person. MCL 37.2201(a); MSA 3.548(201)(a). The HCRA definition of "employer" is nearly identical to that in the Civil Rights Act. MCL 37.1201(b); MSA 3.550(201)(b). A person who is responsible for making personnel decisions is an agent of an employer. *Jenkins v Southeastern Mich Chapter, American Red Cross*, 141 Mich App 785, 799-800; 369 NW2d 223 (1985). Although a supervisor need not have complete authority over hiring, firing, promoting or disciplining to be considered an agent, the supervisor must have "significant control" of those duties. *Champion v Nationwide Security, Inc*, 205 Mich App 263; 517 NW2d 777 (1994), rev'd on other grounds 450 Mich 702; 545 NW2d 596 (1996); *Kauffman v Allied Signal, Inc*, 970 F2d 178, 186 (CA 6, 1992).

Defendant Harrington was the human resources assistant. Her job responsibilities, as stated in her job description, did not include supervisory functions. She performed administrative duties related to personnel matters. Harrington admitted that she gave direction to plaintiffs when asked to do so by Hartley. However, there is no evidence that plaintiffs reported to her or that Harrington had any authority over firing, hiring, disciplining or promoting plaintiffs. Because plaintiffs failed to establish that Harrington had "significant control" over them, we agree that Harrington is not an "agent" and cannot be held liable under the Civil Rights Act or HCRA as an employer.

We now turn to plaintiffs' age discrimination claims. Under the act, an employer shall not:

> (a) Fail or refuse to hire, or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. MCL 37.2202(1); MSA 3.548(202)(1).

We note that plaintiffs appear to combine several different discrimination theories on appeal. However, in response to defendants' motions for summary disposition, plaintiffs directly approached only a claim for intentional discrimination, using the elements required to establish a claim for disparate treatment. See *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991). In support of their claims for intentional discrimination, plaintiffs proceeded, in part, on the theory that defendants created a hostile work environment based on their age-based discrimination of plaintiffs, although they did not specifically set forth a claim based on hostile work environment and did not specifically argue the elements for such a claim.

Disparate treatment claims may be established through direct or indirect evidence. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-695, 707; 568 NW2d 64 (1997); *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 358-361; 597 NW2d 250 (1999). To support a case

of intentional discrimination, an employee is required to prove by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she suffered an adverse employment decision; (3) the defendant was predisposed to discriminating against members of her protected class; and (4) age was a determining factor of the adverse employment decision. *Id*. at 360-361.

Here, plaintiffs allege that defendants engaged in a pattern of discrimination to such an extent that plaintiffs were constructively discharged, by being forced to retire or caused to become "psychologically disabled." An employee who establishes a constructive discharge is treated as if her employer actually fired her. *Champion v Nation Wide Security*, 450 Mich 702, 710; 545 NW2d 596 (1996). A constructive discharge will be found only when the conduct of the employer or the employer's agent's is so extreme that a reasonable person in the position of the employee would feel compelled to resign. *Id*.

Plaintiffs presented evidence that Hartley referred to Harris and Drucz behind their backs as "old codgers," "old fogies," and "fuddy-duddies" and that he commented that Harris, the "old fogy," should retire. Harris and Drucz were not aware of these comments at the time of their retirement; they only learned of the comments from plaintiff Urbanski years later in the course of this lawsuit. Plaintiffs presented evidence that defendant Harrington, who we have found was not an agent of Sears, was often rude and that she often raised her voice when instructing them to do their jobs. None of the plaintiffs ever complained about Harrington's or Hartley's conduct. We are not convinced that the challenged conduct in this case was so extreme that a reasonable person would feel compelled to resign.

Plaintiffs also argue on appeal that there was a hostile work environment. They contend that this issue is preserved because they raised it below. However, our review of plaintiffs' pleadings and arguments in response to defendants' motions for summary disposition establishes that plaintiffs failed to directly raise a claim of discrimination based on a theory of hostile work environment. This Court need not review a claim on a theory different from that on which the claim was tried. *Head v Phillips Campers Sales*, 234 Mich App 94, 110; 593 NW2d 595 (1999). In any event, we find that the challenged conduct was not so egregious that a reasonable person would find that, in the totality of circumstances, the comments and treatment were sufficiently severe or pervasive to create a hostile work environment. *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996); *Radtke v Everett*, 442 Mich 368, 394; 501 NW2d 155 (1993).

Next, plaintiffs argue that plaintiff Harris presented a question of fact whether defendants discriminated against her based on handicap. We disagree. To prove a claim for handicap discrimination, a plaintiff must demonstrate (1) that she is handicapped as defined in the HCRA; (2) that the handicap is not related to her ability to perform her job; and (3) that she was discriminated against in one of the ways set forth in the statute. *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998). At the time plaintiffs brought their claims, "handicap" was defined as a determinable physical or mental characteristic that substantially limits one or more major life activities and is unrelated to the individual's ability to perform the duties of a particular job. MSA 37.1103; MSA 3.550(103). In determining whether a person's condition substantially limits a major life activity the person's condition is assessed as it actually exists, that is, in its medicated state. *Chmielewski, supra* at 613.

Plaintiff Harris argues that the "major life activities" of walking and writing were affected by her multiple sclerosis. The determination whether an impairment "substantially limits" a major life activity requires consideration of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect. *Lown v JJ Eaton Place*, 235 Mich App 721, 728; 598 NW2d 633 (1999). Here, the evidence does not support Harris' claim that her impairment substantially limited her identified major life activities of walking and writing when compared to the average person. *Id.* at 731. The evidence establishes that Harris was able to walk steadily with a cane. She alleged no other restrictions to her mobility. She was able to write, although her handwriting was sometimes shaky. Harris has nor demonstrates that her impairment was severe enough to be considered a substantial limitation. We agree with the trial court that Harris is not handicapped as that term is defined by the statute.

Harris also argues that defendants *perceived* her as handicapped under the HCRA. To establish such a claim, a plaintiff must establish that the defendant believed the plaintiff to be "disabled" within the meaning of the statute. *Chiles v Machine Shop, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 207395, issued 11/5/99), slip op at 6. A plaintiff must show more than merely that an employer thought the plaintiff was somehow impaired. *Id*. The plaintiff must present "evidence that the defendant regarded the plaintiff as having an impairment that substantially limited a major life activity—just as with an actual disability." *Id*, citing *Murphy v UPS, Inc*, 527 US 516; 119 S Ct 2133; 144 L Ed 2d 484 (1999). A perceived disability is normally one involving a disability with some kind of unusual stigma attached, such as a mental disability, where negative perceptions are more likely to influence the actions of an employer. *Chiles*, *supra*, slip op at 6-7.

Harris failed to present evidence to demonstrate that defendants perceived her as handicapped within the HCRA. Hartley admitted that he knew Harris used a cane or walker to walk, but he did not know she had multiple sclerosis. He testified that the only thing he noticed as far as physical limitations was that her handwriting was sometimes difficult to read. The only mobility limitation he noticed was that she needed a cane to walk. The trial court did not err in finding that Harris was not handicapped within the meaning of the HCRA.

Finally, plaintiff Urbanski argues that the trial court erred in dismissing her claim that defendants retaliated against her for filing a claim under the WDCA. We disagree. An employee may have a cause of action against an employer for retaliatory discharge when the reason for the discharge was the employee's exercise of a right conferred by a well-established legislative enactment. *Phillips v Butterball Farms Co*, 448 Mich 239, 244; 531 NW2d 144 (1995). The WDCA prohibits an employer from discharging an employee because the employee instituted a proceeding under the act. MCL 418.301(11); MSA 17.237(301)(11). "[T]he discharge of an employee who is receiving worker's compensation benefits due to a particular on-the-job injury, if it is in retaliation for that employee having sought, in good faith, additional benefits based on the injury, constitutes a retaliatory discharge in violation of the WDCA." *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 819; 584 NW2d 589 (1998), vacated and reinstated in pertinent part 233 Mich App 560; 593 NW2d 699 (1999).

The burden is on the plaintiff to establish a causal connection between the filing of her worker's compensation claim and the adverse employment action. *Chiles*, *supra*, slip op at 3. Urbanski has failed to present evidence establishing this causal connection. The testimony, that plaintiff Urbanski was told by a coworker that Harrington "had an attitude" about Urbanski's receiving benefits and Urbanski's speculation that Harrington acted in retaliation, falls short of establishing a genuine issue of material fact. Summary disposition was appropriate.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] Nancy Urbanski, Virginia Drucz and Agnes Harris will be referred to as "plaintiffs." Because Nancy Urbanski died during the pendency of this matter, Alfred Urbanski was appointed personal representative of her estate and is substituted as the proper party plaintiff on her behalf.

[2] The HCRA is now known as the Persons With Disabilities Civil Rights Act (PWDCRA).