STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER MOOREHEAD,

Plaintiff-Appellant,

v

COMERICA, INC.,

Defendant-Appellee.

UNPUBLISHED
October 31, 2000

No. 203675
Wayne Circuit Court
LC No. 95-532170 CL

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant summary disposition in this case alleging wrongful termination and failure to accommodate under the Persons with Disabilities Civil Rights Act[1] (PWDCRA), MCL 37.1101 *et seq.;* MSA 3.550(101) *et seq*. We affirm.

I

The facts viewed in a light most favorable to plaintiff are that, in 1980, plaintiff began employment as a cash deposit processing teller with Manufacturers National Bank (Manufacturers), and after several years was promoted to group leader of the cash deposit processing tellers. In June 1992, Manufacturers merged with defendant Comerica, and plaintiff became a Comerica employee.

Plaintiff testified that she left work early on September 19, 1994, that she did not feel well that day, that when she got home "that's when I knew something was wrong," and that she had no idea at the time whether she would be gone a short or long time. Plaintiff soon after consulted with Dr. Chalakudy Ramakrishna, a psychiatrist, who stated in a letter to defendant that plaintiff was under his care for an adjustment disorder and that he had advised her to not

[1] At the time this suit was brought the act was known as the Handicappers' Civil Rights Act (HCRA). The act was amended by 1998 PA 20, effective March 12, 1998, and renamed to the Persons with Disabilities Civil Rights Act. The PWDCRA is substantially similar to the HCRA, one of the differences being that the terms "handicap" and "handicapper" were replaced by "disability" and "person with a disability," respectively.

work for five weeks. Dr. Ramakrishna testified that plaintiff's adjustment disorder resulted from the stress of her teenage daughter being very ill, of plaintiff's caring for her, the frustration of seeing multiple doctors who gave varying information, and her daughter's poor reaction to her own illness, compounded with plaintiff's job stress. Dr. Ramakrishna wrote to defendant several other times, including on December 5, 1994, stating that plaintiff should refrain from working for another eight weeks.

On March 9, 1995 plaintiff saw Dr. Ramakrishna and he stated in a note, which plaintiff provided her supervisor, Marilyn Henry, that plaintiff would be unable to return to work until April 30, 1995. On the afternoon of Wednesday, March 15, 1995, plaintiff received by mail two letters in one package, from Susan Janeczek, one of defendant's benefits representatives. One of the letters was dated March 14, 1995, and the second was dated February 16, 1995. It is undisputed that defendant initially sent the latter letter to the wrong address, that the post office returned the letter to defendant, and that defendant did not attempt to resend the letter or otherwise advise plaintiff of its contents until it mailed it to plaintiff with the second letter on March 14, 1995. Defendant's February 16, 1995 letter stated:

> Dear Jennifer,
>
> Our records reflect that you are on a medical leave of absence (short term disability) with a last day worked as September 19, 1994. If this is incorrect, please contact me immediately.
>
> This note reminds you that when an employee has been away from work 180 days, they subject [sic] to being separated from Comerica's payroll system and all benefits will cease at that time.
>
> This note also serves to inform you that you may be eligible to apply for Long Term Disability (LTD). Applying for LTD provides you with a possible source of income in the event that you are seriously ill and unable to return to your job. However, submission of an application does not guarantee approval. Because the process may take 30 or more days, it is advisable to apply as soon as you are aware that your medical leave will extend over the 180 day period.
>
> If approved, your LTD benefits would be come [sic] effective on or about March 19, 1995 and would provide you with 60% of your monthly base salary as of your last day worked. You elected an after-tax premium, so your approved LTD benefit will be tax free to you. However, please be aware that any other compensation you might receive (such as Social Security, Retirement, et al. [sic etc.]) will reduce your LTD benefit.
>
> To apply for LTD, complete the attached Employee's Application for Benefits and have your doctor(s) complete the Attending Physician's Statement(s). Then return all the forms in the pre-addressed envelope.

> Also enclosed is a copy of our LTD Information Sheet containing LTD Plan information. Please read it carefully and keep it for reference.
>
> In the meantime, if you have any questions, you may contact me, at the number provided below.
>
> Sincerely,
>
> Susan Janeczek
> Benefits Representative
> Human Resources -MC 3126
> 1-313-222-7027

Defendant's March 14, 1995 letter stated:

> Dear Jennifer,
>
> Our records indicate that your last day worked was September 19, 1994. It is company procedure to remove an employee from the payroll records after 180 days of medical or workers' comp leave time. Therefore, I must separate you from the payroll system effective March 19, 1995.
>
> Upon separation from payroll, all benefits will cease. However, if you wish to continue your employee medical, dental and/or vision benefits, you may do so through Comerica's COBRA program . . . .
>
> If you have questions or need assistance, please don't hesitate to call me. I can be reached at 1-313-222-7027 between 8:00 a.m. and 4:30 p.m. Monday through Friday.
>
> Sincerely,
>
> Susan Janeczek
> Benefits Representative
> Human Resources-M/C 3126

Plaintiff testified at deposition that immediately upon receiving the two letters from defendant on the afternoon of Wednesday, March 15th, she called Susan Janeczek, got her voice mail, and left a message saying that she did not understand the package regarding benefits she had just received and asked that Janeczek call her at home. Plaintiff testified that she did not know what the letter meant and did not understand that her employment was going to be terminated. She testified that she thought that "separation from payroll" meant that she would be placed on unpaid leave status, which was her understanding of what would occur under the Manufacturers policy. Plaintiff also testified that on that same afternoon, Dorothy Ross, Ms. Henry's supervisor, called her because she had received a copy of defendant's letter of March 14, 1995. Plaintiff testified that Ross said to plaintiff that she did not know what "separated from payroll" meant, that she "was in the middle," and that she would call plaintiff back after speaking

with the Human Resources Department. Plaintiff also testified that on that afternoon, after speaking with Ross, she again called Janeczek, got Janeczek's voice mail, and then dialed zero to speak to someone. She testified that she spoke to Jeff Rosen, later identified as Jeff Rhoads,[2] told him who she was, that she was on medical leave, that she received the letters in the mail, read the March letter to him, and asked what she needed to do. Plaintiff testified that the man named Jeff told her that she needed a doctor's excuse to be able to return to work. Plaintiff testified that after speaking with Jeff, she called Dr. Ramakrishna, left a message, and that he called her back either that day or the next day, that he told her she would have to see him in order to get a return to work note, and that she made an appointment to see him on Monday, March 20, 1995.

Henry testified at deposition that before plaintiff was terminated on March 19, 1995, plaintiff called her and told her she was able to return to work and would return on March 21, 1995. Henry testified that she believed that it would be okay for plaintiff to return to work on that date, that she was surprised when she did not see her on that date, but that she did not tell plaintiff that it was okay for her to return because she did not "have the authority to . . . make that call." Henry testified that she did not tell anybody at the bank about her conversation with plaintiff that she would return on March 21, 1995. When defense counsel examined Henry at deposition, and asked her whether she was "certain that your conversation with Miss Moorehead relating to her being able to return to work by the 21st took place before she was terminated, or are you not certain of the timeframe [sic]?" Henry responded "I'm not a hundred percent certain."

Plaintiff testified that after she left Dr. Ramakrishna's office on Monday, March 20, Ms. Ross called her at 4:50 p.m., she explained to Ross that she had her doctor's letter saying she could return to work, and Ross then told her that she was no longer a bank employee. Plaintiff testified that she asked Ross who she should speak to about the matter and Ross said plaintiff should speak to Dana Allison, a Human Resources consultant. Because it was nearly 5:00 p.m., plaintiff went to see Allison the following morning, March 21, 1995, and testified that she sat in the bank lobby waiting to see her for three hours, after which Allison spoke to her briefly in the hallway. Plaintiff testified that she showed Allison the letter from Dr. Ramakrishna, that Allison refused to take it, and said there was nothing she could do and that plaintiff should write the grievance department. Plaintiff testified that she then made an appointment with Allison's secretary so "she could explain to me what has happened to me," and rather than keep the appointment, the secretary called plaintiff and said no one could do anything for her.

By letter dated March 28, 1995, plaintiff wrote Allison asking to be reinstated, and sent copies to Ross and defendant's complaint department:

Dear Ms. Allison:

---

[2] Rhoads testified at deposition that he was the manager of the preferred compensation division of defendant's Benefits Department.

> As my employment records reflect, I have been an employee at Manufacturer's Bank for 15 years. I commenced a medical leave of absence on September 19, 1994. I have diligently maintained contact with my employer since that date, providing letters from my physician.
>
> During this period, and for years proceeding [sic] it, I was always led to believe an employee in my circumstances would be protected from termination of employment for up to one year. No one ever told me otherwise.
>
> On March 16, 1995, I received two letters from Susan Janeczek, one dated February 16, 1995 and the other March 14, 1995, both received in the same envelope. These letters were telling me I was to be terminated March 19, 1995.
>
> I spoke to Jeff Rosen on March 17, 1995 at which time he explained that if I submitted a return to work letter from my doctor, I could commence work immediately. March 19th was a Sunday, and having so little notice as to the time constraints being put on me, I saw my doctor March 20th.
>
> I called Marilyn Henry that same day in the early morning and said I would be able to return to work the next day March 21st she said ok. Later that day I received a call from Dorothy Ross who informed me I could not return to work.
>
> I believe my treatment is unfair and unduly harsh. *Please consider this my formal request to be reinstated immediately.* I am available for immediate employment. If Comerica elects not to reinstate me, then please consider this my request to invoke my rights to file a grievance. As I have no copy of the company grievance procedures, please forward them to me and let me know what additional steps must be taken to process this grievance.
>
> I trust following through with this grievance won't ultimately be necessary and you will elect to reinstate me.
>
> I can be reached at [phone number] or by mail at [address]. [Emphasis added.]

Plaintiff testified that she received no response to this letter.

II

Defendant's motion for summary disposition or partial summary disposition, brought under MCR 2.116(C)(4), (8) and/or (10), argued that plaintiff had no standing to sue under the PWDCRA because on the day of her termination she was certified as unable to work; that even if plaintiff had standing, she received a reasonable time to heal as a matter of law; that to the extent plaintiff sought to compel defendant to alter the medical leave of absence period, which is the qualifying period under its Employee Retirement Income Security Act (ERISA)-governed LTD plan, any such extension by judicial fiat would be preempted under ERISA, 29 USC § 1001 *et seq.*; that plaintiff could not establish discriminatory intent or show that defendant's reason for not varying its medical leave period was a mere pretext for discrimination; and that defendant

was entitled to partial summary disposition regarding plaintiff's damages because she removed herself from the job market and was laid off from a subsequent job, and because plaintiff could not establish a nexus between the alleged discrimination and the claimed emotional distress and failed to mitigate such alleged distress.

Plaintiff argued in her response brief that her adjustment disorder constituted a handicap under the PWDCRA; that questions of fact existed regarding whether she was able to perform her duties on the date defendant administratively terminated her; and that but for defendant's actions prior to her termination, which were designed to and did prevent her from returning before March 19, 1995, she would have been medically released and on the job before 180 days elapsed. Plaintiff argued that she never alleged that defendant failed to afford her a reasonable time to heal and that the issue was irrelevant. Plaintiff also submitted an affidavit, which stated that after her termination she applied for unemployment benefits but did not receive them because defendant contested her eligibility, and that she was thus without income and unable to hire a caregiver for her daughter. Plaintiff also argued that defendant's personnel policies did not *require* that it terminate employees after 180 days of medical leave, and that since defendant raised the issue of ERISA after discovery closed, she had not had opportunity to conduct discovery, but that, in any event, it was unlikely that further discovery would support defendant's argument because plaintiff was not requesting that payment under the plan be increased to allow her additional pay. Plaintiff further argued that there was evidence of defendant's animus toward her and the handicapped as a class.

Defendant's reply brief to plaintiff's response argued that John Graham, defendant's First Vice President of Benefits and Operations, testified at deposition that defendant strictly adheres to the 180-day leave period since it is also the qualifying period for long-term disability benefits, and that it would be a breach of defendant's duties under ERISA if it attempted to administer the LTD plan in any other way, and that this testimony was uncontroverted. Defendant further argued that

> Plaintiff complains that two letters sent to her, one reminding her that she should timely apply for LTD benefits if her medical disability was to extend past 180 days and the other a COBRA notice, were not received until shortly before the expiration of her leave. However the concept that these were some form of warning letters, warning plaintiff to recover from her disability before 180 days or face administrative termination, was completely foreign to John Graham, First Vice President, Benefits and Operations. Instead, Graham testified that these letters were intended to inform plaintiff about available benefits if her disability continued. Graham's understanding is clearly correct, since a person either is or is not disabled – it simply is not a discretionary matter left to the employee. The line between "disabled" and "not disabled" is not an ambiguous, ill-defined line in the sand. A medical care provider must certify that a person is disabled and must also certify that the person's disability has subsided sufficiently for that person to return to work.

Defendant's reply brief also noted that, contrary to plaintiff's argument, she was not terminated for failure to comply with defendant's medical leave policy, but rather, she had enjoyed the benefits of the policy for the full 180 days allowed.

The circuit court's order states that it granted defendant's motion "for the reasons and on the grounds raised in the briefs in support of defendant's motion . . . and raised by defendant at the hearing on the motion held on December 16, 1996."[3]

III

Plaintiff first argues that a question of fact exists on the issue whether her disability prevented her from performing her job duties on March 19, 1995, the day defendant administratively terminated her. In response to defendant's motion, plaintiff submitted Dr. Ramakrishna's affidavit, in which he stated that had he known sooner that plaintiff was facing termination, he would have cleared her to return to work as early as February 16, 1995:

> 2. Jennifer Moorehead was my patient for the treatment of a stress-related disorder from September 29, 1994 through April 13, 1995.
>
> 3. By February 16, 1995, Jennifer Moorehead had recovered sufficiently so that if asked by Ms. Moorehead and/or her employer, I would have released her to return to work in order to avert the loss of her employment.
>
> 4. I would have maintained contact with her by increasing the time between sessions and/or monitored her condition by telephone.
>
> 5. The loss of her employment after February 16, 1995, presented a more psychologically detrimental event than a closely monitored return to work.

Defendant argues that it should be permitted to rely on the only medical certification it had on March 19, 1995, the date it administratively terminated plaintiff, in which Dr. Ramakrishna stated that plaintiff would be unable to work until April 30, 1995.

We review the circuit court's grant of summary disposition under MCR 2.116(C)(10)[4] de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The circuit court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the party opposing the motion. *Id.* The moving party bears the initial

[3] The circuit court heard argument on defendant's motion on December 16, 1996, and also heard argument on January 24, 1997 and April 9, 1997. On April 21, 1997, the circuit court granted summary disposition, stating from the bench "the court will adopt the brief and the oral argument of the defense as the basis for my decision." The only transcript in the lower court record is the January 24, 1997 hearing on defendant's motion. There is no dispute that the parties attempted to secure the other two transcripts, and were unable to do so through no fault of either party.

[4] The circuit court did not specify under what subrule it granted defendant's motion, but adopted defendant's briefs and argument below, which were brought under MCR 2.116(C)(4), (8) and (10). We thus review the motion as granted under MCR 2.116(C)(10).

burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* at 455, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). If the opposing party fails to do so, the motion is properly granted. *Id.*

The PWDCRA prohibits discrimination against individuals because of handicap. *Id.* The PWDCRA makes it illegal for an employer to discriminate against an individual in hiring, recruiting, promoting, discharging, or 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). An employer is also prohibited from limiting, segregating, or classifying an employee or applicant for employment because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. MCLA 37.1202(1)(c); MSA 3.550(202)(1)(c).

To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must establish that she is handicapped as defined in the act, that the handicap is unrelated to her ability to perform the duties of a particular job, and that she has been discriminated against in one of the ways set forth in the act.[5] *Stevens v Inland Waters, Inc*, 220 Mich App 212, 215; 559 NW2d 61 (1996). If the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action. *Rollert v Civil Service Dep't,* 228 Mich App 534, 538; 579 NW2d 118 (1998). If the employer articulates such a reason, the burden shifts to the plaintiff to show that the employer's articulated reason(s) were a mere pretext. *Id.* Pretext may be established in one of three ways; by showing that 1) the reason(s) had no basis in fact, 2) if the reason(s) had a basis in fact, by showing that they were not the actual factors motivating the decision, or 3) if they were the factors, that they were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Assuming arguendo that plaintiff established a prima facie case of discrimination, i.e., established that questions of fact remained on the question whether on March 19, 1995 her

[5] The PWDCRA defines a "handicap" as follows:

> A determinable physical or mental characteristic of an individual, 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 that individual and is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1103(e)(*i*)(A); MSA 3.550(103)(e)(*i*)(A).]

The phrase "unrelated to the individual's ability" means that with or without accommodation, an individual's handicap does not prevent him or her from performing the duties of a particular job or position. MCL 37.1103(l)(*i*); MSA 3.550(103)(l)(*i*). Major life activities are basic functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. *Lown v JJ Eaton Place,* 235 Mich App 721, 729; 598 NW2d 633 (1999); *Stevens, supra* at 217.

handicap was unrelated to her ability to perform her job duties, we conclude that her claim fails because she did not meet her burden of showing that defendant's articulated reason for discharging her was pretextual.

Plaintiff testified at deposition, and defendant assumed for purposes of its motion, that plaintiff did not receive a Comerica employee handbook, and that Manufacturers' policies applied to her.[6] Manufacturers' policy on extended sick leave[7] stated in pertinent part:

> Extended Sick Leave
>
> If a medical disability, including pregnancy, prevents you from working for five or more consecutive days, you may be granted an extended sick leave. The first five days of absence are considered part of the leave.
>
> The maximum amount of leave time for which you are eligible is based on your consecutive length of service, as shown in the chart below. The chart also shows the number of weeks your salary will continue if you are a full-time, salaried employee. . . .
>
> Any paid days of absence you have taken during the preceding 12 months will be subtracted from your available paid time. . . .
>
> [The chart provided that employees with ten or more years of service had a maximum of twenty-six weeks of sick leave in a twelve month period, with all twenty-six weeks being fully paid, and zero weeks at half paid and unpaid. Employees with five to ten years of service had a maximum of twenty-six weeks of sick leave, with a portion of the weeks being fully paid, a portion half paid, and a portion unpaid.]
>
> Medical documentation must be provided in order for you to be eligible for a leave. It may also be required at various intervals during the leave, depending on the length of time you are out. *When you are ready to come back to work, you must supply a doctor's letter which indicates that your health permits your return.* Because the Bank wants to make sure that performing your job will not jeopardize your health, you will not be allowed to work until such medical evidence is provided. In certain circumstances, the Bank might want to have a physician of its

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[6] Plaintiff testified that her understanding was that Manufacturers' policies applied to her, and that she understood that her job would be protected as long as her medical leave lasted less than one year. She testified that her understanding was that after a certain amount of time, her salary and benefits would be reduced, and then she would go to unpaid status, while maintaining benefits, but not be terminated. Plaintiff also testified that Henry, one of her supervisors, told her that as long as she kept her doctor letters current and everything was in place, plaintiff would be fine.

[7] The policy in the lower court record is dated November 1989.

choosing examine you, as well. In these circumstances, your leave or reinstatement is conditional upon approval by the Bank's physician.

The extended sick leave program is designed to correspond with the Long Term Disability plan, which is described in the Summary Plan Description at the rear of this handbook. *If you exhaust your total leave time and are unable to work, you will be removed from the Bank's records.* However, if you are a participant in an LTD plan, and you meet the qualifications for benefits, you would be eligible to receive them. [Emphasis added.]

The lower court record contains a letter from Manufacturers to plaintiff dated January 16, 1987, regarding a medical leave of absence plaintiff was on at that time. The letter stated in pertinent part:

We understand that you are on a medical leave of absence, and hope that you are soon recovered. As a matter of practice, we like to communicate in writing with all employees on leave. The purpose is to ensure that the employee has an understanding of the guidelines upon which the leave is based, and an opportunity to question any unclear points. Much of the information contained in this letter will probably have been conveyed previously to you by your management.

At the beginning of your leave of absence and approximately every thirty days thereafter, a doctor's letter must be submitted indicating the nature of your disability, the date the disability began and its expected duration. When you are ready to come back to work, you must supply a doctor's letter which indicates that your health permits your return Because the Bank wants to make sure that performing your job will not jeopardize your health, you will not be allowed to work until such medical evidence is provided. Likewise, you are expected to return to work as soon as your doctor releases you.

The maximum amount of leave time available to you is based on seniority and is outlined on page B6 of your Employe Handbook. In the event that you are unable to return before your time is exhausted, your employment would be terminated. However, you may be eligible for LTD benefits, and should contact the Benefits Division if this appears to be a possibility. *You would also be welcome to reapply for a position upon your recovery.* [Emphasis added.]

Susan Janeczek, defendant's benefits representative who sent plaintiff the two letters in March 1995 that are quoted above, testified that she recalled either speaking with plaintiff or getting a phone message from her. She testified that she subsequently spoke to Jeff Rhoads, and that she recalled Rhoads saying "once she has a doctor's note to return to work, there has to be a release. Then we could reinstate her. Or if it was prior to the separation date, then there will not be a separation." Janeczek further testified:

Q. What was your understanding if the person had the doctor's release after the separation date, after the person had already been separated?

A. After they had already been separated, then they would have a doctor's release.

Q. Correct.

A. They would go to Employment and Employment would see whether the job had been filled. And if not, to see what positions they might be qualified for, to apply for a position. And if they were accepted, then they would be reinstated if they'd come back to work within one year from their last day of work.

Q. And by reinstated, you mean their seniority would have been reinstated?

A. Their seniority in terms of benefits would be back.

Q. You did not mean to indicate that they would go back to the same job that they had?

A. No.

Q. And when you say that they would go to Employment, what is Employment, I'm sorry?

A. Employment is another department of Human Resources that actually works with the managers on what job openings are available.

Q. And so it would be a –the person would have to reapply?

A. They'd have to reapply.

Janeczek testified that she also approached Graham regarding extending the 180-day period, explained to him that the bank's initial letter to an employee was wrongly addressed and returned to the bank by the post-office, and testified that Graham did not allow it, saying that the policy to terminate after 180 days was stated in the employee handbook, and that if the employee was able to return to work she could provide a doctor's note and go through the re-employment process. When asked at deposition whether she recalled if she specifically mentioned plaintiff by name in her conversations with Graham, Janeczek testified, "I don't believe I did."

Graham testified that he had been involved in implementing the administration of the LTD benefit. He testified that the fact that the date of an employee's separation from payroll was a Saturday or Sunday did not change the fact that the 180-day period had elapsed and that

> This is an elapsed time. She is qualifying—an individual who is on leave is qualifying for a benefit. That period of time once elapsed qualified them for the benefit.
>
> If we could change the elapsed time, we could take the benefit away from them. It's covered by ERISA. Once you set the policy of the elapsed time, it's the elapsed time . . .

Graham testified that he was not aware of anyone at Comerica that would have the authority to allow an employee that had exhausted the 180-day medical leave to return to work on the 181st day, and that to do so would violate ERISA.

Defendant thus articulated a legitimate non-discriminatory reason for plaintiff's administrative termination. Plaintiff thus had the burden of showing that defendant's articulated reason was a mere pretext. Plaintiff presented no evidence that defendant's extended medical leave policy was not uniformly applied. Plaintiff presented no evidence to rebut that employees that utilized the maximum allowable medical leave time and did not provide a return to work certification before the designated time elapsed were administratively terminated. Plaintiff provided no evidence that her termination was for any reason other than pursuant to that policy, nor did she present admissible evidence to contradict the testimony of defendant's agents that to their knowledge, no employee had been allowed to extend a medical leave of absence beyond 180 days absent a timely doctor's certification. Plaintiff points to no evidence to support that Manufacturers at any time had had a policy that protected employees on medical leave from termination as long as the leave did not exceed one year.

Under these circumstances, we conclude that plaintiff did not present evidence from which a reasonable juror could infer that defendant's reason for plaintiff's termination was a pretext for discriminating against her on the basis of her disability or against persons with disabilities as a class. Dismissal of plaintiff's wrongful termination claim was thus proper.

IV

Plaintiff also argues that questions of fact exist regarding whether an additional day of accrued vacation or personal time would have constituted a reasonable accommodation and whether "the employer would have been unduly burdened by this request." We decline to address this issue because plaintiff unequivocally waived any accommodation claim at her deposition and did not otherwise argue it in the lower court.

Assuming arguendo that plaintiff properly pleaded an accommodation claim in her complaint,[8] she clearly waived that claim during the discovery phase of the litigation. At plaintiff's deposition, plaintiff's counsel unequivocally stated that it was not pursuing an accommodation claim:

> [Defense counsel]: What accommodation were you seeking for your handicap that [defendant] didn't give you?
>
> [Plaintiff]: I don't understand what that means.

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[8] In paragraph sixteen of plaintiff's single count complaint entitled, "Violation of the Michigan Handicapper's Civil Rights Act," plaintiff alleged that "[t]he reasons given for plaintiffs termination from [defendant] are pretextual in nature, and are designed to avoid responsibility for employing an individual with a handicap or a perceived handicap, *or otherwise accommodating the individual with the handicap*" without further explanation. (Emphasis added.)

> [Defense counsel]: Is this basically – then it's not an accommodation case? Or what are you doing?
>
> [Plaintiff's counsel]: No. At that point, she was not asking for accommodation. Had they re-employed her, maybe she would have said I can't do the block at this point.
>
> [Defense counsel]: We are not – it's not an accommodation case?
>
> [Plaintiff's counsel]: *It's not an accommodation case, no.*
>
> [Defense counsel]: *I'm sorry. Since it was pled, I thought I would be sure. With that stipulation in mind as to [¶ 16 of the complaint], then I don't have to question her any further on that.* [Emphasis added.]

As evidenced in part by this exchange, defense counsel relied on plaintiff's representation and ceased questioning concerning the accommodation claim. Moreover, there is no indication that plaintiff attempted to retract the waiver at any time during discovery or that she sought to amend the complaint pursuant to MCR 2.118(A) to add an accommodation claim.

Nor can we conclude that plaintiff raised the accommodation issue in response to defendant's motion for summary disposition. Consistent with plaintiff counsel's representation at plaintiff's deposition that this is "not an accommodation case," defendant noted in its motion for summary disposition that plaintiff was not alleging a failure to accommodate. Plaintiff agreed with defendant's position in her response brief, arguing that defendant's mere mention of the issue was a diversionary tactic:

> Defendant further tries to cloud the [handicap] issue when it points out that plaintiff did not 'allege that the [defendant] failed to provide a reasonable accommodation of her condition.' *The plaintiff did not need accommodation. Ergo, no accommodation was requested and plaintiff would not plead a failure to provide one.*
>
> *Diversions aside*, plaintiff was a qualified handicapper with standing to sue under the criteria set forth in the statute and the applicable law. [Emphasis added.]

In her response brief, plaintiff only mentions accommodation in addressing defendant's argument that it provided her a "reasonable time to heal." Even then, plaintiff's discussion of the issue is prefaced with the assertion that the "reasonable time to heal" argument was a "red herring" and

irrelevant.[9]

The record therefore establishes that plaintiff clearly represented to both defense counsel and the trial court that her claim under the PWDCRA was not predicated on a failure to accommodate. Defendant had a right to rely on, and apparently did rely on, that representation by ceasing questioning at the deposition concerning any alleged failure to accommodate, by deciding not to conduct further discovery on the issue, and by not pursing that claim further in its subsequent motion for summary disposition. Further, the record is void of any indication that plaintiff otherwise raised the issue, now advanced on appeal, below or that the issue was decided by the trial court. It is well established that "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court." *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). See also *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 484 NW2d 791 (1992) (an issue not raised before and considered by the trial court is not properly preserved for appellate review). Accordingly, we hold the accommodation issue waived, *Phinney*, *supra* at 544, and decline to consider it on appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

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[9] As noted above, in that section, plaintiff argued that she never alleged that defendant failed to afford her a reasonable time to heal and that the issue was irrelevant. Plaintiff then stated "[a]ssuming arguendo that [she] had alleged that she was entitled to further time in which to return, it is likely that she would prevail," citing her affidavit indicating that she had accrued vacation and personal time, one case for the proposition that the use of such time constituted a reasonable accommodation, and the Americans with Disabilities Act (ADA), 42 USC § 12101 *et seq.*