

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH GASAWAY,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

December 15, 2000

No. 215465

Oakland Circuit Court

LC No. 96-522908-NZ

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendant. We affirm.

Plaintiff is employed by defendant. Plaintiff began experiencing "flu-like" symptoms in 1979 that lasted until she was laid off from work in 1982. When plaintiff returned to work in 1984, she was often sick with bronchitis and laryngitis. In 1992, plaintiff began experiencing periods of dizziness, disorientation, exhaustion, difficulty breathing, and coughing. On November 1, 1994, she was diagnosed with chemically-induced asthma and instructed to use a respirator while working. On November 4, 1994, plaintiff collapsed at work while wearing a respirator. On November 15, 1994, plaintiff's doctor released her for work with the restriction that plaintiff be provided with a respirator because of her asthma. Plaintiff was not returned to work until January 1996. Plaintiff filed a complaint under the Michigan Handicappers' Civil Rights Act ("HCRA") (now called the Persons with Disabilities Civil Rights Act), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, alleging that her chemically-induced asthma was a disability because it substantially limited her ability to breathe. Plaintiff maintained that she was able to perform her job with accommodation and that her treating physician had released her to return to work with the use of a respirator. Plaintiff alleged that defendant violated the HCRA by wrongfully refusing to certify plaintiff as capable of returning to work and failing to provide her with accommodation for her handicap.

On appeal, plaintiff argues that the trial court erred when it held that plaintiff did not establish a *prima facie* showing of disability under the HCRA. We disagree. "To prove a discrimination claim under the HCRA, the plaintiff must show (1) that he is disabled as defined in the act, (2) that the handicap is unrelated to his ability to perform his job duties, and (3) that he

has been discriminated against in one of the ways delineated in the statute.” *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998); see also *Kerns v Dura Mechanical Components, Inc (On Remand)*, 242 Mich App 1, 12; 618 NW2d 56 (2000). MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A)¹ defined “handicap” as a determinable physical characteristic that:

substantially limits 1 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 or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual’s qualifications for employment or promotion.

“Whether an impairment substantially limits a major life activity is determined in light 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.” *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996), citing 29 CFR 1630.2(j)(2)(i)-(iii). “Major life activities” are those “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* at 217-218, quoting 29 CFR 1630.2(i). “[A] plaintiff seeking to recover under the statute has the burden of providing some evidence from which a factfinder could conclude that her disability caused substantial limitations when compared to the average person. Nonwork major life activities are examined in light of whether the person can perform the normal activities of daily living.” *Lown v JJ Eaton Place*, 235 Mich App 721, 731-732; 598 NW2d 633 (1999) (citations omitted).² “[I]f an individual is not substantially limited with respect to any other major life activity, the individual’s ability to perform the major life activity of working should be considered.” *Id.* at 735, citing 29 CFR 1630.2(j).

Plaintiff’s asthmatic condition and the classification of breathing as a major life activity are not contested. Rather, the question on appeal is whether plaintiff’s asthma substantially limited her major life activity of breathing or working. Viewing the evidence in the light most favorable to plaintiff, we conclude that plaintiff did not provide evidence from which a factfinder could conclude that her asthma caused substantial limitations in the major life activity of breathing when compared to the average person. With regard to the nature and severity of her impairment, plaintiff experienced problems when she was in the plant and around chemicals, but she did not have the problems after being outside. Plaintiff experienced breathing difficulties when entering hardware stores; however, plaintiff carried a mask so that she could remain in the store. Plaintiff had breathing difficulties if a business had recently placed chemicals in the air-

¹ The HCRA was amended in 1998 and this subsection of MCL 37.1103; MSA 3.550(103) was moved to subsection (d)(i)(A). The amendment also replaced the word “handicap” with the word “disability.”

² *Lown* interprets the Persons with Disabilities Civil Rights Act (“PWDCRA”), but does so by relying on *Stevens, supra* at 217, which interpreted the HCRA. Given the similarities between the HCRA and the PWDCRA, the analysis is applicable to the HCRA and a resolution of the current case.

conditioning system, but she resolved the difficulty by leaving. Plaintiff also stated that she was less involved in social activities, but shortness of breath was only one reason for her decreased involvement. Furthermore, plaintiff presented medical records which lead to the conclusion that her asthma did not cause substantial limitations when compared to the average person. Plaintiff was diagnosed with allergic rhinitis and asthma, but plaintiff was not experiencing acute distress and her lungs were clear to percussion and auscultation. Plaintiff's lungs were irritated when she was at work, but the condition improved when plaintiff went outside or was at home. Plaintiff experienced tightness in her chest and difficulty breathing, which were documented as moderate. With regard to the duration of the impairment and its long-term effect, plaintiff testified that she began experiencing flu-like symptoms and breathing problems as early as 1979. In the fall of 1997, plaintiff was told that she would have asthma for the rest of her life. However, plaintiff was not using a respirator when she returned to work and she did not identify any activities of daily living that she could not perform because of the chemically-induced asthma. Plaintiff did not establish a substantial limitation in her ability to breathe.

Because plaintiff did not establish a substantial limitation in a nonwork major life activity, plaintiff's ability to work should be considered. See *Lown, supra* at 735. To establish that one was substantially limited in the major life activity of working, a plaintiff must demonstrate that he or she was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. *Id.*, quoting 29 CFR 1630.2(j)(3)(i). The mere fact that a plaintiff is unable to perform a particular job does not substantially limit the major life activity of working. *Id.* at 735. Rather, the plaintiff must show that the ability to obtain satisfactory employment with another employer is significantly decreased. *Id.*

We conclude that the evidence presented shows that plaintiff was not substantially limited in the major life activity of work. Plaintiff testified during her deposition that one part of the plant was better for her than another. Additionally, plaintiff had returned to work, but was not using a respirator. This evidence demonstrates that plaintiff's limitation with regard to work was limited to those jobs located in close proximity to chemicals. Therefore, plaintiff cannot show that she was significantly restricted in her ability to work. Because plaintiff did not establish that the chemically-induced asthma substantially limited the major life activities of breathing or working, she failed to establish a prima facie case under the HCRA and summary disposition was properly granted.

Plaintiff's final argument is that the trial court erred when it held that her disability was related to her ability to perform her job. This argument is moot in light of our conclusion that summary disposition was properly granted for the reasons stated above.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ David H. Sawyer