

STATE OF MICHIGAN  
COURT OF APPEALS

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NOREEN R. COLLET,

Plaintiff-Appellant,

v

TOTAL PETROLEUM, INC.,

Defendant-Appellee.

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UNPUBLISHED

March 20, 2001

No. 218179

Gratiot Circuit Court

LC No. 97-004801-NZ

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition under MCR 2.116(C)(10), in this perceived handicap discrimination case. We affirm.

This case arises from plaintiff's application for employment at defendant's oil refinery. Defendant extended an offer of employment to plaintiff, subject to the results of a pre-employment physical and a lifting test. Plaintiff's physical revealed indications of heart and cardiovascular problems, including an irregular heartbeat, a narrowed carotid artery, elevated cholesterol and triglyceride levels, and heavy smoking. The physical also revealed that plaintiff's family had a history of strokes and other cardiovascular problems. Further, plaintiff failed the lifting test when she was unable to lift a seventy-five pound weight to a specified height. Defendant then withdrew its offer of employment.

Plaintiff claims that defendant's failure to hire her for the refinery job constitutes perceived handicap discrimination under the Michigan Handicappers' Civil Rights Act (MHCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*<sup>1</sup> Plaintiff alleges that defendant withdrew the offer of employment because it believed that she was at risk of suffering a stroke, and therefore perceived her as a worker's compensation risk. Plaintiff also alleges that the lifting requirement was a pretext for defendant's discriminatory act. Finally, plaintiff claims that defendant violated the MHCRA by imposing a pre-employment physical that was not directly related to any specific job requirement.

<sup>1</sup> At the time of plaintiff's suit, the act was known as the MHCRA. The Legislature subsequently retitled the act as the Persons with Disabilities Civil Rights Act (PDCRA). 1198 PA 20. This opinion will refer to the act as the MHCRA.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10). That court rule tests the factual basis underlying a plaintiff's claim and permits a circuit court to grant summary disposition when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and must grant that party the benefit of any reasonable doubt. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

To establish a discrimination claim under the MHCRA, a plaintiff must show that: (1) he has a "handicap" as defined in the act, (2) his handicap is unrelated to his ability to perform the duties of the position, and (3) he has been discriminated against in one of the ways described in the act. *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998). Before a court can address a plaintiff's ability to perform the duties of a specific position, any alleged discrimination, or any pretext for discrimination, the plaintiff must establish that he is the type of person to whom the statute applies—a person with a "handicap" as defined by the act. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999).

Subsection 103(e) of the MHCRA<sup>2</sup> defines a handicap as follows:

(i) 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:

(A) . . . 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.

\* \* \*

(iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [MCL 37.1103(e); MSA 3.550(103)(e).]

When a plaintiff brings a perceived handicap discrimination claim under subsection 103(e)(iii), he need not prove that he actually suffered from a handicap, as defined in subsection 103(e)(i). Instead, the plaintiff must merely prove that the employer regarded him as suffering from a handicap, as defined in subsection 103(e)(i). *Chiles, supra* at 475. That is, the plaintiff must prove that the employer regarded him as suffering from a determinable physical

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<sup>2</sup> Plaintiff filed her complaint on October 1, 1997. Accordingly, we apply the statutory language in effect at that time.

characteristic that substantially limits a major life activity and is unrelated to the plaintiff's ability to perform the duties of a particular job or position.

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. [*Id.*]

"Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Stevens v Inland Waters, Inc.*, 220 Mich App 212, 217; 559 NW2d 61 (1996) (citations omitted). Although working may constitute a major life activity, a medical condition that "interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working." *Id.* at 218.

Federal case law interpreting the Americans with Disabilities Act, 42 USC 12101 *et seq.*, supports the same conclusion. In *Murphy v United Postal Service, Inc.*, 527 US 516; 119 S Ct 2133; 144 L Ed 2d 484 (1999), the plaintiff was employed as a mechanic, a position which required him to drive commercial motor vehicles. The defendant fired the plaintiff when it discovered that he suffered from high blood pressure, based on the belief that the plaintiff's medical condition prevented him from obtaining a license to drive commercial vehicles. *Id.* at 488-489. The plaintiff appealed the dismissal of his handicap discrimination suit to the United States Supreme Court, arguing that the defendant regarded his high blood pressure as substantially limiting him in the major life activity of working. *Id.* at 490. The Supreme Court held that, "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job." *Id.* at 491.

Consequently, in light of petitioner's skills and the array of jobs available to petitioner utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working. [*Id.* at 492.]

In the present case, plaintiff contends that defendant regarded her as handicapped because it believed that her cardiovascular condition prevented her from working. Even if defendant did perceive plaintiff's cardiovascular condition as one that interfered with her ability to perform heavy manual labor in its oil refinery, plaintiff's claim of perceived handicap discrimination must nevertheless fail. Plaintiff does not contest the proofs presented by defendant that it offered her a different position, performing office work. Based on this un rebutted evidence, plaintiff can prove, at best, that defendant regarded her as unable to perform a particular job. Plaintiff has

failed to present sufficient evidence that defendant regarded her as unable to engage in the major life activity of working.<sup>3</sup>

Plaintiff next argues that the trial court erroneously dismissed her discrimination claim against defendant under MCL 37.1202(1)(d); MSA 3.550(202)(1)(d), because defendant refused to hire her based on a physical examination that was not directly related to the requirements of any specific position. We disagree. At the time plaintiff filed her complaint, § 202 of the MHCRA stated, in pertinent part:

(1) An employer shall not:

\* \* \*

(d) Fail or refuse to hire, recruit, or promote an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job.

Plaintiff argues that defendant required her to take a physical examination, during which she was asked questions about her cardiovascular condition and about her family's history of stroke. Plaintiff contends that this information had nothing to do with her ability to perform any position for defendant.

In order to resolve plaintiff's claim, we must determine the position for which plaintiff applied. Plaintiff contends that she applied for an operator position at defendant's oil refinery, not a maintenance position. In contrast, defendant contends that the entry level position at the refinery is a "B Board" position, and that all "B Board" employees perform both operator and maintenance functions, including heavy manual labor. In support of this contention, defendant produced a complaint filed by plaintiff with the Michigan Department of Civil Rights, on which plaintiff claimed that she applied for a "B Board" position. Further, defendant produced a copy of the transcript from plaintiff's deposition, where she admitted that the entry level position at the refinery was a "B Board" position, and admitted that an employee could only move into an operator position after serving on the "B Board" for at least six months' time. Plaintiff does not counter defendant's argument that all entry level positions at the refinery are "B Board" positions. Neither does she counter defendant's argument that union seniority rules prohibited defendant from hiring plaintiff directly into an operator position.

The trial court indicated that it was "undisputed" that plaintiff had applied for a "B Board" position. Even viewing the evidence in the light most favorable to plaintiff, we must conclude that she applied for the "B Board" position, which included heavy maintenance duties. Plaintiff produced no evidence to the contrary, relying instead on her own subjective beliefs that she was being considered for a different position. Furthermore, plaintiff's representations to the

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<sup>3</sup> Given our conclusion that plaintiff failed to prove that defendant regarded her medical condition as a "handicap," as defined by the MHCRA, we need not address plaintiff's argument that defendant's articulated reason for withdrawing the employment offer was mere pretext for employment discrimination.

Department of Civil Rights and her deposition testimony contradict her allegation in the present case that she was applying only for an operator position. Accordingly, we conclude that the trial court properly determined that plaintiff applied for a “B Board” position.

Applying plaintiff’s subsection 202(1)(d) claim to the position for which she applied, we must determine whether the physical examination was directly related to the requirements of that position. Defendant produced evidence that the “B Board” position involved maintenance duties which included extremely heavy physical labor. Plaintiff presented no evidence contesting the requirements of the maintenance position.<sup>4</sup> We conclude that an employee’s cardiovascular condition and susceptibility to stroke are relevant to his ability to perform heavy physical labor. Therefore, plaintiff’s claim under subsection 202(1)(d) must fail.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Michael R. Smolenski  
/s/ William C. Whitbeck

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<sup>4</sup> Plaintiff does contest defendant’s assertions that maintenance employees were required to lift seventy-five pounds above their heads and wear respirators to protect them from toxic fumes. Plaintiff argues that both of these criteria constitute mere pretexts for discrimination. Because we conclude that plaintiff failed to meet her burden of proof under both subsection 103(e)(iii) and subsection 202(1)(d), we need not decide the issue of pretext.