STATE OF MICHIGAN

COURT OF APPEALS

GINGER OLDHAM, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 5, 2002
v	No. 196747 Wayne Circuit Court
BLUE CROSS AND BLUE SHIELD OF MICHIGAN and DAVID BARTHEL, Defendants-Appellants/Cross-Appellees.	LC No. 94-407474-NO ON REMAND

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

HOLBROOK, JR., P.J. (*concurring*).

Given our Supreme Court's construction of MCL 37.1103(e) of the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*[1], I concur in the result reached by this Court. I write separately to indicate my concern over the rule set forth by the Court in *Michalski v Bar-Leav*, 463 Mich 723; 625 NW2d 754 (2001). As construed by the *Michalski* Court, a plaintiff's cause of action against an employer for discrimination based on a perceived disability is substantially more difficult to sustain than if a plaintiff was actually handicapped, as that term was defined by § 103(e)(*i*) of the HCRA. I believe this narrows the protective scope of the HCRA and thus is at odds with the purposes of the act.

For a plaintiff with an actual handicap to sustain a cause of action under the HCRA for employment discrimination, the plaintiff need establish that he is handicapped as that term is defined in the statute. This means that such a plaintiff must prove, in part, the existence of a "determinable physical or mental characteristic" that "substantially limits 1 or more of the major life activities of that individual." *Id.* A cause of action predicated on subsection (*iii*) requires proof that the employer held a misperception about the plaintiff. Either the employer erroneously believed that the plaintiff had a "determinable physical or mental characteristic" that "substantially limits 1 or more of the major life activities of that individual," or that the employer erroneously believed that the plaintiff's actual "determinable physical or mental characteristic"

[1] After this cause of action was filed, the name of the HCRA was changed to the Persons with Disabilities Civil Rights Act. 1998 PA 20.

"substantially limits 1 or more of the major life activities of that individual." See *Sutton v United Airlines*, 527 US 471, 489; 119 S Ct 2139; 144 L Ed 2d 450 (1999).

However, I believe that the Legislature intended that a cause of action under either subsection (*i*) or subsection (*iii*) requires proof that the handicap is, in fact, "unrelated" to either "the individual's ability to perform the duties," or "the individual's qualifications for employment or promotion." Clearly, an employer can require that an employee be qualified to perform the essential functions of the job at issue. Indeed, "to establish a prima facie case of handicap discrimination, a plaintiff must demonstrate that (1) he is handicapped as defined by the HCRA, (2) the handicap is unrelated to his ability to perform the duties of his job, and (3) he was discriminated against in one of the ways described in the statute." *Michalski, supra* at 730. The question of whether an individual is qualified to perform the essential functions of a job is a matter unrelated to the employer's misperceptions.

Thus, I do not believe that in order to establish the first prong of his prima facie case, a plaintiff need show that the handicap, be it actual or perceived, was regarded by the employer as being unrelated to either "the individual's ability to perform the duties," or "the individual's qualifications for employment or promotion." What the plaintiff must show in either case is that he or she is qualified for the job. A plaintiff bringing a cause of action under subsection (*iii*) should not be required to show both that he or she is qualified *and* that his or her employer regarded the handicap as being unrelated to the plaintiff's ability to perform the essential functions of the job, yet nonetheless took an adverse employment action against the plaintiff.

Under the approach set forth in *Michalski*, the difficulty faced by a plaintiff trying to establish a cause of action under subsection (*iii*) is only magnified when the major life activity at issue is working. Under *Michalski*, a plaintiff with an actual handicap must not only show that his employer regarded that handicap as substantially limiting the plaintiff's ability to work more than one particular job,[2] but also that the employer *did not* regard the handicap as affecting the plaintiff's ability to perform the particular job at issue. If the employer regarded the handicap as substantially limiting the plaintiff's ability to work in general and to perform the particular job at issue, then the plaintiff's cause of action would fail. Thus, the *Michalski* approach requires such a plaintiff to establish a rather unique disjunctive categorization of perceptions on the part of the employer. I believe this is a burden of proof unintended by the Legislature.

/s/ Donald E. Holbrook, Jr.

[2] *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996).