STATE OF MICHIGAN

COURT OF APPEALS

KAREN ANN LEONARD and RICHARD LEONARD,

Plaintiffs-Appellants,

v

BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY,

Defendant-Appellee.

UNPUBLISHED
April 22, 2003

No. 236210
Wayne Circuit Court
LC No. 98-834311-CZ

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right, challenging the trial court's orders granting defendant summary disposition of plaintiff's claims for intentional tort, MCL 418.131(1), breach of contract, violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., and violation of the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*. We remand for entry of a nominal damage award for plaintiff's breach of contract claim, but affirm summary disposition on plaintiff's remaining claims.

I

Plaintiff argues that the trial court erred in finding that she failed to establish a genuine issue of material fact in support of her intentional tort claim. We disagree.

In evaluating a motion for summary disposition under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion to determine whether a genuine issue regarding any material fact exists. *Candelaria v Horizon Cablevision, Inc*, 252 Mich App 681, 685; 653 NW2d 630 (2002). "If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is proper." *Id*. at 685-686. This Court reviews de novo a trial court's decision granting summary disposition. *Id*. at 685.

[1] Because plaintiff Richard Leonard's claim is derivative, the singular term "plaintiff" refers to plaintiff Karen Ann Leonard.

The exclusive remedy provision of the Workers' Disability Compensation Act, MCL 418.131(1), provides:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

Thus, an employee may bring a tort action against the employer only in limited circumstances. *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240-241; 608 NW2d 487 (2000).

In *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173; 551 NW2d 132 (1996), our Supreme Court held that the Legislature's decision to use the phrase "actual knowledge" meant that it did not intend "constructive, implied, or imputed knowledge" to be sufficient. Likewise, it is not sufficient for a plaintiff "to allege that the employer should have known, or had reason to believe, that injury was certain to occur." *Id*. Therefore, "[a] plaintiff may establish a corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Id*. at 173-174. The Supreme Court also held that the phrase "certain to occur" set forth "an extremely high standard." *Id*. at 174. The Court held:

> [T]he laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. Consequently, scientific proof that, for example, one out of ten persons will be injured if exposed to a particular risk, is insufficient to prove certainty. [*Id*.]

Additionally, it is not enough that an employer was aware that a dangerous condition existed, it must also be aware that injury was certain to occur. *Id*. at 176.

Both parties present detailed arguments as to the evidence that existed regarding defendant's alleged knowledge of high concentrations of aspergillus and penicillium in plaintiff's office. They sharply dispute the existence of air quality reports, the disposition of swab samples taken from the window base in plaintiff's office, and the validity of other swab samples submitted to a research laboratory for analysis. However, the salient question is whether plaintiff demonstrated that defendant knew that an injury to plaintiff was certain to occur if she was exposed to the moldy conditions in her office. Merely demonstrating that defendant knew that plaintiff was allergic to the mold in her office is not sufficient.

Plaintiff's burden of establishing that defendant possessed actual knowledge of the causal link between aspergillus in her office and her pulmonary condition is made more difficult by the lack of an obvious connection. Several other persons worked in the McGregor building without becoming ill. Furthermore, many people suffer allergy symptoms from exposure to mold

without developing allergic bronchopulmonary aspergillosis (ABPA) or other serious conditions. Assuming that there was a causal link between the McGregor building and plaintiff's illness, it must have been because plaintiff was unusually sensitive to the allergens. Plaintiff must therefore show that defendant had actual knowledge that she was unusually sensitive to aspergillus, *and* that her unusual sensitivity made it a *certainty* that she would become ill. It is not sufficient to show that defendant knew an injury might occur at some point in time. See *Ford v Pivot Mfg Co (On Rehearing)*, 219 Mich App 608, 610; 558 NW2d 1 (1996), adopting the dissenting opinion of Judge O'Connell in *Ford v Pivot Mfg Co*, 215 Mich App 310, 315; 544 NW2d 770 (1996).

Plaintiff never informed defendant of her unusual sensitivity. Plaintiff relies on a memo from her supervisor, Dan Walker, to Edward Everett, a facilities manager, informing him that plaintiff was having a "breathing reaction" because of the humidity and mold problem in the McGregor building. In the memo, Walker complained that water vapor froze and melted on the window by plaintiff's desk, causing "a two-fold problem." The first problem was "[t]he possible formation of a mold from which [plaintiff] suffers a breathing reaction." The second was flooding of a new carpet.

Notifying Everett of plaintiff's "breathing reaction" falls short of notifying defendant that plaintiff was destined for a serious respiratory illness if the conditions in the McGregor building persisted. Furthermore, the purpose of the memorandum was not to alert defendant to plaintiff's medical condition, but to urge defendant to find a better solution than window caulking to solve the humidity problem. Plaintiff's "breathing reaction" is just one of two reasons Walker provided in his request for a better solution; the other was damage to a new carpet.

Plaintiff's 1996 request for the accommodation of a mold and odor free office also was insufficient to alert defendant to her unusual sensitivity or to the inevitability of illness if she remained in the McGregor building. Although this request indicated that plaintiff found the conditions in the McGregor building unhealthy and bothersome, this is not enough to inform defendant that she was certain to become seriously ill.

Furthermore, the evidence showed that plaintiff herself did not conclusively establish a connection between the McGregor building and her poor health before late 1996. In her communications with her physicians, plaintiff mentioned that the workplace was a possible source of aspergillus exposure, but she also considered her home, her car, and a dog as sources. Plaintiff's doctors also did not make the connection, but repeatedly approved her return to work without restrictions. Plaintiff contends that the issue is not what her doctors knew, but what defendant knew. However, as stated before, actual knowledge of a certain injury to plaintiff depended on actual knowledge of plaintiff's condition and her unusual sensitivity to aspergillus. Even if defendant knew that there was aspergillus in the office, and that plaintiff was allergic to aspergillus, it does not follow that it had actual knowledge of the requisite causal link. Plaintiff does not explain how defendant should have recognized the link when her own doctors did not recognize the alleged link. Consequently, the trial court properly granted summary disposition of this claim.

II

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of her breach of contract claim, or, in the alternative, that the trial court should have awarded her nominal damages. We agree that plaintiff was entitled to nominal damages.

In *Sepanske v Bendix Corp*, 147 Mich App 819; 384 NW2d 54 (1985), this Court considered a claim by an employee who took a leave of absence in accordance with his employer's policies. While the employee was on leave, the employer eliminated his position. Although the leave of absence policy guaranteed the employee that he could return to either his old position or a comparable position, the employer violated the policy and offered him only a position with less status and less opportunity for advancement. *Id*. at 822-824. The employee brought a breach of contract action against the employer, and a jury awarded him damages of $75,206. *Id*. at 824-825.

On appeal, although this Court disagreed with the employer's argument that it had not breached the contract, it did agree that the damages awarded to the plaintiff were improper because they were purely speculative:

> We take an entirely different approach on the issue of damages. We think that plaintiff was entitled to nominal damages only for defendant's breach of the employment contract. This is not a case of wrongful discharge. Plaintiff's expectation under the contract was to be restored to his old job or to an at-will position which was equivalent to or better than his position in pension and payroll, but he had no actionable expectation that any such restoration would be permanent. The position was still at will—one which the employer was free to alter or terminate without consequence. . . . The jury's damage assessment in such a situation amounts to pure speculation. There is no tangible basis upon which damages may be assessed where plaintiff's expectation was for an at-will position which could have been changed or from which he could have been terminated without consequence. [*Id*. at 829.]

This Court therefore remanded for entry of judgment for nominal damages only. *Id*.

Sepanske was decided before November 1, 1990, and, therefore, is not binding precedent on this Court. MCR 7.215(I)(1). However, in *Franzel v Kerr Mfg Co*, 234 Mich App 600, 606-609; 600 NW2d 66 (1999), this Court adopted and endorsed *Sepanske*. This Court is therefore bound by the precedent that plaintiff is entitled to only nominal damages, because lost compensation in an at-will employment situation is purely speculative. The Court in *Franzel* also noted that nominal damages are usually one dollar. *Id*. at 619.

We disagree with plaintiff's argument that *Sepanske* and *Franzel* bar only awards of front pay, and that she can still recover damages for lost back pay. Because plaintiff's employment could have been terminated at any time, even damages for back pay would be speculative. Furthermore, the *Sepanske* Court reduced a jury verdict that presumably included back pay to nominal damages without making any allowance for back pay. However, in the absence of any argument by defendant that it did not breach its leave of absence policy, we agree that plaintiff is entitled to nominal damages.

Defendant argues that even nominal damages are precluded here because any damage award must be offset against benefits plaintiff received under the Michigan Employment Security Act, MCL 421.1 *et seq*. Plaintiff argues that workers' compensation benefits have already been offset against her unemployment benefits, so there is no need to offset them against the nominal damages. Because nominal damages are more symbolic than compensatory, we see no purpose in offsetting them against other benefits. We therefore remand for entry of a nominal damage award.

III

Plaintiff argues that her disability discrimination claims under the PWDCRA are viable, and should have withstood summary disposition. We disagree.

The PWDCRA provides, in pertinent part:

> (1) Except as otherwise required by federal law, an employer shall not:
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> * * *
>
> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1202(1)(b).]

To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must show "that (1) he is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999).

Defendant contends that plaintiff was not disabled within the meaning of the statute because her pulmonary conditions did not substantially limit a major life activity. The PWDCRA defines "disability" as follows:

> Except as provided under subdivision (f), "disability" means 1 or more of the following:
>
> (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) For purposes of article 2 [employment], 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. [MCL 37.1103(d).]

This Court held in *Chiles*, *supra* at 474:

> [N]ot every impairment rises to the level of a disability under the PWDCRA. The impairment must meet the requirements of the statutory definition of "disability." And the "mere assertion of diminished capacity does not constitute a disability within the meaning of the [act.]" *Hilburn v Murata Electronics North America, Inc*, 17 F Supp 2d 1377, 1382 (ND GA, 1998) (interpreting the ADA). Instead, a plaintiff "must provide some evidence beyond the mere existence and impact of a physical impairment." *Id*., citing *Swain v Hillsborough Co School Bd*, 146 F3d 855, 858 (CA 11, 1998).

The Court in *Chiles* also expressed agreement with the United States Supreme Court's decision in *Bragdon v Abbott*, 524 US 624, 631; 118 S Ct 2196; 141 L Ed 2d 540 (1998), which applied a three-step process for determining whether a plaintiff is disabled under the federal Americans with Disabilities Act, 42 USC 12101 *et seq*.:

> First, we consider whether respondent's [complaint] was a physical impairment. Second, we identify the life activity upon which respondent relies . . . and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. [*Chiles*, *supra*, quoting *Bragdon*, *supra*.]

In *Chiles*, the Court defined "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id*. at 477, quoting *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996). The third prong of the test requires that the activity be "substantially limited." *Chiles*, *supra*.

Here, plaintiff's activities of breathing and working were not substantially limited as required by this rule. Plaintiff has admitted that her condition is subject to intermittent flare-ups, and is not a continuously debilitating affliction. She has admitted that she can function normally unless the condition is exacerbated, such as when she is exposed to aspergillus and penicillium. See *Heilweil v Mount Sinai Hosp*, 32 F3d 718, 723 (CA 2, 1994), holding that plaintiff was not disabled within the meaning of the Rehabilitation Act[2] where her asthmatic condition substantially limited her ability to breathe and work only when she was in the unhealthy environment of the hospital blood bank. Additionally, plaintiff's allegation of a respiratory system disability is undermined by her own admission that she exercises on a bicycle, treadmill, and Nordic Track. See *Heilweil*, *supra*. Because plaintiff cannot establish a disability, the trial court properly granted defendant's motion for summary disposition of plaintiff's claims under the PWDCRA. In light of this determination, we need not consider plaintiff's remaining arguments regarding this issue.

IV

Plaintiff argued that defendant violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*., by failing to comply with her request for a copy of her personnel file

[2] 29 USC 794.

until four months after she made her request. MCL 423.511 provides the following remedies for a violation of the statute:

> If an employer violates this act, an employee may commence an action in the circuit court to compel compliance with this act. . . . Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to this act the following damages:
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> (a) For a violation of this act, actual damages plus costs.
>
> (b) For a wilful and knowing violation of this act, $200.00 plus costs, reasonable attorney's fees, and actual damages.

This provision contemplates awarding damages when the employer has failed to comply with the statute, and the plaintiff must bring a legal action to enforce compliance. It does not contemplate the situation here, where defendant eventually complied on its own, before plaintiff brought an action for damages. Furthermore, plaintiff has not demonstrated that receiving the file earlier would have helped her find another position at the university. Defendant did not dispute plaintiff's claim that its leave policies entitled an employee to return to work within a year of taking illness leave; rather, defendant contended that the elimination of plaintiff's position extinguished her return rights. There is no reason to believe that defendant would have changed its position merely because plaintiff had extra documentation of defendant's illness leave policies.

Affirmed in part and remanded for entry of a nominal damage award for plaintiff's breach of contract claim. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper