STATE OF MICHIGAN

COURT OF APPEALS

ANITA SCHNEE,

Plaintiff–Appellant,

v

GARAN, LUCOW, MILLER, SEWARD, COOPER & BECKER, P.C.,

Defendant–Appellee.

UNPUBLISHED
July 23, 1996

No. 182929
LC No. 94-417078 NO

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motion to amend her complaint in this handicap discrimination/retaliatory discharge action. We affirm in part, reverse in part, and remand.

In April 1991, plaintiff began working for defendant as an associate attorney. Subsequently, on February 9, 1992, plaintiff injured her back while lifting files into her car. On April 3, 1992, defendant advised plaintiff to go on medical leave and apply for worker's compensation benefits. Plaintiff did. During her leave, from April 1992 to February 1993, plaintiff remained essentially disabled. On February 8, 1993, one year after her injury, plaintiff was terminated. Plaintiff admits that as of the date of her termination she was unable to return to work. Moreover, after her termination, plaintiff's condition did not greatly improve.

Plaintiff first argues that the trial court abused its discretion in denying her motion to amend her complaint to include a retaliatory discharge claim. We agree. The grant or denial of leave to amend is within the trial court's discretion. *Milnikel v Mercy-Memorial Medical Center*, Inc, 183 Mich App 221, 222; 454 NW2d 132 (1989). This Court will not reverse a trial court's decision regarding leave to amend unless it constitutes an abuse of discretion that results in injustice. *Phillips v Deihm Est*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

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* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court ruled that plaintiff's proposed amendment was futile in part because it was defendant who suggested that plaintiff file a worker's compensation claim in the first place. Moreover, the trial court believed that plaintiff was fired for reasons other than her filing of a worker's compensation claim. The trial court stated, "I think, my personal opinion, she was fired because they didn't like her and she was an at-will employee and they could fire her if they didn't like her." We believe that the trial judge impermissibly supplied her personal opinions as to the merits of the proposed new claim rather than examining the legal sufficiency of the amended complaint alone.

We conclude that plaintiff's proposed amendment presented a claim upon which relief could be granted. The fact that the allegations set forth in the complaint seem weak, given the evidence, only goes to the merits of the case. Therefore, the trial judge's determination that plaintiff was unlikely to recover does not constitute futility as defined by the case law. See *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1993). Consequently, the trial court abused its discretion in denying plaintiff's motion to amend. Therefore, its decision is reversed and the case remanded for proceedings on the merits.

Plaintiff next argues that there existed genuine issues of material fact that precludes summary disposition on her handicap discrimination claim. Specifically, plaintiff alleged that defendant discriminated against her by failing to afford her additional medical leave or a "reasonable time to heal." See *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504, 507; 476 NW2d 451 (1991); see also MCL 37.1202(1)(a); MSA 3.550(202)(1)(a). We disagree. Summary disposition may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dafter Sanitary Landfill v Superior Sanitation Service, Inc*, 198 Mich App 499, 502; 499 NW2d 383 (1993). A trial court's determination on a motion for summary disposition is reviewed de novo. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

We find that plaintiff was not a "handicapper" for purposes of a handicap discrimination claim under the Michigan Handicappers' Civil Rights Act ("HCRA"). The HCRA only covers plaintiffs whose disabilities are unrelated to their capacity to perform their jobs, with or without accommodation. MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A); MCL 37.1103(l)(i); MSA 3.550(103)(l)(i). There is no dispute that on the date of plaintiff's dismissal, she was unable to perform her employment duties. Plaintiff did not desire reasonable accommodation but instead sought part time work in a different department. Defendant has no legal obligation to completely restructure plaintiff's job. MCL 37.1210(15); MSA 3.550(210)(15). Additionally, we find no merit to plaintiff's argument that she was not afforded a reasonable time to heal. Plaintiff's doctor considered her "totally disabled" some fifteen months after the date of her injury. An employer has no duty to keep an employee's position open indefinitely until the possibility of recovery becomes a reality. See *Ashworth v Jefferson Screw Products, Inc*, 176 Mich App 737, 745; 440 NW2d 101 (1989). Thus, plaintiff was not entitled to receive additional sick leave. Accordingly,

we conclude that plaintiff failed to establish a genuine issue of material fact regarding her handicap discrimination claim. Consequently, summary disposition was proper on this issue.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky