STATE OF MICHIGAN

COURT OF APPEALS

MARIE BARRETT,

Plaintiff-Appellant,

v

INGHAM COUNTY FAIR BOARD and COUNTY OF INGHAM,

Defendants-Appellees.

UNPUBLISHED
April 1, 1997

No. 183677
Ingham Circuit Court
LC No. 93-005419 CZ

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendants pursuant to MCR 2.116(C)(7), (8) and (10). Plaintiff had filed a complaint against defendants, her former employers, alleging wrongful termination and violation of the Michigan Handicappers' Civil Rights Act (MHCRA), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*. We affirm.

Plaintiff worked for defendants as an account clerk. In 1991, plaintiff began to suffer serious medical problems. Over the course of 1991 and 1992, plaintiff's medical condition caused extended absences from work. Plaintiff used all of her paid leave and was given several unpaid leaves at defendant's discretion. However, in October 1992, defendant terminated plaintiff's employment.

First, plaintiff contends that the trial court erred in granting summary disposition on her MHCRA claim. We disagree.

The MHRCA establishes the "clear legislative desire to ensure that handicappers are treated like all others." *Carr v General Motors Corp*, 425 Mich 313, 319; 389 NW2d 686 (1986). Generally, in order to establish a prima facie case of discrimination under the MHCRA, it must established that (1) the plaintiff is "handicapped" as defined in the MHCRA, (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been

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

discriminated against in one of the ways set forth in the statute. *Merillat v Michigan State University*, 207 Mich App 240, 244; 523 NW2d 802 (1994).

In this case, plaintiff's handicap was related to her ability to perform her work duties in that it caused her to be absent from work for extended periods of time. Defendants cite plaintiff's excessive absenteeism as the grounds for her termination. However, plaintiff argues that her past attendance record is irrelevant, and that the test is whether, at the time she was terminated, she could have met the qualifications of her job and attained adequate levels of performance within a reasonable time. Plaintiff cites *Rymar v Michigan Bell Telephone*, 190 Mich App 504; 476 NW2d 451 (1991) in support of this argument.

In *Rymar*, this Court stated that "[a]n employer must give its employee a reasonable time to heal, under like conditions as other employees, so long as the delay does not impede getting the employer's work done." *Id*. at 507. We disagree with plaintiff's interpretation of *Rymar* and that plaintiff's past attendance is irrelevant. Taking plaintiff's interpretation to an extreme, an employee could be absent for years due to a temporary handicap, and the employer would not be able to successfully terminate that employee for excessive absence so long as, on the date of termination, the plaintiff could have attained adequate levels of performance within a reasonable time. We reject such an interpretation. Plaintiff ignores the "under like conditions as other employees" language in *Rymar*. In both *Rymar* and Judge Shepherd's dissent in *Ashworth v Jefferson Screw*, 176 Mich App 737, 747-749; 440 NW2d 101 (1989), which was the basis for the *Rymar* decision, the plaintiffs were terminated due to absence from work. However, there was evidence in each case that the plaintiffs were not treated equally, in that they were denied leave time which was available to other employees. We read these cases to hold that, regardless of any handicap, plaintiff must be given the same opportunity to recover from a temporary condition which requires leave as other employees would have been given. Such an interpretation is consistent with the MHCRA's intent to require employers to treat handicappers as all other employees would be treated. *Carr*, *supra*.

Therefore, this case can be distinguished from *Rymar* and *Ashworth*. There is no evidence that plaintiff was denied any leave time which was available to other employees or was treated differently than an employee without a handicap would have been treated. Plaintiff had used all of her paid leave time, and was given several discretionary unpaid leaves by defendants. There is nothing to indicate, and plaintiff does not allege, that plaintiff was given less of an opportunity to recover than any other employee would have been given, regardless of handicap.

Because plaintiff's handicap was related to her ability to perform her work duties and plaintiff was not treated less equally, in terms or her opportunity to recover, than other employees, plaintiff has failed to state a claim upon which relief can be granted. Summary disposition was proper. MCR 2.116(C)(8).

Second, plaintiff argues that a promissory estoppel claim separated from and survives her abandonment of her collective bargaining agreement violation claim on appeal. We disagree.

Plaintiff did not assert a promissory estoppel theory in her complaint or argue such a theory below. Plaintiff used the alleged promises as support for her wrongful termination and MHCRA claims, but did not take issue with the promises in the context of an estoppel claim The reason the trial court did not address a promissory estoppel claim is that it was not raised as such. Issues raised for the first time on appeal are generally not subject to review. *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995).

However, even assuming that a promissory estoppel claim did survive, because plaintiff can not establish the required elements of such a claim, see *State Bank of Standish v Curry*, 442 Mich 76, 83; 500 NW2d 104 (1993), her complaint was properly dismissed. Plaintiff argues that in reliance on defendants' statements, made in September 1992, that her leave of absence would be extended to October 27, 1992, and that she would not be fired because of her hospitalization, she pursued drug rehabilitation and did not return to work when she was released from the hospital in mid-October, 1992.[1] However, plaintiff could not have relied on those statements to her detriment because she could not have returned to work after she was released from the hospital, even if she was willing and able, until she saw defendants' doctor on October 27, 1992. We find these facts to be insufficient to sustain a promissory estoppel claim. See *Powers v Peoples Community Hosp*, 183 Mich App 550, 554-555; 455 NW2d 371 (1990).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] Plaintiff found out she had been fired when she left her rehabilitation on October 19 or 20, 1992.