

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY AVEY,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF
REGENTS,

Defendant-Appellee.

UNPUBLISHED

September 14, 2006

No. 269408

Washtenaw Circuit Court

LC No. 04-001258-NO

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff, Kimberly Avey, appeals as of right an order granting summary disposition in favor of defendant, University of Michigan Board of Regents. Plaintiff claims defendant discharged her from employment in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* Because defendant showed it discharged plaintiff for excessive absenteeism, and plaintiff cannot meet her burden of demonstrating that defendant's proffered reason for plaintiff's termination was a pretext for discrimination, the trial court properly dismissed plaintiff's claim, and we affirm.

This Court reviews a grant of summary disposition *de novo*. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the non-moving party, affording all reasonable inferences to the non-moving party, to determine whether there is any genuine issue of material fact that would entitle the moving party to judgment as a matter of law. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000). The non-moving "party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise . . . set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Failure to rebut evidence from the moving party that no genuine issue of material fact exists requires the trial court to grant summary disposition. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725-726; 691 NW2d 1 (2005).

Plaintiff argues that she presented a *prima facie* case of discrimination in violation of the PWDCRA because she is disabled, her disability is unrelated to her ability to do her job, and defendant discriminated against her when it discharged her from her position. Plaintiff also claims that she not only suffered from depression and anxiety that substantially interfered with

her major life activities except for her employment, but that defendant regarded her as disabled and knowingly discriminated against her after she returned from a leave of absence from work. Defendant counters that plaintiff has not shown that her disability substantially interfered with a major life activity and specifically relies on the assertion that plaintiff testified that even while on disability leave, plaintiff could complete her major life activities aside from going to work.

To establish a prima facie case under the PWDCRA, a plaintiff must prove ““(1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute.”” *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004), quoting *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998) (alterations by *Peden* Court). In relevant part, the PWDCRA defines “disability” 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.

* * *

(ii) A history of a determinable physical or mental characteristic described in subparagraph (i).

(iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [MCL 37.1103(d)(i)(A), (ii), (iii).]

Plaintiff cannot establish that she is disabled within the meaning of the PWDCRA because the record clearly shows that her conditions—anxiety and depression—impacted, and thus are related to, her ability to perform her job. “[A] regular and reliable level of attendance is a necessary element of most jobs.” *Tyndall v Nat’l Ed Centers, Inc of California*, 31 F3d 209, 213 (CA 4, 1994). “Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee ‘who does not come to work cannot perform any of his job functions, essential or otherwise.’” *Id.*, quoting *Wimbley v Bolger*, 642 F Supp 481, 485 (WD Tenn, 1986), *aff’d* 831 F2d 298 (CA 6, 1987).

Further, even assuming that plaintiff is disabled within the meaning of the PWDCRA, defendant has articulated a legitimate, nondiscriminatory reason for discharging plaintiff that she fails to show is a mere pretext for discrimination. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 563; 462 NW2d 758 (1990). Defendant provided ample evidence that plaintiff had a history of missing work or showing up late, defendant informed plaintiff that her attendance was unacceptable, and plaintiff was well-aware that her attendance issues were a serious problem. However, the record reveals that plaintiff continued to take unscheduled time off, show up late,

or miss work even after defendant informed her that continued absences or tardiness would ultimately lead to termination. Indeed, plaintiff even showed up late for work just two days after she received written communications from defendant scheduling a meeting with her supervisor and human resources personnel to discuss plaintiff's attendance problems.

Plaintiff also asserts that defendant's reason for terminating plaintiff, excessive absenteeism and tardiness, was a mere pretext for discrimination in violation of the PWDCRA. Plaintiff supports her position with the argument that her supervisor referenced an employment manual that expressly did not apply to her as a hospital staff member. However, plaintiff's supervisor's reference to the cited manual only shows that she was unsure where the relevant policies on unscheduled paid time off could be found while being questioned during deposition. And the record contains two memoranda sent to plaintiff wherein the supervisor clearly stated that she had reviewed the relevant department policy that did apply to plaintiff concerning unscheduled absences before drafting each memorandum. Each memorandum warned plaintiff that she would be discharged if her attendance did not improve.

Plaintiff also suggests that the pretextual nature of defendant's articulated reason for discharge is evidenced by alleged "manufactured instances of unscheduled paid time off." But we need not delve into any dispute regarding the legitimacy of certain absences because the existence of any further absences would only provide additional support to the plethora of documented, unchallenged absences and therefore only bolster defendant's position.

Finally, plaintiff argues that she could have performed her job had defendant granted her reasonable accommodations. However, plaintiff does not set out with any particularity what accommodations defendant could have provided that would have ameliorated her repeated failure to report to work, as well as her lack of notice of unavailability and tardiness issues. Nor does she cite any authority to support her accommodations argument. Without this information, we are unable to review this issue, and therefore, plaintiff has abandoned this argument, and we decline to address it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *McCartney v Attorney General*, 231 Mich App 722, 725; 587 NW2d 824 (1998).

In sum, our review of the record reveals that defendant demonstrated it discharged plaintiff due to excessive absenteeism, and plaintiff cannot meet her burden of showing that defendant's proffered reason for plaintiff's termination was in actuality a pretext for discrimination in violation of the PWDCRA, MCL 37.1101 *et seq.* The trial court properly dismissed plaintiff's claim.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio