

STATE OF MICHIGAN
COURT OF APPEALS

CLAUDIA MICHALSKI and MICHAEL J.
MICHALSKI,

UNPUBLISHED
January 26, 1999

Plaintiffs-Appellants,

v

No. 204033
Oakland Circuit Court
LC No. 96-527349 NZ

REUVEN BAR-LEVAV, MD., and DR. REUVEN
BAR-LEVAV & ASSOCIATES, P.C.,

Defendants-Appellees.

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

WHITBECK, J. (concurring in part and dissenting in part).

I agree with the majority that the trial court correctly granted summary disposition in favor of defendants on plaintiffs' ¹ claim for intentional infliction of emotional distress. However, unlike my colleagues, I would affirm the trial court's grant of summary disposition in favor of defendants on the claim under the former Handicappers' Civil Rights Act (HCRA), MCL 37.1101, et seq.; MSA 3.550(101), et seq.²

The majority opinion relies largely on two appellate opinions resulting from the same case, *Sanchez v Lagoudakis* 440 Mich 496; 486 NW2d 657 (1992) and *Sanchez v Lagoudakis (On Remand)*, 217 Mich App 535; 552 NW2d 472 (1996), rev'd on other grounds 458 Mich 704; 581 NW2d 257 (1998), for its determination that there was sufficient evidence for plaintiff to survive summary disposition on her HCRA claim based on a "perceived handicap." The majority effectively, although not explicitly, concludes that plaintiff did not have to introduce evidence showing that defendant perceived her as suffering from a condition that substantially limited a major life activity in order to establish a claim under the HCRA. In doing so, the majority overlooks that the pertinent statutory definition of "handicap" under the HCRA at the time of the alleged discrimination against the plaintiff in *Sanchez* in December 1987, differed from the statutory definition of "handicap" in force at the time of the employment of plaintiff here with defendant. Prior to 1990, the definition of "handicap" for employment related purposes under the HCRA, MCL 37.1103(b)(i); MSA 3.550(103)(b)(i) did *not* include a requirement of substantial limitation of a major life activity:

“Handicap” means a determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth, or functional disorder which characteristic:

(i) For purposes of article 2, is unrelated to the individual’s ability to perform the duties of a particular job or position, or is unrelated to the individual’s qualifications for employment or promotion.

Thus, as was entirely appropriate in light of the pre-1990 language of the HCRA, the *Sanchez* opinions included no requirement that for the plaintiff in that case to prevail on her HCRA claim based on a perceived handicap, the defendant employer had to perceive her as suffering from a substantial limitation of a major life activity. The majority emphasizes that, in *Sanchez, supra*, 440 Mich 506-507, the Michigan Supreme Court reversed and remanded for a determination of whether the plaintiff was perceived by the defendant employer as having a physical characteristic resulting from disease and unrelated to her ability to perform the duties of her job. The majority provides this emphasis apparently to point out that the Court did not require a determination of whether the defendant employer perceived the plaintiff in *Sanchez* as being substantially limited in a major life activity. However, in light of the difference in pertinent statutory language, the holding in *Sanchez* does nothing to show that this is not a requirement under the post-1990 version of the HCRA that is applicable to this case. Indeed, in its initial opinion in *Sanchez*, the Michigan Supreme Court noted that the pertinent definition of “handicap” at the time of *Sanchez*’ claim differed from the definition after the 1990 amendment of the HCRA. *Sanchez, supra*, at 500-501 & n, 13.

The HCRA, as in force at the time of plaintiff’s employment with defendant, prohibited an employer from discriminating against an individual with regard to the terms, conditions or privileges of employment “because of a handicap that is unrelated to the individual’s ability to perform the duties of a particular job or position.” MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). Unlike the statutory language controlling in *Sanchez*, the post-1990 version of the HCRA that is applicable to this case, MCL 37.1103(e); MSA 3.550(103)(e), included the following language defining a “handicap” for employment related purposes:

“[H]andicap” 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, *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 1*. [Emphasis added.]

Where statutory language is clear and unambiguous, its plain meaning reflects legislative intent and judicial construction is not permitted. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 217; 580 NW2d 424 (1998). I agree with the majority that, as reflected in the plain language of the statute, an employer is prohibited from discriminating against “an individual who, while not handicapped, is regarded [by the employer] *as having a handicap*.” *Merillat v Michigan State University*, 207 Mich App 240, 245; 523 NW2d 802 (1994) (emphasis added). However, in accordance with the plain language of the statute, such a “perceived handicap” claim under the post-1990 version of the HCRA required that the employer regard the aggrieved person as having “a determinable physical or mental characteristic *described in subparagraph (i)*,” which in part means a characteristic that substantially limited a major life activity.

Thus, while a plaintiff need not actually have a substantial impairment of a major life activity to establish a perceived handicap discrimination claim under the post-1990 version of the HCRA, the plain statutory language required that the employer *perceive* the plaintiff as having such a substantial impairment. As the majority does not really dispute, plaintiff offered no evidence to reasonably support a conclusion that defendant regarded her as having a substantial impairment of a life activity or that she actually had such a substantial impairment or a history of such substantial impairment. Thus, the trial court correctly granted summary disposition on plaintiff’s HCRA claim because she did not present sufficient evidence to create a question of fact regarding whether defendant discriminated against her based on a “handicap” as defined by the post-1990 version of the HCRA.

I also note that, contrary to plaintiff’s argument, an employer’s discrimination based on a perception that an employee was likely to develop a handicap *in the future* was not prohibited by the post-1990 version of the HCRA. As set forth above, the post-1990 version of the HCRA prohibited discrimination in employment based on a “handicap.” However, the statutory definition of “handicap” simply did not include the real or perceived possibility or likelihood that one would become handicapped in the future. Thus, a claim of discrimination under the post-1990 version of the HCRA based on the perception of a likely future handicap was not supported by the plain language of the statute. *McKenzie, supra*.

It may seem, and indeed it may well be, anomalous that the post-1990 version of the HCRA (and like the substantively identical current Persons With Disabilities Civil Rights Act) provided no protection against employment discrimination based on a perception of a physical impairment not rising to the level of a handicap or against discrimination based on the possibility that one would become handicapped in the future. Certainly, in my opinion, wrongful discrimination on these bases such not be condoned. However, our duty is to apply the law, not simply impose personal moral beliefs about ethical business conduct. I note the unanimous observation of the Michigan Supreme Court, per Justice Marilyn Kelly, about the limited scope of the Whistleblowers’ Protection Act (WPA):

The Legislature could have defined protected activity to include confrontation, as in the False Claims Act. It could have allowed employees to recover without a showing of reporting or being about to report. It did neither. Instead, the Legislature defined protected activity as reporting a violation or being about to report one. The Legislature can and may rewrite the statute, but we will not do so. [*Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 405-406; 572 NW2d 210 (1998).]

Likewise, the Legislature may, and perhaps should, amend the current Persons With Disabilities Civil Rights Act to expand the scope of its protections, but it is not the proper role of this Court to do so by construing the HCRA in a manner inconsistent with its plain language.

I respectfully dissent with regard to the majority's treatment of plaintiff's HCRA claim. I would affirm the trial court's grant of summary disposition in favor of defendants on that claim.

/s/ William C. Whitbeck

¹ As does the majority, I will hereafter refer to Claudia Michalski as "plaintiff" and to Dr. Reuven Bar-Levav as "defendant."

² The current version of the statute is titled the "Persons With Disabilities Civil Rights Act."