

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE KING,

Plaintiff-Appellant,

v

AMERICAN AXLE & MANUFACTURING,
INC.,

Defendant-Appellee.

UNPUBLISHED

June 4, 2009

No. 281928

Wayne Circuit Court

LC No. 06-601881-CD

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), which dismissed plaintiff's claims for violation of the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, and intentional infliction of emotional distress. Plaintiff also challenges the circuit court's postjudgment order awarding defendant case evaluation sanctions. We affirm.

I. Summary Disposition

This Court reviews de novo a circuit court's summary disposition ruling. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). This Court must consider the pleadings and any affidavits, depositions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists for trial, or whether the moving party was entitled to judgment as a matter of law. *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

A. PWDCRA

The PWDCRA prohibits discrimination against individuals because of their handicapped status. The act intends to mandate the employment of a handicapped person "to the fullest extent reasonably possible." *Peden v Detroit*, 470 Mich 195, 203; 680 NW2d 857 (2004) (internal quotation omitted). The act prohibits an employer from taking adverse employment actions against an individual "because of a disability . . . that is unrelated (or not directly related) to the individual's ability to perform the duties of a particular job or position." *Id.* at 203-204

(alteration in original), quoting MCL 37.1202(1)(a). The plaintiff bears the burden of proving a violation of the act. *Id.* at 204. To establish a prima facie case of discrimination, plaintiff here had to show that (1) she suffers a disability as defined in the act, (2) her disability is unrelated to her ability to perform her job duties, and (3) defendant discriminated against her in one of the ways delineated in the act. *Id.*; *Chiles v Machine Shop, Inc.*, 238 Mich App 462, 473; 606 NW2d 398 (1999). The PWDCRA defines a “disability” as (1) a “determinable physical or mental characteristic of an individual” that “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[.]” (2) a history of such a determinable physical or mental characteristic, or (3) “[b]eing regarded as having” such a determinable physical or mental characteristic. MCL 37.1103(d); *Peden, supra* at 204.

Plaintiff concedes that she does not have an actual disability as defined in the PWDCRA, but avers that she nonetheless may recover under the act because defendant perceived her to have a disability. Defendant may face liability for violating the PWDCRA if it discriminated against plaintiff on the basis of a perceived disability. *Chiles, supra* at 475. To qualify as disabled on the basis of a perceived disability, a plaintiff must prove (1) that her employer regarded her as having a determinable physical or mental characteristic, (2) “the perceived characteristic was regarded as substantially limiting one or more of the plaintiff’s major life activities,” and (3) “the perceived characteristic was regarded as being unrelated either to the plaintiff’s ability to perform the duties of a particular job or position or to the plaintiff’s qualifications for employment or promotion.” *Michalski v Bar-Levav*, 463 Mich 723, 731-732; 625 NW2d 754 (2001).

We reject plaintiff’s contention that she established a prima facie case of discrimination under the PWDCRA by submitting evidence that raised a genuine issue of material fact whether defendant regarded her as having a condition that substantially limited the major life activity of working. To prevail on her claim, plaintiff must show that defendant regarded her as having a substantial limitation in performing “at least a wide range of jobs.” *Chiles, supra* at 478. Viewed most favorably to plaintiff, the evidence submitted by the parties showed that defendant remained willing to return plaintiff to work, but could not find work at its plant that she could perform consistent with the several medical restrictions that doctors imposed on her.¹ The evidence simply does not give rise to a genuine issue of fact that defendant perceived plaintiff as substantially limited in performing a wide range of jobs. *Id.* at 478 n 5 (noting that the available evidence “merely showed that plaintiff was not recalled for any jobs, not that defendant believed that plaintiff was physically unable to do all the jobs,” and that “the fact that plaintiff was not recalled to any job . . . is not sufficient as a matter of law to support a claim of discrimination based on the employer’s perception that plaintiff was disabled”). The circuit court thus correctly

¹ The restrictions included (1) no lifting more than 10 pounds repetitively, (2) no lifting more than 15 to 20 pounds occasionally, (3) avoiding overhead activity, (4) no vibrating or torquing tools, (5) no pushing or pulling more than 15 pounds, (6) “[p]redominantly sit-down job with sit/stand option,” (7) no squatting, bending, kneeling, or climbing, and (8) no prolonged walking.

determined that plaintiff failed to demonstrate that she had either an actual or perceived disability within the meaning of the PWDCRA, and properly dismissed the PWDCRA claim.

B. Intentional Infliction of Emotional Distress

To support a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004). The offending conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Id.* “It is for the trial court to initially determine whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.” *Id.* “But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery.” *Id.*

Plaintiff maintains that evidence that defendant breached a grievance settlement and gave preferential treatment to worker’s compensation employees factually supports her claim for intentional infliction of emotional distress. However, the evidence does not support that defendant breached the grievance settlement. Contrary to plaintiff’s suggestion, defendant never specifically agreed that it would find work for plaintiff; defendant only agreed to abide by the impartial medical opinion (IMO) findings and return plaintiff to available work compatible with the restrictions imposed. Furthermore, plaintiff has failed to establish anything rising to the level of “outrageous” about defendant’s practice of giving job return preference to worker’s compensation employees. Consequently, the circuit court properly dismissed plaintiff’s claim for intentional infliction of emotional distress.

II. Case Evaluation Sanctions

Plaintiff additionally avers that the circuit court erred in awarding defendant case evaluation sanctions pursuant to MCR 2.403. We decline to address this issue for lack of jurisdiction.

Under MCR 7.203(A)(1), this Court has jurisdiction of an appeal of right filed from a “final judgment or final order,” as defined in MCR 7.202(6). The circuit court’s October 23, 2007 order granting defendant summary disposition constituted a “final order” under MCR 7.202(6)(a)(i), because it was the first order that disposed of all the claims and adjudicated the rights and liabilities of all the parties. *Baitinger v Brisson*, 230 Mich App 112, 116; 583 NW2d 481 (1998). Plaintiff timely filed a claim of appeal from that order on November 9, 2007. Although a party who files a claim of appeal from a final order may raise on appeal issues related to other orders in the case, *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992), the party may not challenge subsequent orders entered after the claim of appeal has been filed. *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 197; 452 NW2d 471 (1989). The circuit court entered its order awarding case evaluation sanctions on December 14, 2007, after plaintiff had filed her claim of appeal from the order granting summary disposition. Plaintiff could have filed a separate appeal by right from the December 14, 2007 order because that order also qualifies as a “final order.” MCR 7.202(6)(a)(iv) (defining “final order” as including “a postjudgment order awarding or denying attorney fees and costs under MCR

2.403”). Because plaintiff did not do so, we do not possess jurisdiction to review this issue. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1991).

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher