

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THOMAS J. WALSH,  
Plaintiff-Appellant,

UNPUBLISHED  
October 16, 2001

v

FOODLAND DISTRIBUTORS, INC.,  
Defendant-Appellee.

No. 221327  
Wayne Circuit Court  
LC No. 98-818775-CL

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Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiff Thomas J. Walsh appeals as of right from the trial court's order granting summary disposition to defendant Foodland Distributors, Inc., in this action brought pursuant to the Persons with Disabilities Civil Rights Act (PWDCRA)<sup>1</sup> and the Whistleblower's Protection Act (WPA).<sup>2</sup> We affirm.

I. Basic Facts And Procedural History

Foodland employed Walsh as a truck driver for approximately twelve years, roughly from January 1985 through 1997. In September 1995, Walsh injured his back in a work-related incident. After being placed on disability leave and collecting worker's compensation benefits, Walsh returned to work under Foodland's special return-to-work program. In effect, this so-called bridge program, offered Walsh a temporary opportunity to do less strenuous work for Foodland while he recovered from his injuries. The goal, however, was to have him return to his position as a truck driver.

Pursuant to this bridge program, Foodland temporarily assigned Walsh to several different departments within Foodland's meat plant and warehouse. Substantively, Walsh performed a variety of tasks, such as auditing orders placed on pallets, handing out bills, sorting labels, and tearing labels on racks. Additionally, Foodland assigned Walsh to audit the plant for safety problems, where Walsh allegedly discovered several health and safety violations. Walsh said that he promptly reported these problems to his supervisors. However, according to Walsh,

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<sup>1</sup> MCL 37.1102(1).

<sup>2</sup> MCL 15.362.

Foodland's management ignored the problems, forcing Walsh to contact the United States Department of Agriculture (USDA), which subsequently inspected Foodland's meat packing plant and cited it for several violations. Shortly thereafter, Foodland removed Walsh from his safety inspection duties, instead assigning him to sorting or tearing labels. Walsh was able to perform this label work, which Foodland allowed him to complete at his own pace, though frequently not within a forty-hour work week.

In February 1998, Walsh underwent several medical examinations and testing procedures, the results of which indicated that he could return to work as a truck driver. In March 1998, Foodland reassigned Walsh to his former position as a truck driver. On his first day back to work, Walsh drove a Foodland truck to Lansing, where he dropped off one trailer and hooked up another. Unfortunately, on the return trip to Foodland's warehouse, Walsh became so overwhelmed with back pain he pulled off the road at Novi and called Foodland for assistance. Foodland sent a driver to bring Walsh and the truck back to a Foodland facility. Walsh later described the pain he experienced as "at such a high level that [he] was unable to function in a manner of driving." Walsh has not worked for Foodland since that day. Nor has he been able to work elsewhere as a truck driver because of physical problems with his knee, his back, or a combination of both.

On June 15, 1998, Walsh filed a complaint alleging that Foodland violated the PWDCRA, causing him to suffer mental anguish, anxiety, humiliation and embarrassment. Specifically, Walsh alleged that Foodland refused to reassign him "to a position that would not require him to walk excessively, squat, repeatedly enter and exit vehicles, or lift heavy weights . . . ." Consequently,

[a]fter several unsuccessful attempts at returning to his former position, Plaintiff was told not to return to work unless he was able to perform all of the duties of his former position; said conduct by Defendant constitutes constructive discharge within the meaning of the Michigan Handicappers' Civil Rights Act,<sup>[3]</sup> MCL 37.1101 et seq.

Additionally, Walsh asserted that, because he had reported the health and safety violations to the USDA, Foodland told him not to return to work, thereby violating the WPA's protection against retaliation. Foodland denied or refused to admit or deny most of the specific allegations Walsh pleaded in his complaint.

On April 28, 1999, Foodland moved for summary disposition. With respect to the PWDCRA claim, Walsh argued that it did not have a statutory duty to accommodate Walsh by transferring him to a different job. More importantly, Foodland noted, the PWDCRA defines a "disability" in this employment context as a "determinable physical or mental characteristic" that "substantially limits 1 or more of the major life activities of that individual," but is "unrelated to

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<sup>3</sup> The Legislature changed the name of the Handicappers' Civil Rights Act to the Persons With Disabilities Civil Rights Act approximately three months before Walsh sued Foodland. See 1998 PA 20.

the individual's ability to perform the duties of a particular job or position . . . .”<sup>4</sup> Because Walsh conceded that he was physically unable to perform his original duties, Foodland argued that he was not “disabled,” and therefore not entitled to protection, under the PWDCRA, justifying summary disposition under MCR 2.116(C)(8) or (10).

Walsh countered this argument, asserting that the PWDCRA did protect him and Foodland had failed to accommodate his job-related disability. Additionally, Walsh contended, even if Foodland did not have a duty to transfer him to a different job as an accommodation, it nevertheless had an obligation to afford him a reasonable accommodations, which Foodland did not do. Overall, Walsh contended that he had pleaded a claim on which relief could be granted concerning the failure to accommodate him and that genuine issues of material fact existed regarding whether Foodland satisfied its statutory duty to accommodate his disability. Consequently, summary disposition under MCR 2.116(C)(8), and (10) was inappropriate.

In response to Walsh’s claim that Foodland had retaliated against him for reporting health and safety violations to the USDA, which was unlawful under the WPA, Foodland argued that the claim was untimely. Foodland asserted that the statute of limitations in the WPA required him to file his claim within ninety days of the alleged WPA violation and Walsh’s last day of work was March 4, 1998. Consequently, Walsh had to file his WPA claim no later than June 2, 1998. Yet, Walsh filed his complaint June 15, 1998, thirteen days after this deadline, making summary disposition under MCR 2.116(C)(7) appropriate.

However, though he never mentioned it in the complaint, Walsh argued that Foodland’s decision to challenge his worker's compensation claims represented a series of retaliatory actions constituting a “continuing course of conduct,” the latest of which occurred on April 19, 1998. Therefore, Walsh reasoned, the period of limitations for his WPA claim commenced on April 19, 1998, making his June 15, 1998, complaint timely and summary disposition under MCR 2.116(C)(7) improper. Walsh insisted that the complaint alleged a cause of action with sufficient specificity under the WPA to survive a motion for summary disposition under MCR 2.116(C)(8). Further, acknowledging that he had failed to submit any documentary evidence of his complaint to the USDA or its subsequent sanctions of Foodland, Walsh asserted that “it is quite apparent that a record may be established that would leave open a question of material fact [concerning the WPA claim], in which case summary disposition [under MCR 2.116(C)(10)] is improper.”

After conducting a hearing on the motion for summary disposition, the trial court ruled in Foodland’s favor, reasoning:

As to both counts. As to Count I, the Court is of the opinion that the date relevant to this motion, this particular ruling is a March 4th, 1998 date and based on that the Court's of the opinion that it's beyond the statute of limitations. As to the other claim pertaining to the handicapped -- I'm sorry, the Handicapper's Civil Rights Act [sic], the Court's of the opinion based upon the authority of Rourk, R-o-u-r-k versus Oakwood Hospital Corporation found at 458 Mich 25, that the motion should again be granted.

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<sup>4</sup> MCL 37.1103(d)(i)(A).

Though the trial court's order granting summary disposition referred to MCR 2.116(C)(7), (8), and (10), it is clear that the trial court summarily disposed of the WPA claim under MCR 2.116(C)(7), which applies specifically to claims that are untimely under a statute of limitations. It is equally clear that the trial court summarily disposed of Walsh's PWDCRA claim under MCR 2.116(C)(10) because it implicitly concluded from the record that there was no disputed question of fact concerning whether Walsh was disabled within the meaning of the PWDCRA.<sup>5</sup>

## II. Standard Of Review

Walsh now challenges the trial court's decision to grant summary disposition with respect to both his PWDCRA and WPA claims. We review de novo orders granting or denying summary disposition.<sup>6</sup>

## III. PWDCRA

### A. MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.<sup>7</sup> The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.<sup>8</sup> Only if there is no factual dispute, making the moving party entitled to judgment as a matter of law, would summary disposition be appropriate.<sup>9</sup> However, in order to conclude that there is no genuine issue of material fact in dispute, the deciding court may not weigh the evidence or make factual findings.<sup>10</sup>

### B. Disability

The PWDCRA guarantees individuals the "opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a handicap. . . ."<sup>11</sup> In order to give life to this guarantee, the PWDCRA<sup>12</sup> requires employers to "accommodate a person with a

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<sup>5</sup> See, generally, *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

<sup>6</sup> *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

<sup>7</sup> MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

<sup>8</sup> *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

<sup>9</sup> See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

<sup>10</sup> See *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

<sup>11</sup> MCL 37.1102(1).

<sup>12</sup> MCL 37.1102(2).

disability,” subject to the limitations within MCL 37.1201 *et seq.*<sup>13</sup> Thus, a critical threshold issue in any claim alleging that a defendant’s failure or refusal to accommodate the plaintiff violated the PWDCRA is whether the plaintiff is a “person with a disability” within the meaning of the PWDCRA.<sup>14</sup>

The Legislature did not leave the definition of a “person with a disability” to the courts to decide. Rather, the Legislature went to great lengths to give a specific meaning to the terms and phrases used in the PWDCRA. According to MCL 37.1103(h), “[p]erson with a disability’ or ‘person with disabilities’ means an individual who has 1 or more disabilities.” In turn, MCL 37.1103(d) defines a “disability” in the employment-related provisions of the PWDCRA as:

(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,<sup>[15]</sup> 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.

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(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).

If it were not already clear from these statutory provisions, case law explains that a disability within the meaning of the PWDCRA cannot be related to a plaintiff’s ability to perform the specified duties of a job.<sup>16</sup>

As Foodland noted in its motion for summary disposition, Walsh conceded in his complaint that he could not “perform the duties of his former position” as a truck driver. Walsh provided no documentary evidence that his disability was unrelated to his ability to perform as a truck driver, the position for which Foodland hired him. In fact, Walsh did not address

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<sup>13</sup> For example, MCL 37.1202 defines practices in which an employer may not engage and MCL 37.1210 sets forth the framework for proving that a defendant unlawfully failed or refused to accommodate the plaintiff’s disability.

<sup>14</sup> See *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

<sup>15</sup> MCL 37.1201 *et seq.*, which is the PWDCRA article concerning disability discrimination in employment.

<sup>16</sup> See *Hatfield v St Mary’s Medical Center*, 211 Mich App 321, 326; 535 NW2d 272 (1995).

Foodland's summary disposition argument that he fell outside the PWDCRA's definition of a "person with a disability." Thus, while we think that Foodland's contention that it had no legal obligation to reassign Walsh to a job that he could perform has merit,<sup>17</sup> this separate threshold issue required judgment as a matter of law in Foodland's favor. Consequently, the trial court did not err when it granted summary disposition of this PWDCRA claim to Foodland under MCR 2.116(C)(10).

#### IV. WPA

##### A. MCR 2.116(C)(7)

MCR 2.116(C)(7) makes summary disposition appropriate if "[t]he claim is barred because of . . . [a] statute of limitations . . . ." MCR 2.116(G)(3)(a) requires affidavits, depositions, admissions, or other documentary evidence to support a motion for summary disposition under MCR 2.116(C)(7) "when the grounds asserted do not appear on the face of the pleadings," and MCR 2.116(G)(5) requires the deciding court to consider any materials submitted.<sup>18</sup>

##### B. Statute Of Limitations

The WPA provides that "[a] person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act."<sup>19</sup> Though the Legislature phrased the right to bring a cause of action for a violation of the WPA in permissive terms, this ninety-day period of limitations is mandatory.<sup>20</sup> However, in *Phinney v Perlmutter*,<sup>21</sup> this Court determined that the continuing violations doctrine applied to claims filed under the WPA. In effect, the continuing violations doctrine, when it applies, extends the time in which a plaintiff may sue for a WPA violation by not requiring the plaintiff to file suit within ninety days of a *first* statutory violation as long as one violation occurred before the period of limitations elapsed.<sup>22</sup> Federal law

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<sup>17</sup> We acknowledge that Walsh argues that Foodland's decision to give him temporary, light-duty assignments under the bridge program obligated Foodland to reassign him. However, Walsh has failed to cite any statutory or case law authority for this proposition. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."). In contrast, Foodland's authority, on which the trial court in this case relied, unambiguously holds that an employer has no obligation to transfer an injured employee to another job to accommodate the employee's physical limitations. *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 29-33; 580 NW2d 397 (1998).

<sup>18</sup> See *Patterson v Kleiman*, 447 Mich 429, 434-435; 500 NW2d 761 (1993).

<sup>19</sup> MCL 15.363(1).

<sup>20</sup> *Covell v Spengler*, 141 Mich App 76, 80; 366 NW2d 76 (1985).

<sup>21</sup> *Phinney v Perlmutter*, 222 Mich App 513, 546; 564 NW2d 532 (1997).

<sup>22</sup> See *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 524-533; 398 NW2d 368 (1986).

originally respected three separate “subtheories” in which the continuing violations doctrine applied:

The first subtheory involves allegations that an employer has engaged in a continuous policy of discrimination. In such a case, the plaintiff is alleging that “he is challenging not just discriminatory conduct which has affected him, but also, or alternatively, the underlying employment system which has harmed or which threatens to harm him and other members of his class.” Schlei & Grossman, [Employment Discrimination Law, p 901].

The second subtheory, the “continuing course of conduct” or “series of events” situation is relevant where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period.

The third subtheory, by all accounts, ceased to be actionable after [*United Airlines v] Evans*[, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977)]. That subtheory held that a continuing violation existed where a party suffered timely effects or injury from a past untimely act of discrimination.<sup>[23]</sup>

The Michigan Supreme Court adopted the first two of these three subtheories in defining the circumstances when the continuing violations doctrine applies:<sup>24</sup>

Walsh relies on the continuing course of conduct subtheory, arguing that Foodland contested his worker’s compensation claims as late as April 19, 1998, in retaliation for his report to the USDA. Under Walsh’s theory, this later alleged violation then extended the period of limitations to July 18, 1998, making his June 15, 1998, WPA claim timely. Three factors traditionally define whether a continuing course of discriminatory conduct exists:

“The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee’s awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?”<sup>[25]</sup>

We can accept for the purposes of this analysis that Foodland’s multiple challenges to Walsh’s alleged right to worker’s compensation benefits were sufficiently connected to suggest a

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<sup>23</sup> *Id.* at 528.

<sup>24</sup> *Phinney, supra* at 546-547, interpreting *Sumner, supra*.

<sup>25</sup> *Sumner, supra* at 538, quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).

continuing violation if they were in retaliation for Walsh's whistle blowing activities. However, the chief problem with Walsh's argument, that this continuing course of conduct subtheory applies to extend the time in which he could file suit under the WPA, is the absolute paucity of other relevant documentary evidence in the record. Walsh submitted forms reporting his leaves of absence because of an injury subject to worker's compensation, some of which note without explanation that Foodland contested the benefits. Yet, the record does not include any evidence regarding his claims for worker's compensation benefits that revealed to what extent or why Foodland disputed those benefits. Without this information, it is impossible to determine whether (1) Foodland was objecting on the same grounds each time, making opposition to these benefits an isolated – though unresolved – conflict between the parties, or (2) Foodland continued to create new objections to worker's compensation benefits, suggesting ongoing wrongful conduct. Finally, the record provides no evidence regarding Walsh's report to the USDA. Without this evidence, it is impossible to gauge whether the timing or other circumstances should have suggested to Walsh that he file his complaint at an earlier time, or whether Foodland's alleged retaliation was so subtle at first Walsh had good reason not to act on his right any earlier.

In sum, the record does not permit an inference that the continuing violations doctrine applied. Without the benefit of this doctrine, Walsh's claim under the WPA was plainly time-barred. Thus, summary disposition under MCR 2.116(C)(7) was appropriate.

### C. Alternative Grounds For Affirming

Even if the continuing violations doctrine did not apply in this case, we would nevertheless affirm the trial court's order summarily disposing of this claim for two other reasons. First, the WPA mandates that employers shall not "discharge, threaten, or otherwise discriminate against" employees who have reported or are about to report a violation or suspected violation of the law to a public body, unless the employee knows that the report is false.<sup>26</sup> A "public body" encompasses *only* state and local entities and individuals.<sup>27</sup> Walsh allegedly reported Foodland to the USDA, which is a federal agency, not a state or local authority. Thus, the WPA does not provide a cause of action for Walsh in this instance, making summary disposition under MCR 2.116(C)(8) appropriate.

Second, the Michigan Supreme Court has made clear in no uncertain terms that a factual dispute regarding a material issue must exist and be supported by evidence in the record at the time of summary disposition for a party to survive a motion under MCR 2.116(C)(10).<sup>28</sup> Yet, the record includes only Walsh's bald assertions that Foodland violated the WPA by retaliating for his decision to inform the USDA of safety and health violations he found at the Foodland facility. All Walsh has done is promise "that a record may be established that would leave open

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<sup>26</sup> MCL 15.362.

<sup>27</sup> See MCL 15.361(d)(i)-(iv).

<sup>28</sup> See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

a question of material fact [concerning the WPA claim], in which case summary disposition [under MCR 2.116(C)(10)] is improper.” In *Smith v Globe Life Ins Co*,<sup>29</sup> the Court explained:

Under MCR 2.116, it is no longer sufficient for plaintiffs to promise to offer factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4).

Thus, it is clear that summary disposition was also proper under MCR 2.116(C)(10).

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Henry William Saad  
/s/ William C. Whitbeck

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<sup>29</sup> *Smith, supra* at 455, n 2.