STATE OF MICHIGAN

COURT OF APPEALS

REBA SULLIVAN,

Plaintiff-Appellant,

v

ACCES MANAGEMENT, INC and UAW-FORD CHILD DEVELOPMENT CENTER,

Defendants-Appellees.

UNPUBLISHED
June 23, 2000

No. 212052
Wayne Circuit Court
LC No. 96-644782-NI

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant Access Management, Inc. (ACCES) summary disposition pursuant to MCR 2.116(C)(10) on her age discrimination claim. Plaintiff also challenges the trial court's previous orders granting, pursuant to MCR 2.116(C)(10), defendant UAW-Ford Child Development Center (properly UAW-Ford National Education, Development and Training Center) (NEDTC) summary disposition on grounds that it was not her employer, and ACCES partial summary disposition on her handicap discrimination, breach of contract/wrongful termination, sexual harassment, and intentional infliction of emotional distress claims. We affirm.

Plaintiff first argues that the trial court erred in concluding that NEDTC was not her employer and, therefore, could not be liable for her employment-related claims. We disagree. This Court reviews de novo a trial court's decision to grant a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). When reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Id.*; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith*, *supra* at 454-455; *Quinto*, *supra*. Similarly, whether a company is a particular worker's employer is a question of law for the court to decide if the evidence on the matter is reasonably susceptible of a single inference. See *Derigiotis v J M Feighery Co*, 185

Mich App 90, 94; 460 NW2d 235 (1990) (addressing the issue in the context of the workers' compensation act).

There appears to be some debate regarding the proper standard to be applied in determining whether an entity constitutes an employer for purposes of determining liability under the Civil Rights Act (CRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. or the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*.[1] See *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231; 581 NW2d 746 (1998) (applying the control test to claim of respondeat superior liability under the HCRA); *McCarthy v State Farm Ins Co*, 170 Mich App 451; 428 NW2d 692 (1988) (applying the economic reality test to determine liability under the HCRA). See also *Chiles v Machine Shop, Inc*, 238 Mich App 462; 606 NW2d 398 (1999) (holding that liability under the act does not require that an employment relationship exist, but simply that the defendant have the authority to adversely affect a plaintiff's employment or potential employment).[2] However, we need not address that issue because under any of the various standards employed, plaintiff's proofs fail to establish that NEDTC was her employer or otherwise had the authority to adversely affect her employment.

On this record, there is no evidence that NEDTC paid plaintiff's wages, established the terms and conditions of plaintiff's employment or position, or had the authority to control or affect ACCES' employment decisions. To the contrary, the contractual agreement between NEDTC and ACCES provided that ACCES, in its capacity as independent contractor, would "operate the center, collect all revenues and assume responsibility for payment of salaries, purchased services and supplies as needed to operate the center in a manner satisfactory to NEDTC." The agreement further provided that ACCES was responsible for designing and managing the center, conducting daily operations, and procuring and maintaining worker's compensation insurance. With respect to employees, ACCES was fully responsible for recruiting, selecting, hiring, training, evaluating, and compensating them, although NEDTC was to be notified of any potential staff terminations. The president of ACCES, and a signatory to the agreement, stated that ACCES was not required to involve NEDTC in hiring or firing decisions, and that NEDTC had no supervisory responsibilities with respect to the employees. Furthermore, plaintiff's testimony established that she interviewed with ACCES' president and executive director prior to hire, that she was supervised and evaluated by ACCES' assistant directors, that she completed an employment application entitled "ACCES Management, Inc. Application for Employment," and that the Employee Handbook provided to her by ACCES governed her employment relationship with ACCES. In light of this evidence, plaintiff's contention that NEDTC and ACCES were joint employers is without merit and the trial court properly granted NEDTC's motion for summary disposition.

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[1] After plaintiff filed this action, the HCRA was amended and renamed the "persons with disabilities civil rights act." MCL 37.1101; MSA 3.550(101), as amended by 1998 PA 20.

[2] Although these cases address HCRA claims, the definition of employer for purposes of the CRA is virtually identical. Compare MCL 37.1201(b); MSA 3.550(201)(b) with MCL 37.2201; MSA 3.548(201).

Plaintiff's related claim that dismissal of NEDTC from the suit was premature because discovery had not been completed is similarly without merit. The record indicates that NEDTC's

motion for summary disposition was heard three weeks after discovery was scheduled to conclude, and we are not persuaded that further discovery would have provided plaintiff a reasonable chance of uncovering factual support for her position that NEDTC was her employer. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994).

Plaintiff next argues that the trial court erred in granting ACCES summary disposition on grounds that she failed to establish a prima facie case of discrimination under the HCRA.[3] We disagree.

At the time plaintiff filed this suit, the HCRA provided that an employer shall not "[d]ischarge or otherwise discriminate against an individual with respect to compensation or 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). To establish a prima facie case of discrimination under the statute, the plaintiff must establish that (1) she is "handicapped" as defined by the statute, (2) the disability is unrelated to her ability to perform the duties of a particular job, and (3) she has been discriminated against in one of the ways described in the statute. *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 568-569; 579 NW2d 435 (1998). The HCRA defines a "handicap," in part, 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:
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> (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*[4] *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. [MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A) (emphasis added).]

Therefore, to fall within the definition of handicap under the plain language of the HCRA, an individual's condition must substantially limit at least one of her major life activities. *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216; 559 NW2d 61 (1996). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, learning, and working." *Stevens, supra* at 217, citing 29 CFR 630.2(i); see also *Chiles, supra at* 477. "Whether an impairment substantially limits a major life activity is determined in light of (1) the nature

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[3] The 1998 amendments to the provisions cited herein merely replaced the term "handicap" with the term "disability."

[4] "Unrelated to the individual's ability" means "with or without accommodation, an individual's handicap does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l)(i); MSA 3.550(103)(l)(i).

and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect." *Stevens*, *supra* at 218, citing 29 CFR 1630.2(j)(2)(i)-(iii).

In the present case, we cannot conclude that plaintiff's alleged handicap, to wit: "a cancer survivor [who] suffers from permanent neuropathy [i.e., numbness in the feet and hands] as a result of chemotherapy" substantially limited one or more of her life's major activities. Plaintiff presented no evidence that the alleged neuropathy *substantially* interfered with caring for herself, performing manual tasks, seeing, hearing, speaking, breathing, learning, working, or walking. *Chiles*, *supra* at 477 (the plaintiff must allege and present evidence that a major life activity was implicated); *Stevens*, *supra* at 218. See also *Sherrod v American Airlines, Inc*, 132 F3d 1112 (CA 5, 1998) (the inability to perform heavy lifting alone was not sufficient to constitute a substantial limitation under the federal statute); *Dutcher v Ingalls Shipbuilding*, 53 F3d 723 (CA 5, 1995) (the inability to hold objects tightly did not constitute a substantial limitation under the federal statute). Further, we are not persuaded by plaintiff's reliance on the Social Security Administration's post-termination determination that she was "disabled" as proof that she was "handicapped" under the HCRA. See *Hall v McRea Corp*, 238 Mich App 361, 367-369; 605 NW2d 354 (1999); *Tranker v Figgie Int'l Inc (On Remand)*, 231 Mich App 115, 121-122; 585 NW2d 337 (1998) (recognizing that the two acts are designed for different purposes and utilize different standards). Because plaintiff failed to establish that she was handicapped under the HCRA, the trial court properly granted ACCES' motion for summary disposition.

Plaintiff next argues that the trial court erred in granting ACCES summary disposition on her age discrimination claim. Again, we disagree.

To establish a prima facie case of discrimination under the CRA, the plaintiff must prove by a preponderance of the evidence that (1) she was a member of a protected class, (2) she was discharged from employment, (3) she was qualified for the position, and (4) she was replaced by a younger person. *Hall*, *supra* at 370; see also *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). The burden then shifts to the defendant to articulate a nondiscriminatory reason for the discharge. *Hall*, *supra* at 370; *Lytle*, *supra* at 153. If the defendant satisfies this burden, the presumption raised by the prima facie case is rebutted and the burden of proof shifts back to the plaintiff to show "that there was a triable issue of fact that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." *Id*., quoting *Lytle*, *supra* at 174.

After a through review of the record, we conclude that plaintiff failed to submit evidence sufficient to create a genuine issue of fact regarding whether she was replaced by a younger person – the fourth element required to establish a prima facie case of age discrimination. At deposition, plaintiff testified that she "was told" by someone that she was replaced by a younger person and stated in her affidavit, without further elaboration, that she was so replaced. Furthermore, none of the affidavits plaintiff submitted in support of this element were notarized, and one was incomplete and did not include the affiant's signature. *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991) (the existence of a material fact must be established by admissible evidence; opinions, conclusions, unsworn averments, and inadmissible hearsay do not satisfy the court rule).

Even if we were to conclude that plaintiff established a prima facie case, summary disposition was nonetheless proper. ACCES submitted admissible evidence that plaintiff was not discharged, but rather, voluntarily resigned after being off work for medical reasons, that she was not replaced by a younger person, and that it did not engage in the practice of hiring younger employees to replace older ones. *Hall*, *supra* at 370. In response, plaintiff presented no evidence to create a triable issue that discriminatory animus was a motivating factor underlying her alleged termination. *Hall*, *supra* at 371; *Lytle*, *supra* at 175-176. At deposition, plaintiff admitted that her claim was based on her personal belief that ACCES hired people with "lots of energy" and "systematically got rid of people who had any age on them." It is well established that a plaintiff's mere assertion or subjective belief that she was the victim of age discrimination is insufficient to survive a motion for summary disposition. *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 81; 433 NW2d 820 (1988); Cf. *Fortier v Ameritech Mobile Communications, Inc*, 161 F3d 1106, 1113 (CA 7, 1998) (holding that employer's comment that the plaintiff's younger replacement had a "lot of energy" did not constitute direct evidence of age discrimination). Consequently, the trial court properly granted ACCES' motion for summary disposition.

Affirmed.

/s/ Gary R. McDonald
/s/ Hilda R. Gage
/s/ Michael J. Talbot