STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM F. HAGER,

Plaintiff-Appellant,

v

WARREN CONSOLIDATED SCHOOLS and THOMAS JESZKE,

Defendants-Appellees.

UNPUBLISHED
January 8, 2002

No. 222594
Macomb Circuit Court
LC No. 96-000287-CZ

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

PER CURIAM.

Plaintiff William Hager brought an action under the Handicappers' Civil Rights Act (HCRA)[1] against defendants Warren Consolidated Schools and Thomas Jeszke, his employer and supervisor. Hager alleged that defendants failed to accommodate his disability and retaliated against him for asserting his right to an accommodation. Following three motions for summary disposition, the trial court summarily disposed of all the claims in the suit in defendants' favor pursuant to MCR 2.116(C)(10).[2] Hager appeals as of right. We affirm.

I. Basic Facts

Hager began teaching for Warren Consolidated Schools (the school system) in 1973. In 1987, he became the instructor of the Building Trades II course at the Career Preparation Center. The goal of the course was to teach students different building trades using traditional classroom instruction methods and by providing them with the experience of building a residence constructed on property the school system purchased. As the instructor, Hager's responsibility was to conduct the classroom lessons as well as assist and supervise the students while constructing the home, which the school system later sold.

[1] MCL 37.1101 *et seq*. The HCRA is now known as the Persons With Disabilities Civil Rights Act (PWDCRA). See 1998 PA 20.

[2] The two orders granting partial summary disposition refer to MCR 2.116(C)(8) and (10). However, the trial court clearly considered more than the pleadings and, therefore, granted summary disposition in both instances pursuant to MCR 2.116(C)(10). See *Krass v Tri-County Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

Before Hager became the instructor for this class, the school system subcontracted some construction tasks associated with building the home. However, Hager was well-qualified to take on both the instructional and supervisory responsibilities inherent in this position. He not only had an advanced degree in guidance and counseling in addition to his teaching certificate with vocational education endorsements, he was also a licensed general builder. In fact, he worked as a builder when not teaching school. Though the school system still subcontracted a number of different tasks after Hager assumed his position, Hager agreed to perform some work that subcontractors usually performed, such as preparing the basement and garage floor for pouring concrete and performing concrete finishing work.

Hager first experienced physical difficulties affecting his ability to perform certain tasks during the 1992-1993 school year. He eventually learned that he suffered from myofascial back and neck syndrome, degenerative disease of both knee joints, and plantar fascitis of both feet. In February 1994, Hager asked the school system to accommodate his disabilities by relieving him of some of his peripheral duties, including doing concrete work, and installing sprinkler systems, ceramic tile, storm drains, and building drains. These were all tasks subcontractors had performed before Hager became a building trades instructor. Hager also asked the school system to notify him of any job openings at the high school level.

The school system partially granted Hager's request to be accommodated. In May 1994, the assistant superintendent of personnel and employee benefits wrote Hager a letter, informing him:

> The disposition of your handicap accommodation is that you be relieved of the actual, physical, hands on work related to the garage and basement cement floor work and of the installation of the lawn sprinkler system(s).
>
> How this is to be accomplished is to be left to the discretion of the principal. Possibilities include: subcontracting; horticulture involvement; more effective supervision and direction of students on your part; temporary adult assistance; or any combination of the above or other possibilities not listed here.

According to Hager, Thomas Jeszke, the principal, failed to implement this accommodation, instead requiring Hager to perform concrete preparation work in the basement of the home under construction. In December 1994, Jeszke wrote Hager a memorandum in which he expressed that he was unsure how to accommodate Hager because Hager would not let him see a letter[3] relieving him of some duties. Jeszke told Hager that he expected Hager "to instruct the students and to manage the class as you have in the past." Also, Hager's union representative, Frank Antonucci, said that Jeszke told him, "I wish Bill [Hager] would do his job like he used to. I don't know what seems to be the problem, and he's a good tradesman, and he's a good teacher, but he just doesn't want to do the job."

In late 1995, while Hager was performing concrete preparation work in the basement of the house, he slipped on a set of stairs and hyper-extended his knee. Hager suffered a torn

[3] Apparently, the May 1994 letter from the assistant superintendent to Hager.

meniscus, which accelerated his degenerative knee disease, forced him to have knee surgery, and kept him from working for more than four months. Because of this injury, Hager asked the school system to provide two accommodations. First, he requested an aide to assist him with some physical tasks. Second, he asked the school system to arrange for him to use a heated trailer at the construction site because his doctor advised him to avoid extended exposure to damp and cold areas. Though Hager had had an aide and trailer in the past, the school system denied these requests.

The school system commissioned a vocational evaluation to determine whether Hager could perform the essential functions of his job. The study, which CRA Managed Care, Inc., performed in April 1996, concluded that the Building Trades II instructor position required a significant amount of physical work, including fifteen minutes of skill demonstrations per hour of instruction, and that Hager's physical limitations prohibited him from performing some of the essential functions of the job. In reaching this conclusion, the individuals who conducted the study relied on an interview with Quinn Henry, the teacher who had temporarily taken Hager's position while Hager was recovering. According to Henry, he did not recall describing the job as requiring much physical work. Rather, Henry said that he spent only about fifteen minutes per 2-1/2-hour class demonstrating construction skills for the students and that, sometimes, weeks would go by during which he would not have to demonstrate any skills. However, Henry also stated that, on his own initiative, he sometimes climbed, lifted, knelt, or bent beyond the physical range the skill demonstrations required.

Having concluded that Hager could not perform the essential functions of the job, in spring 1996, the school system gave him a different job. Hager acknowledged that this job transfer did not offer him a lower salary. In fact, the school system paid Hager at the same rate he had been paid previously, and even continued to pay him his vocational stipend of approximately $1,500. Nevertheless, Hager alleged that Jeszke threatened that he, Hager, could lose his job and his builder's license if he continued to seek an accommodation. Robert Bigelow, another building trades instructor, also reportedly heard Jeszke tell Hager, "You won't have a job at Warren Consolidated if you keep trying for an accommodation."

Hager also claimed that Jeszke retaliated against him by depriving him of the opportunity to earn overtime pay for teaching an extra building trades class, which Hager had done from 1988 until 1994. Because teaching two classes constituted full-time employment, the school system paid Hager overtime for teaching the third class. The school system, however, did not offer the third class for the 1994-1995 school year. The school system and Jeszke claimed that the third class was no longer offered because student enrollment had declined, observing that Hager had written a letter to Jeszke in 1992 in which he discussed dropping the third class, long before Hager first requested an accommodation. Hager, however, noted that a letter Jeszke wrote to him in March 1994 indicated that enrollment in the building trades program was "high" and that the school system dropped the class only half a year later, in fall 1994, *after* he requested the accommodation.

II. Procedural History

In 1996, Hager sued the school system and Jeszke, alleging that their failure to accommodate him constituted discrimination on the basis of handicap and that denying him the opportunity to teach an additional class constituted unlawful retaliation for requesting an

accommodation. Hager also claimed that defendants committed intentional infliction of emotional distress and violated public policy.

Defendants first moved for summary disposition of all these claims except for the retaliation claim. In fact, defense counsel stated at the hearing on the motion for summary disposition that a dispute concerning genuine issues of material fact related to Hager's retaliation claim existed. The judge originally presiding over the case, Judge Steeh, granted defendants' partial motion for summary disposition in October 1997, holding that, as a matter of law, "[p]laintiff's handicaps caused him to be unqualified for the position." Judge Steeh also held that "[d]efendant[s] more than reasonably accommodated [p]laintiff by placing him in a classroom setting where no physical labor was involved."

Later, defendants moved for summary disposition of Hager's remaining retaliation claim. In February 1998, Judge Steeh denied the motion, holding that Hager had presented documentary evidence of retaliation. Judge Steeh further noted:

> Plaintiff has given testimony indicating defendant Jeszke told plaintiff that he would not have a job at Warren Consolidated Schools if plaintiff made a request for accommodation under the Handicappers' Civil Rights Act. Plaintiff's testimony further indicates that defendant Jeszke threatened plaintiff with the loss of his builder's license. Finally, plaintiff's testimony indicates defendant Jeszke never accommodated plaintiff's handicap to the extent determined by assistant superintendent Lawrence Beckett. It is undisputed that plaintiff was transferred from his position as a building trades teacher. . . .
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> . . . In addition to reassignment or transfer to other duties, plaintiff claims he lost a 40% pay differential which he had been receiving during the years he was assigned as a building trades teacher. The loss of pay could be seen as a form of retaliation, despite defendant's contention that plaintiff's base pay rate was not reduced.[4]

A visiting judge, Judge Brookover, subsequently took Judge Steeh's place presiding over this case. Because defendants' trial brief asked the trial court to dismiss Hager's retaliation claim,[5] Judge Brookover treated the brief as if it renewed defendants' motion for summary disposition on the retaliation claim. After the parties filed supplemental briefs, Judge Brookover granted the motion. He held that none of the allegedly retaliatory actions constituted an ultimate employment decision after Hager asked for an accommodation, except for Hager's allegation that Jeszke eliminated the third building trades class, thereby denying Hager the opportunity to

[4] Citations omitted.

[5] Though Hager has submitted a copy of defendants' trial brief among the appendices to his brief on appeal, and though the trial court docket statement refers to this brief, we cannot locate it in the trial court record. We assume that defendants' trial brief did make this request because we have been able to find a number of other documents entered in the trial record both before and after this brief was allegedly filed in which defendants asked the trial court to dismiss the remaining retaliation claim. In fact, Hager filed a responsive brief in which he referred to defendants' "third motion for summary disposition."

earn overtime pay. Though the parties could not agree on the specific enrollment level of the building trades program, Judge Brookover concluded that enrollment "had already declined by the time the third session was eliminated." Judge Brookover also noted that none of Hager's successors had taught an extra building trades class. He reasoned that the evidence clearly showed that defendants' decision to eliminate the third class was not retaliatory, which meant that Hager would not be able to prove retaliation at trial. Therefore, in September 1999, Judge Brookover granted defendants' motion for summary disposition and dismissed Hager's sole remaining claim even though Judge Steeh had refused to do so earlier in the action.

III. Standard Of Review

On appeal, Hager challenges only (1) Judge Steeh's October 1997 order summarily disposing of his accommodation claim and (2) Judge Brookover's September 1999 order summarily disposing of his retaliation claim. We review de novo orders granting or denying summary disposition.[6] Further, this de novo standard of review is appropriate because part of Hager's argument concerning Judge Brookover's September 1999 order summarily disposing of his retaliation claim raises questions of law concerning the court rules.[7]

IV. Accommodation

Hager contends that Judge Steeh erred in summarily disposing of his accommodation claim for two reasons. First, he claims, the record supports his allegation that Jeszke refused to implement the accommodation to which he was entitled before he injured his knee. Second, he asserts, defendants refused to grant him the reasonable accommodations of an aide and a heated trailer following his knee injury.

Assuming that an employee can demonstrate that he falls within HCRA's protections,[8] an employer must reasonably accommodate the employee's disability unless the employer demonstrates that the accommodation would impose an "undue hardship" on the employer.[9] As the Michigan Supreme Court explained in *Rourk v Oakwood Hospital Corp*:[10]

> For the purposes of employment, the HCRA mandates that "a person shall accommodate a handicapper . . . unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102(2); MSA 3.550(102)(2). The plaintiff bears the burden of proving an employer violated the HCRA accommodation mandate; if the plaintiff is successful, the burden shifts to the employer to demonstrate that it cannot reasonably accommodate the plaintiff without undue hardship. MCL 37.1210(1); MSA 3.550(210)(1); *Gloss v General Motors Corp*, 138 Mich App 281; 360 NW2d 596 (1984).

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[6] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[7] *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999).

[8] See *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998).

[9] MCL 37.1102(2).

[10] *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 28; 580 NW2d 397 (1998).

However, the employee may rebut the employer's proof of an undue hardship resulting from an accommodation by showing with a preponderance of the evidence that the accommodation would not cause a hardship.[11]

The record reveals that Jeszke did not require Hager to perform "the actual, physical, hands-on work" of preparing the basement floor. Rather, Jeszke required Hager to see that the work was performed. This entailed supervising the students while *they* performed the work. Thus, Hager has not demonstrated that Jeszke refused to implement his accommodation with respect to relieving him of physical tasks.

Moreover, the school system was not required to provide Hager with an aide and a heated trailer. The employer's duty to reasonably accommodate extends only to altering physical structures to allow access to the place of employment and to modifying peripheral job duties.[12] Here, Hager's requested accommodations involved purchasing new structures and hiring new staff. Further, although the employer's duty to accommodate does not extend to providing the employee with a different job,[13] this is precisely what the school system did for Hager. In this case, rather than failing to reasonably accommodate Hager, defendants went beyond their statutory duty to accommodate him. Defendants transferred Hager to another teaching position that he can perform despite his physical conditions. Indeed, in Hager's first accommodation request, he asked to be notified of other job openings, albeit at the high school level. The HCRA does not specifically entitle a plaintiff to an accommodation of his choice, but merely provides for a reasonable accommodation.[14] Defendants plainly satisfied any statutory duty to accommodate Hager. Consequently, Judge Steeh did not err when summarily disposed of Hager's accommodation claim.

V. Retaliation

A. Reconsideration

Hager first contends that Judge Brookover erred in granting reconsideration of Judge Steeh's February 1998 order denying defendants summary disposition of the retaliation claim under MCR 2.119(F). MCR 2.119(F) provides in pertinent part:

> (1) Unless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion.

Hager emphasizes the mandatory time limitations imposed in MCR 2.119(F)(1), noting that defendants took far longer than fourteen days to seek reconsideration of the order. In fact, Judge

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[11] MCL 37.1210(1).

[12] *Rancour v Detroit Edison Co*, 150 Mich App 276, 279; 388 NW2d 336 (1986).

[13] *Rourk, supra* at 27.

[14] See MCL 37.1102(2); see, generally, *Ansonia Bd of Ed v Philbrook*, 479 US 60, 68-69; 107 S Ct 367; 93 L Ed 2d 305 (1986).

Steeh entered his order denying summary disposition of the retaliation claim on February 5, 1998, and defendants did not ask for dismissal of this claim until March 1999.[15]

Had defendants actually moved for reconsideration of Judge Steeh's February 1998 order, we would agree that the mandatory language in MCR 2.119(F)(1) would have required Judge Brookover to deny the motion on procedural grounds if Hager challenged the motion for reconsideration as untimely.[16] There is no question that defendants failed to ask Judge Brookover to consider dismissing the retaliation claim despite Judge Steeh's February 1998 order within fourteen days of that order. However, we have yet to find any evidence in the record that defendants moved for reconsideration of the February 1998 order rather than moving for summary disposition an additional time in spring 1999. Even if defendants had moved for reconsideration, we have not found any indication that Hager objected to the motion as untimely.

Nor has Hager identified any case law to support his argument that the sole procedure for seeking dismissal of the retaliation claim following Judge Steeh's February 1998 order was a motion for reconsideration. Nothing in the court rules explicitly prohibits moving for summary disposition more than once. To the contrary, MCR 2.116(B)(2) states that "[a] motion under this rule may be filed at any time consistent with subrule (D) and subrule (G)(1) . . . ." MCR 2.116(D) provides no limitation on the timing or number of motions for summary disposition that a party may bring under MCR 2.116(C)(8) and (10), the grounds on which defendants relied in this case. MCR 2.116(G)(1) does nothing more than indicate that the general practice governing motions set out in MCR 2.119 applies to motions for summary disposition with the exception of certain filing requirements also prescribed in MCR 2.116(G)(1). Critically, though MCR 2.116(G)(1) refers to MCR 2.119, neither court rule attempts to define a renewed or additional motion for summary disposition as a motion for reconsideration.

Case also law supports our conclusion that it was not error for Judge Brookover to consider and decide defendants' third motion for summary disposition. In the last eighteen months alone, the Michigan Supreme Court has issued at least three opinions in which a party moved for summary disposition more than once. For instance, in *Michalski v Bar-Levav*,[17] which was also an HCRA case, the trial court initially denied the defendant's motion for summary disposition without prejudice, but the defendant renewed the motion after completing discovery.[18] Not once in any of these opinions has the Supreme Court commented negatively on this procedure of asking the trial court to dismiss an action pursuant to multiple motions for summary disposition. Hager has also failed to provide any authority disapproving of this

[15] The earliest place in the trial court record that we can find defendants asking for the remaining claim to be dismissed again is in their March 1999 reply to Hager's motion in limine.

[16] See *Gavulic v Boyer*, 195 Mich App 20, 24, n 2; 489 NW2d 124 (1992), overruled on other grounds *Allied Electric Supply Co v Tenaglia*, 461 Mich 285, 289; 602 NW2d 572 (1999) ("While we note that Boyer's motion for rehearing was not filed within the fourteen-day period mandated by MCR 2.119[F][1], we conclude that plaintiff's failure to object to its timeliness before the trial court precludes consideration of any arguments related to that issue on appeal.").

[17] See *Michalski v Bar-Levav*, 463 Mich 723, 727, n 5; 625 NW2d 754 (2001).

[18] *Bandit Industries, Inc v Hobbs International, Inc*, 463 Mich 504, 508; 620 NW2d 531 (2001); *Nabozny v Burkhardt*, 461 Mich 471, 474, n 3; 606 NW2d 639 (2000).

approach to summary disposition in this case. Thus, there is no reason to read into the court rules any limitation on the number of motions for summary disposition defendants could bring in order to force us to interpret defendants' request for dismissal as a motion for reconsideration.

One other point bears mentioning with regard to our conclusion on this issue. We see nothing inherently unfair in our determination that defendants' procedure for seeking dismissal of the retaliation claim was cognizable under the court rules in the instant case. The record leaves no doubt that defendants were asking Judge Brookover to dismiss the remaining claim under the summary disposition rule. Hager also availed himself of the opportunities to respond to this motion fully in writing and at the hearing. Consequently, we have no reservation concerning the conclusion that Hager is not entitled to reversal on the basis of this argument.

B. Factfinding

Hager next contends that, in granting the motion for summary disposition, Judge Brookover improperly made a factual finding when he concluded:

> Elimination of the third Building Trades II class session, with the consequent reduction on [sic] pay [for Hager], might constitute such a[n ultimate employment] decision [for the purposes of determining discrimination under the HCRA]. But the evidence clearly shows this transaction was not an act of retaliation. *Enrollment in the Building Trades II program had already declined by the time the third session was eliminated for the 1995-1996 school year*. Plaintiff was not transferred from his Building Trades position until the spring of 1996. None of plaintiff's successors in the Building Trades II course taught a third session, nor has there been a third session since plaintiff was transferred. Plaintiff will be unable to show retaliation at trial.
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> The exhibits also show plaintiff was not discharged or demoted as a teacher at Warren Consolidated Schools. Nor was he denied leave or a promotion. Rather, plaintiff was transferred to a job which did not provide extra compensation for extra hours worked. *Defendants have given evidence indicating the third session for the Building Trades II course was cancelled because enrollment dropped*. Defendant's [sic] contention that enrollment in this course dropped is buttressed by the fact that plaintiff's replacements for the Building Trades II course, Quinlan [sic] Henry and Daniel Baterian, were never scheduled to teach a third session of Building Trades II.
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> *Although plaintiff has shown defendant Jeszke once indicated in a memorandum that enrollment for the Building Trades II course was high, this document is not particularly relevant because it comes from a period six months prior to the decision to drop the third session for Building Trades II*. Plaintiff has presented no evidence indicating enrollment or prospective enrollment was sufficiently high, at the time course scheduling was made, to justify scheduling a third session of the Building Trades II course.
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> The extensive evidence no presented by the parties clearly shows plaintiff cannot demonstrate he suffered [an] adverse employment action within the

> meaning of the retaliation provision found at § 602 of the Michigan Handicappers' Civil Rights Act. Since plaintiff cannot show retaliation, his remaining claim is without factual support and must be dismissed.[19]

In essence, Hager claims that Judge Brookover found that being denied the opportunity to teach a third class for overtime was not retaliation but was a response to low enrollment, a fact that Judge Brookover had previously characterized as "easily determinable." Hager contends that this error was even worse because the finding was contrary to Judge Steeh's earlier conclusion that "[t]he loss of pay [from being denied an opportunity to teach the third class] could be seen as a form of retaliation." Further, Hager claims that Jeszke's deposition testimony suggests that the decision not to offer the third Building Trades II class was made at about the same time Jeszke wrote the memorandum referring to "high" enrollment, not six months later as Judge Brookover concluded.

The general rules governing a motion for summary disposition under MCR 2.116(C)(10) are well known. 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.[20] 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.[21] Only if there is no factual dispute, making the moving party entitled to judgment as a matter of law, would summary disposition be appropriate.[22]

It is also important to remember that, 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.[23] Judge Brookover's comments at the hearing on the motion for summary disposition and in the resulting opinion and order dismissing the case suggest that he engaged in just this type of evidence weighing and factfinding. Defendants' evidence of low enrollment may have been the most believable evidence available. However, Hager did counter their evidence with his own evidence of "high" enrollment, which was all that was necessary at this stage of the proceedings.[24] Hager's case would have been substantially stronger if he had been able to provide other evidence that the enrollment was high, such as enrollment statistics. However, defendants were not able to provide any statistics and, as a result, relied on similarly circumstantial evidence of enrollment, making the evidence much more evenly matched than Judge Brookover's comments suggest. That Judge Brookover dismissed Hager's evidence as "not particularly relevant" and concluded that enrollment was a "question of fact which is easily

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[19] Emphasis added.

[20] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[21] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[22] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[23] See *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

[24] See MCR 2.116(G)(4).

determinable" reveals that he sorted and weighed the quality of Hager's evidence in order to resolve a factual dispute material to whether defendants were using falling enrollment as a pretext to disguise their discriminatory animus.[25]

We do not agree with Hager that Judge Brookover's evidence weighing and factfinding was inappropriate because it differed from Judge Steeh's findings; Judge Steeh was no more entitled to weigh the evidence or make a factual finding than was Judge Brookover. However, Hager is correct in noting that the record does not specifically support Judge Brookover's determination that defendants made the decision to drop this third Building Trades II class six months after Jeszke drafted the memorandum referring to "high" enrollment. Conversely, the record does not definitively establish that defendants actually decided to drop the third class at the same time Jeszke drafted the memorandum; rather the record establishes only that it was possible the decision occurred then. More accurately, there is a debate in the record regarding this question. We therefore agree with Hager's overarching legal proposition that Judge Brookover erred in weighing the evidence and making findings of fact. Nevertheless, we explain below why we must affirm his decision to dismiss the retaliation claim.

C. Alternative Grounds To Affirm

(1) Statutory Prohibition Against Retaliation

MCL 37.1602, the portion of the HCRA concerning retaliation, makes it unlawful for "[a] person or 2 or more persons" to:

> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

Thus, the text of MCL 37.1602 indicates that the first step in proving retaliation is demonstrating one of two circumstances. First, the plaintiff must demonstrate that he opposed a violation of HCRA. Alternatively, the plaintiff must (a) make a charge, (b) file a complaint, or (c) testify, assist or participate in an investigation, proceeding or hearing under HCRA. Generally speaking, a person who satisfies the requirements under either of the two basic prongs of MCL 37.1602(a) is said to be engaging in a "protected activity."[26] Second, when a plaintiff has engaged in this protected activity by opposing a violation of the HCRA, he must inform his employer that he

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[25] See *Rollert*, *supra* at 538 (describing the components of the burden shifting scheme, including pretext, that usually applies in discrimination cases). But see *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 835 (2001) ("The shifting burdens of proof described in *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)] are not applicable if a plaintiff can cite direct evidence of unlawful discrimination."); see also *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 806-807; 584 NW2d 589 (1998), adopted by conflict panel 233 Mich App 560, 562; 593 NW2d 699 (1999) (burden-shifting framework does not apply to HCRA discrimination claim if there is direct evidence of discriminatory animus).

[26] See *Mitan v Neiman Marcus*, 240 Mich App 679, 682; 613 NW2d 415 (2000).

objects to the violation in order to have a cause of action.[27] Essentially, this second step in the analysis focuses on notice to the employer. Notice to the employer is inherent in the alternative form of protected activity that involves making a charge, filing a complaint, or becoming involved in an investigation, hearing or proceeding. The third and final step in making out a prima facie case of retaliation requires evidence of the retaliation itself. Not just any discriminatory or adverse action will suffice as evidence of retaliation. As the word "because" in the statute makes abundantly clear, the retaliation must be causally connected to the plaintiff's protected activity.[28] Further, the word "retaliate" specifically implies that the employer is responding to some action by the plaintiff and, in this context, the event triggering the employer's retaliation must be a protected activity.[29] In sum, the plaintiff must prove that he engaged in protected activity, that the employer had notice of the protected activity, and that the employer retaliated because the plaintiff engaged in that protected activity.[30]

Self-evidently, the chronology or sequence of events underlying a retaliation claim is important, with notice the key connection between protected activities and retaliation. If the alleged retaliatory act occurred before the employer knew that the employee was opposing an alleged violation, there can be no causal connection between the protected activity and the employer's action and, therefore, no liability under MCL 37.1602.[31] Within the context of this case, the chronology of events is the subject of considerable dispute. As we outlined above, weighing the evidence and engaging in factfinding is not appropriate when considering a motion for summary disposition. Though the analysis may consider the evidence closely, the goal is to determine only whether a dispute, when one exists, is relevant to a material fact in this cause of action.

(2) Protected Activity

The record indicates that Hager never made a charge that defendants had violated the HCRA before defendants denied him the opportunity to earn overtime. Nor is it clear that he assisted in an investigation of an HCRA investigation, or otherwise participated in a hearing or proceeding under the HCRA before defendants denied him this overtime. This contradicts any inference that defendants retaliated against Hager for making a formal charge or assisting in an investigation of a violation of the HCRA. Thus, the only remaining protected activity in which Hager could have engaged was "oppos[ing]a violation" of the HCRA.

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[27] See *id*.

[28] Compare *Random House Webster's College Dictionary* (1997), p 117 ("because" means "for the reason that; due to the fact that") and p 208 ("cause" means "the reason or motive for some action").

[29] See *id*. p 1109 ("retaliate" means "to return like for like" or "to requite or make return for [a wrong or injury] with the like").

[30] See *Mitan, supra* at 681-682 quoting and adopting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

[31] See, generally, *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 279-280; 608 NW2d 525 (2000) (discussing connection between notice and causation under the Whistleblower's Protection Act, MCL 15.362, which also prevents retaliation).

Hager, in his complaint, said that defendants retaliated against him for "exercising his rights as a handicapped individual, or for other protected activity Plaintiff has engaged in . . . ." Technically, this claim alluded to an actual violation of Hager's rights under HCRA. We have already concluded that defendants went far beyond any statutory duty they had to accommodated Hager. However, the record reveals that Hager opposed what he perceived to be Jeszke's attempt to impede any forthcoming accommodations, which prompted several meetings and involved his union. Hager also asked for additional accommodations. By the slimmest of margins,[32] this satisfied his obligation to demonstrate whether he had engaged in a "protected activity" by "oppos[ing]a violation" of HCRA.

(3) Notice

There is ample evidence in the record that Hager communicated to defendants that he was not satisfied with the type and extent of accommodations offered to him. There is also plentiful evidence that Jeszke thought Hager had not been forthcoming about the accommodations he was entitled to receive, that Jeszke thought Hager had failed to work in a cooperative fashion to resolve the disagreement over these accommodations, and that Jeszke thought Hager had also failed to supervise his students adequately within his capabilities. There is little question that defendants knew that Hager was attempting to assert what he believed to be his rights under the HCRA, which Hager believed defendants had wrongly denied him.

Further, the grievances that Hager filed may have also served to place his employer on notice that he was opposing what he believed to be a violation of HCRA. The record includes several documents consisting of handwritten notes taken at a meeting Hager, Jeszke, Antonucci, and another individual attended as part of a grievance Hager filed against Jeszke. The notes, which are a rough record of what each person said, show that Jeszke said, "The grievance states you [Hager] were direct[ed] to perform tasks in violation of you[r] accommodations."[33] Further, Hager reportedly stated at the meeting that he and Jeszke "still [had] a conflict" concerning the work he would perform at the construction site.

While the dividing line between asserting the right to a reasonable accommodation and explicitly opposing efforts to deny such a right may be a particularly fine one, it is nevertheless a line that case law draws. In *Mitan v Neiman Marcus*,[34] this Court held that it was not enough for a plaintiff to have complained about unarticulated "job discrimination" and "job harassment." In this case, however, the discrimination alleged in the grievance was specifically a violation of the

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[32] We assume, because we have not been asked to decide, that Hager did not have to provide evidence that he opposed an actual violation of the HCRA in order to consider his conduct protected activity. See, generally, *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312-1313 (1989) ("A person opposing an apparently discriminatory practice does not bear the entire risk that it is in fact lawful; he or she must only have a good faith belief that the practice is unlawful.").

[33] Capitalization altered.

[34] *Mitan, supra* at 683.

accommodations to which Hager thought he was entitled under the HCRA.[35] This was sufficient, although again just barely, to establish the notice that is part of Hager's prima facie case.

(4) Retaliation

In his September 1999 order summarily disposing of Hager's retaliation claim, Judge Brookover noted that Hager had identified seven events that he claimed constituted adverse employment actions. Of these events, Judge Brookover concluded that only the allegation that the school system eliminated the additional building trades class – for which Hager had historically earned overtime – could rise to the level of an "ultimate employment decision." An "ultimate employment decision," as the standard is used in the federal courts, must be material and must embrace actions such as hiring, granting leave, discharging, promoting, or compensating.[36] We have no reason to disagree with Judge Brookover's narrow classification of this action as an "ultimate employment decision." However, only a minority of the federal circuits adhere to this as a standard for retaliation.[37] In contrast, many federal circuits have overtly criticized the "ultimate employment decision" standard as unsupported in case law and in the relevant statutory language, and inconsistent with the purpose of the anti-retaliation provision's remedial purpose.[38] Significantly, we can find no evidence that the United States Supreme Court has resolved this split between the circuits.

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[35] Again, we assume without deciding that whether defendants had actually violated Hager's rights under the HCRA when he claimed that they had done so is not critical to this retaliation claim.

[36] See *Ledergerber v Stangler*, 122 F3d 1142, 1144 (CA 8, 1997); *Mattern v Eastman Kodak* Co, 104 F3d 702, 707 (CA 5, 1997).

[37] See *Ledergerber*, *supra*; *Mattern*, *supra*.

[38] See, e.g., *Von Guten v Maryland*, 243 F3d 858 (CA 4, 2001) ("'[U]ltimate employment decision' is not the standard in this circuit."); *Ray v Henderson*, 217 F3d 1234, 1242 (CA 9, 2000) ("The government urges us to turn from our precedent, and to adopt the Fifth and Eighth Circuit rule that only 'ultimate employment actions' such as hiring, firing, promoting and demoting constitute actionable adverse employment actions. But we cannot square such a rule with our prior decisions.") (footnote omitted); *Gunnell v Utah Valley State College*, 152 F3d 1253, 1264-1265 (CA 10, 1998) (rejecting narrow definition of "adverse employment action" used in other circuits); *Wideman v Wal-Mart Stores, Inc*, 141 F3d 1453, 1456 (CA 11, 1998) ("We join the majority of circuits which . . . hold that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. The Fifth and Eighth Circuits' contrary position is inconsistent with the plain language of 42 USC 2000e-3(a) . . . . Moreover, our plain language interpretation of 42 USC 2000e-3(a) is consistent with Title VII's remedial purpose. Permitting employers to discriminate against an employee who files a charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination.); *Knox v Indiana*, 93 F3d 1327, 1334 (CA 7,1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. It need only be an adverse employment action, as we have often held.").

There is only one published opinion concerning retaliation in the canon of Michigan case law that even mentions an "ultimate employment decision" in the context of a retaliation claim. In *Meyer v City of Centerline*,[39] the plaintiff alleged that the defendants retaliated against her after she sued Centerline for discriminating against her on the basis of her sex.[40] With respect to the adverse action element of her retaliation claim, the plaintiff claimed that her supervisor refused to respond to her request to intervene when her coworkers harassed her because she had filed this other suit.[41] At trial, the trial court barred her from introducing in evidence "sixteen offensive notes or cartoons that were allegedly left on her desk or around her work station . . ."[42] In essence, these notes or cartoons would have allowed the jury to infer that her supervisor's inaction was retaliatory because these notes and cartoon graphically demonstrated the objective need for his intervention in the matter.

On appeal in *Meyer*, this Court examined the anti-retaliation provision in the Civil Rights Act (CRA), MCL 37.2701, which is identical to the anti-retaliation provision in the HCRA, 37.1602.[43] The Court principally defined the concept of an adverse action in the retaliation context by resorting to the definition used in discrimination suits under the CRA.[44] Relying on *Wilcoxon v Minnesota Mining & Mfg Co*,[45] the *Meyer* Court concluded

> that an adverse employment action (1) must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff.[46]

Only after establishing this baseline definition of an adverse action did the *Meyer* Court turn to federal precedent, which the Court recognized was not binding.[47] Citing cases[48] from the Second[49] and Sixth[50] Circuit Courts of Appeal, the *Meyer* Court explicitly aligned Michigan law with the majority of federal circuits rejecting the "ultimate employment decision" standard. Indeed, the Court specifically "agree[ed] with the cases holding that a supervisor's decision not to take action to stop harassment by co-workers in retaliation for an employee's opposition to a

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[39] *Meyer v City of Centerline*, 242 Mich App 560; 619 NW2d 182 (2000).

[40] *Id*. at 563.

[41] *Id*.

[42] *Id*. at 568.

[43] *Meyer, supra* at 568.

[44] *Id.*

[45] *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999).

[46] *Meyer, supra* at 569, quoting *Wilcoxon, supra*.

[47] *Meyer, supra* at 569.

[48] *Id*. at 569-572.

[49] *Richardson v New York State Dep't of Correctional Service*, 180 F3d 426, 446 (CA 2, 1999).

[50] *Morris v Oldham Co Fiscal Court*, 201 F3d 784, 791 (CA6, 2000); *Booker, supra*.

violation of the Civil Rights Act can constitute an adverse employment action";[51] though not an ultimate employment decision, a supervisor's failure to stop harassment was actionable, adverse conduct in the context of a retaliation claim.[52] In the sole instance in which the *Meyer* Court referred to the "ultimate employment decision" standard by name, it was in a parenthetical notation following secondary federal precedent that the Court rejected.[53] Thus, *Meyer* makes clear that Michigan interpretations of civil rights legislation are controlling and that, even though federal authority may be persuasive in some instances, the "ultimate employment decision" standard does not currently apply to state civil rights retaliation claims in Michigan.

Given *Meyer*, the next step in analyzing Hager's claims is to determine whether any of the seven actions he claims were adverse meet the material and objective test outlined in *Wilcoxon*.[54] According to Hager, he was denied the opportunity to work overtime, required to "check in," asked to attend numerous meetings at the end of the workday, was told that if he pursued the "accommodation thing" he might lose his job and builder's license, was evaluated "out of cycle," and another employee was asked to write a letter saying that Hager was "not getting along" with students in the building trades program. Of these seven actions, Hager's claim that he was denied the opportunity to work overtime is the most substantial. However, while there may be a statutory or contractual right to be paid for overtime work actually performed,[55] Hager has provided no authority supporting his claim that he had a right to be given the opportunity to perform overtime work. Consequently, even if material, this action was not adverse to Hager's rights.

Conversely, the other actions Hager points to may be adverse, but either they are not material or they lack an objective basis. For instance, the record leaves us no way to infer that the manner in which defendants kept track of Hager's whereabouts, asked him to attend meetings, and evaluated him was anything more than "'mere inconvenience [to Hager] or an alteration of [his] job responsibilities.'"[56] Though the verbal threats and attempt to procure a negative letter are, indeed, troubling if they are true, we cannot conclude that they are objectively adverse *actions*. Stated another way, despite the threats, Hager received a lateral transfer to a position that accommodates his physical limitations. Hager has provided no evidence that these toothless threats had any material effect on him or his employment in any respect. Nor has he provided evidence that defendants actually procured any negative letter, regardless of whether the allegation had a foundation in fact. In the end, though the record undeniably reveals tension, if not sincere dislike, between Hager and defendants, Hager cannot point to evidence that

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[51] *Meyer, supra* at 571.

[52] *Id*. at 571-572.

[53] *Id*. at 571, citing *Manning v Metropolitan Life Ins Co, Inc*, 127 F3d 686 (CA 8, 1997).

[54] *Wilcoxon, supra* at 364.

[55] See, e.g., 29 USC 207(a) (overtime provisions of the Fair Labor Standards Act of 1938); *Olson v City of Highland Park*, 312 Mich 688, 694; 20 NW2d 773 (1945) ("employees" were entitled to overtime compensation under the city charter).

[56] *Id*., quoting *Crady v Liberty Nat'l Bank & Trust Co*, 993 F2d 132, 136 (CA 7, 1993).

defendants took action against him in retaliation; the evidence merely demonstrates that this tension was his "'subjective impression'" of his work environment.[57]

Without proof of adverse action by defendants, there is no need to examine causation. Though we disagree with his reasoning, Judge Brookover properly granted defendants' motion for summary disposition with respect to Hager's retaliation claim because Hager failed to prove that a dispute of material fact existed with respect to whether defendants actually retaliated against him.[58]

Affirmed.

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

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[57] *Wilcoxon, supra* at 364, quoting *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876 (CA 6, 1996), quoting *Kelleher v Flawn*, 761 F2d 1079, 1086 (CA 5, 1985).

[58] *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").