STATE OF MICHIGAN

COURT OF APPEALS

JOAN GRIFFOR,

Plaintiff-Appellee,

v

DTE ENERGY,

Defendant-Appellant.

UNPUBLISHED
July 9, 2013

No. 301724
Wayne Circuit Court
LC No. 08-016612-NO

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Defendant, DTE Energy, appeals by leave granted the trial court's opinion and order granting reconsideration to plaintiff, Joan Griffor, of the trial court's previous order granting summary disposition to DTE. On order of this Court, defendant's motion for immediate consideration and for stay pending the resolution of the appeal was granted.[1] We reverse.

I. FACTUAL BACKGROUND

Plaintiff, Joan Griffor, was employed as a Security Specialist for DTE at the Belle River Power Plant and had been working for DTE since 1981. Plaintiff was diagnosed with breast cancer and had Attention Deficit Hyperactivity Disorder (ADHD). Todd Dusky became her supervisor on November 29, 2004, when plaintiff was on medical leave.

An incident relevant to this appeal occurred in December of 2006, when DTE employee Juanita Taylor brought a gun to the power plant and left it on the passenger seat of her car parked on company property. Plaintiff was on duty at the time and while she called the shift supervisor's phone, she only reached a clerical assistant, and did not notify the plant manager or shift supervisor. After Taylor was identified as the owner of the car, plaintiff planned on escorting her to the vehicle. However, plaintiff had to go to the bathroom to address a medical issue related to her breast cancer surgery, so asked one officer to stay near Taylor's vehicle and

[1] *Griffor v DTE*, unpublished order of the Court of Appeals, entered April 14, 2011 (Docket No. 301724).

another to inform plaintiff when Taylor arrived. When plaintiff returned from the bathroom, she realized that Taylor was already approaching the car and the two officers had not done as asked.

Plaintiff met up with Taylor when she was returning to the building, and informed her that she was not allowed to have a gun on the premises. Taylor informed plaintiff that she was unaware of the policy, she had a license for the gun, she had locked the gun in the glove compartment, and she only had the gun because she was involved in the NAACP and had been receiving threatening phone calls. According to plaintiff, she visually inspected Taylor to ensure that the gun was not on her person and went to the car to see if the gun was still on the seat.

Plaintiff contacted Dusky after the incident while she was leaving work, and Dusky became upset that she had not informed him sooner. Plaintiff testified that she was aware that DTE prohibits the possession of firearms on company property, that contraband should be confiscated and photographed, that an employee with a license to carry a gun had to remove the gun from the premises, and that as a security officer she had the authority to frisk a person and contact a superior if she was uncomfortable with a task like unloading a weapon.

Dusky met with plaintiff to discuss the gun incident, and plaintiff claimed that he did so in a cubicle where other employees could hear. Plaintiff received a written reprimand from Dusky for her handling of the gun incident. While she filed a dispute resolution, Dusky explained that plaintiff failed to adhere to company policy when she failed to contact her supervisor immediately, she allowed Taylor to go unescorted to the vehicle, she did not confiscate or unload the weapon, and she failed to verify if the weapon was in the glove compartment. Dusky's decision to discipline plaintiff was upheld after an internal review process, and the incident was noted on her performance evaluation.

The second major incident relevant for this appeal occurred in November of 2007, involving a car colliding with a fence on company property. While plaintiff was not on duty when the actual accident occurred, her shift started the next morning, Friday, at 7:00 a.m. Plaintiff waited to contact Dusky until the following Monday, claiming that this was when she finished collecting all of the pertinent information. Dusky claimed that this was unacceptable, as plaintiff was under written warning to contact him immediately for all incidents. A subsequent telephone conversation between plaintiff and Dusky became adversarial, plaintiff became upset, and she asked Dusky for assistance contacting the Employee Assistance Program (EAP), which he refused.

Plaintiff received notice from Dusky that she was receiving a Decision Making Leave (DML) for her handling of the fence incident, which entailed one day off without pay and being ineligible to receive a REP benefit or merit increases. Plaintiff again filed a dispute resolution, and the DML was reduced to a written coaching for several reasons including the fact that similar situations involving other employees did not result in discipline.

In May of 2008, plaintiff filed a complaint with Human Resources regarding a hostile work environment. She alleged that Dusky had created a hostile work environment through intimidation and harassment due to her age, gender, and ADHD disability. Plaintiff then initiated this instant lawsuit against DTE, alleging the following three counts: (I) discrimination based on perceived disability and harassment in violation of the Persons with Disabilities Civil

Rights Act (PWDCRA), MCL 37.1101 *et seq.*; (II) discrimination based on age and gender and harassment in violation of the Michigan Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*; and (III) retaliation in violation of the CRA.[2]

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff produced no evidence that any of the alleged adverse employment actions were related to disability, age, or race.[3] While the trial court initially granted defendant's motion for summary disposition, plaintiff filed a motion for rehearing and reconsideration pursuant to MCR 2.119(F). The trial court granted plaintiff's motion on all counts and allowed plaintiff to reopen proofs to establish the age of the two security guards on duty at the time of the fence incident. Defendant now appeals.

II. MOTION FOR RECONSIDERATION

A. Standard of Review

This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). In order to prevail on a motion for reconsideration, the movant generally must "show that the trial court made a palpable error and that a different disposition would result from correction of the error." *Herald Co, Inc*, 258 Mich App at 82. If the movant merely presents the same issues already ruled on, the motion generally will not be granted. *Id.* 82-83. A motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo, as are questions of law. *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012).

B. Perceived As Disabled

Generally, "[t]o prove a discrimination claim under the PWDCRA, the plaintiff must show (1) that he is disabled as defined in the act, (2) that the disability is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004) (quotation marks, citation, and brackets omitted). The plaintiff bears the burden of establishing these elements. *Id.*

Under a "perceived as disabled" claim, the plaintiff need not have a determinable physical or mental characteristic in order to establish the prima facie elements. *Michalski v Reuven Bar Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001). However, "a plaintiff must still prove that the employer perceived that the employee was actually disabled within the meaning of

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[2] In order to avoid federal jurisdiction, plaintiff amended her complaint and abandoned a claim under the Family Medical Leave Act.

[3] In her response to defendant's motion for summary disposition, plaintiff stated that she voluntarily dismissed her gender discrimination claim under the CRA.

the statute." *Chiles v Mach Shop, Inc*, 238 Mich App 462, 475; 606 NW2d 398 (1999). "In other words, showing that an employer *thought* that a plaintiff was somehow impaired is not enough; rather, a plaintiff must adduce evidence that a defendant regarded the plaintiff as having an impairment that substantially limited a major life activity—just as with an actual disability." *Id.* (emphasis added). This Court uses the following three-step inquiry when reviewing a perceived as disabled claim: (1) whether the evidence established that plaintiff's injury was a physical impairment; (2) whether plaintiff identified a major life activity that was affected by the perceived impairment; (3) whether the injury substantially limited a major life activity. *Id.* at 475-480.

"If the plaintiff presents a prima facie case of purposeful discrimination, the burden then shifts to the defendant to rebut such evidence." *Peden*, 470 Mich at 205. The employer must "articulate a nondiscriminatory rationale for the action." *Rollert v Dep't of Civil Serv*, 228 Mich App 534, 538; 579 NW2d 118 (1998). "If the employer meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a mere pretext." *Id.* (quotation marks and citation omitted).

In the instant case, the trial court abused its discretion in granting plaintiff's motion for reconsideration of the dismissal of her perceived as disabled claim. Even if Dusky knew plaintiff had ADHD and breast cancer before the alleged adverse employment actions, there is no evidence that Dusky perceived plaintiff as being impaired in any way. *Chiles*, 238 Mich App at 475. Plaintiff claims that Dusky believed she was impaired in the "major life activity" of work. However, Dusky never made any comments or engaged in any behavior that suggested he harbored a belief that plaintiff had "an impairment that substantially limited a major life activity." *Chiles*, 238 Mich App at 475. There is no evidence that Dusky attempted to prevent plaintiff from working, limited her responsibilities, or in any way changed the nature of her job after her medical conditions were revealed. While there may have been times when Dusky was dissatisfied with plaintiff's work performance, such as during the gun or fence incident, there is no evidence that his dissatisfaction derived from a perception that plaintiff's performance was a result of any impairment.

Plaintiff, however, contends that her 2006 performance evaluation established that Dusky believed she was impaired because of her medical conditions. The performance evaluation stated that plaintiff's "professional development in 2006 was limited due to medical leave. Due to this, her time in the office was spent on normal duties and allowing her to catch up on activities and administrative items that occurred during her absence." Even viewing the evidence in a light most favorable to plaintiff, this evaluation does not expose Dusky's belief that plaintiff was unable to perform her work activities when she was at work. Contrary to plaintiff's assertions, this comment only confirmed the reality that plaintiff had protracted absences during 2006 due to her medical leave, and any development at work was necessarily limited due to her absence. Further, plaintiff even acknowledged that while this comment was on her performance evaluation, it did not affect her ratings or pay.

While the trial court highlighted Dusky's refusal to help plaintiff contact EAP and plaintiff emphasizes a written comment where Dusky noted that plaintiff showing up to work in her pajamas was irrational, plaintiff failed to link these comments to any work activities that Dusky perceived were impaired. Also, even if the trial court correctly found that testimony from

other DTE employees was admissible, the proffered evidence in no way established that Dusky viewed plaintiff as impaired or discriminated against her based on that perception. None of these other employees had any pertinent information regarding how Dusky was treating plaintiff. Furthermore, while plaintiff alleges that there was an environment of discrimination at DTE, she only produced three witnesses who were not supervised by Dusky and who made no claims that Dusky treated them in a discriminatory manner. Likewise, plaintiff's previous work record has no bearing on whether Dusky perceived plaintiff as being substantially impaired.

Thus, plaintiff failed to demonstrate that defendant "perceived that [she] was actually disabled within the meaning of the statute" because she failed to produce evidence that "defendant regarded the plaintiff as having an impairment that substantially limited a major life activity[.]" *Chiles*, 238 Mich App at 475. Because plaintiff failed to establish the elements of the prima facie case, the burden never shifted to DTE to come forth with a nondiscriminatory reason for any alleged disparate treatment. In light of the lack of evidence supporting plaintiff's claim, the trial court's decision granting reconsideration of this issue constituted an abuse of discretion.

C. Age Discrimination

When a plaintiff alleges that disparate treatment occurred without direct evidence of age discrimination, she must show that: (1) she belonged to a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) the action taken occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). Plaintiff bears the burden of proving this prima facie case by a preponderance of the evidence. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). Once plaintiff has established her prima facie case, the burden shifts to defendant "to articulate a legitimate, nondiscriminatory reason for its actions[.]" *Id.* A defendant, however, does not meet "its burden merely through an answer to the complaint or by argument of counsel." *Hazle*, 464 Mich at 465 (quotation marks and citation omitted).

If defendant succeeds in producing nondiscriminatory reasons justifying its actions, plaintiff then must prove "by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext." *Plieth*, 210 Mich App at 571-572. In other words, "in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle v Malady*, 458 Mich 153, 176; 579 NW2d 906 (1998); see also *Shaw v Ecorse*, 283 Mich App 1, 25; 770 NW2d 31 (2009) ("[t]o prevail on a claim of age discrimination, a plaintiff must establish that age was a determining factor in the adverse employment action.").

On appeal, plaintiff claims that she was subjected to age discrimination in the context of the car accident that allegedly dented the fence. However, even if the trial court properly allowed plaintiff to reopen her proofs and introduce evidence that the two security guards on duty were younger than her and treated differently, plaintiff's claim still must fail. Assuming, *arguendo*, that plaintiff met the prima facie elements delineated above and the burden shifted to

defendant to proffer nondiscriminatory reasons for its actions, plaintiff failed to prove "that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle*, 458 Mich at 176. There is no indication in Dusky's written DML decision or plaintiff's resulting dispute resolution form that age had anything to do with plaintiff's punishment for the fence incident. Dusky consistently claimed that the reason justifying the punishment was that plaintiff was obligated to report incidents to him immediately and failed to do so.

Moreover, plaintiff does not dispute that she was previously disciplined for her handling of gun incident and was under written warning to report any incidents immediately to Dusky. She produced no evidence that the younger security guards were under similar direct orders. She also failed to demonstrate whether their positions, one being a contract position, involved different expectations with regard to reporting. Furthermore, while plaintiff emphasizes the letter that reduced her punishment, the letter specifically stated: "You should not consider the removal of the DML as an indication that you handled the situation in a satisfactory manner." While this letter stated that similar situations had not resulted in discipline, there is no indication that those other situations involved younger employees or employees who were under written instructions to report incidents immediately. The trial court also gave credence to whether the fence was damaged before the accident. That is not relevant. The issue was plaintiff's failure to report incidents promptly to her supervisor, not the extent of damage to the fence.

Because plaintiff produced no evidence that age played any role in Dusky's decision, she was unable to demonstrate that defendant's proffered justification "was a pretext for unlawful discrimination." *Hazle*, 464 Mich at 465-466 (quotation marks, citation, and brackets omitted). The trial court therefore chose a decision outside the range of reasonable outcomes in holding otherwise.[4]

D. Racial Retaliation

In order to establish a prima facie retaliation claim under the CRA, a plaintiff must prove: "(1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001) (quotation marks and citation omitted). "To establish causation, the plaintiff must show that his participation in activity protected by the CRA was a significant factor in the employer's adverse employment action, not just that there was a causal link between the two." *Id.* (quotation marks omitted).

[4] Plaintiff also failed to establish the elements of the prima facie case in regard to the gun incident. She produced no evidence that other employees involved in this incident were younger and treated more favorably or that Dusky made comments or engaged in behavior indicating that age was a deciding factor. Thus, plaintiff produced no evidence that the discipline resulting from the gun incident occurred under circumstances giving rise to an inference of unlawful age discrimination. *Hazle*, 464 Mich at 463.

Plaintiff alleged in the lower court that defendant retaliated against her because she opposed the racial discrimination of Taylor during the gun incident. This claim is not supported by the evidence. In regard to what constitutes protected activity, the CRA states that a person shall not "[r]etaliate 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." MCL 37.2701(a). Here, plaintiff claims that she engaged in a protected activity when she refused to treat Taylor in a racially discriminatory manner.

Plaintiff produced no evidence that she engaged in a protected activity, the first element of the prima facie case. Even accepting, as the trial court did, that plaintiff objected to defendant's disciplinary decision for Taylor, at no time during the incident or during the dispute resolution process did she base that objection on racial grounds. Rather, plaintiff objected because she felt the threats to Taylor were credible and justified Taylor's possession of the gun. Plaintiff never communicated a belief that defendant was treating Taylor differently because of race. While plaintiff highlights her unblemished work record before this incident, that does not negate the lack of evidence that she engaged in a protected activity. Moreover, Taylor may have objected to racially offensive photographs at DTE before the gun incident, but plaintiff produced no evidence that she knew of this situation at the time of the gun incident or that it played any role in her decision to oppose the discipline of Taylor.

Plaintiff likewise failed to demonstrate the second element of her prima facie case, namely, that any alleged protected activity was known to defendant. Even if plaintiff subjectively believed that she was opposing a violation of the CRA, she made no outward manifestations that she was doing so. She only communicated her belief that the threat to Taylor's life was credible, which justified Taylor's possession of the weapon. Defendant's disagreement with that opinion and decision to follow company gun policy strictly does not demonstrate an awareness that plaintiff was opposing the discipline based on racial grounds.

Furthermore, while plaintiff highlights testimony from three other DTE employees and their claims of racial discrimination, none of these employees were involved in the gun incident, none were supervised by Dusky, and none testified to similar circumstances where they were white employees who experienced discipline for allegedly standing up for a black employee.[5] Also relevant is that plaintiff testified that the other employees involved in the gun incident were punished for their behavior in failing to stay near Taylor's car and failing to alert plaintiff when Taylor arrived. The fact that other employees were disciplined for their less than satisfactory performances underscores the lack of evidence that plaintiff's punishment was related to an objection to racial discrimination.

[5] Plaintiff's testimony about a 10 year old incident involving a white woman bringing a gun to the St. Clair Power Plant is likewise unavailing. Plaintiff did not provide evidence of what defendant's gun policy was 10 years ago or if it was different at St. Clair Power Plant. She also admitted that she did not know how security personnel behaved in that circumstance, if they were disciplined, or if the white female who brought the gun to the plant was disciplined.

Lastly, in granting plaintiff's motion for reconsideration, the trial court found it significant that there were underlying factual disputes about the gun incident. However, the issue is not whether plaintiff felt she complied with company policy, but whether defendant's decision to punish plaintiff for this incident was causally connected to any type of racial considerations. Because plaintiff failed to produce evidence establishing the prima facie case, the trial court abused its discretion in granting her motion for reconsideration.

E. Harassment

While plaintiff alleged harassment claims under the PWDCRA and CRA, she failed to address these claims meaningfully in her appellate brief. Therefore, she has abandoned them. See *Gross v Gen Motors Corp*, 448 Mich 147, 162 n 8; 528 NW2d 707 (1995) ("Failure to properly brief an issue on appeal constitutes abandonment of the question."). The trial court also failed to analyze the harassment claims in its opinion granting plaintiff's motion for reconsideration. Also, as discussed repeatedly at this point, plaintiff produced no evidence that she was subjected to communication or conduct that had anything to do with disability, age, or race. See *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998). Accordingly, the trial court abused its discretion in granting plaintiff's motion for reconsideration of her harassment claims.

III. CONCLUSION

The trial court abused its discretion in granting plaintiff's motion for reconsideration of the dismissal of her perceived as disabled claim, age discrimination claim, racial retaliation claim, and harassment claims. We have reviewed any remaining arguments in plaintiff's brief and found them to be without merit. We reverse and remand for entry of an order granting defendant's motion for summary disposition. This Court does not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood