STATE OF MICHIGAN
COURT OF APPEALS

NANCY PENZATO,

Plaintiff-Appellant,

v

CONTINENTAL CABLEVISION OF MICHIGAN, INC.,

Defendant-Appellee.

UNPUBLISHED
July 5, 1996

No. 175748
LC No. 92-234226-CZ

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition in favor of defendant in this weight discrimination case. We affirm.

Plaintiff began employment with defendant on February 2, 1987. At that time, plaintiff was five feet tall and weighed approximately 170 pounds. By 1989, plaintiff had lost some weight.[1] In her complaint, plaintiff alleged that her supervisor, Carol Bouchard, discriminated against her because she was of average weight. Bouchard allegedly was "greatly overweight." According to plaintiff, Bouchard made harassing comments to her about the weight loss, and told plaintiff that she could not wear certain attire because it appeared "unprofessional."

Plaintiff also alleged that during the summer of 1989 Bouchard referred to employees of average weight, including plaintiff, as "sexy bitches." Bouchard stated that the employees wore "hooker clothes" and "hooker heels." Plaintiff also alleged that Bouchard told her that she could not take her breaks with her coworkers, and that she could not associate with former employees or her next evaluation would "not be good."

According to plaintiff, Bouchard did not speak to her except to give orders. Bouchard allegedly placed notes in plaintiff's personnel file without informing plaintiff of the notes. Plaintiff claimed that she was ordered to return to work during her scheduled breaks, and was disciplined for having a "bad

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* Circuit judge, sitting on the Court of Appeals by assignment.

attitude" and for her job performance. On May 18, 1990, Bouchard suspended plaintiff for one day because she spoke inappropriately to a coworker. Plaintiff alleged that Bouchard did not act similarly toward the other workers who were overweight.

On May 21, 1990, plaintiff resigned her employment with defendant as a "necessary result of the harassment and unfair discipline." Plaintiff alleged that her resignation acted as a constructive discharge.

Plaintiff filed a complaint in December 1992 alleging height and weight discrimination, as well as sex discrimination and unlawful retaliation. Plaintiff subsequently stipulated to the dismissal of her sex discrimination and retaliation claims.

At the hearing on defendant's motion for summary disposition, the trial court concluded that plaintiff, who was of normal, average weight, had no basis on which to bring suit under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., because the act applies only to those individuals who are extremely overweight or underweight. The trial court also noted that plaintiff voluntarily left her employment. On April 27, 1994, the trial court granted defendant's motion for summary disposition.

The Elliott-Larsen Civil Rights Act prohibits an employer from discriminating against an individual on the basis of, inter alia, weight. MCL 37.2202(1)(a); MSA 3.548(202)(10(a). The plaintiff in a case alleging unlawful discrimination initially has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. *Dubrey v Stroh Brewery Co* 185 Mich App 561, 563; 462 NW2d 758 (1990). The issue of what a plaintiff must prove to establish discrimination based on weight has not yet been decided in Michigan and is not addressed in any Michigan statute. However, we find application of the elements of a prima facie case of age discrimination equally applicable in a weight discrimination case. Therefore, a prima facie case of weight discrimination can be made by proving either intentional discrimination or disparate treatment. *Wolff v Automobile Club of Michigan,*, 194 Mich App 6, 11; 486 NW2d 75 (1992). To establish a prima facie case of weight discrimination under the intentional discrimination theory, plaintiff must show that (1) she is a member of a statutorily protected class; (2) that she was qualified for the job; (3) that she was discharged from the job; and (4) that she was replaced by someone outside the protected group. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 358; 486 NW2d 361 (1992). In proving disparate treatment, plaintiff must show that she was a member of a protected class and that she was treated differently than persons of a different class for the same or similar conduct. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993). Weight need not be the only reason or main reason for discharge, but must be one of the reasons that made a difference in determining whether to discharge a person. *Id.* at 121.

Plaintiff first argues that the trial court erred in determining that, as an individual of average weight, she is not a member of a statutorily protected class. We review de novo such questions of law.

Labor Council, Michigan Fraternal Order of Police v City of Detroit, 207 Mich App 606, 607; 525 NW2d 509 (1994).

The primary goal of judicial interpretation of statutes is to give effect to the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1995), cert pending. The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the plain meaning of the statute is clear, judicial construction is normally neither permitted nor necessary. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

The term "weight" is not statutorily defined. However, given the act's designated purpose of eliminating the effects of offensive or demeaning stereotypes, prejudices, and biases, see *Malan v Gen'l Dynamics Land Systems, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995), it appears that the Legislature was concerned that overweight people would be cast aside on the basis of inaccurate stereotypes about their abilities. Plaintiff cannot argue that she is similarly victimized.[2] An absurd result would occur if this Court were to interpret the statute to afford protection to persons who are "average" and are not subject to "offensive or demeaning stereotypes, prejudices, or biases." Accordingly, under the facts of this case, we hold that plaintiff has not established that she is a member of a statutorily protected class.[3] Plaintiff has failed to make out a prima facie case of discrimination based on weight.

Assuming arguendo that plaintiff could establish that she is a member of a protected class, we also find that plaintiff was not constructively discharged from her employment. Constructive discharge has been found where:

> [A]n employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, or stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. [*Vagt's v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994)(citation omitted).]

Here, plaintiff has not presented sufficient facts to support her allegation that her working conditions were so difficult, intolerable, or unpleasant that she was constructively discharged. Cf. *Manning v City of Hazel Park*, 202 Mich App 685; 509 NW2d 874 (1993), and *Hammond v United of Oakland, Inc*, 193 Mich App 146; 483 NW2d 652 (1992). A reasonable juror could not conclude that plaintiff's working conditions were so intolerable that a reasonable person would have felt compelled to resign.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Chad C. Schmucker

[1] The parties dispute the exact amount of the weight loss. Plaintiff claims that she lost over fifty pounds. Relying on plaintiff's medical records, defendant claims that plaintiff lost fewer than twenty pounds.

[2] This is particularly true in a case such as this, where no evidence was presented that plaintiff was replaced by a worker outside the "protected group." To hold otherwise would open the floodgates for nonmeritorious suits.

[3] Our holding is limited to the facts of this case.