# STATE OF MICHIGAN

# COURT OF APPEALS

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AZELARABE BENNANI,

Plaintiff-Appellant,

v

DEPARTMENT OF MANAGEMENT & BUDGET,

Defendant-Appellee.

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UNPUBLISHED
August 3, 2006

No. 259538
Ingham Circuit Court
LC No. 03-001658-NO

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In this Persons with Disabilities Civil Rights Act (PWDCRA) case, MCL 37.1101 *et seq*., plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings consistent with this opinion.

Defendant hired plaintiff in March 2000 as an Information Technology Manager in the Michigan Administrative Information Network Department. Plaintiff was informed in July 2000 that his performance was not satisfactory, and he was discharged in September 2000. As part of his duties, plaintiff was required to supervise programmer analyst Amy Geiger, who was hired several months before plaintiff. Geiger had multiple sclerosis, and defendant contends that his discharge resulted from his opposition to defendant's alleged discrimination against Geiger based on her condition in violation of MCL 37.1602(a).

Our review of a trial court's ruling on a motion for summary disposition is de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). At issue is section 602 of the PWDCRA, which provides as follows:

> A person or 2 or more persons shall not do the following:
>
> (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. [MCL 37.1602.]

To establish a prima facie case of retaliation under this section of the PWDCRA,

> a plaintiff must show: (1) that he 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. [*Aho v Dep't of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004).]

Once the plaintiff has established a prima facie case, '"the burden shifts to the defendant to articulate a legitimate business reason"' for the adverse employment action. *Aho*, *supra* at 289, quoting *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000). If the defendant is able to articulate a non-retaliatory reason for the adverse employment action, the plaintiff must prove that the business reason articulated by the defendant for the adverse employment action is merely pretext. *Id*. This Court construes the retaliation provision of the PWDCRA in accord with the retaliation provision of the Civil Rights Act (CRA), MCL 37.2701(a). *Mitan v Neiman Marcus*, 240 Mich App 679, 681-682; 613 NW2d 415 (2000).

The trial court dismissed plaintiff's PWDCRA claim on the singular basis that plaintiff's opposition to the allegedly discriminatory conduct was unreasonable, i.e., it was "disruptive, divisive, unreasonable and biased." This conclusion was premised on the fact that plaintiff allegedly refused his supervisor's directive to prepare a negative performance evaluation for Geiger. The trial court's ruling was in error, for failing to prepare a performance evaluation, as ordered by a supervisor, regarding the allegedly discriminated against employee is not the type of unreasonable behavior that would take the opposition activity outside the protection of the PWDCRA. In *Garg v Macomb Co Comm Mental Health Services*, 472 Mich 263, 275; 696 NW2d 646 (2005), the Supreme Court indicated that employees are not immunized for all their actions taken in opposition to discrimination, and provided some general categories when such protection might not exist:

> An employee is not immunized for any type of responsive conduct, no matter how outrageous or disproportionate, simply because it is connected with opposition to discrimination. Obviously, no employee would be protected under the act from all "retaliation" by an employer for criminal, or sabotaging, or destructive activities simply because these occurred in response to perceived employer discrimination. For purposes of analysis under § 701(a), consideration must be given to separating the motivation underlying an employee's conduct and the means by which such motivation is translated into conduct.

Plaintiff's refusal to give Geiger the evaluation as ordered by his supervisor was not a prudent decision, but it does not rise to the level of criminal behavior or other similar destructive act that would not receive protection under the PWDCRA.

In light of this conclusion, we hold that the trial court erred in granting defendant's motion for summary disposition under the principle announced in *Garg*. We offer no opinion on whether plaintiff can establish a prima facie case, or whether defendant established a legitimate, nondiscriminatory reason for the discharge. Instead, we remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray