STATE OF MICHIGAN

COURT OF APPEALS

HOWARD HOTCHKISS,

Plaintiff-Appellant,

v

JOSEPH PONTIAC, INC.,

Defendant-Appellee.

UNPUBLISHED
July 22, 1997

No. 194923
Oakland Circuit Court
LC No. 95-492170

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition on plaintiff's handicap discrimination claim. We affirm.

Plaintiff, a certified mechanic, was terminated from his position as a service technician at defendant car dealership after approximately two years. During plaintiff's initial interview with defendant's owner and another employee, plaintiff indicated that he had a heart condition. Before beginning employment with defendant, plaintiff signed an employment at-will agreement. During his employment with defendant, plaintiff advised numerous individuals of his heart condition. This condition did not affect plaintiff's performance and was never raised as an issue by anyone. In fact, despite his irregular heart beat, there was evidence that plaintiff jogged to work and lifted more than forty pounds, which was his weight restriction.

During his less than two-year tenure with defendant, two of plaintiff's three supervisors discussed with plaintiff his poor work performance, including plaintiff's making repairs and leaving customer vehicles in disarray with grease on the carpets, doors and steering wheels, and plaintiff's excessive number of "come-backs" (cars being returned after repairs were supposedly repaired). Plaintiff was counseled about these poor performance issues and was given verbal reprimands by defendant's owner, as well as defendant's general manager and the two supervisors. Defendant's owner testified that plaintiff talked back to him and stated, on numerous occasions, "If you don't like it, fire me." Defendant's owner also testified that he received a lot of calls from customers about plaintiff's work.

When plaintiff was terminated, the service manager told him that he had a vehicle "come-back" from the day before; that he had an excessive number of "come-backs," thirteen in five months; and that his work quality was a problem. Plaintiff, however, claimed that he had never been warned about "come-backs" before his termination. Plaintiff did admit that he remembered several of the "come-backs" that were itemized for him at the time of his termination. Plaintiff further acknowledged receiving a written warning, unrelated to "come-backs." Defendant's owner indicated that after plaintiff was terminated, they no longer had excessive "come-backs."

Plaintiff argues that the trial court erred in granting defendant summary disposition on his Michigan Handicappers' Civil Rights Act (MHCRA)[1] claim. We disagree. We review a trial court's order of summary disposition de novo. *Weisman v US Blades, Inc*, 217 Mich App 565, 566-567; 557 NW2d 484 (1996). Summary disposition may be granted where, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

To establish a prima facie case of handicap discrimination, the plaintiff must establish that (1) he is handicapped as defined by the MHCRA, (2) his handicap is unrelated to his ability to perform the duties of the particular job or position, and (3) he has been discriminated against in one of the ways set forth in the MHCRA, i.e. being discharged because of the handicap.[2] *Hall v Hackley Hosp,* 211 Mich App 48, 53-54; 532 NW2d 893 (1995). There must be evidence that the employer acted because of the employee's handicap, and that the employer intended to discriminate because of the handicap. See *Crittenden v Chrysler Corp,* 178 Mich App 324, 330; 443 NW2d 412 (1989); *Murphy v Bradford-White Corp,* 166 Mich App 195, 197; 420 NW2d 101 (1987); *Hickman v General Motors Corp,* 177 Mich App 246, 249; 441 NW2d 430 (1989). "Discriminatory intent may be inferred from the evidence presented." *Hickman, supra.*

Once a plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to show legitimate, nondiscriminatory reasons for its action. *Crittenden*, *supra* at 331. If the employer rebuts the plaintiff's prima facie case, the burden shifts back to the plaintiff, who then has to show that the employer's reasons constituted a pretext for discrimination. *Id.*; see also *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

In this case, the evidence offered by plaintiff to sustain the prima facie case was that he *believed* that he was terminated because eight days before his termination, he informed his supervisor that he had been to the doctor's office and that if his heart deteriorated by five percent he would become disabled. Plaintiff *felt* that the proximity in time between the events evidenced discriminatory intent. Plaintiff also *believed* that defendant terminated him because defendant was in the process of getting disability insurance and his condition would have raised the premiums.

Plaintiff failed to produce sufficient evidence that he was discriminated against because of his handicap. Plaintiff's bare assertion that he felt or believed that he was a victim of discrimination is insufficient to allow a case to proceed to the jury. *Bouwman v Chrysler Corp,* 114 Mich App 670, 682; 319 NW2d 621 (1982). In fact, the evidence in this case implies an opposite conclusion. The

evidence shows that plaintiff was hired after disclosing that he had a heart condition; plaintiff informed numerous employees about this condition throughout his tenure with defendant and no adverse action was taken before plaintiff had his thirteenth "come-back" in five months; plaintiff admitted that no one ever said anything derogatory about his heart condition or told him that he should not be working; and several witnesses stated that they had never heard any remarks about plaintiff's condition.[3] In addition, plaintiff's supervisors noted that he had a higher "come-back" rate than others. Moreover, plaintiff presented no authority to support the proposition that the mere timing of his discharge demonstrates defendant's discriminatory intent.

Furthermore, plaintiff's claim that defendant discharged him because defendant was in the process of getting disability insurance is wholly unsupported by the record. The evidence clearly establishes that defendant never attempted to secure disability insurance for its employees. Rather, defendant's employees were solicited individually by an insurance salesman and many purchased disability insurance for themselves without any contribution from defendant.

Plaintiff also failed to offer evidence that would show that the offered, legitimate reason for his termination, excessive "come-backs," was a mere pretext. Plaintiff offered numerous reasons why he believed that defendant's reason was a pretext. We find that none create a genuine issue of material issue of fact. Contrary to plaintiff's claims, there was overwhelming evidence that his amount of "come-backs" was excessive and that his quality of work was poor. In fact, the evidence showed that the day before his termination, he had an automobile returned to the dealership within a 1/2 hour after he "repaired" it. Further, the phrase "come-backs" as it related to plaintiff's employment and defendant's expectations at defendant's workplace does not appear to be ambiguous or deceptive. The trial court properly granted defendant's motion for summary disposition.

We conclude that plaintiff failed to offer sufficient evidence to create a question of material fact as to his prima facie case of handicap discrimination. Even if he had presented sufficient evidence, plaintiff failed to raise a genuine issue of material fact as to whether defendant's proffered reason for plaintiff's discharge, excessive come-backs, was untrue. Summary disposition was therefore appropriate on plaintiff's handicap discrimination claim.

Plaintiff also argues that the trial court abused its discretion in reinstating the grant of summary disposition after it had vacated its order on the matter. Again, we disagree. After the trial judge entered an order granting summary disposition, plaintiff made a motion for reconsideration, requesting that the order be vacated. Plaintiff discovered that before the entry of the order, the case had been reassigned to another circuit court judge. Without citing any applicable authority, plaintiff argued that because the case had been reassigned before the order was entered, the court lacked jurisdiction to hear and rule on the issue of summary disposition. The trial court granted plaintiff's motion. Defendant thereafter filed a motion for reconsideration, alerting the court to the fact that it did have authority to enter the order and requesting that the order be reinstated. The court reviewed defendant's motion and then reinstated the order of summary disposition. Plaintiff complains that the trial court should not have heard defendant's motion because it amounted to a response to a motion for reconsideration and the court rules do not allow a response to a motion for reconsideration.[4]

A judicial tribunal always has some power to correct its own errors or otherwise appropriately modify its judgments, decrees, and orders. See *Public Health Dep't v Rivergate Manner*, 452 Mich 495; 550 NW2d 515 (1996). MCR 2.613(B) provides that an order may be set aside or vacated *by the judge who entered that order*. Moreover, a trial court has authority to handle matters of reconsideration in any manner it directs. MCR 2.119(F). In this case, defendant's motion for reconsideration apparently presented case law that convinced the court that it had been misled by plaintiff and had erred in holding that it did not have authority to enter the original order. The trial court did not err in granting defendant's motion.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.

[1] MCL 37.1101 *et seq*.; MSA 3.550(101*) et seq*.

[2] MCL 37.1202(1)(b); MSA 3.550(202)(1)(b).

[3] In addition, the testimony revealed that defendant employed and continues to employ other persons with disabilities, including a person suffering from cancer; a person with an extremely serious heart condition; and an employee with knee problems.

[4] Oakland Circuit Judge Richard Kuhn apparently had a conflict on his docket with a similar unrelated case. As a result, Judge Kuhn's case was reassigned to the original trial judge in this case, Oakland Circuit Judge Edward Sosnick. The instant case was then reassigned to Judge Kuhn for docket control purposes. The case was transferred after the briefs were filed, but before Judge Sosnick ruled. Neither party nor the judge was aware of the transfer until well after it occurred and after the hearing on defendant's motion for summary disposition.