STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM M. SHIREMAN,

Plaintiff-Appellant,

v

CITY OF KALAMAZOO,

Defendant-Appellee.

UNPUBLISHED
August 5, 1997

No. 189872
Kalamazoo Circuit Court
LC No. 91-002580-NZ

Before: Neff, P.J., and Smolenski and D. A. Roberson*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendant. We affirm.

Plaintiff was employed by defendant for more than thirty years, first as a fireman and then, after defendant merged its police and fire departments into a unified Department of Public Safety (DPS), as a public safety officer. During his years of employment, defendant had several surgeries for work-related hernias. In 1985, defendant applied to the defendant's pension board for a duty disability retirement apparently because he had sustained yet another work-related hernia. In 1986, the pension board approved plaintiff's application. However, plaintiff did not begin receiving his pension at this time because defendant apparently had a custom of allowing employees to exhaust other benefits before actually retiring. In early 1988, plaintiff, believing that he had fully recovered from his hernia problems, sought to be returned to active duty. However, pursuant to one of defendant's applicable pension ordinances,[1] defendant's DPS chief requested the board retire plaintiff based on the board's previous finding that plaintiff was "Medically Disabled." In September, 1988, the board voted that plaintiff be retired and not returned to work. Plaintiff did not appeal this decision.

In August, 1991, plaintiff filed this case against defendant, asserting in count one a violation of defendant's pension ordinance, in count two a claim for handicap discrimination and, eventually, in count three a claim for age discrimination. All three claims were based on defendant's failure to return plaintiff

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* Recorder's Court judge, sitting on the Court of Appeals by assignment.

to duty in September, 1988. In January, 1994, the trial court denied defendant's motion for summary disposition. Defendant appealed and this Court issued the following order:

> Pursuant to MCR 7.205(D)(2) and 7.211(C)(4), the motion for peremptory reversal is GRANTED in part. The Kalamazoo Circuit Court's January 19, 1994 order, denying defendant's motion for summary disposition is, as to count one only of the complaint, REVERSED, and on remand the circuit court shall enter an order granting summary disposition as to count one of plaintiff's complaint. By statute, the actions of defendant City's pension board were quasi-judicial in nature, reviewable by *certiorari* only, MCL 38.555 [MSA 5.3375(5)]. Plaintiff has never instituted such review proceedings, MCR 3.302(C), and may not collaterally attack the pension board's decision. *Theisen v City of Dearborn*, 5 Mich App 607 [147 NW2d 720] (1967) [remanded on another ground 380 Mich 621 (1968)]. The circuit court's finding that, as to count one, an issue of fact is presented is clearly erroneous, since, on an appeal in the nature of *certiorari*, the court may not inquire into the sufficiency of the evidence, but may review only questions of law. *Imlay Twp Primary School Dist #5 v State Bd of Ed*, 359 Mich 478 [102 NW2d 720] (1960); *McComb v City Council of Lansing*, 264 Mich 609 [250 NW 326] (1933); see also *In re Payne*, [444 Mich 679; 514 NW2d 121 (1994)].
>
> In all other respects the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review. That plaintiff might have raised issues of discrimination in a direct review proceeding, *Shelby Fire Dep't v Shields*, 115 Mich App 98 [320 NW2d 306] (1982), does not mean that plaintiff had to proceed in that manner. *Pompey v General Motors Corp*, 385 Mich 537 [189 NW2d 243] (1971); *Boscaglia v Michigan Bell Telephone Co*, 420 Mich 308 [362 NW2d 642] (1984); *Holmes v Haughton Elevator Co*, 404 Mich 36 [272 NW2d 550] (1978). [*Shireman v City of Kalamazoo*, unpublished order of the Court of Appeals, entered April 7, 1994 (Docket No. 172012).]

In July, 1995, defendant again moved for summary disposition of plaintiff's age and handicap discrimination claims pursuant to MCR 2.116(C)(7), (8) and (10). Following oral argument, the trial court issued a bench opinion, stating, in relevant part, as follows:

> This Court determines, in looking at the pleadings, that the Plaintiff's complaint centers around the actions and findings of the Pension Board, which resulted in the termination of his employment. He has not alleged an act other than that by the Pension Board – excuse me – as a basis for his complaint. He does allege, however, that the action taken by the Pension Board was simply a rubber stamp approval of what the chief of the Public Safety Department wanted, and that the resulting forced retirement was part of a general plot to weed out older, so-called fireside command officers from the Public Safety Department and to elevate younger officers into those positions. However, the essence of the complaint continues to be a decision made by the Pension

Board and does not change the fact that his complaint is with the decision of the Pension Board and not the City of Kalamazoo.

This Court finds it significant that the Pension Board is a *quasi* judicial body, per MCL 38.555 [MSA 5.3375(5)]. The Kalamazoo City Code provides that an employee has the right to appeal the decision of a pension board. And, that right is also affirmed in the above-quoted statute.

In the instant action the Plaintiff did not appeal the decision of the Pension Board by writ of *certiorari*, or otherwise. It has been decided that a plaintiff may not collaterally attack the *quasi* judicial decision. I would . . . cite *Theisen*, [*supra*], a 1967 decision.

This Court finds that the . . . instant action amounts to a collateral attack on the decision of the Pension Board.

Since Plaintiff's complaint lies with the action taken by the Pension Board and does not delineate any acts by the City of Kalamazoo, which are independent of the action taken by the Pension Board, this Court believes that the Plaintiff's claim is barred by prior judgment and fails to state a claim upon which relief can be granted.

Accordingly, the Court will grant summary disposition to the City of Kalamazoo, pursuant to Subsection (7) and (8) of MCR 2.116(C).

I would indicate to Counsel that I believe every opportunity has been given to the Plaintiff to develop a cause of action. There have been numerous amendments to the complaint. This case has . . . wound its way through various courts, including this Court, the Court of Appeals, the Federal District Court.

Bottom line, after considering the case law in this matter, and looking at the decisions of the other courts who have had input in this matter, is that in the final analysis the decision complained of was by the Pension Board. Whether there is an alter ego theory that can be pled in matters of this type involving the *quasi* judicial body is one which, I think, is best decided by the appellate level and not by this Court.

Accordingly, in light of everything which has occurred, the Court will grant summary disposition as to the remaining allegations in the complaint.

The trial court subsequently entered a final order in conformity with its bench opinion.

On appeal, plaintiff argues that the court erred in granting summary disposition in favor of defendant. Specifically, plaintiff contends that the pleadings do allege claims of handicap and age discrimination upon which relief can granted. Plaintiff further alleges that the trial court erred in concluding that his claims are barred by collateral estoppel.

We agree with the trial court that the essence of plaintiff's age and handicap discrimination claims concern the pension board's decision to retire plaintiff. Based on the ruling contained in the previous order issued by this Court, the law of the case is that plaintiff may not now collaterally attack the pension board's quasi-judicial decision. *MS Development, Inc v Auto Plaza of Woodhaven (After Remand)*, 220 Mich App 540, 548; 560 NW2d 62 (1996).[2] Accordingly, we cannot say that the trial court's grant of summary disposition in favor of defendant was error. *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Dalton A. Roberson

[1] Kalamazoo Ordinance § 2-242(a).

[2] In light of our conclusion in this regard, we need not consider plaintiff's collateral estoppel argument.