STATE OF MICHIGAN

COURT OF APPEALS

RICHARD CHAPPLE,

Plaintiff-Appellant,

v

TABRO'S GLASS, INC.,

Defendant-Appellee.

UNPUBLISHED
December 19, 1997

No. 192526
Wayne Circuit Court
LC No. 95-511944-CZ

Before: Jansen, P.J., and Young and R.I. Cooper*, JJ.

PER CURIAM.

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

I

Plaintiff began working for defendant on September 14, 1994. Plaintiff installed car windows in defendant's shop. Plaintiff claims that the work caused the gradual onset of pain and swelling in his right elbow. In January 1995, plaintiff reported these symptoms, but apparently not the work-related cause of the pain, to defendant's general manager, Al Stepaniak, who requested that plaintiff wait and get his elbow examined at a later time. On February 6, 1995, plaintiff went to an orthopedic surgeon, Dr. Leo Ottoni, to have his elbow examined. Dr. Ottoni diagnosed plaintiff as having medial epicondylitis of the right elbow, as well as left volar wrist ganglion. Plaintiff received a cortisone injection in his elbow, and his right arm was placed in a fiberglass cast. Plaintiff was given a note recommending that he not be given work requiring the use of his right upper extremity.

Plaintiff reported to work the next day and submitted his doctor's note. On February 8, 1995, John Tabro, defendant's president, approached plaintiff. According to plaintiff, Tabro said, "I got no damned use for anybody who's only got one arm. Hit the clock; you're done. Punch out; you're done. I want you out of my building." On the other hand, Tabro testified that plaintiff was only being laid off until he was able to fully perform his job again. Although Tabro "assumed" that plaintiff knew he could

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

come back when he felt better, Tabro admitted that he did not expressly tell plaintiff that his lay off was only temporary. Tabro testified that he terminated plaintiff and instructed that he be given his last paycheck when plaintiff "started cursing me out and calling me four letter words."

Plaintiff thereafter filed for unemployment benefits, which he received, and filed suit alleging retaliatory discharge and handicapper discrimination. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), which the trial court ultimately granted. This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996).

II

A motion under MCR 2.116(C)(8) tests whether the opposing party's pleadings allege a prima facie case. The court must accept all well-pleaded facts as true and determine if the allegations state a legally cognizable claim. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). On the other hand, a court reviewing a motion brought under MCR 2.116(C)(10) must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the party opposing the motion. *Radtke, supra* at 374; *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 77-78; 433 NW2d 820 (1988). The court's task is to review the record evidence, including all reasonable inferences drawn from that evidence, and determine whether a genuine issue of material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994).

III

Plaintiff's claim of retaliatory discharge is premised on the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*. MCL 418.301(11); MSA 17.237(301)(11) provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

It is well-settled that an employer may not discharge an employee for filing a claim under the WDCA. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 244-245; 531 NW2d 144 (1995). However, this Court has held that MCL 418.301(11); MSA 17.237(301)(11) does not prohibit discharge in retaliation for the *anticipated* filing of a worker's compensation claim. *Griffey v Prestige Stamping*, 189 Mich App 665, 667-668; 473 NW2d 790 (1991); *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 645-646; 413 NW2d 79 (1987). The trial court dismissed plaintiff's claim, apparently under MCR 2.116(C)(8), on the basis that there could be no retaliatory discharge for the anticipated filing of a worker's compensation claim.

Significantly, plaintiff acknowledges that he did not file a worker's compensation claim either before or after he was terminated. Rather, plaintiff argues that he was terminated for exercising a right

afforded by the WDCA, namely, the right to report a work-related injury and obtain medical treatment, and that he has therefore stated a valid claim for relief. We need not reach the issue whether plaintiff stated a valid claim for purposes of MCR 2.116(C)(8) because we conclude that plaintiff failed to establish a factual predicate for his claim and that summary disposition was appropriate under MCR 2.116(C)(10).

The defect in plaintiff's case is that plaintiff never told his employer that he had a work-related injury. Indeed, plaintiff's own deposition testimony,[1] which was before the trial court, established that plaintiff not only failed to claim that his injury was work-related, but that plaintiff was unsure of the cause of the injury himself. Plaintiff has therefore failed to establish a nexus between his employer's action in discharging him, and his employer's knowledge that plaintiff had exercised or was attempting to exercise a right afforded by the WDCA. Consequently, because plaintiff has not established on this record a factual predicate that he sought to exercise a right under the WDCA for which his employer retaliated, defendant was entitled to summary disposition on that claim.

IV

Plaintiff's claim under the Handicapper's Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, is based on the accommodation provisions of MCL 37.1103(l); MSA 3.550(103)(l).[2] Plaintiff acknowledges that his condition prevented him from performing the duties of an automobile glass installer. He argues, however, that he could have performed the duties of his job if defendant "accommodated" him by granting him leave "for a reasonable time" or by not assigning him to tasks which his condition made him unable to perform. Thus, plaintiff concludes, he could have performed his job duties "with accommodation" and, therefore, he was handicapped within the meaning of the HCRA.

Plaintiff's argument fails because, even if the accommodation provisions of the HCRA require an employer to grant leave or change an injured employee's job duties, those requirements did not apply to this defendant. Under MCL 37.1210(14); MSA 3.550(210)(14), "[a] person who employs fewer than 15 employees is not required to restructure a job or alter the schedule of employees as an accommodation under this article." It is undisputed that defendant employs fewer than fifteen people. Thus, defendant was not required to alter plaintiff's schedule by granting plaintiff medical leave, nor was it required to "restructure a job" by assigning plaintiff only tasks he could complete. Moreover, we reject as inconsistent with the plain language of the statute plaintiff's assertion that defendant somehow "waived" the application of MCL 37.1210(14); MSA 3.550(210)(14) by giving plaintiff some work that he could perform while wearing his cast. Therefore, the trial court did not err in granting summary disposition in favor of defendant with regard to plaintiff's claim under the HCRA.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper

[1] The dissent finds our reliance on plaintiff's deposition testimony "inexplicable." While the dissent correctly points out that "this Court does *not* have the entire transcript of plaintiff's deposition testimony," we note that the transcript excerpts we rely upon were the ones the parties submitted to the trial court in support of and opposition to defendant's motion for summary disposition. Thus, in deciding this issue, we have reviewed *the same record* that was before the trial court.

The dissent also appears to object to our resolving this issue "on a reason not relied upon by the trial court." However, if the record permits, we may uphold a trial court's decision granting summary disposition on entirely different grounds than those relied upon by the trial court. See *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 143; 530 NW2d 510 (1995). It bears noting that in this case defendant sought summary disposition under *both* MCR 2.116 (C)(8) and (C)(10), and that both parties submitted to the trial court materials outside the pleadings. Therefore, we believe that plaintiff had sufficient opportunity below to develop a factual record in support of his claims.

[2] The HCRA protects an employee from employment discrimination "because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b); MSA 3.550(202)(1)(b). "Unrelated to the individual's ability" means that the individual's condition does not prevent him from performing job duties "with or without accommodation." MCL 37.1103(l)(i); MSA 3.550(103)(l)(i).