

STATE OF MICHIGAN
COURT OF APPEALS

LARRY YOUNG,

Plaintiff-Appellant/Cross-Appellee,

v

GREEN OAK TOWNSHIP,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
March 13, 1998

No. 198019
Livingston Circuit
LC No. 95-014387

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the July 19, 1996 order granting defendant's motion for summary disposition with respect to plaintiff's claims under the Michigan Handicapper's Civil Rights Act. Defendant cross-appeals claiming that the trial court erred by failing to dismiss plaintiff's remaining retaliation claims. We affirm.

Plaintiff became employed as a patrol officer for defendant in February 1979. Plaintiff's employment with defendant continued until he injured his back during a training exercise on August 26, 1992. Plaintiff was temporarily disabled from performing his duties as a patrol officer from August 26, 1992 until August 31, 1992, when he was allowed to return to light duty. As a result of his back injury, plaintiff filed a worker's compensation claim in August, 1992. Plaintiff remained on light duty until December 14, 1992, when he again went on disability. According to plaintiff, he was approved by his doctor to return to light duty on April 5, 1993, but the department denied him a light-duty assignment. In early 1993, a sergeant-investigator position became available in the department for which plaintiff applied. Officer Richard Walter, the only other officer who applied for the position, was ultimately awarded the promotion. Two days after plaintiff learned that he did not receive the promotion to sergeant, he filed a charge with the EEOC claiming age and handicap discrimination because Walter was younger than he, had inferior qualifications, and had less seniority. According to plaintiff, he was constructively discharged in October 1993, when he was instructed to turn in his department equipment and was prohibited from entering the police station without prior authorization.

On July 3, 1995, plaintiff filed a four-count complaint against defendant. In Count I, plaintiff alleged that he was passed over for a promotion to sergeant based upon his age and disability in violation of the Elliott-Larsen Civil Rights Act (ELCRA) and the Michigan Handicapper's Civil Rights Act (MHCRA), respectively. In Count II of his complaint, plaintiff claimed that he was subjected to retaliation for having filed charges with the Equal Employment Opportunity Commission (EEOC). In Count III, plaintiff alleged that defendant also retaliated against him for filing his worker's compensation claim. Finally, in Count IV, plaintiff generally claimed that defendant discriminated against him based upon his age and disability, which ultimately resulted in plaintiff's constructive discharge in October 1993. Plaintiff later abandoned his age discrimination claims.

Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary disposition with regard to plaintiff's handicap discrimination claims. This Court reviews a trial court's grant or denial of a motion for summary disposition de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. This Court's task is to review the record and all reasonable inferences drawn from it, and to decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

Plaintiff first claims that defendant denied him a promotion to sergeant-investigator due to his back injury, in violation of the MHCRA. Plaintiff further claims that defendant constructively discharged him from his position as a patrol officer in violation of the MHCRA because he was denied a permanent light-duty position with the department and was eventually banned from the police station.

MCL 37.1202(1); MSA 3.550(202)(1), provides that an employer shall not fail or refuse to promote or discharge an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position. To establish a prima facie case of discrimination under the MHCRA, it must be shown that: (1) the plaintiff is "handicapped" as defined by the act, (2) the handicap is unrelated to plaintiff's ability to perform the duties of the job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Sanchez v Lagoudakis (On Remand)*, 217 Mich App 535, 539; 552 NW2d 472 (1996).

A "handicap" is defined by MCL 37.1103(e); MSA 3.550(103)(e) as:

(i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:

(A) For purposes of article 2 [MCL 37.1201 *et seq.*; MSA 3.550(201) *et seq.*], substantially limits 1 or more of the major life activities of the individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

Subsection A incorporates the second element of a prima facie case, which requires that the handicap be unrelated to plaintiff's ability to perform the duties of the job. A handicap is unrelated to an individual's ability to perform the duties of the job if, with or without accommodation, an individual's handicap does not prevent the individual from performing the duties of a particular job or position. MCL 37.1103(1); MSA 3.550(103)(1). Plaintiff has admitted that he has been adjudicated permanently, partially disabled due to his injury, and cannot perform all of the normal duties of a full-time patrol officer. Plaintiff testified at deposition that, if he returned to work as a patrol officer, he would have a medical restriction against "physical interruptions, physical restraints, physical encounters, violent physical encounters." Furthermore, plaintiff's treating physician stated that plaintiff should not be involved in the apprehension or handling of any uncooperative, potentially violent individuals. Although plaintiff admitted that he cannot perform all of the duties of a patrol officer, plaintiff maintains that his handicap is unrelated to his ability to perform the basic duties of a sergeant-investigator.

Defendant claims that plaintiff failed to show that he was "handicapped" as defined by the MHCRA because his disability is related to his ability to perform the duties of the position. According to defendant, the duties of a sergeant include road patrol, which involves the potential for violent contact on a continuous basis. According to plaintiff, the sergeant position is dominated by supervisory and administrative duties that are unrelated to his handicap. Plaintiff further claims that defendant should not be permitted to evade the MHCRA by including a duty to "perform such duties as are required of a Police Officer, including road patrol," which effectively eliminated him from consideration for the job.

There is no question that a disability that is related to one's ability to perform the duties of a particular position is not a "handicap" within the meaning of the MHCRA. *Carr v General Motors Corp*, 425 Mich 313, 320-323 389 NW2d 686 (1986); *Keoster v Novi*, 213 Mich App 653, 661-662; 540 NW2d 765 (1995). Whether a handicap is related to an individual's ability to do the job should not be determined solely by reference to the employer's definition of the job or the qualifications for the job. *Adkerson v MK-Ferguson Co*, 191 Mich App 129, 140-141; 477 NW2d 465 (1991). Not only did the job description include road patrol as one of the duties of a sergeant, but Sgt. Walter testified that he was frequently on road patrol and had been involved in at least two recent situations requiring the use of physical force. Defendant has a strong interest in providing the community that it serves with road patrol officers who are capable of apprehending criminals and handling emergency situations. Those tasks can necessarily require the swift use of physical force. Therefore, because plaintiff failed to carry his burden of showing that there is a genuine issue of material fact regarding whether his injury was related to his ability to do the job of a sergeant, summary disposition was appropriate.

Plaintiff argues in the alternative that he could perform the duties of sergeant if the department provided him with certain accommodations pursuant to the MHCRA, MCL 37.1102(2); MSA 3.550(102)(2). In other words, plaintiff claims that with reasonable accommodation from the department, his physical condition would become unrelated to his ability to perform the duties of that position. MCL 37.1102(2); MSA 3.550(102)(2) provides:

Except as otherwise provided in article 2, a person shall accommodate a handicapper for purposes of employment, public accommodation, public service,

education, or housing unless the person demonstrates that the accommodation would impose an undue hardship.

In the present case, plaintiff's request for a permanent light-duty assignment is not a reasonable accommodation because it would impose an undue hardship on defendant. Both the positions of patrol officer and sergeant-investigator required plaintiff to have the ability to apprehend criminals by use of physical force. To permit plaintiff to hold one of these position without this ability would undermine the effectiveness of the police force. Therefore, plaintiff's argument has no merit.

On cross-appeal defendant claims that the trial court erred in denying defendant's motion for summary disposition with regard to plaintiff's retaliation claims. Because we concluded that the trial court properly granted summary disposition with respect to plaintiff's handicap discrimination claims, the issue on cross-appeal is rendered moot pursuant to the terms of the settlement agreement entered by the trial court on September 3, 1996. In addition, as none of the issues in this case will proceed to trial, plaintiff's claim that the trial court erred in denying his motion to amend his witness list to add a medical expert is also rendered moot.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Martin M. Doctoroff

I concur in result only

Henry William Saad