STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY WATKINS, M.D.,

Plaintiff-Appellant,

v

HUTZEL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
May 4, 1999

No. 205370
Wayne Circuit Court
LC No. 96-628150 NO

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff is a practicing obstetrician and gynecologist who was denied staff privileges at defendant hospital based largely on the recommendation of Dr. David Cotton, defendant's then-chairperson of the Department of Obstetrics and Gynecology. Plaintiff, who suffers from bipolar disorder, claimed that this employment decision was based on discriminatory animus in violation of the Michigan Handicappers' Civil Rights Act, MCL 37.1201(1)(a); MSA 3.550(202)(1)(a). Defendant claimed the decision was based on plaintiff's refusal to produce records from his previous employment with the University of Michigan hospital.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In granting a motion for summary disposition, the trial court should consider affidavits, depositions, admissions, or other admissible documentary evidence before determining that there is no genuine issue of material fact in a specific matter. *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996). It must examine the evidence in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A motion for summary disposition is properly granted when 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).

As a preliminary matter, plaintiff's argument that defendant's motion for summary disposition was in "gross violation" of MCR 2.116(C)(10) is without merit. A motion is acceptable despite "procedural peculiarities of the prior pleading and responses" when it is evident at the time of the summary disposition hearing that the parties knew a particular claim was at issue. *Quinto, supra* at 366. Although defendant's motion does not technically comply with MCR 2.116(C)(10), because it states only that it is requesting summary disposition under MCR 2.116(C)(10) for reasons outlined in the attached brief, plaintiff clearly knew what was at issue and fully briefed and argued the question. Defendant's motion for summary disposition was sufficient.

Plaintiff next argues that the trial court erred in granting summary disposition because he had presented direct evidence of discriminatory animus, and therefore he did not need to prove that defendant's articulated reason for refusing to grant him staff privileges was a mere pretext. While we agree that the trial court employed the wrong analytical framework for granting summary disposition, we find that plaintiff has not made out a prima facie case of discrimination. Therefore, summary disposition was proper.

The MHCRA provides, in relevant part, that an employer shall not "[f]ail or refuse to hire, recruit, or promote an individual 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)(a); MSA 3.550(202)(1)(a).[1] The purpose of the Act is "to ensure that all persons be accorded equal opportunities to obtain employment, housing, and the utilization of public accommodations, services, and facilities." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216; 559 NW2d 61 (1996).

The trial court ruled that defendant had presented evidence sufficient to prove its reasons for denying plaintiff staff privileges were not a mere pretext. Therefore, the court concluded that there was no genuine issue of material fact that defendant discriminated against plaintiff when it decided not to extend him staff privileges.

We find that the trial court employed the wrong analytical framework in granting summary disposition. Most handicap discrimination cases in Michigan are analyzed in terms of a shifting burden of proof, where the plaintiff must overcome a defendant's legitimate nondiscriminatory reason for its employment decision. *McDonnell Douglas Corp v Green*, 411 US 792, 803-805; 93 S Ct 1817; 36 L Ed 2d 688 (1973). However, where there is direct evidence of discriminatory animus, this burden-shifting analysis should not be applied. *Norris v State Farm Fire and Casualty Co*, 229 Mich App 231, 235; 581 NW2d 746 (1988). See also *Harrison v Olde Financial Corp*, 225 Mich App 601, 609-610; 572 NW2d 679 (1998) and *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998). "'Direct evidence' is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor." *Downey*, *supra*. It provides a distinct evidentiary path by which to decide the ultimate issue of whether the defendant's intent was discriminatory. *Harrison*, *supra* at 610. Once a plaintiff has shown by direct evidence that discrimination was more likely than not a motivating factor, the case becomes a mixed motive case. The defendant must then prove by a preponderance of the evidence that it would have reached the same decision even if it had not considered the protected characteristic. *Id.* at 611. If an employer in a mixed motive case would have reached the same decision even without having discriminated, the

employer may exercise its prerogative of not hiring the employee and no liability attaches. *Id.* (citing *Price Waterhouse v Hopkins*, 490 US 228; 109 S Ct 1775; 104 L Ed 2d 268 (1989).

In this case, plaintiff presented direct evidence of discriminatory animus. Plaintiff claims that at the end of his initial interview, Dr. Cotton told him that people suffering from bipolar disorder should seek a less stressful specialty than obstetrics, and he recommended dermatology. In his deposition, Dr. Cotton claims he cannot recall this comment, but we draw all legitimate inferences in favor of the nonmoving party. The statement is direct evidence of discriminatory animus. Therefore, the trial court should not have employed the burden-shifting analysis.

Although we disagree with the trial court's reasoning, we hold that summary disposition was proper because plaintiff failed to make out a prima facie case of employment discrimination. Even where there is direct evidence of discriminatory animus, "the disabled individual always bears the burden of proving that he or she is 'otherwise qualified' for the position in question." *Norris, supra* at 236, quoting *Monette v Electronic Data Systems Corp*, 90 F3d 1173, 1184 (CA 6, 1996). Plaintiff has not met this burden.

When plaintiff filed his application with defendant, he signed a general release allowing defendant to request his records from his previous employers. The language of that release is instructive for purposes of resolving this case. For example, the release entitles defendant to information concerning plaintiff's "competence and qualifications," which are defined in the release:

> "Competence and qualifications" including clinical ability, professional ethics, character, physical and mental health, emotional stability, ability to work with others, and moral and other qualifications for medical staff appointment(s), reappointment(s) and clinical privileges . . .

With respect to information regarding his physical or mental health, the language in the release is quite specific, and it appears to anticipate these sorts of disputes:

> I further agree to facilitate the release of such information by providing appropriate release and authorization forms; I understand that, in the event that any physician or hospital continues to refuse to provide such information, the hospital(s) shall give no further consideration to my application for a staff appointment(s) or membership, and privileges, if previously granted, shall be terminated. . .

In the instant case, the University of Michigan refused to release plaintiff's employment records without a separate release specifically absolving that institution of any liability. When defendant asked plaintiff to sign the additional release, he refused.

Plaintiff has certainly presented some evidence that he is otherwise qualified for staff privileges at Hutzel. However, we are reluctant to hold that applicants can apply for positions, withhold negative job reviews, submit good ones, then claim discrimination when the hiring party claims it does not have a sufficient basis upon which to make a decision. Such a finding would be particularly misguided in a case

where the plaintiff has signed a release agreeing that failure to help the hospital secure past employment records will result in his application being denied. To the extent that he has not completed his application process, plaintiff has not put forward a prima facie case. In a very real sense, he has not shown himself to be otherwise qualified, because he has not been entirely candid with the admissions committee. He should have signed the release. He cannot claim that the University of Michigan records contain nothing of relevance to this inquiry then refuse to release them to defendant. If plaintiff had made the records available, and they contained no more information than he claims they contain, then plaintiff would be on very different footing today. Unfortunately, by refusing to sign the separate release for the University of Michigan, he permitted the legitimate inference that he was hiding something, and the hospital's administrators were entitled to act on that inference.[2] Plaintiff agreed to this inference when he signed the original release. Summary disposition was proper.

Plaintiff next argues that the trial court erred when it refused to grant his motion for rehearing. We disagree. While the trial court did err when it employed the burden-shifting analysis from *McDonnell Douglas*, summary disposition was proper because plaintiff has failed to show, by completing the application process, that he is otherwise qualified for staff privileges at the defendant hospital.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Plaintiff brought this action under the public accommodation section of the MHCRA. MCLA 37.1301 *et seq.*; MSA 3.550(301) *et seq*. As a health facility, defendant is a place of public accommodation under the Act. MCLA 37.1301(a); MSA 3.550(301)(a). However, a physician seeking staff privileges is more analogous to an employee seeking employment than to a handicapped person seeking equal opportunity to utilize public facilities. MCL 37.1201 *et seq.*; MSA 3.550(101) *et seq*. We therefore analyze this case under the employment provision of the MHCRA.

[2] The permitted range of that inference is not limited to plaintiff's admitted problems with bipolar disorder. The records might contain information about plaintiff as an employee that is unrelated to his handicap, but might still cause defendant to conclude that it should not grant plaintiff staff privileges.