STATE OF MICHIGAN

COURT OF APPEALS

LESLIE G. CRAWFORD,

Plaintiff-Appellant,

v

DEPARTMENT OF CIVIL SERVICE and DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

UNPUBLISHED
June 1, 1999

No. 205603
Saginaw Circuit Court
LC No. 96-014806 CZ

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants summary disposition in this reverse discrimination case. We affirm.

This case arose after plaintiff was rejected by defendant Department of Corrections (DOC) for one of eleven openings for a Corrections Shift Supervisor IV B ("CSS IVB") position at the DOC's Saginaw Correctional Facility ("SCF") in Freeland, Michigan. In applying for the position, plaintiff sought a lateral transfer to the SCF from the Gus Harrison Correctional Facility in Adrian. Plaintiff alleged that he was wrongly rejected for the CSS IVB position because of the DOC's affirmative action plan and the use of augmented certification.

I

First, we reject plaintiff's argument that the trial court erred in granting defendants summary disposition of his claim under the Michigan Civil Rights Act, MCL 37.2102(1); MSA 3.548.[1]

This Court reviews a trial court's order of summary disposition de novo. *Weisman v US Blades, Inc*, 217 Mich App 565, 566-567; 552 NW2d 484 (1996). A motion for summary disposition under MCR 2.116(C)(4) may be granted when the court "lacks jurisdiction of the subject matter." MCR 2.116(C)(4). A motion under MCR 2.116(C)(8) relies on the pleadings alone, and all well-pleaded factual allegations are accepted as true as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546

NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(8) should be granted "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* at 487. Finally, when reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings and all documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Summary disposition may be granted under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

MCL 37.2210; MSA 3.548(210) provides:

> A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex *if the plan is filed with the commission under rules of the commission and the commission approves the plan*. [Emphasis added.]

The Supreme Court has held that, by enacting § 210, the Legislature intended to encourage persons subject to the Civil Rights Act to take voluntary steps toward ensuring equal opportunity in employment and to be free from charges of discrimination by requiring that plans be filed with and approved by the Civil Rights Commission before implementation. *Victorson v Dep't of Treasury*, 439 Mich 131, 140; 482 NW2d 685 (1992). Further, by requiring preapproval, the Legislature intended to ensure that plans did not unnecessarily trammel the rights of nonminority employees. *Id*. When an employer obtains approval of an affirmative action plan from the Civil Rights Commission, the employer is protected from legal action under the Civil Rights Act. *Kulek v Mt Clemens*, 164 Mich App 51, 64-65; 416 NW2d 321 (1987); see also *Middleton v City of Flint*, 92 F3d 396, 401 n 4 (CA 6, 1996).

Here, it is undisputed that the MDOC's affirmative action plan was filed with, and approved by, the Michigan Civil Rights Commission. The Assistant Director of the Business and Economic Services Team of the Michigan Department of Civil Rights averred in his affidavit that he is familiar with the procedures under which Equal Employment Opportunity Plans are developed, submitted to, and approved by, the Michigan Department of Civil Rights. He further declared that the 1992-1994 Equal Employment Opportunity Plan for the DOC was approved by the Civil Rights Commission under § 210 of the Civil Rights Act. Therefore, to the extent that plaintiff is alleging discrimination on the basis of practices that were approved by the commission, the trial court properly granted summary disposition under MCR 2.116(C)(10).

We reject plaintiff's contention that § 210 is not a complete defense here because augmented certification was separate and wholly distinct from the DOC's plan. Based on a review of the plan, as well as the affidavit of the Equal Employment Opportunity Administrator, it is apparent that augmented certification was referred to and incorporated into the DOC's affirmative action plan.

II

Next, we find that the trial court did not err in concluding that plaintiff lacked standing to seek declaratory and injunctive relief under 42 USC 1983[2] and Const 1963, art 11, § 5.[3] We review this issue de novo as a question of law. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997).

To have standing, a plaintiff must demonstrate a legally protected interest that is in jeopardy of being adversely affected, and must allege a sufficient personal stake in the outcome of the dispute to ensure that the controversy sought to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution. *Trout Unlimited v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992). Standing entails three requirements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury. *Steel Co v Citizens for a Better Environment*, ___ US ___; 118 S Ct 1003, 1016-1017; 140 L Ed 2d 210 (1998).[4]

Plaintiff correctly asserts that standing may be conferred based on a theory of competitive injury or the loss of an equal employment opportunity. *Laitinen v City of Saginaw*, 213 Mich App 130, 132-133; 539 NW2d 515 (1995). However, the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages . . . does nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Los Angeles v Lyons*, 461 US 95; 103 S Ct 1660; 75 L Ed 2d 675 (1983); see also *Adarand Constructors, Inc v Pena*, 515 US 200, 210; 115 S Ct 2097; 132 L Ed 2d 158 (1995). To receive forward-looking injunctive or declaratory relief, plaintiff is required to demonstrate the "imminence" of his injury by making "an adequate showing" that he will re-apply for a sergeant's position in the relatively near future and that the DOC will utilize their affirmative action plan "in the relatively near future." See *Adarand*, *supra*. An imminent injury is one that is not too speculative and "certainly impending." *Lujan v Defenders of Wildlife*, 504 US 555, 565 n 2; 112 S Ct 2130; 119 L Ed 2d 351 (1992). Also, again, the relief sought must redress the alleged injury. *Steele*, *supra*.

Here, the substance of plaintiff's complaint deals only with his past rejection. There has been no showing that plaintiff will continue to apply for the sergeant's positions at the SCF in the near future or otherwise. Nor does plaintiff indicate that a particular position exists for which he may apply in the future where the DOC's affirmative action policy would also apply. Plaintiff also does not claim to be excluded from any further applicant pool or selection process in applying for any given appointment for which he is qualified.

In addition, even if plaintiff had alleged that he was going to apply for a sergeant's position in the immediate future at a desirable location, there is no evidence that the DOC will again use the affirmative action plan and augmented certification lists. To the contrary, on April 25, 1997, the DOC discontinued its use of augmented certification lists. Thus, if plaintiff attempts to apply for another position, the selection process will not use certification lists. Therefore, it is conjectural whether plaintiff will suffer any future injury because of the DOC's affirmative action plan. Accordingly, we find that plaintiff failed

to demonstrate a real and immediate threat that he would again suffer similar injury in the future and that the relief sought would redress the future injury.

Plaintiff also sought an injunction placing him in the CSS IVB position at the SCF. Injunctive relief represents an extraordinary and drastic act of judicial power that is appropriately exercised only if justice requires it, a real and imminent danger of irreparable injury arises if an injunction is not issued, and there is no adequate remedy at law. *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996). In addition to the raw interview scores that plaintiff relies on, other criteria was used to chose the candidates, including experience, background, and references. Although plaintiff had a good raw interview score, he did not receive a good recommendation from individuals who had supervised and worked with him. Finally, the SCF warden indicated that the eleven chosen candidates were those best suited for the CSS IVB position, given their previous institutional experience, the evaluation of staff and supervisors who had worked with the individuals, and their interview performance.[5]

III

Given our previous conclusions, we decline to address the trial court's alternative or parenthetical basis for granting defendants summary disposition. We likewise decline to address those issues raised by the parties in their appellate briefs that were not addressed by the trial court. See *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996); *Schubiner v New England Ins Co*, 207 Mich App 330, 331; 523 NW2d 635 (1994).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer

[1] The statute provides, in relevant part:

> (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

[2] Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

[3] Const 1963, art 11, § 5, gives the Civil Service Commission authority over classified state employees. Plaintiff relies on that part of section 5 that provides:

> No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.

[4] Michigan courts have relied upon federal authority when deciding standing questions. See, e.g., *Speaker v State Administrative Bd*, 441 Mich 547, 560 n 21; 495 NW2d 539 (1993).

[5] Plaintiff claims that the trial court erred in referring to the testimony of Harold White and Mark Machulis because of res judicata or collateral estoppel as a result of the grievance proceeding. However, plaintiff did not raise this issue below. *In re Hensley*, 220 Mich App 331, 335; 560 NW2d 642 (1996). In addition, plaintiff does not claim that the warden's statements should be barred.