STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BIGGS, Individually and as Personal Representative of the ESTATE OF JAMES WESLEY RIPPLE, Deceased,

Plaintiff-Appellee,

v

CITY OF JACKSON,

Defendant-Appellant.

UNPUBLISHED
June 11, 1999

No. 211254
Jackson Circuit Court
LC No. 94-068301 NZ

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's final judgment and order finding that defendant violated the Persons with Disabilities Civil Rights Act,[1] MCL 37.1302; MSA 3.550(302), § 504 of the Rehabilitation Act of 1973 as amended, 29 USC 794, and § 202 of the Americans with Disabilities Act, 42 USC 12132, and ordering defendant to install a handicap parking sign in front of plaintiff's home. We reverse.

Plaintiff purchased his home located at 141 West Mason Street in the City of Jackson in May 1993. At the time he purchased the house, plaintiff had previously tested positive for the human immunodeficiency virus [HIV]. Although plaintiff had not developed acquired immune deficiency syndrome [AIDS] at the time of purchase, he suffered from leg pain and dizziness as well as asthma and shortness of breath. Plaintiff complained that these ailments made it extremely difficult for him to walk more than thirty to fifty feet without taking a rest. Plaintiff's difficulty walking long distances eventually prompted his physician to fit him with a cane and provide him with documentation necessary to obtain a handicap parking permit.

Defendant's parking program[2] allows for unrestricted, curbside parking throughout the City of Jackson including West Mason Street where plaintiff resides. The public parking spots on West Mason Street, including the spot directly in front of plaintiff's apartment, are accessible to all drivers. A lack of available parking on plaintiff's individual property required him to park his vehicle along the street which, at its closest, was approximately thirty feet from his front door. Shortly after he moved into his house,

however, plaintiff discovered that the traffic generated by neighboring businesses often made it difficult for him to find an available parking spot within reasonable walking distance from his home. As a result, plaintiff twice requested that defendant post a handicap parking sign on the street in front of his home that would increase his chances of being able to park closer to his home. Defendant refused both of plaintiff's requests, despite plaintiff's offer to pay for the sign. Instead, defendant proposed that a bus stop be designated in front of plaintiff's house so that the bus could transport plaintiff, or that plaintiff pay to have the curb near his house cut down and install a small driveway on what was plaintiff's existing front lawn.

Plaintiff brought this action pursuant to the Persons with Disabilities Civil Rights Act, MCL 37.1302; MSA 3.550(302) [PDCRA], § 202 of the Americans with Disabilities Act, 42 USC 12132 [ADA], and § 504 of the Rehabilitation Act of 1973 as amended, 29 USC 794, alleging that defendant deprived him of an equal opportunity to benefit from its curbside parking program when it refused to modify its parking policies and install a handicap parking sign in front of his home. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) on the basis that its refusal to honor plaintiff's request was based on safety concerns, and did not have a discriminatory motive or effect. The trial court dismissed the case finding that plaintiff failed to establish a prima facie case of handicap discrimination under Michigan and federal law.

On appeal, a panel of this Court reversed the trial court's order and remanded for further proceedings before a different judge. Unpublished opinion per curiam of the Court of Appeals, issued August 9, 1996 (Docket No. 181678). This Court found that plaintiff had stated claims on which relief could be granted under both Michigan and federal law, and that factual questions existed which precluded summary disposition on these claims. *Id.* at 3-4. Accordingly, summary disposition under MCR 2.116(C)(8) and (10) was inappropriate, and the case was remanded to the trial court for further proceedings. *Id.* at 6.

Following a bench trial, the trial court concluded that plaintiff proved handicap discrimination by defendant under the PDCRA, the ADA, and the Rehabilitation Act of 1973. In particular, the court found that defendant "violated each of these three acts by not reasonably accommodating Mr. Biggs and Mr. Ripple when he was alive by not installing the sign at nominal expense." The court explained the basis for its ruling as follows:

> I don't think I find that it was a reasonable accommodation to eliminate the parking on the other side of the street, that disrupts the parking for everybody, the businesses, the other people that live there. I don't think I find that that is a reasonable alternative. I also think in making the streets one way is really much more complex, it affects traffic patterns, and disrupts what people want to do in the neighborhood and I don't know that I would find that that is a reasonable accommodation.
>
> I'm also concerned about if you really have to do the expensive repairs . . . is it 14 or $15,000 of construction. . . . I think the city could be, you know, required to be doing lots of modifications to roadway that I tend to think I would find if that much is required that would not be a reasonable accommodation. But I think they can simply do it and

> put the sign up there. I don't find - I think it's marginally affecting the safety and I think the city should have done that. I think that was unreasonable for the city not to have complied with that request.

Accordingly, the court entered judgment in favor of plaintiff and ordered defendant to place a handicap parking sign on the public street in front of plaintiff's home.

This case is now before us for the second time. Defendant first argues that the trial court erred in denying its motion for involuntary dismissal under MCR 2.504(B)(2)[3] because plaintiff failed to prove handicap discrimination by defendant under federal law.

The trial court made factual findings and legal conclusions in its ruling, and therefore, this issue presents mixed questions of law and fact. Questions of law are reviewed de novo. *Burt Twp v Dep't of Natural Resources*, 227 Mich App 252, 255; 576 NW2d 170 (1997). Findings of fact are reviewed for clear error. *Featherstone v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997).

To establish a violation of Title II of the ADA, plaintiff must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits or discrimination was by reason of plaintiff's disability. 42 USC 12132.; *Weinreich v Los Angeles Co Metropolitan Transportation Authority*, 114 F3d 976 (CA 9, 1997), cert den ___ US ___; 118 S Ct 423; 139 L Ed2d 324 (1998); *Darian v University of Massachusetts Boston*, 980 F Supp 77 (D Mass, 1997).

Defendant contends that plaintiff failed to present sufficient evidence of discrimination under the ADA because he did not introduce any medical testimony that he had a mobility impairment which limited his ability to walk long distances, and did not present any evidence that he was a disabled person who, with or without reasonable accommodations, met the eligibility requirements for participation in the public program. Defendant's argument is without merit. Both federal and state courts have determined that AIDS and the related HIV, symptomatic or asymptomatic, are included within the term "physical or mental impairment" as used to define a "disability." 28 CFR 35.104; *Hamlyn v Rock Island Co Metropolitan Mass Transit Dist*, 986 F Supp 1126 (CD Ill, 1997); *Sanchez v Lagoudakis (After Remand)*, 458 Mich 704, 713; 581 NW2d 257 (1998). Given plaintiff's limited ability to walk, attributable to the HIV, we are satisfied that he has established a substantial limitation of a major life activity that renders him a "qualified individual with a disability" under 42 USC 12131(2). In addition, plaintiff produced a valid Michigan driver's license, and testified that he owned a vehicle and was capable of driving at the time he made the request for the handicap parking spot. Therefore, we find that plaintiff met the eligibility requirements for the public parking program.

However, we find no support in the record for the trial court's finding that plaintiff was denied the benefits of the public program solely because of his disability. Plaintiff did not produce any evidence that the alleged discrimination occurred because of his disability. On the other hand, defendant presented evidence by witnesses found credible by the trial court, that defendant's refusal to post a handicap sign was occasioned by safety concerns and attempts to comply with the applicable federal

regulations, and had no relation whatsoever to defendant's disability. Because the record is devoid of any evidence to counter defendant's position that its decision was not illegally motivated, but instead motivated by its good faith attempt to comply with the law, we must therefore conclude as a matter of law that plaintiff failed to present sufficient evidence to prove a cause of action for handicap discrimination under the ADA.

Similarly, in order to establish a cause of action under § 504 of the Rehabilitation Act, after which Title II of the ADA was expressly modeled, plaintiff is required to prove that (1) he is a handicapped individual; (2) he is "otherwise qualified" for participation in the program; (3) he is being excluded from participation in or denied benefits or being subjected to discrimination under the program solely due to a handicap; and (4) the relevant program or activity is receiving federal financial assistance. 29 USC 794; *Landefeld v Marion General Hospital, Inc*, 994 F2d 1178, 1180-1181 (CA 6, 1993). The principal distinction between the Rehabilitation Act and the ADA is that coverage under the Rehabilitation Act is limited to entities receiving federal financial assistance while the ADA extends to purely private entities as well. *McPherson v Michigan High School Ass'n, Inc*, 119 F3d 453 (CA 6, 1997).

For the same reasons that we find plaintiff failed to prove a cause of action under the ADA, we conclude that he has likewise failed to prove a claim for relief under the Rehabilitation Act. As already noted, plaintiff's difficulty walking, attributable to his HIV, renders him a qualified individual with a disability, who is otherwise eligible to participate in the curbside parking program. However, we find no support in the record for plaintiff's allegation that defendant's refusal to honor his request for a handicap parking spot was due solely to his disability. As noted above, defendant presented expert testimony that that its decision to refuse plaintiff's request was based exclusively on safety concerns and the mandates of federal regulations, not on plaintiff's HIV status. Plaintiff did not present any evidence to rebut defendant's position, and the trial court expressly stated that it "found all the witnesses credible." Given defendant's uncontroverted evidence that its decision not to post a handicap parking sign was predicated on nondiscriminatory motives, we conclude that plaintiff failed to establish a cause of action under the Rehabilitation Act as a matter of law.

Next, defendant argues that the trial court erred when it concluded that defendant violated the PDCRA by failing to reasonably accommodate plaintiff's handicap by posting a handicap parking sign in front of his residence. We agree. To establish a prima facie case of handicap discrimination under the PDCRA, plaintiff must prove that (1) he is "handicapped" as defined in the statute; (2) the handicap is unrelated to his ability to use and benefit from a place of public accommodation or service; and (3) he has been discriminated against in one of the ways set forth in the statute. *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998). If the plaintiff establishes a prima facie case, the burden of production then shifts to the defendant to articulate a nondiscriminatory rationale for the action. *Id*. If the defendant meets the burden of production, the plaintiff must then prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a mere pretext. *Id.*

First, we reject plaintiff's contention that the law of the case doctrine precludes this Court from engaging in a de novo review of this claim of error because a prior panel of this Court, by reversing the

trial court's order granting summary disposition to defendant and remanding for further proceedings, already concluded that federal regulations, specifically 28 CFR 35.151, did not preclude posting a handicap parking sign as a reasonable accommodation.

The law of the case doctrine provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981); *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). Likewise, a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court. *Kalamazoo, supra* at 135. Thus, as a general rule, a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals. *Id.* The law of the case doctrine applies only to questions specifically decided in the prior decision and to those questions necessary to the court's prior determination. *Id.*

In Docket No. 181678, the first appeal of this case, this Court held that plaintiff had stated claims for relief under § 202 of the ADA and § 504 of the Rehabilitation Act of 1973, and that fact questions existed on whether defendant reasonably accommodated plaintiff's disability or whether the requested accommodation posed an undue hardship under the PDCRA. When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits. *Brown v Drake-Willock, Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995). Thus, the first appeal was not decided on the merits, and we are not precluded from reviewing this issue. *Id.*; *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982).

Defendant does not directly contest the trial court's finding that plaintiff established a prima facie case of discrimination based on disability under the PDCRA. Rather, as noted, defendant contends the trial court erred by finding that it was a reasonable accommodation for defendant to place a handicap parking sign on the street in front of plaintiff's house.

Defendant introduced uncontroverted evidence that federal regulations require that, in order for handicap parking to be made available on a public street, there must be at least thirteen feet of area designated for the parking spot -- eight feet for parking and five feet for maneuverability into and from the parked vehicle. Defendant also introduced uncontroverted evidence that the requisite space for a handicap parking spot did not exist on West Mason Street, if maintained as a two-way street, and therefore, a handicap parking spot would be both unsafe and in violation of federal regulations. In the face of this uncontroverted evidence provided by witnesses, found to be credible by the trial court, we must conclude that as a matter of law, satisfaction of the reasonable accommodation requirement under the PDCRA cannot include circumstances which require violations of federal regulations. In this regard, we find the trial court's finding clearly erroneous. *Hall v Hackley Hosp*, 210 Mich App 48, 55-56; 532 NW2d 893 (1995).

Plaintiff introduced no evidence to counter the defendant's evidence that West Mason Street was not sufficiently wide to safely designate as a handicap parking space under federal regulations and

that the posting of such a sign to designate such a space would essentially create a "defective highway". Therefore, plaintiff failed to meet his burden to show that the legitimate, nondiscriminatory reasons established by defendant for its refusal to post a handicap sign in front of plaintiff's house were pretextual, and judgment in favor of plaintiff was improper.

For the reasons stated herein, we reverse the trial court's judgment in favor of plaintiff as well as the order requiring defendant to post the handicap parking sign, and remand for entry of judgment in favor of defendant and an order dismissing plaintiff's claims.

Reversed and remanded for action consistent with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Kurtis T. Wilder

[1] The Michigan Handicappers' Civil Rights Act, MCL 37.1101; MSA 3.550(101), was amended by PA 1998, No. 20, effective March 12, 1998, and shall now be known and cited as the Persons with Disabilities Civil Rights Act.

[2] Defendant challenges the trial court finding that it runs an actual curbside parking "program", instead of simply permitting unrestricted, curbside parking to occur throughout the city. Because the evidence established the existence of city ordinances which regulate on-street parking, however, for purposes of this opinion we will simply assume without deciding that such a parking "program" exists.

[3] At the close of plaintiff's presentation of evidence, defendant moved for involuntary dismissal pursuant to MCR 2.504(B)(2), which provides in pertinent part:

> In an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence.