STATE OF MICHIGAN

COURT OF APPEALS

JAMES HINDELANG,

Plaintiff-Appellant/Cross-Appellee,

v

BAY MEDICAL CENTER,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
August 11, 2000

No. 217487
Bay Circuit Court
LC No. 97-003856-CL

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2116(C)(10) and dismissing his failure to accommodate and retaliatory discharge claims under the Handicappers' Civil Rights Act (HCRA) MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq*.[1] We affirm.

Defendant operates a hospital and related medical facilities in Bay County, Michigan. Plaintiff was hired in March 1978 as head of the respiratory therapy department and was later named as department director. At the time plaintiff was hired, he suffered from a slipped epiphysis (top femur slips out of hip socket), which caused severe arthritis in his right hip. As a further consequence of his condition, plaintiff's right leg is shorter than his left leg, and he wears a two inch lift in that shoe. The hip condition resulted in "very painful ambulation," tightness and cramping in the hip, and "loss of stability," which required him to periodically use a cane. Between April and July 1996, plaintiff took a leave of absence to have hip replacement surgery, which made his hip more comfortable, reduced the pain, and improved his gait. Plaintiff testified that by November 1996, he used a cane only in inclement weather

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[1] After plaintiff filed the instant action, the HCRA was renamed the "persons with disabilities civil rights act." The 1998 amendments, substituted the terms "handicap" and "handicapper" with "disability" and "person with a disability."

or when walking long distances

of a "block" or "half block." Plaintiff was terminated from employment in January 1997, allegedly due to inappropriate work hours, lack of availability, and unsatisfactory interpersonal relationships with staff.

Following his termination, plaintiff filed the instant action, alleging in pertinent part that defendant discriminated against him on the basis of his handicap (i.e., an arthritic hip condition that impaired his ability to walk); that defendant failed to accommodate him by refusing to allow him to park in non-employee handicapped spaces in front of the building; and that defendant retaliated against him for asserting a protected legal right to accommodation. The trial court granted defendant's motion for summary disposition with respect to all claims. On the handicap discrimination claim, the trial court found that material questions of fact existed regarding whether plaintiff was "handicapped" within the meaning of the HRCA; however, the court dismissed the claim on the ground that plaintiff failed to show that defendant's legitimate, nondiscriminatory reasons for termination were pretextual.[2] With respect to the accommodation claim, the trial court ruled that defendant's refusal to permit plaintiff to park in the lot in front of the building, which was designated for use by patients and visitors, did not violate the "accommodation mandate." The trial court also dismissed the retaliation claim, finding that plaintiff failed to establish a causal nexus between any protected activity and termination and, in any event, did not show that defendant's proffered reasons for termination were pretextual.

Plaintiff first argues that a question of fact existed regarding whether defendant failed to reasonably accommodate his walking disability after his July 1996 request for "the best available parking for his work environment." We disagree. This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). On a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

The HCRA guarantees the "opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a handicap . . . ." MCL 37.1102(1); MSA 3.550(102)(1). A person is handicapped under the HCRA if their physical or mental condition substantially limits one or more major life activity and is unrelated to the person's ability to perform a particular job or position with or without accommodation. MCL 37.1103; MSA 3.550(103); *Rourk v Oakwood Hospital Corp*, 458 Mich 25, 28; 580 NW2d 397 (1998).

In the present case, plaintiff alleged that defendant failed to accommodate him by refusing to allow him to park in the handicap spaces in the lot in front of the building (i.e., Lot A), which was designated for visitors and patients. For the purposes of employment relationships, the

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[2] Plaintiff does not challenge on appeal the trial court's ruling with respect to his handicap discrimination claim.

HCRA mandates that "a person shall accommodate a handicapper . . . unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1102(2); MSA 3.550(102)(2); *Rourk, supra* at 28. Section 210 allocates the burden of proof with respect to the duty of reasonable accommodation as follows:

> In an action brought pursuant to this article for failure to accommodate, the handicapper shall bear the burden of proof. If the handicapper proves a prima facie case, the person shall bear the burden of producing evidence that an accommodation would impose an undue hardship on that person, the handicapper shall bear the burden of proving by a preponderance of the evidence that an accommodation would not impose an undue hardship on that person. [MCL 37.1210(1); MSA 3.550(210)(1).]

Therefore, if the plaintiff meets the initial burden of proving that the employer violated the accommodation mandate, the burden shifts to the employer to demonstrate that it cannot reasonably accommodate the plaintiff without undue hardship. MCL 37.1210(1); MSA 3.550(210)(1); *Rourk*, *supra*; *Hall v Hackley Hospital*, 210 Mich App 48, 54-55; 532 NW2d 893 (1995).

The accommodation provisions of the HCRA evidence an attempt to balance the rights of the handicapper with those of the employer. *Rourk*, *supra* at 35. Section 210 specifically recognizes the following types of accommodation: (1) purchasing equipment and devices, (2) reasonable routine maintenance or repair of such equipment and devices, (3) hiring readers and interpreters, and (4) restructuring jobs and altering schedules for minor and infrequent transfers. *Id.* at 33, citing MCL 37.1210(2)-(5), (7)-(11), (14)-(15); MSA 3.550(210)(2)-(5), (7)-(11), (14)-(15). With respect to accommodations not expressly listed in the statute, "it is for the courts to determine whether the burden of the requested accommodation imposes an undue hardship, for implicit in the statute is a standard of reasonableness." *Rourk*, *supra* at 36; *Roller v Dep't of Civil Service*, 228 Mich App 534, 539-540; 597 NW2d 118 (1998). The question of reasonableness is not always driven by cost and may include other factors. *Id.* 36 n 6, citing *Hall*, *supra*.

Assuming without deciding that plaintiff's arthritic condition constituted a "handicap" within the meaning of the HCRA, we conclude that defendant's duty to accommodate did not require it to permit plaintiff to park in lots reserved for patients and visitors. Plaintiff submitted no authority for the proposition that defendant was legally required to create a parking space in a lot reserved exclusively for non-employees. Nor do we believe that the HCRA requires an employer to reduce customer parking to accommodate its employees' walking limitations. See *Kornblau v Dade County*, 86 F3d 193 (CA 11, 1996) (a disabled person was not entitled, under the ADA, to park in a lot reserved for county employees, even though it was the closest lot to the county building, where she was not a county employee, she had access to other lots with disabled parking, and parking in the disputed lot would not have been available to her even were she not disabled). As the trial court noted, "while defendant was obligated to reasonably accommodate employee handicaps, and thus might be required to reassign existing employee parking spaces within employee lots, that obligation of reasonable accommodation did not impose on it a duty to create new employee parking spaces for handicapped employees by eliminating patient and visitor parking judged necessary by defendant for the operation of its business." Accordingly, we agree with the trial court's conclusion that plaintiff failed to carry his initial burden of

proving that defendant's conduct as alleged in the complaint violated the HCRA accommodation mandate. See *Rourk*, *supra* (the plaintiff failed to carry her initial burden of proving that her employer had a duty to accommodate her by transferring her to a different job); *Hall*, *supra* at 55-56 (the plaintiff failed to carry the initial burden of proving that her employer had a duty to accommodate her by banning smoking in its psychiatric facility).

In any event, although defendant refused to permit plaintiff's attempt to park in Lot A or similar lots, defendant satisfied its duty to accommodate plaintiff by offering him numerous other options. The uncontested evidence established that defendant permitted plaintiff to park in handicapped spaces in employee lots and even created additional handicapped spaces in one lot. Defendant also offered plaintiff the use of a motorized cart to assist him in traveling from the hospital entrance to his office which, according to defendant, would have substantially reduced the amount of walking. Plaintiff, however, rejected the offer and did not request the use of the cart from his car to the building. An employer has the ultimate discretion in choosing between reasonable accommodations, even if the accommodation is not the one that the employee desires. See *Keever v City of Middletown*, 145 F3d 809 (CA 6, 1998) (a desk job offered to the plaintiff was a reasonable accommodation, although it was not the plaintiff's preferred accommodation); *Hankins v Gap Inc*, 84 F3d 797, 800 (CA 6, 1996) (the defendant provided reasonable and effective accommodation even though the accommodation proposed by the plaintiff was also reasonable). Under these circumstances, we conclude that the trial court properly granted summary disposition with respect to plaintiff's accommodation claim.

Plaintiff also argues that issues of material fact existed that precluded summary disposition of his claim of illegal retaliation under the HCRA. Plaintiff contends that defendant retaliated against him for complaining to defendant that its failure to accommodate him constituted a violation of the HCRA and for submitting a written request for an accommodation. We disagree.

MCL 37.1602; MSA 3.550(602), provides in pertinent part:

> A person or 2 or more persons shall not do the following:
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> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of unlawful retaliation under the HCRA, "a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Mitan v Neiman Marcus*, 240 Mich App 679, 681; ___ NW2d ___ (2000), citing *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997) (holding that the prima facie elements of a retaliation claim brought under the Civil Rights Act also apply to retaliation claims brought under the HCRA).

Assuming for the sake of argument that plaintiff presented evidence sufficient to sustain the other prima facie elements of a retaliation claim, we conclude that plaintiff failed to establish a causal nexus between the protected activity and his termination. In an attempt to show causation, plaintiff presented evidence which, at most, establishes that he repeatedly requested the ability to park in Lot A, and that defendant's vice president of human resources refused to permit him to park there and reprimanded him for doing so. This evidence, however, fails to show that defendant terminated plaintiff's employment because he engaged in protected activity under the HCRA or that such activity was causally related to defendant's termination. Moreover, the record is devoid of evidence establishing that defendant's vice president of human resources had any "input" in the termination decision or that plaintiff's immediate supervisor, the true decision-maker, harbored retaliatory animus. Particularly where there was a six-month temporal gap between plaintiff's 1996 written accommodation request and the January 1997 discharge, we find that the evidence plaintiff submitted was insufficient to establish the required causal connection. See *Wixson v Dowagiac Nursing Home*, 866 F Supp 1047, 1057 (WD Mich, 1994) (seven months was too remote to support an inference of retaliation); *Reeves v Digital Equipment Corp*, 710 F Supp 675, 677 (ND Oh, 1989) (three months was too remote to support an inference of retaliation).

Even if we were to conclude that plaintiff established a prima facie case, summary disposition was nonetheless proper. Defendant submitted admissible evidence establishing that plaintiff was terminated because his immediate supervisor lost confidence in his ability to manage the respiratory therapy department in light of his inappropriate work hours and his unsatisfactory interpersonal relationships with staff. In response, plaintiff failed to present evidence sufficient to create a triable issue that defendant's legitimate non-retaliatory reasons were pretextual or that retaliatory animus was a motivating factor underlying the termination decision. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-176; 579 NW2d 906 (1998); *Hall v McRea Corp*, 238 Mich App 361, 370-371; 605 NW2d 354 (1999). Summary disposition was therefore properly granted.

In light of our disposition, we need not address defendant's issue on cross-appeal that the trial court erred in concluding that a question of material fact existed regarding whether plaintiff was handicapped within the meaning of the HCRA.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot