

STATE OF MICHIGAN  
COURT OF APPEALS

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DOUGLAS B. MAY,

Plaintiff-Appellant,

v

EPPERT OIL COMPANY,

Defendant-Appellee.

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UNPUBLISHED  
December 8, 2000

No. 217144  
Wayne Circuit Court  
LC No. 97-727226-CZ

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber\*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff worked for defendant as a salesperson. His job required extensive travel virtually every week. In April, 1995 plaintiff suffered a stroke which left him permanently afflicted with dysphasia, a speech impediment. On August 3, 1995, plaintiff and his wife met with defendant's president and others to discuss his return to work. The parties agreed that plaintiff would return on a part-time basis and would perform tasks in the office. Following the meeting, plaintiff confirmed the conditions of his return in a letter to defendant. The letter stated that regular sales trips, limited to every other week, could begin once plaintiff returned to full-time work. When plaintiff returned to work, he was told that his territory had been reassigned. Eventually, plaintiff was assigned to a territory that was in disarray. He was able to do little to rectify the situation, and his job performance declined as a result. Plaintiff resigned his employment on July 10, 1997.

In August 1997, plaintiff filed suit pursuant to the Michigan Handicappers' Civil Rights Act (HCRA) (now known as the Persons With Disabilities Civil Rights Act), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Plaintiff alleged that his speech impediment constituted a handicap as defined in the HCRA, and was unrelated to his ability to perform the duties of a salesperson. He alleged that defendant constructively discharged him in violation of the HCRA.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

In addition, plaintiff alleged age discrimination in violation of the ELCRA. [Subsequently, plaintiff voluntarily dismissed his age discrimination claim.]

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not make out a prima facie case under the HCRA because he could not establish that his condition was unrelated to his ability to perform the essential duties of a salesperson. In response, plaintiff contended that the evidence showed that he was able to perform all essential functions of his position at the time he returned to work; nevertheless, defendant removed him from that position and placed him into a situation that eventually became intolerable. The trial court granted the motion, finding that plaintiff had not established a prima facie case of discrimination under the HCRA.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

To recover under the HCRA, a plaintiff must plead and prove: (1) that he is handicapped as defined in the HCRA (a determinable physical or mental characteristic that substantially limits one or more major life activities and is unrelated to the ability to perform the duties of a particular job, MCL 37.1103(e); MSA 3.550(103)(e)); (2) that the handicap is unrelated to his ability to perform the duties of a particular job, with or without accommodation; and (3) that he was discriminated against in one of the ways set forth in the statute. *Hall v Hackley Hospital*, 210 Mich App 48, 53-54; 532 NW2d 893 (1995).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. The documentary evidence, including plaintiff's deposition and his letter of August 3, 1995, established that when plaintiff returned to work, he did so with restrictions. He needed continuing speech therapy, and could not drive long distances and with the frequency necessary to cover his sales territory. The letter stated that for an (unspecified) time after plaintiff returned to full-time work, he could drive on extended sales trips only every other week. This evidence established that when plaintiff returned to work he could not perform the essential duties of his job as a salesperson. The affidavits plaintiff submitted in support of his response to defendant's motion for summary disposition stated otherwise; however, a party cannot create an issue of fact by making statements in an affidavit that are contrary to statements made in earlier deposition testimony. *Kaufman & Payton, P.C. v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). When plaintiff returned to work in August 1995, it was unknown when he would be able to resume the duties of a salesperson. Defendant was not required to hold plaintiff's position open indefinitely. *Ashworth v Jefferson Screw Products, Inc*, 176 Mich App 737, 745; 440 NW2d 101 (1989). Plaintiff's handicap was not unrelated to his ability to perform the essential duties of his position; therefore, the trial court correctly concluded that plaintiff failed to establish a prima facie case under the HCRA. Summary disposition was proper.

Affirmed.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Dennis B. Leiber