STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GEROW,

Plaintiff-Appellant,

V

CITY OF SAGINAW,

Defendant-Appellee.

UNPUBLISHED
October 30, 2001

No. 223355
Saginaw Circuit Court
LC No. 98-025691-CZ

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

In this handicap discrimination case brought under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*,[1] plaintiff appeals as of right from the circuit court's grant of summary disposition to defendant under MCR 2.116(C)(10). We reverse.

I. Factual and Procedural Background

Plaintiff became a firefighter with defendant City of Saginaw in 1974. Over the next twenty-two years, plaintiff rose through the ranks, eventually attaining the rank of captain. In each of the various positions held by plaintiff, including captain, plaintiff worked as a front-line firefighter. His duties included working twenty-four hour shifts, sleeping at the fire station, responding to emergency calls at any time of the day or night, wearing heavy protective gear and a self-contained breathing apparatus, and lifting and carrying heavy objects. Although some positions within the fire department involved additional administrative duties, the parties agree that all positions with the fire department involved front-line firefighting, including all of the duties described above.

In 1994, plaintiff was first diagnosed with diabetes, a medical condition involving irregular blood sugar levels. Although plaintiff and his doctor initially attempted to control the diabetes with oral medication and diet, that treatment was unsuccessful. Plaintiff did not initially

[1] This act was formerly titled the Michigan Handicappers' Civil Rights Act. Along with certain substantive amendments, the Legislature amended the title of the act effective March 12, 1998. See 1998 PA 20. The Legislature again amended the act effective March 15, 2000. See 2000 PA 32. Because plaintiff filed his complaint on October 23, 1998, we apply the act's provisions in effect at that time.

inform defendant of his condition. In May 1996, plaintiff began taking insulin injections to control his diabetes. Five months later, on October 15, 1996, plaintiff informed the fire chief of his diabetic condition and of the fact that he was taking insulin injections.[2] The fire chief immediately directed plaintiff to apply for a disability pension. In addition, the fire chief informed plaintiff that he could be fired if he refused to apply for a pension. Plaintiff therefore complied with the chief's demand, filing the necessary paperwork with defendant's pension board.[3] While plaintiff's disability application remained pending, defendant placed him on temporary "light duty work" that did not require front-line firefighting.[4]

Under defendant's disability pension application process, defendant's medical director is required to evaluate each applicant's medical condition and determine whether the applicant is "disabled" under defendant's pension plan. In the present case, instead of personally evaluating plaintiff, the medical director sent him to Dr. Balcueva, a specialist in internal medicine. According to plaintiff, Balcueva did not conduct an examination, but simply asked him a few questions. As a result of this interview, Balcueva recommended that defendant place plaintiff on a disability pension, given his conclusion that plaintiff "would probably develop hypoglycemia." Over two years later, after plaintiff filed the instant lawsuit, defendant arranged for Dr. Hammoud, a specialist in endocrinology and internal medicine, to examine plaintiff. Hammoud likewise concluded that plaintiff was disabled from working as a firefighter, given his finding of a risk that plaintiff "could become hypoglycemic with excessive physical activity."

The pension board granted plaintiff's pension application on November 4, 1996, and plaintiff's retirement became effective the next day. Plaintiff did not contest the pension board's decision through internal appeal procedures. Instead, plaintiff filed a complaint against defendant in circuit court, alleging that defendant violated the PWDCRA when it forced him to accept a disability pension and retire from the fire department. Before the close of discovery,[5] defendant filed a motion for summary disposition under MCR 2.116(C)(10). The circuit court granted defendant's motion, based on two separate conclusions: (1) no genuine issue of material

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[2] Defendant does not contend that plaintiff experienced any diabetes-related problems, rendering him incapable of performing the duties of a front-line firefighter, between the 1994 diabetes diagnosis and the October 1996 revelation to the fire chief of plaintiff's condition. There was no evidence submitted below that plaintiff was unable to satisfactorily perform the duties of his position during this time period, despite his diabetes. In fact, plaintiff was named "fire fighter of the year" in 1995, *after* he was diagnosed with diabetes.

[3] Plaintiff argued that the fire chief essentially forced him to apply for the disability pension. We note that defendant's internal policies empowered the fire chief to apply for a disability pension on plaintiff's behalf, if plaintiff declined to do so. For the purpose of ruling on plaintiff's motion for summary disposition, the circuit court treated the pension application as one filed by the fire chief. For the purpose of this opinion, we adopt the same assumption.

[4] Defendant asserts that it does not have any permanent "light duty" positions. Plaintiff does not dispute that assertion.

[5] In its brief, defendant asserts that it filed the motion for summary disposition after the close of discovery in this matter. However, the lower court record contains a stipulation and order dated June 10, 1999, extending discovery to June 28, 1999. The circuit court heard and granted defendant's motion on June 14, 1999, two weeks *before* the close of discovery.

fact existed regarding plaintiff's inability to perform the essential duties of a front-line firefighter, and (2) plaintiff had failed to exhaust internal appeal procedures before the pension board. Plaintiff filed a motion for reconsideration, which the circuit court denied. Plaintiff appeals as of right from the circuit court's decision. We reverse.

II. Standard of Review

In *Michalski v Bar-Levav*, 463 Mich 723, 729-730; 625 NW2d 754 (2001), our Supreme Court explained the standard for a circuit court's grant of summary disposition under MCR 2.116(C)(10):

> A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is subject to de novo review. In reviewing a motion for summary disposition under MCR 2.116(C)(10), the court considers the pleadings, affidavits, and other documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. The motion is properly granted if the documentary evidence presented shows that there is no genuine issue with respect to any material fact and the moving party is therefore entitled to judgment as a matter of law. [Citations omitted.]

We review the circuit court's decision granting or denying such a motion under a de novo standard of review. *Id*. at 729; *Petzold v Borman's, Inc*, 241 Mich App 707, 713; 617 NW2d 394 (2000).

III. The Persons with Disabilities Civil Rights Act

A. Statutory Provisions

Plaintiff's complaint alleged that defendant violated the PWDCRA by forcing him to retire upon discovering his medical condition, insulin-dependent diabetes. During the relevant time period, the PWDCRA prohibited an employer from discharging or otherwise discriminating against an individual "because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b).[6] In order to present a prima facie case under the PWDCRA, a plaintiff must show: (1) that he has a "disability," as defined by the statute, (2) that the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) that the plaintiff has been discriminated against in one of the ways set forth in the statute. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). The PWDCRA defines the term "disability" as follows:

> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:

[6] A subsequent amendment also prohibited an employer from discharging or otherwise discriminating against an individual because of genetic information unrelated to the individual's ability to perform the duties of a particular job or position. See 2000 PA 32.

(A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

* * *

(*ii*) A history of a determinable physical or mental characteristic described in subparagraph (i).

(*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [MCL 37.1103(d).]

B. Perceived Disability

On appeal, plaintiff frames his argument in terms of a "perceived disability" claim under MCL 37.1103(d)(iii), rather than a typical disability claim under MCL 37.1103(d)(i). We conclude that it would be inappropriate to analyze this case under the "perceived disability" provision. This is not a case where an employer erroneously believed that an employee suffered from a medical or psychological condition. Rather, both plaintiff and defendant agree regarding the existence of plaintiff's medical condition, insulin-dependent diabetes. As this Court stated in *Chiles*, *supra* at 475-476:

> Normally, a *perceived* disability will be one that pertains to a disability with some kind of unusual stigma attached, often a mental disability, where negative perceptions are more likely to influence the actions of an employer. Rarely, on the other hand, will an employer inaccurately perceive an employee to have a *physical* impairment because such impairments are generally obvious and unlikely to be misread. An employee will rarely if ever be wrongly perceived, for example, to suffer from blindness, deafness, amputation or paralysis." [Emphasis in original.]

In the present case, defendant did not wrongly perceive that plaintiff was an insulin-dependent diabetic. Plaintiff concedes that he has this condition. Therefore, we decline to analyze this case as one involving a "perceived disability."

C. Job-Relatedness

For the purpose of deciding defendant's motion for summary disposition, the circuit court focused on the second element of plaintiff's prima facie case, whether plaintiff's diabetes was unrelated to his ability to perform the duties of a front-line firefighter. The circuit court, along with both parties, apparently assumed that plaintiff's diabetes qualified as a determinable physical characteristic that substantially limited one or more of his major life activities. MCL 37.1103(d). On appeal, defendant does not argue that plaintiff failed to establish either of those factors. Therefore, we confine our analysis to whether plaintiff's medical condition was unrelated to his ability to perform the duties of his position.

Before the circuit court, defendant argued that plaintiff's diabetes rendered him unable to perform the duties of a front-line firefighter. To support that conclusion, defendant relied on the medical opinions of Dr. Balcueva and Dr. Hammoud. Dr. Balcueva's records stated that plaintiff had "apparently experienced ten episodes of hypoglycemia, although not documented. He felt bad, sweaty, dizzy, weak, but did not lose consciousness." Based on this information, Balcueva opined that plaintiff should not work as a firefighter because he would "probably develop hypoglycemia." Hammoud likewise opined that plaintiff should not work as a firefighter, because plaintiff was "at risk for hypoglycemia especially at the time of excessive strenuous activity." Apparently, both doctors based their opinions on the possibility that plaintiff might be called to fight a fire early in the morning, before plaintiff was able to take his medication. If that happened, they concluded that plaintiff might experience weakness, dizziness, or other symptoms that might prevent plaintiff from performing his job duties. Neither doctor based his opinion on any actual problems experienced by plaintiff while on the job.

In contrast, plaintiff argued that his diabetes did not render him unable to perform the duties of a front-line firefighter. To support that conclusion, plaintiff relied on: (1) his own testimony about his physical condition, and (2) the medical records of Dr. Koenig, plaintiff's treating physician. Plaintiff testified that Balcueva's claim of "undocumented" hypoglycemic episodes was inaccurate, as plaintiff had not suffered from such episodes. Plaintiff did concede that, prior to being placed on medication, he did not feel well and he experienced both excessive thirst and frequent urination. However, once placed on medication, he testified that his condition was well-controlled and that he felt fine. Plaintiff also testified that the risk of hypoglycemic episodes could be avoided simply by carrying food or candy while at work.

Koenig's medical records also supported plaintiff's argument that his diabetes did not prevent him from performing the duties of a front-line firefighter.[7] The records contain no mention of hypoglycemic episodes. Further, the records from September 1996, just weeks before the fire chief forced plaintiff to retire, indicate that plaintiff's condition was "controlled" and that plaintiff felt "the best he has felt in years."

At the time of the June 14, 1999 hearing on defendant's motion for summary disposition, two weeks of discovery remained, the parties having stipulated to extend discovery until June 28, 1999 and to adjourn mediation. The circuit court noted at the outset of the hearing that it had received the parties' stipulation to extend discovery. Further, at the hearing, after defense counsel presented his argument, the circuit court asked plaintiff's counsel if she had medical evidence contrary to Dr. Balcueva's opinion that plaintiff could not perform the job of fire captain. Plaintiff's counsel responded:

> What I have is Dr. Koenig's records showing my client's condition while he worked for the City. And it is my intent to take Dr. Koenig's de bene [esse] dep [sic deposition] in this case to establish that my client could do the essential functions of the job. . . .

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[7] Both parties attached copies of Koenig's medical records as exhibits to their respective briefs regarding defendant's motion for summary disposition.

Defendant stated no objection.[8]

As a general matter, summary disposition is premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), citing *Dep't of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). The proper inquiry is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position. *Id*. In conjunction with his motion for rehearing, plaintiff presented the circuit court with a letter from Koenig indicating that plaintiff "could have and can successfully complete his job as Fire Captain, despite being an insulin dependent diabetic." Therefore, it appears that further discovery did stand a fair chance of uncovering additional factual support for plaintiff's position. We conclude that the circuit court inappropriately granted defendant's motion for summary disposition before discovery on this disputed issue was complete.

Even if we declined to consider the opinion contained in Koenig's letter, on the grounds that it was not properly before the circuit court at the summary disposition hearing, we would conclude that the circuit court erroneously granted defendant's motion for summary disposition. When deciding defendant's motion, the circuit court was required to consider the evidence in the light most favorable to plaintiff. *Michalski*, *supra* at 729-730. Viewed in that light, we are convinced that a genuine issue of material fact did exist with regard to plaintiff's ability to perform the duties of his job, despite his insulin-dependent diabetes. Defendant does not contend that plaintiff experienced any type of diabetic or hypoglycemic episodes that actually prevented plaintiff from performing his job duties.

Further, we note the evidence introduced by plaintiff indicating that defendant allows diabetics taking oral medications to continue working as firefighters, while prohibiting diabetics taking insulin from performing identical job duties. Plaintiff argues that application of such a policy results in handicap discrimination because the policy focuses on the employee's disease, not on his individual ability to perform his job duties. We agree. We conclude that the circuit court committed error requiring reversal when it found that no genuine issue of material fact existed regarding plaintiff's ability to perform the duties of a front-line firefighter.

IV. Exhaustion of Administrative Remedies

Finally, we conclude that the circuit court committed error requiring reversal when it granted defendant's motion for summary disposition based on a conclusion that plaintiff had failed to exhaust internal appeal procedures before the pension board. Defendant contends that its pension ordinance was part of a collective bargaining agreement, approved by plaintiff's union, and adopted by the Saginaw City Council. Therefore, defendant argues that plaintiff was required to exhaust his appellate rights under the pension ordinance before filing a handicap

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[8] Under these circumstances, and under the circumstance that defendant's appellate brief argues that discovery was closed at the time its summary disposition motion was heard, which is contrary to the stipulation of the parties extending discovery, we do not agree with our dissenting colleague's statement that we are sua sponte raising the issue that summary disposition was granted before the close of discovery.

discrimination claim in circuit court. Because plaintiff did not do so, defendant argues that plaintiff's lawsuit was properly dismissed.

Defendant's argument ignores *Jackson v City of Flint*, 191 Mich App 187, 189-190; 477 NW2d 489 (1991), where this Court held that a plaintiff is not required to exhaust his remedies under a collective bargaining agreement before he may bring a civil suit in circuit court for handicap discrimination:

> The Legislature, by enacting the HCRA, intended to mandate the employment of the handicapped to the fullest extent reasonably possible. [The statute] should be liberally construed to this end.
>
> In *Marsh v Dep't of Civil Service*, 142 Mich App 557; 370 NW2d 613 (1985), a panel of this Court examined the above-cited sections of the HCRA and concluded: (1) that exhaustion of administrative remedies with the Department of Civil Rights was unnecessary before bringing suit in circuit court; (2) that the HCRA provided direct access to the circuit court; (3) that the Civil Rights Commission and the circuit court held concurrent jurisdiction over civil rights claims; and (4) that the aggrieved party could proceed simultaneously in both forums.
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> We extend that reasoning and hold that, just as plaintiff need not exhaust his remedies before the Civil Rights Commission, *he need not exhaust his remedies under the collective bargaining agreement.* A requirement that plaintiff first exhaust his remedies under the collective bargaining agreement unnecessarily infringes on his statutory right and the strong policy favoring direct and immediate access to the circuit court. [Citations omitted, emphasis added.]

Accordingly, defendant's exhaustion of administrative remedies argument is without merit and the circuit court erroneously granted defendant's motion for summary disposition on this basis. We reverse the circuit court's grant of summary disposition to defendant and remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Judge White
/s/ Judge Smolenski