STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM M. SHIREMAN,

Plaintiff-Appellant,

v

CITY OF KALAMAZOO,

Defendant-Appellee.

UNPUBLISHED
November 16, 2001

No. 225768
Kalamazoo Circuit Court
LC No. 91-002580-NZ

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10) in this employment discrimination case. We affirm.

Plaintiff began working for defendant as a firefighter in 1957, and later became a captain. In 1982, the police and fire departments merged into a single public safety department. Existing personnel were required to cross train, and plaintiff became a lieutenant in the public safety department. John Ross, formerly with the police department, became the chief of the public safety department. There is evidence of animosity between the two former departments and the subsequent rankings they received in the new public safety department.

Plaintiff suffered a total of four hernias during his employment: in 1974, 1980, 1982, and 1985. The fourth hernia that plaintiff suffered in 1985 led to his application for a duty disability pension. Plaintiff submitted his application to defendant's pension board and asked to retire effective December 24, 1985. On March 20, 1986, the pension board determined that plaintiff could retire on a duty disability pension, but that the date of retirement had to be determined depending on the exhaustion of his other benefits. A dispute regarding worker's compensation benefits was subsequently resolved, and plaintiff informed the pension board that he would name his retirement date after the worker's compensation benefits were exhausted. The pension board, in turn, informed plaintiff that he would have to resubmit his retirement application within ninety days of the date he planned to retire.

In early 1988, plaintiff decided that he could return to work, and informed the union's president that he planned to return to work rather than retire. In a memorandum dated March 11, 1988, however, Chief Ross asked the pension board to place plaintiff on medical retirement based on the previous finding that he was medically disabled. In September 1988, the pension board decided to place plaintiff on retirement status. This lawsuit ensued on August 23, 1991.

This case has had a lengthy appellate history, having been in this Court on two separate occasions and in the Supreme Court once. Following remand to the trial court by the Supreme Court for further proceedings,[1] defendant sought summary disposition with regard to plaintiff's claims of handicap and age discrimination.

The trial court granted defendant's motion for summary disposition in an opinion and order dated September 23, 1999. The trial court ruled that plaintiff voluntarily terminated his employment because he did not intend to return to active employment, but only did so when he realized that he pension benefits would not be as favorable as he had hoped. The trial court also ruled that plaintiff was not qualified for re-employment in 1988 because he was no longer certified as a public safety officer. Lastly, the trial court ruled that plaintiff failed to establish any genuine issues of material fact with respect to the age and handicap discrimination claims because there was no evidence that these were factors in the pension board's determination to place plaintiff on medical retirement. The final order denying plaintiff's motion for reconsideration was entered on March 1, 2000.

The trial court granted summary disposition under MCR 2.116(C)(7) and (10). We review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Under both MCR 2.116(C)(7) and (10), the pleadings, affidavits, admissions, depositions, and other documentary evidence filed in the action or submitted by the parties must be considered by the court. MCR 2.116(G)(5). When a motion is filed under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden, supra,* p 119. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and the evidence must be evaluated in a light most favorable to the nonmoving party. *Maiden, supra,* p 120. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff contends that he has been discriminated against on the basis of his age (fifty-five years old when placed on medical retirement), in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*, and on the basis of his disability (hernia), in violation of the Handicapper's Civil Rights Act,[2] MCL 37.1101 *et seq.* Regardless of whether plaintiff voluntarily retired and whether plaintiff was qualified to return to work because of his certification status, we affirm the trial court because plaintiff has failed to set forth any evidence that he was placed on a medical retirement because of age and handicap discrimination.

Because plaintiff has not set forth direct evidence of discrimination, his claims are subject to the burden-shifting framework set forth in *McDonnell Douglas Corp v Green,* 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Under this framework, plaintiff must first establish a prima facie case of discrimination. Here, plaintiff must show that (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position with respect to which discrimination is claimed; and (4) the job was given to another person under

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[1] See *Shireman v City of Kalamazoo,* 459 Mich 907 (1998).

[2] This act has been redesignated the "Persons with Disabilities Civil Rights Act," but this suit was commenced long before the statute was renamed.

circumstances that give rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co,* 464 Mich 456, 463; ___ NW2d ___ (2001). Once plaintiff establishes a prima facie case of discrimination, defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision to rebut the presumption of discrimination created by the plaintiff's prima facie case. *Id.* at 464. If defendant produces evidence that its action was taken for a legitimate, nondiscriminatory reason, the burden shifts to plaintiff to demonstrate that the evidence is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by defendant toward plaintiff. *Id.* at 464-465.

In this case, plaintiff has failed to present any evidence that he was discriminated against on the basis of his age. The evidence shows that there was animosity between personnel of the former fire and police departments and resentment over the new rankings and supervisors. Additionally, plaintiff's proffered evidence shows that former police officers were favored over former firefighters. However, plaintiff has failed to come forth with any evidence that either Chief Ross or the pension board discriminated against plaintiff on the basis of his age. In other words, there is simply no evidence that age was a determining factor in the pension board's decision to place plaintiff on medical retirement. *Matras v Amoco Oil Co,* 424 Mich 675, 682; 385 NW2d 586 (1986). Accordingly, the trial court did not err in grating summary disposition in favor of defendant for the reason that plaintiff failed to present any evidence that he was placed on medical retirement because of his age.

Further, plaintiff has failed to establish a claim of handicapper's discrimination. To establish a claim of handicapper's discrimination, plaintiff must show that (1) he is handicapped as defined in the act, (2) the handicap is unrelated to his ability to perform his job duties, and (3) he has been discriminated against in one of the ways set forth in the statute. *Chmielewski v Xermac, Inc,* 457 Mich 593, 602; 580 NW2d 817 (1998). Plaintiff cannot establish a handicapper's discrimination claim because his hernia is clearly related to his ability to perform his job since he could not work with a hernia. Additionally, if his hernia had been healed and he no longer had a hernia by 1988, and evidence offered by plaintiff also supported this,[3] then plaintiff is not handicapped within the definition of the statute. However, even if plaintiff was perceived to have a handicap (his hernia), the perception on the part of the pension board is not sufficient to establish a claim of handicapper's discrimination. This is because the perceived handicap was related to plaintiff's job duties. The record indicates that defendant was concerned with whether the hernia would prevent plaintiff from doing police and fire work. This concern was not discriminatory because the perceived handicap must be unrelated to the individual's ability to perform the duties of a particular job or position. MCL 37.1202(a); *Merillat v Michigan State Univ,* 207 Mich App 240, 245-246; 523 NW2d 802 (1994). Further, to the extent that plaintiff argues that he should have been allowed a "healing time" to become requalified for his job, this Court has expressly overruled prior cases establishing a "reasonable time to heal" doctrine in handicapper's discrimination cases. *Lamoria v Health Care Corp,* 233 Mich App 560; 593 NW2d 699 (1999).

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[3] Indeed, plaintiff argues forcefully in his appellate brief that his hernia was cured by 1988 and that the pension board should not have placed him on a duty disability retirement at that time.

Accordingly, the trial court did not err in granting summary disposition to defendant on the handicapper's discrimination claim because plaintiff to establish the elements of the claim.

Lastly, we find no error in the trial courts' decisions to deny plaintiff's motions for recusal because there was no showing of actual or personal bias on the part of the trial court handling the case. *Cain v Dep't of Corrections*, 451 Mich 470, 494-495; 548 NW2d 210 (1996); MCR 2.003(B)(1).

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell