STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY WAYNE MILLER, Plaintiff-Appellant,	UNPUBLISHED January 11, 2002
v	No. 222439 Ingham Circuit Court
DEPARTMENT OF CORRECTIONS, Defendant-Appellant.	LC No. 98-087928-NZ

Before: K. F. Kelly P.J., and White and Talbot, JJ.

K. F. Kelly, P.J. (dissenting).

I respectfully dissent. Because I believe that plaintiff put forth sufficient evidence to establish that he is "a person with a disability" as that term is defined within the statute, and that there are genuine factual issues regarding whether accommodating plaintiff's disability would place an undue hardship upon the institution, I would affirm the trial court and deny defendant's motion for summary disposition.

For purposes of the PWDCRA, "disability" is defined as:

> (i) A determinable physical . . . characteristic of an individual, which may result from . . . injury . . . if the characteristic:
>
> (A) for purposes of [employment discrimination] 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 positio*n . . . . MCL 37.1103(d)(i)(A)[1]. (Emphasis added.)

"Unrelated to the individual's ability" is the operative language in MCL 37.1103(d)(i)(A) and designates those disabilities that "with or without accommodation . . . [do] not prevent the individual from []performing the duties of a particular job." MCL 37.1103(l)(i). In *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 31; 580 NW2d 397 (1998), our Supreme Court stated that the "with our without accommodation" qualification "lowers the threshold of proof of a [disability]" and "*guarantees* that an individual

[1] Before 1998 PA 20, which rewrote this particular section, the quoted provision appeared at MCL 37.1103(e)(i)(A).

otherwise qualified for a particular position *is entitled* to some accommodation if needed." (Emphasis added.)

Where an individual qualifies as a "person with a disability" for purpose of the act, then an affirmative duty arises requiring an employer to accommodate that person "unless the accommodation would impose an undue hardship." See MCL 37.1102(2).

As an initial matter, I would find that plaintiff qualifies as a person with a disability as that term is defined by the PWDCRA. The evidence available on the record indicates that the injury plaintiff sustained to his ankle substantially impairs plaintiff's ability to ambulate which is considered a "major life activity" for purposes of the act. See *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996) (citing with approval the administrative regulations to the federal ADA and the Rehabilitation Act which specifies walking as a "major life activity" for purposes of those acts.)

The issue then becomes whether plaintiff's inability to ambulate is related to his ability to perform the duties of a corrections officer. Relative to plaintiff's employment, plaintiff's disability confines him to a sit down or sedentary job only. According to plaintiff, with this "accommodation" he could perform his assignment. Consequently, to accommodate plaintiff's disability, defendant must provide plaintiff with an assignment allowing plaintiff to remain sedentary, "unless the accommodation would impose an undue hardship." See MCL 37.1102(2); *Hall v Hackley Hosp*, 210 Mich App 48, 54; 532 NW2d 893 (1995). If the accommodation required poses an undue hardship upon defendant, then the accommodation is not "reasonable" thereby obviating defendant's duty in this regard.

In the case at bar, the evidence submitted establishes that after plaintiff's initial injury, plaintiff returned to work under a "no continuous walking, no running, must be able to sit" restriction. To accommodate plaintiff's medical limitations, defendant provided plaintiff with various light-duty assignments. However, when plaintiff re-injured his ankle and returned to work with a more onerous, "sedentary only" job restriction, defendant refused to accommodate stating that there were no jobs available for plaintiff respecting plaintiff's restriction as even light-duty assignments require limited amounts of walking. Accordingly, defendant terminated plaintiff's employment.

A review of plaintiff's deposition reveals that there are at least two positions within plaintiff's classification, gun tower and bubble officer, that, according to plaintiff, would accommodate plaintiff's sedentary only restriction considering that neither of these positions would require him to respond to a duress and would otherwise allow him to circumvent strain on his ankle. While it is clear that an employer's duty to accommodate does not require "recreating the position, adjusting or modifying the job duties otherwise required by the job description, or placing the plaintiff in another position," *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 16; 618 NW2d 56 (2000), whether permanently placing plaintiff in one of these two positions is a "reasonable accommodation" that would not otherwise impose an "undue hardship" upon defendant, are factual inquiries properly resolved by the trier of fact. Indeed, whether defendant breached its affirmative duty to make reasonable accommodations turns on whether the

requisite accommodations impose an "undue hardship" upon defendant. See *Collins v Blue Cross Shield of Michigan*, 228 Mich App 560, 573; 579 NW2d 435 (1998).

The record in the case *sub judice* is devoid of evidence establishing that accommodating plaintiff's sedentary only restriction would cause defendant undue hardship especially considering that defendant accommodated plaintiff in the past. While the affidavits submitted by defendant in support of its motion for summary disposition establish that no employee has ever received permanent light duty assignments, there is not a scintilla of evidence presented demonstrating that to do so would impose an undue hardship upon defendant thereby vitiating defendant's statutory duty to make reasonable accommodations.

It very well may be that a trier of fact will conclude that plaintiff's disability along with the requested accommodations are fundamentally incompatible with the very nature of plaintiff's position as a corrections officer. Indeed, it may not be possible for defendant to accommodate plaintiff's sedentary only restriction without compromising the internal safety of the institution itself thus potentially placing the public at risk. However, these concerns, in light of defendant's ability to accommodate plaintiff in the past, create genuine factual issues relative to whether plaintiff's employment restrictions coupled with the degree of accommodation required places an *undue hardship* upon defendant thereby obviating defendant's duty to provide "reasonable accommodations."

Consequently, the ultimate resolution of these issues properly lies within the sole province of the finder of fact and cannot be determined summarily as a matter of law. I would thus affirm the trial court's decision denying defendant's motion for summary disposition and permit the matter to proceed to trial and ultimate resolution.

/s/ Kirsten Frank Kelly