STATE OF MICHIGAN

COURT OF APPEALS

ROBERT YOUNG,

Plaintiff-Appellee,

v

GENERAL MOTORS CORP.,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 226633
Genesee Circuit Court
LC No. 99-065090-CZ

Before: White, P.J., and Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Defendant appeals by leave granted[1] the circuit court's order denying its motion for summary disposition in this case alleging failure to accommodate under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. We reverse.

I

Plaintiff was employed by defendant at its Truck and Bus Assembly Plant in Flint, Michigan, from 1967 until 1997. Plaintiff suffered a serious shoulder injury in 1973, and was on sick leave until he returned to work in 1977. Plaintiff's complaint alleged that from 1977 until 1996, defendant accommodated him by placing him in positions that "did not require him to engage in repetitious work outside of his restrictions," and that these accommodations did not place an undue burden on defendant. The complaint alleged that in 1996 and 1997 defendant refused to accommodate plaintiff any longer, and instead assigned him to positions which required repetitious work outside his restrictions. Plaintiff's complaint alleged that his shoulder injury constituted a disability under the PWDCRA (Act), that his disability was unrelated to his ability to perform the duties of each of the positions he held from 1977 until 1996, and that defendant violated the Act by terminating his employment in 1997.[2]

[1] By order dated May 18, 2000, this Court granted defendant's motion for immediate consideration, defendant's application for leave to appeal, and defendant's motion for stay.

[2] Defendant removed the case to federal district court on the basis that national and local collective bargaining agreements governed the parties' employment relationship, and the Labor
(continued…)

Defendant's motion for summary disposition under MCR 2.116(C)(10) argued that plaintiff was not disabled within the meaning of the PWDCRA because his shoulder injury: 1) did not substantially limit a major life activity, and 2) was directly related to his ability to perform his regular job of absentee replacement worker. Defendant also argued that plaintiff's claim was barred as a matter of law under *Rourk v Oakwood Hospital Corp*, 458 Mich 25; 580 NW2d 397 (1998), which, it argued, held that an employer's duty to accommodate a disabled employee does not extend to transferring the employee or creating a position for the employee. Defendant further argued that plaintiff did not request an accommodation in writing, a jurisdictional prerequisite under the Act.

The circuit court concluded that a genuine issue of material fact existed regarding whether plaintiff's shoulder injury affected a major life activity. The court determined that, given that there were jobs plaintiff had done before and could still do, a genuine issue of fact existed whether plaintiff should be considered an "hourly employee" or, more narrowly, an "absentee replacement worker" for the purpose of the transfer question.

II

We review the circuit court's denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must show that: (1) he or she has a disability as defined in the act; (2) the disability is unrelated to his or her ability to perform the duties of a particular job; and (3) the defendant discriminated against him or her in one of the ways described in the act. MCL 37.1202(1); *Kerns v Dura Mechanical Components, Inc (On Remand)*, 242 Mich App 1, 12; 618 NW2d 56 (2000); *Petzold v Borman's, Inc*, 241 Mich App 707, 714; 617 NW2d 394 (2000).

The PWDCRA defines "disability" in pertinent part as:

> 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:
>
> . . . 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. . . [MCL 37.1103(d)(i)(A)].

MCL 37.1103(l) defines the phrase "unrelated to the individual's ability" as meaning:

(…continued)

Management Relations Act (LMRA), 29 USC 185, thus applied. The case was remanded to circuit court, pursuant to the parties' stipulation.

"with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position."

A

Plaintiff testified that defendant accommodated him from the time he returned to work in 1977 until 1996:

Q. I take it from the allegations in the complaint that you believe you were accommodated from the time you returned to General Motors in 1977 through the time you took your inverse layoff in January of 1996?

A. I believe that I was accommodated when I was brought back to work, that the restrictions were known, that I was placed on a job that I could do.

And I believed that through my own personal twenty years' work record, that I never needed to request any more accommodation because I never had a problem with my shoulder.

Q. Between the time you came back to work in 1977 and the time you took the inverse layoff in January of 1996, you had no complaints that you were asked to perform a job that you believe was outside of whatever restrictions you had?

A. Right, not on a repetitive basis. There were times that it hurt my shoulder to do things, but it was not repetitive. . .

Plaintiff testified at deposition that after returning to work from layoff in July 1996, he worked as an absentee replacement (AR) worker for approximately six months, from July 1996 through February 1997. Plaintiff testified that an AR fills in for employees who are absent from their regularly scheduled positions, must be capable of performing all of the operations within a department, and that his department had approximately twenty-five different jobs.

Q. Did you select the absentee replacement position when you came back [from layoff] in July of 1996?

A. That was one of the options that I signed up for.

Q. But you specifically put your name under that position?

A. I had to put my name under three positions.

Q. Do you recall the other positions that you put your name under?

A. No, I don't. One of them was a monitor-type job and one of them might have been a team leader-type job.

Q. Do you know if you had the seniority to hold the monitor or team leader job?

A. If I would have been chosen [sic], I could have, yes. It's hard. You don't know what seniority are putting in for the same jobs.

Q. That's what I'm saying. You go in a room, you put your name under three jobs?

A. Right.

Q. You put your name, obviously, on two jobs that you didn't get at that time?

A. Right.

Q. And what I want to know is, later on, did you learn that somebody with less seniority than you obtained a job that you had applied for, that is the monitor job or the team leader job?

A. Not those two, no.

* * *

Q. Was there any certification that was necessary to become an absentee replacement?

A. You had to be able to perform all the operations.

Q. In the department?

A. Yes.

Q. As an absentee replacement – let me make sure I understand how this works – it's your job to place [sic replace] any person in the department who may be absent for whatever reason?

A. Yes.

Q. Which means that you could perform any job within a department that Don Everett supervised based on who was absent?

A. Yes.

* * *

Q. The area that Mr. Everett supervised, what was that called?

A. It was called the Box Area.

* * *

Q. . . . After you became an absentee replacement, did you have any conversations with Mr. Everett about your ability to perform the jobs in the department?

A. Only to the extent there was a couple of jobs that I just physically couldn't do.

Q. What conversations did you have with Mr. Everett about that?

A. I just would tell him that I was trading with another utility man because I couldn't do that specific job as good [sic] as they could.

Q. What jobs were you not able to do as well as these other people such that you would want to trade?

A. Some of the weld operations, I had to press down and hold down a heavy gun, and my shoulder wouldn't allow me to press down the strength to hold the gun down to do the welding.

Q. Do you know what that job was called?

A. There was more than one. There was two or three of them like that. I mean I did do them and that's what created the pain to the point I couldn't do them anymore.

Q. Did you ever complain to Mr. Everett that you were unable to perform those jobs?

A. Not until the pain became so great that I knew I couldn't do them anymore.

Q. And that was in February of 1997.

A. Yes.

Q. Then the first time Mr. Everett found out that you had pain that prevented you from performing the jobs as an absentee replacement, he put you in the weld monitor position?

A. Well, I think he loaned me to another department where I had to refuse to do a job. I don't think he immediately put me in the monitor position.

* * *

Q. Approximately how long prior to you going on sick leave did you first complain to Mr. Everett?

Let me put a time frame on it. If the records show that you went on sick leave on February 27th, that your last day of employment was February 20th, that's the day that you spoke to Dr. Good, when in relation to that did you first approach

Mr. Everett regarding your inability to perform the jobs as an absentee replacement?

A. It was within the week that I went on sick leave. It was in that prior week. I'm not exactly sure. Two days, three days, four days. I'm not sure.

* * *

Q. Why didn't you tell Mr. Everett that you thought that that position was hurting you?

A. Let me clarify. Over the six-month period that I was utility man, I started out thinking that I possibly could do these jobs if I did them in different body motions than a lot of people do them, without hurting myself.

And, gradually, over that six-month period, I found out that I could not continue to do these jobs in a repetitive fashion without hurting myself seriously.

Q. I'm just trying to understand now why didn't you complain to Mr. Everett that this position hurt you?

A. Because the point that I did finally complain was the point that I could not do the [utility] jobs anymore, and that's when I told Mr. Everett that I could not do it.

* * *

Q. Do you know of any individuals at Flint Assembly who are working in an absentee replacement position who have work restrictions?

A. No.

Q. When you first became an absentee replacement in July of 1996, did you tell Mr. Everett that you had work restrictions?

A. I saw no need to. I thought I could do the jobs.

* * *

Q. . . . did you tell anybody in management that you had restrictions?

A. No. I hadn't had to in twenty years, so I didn't. Like I said [sic], I thought I could do the jobs.

Plaintiff testified that when he told Everett that he could no longer perform certain utility man jobs, Everett and plaintiff's committee person spoke to the plant doctor, Dr. Good, after which they told plaintiff to visit his own doctor and get new restrictions and new x-rays in order to be accommodated. Plaintiff took two vacation days, obtained a list of restrictions from Dr. Damm, and obtained x-rays as well. He returned to work, was placed on a monitoring job on the

assembly line, which plaintiff testified he could do, and saw the plant doctor that morning. Plaintiff's doctor's list of restrictions stated:

(1) No lifting over 10 #

(2) No side or front extension

(3) No twisting of L upper arm

(4) No awkward movements to compensate for L side disability

(5) Free swing of shoulder ok but no leverage control

(6) No work above waist level

Plaintiff testified that he gave Dr. Good his list of restrictions and x-rays, and that Dr. Good said "you are basically a one-armed man and my superiors would not approve of me placing you on a job." Plaintiff testified that he then asked Dr. Good what he should do, and Dr. Good responded that "you're going to have to go on sick leave." Plaintiff testified that he then told his union committeepersons what Dr. Good had said, and their response was "you better get a good lawyer."

B

Assuming, as plaintiff argues, that a genuine issue of fact remained whether plaintiff's shoulder injury substantially limited one or more of his major life activities, and assuming that plaintiff's particular job or position for purposes of the Act was "hourly employee," rather than the more narrow position of absentee replacement worker, as defendant contends, we nonetheless conclude that defendant's motion for summary disposition should have been granted.

Plaintiff testified at deposition that it was only when he could no longer physically perform certain utility jobs because of pain that he notified defendant he was having problems. There is no dispute that there were procedures in place for employees to request a transfer;[3] however, plaintiff did not employ them and did not request a transfer. Rather, he went on sick leave. Further, defendant has procedures for accommodating handicapped employees through alternative job assignments. Plaintiff admits that he did not pursue these procedures. He seeks to excuse his inaction in this regard by explaining that Dr. Good told him to go on sick leave and his union told him to get a lawyer. However, the union's statement cannot create liability in defendant, and Dr. Good made his comment based on the restrictions set forth in Dr. Damm's note. The placement specialist testified that there were no jobs within Dr. Damm's restrictions. Additionally, it was plaintiff's own doctor that placed six restrictions on plaintiff in February 1997, and plaintiff does not argue that he asserted that his doctor was wrong.[4] Although plaintiff

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[3] Plaintiff submitted below excerpts of the deposition of John Mahoney, of defendant's labor relations office, regarding the procedures by which hourly workers can initiate job changes.

[4] Plaintiff contends on appeal that he spent nearly two decades in defendant's employ with the same limitations as presented by Dr. Damm in February 1997, but there is no record evidence (continued…)

submitted evidence below that there were hourly employee positions that do not require overhead work (and assuming arguendo that overhead work is the same as work above the waist), he presented no evidence that there were positions that fit within the remaining five restrictions his doctor placed on him, and he does not argue that he told anyone that he could perform any alternative jobs. Under these circumstances, the circuit court should have granted defendant summary disposition.

Reversed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.

(…continued)

that plaintiff had ever been under restrictions as great in number or as extensive as in 1997.