

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL LANE,

Plaintiff-Appellee,

v

CITY OF RIVERVIEW,

Defendant-Appellant.

UNPUBLISHED

April 16, 2002

No. 227374

Wayne Circuit Court

LC No. 98-832057-NZ

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition of plaintiff's claim under the persons with disabilities civil rights act (PWDCRA), MCL 37.1101 *et seq.*¹ We reverse.

Plaintiff was employed by defendant as a heavy equipment operator at the city landfill. Plaintiff began to have problems with his right elbow in 1995, and was subsequently diagnosed with epicondylitis and underwent physical therapy. Plaintiff returned to work and did not inform defendant of any restrictions, but was unable to operate most of the heavy equipment. The landfill's lead operator assigned plaintiff to light "floater" tasks from approximately May 1996 until the end of the year. On February 19, 1997, plaintiff was placed on a work restriction, which called for no repetitive motion of his right arm. The landfill director determined that plaintiff would have to resume the other duties of a heavy equipment operator. Plaintiff could not operate all the heavy equipment and was unable to continue working without the light duty assignments. Plaintiff brought this action, alleging he was handicapped and unlawfully discriminated against when defendant refused to accommodate him by allowing him to perform light duties as the landfill's "floater." Defendant's subsequent motion for summary disposition was denied by the trial court.

This Court reviews de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the

¹ The PWDCRA was formerly known as the Handicappers' Civil Rights Act. Plaintiff's claim was originally filed under that former title.

nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

To establish a prima facie case under the PWDCRA, plaintiff must establish that (1) he is disabled as defined by the PWDCRA,² (2) his disability is unrelated to his ability to perform the duties of a particular job, and (3) he was discriminated against in one of the ways described in the statute. *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 12; 618 NW2d 56 (2000), citing *Rollert, supra* at 538. For a disability to be unrelated to an individual's ability to perform, the disability, with or without accommodation, must not prevent the individual from performing the duties of a particular job or position. MCL 37.1103(l)(i).

Plaintiff has the burden of coming forward with evidence from which a factfinder could reasonably infer that his physical impairment affected his ability to perform the normal activities of daily living. *Lown v JJ Eaton Place*, 235 Mich App 721, 734; 598 NW2d 633 (1999).

Whether an impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term effect. An impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working. [*Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996) (citations omitted)].

Here, plaintiff has not produced evidence that establishes the existence of a genuine issue of material fact regarding the existence of a disability.³ At most, plaintiff has shown that his

² MCL 37.1103(d)(i)(A) provides:

Except as provided under subdivision (f), "disability" means 1 or more of the following:

(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:

(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.

³ We reject plaintiff's argument that this particular issue is unpreserved. Defendant argued in its motion for summary disposition that plaintiff was not handicapped and could not establish a prima facie case under the statute. Plaintiff's response to the motion claimed that plaintiff was handicapped within the definition of the statute. The trial court's order denying defendant's
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impairment interfered with his ability to work as a heavy equipment operator. Although plaintiff claims in his brief on appeal that epicondylitis is permanent in nature and significantly restricts his ability to use his arm, he has not presented evidence of such impairment. The report of Dr. R.H. Poling, which plaintiff introduced below describes plaintiff's condition and treatment between December 1995 and March 1996, but does not indicate the duration of impairment or any long-term effect. Neither plaintiff's deposition nor any medical record provides evidence of duration or permanency. It is not enough for plaintiff to suggest that he will present evidence of his impairment at trial. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), and *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635NW2d 69 (2001) (stating that when the burden of proof at trial would rest on the party opposing the motion for summary disposition, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial). Under these circumstances, plaintiff has not shown that his alleged impairment substantially limits a major life activity. *Lown, supra*; *Stevens, supra*.

Further, plaintiff cannot establish that his alleged disability is not related to his ability to perform his job as a heavy equipment operator. Plaintiff testified at deposition that the "floater" position is a recognized position at the landfill and as the employee with the most seniority, he was entitled to the position. The affidavit of the landfill's former lead operator, Michael Jones, supports plaintiff's claim that he was entitled to work as the "floater." The city's official job description for "heavy equipment operator" lists several duties involving eight separate pieces of equipment. Among those duties are operation of the sweeper and water wagon, which plaintiff performed under Jones' supervision. The city's job description further states that "all incumbents may not perform all duties." Given that evidence, there is an issue of fact regarding whether the "floater" position exists and whether plaintiff was entitled to the position.

Significantly, however, there is no evidence to suggest that the light duties performed by plaintiff while serving as the "floater" are the only duties required to be performed by the landfill's "floater." Instead, the undisputed evidence indicates the tasks plaintiff performed as the "floater" under Jones' supervision were less than full-time duties. Plaintiff testified at deposition that "[t]he landfill basically had no light-duty work" and that Jones "was helping him out" by assigning him light tasks. Plaintiff acknowledged that other employees complained because he was getting light assignments. According to the affidavit of Jones' successor, Rawson Beals, the tasks performed by plaintiff during the period Jones gave plaintiff light duty assignments were not full-time tasks. The sweeper and water wagon, the only two essential pieces of equipment that plaintiff operated, were not operated on a full-time basis. Beals claimed the sweeper was not operated in winter months. Beals also claimed there is no need for a landfill employee to take care of supplies in the tool room or to do paperwork.⁴ Beals recalled that

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motion states: "Adopt plaintiff's brief and oral argument as the basis for my decision." Thus, the issue whether plaintiff presented sufficient evidence to create a genuine issue of material fact in regard to his alleged disability was raised and addressed below. Consequently, the issue was preserved for our review. *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 235; 553 NW2d 371 (1996).

⁴ We note that Jones' affidavit claims the "floater" position involves the duties that were performed by plaintiff. However, neither Jones nor any other witness indicated that the tasks

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during the time Jones was giving plaintiff light assignments, when a landfill employee was absent, heavy equipment operators other than plaintiff would be required to work overtime to cover for the missing employee.⁵

We conclude that while there was evidence that the “floater” position exists and the most senior employee is entitled to that position, there is no evidence that plaintiff could perform the essential functions of that job on a full-time basis. Plaintiff essentially seeks to have his job as heavy equipment operator restructured due to his alleged impairment, which defendant is not obligated to do.

Because plaintiff failed to establish a prima facie case under the PWDCRA, the trial court erred in denying defendant’s motion for summary disposition. In light of our disposition, we need not address defendant’s remaining issues.

Reversed.

/s/ William C. Whitbeck

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

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performed by plaintiff were the only tasks required of the “floater.”

⁵ We note that the term “floater” suggests that the individual filling the position have the ability to be placed in any position at the landfill depending on day-to-day need. It is undisputed that plaintiff was unable to operate all the equipment at the landfill.