

STATE OF MICHIGAN
COURT OF APPEALS

DONALD ZIMMERMAN,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 233661

Ingham Circuit Court

LC No. 00-091269-CZ

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted from the trial court's denial of its motion for summary disposition, pursuant to MCR 2.116(C)(10), of plaintiff's employment discrimination claim under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* We affirm.

I. Background Facts and Procedural History

Defendant hired plaintiff as a corrections officer in 1989 and assigned him to work in the Parnall Correctional Facility. Subsequently, plaintiff developed an increasing allergic reaction to secondhand tobacco smoke. In August 1993, plaintiff requested an assignment with reduced exposure to secondhand smoke. Defendant granted this request and assigned plaintiff to the highway gate on a relief basis. The next year, plaintiff accepted a promotion to a non-bid position as a resident unit officer and was assigned to work in a housing unit.¹ At his deposition, plaintiff explained that he accepted this position with the understanding that he would be placed in the A unit, a non-smoking housing unit. Defendant later removed plaintiff from the A unit due to the fact that all the housing units were allegedly non-smoking units. In 1996, defendant adopted a non-smoking policy within all department buildings. While the regulations prohibited

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

¹ "Bid assignments" are bid on by employees and are awarded according to seniority. A bid assignment does not change until the employee leaves the assignment. Conversely, "non-bid assignments" are issued on a daily basis and are rotated amongst the staff according to the organizational needs of the facility.

smoking within the housing units, plaintiff contended that the rules were rarely enforced and that the punishments were minor. Because the smoking regulations were frequently ignored, plaintiff claimed that he was exposed to a high concentration of secondhand smoke inside the housing units.

On July 21, 1997, plaintiff requested permission to wear a breathing mask to protect him from the smoke in the housing units. Henry Grayson, the Warden of Parnall, described the breathing mask as something akin to a gas mask because it attached to plaintiff's head and covered his nose and mouth. Warden Grayson denied plaintiff's request because the mask could inhibit plaintiff's ability to communicate with the prisoners and staff. He further recommended that plaintiff consider a demotion from a resident unit officer to a corrections officer, where plaintiff would only occasionally have to work in a housing block. Nearly a year later, plaintiff requested and received a transfer to third shift as a corrections officer. Plaintiff remained in that position until he went on sick leave in February 1999.

Plaintiff made a third written request for an accommodation on April 9, 1999. In his request, plaintiff stated that his doctor ordered him to avoid any exposure to secondhand smoke. Plaintiff requested a corrections officer position that would avoid work within a housing unit on a permanent basis. Plaintiff again noted that although the regulations prohibited smoking within the housing units, the rules were rarely enforced and he was continually exposed to a high concentration of secondhand smoke.

In a letter dated June 17, 1999, defendant denied plaintiff's request for accommodation. Defendant stated that because all non-bid officers could be assigned to any position according to operational necessities, it was unable to guarantee that plaintiff could always avoid work in a housing unit. Defendant further questioned whether plaintiff's respiratory condition was substantially limiting and opined that plaintiff had an unrealistic expectation that he could avoid contact with secondhand smoke in a prison setting. Nevertheless, defendant maintained that its non-smoking policy was enforced and that there was a ventilation system in place to expel smoke from the buildings. When plaintiff exhausted his medical leave on July 9, 1999, he was "separated" from employment with defendant.

On April 7, 2000, plaintiff filed an amended complaint alleging that defendant violated the PWDCRA.² Plaintiff maintained that defendant was an employer according to the PWDCRA and that it refused to make reasonable accommodations for his disability. Plaintiff claimed that his severe reaction to secondhand smoke constituted a disability under the PWDCRA because it interfered with the major life activity of breathing. Plaintiff further purported that his physical reaction to secondhand smoke was unrelated to his qualifications for employment as a corrections officer. Plaintiff stated that he made written requests for reasonable accommodations to minimize or eliminate his exposure to secondhand smoke and that defendant had positions available to accommodate his condition.

² Plaintiff filed his first complaint on August 10, 1999. This complaint was dismissed on defendant's motion for summary disposition for failure to state a claim, MCR 2.116(C)(8).

Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), on March 7, 2001. In its motion, defendant claimed that plaintiff failed to produce sufficient evidence that he suffered from a substantial limitation of a major life activity. Rather, defendant noted that most of plaintiff's breathing difficulties occurred at work and that he otherwise led an active life. Citing *Muller v Costello*, 187 F3d 298 (CA 2, 1999), a case involving a similar factual scenario, defendant contended that a major life activity was not substantially limited where most of plaintiff's breathing difficulties occurred at work and he was otherwise active.

Defendant further alleged that plaintiff's condition was related to the duties of a corrections officer and, therefore, not a protected disability under the PWDCRA. Specifically, defendant argued that a corrections officer could be required to work in a housing unit during an emergency or due to the operational needs of the facility. Defendant also suggested that plaintiff's reaction when exposed to secondhand smoke, such as dizziness and lightheadedness, could be a personal and public safety issue. Because a corrections officer's ultimate responsibility is to maintain inmate order throughout the facility, defendant asserted that plaintiff's condition was related to his job function.

Defendant asserted additionally that in order to accommodate plaintiff's request, defendant would be forced to create a new position. Corrections officer assignments are filled on a rotating basis and several positions require placement in a housing unit. Therefore, defendant maintained that there were no existing corrections officer positions that would completely eliminate an employee's exposure to the housing units. Defendant asserted that the duty to accommodate under the PWDCRA did not extend to the creation of new jobs or transfers.

Plaintiff responded to defendant's motion and argued that because the ability to breathe was a major life function, he was disabled according to the PWDCRA. Plaintiff stated that he suffered this impairment for eight years with no known treatment; that his condition was permanent; and that continued exposure to secondhand smoke would aggravate his medical condition. Plaintiff noted his physician's opinion that there was a "direct causative relationship between the dysplasia³ and the tobacco smoke" Plaintiff maintained that the nature and severity of his impairment, its duration, and its permanent or long term impact clearly indicated that his condition limited him on a substantial basis.

Moreover, plaintiff contended that his disability was unrelated to his ability to function as a corrections officer because breathing secondhand smoke was not a prerequisite for his position. To support this contention, plaintiff noted the state-wide directive banning smoking within the state prison system. Plaintiff asserted that defendant bore the burden of establishing that such exposure was an essential function of a corrections officer. Plaintiff then cited the past accommodation agreed to by defendant and the several positions it identified that could accommodate his needs. Because there were several positions that could accommodate his disability, plaintiff maintained that there was a question of fact concerning whether exposure to secondhand smoke was an essential function of a corrections officer. Plaintiff also claimed that there was no evidence that his reaction to secondhand smoke ever affected his ability to perform

³ Dysplasia is defined as "[a]bnormal tissue development." *Stedman's Medical Dictionary* (26th ed).

his duties. Rather, plaintiff purported that repeated exposure to secondhand smoke posed a permanent health risk to him but did not interfere with his job responsibilities.

On April 4, 2001, defendant's motion for summary disposition was heard. Relying on testimony concerning plaintiff's reaction to secondhand smoke and his physician's medical reports, the trial court found that plaintiff was disabled. The trial court concluded that the *Muller*⁴ court's discussion, explaining that an individual's asthma did not amount to a substantial limitation of his breathing where he was active outside work, was dicta and ultimately unpersuasive. Rather, the trial court noted Michigan's clear public policy regarding exposure to secondhand smoke. The trial court expressed disagreement with defendant's rationale that a disability was not substantially limiting simply because a person could make it through the day alive. The trial court also held that an allergy to secondhand smoke was unrelated to a corrections officer's job function of controlling prisoners. Based on the facts presented, the trial court concluded that it was a question of fact whether plaintiff was improperly discriminated against.

Because defendant had positions available that plaintiff could fulfill, the trial court found that it was not required to create a new position. Rather, it appeared to the trial court that the accommodation would either require a permanent assignment or a partial reassignment of duties. To the extent that accommodating plaintiff's disability imposed an undue burden on defendant, the trial court found that to be a question of fact for the jury. The trial court denied defendant's motion in an opinion issued on April 16, 2001.⁵

II. Standard of Review

A trial court's decision on a motion for summary disposition is subject to review de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454, 597 NW2d 28 (1999). A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition under MCR 2.116(C)(10) is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co, supra* at 397.

III. Persons With Disabilities Civil Rights Act

⁴ *Muller, supra*.

⁵ On May 29, 2001, defendant offered plaintiff a non-bid corrections officer assignment as a yard officer. Plaintiff accepted this position despite the caveat that he might be required to work in or around housing units. The letter stated that plaintiff would be required to regularly rotate positions and participate in other non-bid assignments as needed.

“The PWDCRA was enacted with the purpose of ensuring ‘that all persons be accorded equal opportunities to obtain employment, housing, and the utilization of public accommodations, services, and facilities.’” *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999), quoting *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216; 559 NW2d 61 (1996). The provisions of the PWDCRA are liberally construed due to its remedial nature. *Chmielweski v Xermac, Inc*, 457 Mich 593, 601; 580 NW2d 817 (1998). While not binding authority, analogous federal cases addressing the Americans with Disability Act are persuasive when interpreting provisions of the PWDCRA. *Id.* at 601-602.

In employment cases, the PWDCRA precludes employers from discharging an employee for a disability unrelated to that employee’s ability to perform a particular job or position. MCL 37.1202(1)(b). To establish a prima facie case of discrimination under the PWDCRA, the plaintiff has the burden of proving that: (1) he is disabled within the meaning of the statute; (2) the disability is unrelated to his ability to perform his employment duties; and (3) he was discriminated against in one of the ways contemplated by the statute. *Michalski v Bar-Levay*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Defendant initially argues on appeal that plaintiff failed to establish that he suffered a substantial limitation of the major life activity of breathing. We disagree.

The PWDCRA defines a disability in pertinent part 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:

(A) . . . 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).]

Major life activities have been defined as those basic activities, such as breathing, that an average person can perform with little or no difficulty. *Lown v JJ Eaton Place*, 235 Mich App 721, 729; 598 NW2d 633 (1999). Whether such an activity is substantially limited by an individual’s impairment is determined in view 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.” *Id.* at 728.

Plaintiff presented evidence that exposure to secondhand smoke affected his ability to breathe and that this resulted in nausea and lightheadedness. Plaintiff testified in his deposition that after prolonged exposure to secondhand smoke in the housing units he frequently needed to seek medical attention. Plaintiff also presented letters from his physicians indicating that there was a direct relationship between his exposure to secondhand smoke and his abnormal pulmonary function. While one physician described plaintiff’s condition as consistent with “mild emphysema or mild asthma”, the other stated that it was important for plaintiff to avoid exposure to tobacco smoke because it “could result in initiating squamous cell carcinoma of his larynx.” Both physicians advised plaintiff to avoid exposure to secondhand smoke because this would adversely affect his condition.

The fact plaintiff could otherwise care for himself and perform various physical activities does not necessarily render him outside the protection of the PWDCRA. Plaintiff admitted that he could breathe as long as he was not exposed to secondhand smoke. He also explained that he steadfastly avoided exposure to secondhand smoke outside of work so that he would not become ill. Thus, it appears that plaintiff had problems at work because he was required to work in housing units where there was a proliferation of secondhand smoke in an enclosed area. Based on this record, we find that reasonable minds could differ regarding whether plaintiff's breathing was substantially limited for purposes of the PWDCRA.

Defendant next opines that plaintiff is not "disabled" under the PWDCRA because his condition affects his ability to perform as a corrections officer. According to defendant, corrections officers work on a rotational basis and must be able to respond to any emergency situation regardless of whether it is in a housing unit or near secondhand smoke. Defendant further notes that plaintiff's reaction to secondhand smoke could be a public safety issue. We disagree.

A disability is related to a person's ability to perform if, with or without accommodation, it prevents that individual from performing the duties of a particular job or position. MCL 37.1103(l)(i); *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 570; 579 NW2d 435 (1998). Our Supreme Court has interpreted this to mean that:

an individual is handicapped even if some accommodation is necessary to allow that individual to perform the duties of a particular job or position. The amendment overturned the narrow holding of *Carr [v General Motors Corp]*, 425 Mich 313; 389 NW2d 686 (1986)], and the addition of the language "with or without accommodation" guarantees that an individual otherwise qualified for a particular job or position is entitled to some accommodation if needed. [*Rourk v Oakwood Hosp Corp*, 458 Mich 25, 31; 580 NW2d 397 (1998).]

To determine whether a plaintiff is able to perform the essential duties of his or her job, we must examine the particular circumstances involved. *Mitchell v General Motors Acceptance Corp*, 176 Mich App 23, 29-31; 439 NW2d 261 (1989). Requirements bearing more than a marginal relationship to a job are considered its essential functions. *Employment Litigation in Michigan*, § 6.30, p 6-38, citing ADA Interpretive Guidance, § 1630.2(n). Unless the employer demonstrates that an accommodation would impose undue hardship, a disabled person under the statute must be accommodated for purposes of employment. MCL 37.1102(2). The duty to accommodate does not extend to job transfers or the creation of new jobs. *Rourk, supra* at 36; *Koester v Novi*, 213 Mich App 653, 662-663; 540 NW2d 765 (1995), rev'd in part on other grounds 458 Mich 1; 580 NW2d 835 (1998).

The ultimate responsibility of a corrections officer is to maintain order within the facility. The evidence in this case shows that plaintiff is able to perform this function despite the presence of secondhand smoke. While plaintiff admitted that exposure to secondhand smoke made him nauseous and lightheaded, there was never any indication that his job performance suffered. To the contrary, plaintiff worked as a corrections officer for several years while suffering from this disability and was recently rehired by defendant in the same capacity. Moreover, we find this situation distinguishable from cases involving corrections officers or police officers requesting permanent light duty assignments because of an inability to perform the physical aspects of their

job. Compare *Hoskins v Oakland Co Sheriff's Dept*, 227 F3d 719 (CA 6, 2000); *Miller v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2002 (Docket No. 222439). In this case, plaintiff requested the instant accommodation because *repeated exposure* to secondhand smoke posed a permanent health risk to him, not because he was physically unable to perform his duties.

Moreover, there is a genuine issue of material fact regarding whether exposure to the housing units or smoking was an essential function of a corrections officer. Defendant's non-smoking policy explicitly bans smoking inside all department buildings. Thus, it appears that a corrections officer's duties do not legitimately include the ability to be exposed to secondhand smoke inside department buildings. Moreover, plaintiff has identified several existing positions within his classification that, pursuant to a memorandum from defendant, do not require exposure to the housing units or do so only in the event of an emergency. Indeed, the record establishes that defendant accommodated plaintiff in the past by placing him in a non-smoking position. Accordingly, we find that the trial court properly denied defendant's motion for summary disposition.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Robert J. Danhof