STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE JUBENVILLE,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 234352
Wayne Circuit Court
LC No. 00-040042-CZ

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its second motion for summary disposition/motion for reconsideration. We reverse.

Plaintiff was a substance abuse counselor employed by Apex Behavioral Health, PLLC. According to plaintiff's complaint, Apex contracted with defendant to provide substance abuse treatment to inmates at defendant's correctional facilities. In late 1999, defendant advised Apex that it wanted the majority of substance abuse counseling with female inmates to be conducted by female therapists. As a result, plaintiff contends that he was transferred to another correctional facility where he experienced a significant reduction in income, reduced hours, and a loss of promotional opportunities.

On appeal, defendant argues that the trial court erroneously denied its motion for summary disposition because it was not a proper party in this Elliott-Larson Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*, action. Specifically, defendant asserts that plaintiff failed to satisfy the requirements of the economic reality test to prove defendant was plaintiff's employer. We agree. 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.

Under MCL 37.2202(1), an employer may not:

> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or mental status.

Plaintiff maintains that this language protects "individuals" and does not require an employer-employee relationship to bring a discrimination action. According to plaintiff, the ELCRA acts to "provide a remedy for 'an individual' who has been discriminated against with respect to his employment." The trial court agreed with this interpretation and concluded that an employer's ability to affect the terms and conditions of an individual's employment could be sufficient to sustain a cause of action under the ELCRA

In *Seabrook v Michigan Nat'l Corp*, 206 Mich App 314; 520 NW2d 650 (1994), this Court held that the plaintiff could not bring an action under the ELCRA because she failed to establish an employer-employee relationship with the defendant corporation. Moreover, *Ashker v Ford Motor Co*, 245 Mich App 9, 15; 627 NW2d 1 (2001), recently reaffirmed the use of the economic reality test to determine whether a plaintiff could be considered an employee of the defendant for purposes of an ELCRA claim. See also *McCarthy v State Farm Ins Co*, 170 Mich App 451, 455; 428 NW2d 692 (1988).[1] The factors considered in applying the economic reality test are (1) control; (2) payment of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline. *Ashker, supra* at 12.

While defendant may have been able to exert some control over plaintiff's employment through its contract with Apex,[2] a review of the entire record indicates that plaintiff was not employed by defendant. Indeed, the ability to control is only one factor to be considered under the economic reality test. See *Ashker, supra* at 12; *McCarthy, supra* at 455. The record indicates that defendant did not pay plaintiff's salary, provide benefits, or supply W-2 tax forms to plaintiff. Defendant also lacked the authority to hire, fire, transfer, discipline, lay off, promote, or even evaluate plaintiff. Furthermore, defendant never maintained a personnel file on

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[1] We note that *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231; 581 NW2d 746 (1998), overruled *McCarthy, supra*, on the grounds that the appropriate test for respondent superior liability was the control test. However, this Court in *Ashker, supra* at 14, held that *Norris* "misinterpreted *McCarthy* by failing to recognize that the earlier decision addressed two separate issues." Specifically, *Ashker, supra* at 14, concluded that *McCarthy* addressed the employer-employee relationship and an alternative theory of respondeat superior. According to *Ashker*, "[t]he 'control test' has been limited to those situations where respondeat superior has been alleged and the vicarious liability of a master is involved." *Ashker, supra* at 15, quoting *Chilingirian v City of Fraser*, 194 Mich App 65, 69; 486 NW2d 347 (1992).

[2] Defendant retained authority under the contract to approve all treatment programs provided to inmates and any modifications to those programs.

plaintiff, monitored his work schedule, or dictated the number of his work hours. See generally *McCarthy*, *supra* at 455-456.

The totality of the factors of the economic reality test indicate that plaintiff was not an employee of defendant. Accordingly, we reverse the trial court's denial of summary disposition.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper