

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER GALFORD,

Plaintiff-Appellee,

v

P.R.S. CONTRACTING, INC.,

Defendant-Appellant.

UNPUBLISHED

May 27, 2004

No. 245292

Wayne Circuit Court

LC No. 01-123564-CL

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action involving the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* We reverse and remand.

In his complaint, plaintiff alleges that defendant discriminated against him in violation of the PWDCRA by terminating his employment as a carpenter because of a perceived disability. Plaintiff was terminated when he attempted to return to work following surgery for testicular cancer, but before his scheduled rounds of chemotherapy. Defendant moved for summary disposition, asserting that plaintiff had not met the foundational requirement of a "handicap," i.e., disability, under the PWDCRA, that plaintiff failed to establish that defendant discriminated against him because plaintiff had a handicap unrelated to job performance, and that because plaintiff was an "at-will" employee, defendant need not provide a reason for refusing to return plaintiff to his prior position. In response, plaintiff claimed that defendant perceived plaintiff's testicular cancer as a disability that substantially limited a major life activity, that defendant improperly terminated his employment despite his physician's and his own personal assurances that he could work without restriction, and that defendant's decision to terminate his employment was a pretext for discrimination based on a perceived disability (testicular cancer). Having heard oral argument, the trial court denied defendant's motion on the bases that genuine issues of material of fact existed concerning whether defendant perceived plaintiff's testicular cancer as limiting his major life activities and whether defendant acted on that perception in terminating plaintiff's employment. Further, the trial court concluded that disputed facts exist concerning whether plaintiff's condition affected his ability to perform as a carpenter. Defendant now appeals by leave granted the trial court's denial of its motion for summary disposition, arguing that the trial court erred in finding that genuine issues of material fact precluded summary disposition in defendant's favor.

On appeal, a trial court's grant or denial of summary disposition is reviewed 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 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). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). "When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Shepherd, supra*. Further, statutory interpretation is a question of law that is also reviewed de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The PWDCRA provides in part that an employer shall not "[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability ... that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). "To establish a prima facie case of discrimination under the [PWDCRA], a plaintiff must show that (1) he is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999).

Here, plaintiff argues that defendant regarded, or perceived, him to be disabled. A defendant can be found to have "violated subsection 103d¹ of the PWDCRA if it discriminated

¹ MCL 37.1103 provides, in pertinent part:

(d) ... "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) ... 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.

(iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i).

against [a] plaintiff on the basis of a perceived disability.” *Chiles, supra* at 475. With regard to discrimination on the basis of a perceived disability, in *Chiles, supra*, this Court explained:

Although this claim may at first appear easier to establish because a plaintiff need not actually be disabled to fall within the PWDCRA, a plaintiff must still prove that the employer perceived that the employee was actually “disabled” within the meaning of the statute. In other words, showing that an employer thought that a plaintiff was somehow impaired is not enough; rather, a plaintiff must adduce evidence that a defendant regarded the plaintiff as having an impairment that substantially limited a major life activity—just as with an actual disability. [*Id.*; citations omitted.]

In light of the statutory language of MCL 37.1103(d)(i) and (iii), in order to succeed on a claim for a perceived disability, an employee must prove:

(1) the plaintiff was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of the plaintiff’s major life activities; and (3) the perceived characteristic was regarded as being unrelated either to the plaintiff’s ability to perform the duties of a particular job or position or to the plaintiff’s qualifications for employment or promotion. [*Michalski v Bar-Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001).]

In *Chiles, supra* at 476, this Court explained that “to determine whether there was evidence sufficient to establish that defendant perceived plaintiff as being disabled within the meaning of the PWDCRA, we rely on the three-step process utilized in *Braddon* [*v Abbott*, 524 US 624, 631; 118 S Ct 2196; 141 L Ed 2d 540 (1998)].” That is:

First, we consider whether respondent’s [complaint] was a physical impairment. Second, we identify the life activity upon which respondent relies ... and determine whether it constitutes a major life activity under the [PWDCRA]. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. [*Chiles, supra* at 474, quoting *Braddon, supra*.]

Here, there was no real dispute that testicular cancer was a physical impairment and the evidence, including plaintiff’s use of a medical leave of absence, plaintiff’s January 24, 2001 surgery and accompanying restrictions, and plaintiff’s receipt of SSI benefits, demonstrates that plaintiff had a physical impairment. Further, in his affidavit, Joseph Przygoda averred that he had concerns regarding plaintiff’s weakness, dizziness, and lifting restrictions. As such, we find that plaintiff satisfied the first element.

Next, this Court considers whether plaintiff identified a “major life activity” that was affected by the impairment. Major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” *Chiles, supra* at 477, quoting *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996) (citations omitted). In the present case, nowhere in his complaint does plaintiff allege that a major life activity was affected by his medical condition. However, in light of the

assertion that defendant discriminated against him on the basis of a perceived disability and looking at the evidence in the light most favorable to plaintiff, including Przygoda's affidavit that states that Przygoda was concerned about potential weakness and dizziness, arguably affecting the major life activities of lifting, standing, walking, and working, plaintiff possibly satisfied the second element of a perceived disability claim.

However, plaintiff failed to satisfy the third element, whether plaintiff's testicular cancer substantially limited a major life activity. "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." *Stevens, supra* at 218. With respect to plaintiff's lifting restrictions, "a general lifting restriction, without more, is insufficient to constitute a disability." *Chiles, supra* at 478. We conclude plaintiff's lifting restrictions would not constitute a substantial limitation, particularly where plaintiff testified that he returned to work without any restrictions and/or he nonetheless could work in spite of them, and the restrictions were temporary. "[A] disability normally does not include temporary medical conditions, even if those conditions require extended leaves from work." *Chiles, supra* at 479; see also *Stevens, supra*. Similarly, plaintiff's ability to stand or walk as a result of possible dizziness from his chemotherapy treatment would not constitute a substantial limitation because they too were temporary conditions. See *Chiles, supra* at 479-782. The record revealed that at most, plaintiff received chemotherapy treatments for a span of ten weeks. Further, plaintiff testified that he only became sick once, and he was able to play volleyball while he was receiving the treatments.

Also, with respect to whether plaintiff's cancer affected "the major life activity of working," we conclude that it did not. "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, supra* at 218. "Instead, the impairment must significantly restrict an individual's ability to perform at least a wide range of jobs." *Chiles, supra* at 478.

Here, plaintiff presented no evidence that his impairment was viewed as a substantial limitation on his ability to work generally. "[A]n employer does not perceive an employee as disabled merely by determining the employee to be unable to temporarily satisfy the requirements of a singular position." *Chiles, supra* at 482-483 (citation omitted). The record demonstrates that Przygoda did not believe that plaintiff could perform the work of a carpenter, not a wide range of jobs. Plaintiff testified and maintained that he could work in the capacity of a carpenter, provided he was given time to regain his strength, and a flexible schedule. Moreover, plaintiff, after his termination, sought to continue his employment with defendant in a different position. Plaintiff was able to use his carpenter skills when he built the deck for his father after his first surgery. More importantly, plaintiff testified that he found subsequent employment at a marina, where he worked without any medical restrictions. Thus, plaintiff has not shown a perceived substantial limitation on the activity of working.

In sum, viewing the evidence in the light most favorable to plaintiff, we conclude that he did not demonstrate a genuine issue of material fact that would warrant denying defendant's motion for summary disposition. Because plaintiff's condition did not constitute a substantial limitation on a major life activity, defendant could not have perceived him as disabled as defined

in the PWDCRA. The trial court improperly denied defendant's motion for summary disposition.

Reversed and remanded for entry of summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly