STATE OF MICHIGAN

COURT OF APPEALS

STANLEY WILLIAMS, Plaintiff-Appellant,	UNPUBLISHED December 16, 2010
v	No. 291323 Washtenaw Circuit Court
UNIVERSITY OF MICHIGAN, Defendant-Appellee.	LC No. 08-000411-CL

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff has worked for defendant's medical center as an anesthesia technician since 1995. On July 24, 2006, plaintiff was placed on an approved leave of absence from his employment because of severe obstructive sleep apnea, which caused tiredness at work, difficulties with concentration and attention, falling asleep while driving, and decreased sleep. Plaintiff's treating physician authorized him to return to work on February 1, 2007. Defendant referred plaintiff to sleep medicine specialist Michael Zupancic, M.D., for a fitness-for-duty evaluation required by defendant, and based on that evaluation, Zupancic concluded that plaintiff could return to work provided that he work part-time, with a later starting time, and with the assistance of a colleague to work alongside him to monitor his work and correct any mistakes he might make. Defendant determined that it could not authorize plaintiff's return to work with this "work buddy" restriction, even after Zupancic indicated that, as an alternative to the "work buddy" arrangement, a colleague could check on plaintiff at regular intervals, such as every five minutes. In July 2007, after a subsequent evaluation, Zupancic authorized plaintiff to return to work without a colleague working alongside him, and defendant returned plaintiff to work in August 2007.

In July 2008, plaintiff filed the instant action, alleging that defendant discriminated against him on the basis of his disability, in violation of the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq.*, by not allowing him to return to work when first authorized, and under the conditions established, by Zupancic. Plaintiff also alleged that defendant had engaged in retaliatory conduct against him, because he sought accommodations under the PWDCRA. Defendant moved for summary disposition, pursuant to MCL 2.116(C)(10). The trial court granted the motion, finding that plaintiff's disability (severe obstructive sleep apnea) prevented him from performing his job even with reasonable

accommodation, and further, that providing a second person to monitor plaintiff and to correct any mistakes or oversights if necessary was not a reasonable accommodation under the statute. The trial court also found that defendant had not retaliated against plaintiff, because he was working in the same position, his performance reviews were reasonable, and his raises and compensation were comparable to other employees in his position.

Plaintiff first argues on appeal that the trial court erred by finding that plaintiff could not perform the essential functions of his job, even with the proposed accommodation, and that the proposed accommodation was unreasonable. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The PWDCRA prohibits discrimination against individuals because of their disability status. *Peden v City of Detroit*, 470 Mich 195, 203; 680 NW2d 857 (2004). "[T]he PWDCRA generally protects only against discrimination based on physical or mental disabilities that substantially limit a major life activity of the disabled individual, but that, with or without accommodation, do not prevent the disabled individual from performing the duties of a particular job." *Id.* at 204. "The purpose of the act is to mandate the employment of the [disabled] to the fullest extent reasonably possible." *Id.*, quoting *Chmielewski v Xermac, Inc*, 457 Mich 593, 601; 580 NW2d 817 (1998) (internal quotation omitted). Accordingly, the PWDCRA prohibits employment discrimination by mandating that "employers" refrain from taking any of a number of adverse employment actions against an individual "because of a disability . . . that is unrelated [or not directly related] to the individual's ability to perform the duties or a particular job or position." MCL 37.1202(1)(a)-(e); *Peden*, 470 Mich at 203-204. "[U]nrelated to the individual's ability" means, with or without accommodation, an individual's disability does not prevent the individual from performing the duties of a particular job or position. MCL 37.1103(*l*)(i); *Peden*, 470 Mich at 204.

To establish a prima facie case of discrimination under the PWDCRA, plaintiff must demonstrate (1) that he is disabled as defined by the PWDCRA,[1] (2) that the disability is unrelated to his ability to perform the duties of his particular job, and (3) that he was

[1] A "disability," for purposes of article 2 of the PWDCRA, MCL 37.1201-37.1214, is defined in MCL 37.1103(d) as: (i) "[a] determinable physical or mental characteristic of an individual . . . 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 . . ."; (ii) "[a] history of [such a] determinable physical or mental characteristic . . ."; or (iii) "[b]eing regarded as having [such a] determinable physical or mental characteristic. . . ." *Peden*, 470 Mich at 204.

discriminated against in one of the ways described in the statute.[2] *Peden*, 470 Mich at 204, quoting *Chmielewski*, 457 Mich at 601; *Lown v JJ Eaton Place*, 235 Mich App 721, 727; 598 NW2d 633 (1999). If plaintiff cannot demonstrate that he is able, with or without accommodation, to perform the duties essential to his job, he may not proceed on a claim under the PWDCRA. *Peden*, 470 Mich at 205-206; see also, *Carr v General Motors Corp*, 425 Mich 313, 322-323; 389 NW2d 686 (1986); *Bowerman v Malloy Lithographing, Inc*, 171 Mich App 110, 116; 430 NW2d 742 (1988).

At issue here is whether plaintiff's disability (severe obstructive sleep apnea) was unrelated to his ability to perform the duties of his job as an anesthesia technician. In *Peden*, our Supreme Court explained that

> . . . in disputes regarding what the duties of a particular job are, the employer's judgment is entitled to substantial deference. Consistent with the plaintiff's burden of proving discrimination under the PWDCRA, the plaintiff bears the burden of presenting sufficient evidence to overcome this deference. Unless the plaintiff can satisfy this burden, it is to be presumed that the employer's judgment concerning the duties of a particular job is reasonable. In such circumstances, the plaintiff must prove that he can, with or without accommodation, perform those duties. [*Peden*, 470 Mich at 219.]

The trial court specifically found that plaintiff's disability prevented him from performing the duties required of an anesthesia technician, even with a reasonable accommodation, because of the risks posed to patient safety as a consequence of plaintiff's disability.[3]

According to the anesthesia technician job description provided by both parties, plaintiff's duties were to set up and operate anesthesia equipment. The job duties included setting up for and assisting in the placement of arterial lines, central lines, epidural catheters, airway devices, echo-monitoring devices, and devices necessary for cardiac and vascular cases. The job description provided that plaintiff would also assist in the anesthesia induction of patients at staff's request. Plaintiff was responsible for ensuring that the equipment used for anesthesia was working properly. The job description further stated that plaintiff was to respond

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[2] MCL 37.1202 generally provides that an employer shall not purposefully discriminate, through direct action or by failing to provide necessary accommodation, against a person because of a disability that is unrelated to that person's ability to do the duties of a job; an employer shall not limit, segregate, or classify employees in a manner that adversely affects a person because of a disability that is unrelated to that person's ability to do the duties of a job; an employer shall not take direct adverse action against an individual on the basis of examinations that are not directly related to the requirements of the job. *Peden*, 470 Mich at 205 n 8.

[3] Plaintiff argues that the trial court misunderstood the law in accepting defendant's argument that plaintiff could not work independently and perform the essential function of his employment because it did not account for working with the reasonable accommodation. However, as noted above, the trial court plainly considered whether plaintiff could perform the essential duties of his job with, or without, a reasonable accommodation.

quickly to pages and provide the services requested as well as to continually check with anesthesia staff in operating rooms to determine if any assistance was required.

Plaintiff agreed that his position as an anesthesia technician involved assisting in giving surgical patients anesthesia as required by various departments. As plaintiff described them, his main responsibilities involved making sure that the nurse anesthetist, resident doctor, and staff are comfortable with the assistant putting the patient asleep by making a good airway, a procedure called induction, and then assisting in putting an IV in the patient, and then providing whatever else the providers needed. Plaintiff also testified that his position required significant patient care in different areas of the hospital. He acknowledged that precision was very important in his work, and that a failure by him to do his job properly could be life-threatening to the patient.

To overcome defendant's motion for summary disposition, plaintiff bears the burden of raising a genuine issue of material fact regarding whether he could have performed duties of an anesthesia technician with, or without, accommodation. *Peden*, 470 Mich at 204. In his affidavit, plaintiff asserted that tasks he rated as "medium safety risk," such as infusion, patient suction, and cell saving, were infrequent and that the operating room team works together to prevent mistakes. Plaintiff asserted that having a temporary "work buddy" was a reasonable accommodation because his work was already frequently double checked by the other members of the operating room team and because the three or four anesthesia technicians working together during each shift normally utilized a team approach. However, Paul Reynolds, M.D., defendant's Chief of Pediatric Anesthesiology, stated that allowing plaintiff to return to work, even with the proposed accommodation, posed an unacceptable risk to patient safety, because patients depended on the equipment that plaintiff set up for respiration, and plaintiff may be required to assist in the operating room, where his failure to be sufficiently alert could have had life-threatening consequences to the patients. Reynolds stated that he made the final determination to prevent plaintiff's return to work with the restrictions because of patient safety, and the nature of the workplace and job.

Similarly, Angela Nortly, the disability claims consultant for defendant, testified that it would not be safe for plaintiff to work with patients with a co-worker monitoring him. Plaintiff's supervisor, Mary Jean Yablonsky, stated that anesthesia technicians were relied on to function fairly independently in setting up equipment that was important for patient care, and that errors could result in trauma to the patient. Patricia Whitfield, a human resources consultant for defendant, explained that defendant was not able to accommodate plaintiff by requiring a colleague to work along side of him and check him, because of the danger to the patient in the operating room due to any possible lapse of concentration by plaintiff, or the unavailability of other staff needed to watch plaintiff.

Additionally, plaintiff's sleep specialist, Zupancic, indicated concerns about patient safety posed by the symptoms and consequence of plaintiff's disability. Zupancic reported that his intention in suggesting that a colleague should work alongside plaintiff was to keep patients safe by ensuring that the colleague could catch any error that plaintiff may make in an important situation. In other words, Zupancic's reasoning was that plaintiff's illness could result in mistakes in plaintiff's job performance whereby the safety of the patient would be placed at risk. Regardless of whether we agree with the court's determination concerning the reasonableness of the accommodation that plaintiff sought, plaintiff cannot show that he created a question of fact that he could perform the essential duties of his position even with the accommodation. Having

someone available to safely perform the tasks of an anesthesia technician by correcting mistakes that plaintiff might make in important situations is not the same as plaintiff's being able to perform his own duties with the accommodation. Despite an effective team environment and the presence of a colleague to monitor and correct his work, there is no way to ensure that, plaintiff would be able to perform safely the essential duties of an anesthesia technician.

Plaintiff argues that he was able to perform his job because he had a small role in assisting the physician that performs the induction of anesthesia and the team environment ensured the patient's safety. However, as noted above, there was substantial testimony that plaintiff's disability would present a risk to patient care, even with an accommodation to assist him. While the employer's own judgment about the duties of a job position will not always be dispositive, it is nonetheless always entitled to substantial deference. *Peden*, 470 Mich at 217-218. No matter how often a patient would rely solely on plaintiff to safely induce anesthesia, the testimony of plaintiff, employees of defendant, and the job description consistently demonstrate that plaintiff played an active role in assisting this process, which undoubtedly has to be performed without error because of the vulnerability of the patient. A disability that prevents someone from doing a job with due regard for the safety of others is a disability that is related to the ability to perform that job. *Szymczak v American Seating Co*, 204 Mich App 255, 257; 514 NW2d 251 (1994). Thus, despite plaintiff's assertions to the contrary, the trial court did not err when it found that defendant's disability prevented him from being able to fully perform the duties and tasks required of an anesthesia technician.

Plaintiff next argues that the trial court erred by concluding that providing a "job buddy" to plaintiff was not a reasonable accommodation. However, we need not reach this issue in light of our agreement with the trial court that plaintiff has not created a question of fact as to whether he could perform the essential functions of his job, even with such an accommodation.

Lastly, plaintiff argues that the trial court erred by finding that plaintiff was not retaliated against for seeking reasonable accommodations to return to work. The PWDCRA provides that an employer shall not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.1602(a). To establish a prima facie case of unlawful retaliation, a plaintiff must show: (1) that he engaged in a protected activity, (2) defendant knew of the protected activity, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Aho v Dep't of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004); *Mitan v Neiman Marcus*, 240 Mich App 679, 680-681; 613 NW2d 415 (2000).

Plaintiff asserts that he engaged in a protected activity when his counsel informed defendant that it had denied reasonable accommodation to plaintiff. A plaintiff engages in "protected activity" under the PWDCRA, when he opposes a violation of the PWDCRA, or (1) makes a charge, (2) files a complaint, or (3) testifies, assists, or participates in an investigation, proceeding, or hearing under the PWDCRA. *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 435; 653 NW2d 415 (2002). Here, the trial court did not specify whether plaintiff engaged in protected activity, but his counsel's July 5, 2007 letter to defendant served as notice that plaintiff believed that he was qualified to return to work with accommodation under the ADA and that defendant had precluded him from returning to work. In that sense, at least, plaintiff sufficiently opposed what he perceived to be a violation of the ADA or the PWDCRA.

Plaintiff argues that he suffered an adverse employment action when he suffered harassment from his supervisor. Plaintiff cites *Morris v Oldham Co Fiscal Court*, 201 F 3d 784, 792 (CA 6, 2000), for the proposition that supervisor harassment can create an adverse employment action. However, *Morris*, 201 F 3d at 786, was a case that was considered under Title VII of the Civil Rights Act of 1964, 42 USC 2000 *et seq*., the Civil Rights Act of 1991, 42 USC 1981 *et seq*., and a Kentucky anti-discrimination statute, not the Michigan statutes at issue here. Additionally, the *Morris* court reasoned that "severe or pervasive" supervisor harassment can constitute discrimination. *Id*. at 792. The harassment detailed in *Morris* was that the supervisor:

> [C]alled Morris on the telephone over thirty times, despite Black's warnings, solely for the purpose of harassing Morris; (2) drove to the Road Department on several occasions, and simply sat in his truck outside the Department building, looking in Morris's window and making faces at her; (3) followed Morris home from work one day, pulled his vehicle up beside her mailbox, and gave her "the finger"; (4) destroyed the television Morris occasionally watched at the Road Department; and (5) threw roofing nails onto her home driveway on several occasions. [*Id*. at 793.]

Here, plaintiff alleged that, after his return to work, his supervisor criticized his work performance somewhere between one and ten times in meetings at her office, commencing within hours of his return to work. Plaintiff also identified co-workers who had told him that his supervisor had co-workers watch plaintiff's work because she did not like him, and testified that the supervisor falsely told him that a co-worker was complaining about plaintiff's performance. However, plaintiff also stated that he returned to the same position that he previously worked and at the same pay. Plaintiff further admitted that the department did accommodate a later work starting time for him, as well as giving him part-time shifts, due to his sleep-related difficulties. Plaintiff testified that the supervisor apologized to him for her tone toward him, relayed compliments that she received regarding plaintiff's work, and that other employees also complained about the supervisor's demeanor toward them. Plaintiff also agreed that his performance evaluations after his return were positive and included a pay increase. There is no evidence here of the severe and pervasive supervisor harassment referenced in *Morris*.

The trial court found that there was no retaliation against plaintiff because plaintiff's employment was restored to what it was previously, his performance reviews were reasonable, and his raises and compensation were comparable to other employees in his position. We agree. The trial court did not err by dismissing plaintiff's retaliation claim.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Jane E. Markey