APPELLANT PRO SE:

KENNETH E. GENTRY
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEES:

STEVE CARTER
Attorney General of Indiana

ELIZABETH ROGERS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KENNETH E. GENTRY,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 46A04-0704-CV-225
	)	
PEN PRODUCTS, HERB NEWKIRK, FLOYD BURTON, ED JONES,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Paul J. Baldoni, Judge
Cause No. 46D03-0302-PL-30

November 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Kenneth Gentry appeals the trial court's grant of summary judgment in favor of defendants Pen Products, Herb Newkirk, Floyd Burton, and Ed Jones, (collectively "Defendants") and the denial of his two motions for default judgment. Gentry also appeals the trial court's denial of his motion for change of venue from the judge. We affirm.

Issues

Gentry raises three issues, which we reorder and restate as:

I. whether the trial court abused its discretion when it denied Gentry's motion for change of judge;

II. whether the trial court abused its discretion when it denied Gentry's two motions for default judgment; and

III. whether the trial court properly granted Defendants' motion for summary judgment.

Facts

Gentry was an inmate at the Westville Correctional Facility ("WCC"). Gentry worked at the Pen Products sign shop ("Pen") while incarcerated. His responsibilities at Pen included painting, lifting, and loading signs. Gentry is diabetic and claimed that his diabetes affected his ability to work at Pen. Gentry's complaint alleged that there was a period of time when his blood count dropped and affected his ability to complete his job

duties.[1] Pen terminated Gentry on November 14, 2000. Gentry filed a classification appeal with WCC officials alleging he could not complete work at Pen because of his diabetes. He requested another placement at Pen but was not re-hired. Defendants claim Gentry was terminated for sleeping on the job, not keeping up with job duties, and for damaging equipment.

On February 28, 2003, Gentry brought a pro se action against Pen Products, Floyd Burton, the shop supervisor, Ed Jones, the manager of job placement at WCC, and Herb Newkirk, the former superintendent of WCC.[2] Gentry alleged Defendants violated the Americans with Disabilities Act ("ADA") by wrongfully terminating him and discriminating against him, violated his Fourteenth Amendment rights, and created a hostile work environment. He claimed his supervisors knew about his diabetic condition, fired him because of it, and then refused to find him an alternative position.

Gentry filed two motions for default judgment on September 4, 2003, and April 4, 2004. The trial court denied both motions. The attorney general appeared on behalf of Defendants on June 7, 2004. Defendants filed a motion for summary judgment on November 8, 2005. Gentry filed a response on January 17, 2006. Defendants filed their reply on January 24, 2006.

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[1] Gentry does not specify that his blood sugar count dropped, but considering his later references to insulin and his diabetic status, we assume he means blood sugar count when he states "blood count." Appellee's App. p. 5.

[2] Gentry first brought the action in federal court in the Northern District of Indiana on September 27, 2002. Following that court's dismissal of his constitutional claims and an instruction to pursue the ADA claims in state court, Gentry re-filed the action in LaPorte County.

On January 25, 2006, the trial court determined Gentry's state court complaint was filed outside the statute of limitations and dismissed Gentry's action with prejudice. Gentry filed a notice of appeal on February 9, 2006.[3] On August 1, 2006, this court issued an order that the complaint was timely filed and remanded the case. On August 8, 2006, Gentry filed a motion for change of venue from the judge. The trial court denied the motion. On March 3, 2007, the trial court granted Defendants' motion for summary judgment. This appeal followed.

Analysis

I. Change of Venue from the Judge

Gentry argues that he was entitled a change of venue from the judge and the trial court abused its discretion by denying his motion. We review a trial court's decision on a motion to change venue for an abuse of discretion. In re Guardianship of Hickman, 805 N.E.2d 808, 814 (Ind. Ct. App. 2004), trans. denied. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances, or if the trial court has misinterpreted the law. McCullough v. Archbold Ladder Co., 605 N.E.2d 175, 180 (Ind. 1993).

A party is entitled to one change of judge without specifying the reasons, if that party moves within the prescribed time limit. Ind. Tr. R. 76(B), (C). Indiana Trial Rule 76(B) provides:

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[3] Gentry argued that his state court complaint was timely under the Journey's Account Statute, Indiana Code Section 34-11-8-1. Defendants agreed and filed a verified motion to dismiss the appeal and remand.

> In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefore by a party or his attorney.

Under Rule 76(C) a motion for change of venue from the judge must be filed no later than ten days after the issues are first closed on the merits, with a few exceptions. In lawsuits with multiple defendants, the issues are considered closed with the filing of the first answer. Mann v. Russell's Trailer Repair, Inc., 787 N.E.2d 922, 925 (Ind. Ct. App. 2003), trans. denied. The merits were closed on July 7, 2004, when Defendants filed an answer. The State contends that Gentry's motion for change of venue from the judge is untimely because it was not filed until nearly two years after that date. We agree. Gentry seems to contend that he is entitled to an exception under Rule 76(C)(3). However, at the time Gentry filed his motion, Rule 76(C)(3)[4] provided:

> [W]hen a new trial is granted, whether the result of an appeal or not, the parties thereto shall have ten days from the date the order granting the new trial is entered on the record of the trial court . . . .

This court remanded Gentry's case on August 1, 2006, after his first appeal. The order provided: "This appeal is dismissed without prejudice and remanded to the trial court for further proceedings." Gentry v. Pen Products, No. 49A02-0602-CV-176, slip

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[4] A new version of Rule 76(C)(3) became effective January 1, 2007 and provides:

> [I]f the trial court or a court on appeal orders a new trial, or if a court on appeal otherwise remands a case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial, the parties thereto shall have ten days from the date the order of the trial court is entered or the order of the court on appeal is certified.

op. at 2 (Ind. Ct. App. Aug. 1, 2006). The order also noted: "Appellees contend that this appeal should be dismissed without prejudice and remanded for a determination on the merits because Appellant is correct that his civil complaint was timely filed." Id.

Pursuant to the order, the trial court was instructed to consider Gentry's action on the merits. The trial court would first have to consider the pending summary judgment motion. In doing so, the trial court would be considering the designated evidence and possibility holding a hearing. Still, our supreme court has held that "a summary judgment decision is not a trial." State ex rel. Sink & Edwards, Inc. v. Hancock Superior Court, 470 N.E.2d 1320, 1322 (Ind. 1984); see also McAllister v. State, 280 N.E.2d 311, 312 (Ind. 1972) (reasoning that the setting of a hearing on a motion for summary judgment is not a 'trial' within the meaning of trial rule 76(7)); Brames v. Crates, 399 N.E.2d 437, 440 (Ind. Ct. App. 1980) ("In contrast to a trial where the purpose is to try the facts and determine the preponderance of the evidence, a summary judgment proceeding is a procedure for applying the law to the facts where no factual controversy exists."). For all intents and purposes, when this court remanded Gentry's cause of action on August 1, 2006, the first note of business for the trial court was to determine the outstanding summary judgment issue. This situation did not constitute a new trial.

Moreover, any further proceedings as directed by this court in August 2006, could not be considered a "new trial" because no original trial was ever conducted. Our supreme court has explained that in order for a 'new trial' to exist, a first trial must have been held. "[S]ince there has been no trial in this case, the Court of Appeals opinion can not be interpreted as an order for a new trial." State ex rel. Sink & Edwards, Inc., 470

N.E.2d at 1322. The trial court did not abuse its discretion in denying Gentry's motion for change of venue from the judge.

II. Motions for Default Judgment

Gentry filed two motions for default judgment, and the trial court denied both of them. The first motion was filed on September 4, 2003, and denied the same day. The second motion was filed on April 4, 2004, and denied on April 14, 2004. At the time of these filings, no attorney had appeared on behalf of any of the defendants, and one did not appear until a few months later on June 7, 2004.

The trial court has considerable discretion in granting or denying a motion for default judgment. Delphi Corp. v. Orlik, 831 N.E.2d 265, 267 (Ind. Ct. App. 2005). The trial court should use that discretion to do what is "just" in light of the unique facts of each case. Id. That discretion should be "exercised in light of the disfavor in which default judgments are held." Progressive Ins. Co. v. Harger, 777 N.E.2d 91, 94 (Ind. Ct. App. 2002). At the time of the trial court's denials, no attorney had appeared on behalf of any of the defendants. In addition, the chronological case summary did not reveal that the Indiana Attorney General had been served or given notice of the action. Considering this situation, we hold that the trial court did not abuse its discretion in denying Gentry's motions for default judgment.

III. Summary Judgment

Gentry contends the trial court improperly granted Defendants' motion for summary judgment. When reviewing a trial court's grant or denial of summary judgment the standard of review is the same as the standard governing the trial court. Northern Ind.

Pub. Serv. Co. v. Bloom, 847 N.E.2d 175, 180 (Ind. 2006). "Summary judgment should be granted only if the evidence designated pursuant to Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law." Id. All facts and reasonable inferences are construed in favor of the nonmovant, and we rely only on the facts designated to the trial court. Id.

We carefully review a grant of summary judgment to ensure that a party was not improperly denied his or her day in court. Matteson v. Citizens Ins. Co. of America, 844 N.E.2d 188, 192 (Ind. Ct. App. 2006). We will affirm on any legal theory supported by the record if there are no genuine issues of material fact. Id. The party appealing the denial of a motion for summary judgment has the burden of persuading this court on appeal that the trial court's ruling was improper. Jordan v. Deery, 609 N.E.2d 1104, 1107 (Ind. 1993).

Gentry alleges Fourteenth Amendment due process and equal protection violations, which have already been adjudicated as improper and must fail as a matter of law. The district court for the Northern District of Indiana already held that Gentry could not pursue a 42 U.S.C. §1983 claim based on a violation of Fourteenth Amendment rights and instructed Gentry to pursue his remaining ADA claims in state court. Gentry v. Prison Shop Foreman Floyd, et al., No. 3:02-CV-0587 RM (N.D. Ind. Oct. 18, 2002) (memorandum and order). The doctrine of res judicata prevents repetitious litigation of disputes that are essentially the same. Indianapolis Downs, LLC v. Herr, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), trans. denied. We affirm the trial court's grant of

summary judgment in favor of Defendants on these claims and will turn our attention to the ADA claims.

To establish a prima facie case of discrimination under the ADA and survive summary judgment, Gentry is required to prove the following four elements: first, that he is disabled within the meaning of the ADA; second, that his work performance met Pen's legitimate expectations; third, that he was discharged; and, fourth, that the circumstances surrounding the discharge indicated it is more likely than not this his disability was the reason for the discharge. See Lawson v. CSX Transp., Inc., 245 F.3d 916, 922 (7th Cir. 2001).

Defendants' summary judgment motion focuses on the second and fourth elements, namely that Gentry has not produced sufficient evidence to show that he was meeting the legitimate expectations of his employer, and, second, that he was discharged for legitimate reasons having nothing to do with discrimination. We will, in turn, limit our analysis to those claims.

To succeed on his claim, Gentry must prove disability discrimination under the direct or indirect method of proof. Timmons v. General Motors Corp., 469 F.3d 1122, 1126 (7th Cir. 2006). Under the direct method, Gentry is required to present evidence of clear cut discrimination by the employer. This essentially requires Gentry to present "an admission by an employer or some sort of 'smoking gun' that points to discrimination." Isbell v. Allstate Ins. Co., 418 F.3d 788, 794 (7th Cir. 2005), cert. denied. Gentry presented no such evidence here. Gentry's self-serving affidavit includes a statement that "Burton stated to me that he didn't want any diabetic working for him because they were

to [sic] troublesome requiring to [sic] much attention and he wished I work [sic] someplace else beside the sign shop out of his way." Appellant's App. p. 33. This statement does not amount to an admission by the employer; rather, it is a second hand allegation by Gentry. In assessing discrimination claims, the Seventh Circuit has held that "self-serving affidavits without factual support in the record will not defeat a motion for summary judgment." Albiero v. City of Kankakee, 246 F.3d 927 (7th Cir. 2001). Nor do we find that this statement can be connected to Gentry's firing. Gentry alleges that Burton stated he wanted Gentry "out of his way" and out of the sign shop area. Gentry was fired from Pen and not placed in any other areas within Pen or elsewhere in the WCC. Gentry cannot prove ADA violations under the direct method.

Under the indirect method, Gentry is required to satisfy the McDonnell Douglas test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). First, an employee must prove, by a preponderance of the evidence, a prima facie case of discrimination. Id. If the employee succeeds in proving a prima facie case of discrimination, the burden shifts to the employer to articulate a nondiscriminatory reason for the employment action. Id. If the employer articulates such a reason, then the burden shifts back to the employee to prove the reason was merely a pretext for discrimination. Id. At all times, the employee retains the ultimate burden of persuading the trier of fact that he was intentionally discriminated against. Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1256 (Ind. Ct. App. 2002) (citing Miranda v. Wis. Power & Light Co., 91 F.3d 1011, 1015 (7th Cir. 1996)).

Evidence designated by Gentry in his response to the motion for summary judgment includes his own affidavit, a performance review from November 2000, medical records showing an adjustment to insulin, and an employment form with medical codes. In his affidavit, Gentry contends that supervisors knew of his diabetic condition because of the medical codes on the employment form and because he told them. He contends his diabetic condition affected his ability to work, and he requested a new placement. The performance review from November, however, rates Gentry as an "unacceptable" employee. Appellant's App. p. 75. The plant foreman indicated that Gentry was "not working out" in two different areas of the shop and had "no motivation about getting thing [sic] done with the pace that [sic] set in the shop." Id.

In their summary judgment motion, Pen supervisors submitted affidavits with legitimate nondiscriminatory reasons for Gentry's termination. Burton, the plant foreman, stated that he had no access to inmate's medical records and no knowledge of Gentry's condition. He declared that Gentry was terminated for not completing assignments, sleeping on the job, and ruining a pair of safety glasses. The employment form document submitted by Gentry also indicated that he ruined safety glasses on November 14, 2000. Burton also stated that if Gentry had explained that medical conditions affected his job and requested a new placement for that reason, then steps would have been taken to accommodate Gentry. Herb Newkirk, the plant superintendent, submitted an affidavit declaring that he reviewed Gentry's classification appeal and determined he was terminated based on work performance. Newkirk's affidavit echoed Burton's in that Newkirk explained that if his own review had revealed that Gentry's

termination resulted from a medical condition, steps would have been taken to resolve the matter. Those steps would have included returning Gentry to a position in the sign shop or a comparable position elsewhere in the WCC.

Defendants have come forward with legitimate, nondiscriminatory reasons for Gentry's termination. Gentry has not presented evidence that these reasons were not credible or were any of kind of pretext for discrimination. He denies sleeping on the job, but provides no independent evidence, such as statements from other employees, to back up this claim. He also argues that his supervisors knew of his disability, but his evidence of such knowledge includes obscure coding on an employment form. The medical code applied to Gentry seemed to be "G." Appellant's App. p. 57. According to the additional exhibits submitted by Gentry, "G" merely a means any "stabilized, permanent or chronic physical or medical condition" and indicates that frequent monitoring is not needed, the offender has appropriate knowledge and motivation, can self serve, and a twenty pound lift restriction is needed. Contrary to his contentions, this generic classification does not put any Pen officials on notice that Gentry was diabetic.

Gentry also contends he told officials that he was diabetic, while Defendants insist they had no knowledge. This dispute, however, is not material to the ADA analysis. Three officials submitted affidavits contending that they did not discriminate against him because of such condition. The performance review indicated Gentry was not meeting his employer's expectations and the employment form with the health codes indicated Gentry did ruin a piece of his employer's property. Without being able to overcome defendant's proffered legitimate reasons for termination, Gentry cannot prove a prima

facie case of discrimination under the ADA. The trial court properly granted summary judgment on all of Gentry's ADA claims.

Gentry's claim that he was subject to a hostile work environment also fails as a matter of law. The Seventh Circuit has not yet recognized a cause of action under the ADA for a hostile work environment. See Mannie v. Potter, 394 F.3d 977, 982 (7th Cir. 2005); Conley v. Village of Bedford Park, 215 F.3d 703, 712-13 (7th Cir. 2000). Even if such a claim could exist, Gentry has failed to present evidence that he experienced harassment "so severe or pervasive as to alter the conditions of employment and create an abusive working environment." Mannie, 394 F.3d at 982. Summary judgment on Gentry's hostile work environment claim was properly granted.

Conclusion

Gentry did not meet his burden to present a prima facie case of disability discrimination and overcome summary judgment, and the trial court properly granted summary judgment in favor of Defendants on all Gentry's claims. The trial court did not abuse its discretion in denying Gentry's motion for change of venue from the judge and both motions for default judgment. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.