STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY P. SIEBENECK,

Plaintiff-Appellant,

v

CROP PRODUCTION SERVICES, INC., and LOUIE HERMAN,

Defendants-Appellees.

UNPUBLISHED
December 28, 1999

No. 210601
Monroe Circuit Court
LC No. 96 5788 CZ

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting defendants' motion for summary disposition on his handicap discrimination claim. We affirm.

Plaintiff was employed by defendant Crop Production Services (CPS) from November 8, 1994, to May 22, 1996. Defendant Louie Herman was plaintiff's direct supervisor at CPS. On December 4, 1995, plaintiff began to experience breathing problems at work. Plaintiff testified that he experienced shortness of breath and drove himself to the hospital, where he remained for about a week and was diagnosed with an asthmatic condition. About one month later, on January 10, 1996, plaintiff again experienced breathing difficulties at work and was taken to the hospital by ambulance. According to plaintiff, he told defendant Herman and several of defendant's employees that he was suffering from panic attacks, upon his return to work after the second incident. About two months later, plaintiff experienced his third episode at work. Although plaintiff was not hospitalized on this third occasion, he had an employee drive him home. Plaintiff was diagnosed with major depressive disorder and chronic anxiety disorder with panic attacks. When he experienced the panic attacks at work, plaintiff's symptoms included "shortness of breath, severe nausea, shaking, flushing, crying and sense of losing control." Both plaintiff and his doctor testified that plaintiff could not perform his job duties while experiencing the panic attacks, and that CPS could not have provided an accommodation which would have allowed plaintiff to perform his job duties while experiencing the panic attacks.

Plaintiff testified that he was told not to report to work after he experienced his third panic attack, and that defendant Herman told him to take a medical leave of absence, or he would be fired.

Defendant Herman confirmed that he told plaintiff to take a leave of absence for the purpose of treating his medical problem, because other employees were concerned plaintiff would experience another attack at work. Leonard Williams, a CPS employee, was present when defendant Herman told plaintiff to take the leave of absence, and he testified that defendant Herman said plaintiff was "crazy," that he had "flipped out" and that he would never work as a manager for defendant Herman again. The following day, March 19, 1996, defendant Herman issued a memo to CPS employees stating that plaintiff was no longer plant manager, due to health reasons. After two months on medical leave, plaintiff's doctor released him to return to work, with no restrictions. Although plaintiff did return to work, he was fired shortly thereafter. Plaintiff claims that he was fully able to resume all the duties of the plant manager position when he returned to work. His doctor testified that plaintiff had a chronic disorder, not a temporary condition, and predicted that it would recur in the future. He testified that plaintiff was not cured when he went back to work, but was in remission. At the time of his deposition, plaintiff testified that his condition had not gone away, but it was under control.

On appeal, plaintiff contends that the circuit court erred in dismissing his handicap discrimination claim because he established each of the prima facie elements of a claim brought under MCL 37.1103(d); MSA 3.550(103)(d). We disagree.

The circuit court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Such a ruling will be reviewed by this Court under a de novo standard. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The evidence must be viewed in the light most favorable to the nonmoving party, and the motion should be granted only if there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In order to prove a prima facie case under the statute,[1] plaintiff was required to demonstrate: 1) that he was handicapped as defined by the statute; 2) that the handicap was unrelated to his ability to perform his job duties; and 3) that he was discriminated against in one of the ways described in the statute. MCL 37.1103(d); MSA 3.550(103)(d). *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998).

The circuit court granted defendants' motion for summary disposition on the grounds that plaintiff's condition did not meet the definition of "handicap," as he failed to present sufficient evidence that his condition was unrelated to his ability to perform his job. The trial court ruled,

> This Court concludes that Plaintiff has not met its burden in responding to this motion for summary disposition. There is a complete absence of factual support in the record to rebut the claims that Plaintiff was anything but incapacitated during the major attacks. No reasonable jury could find the existence of a question of fact as to Plaintiff's inability to perform his job while having the panic attacks.

Plaintiff argues that he would have been able to perform all of the functions of his job as plant manager had he been given a reasonable time to heal. He cites *Rymar v Michigan Bell Telephone Co*,

190 Mich App 504; 476 NW2d 451 (1991), for the proposition that an employer commits unlawful handicap discrimination if it fails to give an employee a reasonable time to heal from a temporary disability. Plaintiff's argument is without merit because the *Rymar* holding is no longer the law in Michigan. In *Lamoria v Health Care & Retirement Corp*, 233 Mich App 560; 593 NW2d 699 (1999), a special panel of this Court convened under MCR 7.215(H)(3) to resolve the conflict between *Rymar* and the prior vacated opinion in *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801; 584 NW2d 589 (1998), regarding the "reasonable time to heal" doctrine under the PDCRA. We rejected the holding of *Rymar* and adopted the prior opinion in *Lamoria*, holding:

> We agree with the *Lamoria* majority and hold for the reasons it expressed that the [PDCRA] does not require that an employer allow a disabled employee a reasonable time to heal. We therefore affirm the trial court's grant of summary disposition regarding plaintiff's [PDCRA] claim. In all other respects, we adopt the opinion of the prior *Lamoria* panel as our own. [*Lamoria*, 233 Mich App at 562.]

Plaintiff also argues that he was able to perform the functions of his job on the day he was terminated, and concludes that his condition was unrelated to his ability to perform his job as plant manager. The parties here agree that plaintiff was completely unable to perform his job duties while experiencing a panic attack. The issue before us is whether an intermittent or episodic mental characteristic, which is completely disabling when it occurs, may be deemed to prevent plaintiff from performing the essential functions of his job.

Because there appear to be no Michigan cases on point, we have considered the analogous federal law cited by the parties. See *Martinson v Kinney Shoe Corp*, 104 F3d 683 (CA 4, 1997); *Johnson v Morrison, Inc*, 849 F Supp 777 (ND Ala, 1994). We conclude that, under the clear requirements of the statute, plaintiff's condition does not qualify as a "handicap" because his condition was not "unrelated to the individual's qualifications for employment." MCL 37.1103(d)(i)(A); MSA 3.550(103)(d)(i)(A). Even though plaintiff's attacks occurred infrequently, they rendered him unable to perform his job while they lasted.

Thus, even assuming arguendo that plaintiff can demonstrate that his condition is a determinable mental characteristic and that it substantially limits one or more of his major life activities, summary disposition was appropriate in this case.

In light of our determination that plaintiff's condition was not a handicap under the act, plaintiff's remaining claims concerning his medical history, defendants' perception of him as handicapped, and defendant Herman's individual liability are without merit and need not be addressed.

Plaintiff also contends that defendants' perception of him as mentally unstable automatically falls within the definition of a handicap. This issue is also without merit. While a plaintiff may bring an action on the basis of a perceived handicap, MCL 37.1103(d)(iii); MSA 3.550(103)(d)(iii), the perceived handicap must be a characteristic which substantially limits one or more major life functions yet does not prevent the employee from performing the essential functions of the job. Defendants here perceived plaintiff as suffering from a mental condition which was related to his ability to perform his job.

Therefore, defendants did not perceive plaintiff as being handicapped as defined by the statute and plaintiff's claim was properly dismissed.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin

[1] When plaintiff's cause of action accrued, the Persons With Disabilities Civil Rights Act ("PDCRA"), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., was titled the Michigan Handicappers' Civil Rights Act.