STATE OF MICHIGAN

COURT OF APPEALS

DWIGHT BOUTELL,

Plaintiff-Appellant,

v

SPARTAN STORES, INC.,

Defendant-Appellee.

UNPUBLISHED
April 21, 2000

No. 217793
Kent Circuit Court
LC No. 97-013048-CZ

Before: Meter, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this action in which plaintiff claimed that defendant violated the Persons With Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, by refusing to grant him the specific accommodation he requested. We affirm.

We review de novo a trial court's grant of a motion for summary disposition. *Koenig v South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Summary disposition may be granted pursuant to MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Koenig, supra* at 674.

A prima facie case of discrimination under the PWDCRA requires a plaintiff to demonstrate (1) that he is disabled as defined in by the PWDCRA, (2) that the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways described in the statute. *Lown v JJ Eaton Place*, 235 Mich App 721, 727; 598 NW2d 633 (1999).

Plaintiff contends that the trial court erred by concluding that plaintiff's right-eye blindness, or monocular vision, is related to his ability to drive a commercial vehicle. We disagree. The ruling of the trial court is supported both by the law and by the record facts. Pursuant to MCL 480.12d; MSA 9.1666(12d), Michigan has adopted 49 CFR 391.41(b)(10), which generally prevents an individual with vision in only one eye from operating a commercial vehicle. Moreover, plaintiff testified that his

overall vision has worsened since losing vision in his right eye, and that he has difficulty operating a vehicle in fog or fog-like conditions, such as a "white-out" blizzard. Additionally, plaintiff conceded that in the event that a foreign object, such as a rock or an insect, became lodged in his left eye, he would be much less safe than a driver with vision in both eyes. We believe that these facts indisputably indicate that plaintiff's vision loss is related to his ability to safely operate a commercial vehicle. Consequently, we conclude that the trial court did not err by holding that plaintiff's monucular vision was related to his ability to perform the duties of an interstate truck driver.

We acknowledge that MCL 480.12d; MSA 9.1666(12d) allows an individual otherwise disqualified to operate a commercial vehicle by 49 CFR 391.41(b)(10) to operate a commercial vehicle within Michigan's borders if a waiver is obtained. Plaintiff contends that he requested defendant's assistance in obtaining such a waiver and that this was the only accommodation he requested.

However, to accommodate plaintiff's request defendant would have had to create a new position for him because all of defendant's truck drivers are required to drive at least some interstate routes. Our Supreme Court has held that the PWDCRA does not impose a duty on an employer to transfer an employee to a new position. *Rourk v Oakwood Hospital Corp*, 458 Mich 25, 36; 580 NW2d 397 (1998). If an employer is not required by the PWDCRA to transfer an employee to a new position, it logically follows that an employer is not required to create a new position for an employee. Hence, we conclude that defendant was not required to accommodate plaintiff by creating a new position for him.

Further, the waiver program requires an employer to agree that the employee's driving will be restricted to intrastate routes only. MCL 480.12k(3)(c); MSA 9.1666(12k)(3)(c). The record documentation clearly established that defendant was unable to agree to restrict plaintiff to intrastate routes because the agreement would require defendant to circumvent the collective bargaining agreement. To the extent that plaintiff contends that the accommodation requested was merely a scheduling alteration, we note that MCL 37.1210(15); MSA 3.550(210)(15) provides that these alterations apply only to "minor" or "infrequent" duties. Plaintiff testified that he frequently drove to Illinois and Indiana after dropping off shipments at stores in the southern portion of the state and that he "went to Chicago a lot." Plaintiff attested that at the very least, ten percent of his runs were interstate. We do not believe that this volume of interstate traffic constitutes a minor or infrequent task.

In sum, we conclude that the trial court properly granted defendant's motion for summary disposition because (i) plaintiff's physical condition was related to his ability to perform his job and (ii) defendant was not required by or obligated under the act to grant the relief requested by plaintiff.[1]

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

[1] We decline to address plaintiff's remaining claim because the issue was not decided in the trial court. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).