

STATE OF MICHIGAN
COURT OF APPEALS

ALLAN B. PEDEN,

Plaintiff-Appellant,

v

CITY OF DETROIT, DETROIT POLICE
DEPARTMENT,

Defendant-Appellee.

UNPUBLISHED

March 23, 2001

No. 214491

Wayne Circuit Court

LC No. 96-645449-CZ

Before: Neff, P.J., and Talbot and J. B. Sullivan,* JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order of summary disposition, dismissing plaintiff's discrimination claims under the Persons with Disabilities Civil Rights Act (PWDCRA),¹ MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, and the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* We reverse.

I

Plaintiff was hired as a police officer for the Detroit Police Department (herein "the Department") in 1972, working first as a patrol officer and later as a precinct "A-clerk." Following a heart attack in 1986, plaintiff was placed on restricted duty status. He was subsequently diagnosed with heart disease, but continued to work. In 1993, plaintiff transferred to the Department's Crime Analysis Unit (CAU), where he worked until October 1996, when he received an involuntary nonduty disability retirement.² According to the Department, plaintiff's

¹ The PWDCRA was known as the Handicappers' Civil Rights Act (HCRA) when plaintiff commenced this action.

² Plaintiff was retired under provisions in the Detroit City Charter, Title IX, Chapter VII, Article VI, § 3, by which the chief of police may request nonduty retirement for an officer "who becomes totally incapacitated for duty by reason of injury, illness or disease not resulting from the performance of duty."

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

medical condition prevented him from performing the essential functions of a police officer,³ and he was therefore subject to involuntary retirement.

Following his termination, plaintiff commenced this action claiming that the Department had illegally discriminated against him because of his disability in violation of the PWDCRA and the ADA. Defendant moved for summary disposition, arguing that plaintiff had failed to establish a claim under either the PWDCRA or the ADA, which require plaintiff to show he can perform the essential functions related to his employment to qualify for protection under the statutes. According to defendant, because plaintiff's heart disease rendered him permanently unable to perform the essential functions of a police officer, he was not a "qualified individual" within the meaning of the statutes. The trial court agreed and granted summary disposition in favor of defendant, concluding that even though plaintiff was assigned to the CAU in a nonpatrol position, he was unable to perform the essential functions of a police officer, which applied to all sworn officers as a matter of Department prerogative.

II

We review de novo a trial court's ruling on a motion for summary disposition. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999); *Petzold v Borman's, Inc*, 241 Mich App 707, 713; 617 NW2d 394 (2000). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence in a light most favorable to the party opposing the motion. *Smith, supra*. The motion may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III

The PWDCRA and the ADA share the same purpose and use similar definitions and analyses. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 472; 606 NW2d 398 (1999). 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. *Id.* at 473. Similarly, under the ADA, a plaintiff must demonstrate that (1) he is disabled, (2) he is qualified to perform the essential functions of the job, and (3) his employer subjected him to discriminatory treatment solely because of his disability. *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 568; 579 NW2d 435 (1998).

At issue in this case is the second element of the prima facie case under the respective statutes, i.e., whether plaintiff was otherwise qualified for employment, despite his disability, within the meaning of the statutes. See *id.* at 570-571, 573 ("qualified individual" is one who satisfies the

³ For ease of reference, we have used the term "police officer" interchangeably with the term "law enforcement officer."

work-related requirements of the job and can perform its essential functions with or without reasonable accommodation). We conclude that because a genuine issue of material fact exists regarding whether plaintiff could perform the essential functions of his position despite his disability, summary disposition was improper.

A

Statutory protections against illegal discrimination do not apply where the claimant is not otherwise qualified to perform the job.⁴ *Id.* at 570. That is, the plaintiff must be qualified for the particular job despite his disability. “A qualified individual with a disability is one who satisfies the requisite skill, experience, education, or other work-related requirements of the job and who can perform its essential functions with or without reasonable accommodation.” *Id.*; see also *Monette v Electronic Data Systems Corp*, 90 F3d 1173, 1186 (CA 6, 1996) (ADA); *Mitchell v General Motors Acceptance Corp*, 176 Mich App 23, 28-29; 439 NW2d 261 (1989) (HCRA). A disability that is related to one's ability to perform the duties of a particular position or job is not a “disability” warranting protection under the PWDCRA. MCL 37.1103(d)(i)(A); MSA 3.550(103)(d)(i)(A), *Sanchez v Lagoudakis (After Remand)*, 458 Mich 704, 715; 581 NW2d 257 (1998); *Chiles, supra* at 473-474.

Defendant contends that plaintiff is not otherwise qualified for his position because he is unable to perform the essential functions of a police officer, as outlined in the Michigan Law Enforcement Officers Training Council (MLEOTC) model, adopted by the Department.⁵ Plaintiff, however, challenges these functions as unessential to his CAU position, asserting that the MLEOTC functions relate to patrol positions and patrol work is generally not required of officers in the CAU.

The parties each argue that case precedent analyzing the essential functions of police officers supports their respective positions and mandates the particular outcome in this case. We disagree. Where such issues are in dispute, a determination that the plaintiff is unable to perform the duties of a particular job or position cannot be made without an examination of circumstances

⁴ The ADA’s “qualified” language and the PWDCRA’s “disability” language require essentially the same analysis, despite the statutes’ distinct terminology. *Collins, supra* at 574. The recent substitution of the “disability” language for the “handicapped” language in Michigan’s statute does not change the underlying analysis. See *Chiles, supra* at 473-474 (PWDCRA); *Mitchell v General Motors Acceptance Corp*, 176 Mich App 23, 28-29; 439 NW2d 261 (1989) (HCRA). We proceed using the terminology of the ADA, as did the trial court. The result under either statute is the same.

⁵ The MLEOTC model entitled: “essential job functions of a law enforcement officer,” lists twenty-four job functions, such as effecting forcible arrests, climbing over obstacles and through openings, entering and exiting vehicles quickly, using firearms from a variety of body positions while under extreme stress, and pursuing fleeing suspects on foot. Although the model was adopted after plaintiff was hired, defendant maintains that the essential functions of his position are similarly described in earlier Department job descriptions for the position of police officer.

involved. *Mitchell, supra* at 29-31. The nature of the inquiry requires a case-by-case determination concerning whether a particular individual is otherwise qualified for a particular job. Larson, 9 Employment Discrimination (2d ed) § 153.05[1], p 58. In this case, the trial court failed to make such an inquiry.

Under the ADA, where a disabled individual challenges “a particular job requirement as unessential, the employer will bear the burden of proving that the challenged criterion is necessary.” *Monette, supra* at 1184, citing 42 USC 12112(b)(6). Consideration must be given to the employer’s judgment concerning which functions of the job are essential, and a job description may be considered evidence of the essential functions of a job; however, a court need not limit its consideration to these factors. 42 USC 12111(8); Larson, *supra* at § 153.05[1], pp 57, 59.

The Equal Employment Opportunity Commission (EEOC) interpretative guidance on the ADA indicates that the identification of the essential functions of a job is a fact-specific inquiry. See 29 CFR 1630.2(n). One factor in designating a particular function as essential is that there is a limited pool of employees available to perform that function. 29 CFR 1630.2(n)(2); Larson, *supra* at § 153.05[1], p 58 and § 153.05[4], pp 64-65. This factor is often considered in cases involving police officers. Larson, *supra* at 153.05[4], pp 64-65. The types of evidence that may be considered in determining the essential functions of a job include:

- (i) The employer’s judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs. [29 CFR 1630.2(n)(3).]

B

In this case, the Department asserted that the essential functions of plaintiff’s position are those of a police officer, in general, and that plaintiff’s disability prevented him from performing those functions. Defendant argued that the law enforcement functions are essential to plaintiff’s CAU position because the Department regularly requires CAU officers to participate in special patrols, such as the Freedom Festival Fireworks and the Detroit Grand Prix. Further, because of a shortage of patrol officers within the Department, it is necessary that officers such as plaintiff be able to assume patrol duties, particularly in the event of an emergency.

However, plaintiff presented evidence raising a genuine issue of material fact regarding whether the MLEOTC model functions are, in practice, essential functions of his CAU position. Plaintiff presented evidence of the Department's organization, showing that the function of the CAU was essentially "inside" work, e.g., monitoring and analyzing crime data, maintaining an information system, and providing crime information. Other evidence showed that, in the past, not all officers assigned to the CAU participated in special patrols, and, moreover, that such patrols were infrequent. Inspector Barbara Weide testified during deposition that officers assigned to the CAU normally were not required to perform police functions on a routine basis.

Plaintiff likewise presented evidence contradicting defendant's contention that budget constraints and patrol officer shortages made it necessary that officers assigned to non-patrol positions be able to perform patrol functions. Weide testified that the Department does not routinely evaluate patrol officers to determine their abilities to perform the essential functions listed in the MLETOC model. According to deposition testimony of Commander Falvo, the Department employs other officers who are unable to perform patrol functions, including an officer confined to a wheelchair. Further, deposition testimony of Chief McKinnon indicated that the Department was currently staffed at approximately 125 fewer positions than were budgeted and that greater staff shortfalls were projected for the near future. Documentary evidence presented by defendant confirms that at the time plaintiff was involuntarily retired, the Department was not staffed at its budgeted strength, and that of the new officers to be hired, not all would be assigned to precincts.

Moreover, plaintiff disputed that his disability prevented him from performing particular functions of a police officer. He presented documentary evidence that he had pursued suspects on foot and had made arrests while on restricted duty. Viewing the evidence in a light most favorable to plaintiff, there exists a genuine issue of material fact regarding the essential functions of plaintiff's job and whether he was able to perform them despite his disability.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan