STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GEROW,

Plaintiff-Appellant,

V

CITY OF SAGINAW,

Defendant-Appellee.

UNPUBLISHED
October 30, 2001

No. 223355
Saginaw Circuit Court
LC No. 98-025691-CZ

Before: O'Connell, P.J., and White and Smolenski, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. At the motion for summary disposition, plaintiff failed to present any medical evidence to contradict defendant's assertions that his diabetes rendered him unable to perform his duties as a firefighter. A mere promise to produce evidence is not sufficient to withstand a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). I would affirm the trial court's judgment.

Plaintiff filed the instant action on October 23, 1998. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on April 23, 1999. Specifically, defendant asserted that plaintiff failed to set forth a prima facie claim of discrimination under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., because his diabetes is not unrelated to his ability to perform his job. In support of its motion, defendant presented the medical opinions of two physicians who had met with and examined plaintiff, and who opined that the risk of hypoglycemia resulting from plaintiff's diabetes rendered him unable to perform his firefighting functions.

In his May 26, 1999 response to defendant's motion for summary disposition, plaintiff argued that he was able to perform all of the essential duties of a firefighter. In support of this argument, plaintiff presented his own deposition testimony, as well as the deposition testimony of retired fire chief Timothy Gray and retired fire captain Thomas Callison. However, plaintiff failed to present any medical evidence to contradict defendant's assertion that his diabetes rendered him unable to perform his duties as a firefighter.[1] During the subsequent hearing on

[1] Plaintiff also presented the medical records of his family physician, Charles N. Koenig, M.D., relating to plaintiff's treatment. The majority concludes that these records "supported plaintiff's argument that his diabetes did not prevent him from performing the duties of a front-line
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defendant's motion for summary disposition, the trial court inquired whether plaintiff had any medical evidence to refute defendant's contention that his diabetes rendered him unable to perform his job. Plaintiff's attorney indicated that plaintiff did not have any such medical evidence, but that she intended to depose plaintiff's family physician, Charles N. Koenig, M.D.[2] In its ruling from the bench on June 14, 1999, the trial court found that summary disposition was appropriate because plaintiff did not offer any evidence to rebut defendant's claim that his diabetes rendered him unable to perform his firefighting functions.

On appeal, the majority sua sponte[3] raises the issue that summary disposition was prematurely granted. Specifically, the majority recites the maxim that summary disposition may be premature where discovery on a disputed issue is not complete. See *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). According to the majority, summary disposition was improperly granted because further discovery was likely to uncover factual support for plaintiff's position. In support of this conclusion, the majority points to a letter written by Koenig on June 29, 1999, presented to the trial court for the first time in support of plaintiff's July 26, 1999 motion for reconsideration. In my view, it is inappropriate for this Court to rely on Koenig's letter as a basis for concluding that further discovery was likely to yield factual support for plaintiff's position, given that this letter was not before the trial court when it considered the motion for summary disposition. *Spiek v Dept't of Transportation*, 456 Mich 331, 338 n 10; 572 NW2d 201 (1998); *Maiden*, *supra* at 126 n 9.

Moreover, in *Maiden*, our Supreme Court stated that summary disposition is appropriate where the nonmoving party does not offer evidence setting forth specific facts showing a genuine issue for trial. *Id.* at 120; see also MCR 2.116(G)(4).

> *A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10).* The court rule plainly requires the adverse party to set forth specific facts *at the time of the motion* showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence *actually proffered* in opposition to the motion. *A reviewing court may not employ a standard citing the mere possibility that the claim might*

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firefighter." *Ante*, at 5. However, a close review of these medical records reveals that plaintiff complained to Koenig on May 26, 1996 that getting up in the middle of the night to fight fires "thr[ew] him off." Further, according to Koenig's records, plaintiff complained to Koenig on May 10, 1996 that "he doesn't feel good, he doesn't function well, and he knows he has got to do something." According to the record, plaintiff began taking insulin the next day.

[2] Plaintiff's attorney did not give any reason for the failure to depose Koenig, nor did plaintiff submit an affidavit indicating why an affidavit setting forth the substance of Koenig's testimony was not procured. See MCR 2.116(H).

[3] Plaintiff did not raise this issue in the lower court, nor has plaintiff raised this issue on appeal.

> *be supported by evidence produced at trial. A mere promise is insufficient under our court rules.* [*Maiden, supra* at 121 (citations omitted; emphasis supplied).]

A prima facie case of discrimination under the PWDCRA is established where the plaintiff shows 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." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999) (emphasis supplied); see also *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001); MCL 37.1103(d)(i)(A); MCL 37.1103(l)(i); MCL 37.1202(1)(b). In the instant case, defendant set forth documentary evidence demonstrating that plaintiff's condition, specifically the risk of experiencing hypoglycemia, rendered plaintiff unable to perform the duties of his job as a firefighter. In contrast, plaintiff did not set forth any medical evidence indicating that his diabetes would not affect his ability to carry out his job. Because plaintiff did not present sufficient evidence to create a triable dispute with regard to this issue, the trial court properly granted summary disposition in favor of defendant. I would affirm.

/s/ Peter D. O'Connell