STATE OF MICHIGAN

COURT OF APPEALS

STEVEN JAMES RAYMAN and NANCY RAYMAN,

Plaintiffs-Appellants,

v

PROGRESSIVE TOOL & INDUSTRIES COMPANY and FREDERICK BEGLE,

Defendants-Appellees.

UNPUBLISHED
February 19, 2002

No. 227324
Oakland Circuit Court
LC No. 99-014002-CZ

Before: Whitbeck, C.J., and Markey and K. F. Kelly, JJ.

PER CURIAM.

Plaintiffs Steven and Nancy Rayman[1] appeal as of right the trial court's order granting defendants Progressive Tool & Industries Company and Frederick Begle's motion for summary disposition pursuant to MCR 2.116(C)(10). At issue in this case is whether defendants violated the Persons With Disabilities Civil Rights Act (PWDCRA)[2] and the anti-retaliation provision of the Worker's Disability Compensation Act (WDCA).[3] Rayman does not appeal the portion of the trial court's order summarily disposing of his slander claim. We affirm.

I. Basic Facts

Progressive designs and builds automated systems and equipment for the automotive industry. Frederick Begle is Progressive's Personnel Director. In February 1986, Progressive hired Rayman as a fluid power pipefitter trainee. Between 1986 and the end of 1992, Rayman had been promoted several times until he was made a Class I pipefitter, the top classification for

[1] Nancy Rayman's claims are purely derivative of her husband's claims. We use "Rayman" to refer to Steven Rayman.

[2] MCL 37.1101, *et seq*. This was formerly known as the Handicappers' Civil Rights Act (HCRA). 1998 PA 20. Much of the allegedly discriminatory conduct took place while the HCRA was in effect, Rayman referred to the HCRA in his complaint, and other materials in the record occasionally refer to the HCRA. However, the amendments to the HCRA have no substantive effect on this case. Therefore, for simplicity's sake and to match Rayman's arguments, we refer to the PWDCRA and use its terminology when appropriate.

[3] MCL 418.301(11).

this skilled trade. However, during this same period, Rayman did not work consistently. Progressive, evidently in response to fluctuating demand for its services, laid him off three times: for forty-nine days in 1989, more than nine months in 1991, and for ninety-nine days in 1992. Starting in April 1989, Rayman also took leave because he severely injured his right arm on the job. His six medical leaves were as short as one week and as long as about eight months. Progressive denied some of Rayman's applications for worker's compensation, but it did eventually pay benefits to him, on one occasion after Rayman involved the United States Department of Labor.

In January 1994, following his second-to-last medical leave, Rayman's physician released him to work as a pipefitter on a restricted basis.[4] The restriction was that he could only use his left hand, which meant he was unable to perform his work as a pipefitter. Progressive offered Rayman a position as a security guard, the only position available at that time that would accommodate his injury. Rayman was not pleased with this job because it paid much less per hour, but he accepted it and received a worker's compensation supplement. Rayman subsequently interviewed for two other jobs within Progressive, one in project management and one as a reliability technician. Progressive did not offer him the project management job because of a conflict of interest involving Rayman's father, but did offer him the reliability technician position. Rayman declined the reliability technician position because it would have required him to travel extensively.

Rayman's physician lifted his work restriction, allowing him to return to work as a pipefitter in March 1994. However, he reinjured his right arm and took his last medical leave between July 5, 1994 and July 12, 1994. Rayman's physician again released him to work with the restriction that he only work with his left hand, which Progressive accommodated by transferring him back to the security guard position.

In fall 1994, Progressive created an instructor position in its corporate training department to teach fluid power and pipefitting techniques, giving that job to Rayman. As Rayman would later testify in his deposition, from that time forward he considered being an instructor as his "vocation"; he simply could not perform the work of a pipefitter, even though he liked that work and would have liked to have been able to continue doing it. In his capacity as an instructor, which was classified as an administrative position, Rayman trained Progressive employees, developed training manuals, and did some machinery maintenance. Progressive hired an assistant to help Rayman demonstrate pipefitting techniques he could not perform because of his injury. Progressive eventually added five to six additional employees as instructors in this same department. Each of these instructors had an area of technical expertise, such as robotics and computer aided design, that Rayman did not have.

While working as an instructor, there was discord between Rayman and the director of the corporate training department, Shannon Destrampe. According to Rayman, Destrampe delayed his performance reviews, which in turn delayed his raises, to harass him. Though

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[4] Evidently, this was the physician Progressive required Rayman to see for his worker's compensation benefits, not Rayman's personal physician, who had already determined he could not work as a pipefitter.

Rayman received some good performance reviews and did receive raises, at least one memorandum Destrampe issued to Rayman in February 1996, reveals that Destrampe thought that Rayman had a poor attitude, needed to develop more leadership skills, and needed to improve his communication skills.

Progressive began cutting costs in 1997, which included an effort to reduce administrative positions by taking advantage of employee retirements and imposing a hiring freeze, but also resorted to layoffs, terminations, and employee transfers to direct labor positions. Destrampe evaluated his department and determined that there was no longer a need for instructors in three different areas, one of which was pipefitting, because Progressive employees had already been trained, processes had been simplified, or Progressive had already achieved greater efficiency. Rayman taught his last class in January 1998 and spent the next five months working on training manuals. Of the two other instructors who lost their positions, one transferred back to the shop floor and the other transferred to Progressive's communications department.

In summer 1998, Progressive assigned Rayman to the manufacturing computer aided design department on a temporary basis. There, Rayman did not perform computer aided design work. Rather, he helped supervisor Al Busch develop training manuals and projects. His permanent assignment remained in the corporate training department. One critical difference between this temporary assignment and Rayman's position in the corporate training department was that Progressive considered manufacturing computer aided design employees to be manufacturing employees, not administrative employees. This was significant because all manufacturing computer aided design employees were expected to be able to perform manufacturing work and Rayman could no longer work as a pipefitter, his previous manufacturing job.

While Rayman was working temporarily in the manufacturing computer aided design department, Destrampe had to reduce his staff further. Though other instructors remained in the corporate training department, Progressive still needed their skills, while Rayman had been finished with his pipefitter instruction duties for many months. Destrampe did not know of another Progressive job that Rayman could have. Destrampe informed him that he was being laid off, though not terminated, on October 8, 1998, because Progressive was being consolidated. Rayman, upset at this layoff, confronted Begle at work the next day, but was not allowed to return to work.

II. Procedural History

Rayman filed suit against Progressive and Begle on April 14, 1999. He alleged that Progressive had discriminated against him on the basis of his disability by transferring him to the security guard position for lower pay. Rayman claimed that Progressive had hired two new employees for the corporate training department in fall 1998 who survived the layoffs and were neither disabled nor had filed any worker's compensation claims, and had subsequently hired more employees for this department. Rayman asserted that he fit the definition of a "handicapper" under the HCRA or, alternatively, Begle perceived him to be a "handicapper."[5]

[5] The PWDCRA now used the word disabled. See MCL 37.1103(d).

"Despite being a handicapper," Rayman maintained, he "was able to perform the duties of his job in the manufacturing computer aided design department without limitation of any kind." Further, not only were Progressive and Begle predisposed to discriminate against the disabled, Begle acted on that animus either by deciding to "terminate" Rayman or by being instrumental in the decision. With respect to his WDCA retaliation claim, Rayman alleged that Progressive and its employees were hostile to him when he started filing claims and that they chose to "terminate" him because he had filed these claims.

Progressive moved for summary disposition pursuant to MCR 2.116(C)(10). In relevant part, Progressive argued that Rayman did not meet the statutory definition of someone with a disability because he could not perform the essential functions of an manufacturing computer aided design employee, which involved manufacturing work. Even if he could perform these tasks, Progressive asserted that it had no legal obligation to transfer him to a position in the manufacturing computer aided design department. Noting that it laid off Rayman, but did not fire him, Progressive also argued that there was no causal connection between its decision to layoff Rayman and his claims for worker's compensation.

At the close of the hearing on the motion for summary disposition, the trial court announced its ruling, which is later incorporated in a written order. The trial court concluded that Rayman did not meet the definition of a person with a disability "for the purpose for which he was hired and the job in which he was terminated from." In other words, the trial court concluded that though Rayman had a physical disability, it was related to his ability to perform his job and, therefore, he did not meet the statutory definition. The trial court also determined that there was no evidence of a causal connection between Rayman's claims for worker's compensation and his layoff. As the trial court noted, Rayman made his first claim for benefits ten years before the layoff and his last claim for benefits five years before the layoff. Additionally, the trial court remarked, "Although [Rayman] produced evidence of friction with Defendant Begle, he fails to consider that since that time he has received promotions and alternative placements within Defendant company."

Following the order granting summary disposition, Rayman moved for reconsideration and asked the trial court to allow him to amend his complaint to allege that Progressive and Begle violated his rights under the HCRA by failing to accommodate him. The trial court denied the motion as a whole, concluding that amending the complaint would be futile.

III. Arguments On Appeal

Rayman now argues that he was disabled within the meaning of the PWDCRA because his job as a pipefitter was not relevant to determining whether he was able to perform the duties of an instructor in the manufacturing computer aided design department, especially when there was no question concerning his ability to be an instructor. He also claims that there was sufficient evidence to raise a question concerning whether there was a causal connection between his discharge and worker's compensation claims. Finally, he contends that the trial court erred in denying his motion to amend his complaint.

IV. Summary Disposition

A. Standard Of Review

We review de novo orders granting or denying summary disposition.[6]

B. MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[7] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[8] Only if there is no factual dispute, making the moving party entitled to judgment as a matter of law, would summary disposition be appropriate.[9] However, in order to conclude that there is no genuine issue of material fact in dispute, the deciding court may not weigh the evidence or make factual findings.[10]

C. PWDCRA

The PWDCRA guarantees individuals the "opportunity to obtain employment . . . without discrimination because of a disability . . . ."[11] In order to give life to this guarantee, the PWDCRA[12] prohibits an employer from "[d]ischarg[ing] or otherwise discriminat[ing] against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability . . . that is unrelated to the individual's ability to perform the duties of a particular job or position." Thus, the critical threshold issue for Rayman's claims is whether he is a "person with a disability" within the meaning of the PWDCRA.[13]

The Legislature did not leave the definition of a "person with a disability" to the courts to decide. Rather, the Legislature went to great lengths to give a specific meaning to the terms and phrases used in the PWDCRA. According to MCL 37.1103(h), a "'[p]erson with a disability' or 'person with disabilities' means an individual who has 1 or more disabilities." In turn, MCL 37.1103(d) defines a "disability" in the employment-related provisions of the PWDCRA as:

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[6] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[7] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[8] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[9] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[10] See *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

[11] MCL 37.1102(1).

[12] MCL 37.1202(1)(b).

[13] See *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
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> (A) For purposes of article 2,[14] substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> (ii) A history of a determinable physical or mental characteristic described in subparagraph (i).

If it were not already clear from these statutory provisions, case law explains that a disability within the meaning of the PWDCRA cannot be related to a plaintiff's ability to perform the specified duties of a job.[15]

No one challenges the severity of Rayman's arm injury. What is in question is whether this injury was related to his ability to do his job.[16] However, the parties do not agree what that job was. Rayman says that he was an instructor in the manufacturing computer aided design department and that he had no problem being an instructor there. Progressive and Begle claim that he was actually a member of the corporate training department and that he could not be transferred to the manufacturing computer aided design department because he could not perform the necessary manufacturing work. Having reviewed all the documentary evidence in the record, we agree with Progressive.

Though Rayman was working with Busch, who supervised the manufacturing computer aided design department, there simply is no evidence that he had been transferred to the manufacturing computer aided design department before he was laid off. According to Rayman's deposition testimony, while he was working in the manufacturing computer aided design department, Progressive still listed him as having his administrative instructor position with the corporate training department. Begle said in his affidavits that, though Rayman provided "labor support" for the manufacturing computer aided design department, he was never transferred to that department. Destrampe stated in his affidavit that Rayman was assigned to assist Busch temporarily, but he "remained a member of the Corporate Training Department."

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[14] MCL 37.1201 *et seq*., which is the PWDCRA article concerning disability discrimination in employment.

[15] See *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 326; 535 NW2d 272 (1995).

[16] In the complaint, Rayman alleged that Progressive and Begle perceived him to be disabled within the meaning of the PWDCRA. See MCL 37.1103(d)(ii). However, he does not assert this theory on appeal.

Further, unlike other members of the manufacturing computer aided design department, including other pipefitters, Rayman did not charge his time to a particular manufacturing project.

Even assuming that Rayman was actually a manufacturing computer aided design employee, he has provided no evidence that would create a question of fact concerning whether his injury was unrelated to the work the jobs there required. For instance, he provided no job descriptions from the manufacturing computer aided design department listing required skills, much less required skills that excluded manufacturing responsibilities. In contrast, the deposition testimony consistently established that manufacturing computer aided design employees were part of Progressive's manufacturing division and had manufacturing responsibilities. Rayman even said that he knew that manufacturing computer aided design department employees would be reassigned to manufacturing jobs and that he could not be transferred to such a job because of his injury. He knew of no manufacturing computer aided design department employees, other than Busch, who were excused from manufacturing responsibilities. Begle also said that Rayman was never transferred to that department "because there were no available positions and [Rayman] could not perform the necessary direct labor tasks with his medical restrictions." If Rayman had some other manufacturing skills that would satisfy the manufacturing computer aided design department requirement without implicating his injury, he did not indicate what they were or provide evidence of those skills. He simply claimed to be an instructor. While Rayman may have been a gifted instructor and valuable aide to Busch, the record is settled that Rayman's injury prevented him from doing the manufacturing work required in the manufacturing computer aided design department. Thus, he did not fit the definition of a person with a disability under MCL 37.1103(d)(ii) even if he was a member of that department.

D. WDCA Retaliation

The WDCA prevents retaliation against workers who file claims for worker's compensation benefits by providing:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.[17]

"The burden is on plaintiff to show that there was a causal connection between the protected activity, i.e., the filing of his worker's compensation claim, and the adverse employment action."[18] Rayman contends that the evidence in the record that Begle knew that he had a history of worker's compensation claims and Robert Eddy's deposition testimony established that Begle wanted to get rid of employees who filed worker's compensation claims, which was sufficient

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[17] MCL 418.301(11).

[18] *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999).

evidence of causation under *Lamoria v Health Care & Retirement Corp*[19] to survive summary disposition. Rayman does not rely on evidence that Progressive transferred him to a security guard position to support this retaliation claim on appeal.

In *Lamoria*, plaintiff Barbara Lamoria was a nurse at a facility the defendant owned.[20] While performing her duties at work in August 1993, Lamoria injured her knee.[21] This injury aggravated her degenerative arthritis.[22] Lamoria went on medical leave with permission in January 1994 so she could undergo arthroscopic surgery.[23] When this did not improve her condition, her physician determined that she needed a total knee replacement,[24] which then kept Lamoria on medical leave through the end of the next summer.[25] She went to her workplace every month between February and August 1994 to prepare the paper work necessary for this medical leave, receiving approval each time without any limitation on the amount of leave time she could take.[26] Meanwhile, Lamoria's physician, attempting to schedule her knee replacement surgery, contacted the defendant to arrange for authorization for payment for this surgery under the defendant's insurance policy for work-related injuries.[27] The defendant never clarified whether it would pay for the surgery.[28] Lamoria's inquiries to the defendant and its insurer made no difference either.[29] At the end of June 1994, Lamoria finally learned from the defendant's insurer that it was denying her claim for worker's compensation benefits to cover the cost of her surgery.[30] According to the insurer's representative handling her case, the defendant was "pressuring" the representative "to deny the claim, that 'he had "no alternative" but to stop compensation payments because [the defendant] had told him to do it' and that '[the defendant] was "self funded" for worker's compensation insurance, thus [the defendant] could tell him to stop payments . . . .'"[31] This dovetailed with an observation by a social worker who worked with Lamoria at the defendant's facility that the facility administrator knew that Lamoria required

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[19] *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801; 584 NW2d 589 (1998), adopted 233 Mich App 560, 562 (1999).

[20] *Id*. at 802.

[21] *Id*.

[22] *Id*. at 804.

[23] *Id*. at 802, 804.

[24] *Id*. at 804.

[25] *Id*. at 802.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 805.

[31] *Id*.

surgery and rehabilitation, but did not want the defendant to pay for it.[32] Only in October 1994 did the defendant send Lamoria notice that it had terminated her the previous July.[33]

Lamoria sued the defendant under a number of theories, including retaliation contrary to the WDCA.[34] The trial court noted that Lamoria had no claims or suits for worker's compensation pending at the time the defendant terminated her employment, the defendant had paid her previous claims, and there was a dispute regarding whether her work injury required the knee replacement surgery.[35] In the trial court's view, the only reason why the defendant might want to terminate Lamoria was because of future claims.[36] Thus, the trial court concluded that a line of cases preventing actions for discharge in anticipation of future worker's compensation cases barred Lamoria's retaliation claim.[37] This Court, however, disagreed. Examining the evidence of causation in these alleged facts, this Court concluded that

> the discharge of an employee who is receiving worker's compensation benefits due to a particular on-the-job injury, if it is in retaliation for that employee having sought, in good faith, additional benefits based on the injury, constitutes a retaliatory discharge in violation of the WDCA. In such a circumstance, the fact that a person actually filed an initial worker's compensation claim under which the person began receiving benefits would be a direct causal factor in the decision to discharge the employee.[38]

Thus, this Court distinguished Lamoria's suit from cases in which the discharged employee has never filed a worker's compensation claim, implying that the employer could only anticipate that there might be a future claim at the time of discharge, which is not actionable.[39]

Rayman contends that this Court found three factors critical in *Lamoria*: (1) the defendants knew Lamoria would have future worker's compensation claims, specifically her surgery and rehabilitation costs; (2) the defendants opposed paying these costs; and (3) the defendants had control over whether to pay these claims. While these last two factors may be true, and may have contributed to the decision in *Lamoria*, we see a more complex set of factors at work: Lamoria's attempts to secure worker's compensation at the time the defendant terminated her, coupled with the comments from the defendant's insurer's representative concerning pressure to deny the claim.

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[32] *Id*. at 519.

[33] *Id*. at 802.

[34] *Id*. at 801.

[35] *Id*. at 818.

[36] *Id.*

[37] *Id.*

[38] *Id*. at 819.

[39] *Id*.

In this case, Rayman had applied for and received worker's compensation benefits as many as ten years before Progressive laid him off, his last worker's compensation claim was a number of years before this separation, and he had no worker's compensation claims pending at the time. The time gap between the worker's compensation claim and the decision to terminate Lamoria did not approach the time gap in this case. Additionally, Rayman evidently was not working in a capacity that put him at risk of reinjuring his right arm, making any possibility of future claims completely unrelated to his longstanding history of claims, and therefore completely speculative. Speculation cannot defeat a motion under MCR 2.116(C)(10).[40] We also agree with Progressive and Begle, who note that Eddy only said that he suspected that Begle wanted to get rid of employees who filed claims for benefits, not that he actually knew that was Begle's motivation laying off Rayman. This was a far cry from the virtual "smoking gun" evidence in *Lamoria* that the defendant was actually pressuring its insurer to deny the claim, which is exactly what Lamoria's facility administrator wanted to do. Even when viewing the materials in the record in the light most favorable to Rayman, we can find no evidence linking Rayman's worker's compensation claims with his layoff, much less a question of fact concerning that issue. Therefore, summary disposition of this claim was proper.

V. Amending The Complaint

A. Standard Of Review

Rayman argues that the trial court erred in denying his motion to amend his complaint to add a claim that Progressive and Begle violated the PWDCRA when it failed to accommodate his disability by completing the paper work necessary to make him a formal member of the manufacturing computer aided design department. We review a trial court's decision to deny a motion to amend a complaint to determine whether the trial court abused its discretion.[41]

B. Futility

When a party moves for summary disposition pursuant to MCR 2.116(C)(10), as Progressive and Begle did, MCR 2.116(I)(5) provides that "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." In turn, MCR 2.118 similarly states that, other than with respect to a situation not at issue here, "[l]eave [to amend a pleading] shall be freely given when justice so requires." Nevertheless, a trial court may deny a motion to amend a complaint when it would be futile to amend the complaint.[42]

We agree with the trial court that amendment was futile in this case. There is no support in the record for Rayman's contention that his transfer to the manufacturing computer aided design department was a mere formality. As a corporate training department employee, Rayman had no right to be transferred to the manufacturing computer aided design department to

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[40] See *Moody v Chevron Chemical Co*, 201 Mich App 232, 238; 505 NW2d 900 (1993).

[41] See *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

[42] See *id*. at 658.

accommodate his physical injury.[43] Even assuming that Rayman had a right to be transferred to the manufacturing computer aided design department, the PWDCRA did not require Progressive and Begle to alter the essential requirement that he be able to perform manufacturing work to accommodate Rayman's injury.[44]

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

[43] See *Rourk v Oakwood Hosp*, 458 Mich 25, 27; 580 NW2d 397 (1997).

[44] See *March v Dep't of Civil Service*, 173 Mich App 72, 80; 433 NW2d 820 (1989).