STATE OF MICHIGAN

COURT OF APPEALS

LARRY J. OLSEN and MARY E. OLSEN,

Plaintiffs-Appellees/Cross-Appellants,

v

TOYOTA TECHNICAL CENTER USA, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
December 27, 2002

No. 229543
Wayne Circuit Court
LC No. 96-645266-NO

Before: Whitbeck, C.J., and Fitzgerald and Markey, JJ.

WHITBECK, C.J. (*dissenting*).

I respectfully dissent. Toyota raises numerous issues in its brief, but the issue challenging the evidence in support of Larry Olsen's prima facie case is, in my view, dispositive of this appeal.

I agree that Olsen's back injury was a disability within the meaning of the Persons With Disabilities Civil Rights Act (PWDCRA).[1] However, I cannot agree that there was sufficient evidence that Olsen's back condition impaired a major life activity[2] to support the trial court's decision to deny the defense motion for a directed verdict. Olsen has never been particularly clear about what major life activity his back injury affected during his employment with Toyota. According to his appellate brief, Olsen "was substantially limited in his ability to lift and move about, not only in the course of his employment but throughout his life activities, at the time Defendant hired him as a senior maintenance technician." This roughly matches his attorney's arguments countering the motion for a directed verdict, which focused more on Olsen's ability to do his work at Toyota. At oral arguments, Olsen's attorney stated that Olsen's back injury had substantially impaired his major life activities of repetitive bending, lifting, and pushing.

Contrary to the majority's conclusion, the fact that Olsen received a vocationally handicapped worker's certificate does not at all prove that his back condition impaired one of his

---

[1] MCL 37.1103(d).

[2] *Chiles v Machine Shop, Inc*, 238 Mich App 462, 474; 606 NW2d 398 (1999), quoting *Bragdon v Abbott*, 524 US 624, 631; 118 S Ct 2196; 141 L Ed 2d 540 (1998).

major life activities. Pursuant to MCL 418.901(a), the state furnishes vocationally handicapped worker's certificates to individuals with a specified impairment that "is a substantial obstacle to employment, considering such factors as the person's age, education, training, experience, and employment rejection." This certification may have been relevant support for Olsen's obligation to prove that he had a physical impairment at some time in the past. However, there is no obvious connection between an impairment that qualifies for this certificate and proof of a substantial impairment of a major life activity under the PWDCRA. The vocationally disabled persons chapter of the worker's compensation act[3] is concerned only with encouraging *employment* by limiting employer liability if a previously injured employee sustains another injury.[4] Clearly, this provision in the worker's compensation act does not attempt to define a disability in the context of any sort of workplace discrimination. Nor does the relevant portion of the worker's compensation act[5] use statutory language tracking the major life activity language in the PWDCRA,[6] which might suggest that the Legislature intended to use the same disability concepts in both statutory schemes.

More importantly, MCL 418.901(a) assumes that the individual who obtains a vocationally handicapped worker's certificate is able to work, but would not be hired because of the financial risk of future expenses that would arise in the event that the individual sustained an additional injury. "Work" is a major life activity.[7] However, Olsen never claimed that his back injury prevented him from holding any sort of job during the period Toyota employed him; indeed, that argument would have been nonsensical because he *was* working at Toyota. To the extent that Olsen argues that his back injury impaired his ability to lift, bend, push and move generally while performing his work responsibilities at Toyota, he falls outside the statutory definition of a disabled person because he has failed to provide evidence of how those particular impairments affected his ability to work at all. As this Court has explained, "[a]n impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working."[8]

The record also indicates that, before Olsen's spinal fusion surgery in August 1995, his medical leaves of absence related to his back were intermittent and temporary, which means that he was not disabled under the PWDCRA during those interludes because the PWDCRA addresses only permanent disabilities.[9] Critically, he does not claim that he was the subject of discrimination following this surgery, when it was clear that he could not longer perform the essential functions of his job, even though the definitions of those essential functions were debatable. That Olsen suffered because of his back during his employment with Toyota is

---

[3] See MCL 418.901 *et. seq*.

[4] See MCL 418.921.

[5] See MCL 418.901 *et. seq*.

[6] See MCL 37.1103(d)(i)(A).

[7] See *Lown v JJ Eaton Place*, 235 Mich App 721, 728; 598 NW2d 633 (1999).

[8] *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996).

[9] *Lown, supra* at 733.

virtually beyond debate. However, this actually negates his claim that he fit the statutory definition of a person with a disability because he continued to work, despite pain and physical limitations. Thus, in short, this record makes it impossible to say that his back injury substantially impaired a major life activity during his employment with Toyota.

Olsen also argues that his back injury essentially impaired all other aspects of his life. Olsen provided ample evidence regarding the substantial limitations he faced on a daily basis at the time of trial. However, the pertinent period in question is the date Toyota hired Olsen until he stopped working for Toyota, which was *before* the spinal fusion surgery and trial. Olsen completely fails to articulate what major life activities his back condition impaired in that period. The record leaves only the vague impression that, some time before the spinal fusion surgery in August 1995, Olsen led an active life, which declined at an unidentified time, but most precipitously after that surgery. For instance, Olsen has never claimed to have been unable to feed, dress, or care for himself during this relevant time frame. How long he was able to hunt, fish, attend amusement parks, and provide the companionship and support to his wife as he was accustomed to doing simply cannot be determined from the record.

To be clear, I do not mean to suggest that Olsen's claim lacked merit. Rather, he failed to provide the necessary proof that his back condition substantially impaired one or more of his major life activities at a time when he could have been subject to discrimination at Toyota. From a practical standpoint, it is possible to infer that it was increasingly difficult for Olsen to perform the tasks assigned to him at Toyota, and that lifting and moving might be major life activities. Yet, Olsen failed to identify (a) the specific lifting and moving activities that he performed, whether at work or elsewhere, (b) during the period while he was employed at Toyota, (c) which were unrelated to the essential functions of his job, and (d) which were subject to substantial limitation because of his back injury. Consequently, I believe that the trial court erred in denying the motion for directed verdict. Because Mary Olsen's claim is derivative of Olsen's argument that he suffered unlawful discrimination, I think that the trial court should have directed a verdict for her claim as well. Undeniably, this is a harsh result. However, after having reviewed the record thoroughly, I believe it is the proper result under the law. I therefore am compelled to dissent.

/s/ William C. Whitbeck