STATE OF MICHIGAN

COURT OF APPEALS

GEORGE R. PARKER,

Plaintiff-Appellant,

v

DAIMLERCHRYSLER CORPORATION, f/k/a CHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 18, 2004

No. 245066
Oakland Circuit Court
LC No. 2001-031492-NZ

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition in this action under the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. We affirm.

Plaintiff argues that the trial court erred in determining that he was not disabled within the meaning of the PWDCRA. He further argues that the trial court erred in finding that he failed to establish an accommodation violation under MCL 37.1102(2), and in concluding that he could not prevail on his claims for discrimination, retaliation, and harassment under the PWDCRA. We disagree.

This Court reviews de novo a trial court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing an order of summary disposition under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

The PWDCRA prohibits an employer from discharging or otherwise discriminating against an employee because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position. MCL 37.1202(1)(b). To establish a prima facie case of disability discrimination, "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." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). Additionally, the plaintiff must produce enough evidence to create a rebuttable presumption of discrimination. *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998). If the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a nondiscriminatory rationale for the action. *Id*. If the employer meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the legitimate reason that the defendant offered was a mere pretext. *Id*.

Before a court can address a plaintiff's ability to perform his job, any alleged discrimination, and any pretext for the alleged discrimination, the plaintiff must establish that he is the type of person to which the statute was meant to pertain, i.e., a person with a "disability." *Chiles, supra* at 473. The PWDCRA defines "disability," in pertinent part, as follows:

> (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:
>
> (A) . . . 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. [MCL 37.1103(d).]

The term also includes a history of such a condition. MCL 37.1103(d)(ii).

In *Chiles, supra*, this Court explained:

> [N]ot every impairment rises to the level of a disability under the PWDCRA. The impairment must meet the requirements of the statutory definition of "disability." And the mere assertion of diminished capacity does not constitute a disability within the meaning of the [act]. Instead, a plaintiff must provide some evidence beyond the mere existence and impact of a physical impairment. [*Id.* at 474 (citations and internal quotations omitted).]

We conclude that the trial court properly dismissed plaintiff's claims for disability discrimination, failure to accommodate, and harassment under the PWDCRA, because plaintiff failed to establish a genuine issue of material fact with regard to the existence of a disability within the meaning of the act, a threshold requirement for each of these claims. MCL 37.1202(1)(b); MCL 37.1102(2)[1]; *Chiles, supra* at 473; *Downey v Charlevoix Co Bd of Co Rd*

---

[1] MCL 37.1102(2) provides:

(continued…)

Comm'rs, 227 Mich App 621, 627-629; 576 NW2d 712 (1998). Although plaintiff presented evidence that he suffered from back ailments and respiratory problems, the evidence failed to show that the ailments substantially limited a major life activity, such as his ability to care for himself, perform manual tasks, walk, see, hear, speak, breath or learn. *Chiles*, *supra* at 477. Plaintiff admitted that he is able to get in and out of bed on his own, dress himself, tie his shoes, groom himself, prepare his food, and sit down and stand up independently. Additionally, he can walk up and down stairs, and is able to drive, shop for groceries, and take out his trash. He also regularly goes to the gym, working out with weight machines and an elliptical machine. Nor was there evidence that plaintiff was substantially limited in the major life activity of working. *Id*. Despite his various ailments, the evidence did not show that he was significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. *Lown v JJ Eaton Place*, 235 Mich App 721, 735; 598 NW2d 633 (1999).

The trial court properly granted summary disposition on plaintiff's claims for disability discrimination, failure to accommodate, and harassment under the PWDCRA.

We also conclude that the trial court properly dismissed plaintiff's retaliation claim. The PWDCRA prohibits an employer from retaliating against an employee who has either opposed a violation of the act or asserted his rights under the act. MCL 37.1602(a).[2] To establish a prima facie case of unlawful retaliation under the PWDCRA, a plaintiff must demonstrate "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an . . . action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse . . . action." *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 435; 653 NW2d 415 (2002), quoting *Mitan v Neiman Marcus*, 240 Mich App 679, 681; 613 NW2d 415 (2000).

In *Bachman*, *supra*, the Court explained:

> [T]he first step in proving retaliation is demonstrating one of two circumstances. First, the plaintiff must demonstrate that he opposed a violation of

---

(…continued)

> Except as otherwise provided in Article 2 [MCL 37.1201 *et seq.*], a person shall accommodate *a person with a disability* for purposes of employment . . . unless the person demonstrates that the accommodation would impose an undue hardship. [Emphasis supplied.]

[2] MCL 37.1602 provides:

> A person or 2 or more persons shall not do the following:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

> the PWDCRA. Alternatively, the plaintiff must (1) make a charge, (2) file a complaint, or (3) testify, assist, or participate in an investigation, proceeding, or hearing under the PWDCRA. Thus, if a person satisfies the requirements under either of these two prongs of MCL 37.1602(a), then the person is said to be engaging in "protected activity." [*Id.* at 435 (citation omitted).]

Further, when a plaintiff engages in the protected activity by opposing a violation of the PWDCRA, then the plaintiff must inform and give notice to the employer so that the employer has knowledge that the plaintiff is objecting to an alleged violation of the PWDCRA. *Id.* The burden shifting framework discussed above applies to retaliation claims as well. Cf. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000).

To the extent that plaintiff's evidence showed that he opposed an alleged violation of the PWDCRA and, therefore, was engaged in protected activity, defendant submitted evidence of a legitimate, nondiscriminatory reason for plaintiff's discharge (i.e., that plaintiff failed to return to work as directed) and plaintiff failed to present evidence showing that this reason was a mere pretext.

Plaintiff also claims that defendant retaliated against him by tolerating harassment by his co-workers. We disagree. Plaintiff failed to present evidence suggesting that this alleged adverse action was causally related to his protected activity. Further, the submitted evidence showed that defendant did not tolerate harassment. The evidence showed that defendant appropriately responded to plaintiff's complaints of harassment. Following an altercation with Al Carion, defendant instructed Carion to avoid contact with plaintiff and also required Carion to attend a personal relationship management class. When plaintiff reported harassment by Gary O'Toole, he too was instructed to stay away from plaintiff. Plaintiff admitted that he never made any further reports of O'Toole's behavior, other than a kicking incident, which plaintiff conceded was addressed correctly. There was no evidence that plaintiff informed anyone that Bob Richmond was harassing him. The trial court properly granted summary disposition on this claim.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly