STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GEROW,

Plaintiff/Counter-Defendant-Appellant,

v

CITY OF SAGINAW,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
January 24, 2008

No. 269112
LC No. 98-025691-CZ

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant on plaintiff's claims of discrimination and unlawful retaliation under the Persons with Disabilities Civil Rights Act (PWDCRA). MCL 37.1202; MCL 37.1602. Plaintiff also appeals the trial court's grant of summary disposition in favor of defendant on defendant's counterclaim for reimbursement of overages in the pension payments made to plaintiff after his retirement in violation of a local ordinance. We affirm.

In a prior appeal of this action, this Court reversed an earlier grant of summary disposition and remanded the case to the trial court for the completion of discovery. *Gerow v City of Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2001 (No. 223355). After additional discovery was conducted, defendant filed a renewed motion for summary disposition asserting that discovery demonstrated plaintiff was not disabled within the meaning of the PWDCRA and a counterclaim seeking reimbursement of pension payments based on plaintiff's earnings exceeding the amounts permitted by the local pension ordinance. In response, plaintiff filed an amended complaint contending that defendant's enforcement of the pension ordinance was in retaliation for plaintiff's PWDCRA claim and that the doctrines of laches and equitable estoppel barred defendant from enforcement of the ordinance.

Although this Court summarized the facts underlying plaintiff's complaint in the first appeal of this case, a brief recitation of the history may prove useful. Plaintiff began working in 1974 as a firefighter for defendant. There were no complaints regarding plaintiff's job performance and he was promoted on two occasions before his retirement on November 5, 1996. In 1994, plaintiff was diagnosed with diabetes by his family physician, Charles Koenig, M.D. When oral medication did not sufficiently control his condition, plaintiff was prescribed and

began using insulin injections. Plaintiff asserted that he did not experience diabetic symptoms while at work and would inject insulin just before and after his shift. Plaintiff did not immediately reveal his diagnosis to his employer.

When plaintiff's diagnosis was discovered, he was placed on light duty pending the completion of a medical examination by defendant's physician. Plaintiff contends defendant told him he must apply for a pension or face the alternative of being fired for not revealing his medical condition and prescribed use of insulin. Defendant denied having threatened plaintiff with loss of employment, however plaintiff did apply for a non-duty disability pension on October 15, 1996. Shortly thereafter, defendant's physician, Edgar P. Balcueva, MD, examined plaintiff and concluded that plaintiff was at risk for developing hypoglycemia and disabled plaintiff. Plaintiff's pension application was approved and he began receiving benefits in December 1996.

Based on allegations contained in plaintiff's original complaint, he was reexamined for his pension status in April 1999 by Jamal Hammoud, M.D., a board-certified physician in endocrinology and internal medicine. Dr. Hammoud reaffirmed that plaintiff was disabled from working as a firefighter, despite plaintiff's assertion that he was not experiencing diabetic symptoms. Approximately three years after initiation of his pension benefits, plaintiff's original treating physician, Koenig, authored a letter and opined that plaintiff was capable of performing his firefighter duties despite his medical condition. In July 2002, Dr. George Grunberger, MD, a records review physician, concurred regarding plaintiff's ability to perform his firefighter duties.

Following remand by this Court, defendant learned that plaintiff's earnings exceeded permissible limits. Based on a local ordinance, defendant asserted a counterclaim to obtain reimbursement for the overpayment of pension benefits. During his retirement, plaintiff worked and earned income as a plumber. Defendant asserted that the ordinance permitted plaintiff to earn the difference between his pension benefit and the income he would have received as a firefighter but that additional earnings required an offset against his pension. In this instance, defendant asserted it was entitled to reimbursement in the amount of $142,110.72 in the compensation paid to plaintiff from 2000 to 2003. Defendant contends plaintiff failed to inform it of the substantial earnings being received. In response, plaintiff argued defendant never enforced the subject ordinance and that an implicit understanding existed that defendant would routinely turn a blind eye to retirees' subsequent income or earnings and had never established a procedure for retirees to report additional income. Plaintiff contended that defendant's claim for reimbursement was merely a means of retaliation for plaintiff's filing of the PWDCRA claim.

We review de novo a trial court's grant of summary disposition. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). Based on review of the lower court record, we find that plaintiff has failed to demonstrate that he is within the scope of protection afforded by the PWDCRA.

The PWDCRA protects individuals who have substantial limitations of one or more major life activities, or who are regarded as having such limitations. Specifically, MCL 37.1103[1] provided, in relevant part:

> (d) Except as provided under subdivision (f), "disability means 1 or more of the following:
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> (*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) [S]ubstantially 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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> * * *
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> (*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*).

Further, MCL 37.1202(1)(b) specifically precludes an employer from "discharg[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."

The PWDCRA only prohibits discrimination based on the existence of disabilities that substantially limit a major life activity, but that do not prevent the disabled person from performing his or her job duties. *Peden v Detroit,* 470 Mich 195, 204; 680 NW2d 857 (2004). Not every physical impairment rises to the statutory definition of a disability. *Chiles v Machine Shop, Inc,* 238 Mich App 462, 474; 606 NW2d (1999). To ascertain if a plaintiff has a disability as defined by the PWDCRA, this Court applies a three-part test:

> (1) Does plaintiff's condition constitute a mental or physical impairment,
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> (2) Does plaintiff identify a major life activity that is affected or impacted by the impairment, and
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> (3) Does the impairment substantially limit or curtail a majority life activity when compared to an average person. [*Id.* at 474-475, 476-479.]

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[1] Language of the cited statutory provisions is consistent with 1998 PA 20, which was in effect at the time of the filing of plaintiff's complaint.

The problem that arises stems from plaintiff's own actions that demonstrate that his diabetic condition did not limit any major life activity. Absent such a limitation, plaintiff does not come within the umbrella of protection afforded by the PWDCRA. See MCL 37.1103(d)(*i*)(A); see also *Michalski v Bar-Levav*, 463 Mich 723, 734-735; 625 NW2d 754 (2001).

"An 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." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996). Plaintiff amply demonstrated his ability to engage in gainful employment. He was merely precluded, based on concerns stemming from the possible risks to plaintiff and others, from working as a firefighter. Notably, a "disability" that presents or poses a "direct threat to the health and safety of other individuals in the workplace," which cannot be eliminated through the provision of reasonable accommodations, is not protected under the statute. *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 571-573; 579 NW2d 435 (1998). As a result, an employer is not required to retain an individual that it considers "a direct threat to workplace safety." *Id.* at 570-571. Even if plaintiff was capable of performing the duties of a firefighter in spite of his diabetic condition, plaintiff was not disabled in accordance with the meaning of the statute because he did not meet the criteria of having a condition that "substantially limits 1 or more of the major life activities of that individual."

Plaintiff cites to *Bragdon v Abbott*, 524 US 624; 118 S Ct 2196; 141 L Ed 2d 540 (1998) in support of his contention that his failure or inability to "manufacture and process insulin" qualified as a substantially impaired major life activity. *Bragdon* dealt with the issue of reproduction as a major life activity for an individual with the human immunodeficiency virus (HIV) under the Americans with Disabilities Act (ADA).[2] Although plaintiff fails to specifically cite the language he seeks to apply, we assume that he is relying on the Court's statement that "Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major.'" *Id.* at 625. We find plaintiff's interpretation of this language to be overly broad and encompassing. Plaintiff ignores the Court's further definitional explanation of the term "major life activity" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* at 638-639. This language coincides exactly with this Court's definition of "major life activities." *Chiles, supra* at 477 (citation omitted). It is evident that the Court, in using this language, was referring to behaviors, functions or activities that are engaged in by an individual rather than a strictly biological component that defines the actual medical condition. This is consistent with our statutory delineation in MCL 37.1003(d)(*i*) and (d)(*i*)(A) between the existence of a physical condition and its impact on life functioning.

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[2] We would note that plaintiff relies heavily on federal citations, which are distinguishable as many of the cases cited by plaintiff interpret federal law and not the PWDCRA. "Although lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

Plaintiff contends that defendant's counterclaim seeking reimbursement of pension payment overages violates MCL 37.1602(a), which prohibits persons from:

> Retaliat[ing] or discriminat[ing] 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.

To withstand summary disposition on his claim of unlawful retaliation, it was incumbent on plaintiff to demonstrate a causal connection between the protected activity of filing a claim and defendant's decision to seek reimbursement of the pension overage payment. See *Aho v Dep't of Corrections,* 263 Mich App 281, 288-289; 688 NW2d 104 (2004).

Plaintiff argued that he was the first retiree from whom defendant's pension board sought reimbursement and that the pension board treated him more harshly than other retirees with pension overages. However, plaintiff did not come forward with evidence in support of this claim. Contrary to plaintiff's contentions, a pension board member and the board secretary testified that the board was unable to pursue pension overage information before 2002 because it lacked sufficient staffing to conduct investigations. Another board member testified that he began reviewing and examining the pension overage ordinance in 2001 before obtaining knowledge or information regarding either plaintiff's or any other retiree's status. In addition, plaintiff failed to offer evidence of any similarly situated retiree having a pension overage comparable to that of plaintiff. As a result, plaintiff has failed to prove retaliatory conduct or disparate treatment by defendant in seeking reimbursement.

Finally, plaintiff argues the trial court should have precluded defendant from enforcing the pension ordinance based on laches or equitable estoppel. Citing *Royal Oak Twp v School Dist No. 7, Royal Oak Twp,* 322 Mich 397; 33 NW2d 908 (1948), plaintiff contends that enforcement of the recoupment ordinance should be barred based on plaintiff's reliance on the historical lack of enforcement. This Court reviews a trial court's equitable decisions de novo. *Yankee Springs Twp v Fox,* 264 Mich App 604, 611; 692 NW2d 728 (2004).

"The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against [plaintiff]." *City of Troy v Papadelis (On Remand),* 226 Mich App 90, 96-97; 572 NW2d 246 (1998). When determining whether the doctrine of laches in applicable, "each case must be determined on its own particular facts." *Id.* at 97. In addition to proving a lack of "due diligence" on the part of defendant, plaintiff must also demonstrate a resultant "prejudice" to plaintiff from the prolonged inaction. *Id.* More specifically:

> [A] lack of due diligence alone is not sufficient. The defense of laches does not apply unless the delay of one party has resulted in prejudice to the other party. 'It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.' [*Id.* at 97 (citations omitted).]

Plaintiff does not deny that he was aware of the existence of the ordinance, only that he assumed or believed that defendant's history of non-enforcement would continue unabated. Imposition of the doctrine of laches "is based on the equitable maxim, 'he who seeks equity must

do equity.'" *White Lake Twp v Lustig*, 10 Mich App 665, 675; 160 NW2d 353 (1968). "It is essentially a long period of inaction in asserting a right, attended by such intermediate change of conditions as to render inequitable the enforcement of that right." *Id.* Based on plaintiff's awareness of the existence of the ordinance any detrimental impact suffered accrued to him through knowing violation of the ordinance and reliance on an assumption regarding defendant's future actions rather than an implicit assurance that enforcement would not occur.

Plaintiff has failed to demonstrate that he changed his position as a result of defendant's lack of enforcement and does not explain what, if anything, he would have done differently had he known the pension board would initiate ordinance enforcement. Plaintiff does not dispute that his earnings exceeded the amount permissible under the ordinance, nor does he claim that the ordinance itself is invalid. The mere absence of any prior enforcement effort, without evidence that plaintiff received an express assurance that the ordinance would not be enforced, is insufficient to estop defendant from seeking reimbursement. See *White Lake Twp v Amos*, 371 Mich 693, 698-699; 124 NW2d 803 (1963).

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly