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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-63

Joseph Leitner,
Appellant,

vs.

Gartner Studios, Inc.,
Respondent.

Filed February 5, 2008
Affirmed
Hudson, Judge

Washington County District Court
File No. C2-05-4635

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Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

U N P U B L I S H E D   O P I N I O N

HUDSON, Judge

On appeal from summary judgment in favor of respondent, appellant argues that (1) genuine issues of material fact exist regarding whether appellant is disabled within the meaning of the Minnesota Human Rights Act, whether he is qualified to perform the

essential functions of the job with or without reasonable accommodation, and whether respondent failed to provide him with a reasonable accommodation; and (2) respondent's reason for firing appellant was pretextual and therefore precluded summary judgment. Because we conclude that appellant was not disabled within the meaning of the Minnesota Human Rights Act, we affirm.

FACTS

Appellant Joseph Leitner was employed as a first-shift production supervisor for respondent Gartner Studios, Inc. In October 2002, appellant informed respondent that he needed to have heart surgery and requested medical leave. Appellant underwent heart surgery on November 5, 2002. Per his doctor's order, appellant returned to work part-time on January 6, 2003, and full-time on January 13, 2003. During the month of January, appellant missed several days of work due to either doctor appointments or illness. At the end of January, respondent instructed appellant not to return to work until he had a note from his doctor stating when he could return to work and whether he had any work restrictions.

On February 7, 2003, appellant's doctor advised him not to work more than 40 hours per week "at least for the time being," and not to lift more than five to ten pounds at a time for one month. These restrictions were faxed to respondent on February 11, 2003. Shortly after receiving the fax, Lynn Schoenbauer, respondent's human resource manager, contacted appellant to inform him that they needed him to work the second-shift production supervisor position, which did not require lifting. Appellant informed Schoenbauer that he did not believe that a second-shift position was adequate under the

Family and Medical Leave Act (FMLA); that he did not have a driver's license and relied on others for transportation, which would be difficult on the second shift; and that the second-shift position would interfere with his medication schedule. Schoenbauer asked appellant to obtain written documentation from his doctor regarding his medication schedule as well as any other restrictions appellant would have working the second shift. Shelly Engle, respondent's operations manager, also spoke with appellant and reiterated what Schoenbauer had told appellant. Appellant asked Engle to evaluate whether there was another position available for him on first shift and explained that he would have difficulty working the second shift because he did not have a driver's license. After evaluating the available positions, Engle determined that there were no vacant positions on the first shift that did not require lifting. Engle informed Schoenbauer that the only position available that met appellant's lifting restriction was on the second shift.

On February 19, 2003, Engle spoke with appellant and again asked him for written documentation from his doctor concerning any restrictions he might have related to working the second shift. The next day, Engle sent appellant a letter memorializing their conversation. Appellant contends that he told Engle he had a doctor's appointment scheduled for early March 2003 to discuss his restrictions; Engle denies being told of any March appointments. In any event, both parties acknowledge that appellant saw his doctor several times in February; yet nothing in the record suggests that appellant attempted to secure written documentation from his doctor concerning his restrictions vis-à-vis the second shift. On March 3, 2003, respondent terminated appellant's employment due to his failure to report to work and, despite several doctor's

appointments during the month of February, his failure to produce any medical documentation evidencing any second shift medical restrictions.

Following an investigation and determination by the Minnesota Department of Human Rights that probable cause existed to believe an unfair discrimination practice was committed, appellant initiated a lawsuit against respondent alleging violations of the Minnesota Human Rights Act (MHRA). In November 2006, the district court granted respondent's summary-judgment motion and dismissed the complaint. The district court found that appellant was allowed to return to work full time as of February 7, 2003, with a one-month lifting restriction of no more than five to ten pounds. The district court concluded that "[a] temporary, one-month lifting restriction [was] not a material limit on a major life activity"—working; therefore, appellant was not disabled within the meaning of the MHRA. The district court went on to find that even if appellant was disabled under the MHRA, he had not established a prima facie case that he is qualified to perform the essential functions of the job with or without a reasonable accommodation. This appeal follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

> [T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of

> the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). We must view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Appellant argues that the district court erred in granting summary judgment in favor of respondent because genuine issues of material fact exist regarding whether appellant is disabled within the meaning of the Minnesota Human Rights Act (MHRA), whether he is qualified to perform the essential functions of the job with or without reasonable accommodation, and whether respondent failed to provide him with a reasonable accommodation. Under the MHRA, it is an unfair employment practice for an employer to discharge or otherwise discriminate against an employee because of the employee's disability. Minn. Stat. § 363A.03, subd. 1(2)(b)-(c) (2006). A plaintiff has the burden of establishing a prima facie case of discrimination. *Hoover v. Nw. Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Discriminatory intent may be proven "by direct evidence or by using circumstantial evidence in accordance with the three-part burden-shifting test set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.E.2d 668 (1973)." *Id.* Under *McDonnell Douglas*, in order to establish a prima facie case of discrimination, appellant must show that (1) he is disabled within the meaning of the MHRA; (2) he is qualified to perform the essential functions of his job with or without reasonable accommodations; and (3) he has suffered an adverse employment action as a result of his

disability. *See Burchett v. Target Corp.*, 340 F.3d 510, 516 (8th Cir. 2003) (setting forth the formula for establishing a prima facie case of disability discrimination).

If a plaintiff establishes a prima facie case of discrimination, the burden then shifts to the defendant to produce evidence that there was a legitimate, non-discriminatory reason for the plaintiff's discharge. *Id.* at 516–17. "If the defendant provides a legitimate, nondiscriminatory reason for its actions, the presumption of discrimination disappears and the plaintiff has the burden of establishing that the employer's proffered reason is a pretext for discrimination." *Hoover*, 632 N.W.2d at 542. Summary judgment in favor of the employer is appropriate when a plaintiff fails to establish a prima facie case of discrimination. *Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995). Because the provisions of the MHRA and Title I of the Americans with Disabilities Act (ADA) are similar, we can look to the ADA for guidance. *See Kolton v. County of Anoka,* 645 N.W.2d 403, 407–08 (Minn. 2002) (applying interpretation of ADA to MHRA).

Appellant first contends that a genuine issue of material fact exists regarding whether he is disabled within the meaning of the MHRA. "A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Minn. Stat. § 363A.03, subd. 12 (2006). The district court only addressed the first prong of the definition, finding that a temporary, one-month lifting restriction was not a material limit on a major life activity and concluded that appellant was not disabled within the meaning of the MHRA.

Under the first prong of the definition, appellant must prove that his heart condition "materially limit[ed]" him in one or more major life activities. There is no dispute that appellant's heart condition is a physical impairment, and that "working is a major life activity." *Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228 (Minn. 1995). Rather, the dispute is whether appellant's heart condition materially limited his ability to work. A major life activity is materially or substantially limited if an individual is

> significantly restricted in 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. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. 1630.2 (j)(3)(i).

There is nothing in the record to support appellant's contention that his heart condition materially limits his ability to work—he was able to work full-time and only had a temporary lifting restriction. While it is true that appellant's heart condition is a physical impairment, a physical impairment alone is insufficient to establish disability without evidence that the impairment materially limits a major life activity. *See Sigurdson*, 532 N.W.2d at 228–29 (holding that while diabetes is a physical impairment, without evidence of a material limitation on a major life activity, diabetes alone was insufficient to qualify appellant as disabled). No genuine issues of material fact exist to show that appellant had a physical impairment that materially limited his ability to work.

To meet the definition of being disabled under the second prong of the definition, appellant must prove that he had a record of an impairment. "To have a record of an impairment, an employee must ha[ve] a history of . . . a mental or physical impairment that substantially limits one or more major life activities." *Heisler v. Metro. Council*, 339 F.3d 622, 630 (8th Cir. 2003) (alteration in original) (quotation omitted). Appellant argues that a genuine issue of material fact exists regarding whether he has a record of an impairment that substantially limits his ability to work due to his history of coronary heart disease pre-dating his employment with respondent, his 1999 heart attack, and the fact that respondent was aware of his heart condition beginning in the fall of 2002. However, appellant produced no evidence that his history of coronary heart disease or his heart attack substantially limited his ability to work. Prior to his heart surgery in November 2002, appellant worked full-time with no restrictions. Further, the simple fact that appellant had heart surgery does not establish that he was disabled. *See id.* (stating simply being hospitalized does not establish a history of an impairment under the ADA). No genuine issues of material fact exist to show that appellant had a record of an impairment that substantially limited his ability to work.

Finally, to meet the definition of being disabled under the third prong, appellant must prove that respondent regarded him as having an impairment that materially limited his ability to work. To meet this prong of the definition, appellant is required to show that respondent believed appellant could not perform a broad range of jobs. *See Pittari v. Am. Eagle Airlines, Inc.*, 468 F.3d 1056, 1061–62 (8th Cir. 2006) (stating in order to establish that job opportunities were substantially or materially limited, at a minimum,

the employee must show he was regarded as unable to work in a broad class of jobs). Here, the written job description for the first-shift production supervisor position states that lifting up to 50 pounds was a requirement of the job. Arguably, respondent regarded appellant as having an impairment that materially limited his ability to work due to the lifting restriction. Accordingly, no genuine issues of material fact exist regarding whether appellant was regarded as having an impairment that substantially limited his ability to work. Even if respondent did regard appellant as having an impairment, the record shows that respondent reasonably accommodated appellant by allowing him to continue in his role as production supervisor on the second shift, which did not require lifting. A reasonable accommodation "may include but is not limited to, nor does it necessarily require: . . . job restructuring, modified work schedules." Minn. Stat. § 363A.08, subd. 6(a) (2006).

We conclude that appellant has failed to meet his burden of establishing that he is disabled within the meaning of the MHRA. Therefore, he has failed to establish a prima facie case of discrimination in violation of the MHRA, and we need not address the remaining prongs of the *McDonnell Douglas* test or whether respondent's reason for terminating appellant's employment was pretextual. Because there are no genuine issues of material fact and there was no error in the application of the law, the district court did not err in granting respondent's summary-judgment motion.

Finally, appellant's reliance on FMLA is misplaced. Appellant did not plead a FMLA action, and the district court's decision is based on the MHRA claim. Because the district court did not consider a FMLA claim, we will not consider it on appeal. *See*

Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (stating this court generally will not consider an issue raised for the first time on appeal).

Affirmed.