

STATE OF MICHIGAN  
COURT OF APPEALS

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ERIE SPENNY,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, DEPARTMENT  
OF MANAGEMENT AND BUDGET,

Defendant-Appellee.

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UNPUBLISHED  
May 21, 1996

No. 176455  
LC No. 93-74804-NO

Before: O’Connell, P.J., and Hood and C.L. Horn, \* JJ.

PER CURIAM.

Plaintiff appeals as of right the order dismissing pursuant to MCR 2.504(B)(2) his Michigan Handicapper Civil Rights claim, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We affirm.

As stated in *Samuel D Begola Services, Inc v Wild Brothers*, 210 Mich App 636, 639; 534 NW2d 217 (1995), “[t]he involuntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff’s evidence that ‘on the facts and the law the plaintiff has shown no right to relief.’ MCR 2.504(B)(2).” A trial court’s decision to dismiss an action pursuant to this subrule will not be overturned on appeal unless it is clearly erroneous, that is, the evidence manifestly preponderates contrary to the court’s decision. *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991).

We find no error in the court’s grant of defendant’s motion for involuntary dismissal. Plaintiff contended that defendant had failed to promote him because of his handicap in violation of MCL 37.1202(1)(a); MSA 3.550(202)(1)(a). That statute and subsection provides that “[a]n employer shall not . . . [f]ail or refuse to hire, recruit, or promote an individual because of a handicap *that is unrelated to the individual’s ability to perform the duties of a particular job or position*” (emphasis supplied). The unrefuted evidence demonstrated that the particular position for which plaintiff applied required him to work overtime and to show up for work consistently. Similarly, the unrefuted evidence

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\* Circuit judge, sitting on the Court of Appeals by assignment.

demonstrated that plaintiff had submitted at the direction of his physician a signed memorandum stating that he was “not, for any reason, to work more than eight hours in any day,” and that he had an inadequate attendance record. Therefore, because plaintiff’s handicap was not unrelated to his ability to perform the duties of the particular position for which he applied, defendant did not violate MCL 37.1202(1)(a); MSA 3.550(202)(1)(a), by refusing to promote plaintiff. Thus, because on the facts and the law the plaintiff has shown no right to relief, MCR 2.504(B)(2); *Begola, supra*, the involuntary dismissal of plaintiff’s action was appropriate.

Plaintiff argues that, because of the differing duties of his current job and the job for which he applied, the limitation on his ability to work overtime could have been waived or eased. Had this restriction been waived, he would have been able to work overtime as he would have been required to do. This argument fails for two reasons. First, even assuming plaintiff’s assertion to be true, this would not cure his inability to appear for work consistently in timely fashion, a requirement of the position for which he applied. Second, plaintiff presented no competent contemporaneous evidence that the restriction would have been lifted had he been promoted. While the restriction was eventually lifted, this did not occur until some 16 months after plaintiff interviewed for the position. Therefore, we are not persuaded that plaintiff presented an even remotely tenable argument that his handicap was unrelated to the duties of the position for which he applied.

Plaintiff submits that the trial court failed to shift the burden to the defendant to prove a legitimate reason for its failure to promote plaintiff. As set forth in a plethora of this Court’s decisions, Handicapper Civil Rights actions are subject to a shifting burden analysis in which, after the plaintiff presents evidence that he is handicapped and that the handicap does not affect his or her ability to perform the duties of a particular job, the burden shifts to the defendant to demonstrate a legitimate nondiscriminatory reason for its adverse action toward the plaintiff. See, e.g., *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989). It is true that the record gives no indication that defendant was ever burdened with demonstrating a nondiscriminatory reason for failing to promote plaintiff. However, given our analysis above in which we conclude that plaintiff failed to establish that his handicap was unrelated to the position for which he applied, the court was not required to shift the burden to defendant. Indeed, it would have been error had the court proceeded to this stage of analysis where plaintiff had failed to carry its initial burden. Therefore, we find no error.

Finally, plaintiff argues that “the trial court err[ed] in treating this case as if it were an administrative appeal or a contract case.” Plaintiff rests his “contract” argument on the memorandum in which he averred that because of his handicap he would be unable to work overtime. He alleges that court treated this as some type of a contract by which plaintiff was bound. However, our review of the record indicates that this memorandum was treated as relevant evidence, which it is. See MRE 401. It is evidence that plaintiff’s handicap limited his ability to work overtime, one of the key issues before the trial court. Therefore, this memorandum was properly considered. With respect to plaintiff’s “administrative appeal”

argument, the record does not suggest that the present action was treated in any way like an administrative appeal.

Affirmed.

/s/ Peter D. O'Connell

/s/ Harold Hood

/s/ Carl L. Horn