

STATE OF MICHIGAN
COURT OF APPEALS

OTIS R. DIAMOND,

Plaintiff-Appellee,

v

ELM METAL FINISHING CORPORATION,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 177758

Jackson Circuit Court

LC No. 93-64386 NO

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

In this Michigan Handicappers' Civil Rights Act action, defendant appeals as of right the order denying its motion for summary disposition and, following trial, the subsequent order denying its motion for judgment notwithstanding the verdict or, in the alternative, a new trial. We affirm the order denying defendant's motion for summary disposition, but reverse the order denying the motion for a new trial and remand for that purpose.

Over the course of several years, plaintiff repeatedly injured his back while employed by defendant, and allegedly suffered lingering pain. Plaintiff filed suit after defendant transferred him to a position allegedly beyond plaintiff's physical capabilities rather than transferring him to another position he was capable of performing. As relevant to the instant appeal, plaintiff claimed that these actions constituted a violation of the Michigan Handicappers' Civil Rights Act (MHCRA), MCL 37.1101 *et seq.*; MSA 3.559(101) *et seq.* Defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) were denied, and the case proceeded to trial. The jury returned a verdict in favor of plaintiff, after which defendant moved for judgment notwithstanding the verdict (JNOV) or a new trial, contending that the jury instructions were contrary to Michigan law. The motion was denied.

On appeal, defendant first contends that the trial court erred in denying its motion for summary disposition. In its motion, defendant argued that because plaintiff had admitted that he was physically incapable of performing the job to which he had been transferred, he was not "handicapped" as that term is used in the MHCRA, MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(a), and, accordingly,

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

summary disposition was warranted. Our review is de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1996).

We find no error. The MHCRA provides that an employer shall not “discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual’s ability to perform the duties of a particular job or position.” MCL 37.1202(1)(b); MSA 3.550(202)(1)(b) (emphasis supplied). Here, plaintiff alleged, in effect, that his being transferred from a position he was capable of performing to a position he was admittedly incapable of performing was a pretext for terminating him. This allegation, if proven, would likely constitute discrimination as prohibited by the MHCRA. *Id.* Thus, while it is true that plaintiff admitted that he was incapable of performing the job from which he was terminated, this is not fatal to plaintiff’s claim at all but, rather, the foundation of his claim. Therefore, plaintiff’s concession that his back injury precluded him from performing adequately in his new position was not sufficient to justify summary disposition in defendant’s favor. Accordingly, we affirm the order denying defendant’s motion for summary disposition.

Defendant next argues that the court abused its discretion, *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 186-187; 466 NW2d 717 (1991), in denying its motion for JNOV or a new trial. With respect to defendant’s motion for JNOV, defendant raises essentially the same argument in this context as it raised in the context of its motions for summary disposition, and we again find it to be without merit.

With respect to defendant’s alternative argument requesting a new trial, we believe the court instructed the jury in a manner inconsistent with Michigan law. The court appears to have relied on various materials pertaining to the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, when fashioning supplemental jury instructions. Apparently, under the ADA, an employer has an affirmative duty to place a handicapped employee in a vacant position that the employee is capable of performing where such a vacancy exists. In reliance on this federal law, the court instructed the jury accordingly and the jury was presented with a verdict form to similar effect. However, unlike the ADA, under the MHCRA an employer’s duty to accommodate a handicapped employee does not include a duty to transfer the employee to a vacant position that he is capable of performing. *Hall v Hackley Hosp*, 210 Mich App 48, 57; 532 NW2d 893 (1995).

Our review of the record, jury instructions and verdict form indicates that the plaintiff’s recovery was based on the court’s inaccurate summary of the law. Plaintiff presented evidence that, after he was transferred, job vacancies existed that he was capable of filling. The court instructed the jury that recovery could be predicated on defendant’s failure to assign plaintiff to such a position, and the jury specifically found that this occurred. While such a factual scenario may be sufficient to allow recovery under the ADA, it is not sufficient under the MHCRA. Therefore, because the applicable law was not accurately presented to the jury, *Luidens v 63rd District Court*, ___ Mich App ___; ___ NW2d ___ (Docket No. 165935, issued 9/17/96) slip op p 2, and because the jury based its decision on the erroneous instruction, *Beadle v Allis*, 165 Mich App 516, 525; 418 NW2d 906 (1987), a new trial is warranted.

The order denying defendant's motion for summary disposition is affirmed. The order denying defendant's motion for new trial is reversed, and the matter remanded for a new trial.

/s/ Peter D. O'Connell

/s/ Kenneth W. Schmidt