STATE OF MICHIGAN

COURT OF APPEALS

KEITH COTTRILL,

Plaintiff-Appellee/Cross-Appellant,

v

DUNIGAN BROS, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 1, 1997

No. 182931
Jackson Circuit Court
LC No. 94-068747-CZ

Before: Sawyer, P.J., and Bandstra and M. J. Talbot*, JJ.

PER CURIAM.

Defendant appeals, and plaintiff cross appeals, from a judgment of the circuit court entered upon a jury verdict in favor of plaintiff on his Handicappers' Civil Rights Act (HCRA), MCL 27.1101 et seq.; MSA 3.550(101) et seq. claim. We reverse.

Plaintiff was employed by defendant beginning in June of 1988 to maintain equipment. In June of 1992, plaintiff began suffering from prepatellar bursitis. The bursitis caused his leg to swell and become inflamed to the point he could not bend it. Plaintiff recovered and was able to return to work in early September 1992, having not worked since June 17. However, after working one day, he was terminated.

At trial, plaintiff's supervisor, John Dunigan, testified that plaintiff was terminated because of poor job performance. According to Dunigan, the decision to terminate plaintiff had been reached by himself and defendant's president, Joseph Dunigan, shortly before plaintiff's bursitis arose. However, they decided to delay the termination under after plaintiff recovered. Joseph Dunigan confirmed this version of events.

A number of issues are raised on appeal, one of which is dispositive: did the trial court err in denying defendant's motion for summary disposition. We agree with defendant that it did. At issue is whether plaintiff is handicapped within the meaning of the HCRA. We conclude that he is not.

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

MCL 37.1202(1); MSA 3.550(202)(1) provides in pertinent part as follows:

> An employer shall not:
>
> * * *
>
> (b) 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.

First, we note that if plaintiff was, in fact, terminated because of poor job performance, that he is not entitled to the protections of the above statute because he was not terminated because he was handicapped. That aside, however, we still do not believe that plaintiff comes within the provisions of the act. One of two conditions exist: either (1) plaintiff was fully recovered from his bursitis or (2) he was not and the bursitis would recur. In the first case, plaintiff was no longer handicapped and, therefore, not protected by the act. In the second case, plaintiff is still not protected by the act because it is undisputed that he was unable to perform his job when suffering from bursitis.

The trial court rejected defendant's motion by relying on *Rymar v Michigan Bell Telephone Co*, 190 Mich App 504; 476 NW2d 451 (1991). However, the trial court's reliance on *Rymar* is misplaced for the same reason expressed by this Court in *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 329; 535 NW2d 272 (1995):

> While we question the soundness of the reasoning in *Rymar*, we conclude that we are not constrained to follow it because *Rymar* is distinguishable.
>
> Unlike the plaintiff in *Rymar*, plaintiff in this case never alleged that defendant denied her adequate leave time.

Finally, plaintiff also argues that he is entitled to the protections of the HCRA because, at the time of his termination, the bursitis did not affect his ability to perform his job. Again, however, if plaintiff was completely cured, then he was no longer handicapped. If he was not, then his condition did affect his ability to perform his job and he was not entitled to the protections of the act. It would be illogical in cases of chronic, recurring conditions to allow termination only when the employee was unable to work and not during an interlude of health when he was able to work. First, it overlooks the basic fact that a key element of the ability to perform a job is the ability to report to work and perform the job on a consistent basis. Excessive absenteeism, regardless of the cause, is itself an inability to perform the job. Second, it would provide a tremendous disincentive for an employer who chose to leave an employee on the payroll during a period of disability, providing an opportunity to possibly heal as well as to retain medical and other benefits during a period in which it would be difficult, if not impossible, for the employee to obtain new employment and new benefits.

For the above reasons, we conclude that defendant was entitled to summary disposition. Accordingly, it is unnecessary to address the remaining issues raised.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot