

STATE OF MICHIGAN
COURT OF APPEALS

LARRY A. PIKE,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

April 11, 1997

No. 190784

Washtenaw Circuit Court

LC No. 94-003112-CK

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this case involving claims of handicap discrimination and wrongful discharge. We affirm.

Plaintiff, who is hearing-impaired, was hired by defendant on October 29, 1990, as a records clerk at the University of Michigan Dental School Clinic. According to University records, plaintiff was absent for illness twenty-nine days in 1991 and twenty-three days in 1992. Plaintiff's absenteeism was noted in his 1991 performance evaluation completed by his direct supervisor, Joan Shores. In 1992, Shores was promoted to a higher supervisory position and Debbie Coleman became plaintiff's immediate supervisor. Coleman's 1992 performance evaluation on plaintiff stated that plaintiff's use of sick leave was unacceptable and needed improvement. Plaintiff also received counseling at the University Rehabilitation Department as a result of his excessive sick time. Plaintiff was told during the counseling session that he needed to attend work regularly.

In 1993, plaintiff was absent for alleged illness commencing on February 17 and continuing until March 19, when he was placed on suspension. As a result of plaintiff's suspension, a disciplinary review conference was held on March 26, 1993, where plaintiff was provided with an interpreter. According to defendant, plaintiff was provided with four medical forms to be filled out by plaintiff's doctors and returned within a two-week period. Plaintiff did not dispute that defendant requested that the forms be completed, but denied that he was told that the forms had to be returned within two weeks.

On May 3, 1993, Shores terminated plaintiff for failure to return the medical forms. Plaintiff's employment was terminated effective March 5, 1993.

On August 24, 1994, plaintiff filed a complaint against defendant alleging that he was terminated because of his handicap in violation of the Michigan handicappers' civil rights act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* Plaintiff also alleged that his termination was not in compliance with University guidelines on sick leave. Defendant moved for summary disposition, which was granted by the trial court. The trial court ruled that the evidence established that plaintiff was terminated for excessive absenteeism, and that there was no evidence that plaintiff's deafness was a factor in the termination. The trial court also ruled that even if plaintiff had presented a prima facie case, there was no issue of fact regarding whether absenteeism was a pretext for discrimination on the part of defendant. Finally, the trial court ruled that there was no fact issue regarding whether defendant violated its employment policies. The trial court granted summary disposition in defendant's favor regarding both counts of plaintiff's complaint.

I.

Plaintiff first claims that the trial court erred in dismissing his employment discrimination claim on the basis that plaintiff failed to present a prima facie case. We review the trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc.*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Id.* A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion. The court's task is to review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

To establish a prima facie case of handicap discrimination, the plaintiff must establish: (1) the plaintiff is "handicapped" as defined in the act; (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job; (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Doman v Grosse Pointe Farms*, 170 Mich App 536, 541; 428 NW2d 708 (1988). *Id.*

Here, there is no dispute that plaintiff's deafness is a handicap within the meaning of the statute. It is also undisputed that the handicap is unrelated to plaintiff's ability to perform his duties as a records clerk. Thus, the only element in dispute is whether plaintiff has been discriminated against in one of the ways set forth in the statute; i.e., whether plaintiff was terminated because of his deafness. To survive a motion for summary disposition in discrimination cases, the plaintiff must tender specific factual evidence that could lead a reasonable jury to conclude that the defendant intentionally discriminated against him. *Lyttle v Malady & Howmet Corp.*, 209 Mich App 179, 187-188; 530 NW2d 135 (1995), lv gtd 451 Mich 920 (1996).

Plaintiff first claims that defendant's failure to follow its policies and guidelines with respect to sick time and termination is evidence that plaintiff was terminated because of his handicap. The parties

have presented three potential sources of University guidelines/policy regarding sick leave. The first two, the “Sick Time Pay” policy contained in the University of Michigan Staff Handbook for Allied Health, Office, Professional/Administrative and Technical Employees, and the “Sick Time Pay” policy contained in the Standard Practice Guide, discuss eligibility for short- and long-term sick leave benefits. These policies are clearly intended to describe employee benefits; they do not address termination resulting from excessive sick leave or any steps that must be followed by the University to terminate an employee for excessive absenteeism. Therefore, plaintiff was not terminated “in violation” of these policies.

Plaintiff also maintains that he was terminated in violation of the “Sick Time Guidelines” contained in the School of Dentistry Monitoring Records, and Recall Department, Patient Services Employee Guidelines (“Employee Guidelines”). The “Sick Time Guidelines” include the following information:

Excused sick time with pay is granted when an employee is unable to work due to personal illness or injury or is off work due to a prearranged medical or dental appointment. With the exception of medical/dental appointments, each separate or distinct employee absence is defined as an occurrence. An absence of two (2) or more consecutive days for the same illness or injury is still considered one occurrence. *The number of occurrences and the number of hours of absenteeism within a specific time period is used to determine whether the employee’s attendance record is reasonable.*

* * *

If the employment obligation of regular and reasonable attendance is not met, *any one or all* of the following steps will be taken to correct the situation:

1. Supervisor may request written verification to substantiate all absences due to illness, injury, or prearranged medical/dental appointments.

* * *

5. Employee may be discharged for failure to meet employment obligation for ten (10) or more absences due to illness or injury occurring within a twelve (12) month period. [Emphasis added.]

Plaintiff argues that he was terminated in violation of the Employee Guidelines because he had not had ten absences in the twelve months preceding his termination. An absence of two or more consecutive days for the same illness or injury is still considered one occurrence under the Employee Guidelines. In this case, plaintiff left work on February 17 and did not return; therefore, plaintiff maintains that his absence was just one occurrence.

In the event that the employment obligation of regular and reasonable attendance is not met, the Employee Guidelines leave it to the discretion of the supervisor to decide which one or more of the listed steps to take. Here, Debbie Coleman pursued the first step by requesting plaintiff to provide written verification of his illness. Plaintiff was requested to provide additional verification at the disciplinary review conference. Moreover, even accepting plaintiff's argument that his absence was only one "occurrence" (even though he was absent for twenty-two days before his suspension and was absent for a total of forty-one days in the past twelve months), the guidelines do not purport to be an exclusive list of remedies. We do not interpret the guidelines as providing that an employee may only be terminated for excessive absences if he or she has ten or more absences within a twelve-month period. Under plaintiff's theory, he could be gone from work for an infinite period of time without consequence. The guidelines specify that the number of occurrences *and the number of hours* of absenteeism within a specific time period are used to determine whether an employee's attendance record is reasonable.

Plaintiff also asserts that Joan Shores admitted at deposition that she did not follow the Employee Guidelines with respect to terminating plaintiff. However, a review of the relevant deposition testimony does not support plaintiff's assertion. Shores admitted that she did not take all of the steps listed under the "Unexcused Absences" provision; however, those steps were completely discretionary as the guideline explicitly provides that any one or more of the steps "may" be taken in the case of excessive unexcused absences. Therefore, plaintiff has not provided any evidence that defendant failed to comply with its own policies and procedures in terminating plaintiff, let alone that a breach of those policies or procedures was motivated by plaintiff's handicap.

Plaintiff claims that Shores' belief that he was not sick was evidence of discriminatory animus in light of the medical certifications that he provided. However, the pattern presented in those medical certifications could raise a question in any reasonable mind regarding plaintiff's true ability to work. Moreover, Shores' belief or disbelief in plaintiff's illness has no reasonable connection to a discriminatory motive or intent. Plaintiff also asserts that Coleman discriminated against him based on his handicap. However, plaintiff did not present anything other than his subjective beliefs in support of his claims.

Plaintiff also appears to associate discriminatory intent with the fact that he was allegedly verbally requested at the disciplinary review conference to return four medical forms within two weeks. Plaintiff claims that he did not know that the forms had to be returned within two weeks, and that any such request should have been made in writing. Plaintiff further stated that he did not have any control over the doctors who were asked to complete and return the forms. Plaintiff's arguments regarding the medical forms do not provide any evidence of discriminatory intent. First, plaintiff was provided with an interpreter at the conference. Second, even if it was not communicated to plaintiff that the forms had to be returned in two weeks, Shores waited a reasonable amount of time (five weeks) before terminating plaintiff. Finally, plaintiff presents no evidence that his termination for failure to ensure that the forms were completed and returned by his doctors in a reasonable amount of time indicates discrimination on the part of defendant.

Viewing the evidence presented by plaintiff as a whole, this Court does not believe that the trial court erred in finding that plaintiff failed to present a prima facie case of handicap discrimination. None of the evidence presented by plaintiff demonstrates discriminatory animus toward plaintiff. To the contrary, it appears that the staff was so enthusiastic about accommodating plaintiff's handicap that they undertook to learn basic sign language. In addition, every effort was made to accommodate plaintiff by providing him with an interpreter for staff meetings and meetings with his supervisor. Nor did plaintiff present any evidence that his deafness was a motive for his termination. All of the evidence on the record indicates that plaintiff was terminated for a long-term pattern of excessive absenteeism.

Even if plaintiff did establish a prima facie case of handicap discrimination, the trial court correctly concluded that summary disposition would still be proper in this case. Under the burden-shifting analysis, once a prima facie case is established, the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for its action. *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 412 (1989). If such a reason is articulated, the burden shifts back to the plaintiff, who must show that the legitimate reason put forth by the defendant was not a true reason, but was a mere pretext for discrimination. *Clark v Uniroyal Corp*, 119 Mich App 820, 824; 327 NW2d 372 (1982). In order to survive a motion for summary disposition pursuant to MCR 2.116(C)(10), the plaintiff must put forth factual allegations to raise a triable issue of fact as to whether the proffered reason was a mere pretext. *Id.* at 825-826.

In this case, defendant articulated a legitimate reason for terminating plaintiff -- his excessive absenteeism. Plaintiff has failed to offer any evidence that tends to show that defendant's reason is pretextual. It is undisputed that plaintiff was absent due to illness for twenty-nine days in 1991 and twenty-three days in 1992. The Employee Guidelines provided to plaintiff emphasized the importance of regular attendance. Plaintiff also admitted that he received counseling at the University Rehabilitation Department in connection with his employment because of concern over his sick time, where he was informed that he was required to attend work regularly. Plaintiff was also warned in his 1991 and 1992 performance evaluations that his sick-time was a problem that needed improvement. After being absent from work from February 17 until March 18 (22 days), plaintiff was placed on suspension which culminated in the disciplinary review conference held on March 26, 1993. At that meeting, plaintiff was provided with an interpreter and was asked to return four medical forms that had to be completed by plaintiff's doctors. After five weeks the forms had not been returned, and plaintiff was terminated.

II.

Plaintiff also claims that the trial court erred in granting summary disposition with regard to his claim for wrongful discharge. Plaintiff claims that he was wrongfully discharged due to defendant's failure to follow the rules, regulations, and guidelines of the University relative to sick time and/or termination of employment. Plaintiff further claims that defendant refused to allow plaintiff to proceed with a grievance procedure, contrary to the terms of the Standard Practice Guide. An action for wrongful discharge may be based on an employer's failure to comply with its own procedures for discharge. *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 537; 442 NW2d 714 (1989). Whether established procedures were followed is generally a question for the trier of fact.

Struble v Lacks Industries, Inc, 157 Mich App 169, 175; 403 NW2d 71 (1986). We concluded above that defendant did not violate any of its sick time policies or guidelines in terminating plaintiff.

Plaintiff claims for the first time on appeal that he was denied access to the grievance process. A party who fails to raise an issue before the trial court has failed to preserve the issue for appellate review. *Burgess v Clark*, 215 Mich App 542, 548; 547 NW2d 59 (1996). Moreover, this Court was not provided with sufficient information to substantiate plaintiff's claim.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski