STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM WAHL,

Plaintiff-Appellant,

v

JEFFERSON SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
May 2, 1997

No. 187977
Monroe Circuit Court
LC No. 94-002645

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting defendant summary disposition, granting defendant a protective order to prevent the deposition of defendant's attorney, and denying plaintiff's motion for withdrawal of admissions. We affirm.

Plaintiff worked as a high school teacher and coach for defendant. In August 1993, police discovered that plaintiff was making telephone calls to young girls, posing as a fashion photographer and promising gifts in exchange for sexual favors from the girls. Plaintiff has repeatedly admitted that he made the phone calls. Shortly afterwards, defendant learned of the investigation into plaintiff's criminal conduct. Defendant advised plaintiff that he was not required to report for the upcoming school year, and the parties agreed that plaintiff would remain on paid sick leave status until defendant acquired more information regarding the criminal matter. The criminal matter was transferred to the State Attorney General's office and criminal charges were filed in January 1994. In October 1994, defendant pleaded nolo contendere to eight counts of accosting, enticing, or soliciting a child for immoral purposes. MCL 750.145a; MSA 28.341.

During the pendency of the criminal matter, plaintiff sought reinstatement of his teaching position, submitting letters from his treating psychiatrist indicating that plaintiff was being treated for bipolar disorder. Defendant declined to reinstate plaintiff based on the information it reviewed regarding the investigation into plaintiff's criminal conduct, which included transcripts of plaintiff's telephone calls to the girls. Nevertheless, defendant offered to negotiate a settlement to resolve plaintiff's employment

status without a tenure hearing and was willing to consider plaintiff's assertion that his conduct was caused by bipolar disorder. Defendant requested plaintiff's agreement to submit to an independent medical examination for which defendant would pay. The parties attempted unsuccessfully to negotiate an agreement whereby plaintiff would submit to an independent psychiatric or medical examination to provide defendant the requested information. An agreement could not be reached, and in August 1994, plaintiff was suspended *with* pay. After plaintiff pleaded nolo contendere to the criminal charges, defendant filed charges against plaintiff with the State Tenure Commission in November 1994. Plaintiff appealed those charges, and in August 1995, an administrative law judge ruled that although plaintiff may suffer from bipolar disorder, plaintiff's criminal conduct involving children provided just and reasonable cause to discharge plaintiff. Because no exceptions were filed, the decision became final and binding in September 1995.

Plaintiff argues that the trial court erred in summarily dismissing his discrimination claim brought under the Handicappers Civil Rights Act ("HCRA"), MCL 37.1101 et seq.*;* MSA 3.550(101) et seq.[1] Plaintiff primarily contends that the trial court misunderstood the legal basis of his discrimination as a claim in that plaintiff was currently suffering from a "handicap" under the HCRA and that plaintiff was contesting his discharge. Plaintiff maintains instead that defendant's refusal to reinstate him was based upon its discriminatory *perception* that plaintiff's history of bipolar disorder[2] would pose a danger to students, relying on an alternative definition of handicap under MCL 37.1103(e)(ii) and (iii).[3] We disagree.

This Court reviews a trial court's grant of summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 86; 520 NW2d 633 (1994). MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted, and in reviewing this motion, the court determines whether the opposing party's pleadings allege a prima facie case. *Id*. Accepting as true all well-pleaded facts, summary disposition pursuant to MCR 2.116(C)(8) is valid if the allegations fail to state a legal claim. *Id*. A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence submitted by the parties. MCR 2.116(G)(5); *SSC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 364, 366; 480 NW2d 275 (1991). Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. *SSC Associates*, *supra* at 364. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mitchell v Dahlberg*, 215 Mich App 718, 725; 547 NW2d 74 (1996).

To establish a prima facie case of handicap discrimination, a plaintiff must show (1) the plaintiff is "handicapped" as defined within the HCRA, MCL 37.1103; MSA 3.550(103); (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job; and (3) the plaintiff has been discriminated against in one of the ways set forth in the HCRA. *Hall v Hackley Hosp*, 210 Mich App 48, 53-54; 532 NW2d 893 (1995). Once a plaintiff establishes a prima facie case, the burden shifts to

the employer to show legitimate, nondiscriminatory reasons for its action. *Crittenden v Chrysler Corp*, 178 Mich App 324, 331; 443 NW2d 41 (1989). If the employer makes this showing, the burden shifts back to the plaintiff, who then must demonstrate that the employer's reasons constituted a pretext for discrimination. *Id.* at 132-133 (citations omitted). The plaintiff is required to show that defendant was motivated by discriminatory intent or that discrimination was a determining factor in the defendant's conduct. *Id.*; *Hickman v General Motors Corp*, 177 Mich App 246, 249; 441 NW2d 430 (1989).

Notwithstanding his admission to criminal conduct involving school-aged girls, plaintiff contends that the true motivation behind defendant's actions is a discriminatory animus against an individual who defendant perceives to be suffering from bipolar disorder or who has had a history of bipolar disorder. In support of this argument, plaintiff argues that defendant's then superintendent, Jon Rhoades, admitted in his deposition that he was concerned that plaintiff's bipolar disorder would pose a risk to students. Plaintiff's argument is not only unsupported by the record, but also his characterization of Rhoades' testimony is a deliberate attempt to mislead this Court.

According to correspondence sent to plaintiff's attorney from defendant's attorney, defendant offered plaintiff an opportunity to reach a negotiated settlement and avoid tenure charges. Plaintiff, on the other hand, maintained that he wanted to be automatically reinstated based upon his treating doctor's conclusion that his disorder was under control, or in the event an independent examiner concurred with his doctor's assessment.[4] Defendant maintained that it was willing to consider plaintiff's explanation of the cause of his criminal conduct to reach a resolution regarding plaintiff's employment status if plaintiff agreed to an independent professional examination, conducted by a physician agreed to by the parties and paid for by defendant. Despite this offer, plaintiff repeatedly created obstacles to satisfy defendant's request for a neutral and comprehensive report, frustrating and ultimately terminating the negotiation process.

In his deposition, then superintendent Rhoades testified that his primary concern was the safety of the students, and he explained that the independent examination was requested to acquire competent information regarding plaintiff's asserted condition before he could be convinced that it would be safe to return plaintiff to the school. Rhoades further testified that he never received that information, and as such never treated plaintiff's case as a handicap case.

Hence, contrary to plaintiff's assertions, the undisputed facts indicate that defendant based its decisions on plaintiff's admitted criminal conduct rather than an alleged *perception* that plaintiff suffered from bipolar disorder. Further, although defendant gave plaintiff ample opportunity to provide defendant with satisfactory evidence that a bipolar disorder was the cause of his criminal conduct, plaintiff's refusal left defendant with no alternative but to prevent plaintiff's return to the classroom based on plaintiff's criminal conduct. Therefore, we conclude that plaintiff could not establish a prima facie case based on his alternate theory of handicap discrimination, and also, that reasonable minds could not differ regarding whether defendant had a legitimate nondiscriminatory basis for preventing plaintiff's return to the classroom. *Crittenden*, *supra*; *Hickman*, *supra*.

Next, plaintiff argues that the trial court abused its discretion in granting defendant's motion for a protective order to prevent the deposition of one of defendant's attorneys, G. Michael White. Plaintiff claims that he sought to depose White as to matters he handled not as defendant's attorney, but as defendant's acting personnel director, and thus, he was not seeking privileged information. In addition, plaintiff claims that White's deposition testimony was necessary because plaintiff was unable to ascertain defendant's motivation for suspending plaintiff from any other source. We disagree.

We review a court's grant or denial of discovery for an abuse of discretion. *Nuriel v Young Women's Christian Association of Metropolitan Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990). White is an attorney with defense counsel's law firm who was actively involved in advising defendant early on in this case. The attorney-client privilege attaches to communications made by a client to its attorney for the purpose of obtaining legal advice on some right or privilege. *Grubbs v K mart Corp*, 161 Mich App 584, 589; 411 NW2d 477 (1987). As such, if plaintiff were allowed to depose White, it could lead to a breach of client confidentiality and inquiry into privileged information. Therefore, we conclude that defendant demonstrated a sound basis for requesting that White's deposition not be had. MCR 2.302(C)(1). In addition, plaintiff has not shown good cause to depose White regarding non-privileged matters as he was allowed to depose Jon Rhoades, defendant's superintendent at the time of this incident, regarding defendant's reasons for its actions. *Yates v Keane*, 184 Mich App 80, 82; 457 NW2d 693 (1990). Hence, plaintiff's argument that it could not obtain this information from another source is disingenuous and without merit such that the trial court properly granted defendant's motion for a protective order.

Finally, plaintiff argues that the trial court abused its discretion in denying plaintiff's motion to withdraw admissions. We disagree. Plaintiff failed to show good cause for his failure to timely respond within 28 days as required under MCR 2.312(B)(1). Where a party served with a request for admissions neither answers nor objects to the request, the matters in the request are deemed admitted. *Medbury v Walsh*, 190 Mich All 554, 556; 476 NW 2d 470 (1991). Further, there is no merit to plaintiff's argument that defendant was required to notify plaintiff that his time to respond would lapse. Plaintiff bears the burden of responding within the time prescribed by the rules or seeking leave from the court for an extension. See generally, MCR 2.302(F)(2).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.
/s/ Jane E. Markey
/s/ Donald A. Teeple

[1] The trial court also dismissed plaintiff's equal protection claim; however, because plaintiff has not stated this claim in his statement of questions presented on appeal, we will not review it. See *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

[2] Bipolar disease is a mental disorder characterized by episodes of major depression alternating with episodes of mania. See Diagnostic and Statistical Manual of Mental Disorders ("DSM IV"), p 214 (4th ed).

[3] Contrary to plaintiff's assertions, the trial court understood plaintiff's claim under the alternative form of alleging a handicap and properly rejected it. Nevertheless, because we affirm for different reasons than those cited by the trial court, we will address plaintiff's argument as he has presented it.

[4] The treating psychiatrist's letters contained little information other than the fact that plaintiff was being treated for the disorder and that his treating psychiatrist opined that plaintiff's illness was under control. Although plaintiff's psychiatrist and his alleged independent psychiatrist concluded that plaintiff was mentally fit to return to work, neither psychiatrist provided an explanation for their conclusion that plaintiff's behavior was "not likely" to recur. Indeed, when plaintiff's treating psychiatrist testified at the tenure hearing, he refrained from making a prediction, and would only state that plaintiff's behavior was dependent upon his continuation of his treatment. Another psychiatrist, who opined that plaintiff did not pose a threat to the students, explained that he based his conclusions on *plaintiff's* description of the events at issue compared with *plaintiff's* description of how he felt at the time of the examination. Understandably, defendant could not accept these letters as an *independent* examination of plaintiff's asserted disorder or the effectiveness of any treatment that he had received.