STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK R. WILD and JOAN M. WILD,

Plaintiffs-Appellants,

v

CHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 21, 1997

No. 194652
Wayne Circuit Court
LC No. 95-501146 NO

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right the circuit court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). Plaintiff brought suit alleging a violation of the Michigan Handicapper's Civil Rights Act (MHCRA), MCL 37.1101 *et seq.;* MSA 3.550(101) *et seq.* We affirm.

Plaintiff was employed by defendant for a number of years as a security guard. Between 1988 and 1993, defendant, with the approval of plaintiff's union, merged the positions of security guard and fire marshal. Once the positions were merged, a number of the individuals holding the newly created position of fire/security officer (FSO) in the Detroit area had physical limitations which prevented them from performing some of the primary duties of an FSO. Defendant recognized that this presented a serious problem and formed a committee to resolve the problem. Ultimately, defendant put in place a policy whereby individuals who were placed in the newly created position of FSO at the time of the merger would be allowed to continue to work despite the fact that they had physical limitations which prevented them from performing some of the primary duties of an FSO. These individuals were given abbreviated job responsibilities. However, any individual holding the FSO position who presented a new restriction would be evaluated by the committee, which would determine whether the individual could perform the primary duties of an FSO. If the individual could not perform these duties, he would not be allowed to return to work.

Prior to the merger of the security guard and fire marshal positions into the position of FSO, plaintiff was subject to medical restrictions. In 1994, following the merger of the positions, plaintiff was

placed on involuntary sick leave status. After being examined by an independent medical examiner, plaintiff returned to work in January 1995 with no medical restrictions. Shortly thereafter, plaintiff visited a new doctor, who reimposed medical restrictions on plaintiff. Since plaintiff had worked for a period of time without restrictions, he was evaluated by the committee to determine whether he could perform the primary duties of an FSO. Because plaintiff's medical restrictions prohibited him from lifting more than twenty pounds, climbing stairs, and standing for long periods of time, he was not allowed to return to work as an FSO.

Thereafter, plaintiff filed this action against defendant alleging a violation of the MHCRA. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that plaintiff could not perform the duties of an FSO. The trial court granted defendant's motion. Plaintiff now appeals as of right arguing that a factual question exists as to whether plaintiff's job was that of an FSO or a security guard and, even if plaintiff's job is that of an FSO, that summary disposition was improper as defendant had a duty to accommodate his handicap. We affirm.

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The trial court, giving the benefit of reasonable doubt to the nonmoving party, must determine whether a record might be developed where reasonable minds might differ upon an issue. *Id.* The nonmoving party may not rest upon mere allegations or denials, but must set forth specific facts to show that a genuine issue exists for trial. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994).

In order to establish a prima facie case of discrimination a plaintiff must show (1) that he is handicapped as defined by the MHCRA, (2) that the handicap is not related to his ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways described in the statute. *Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997). The MHCRA defines handicap as:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion. [MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A).]

The phrase "unrelated to the individual's ability" means that (with or without accommodation) an individual's handicap does not prevent him from performing the duties of a particular job or position.

MCL 37.1103(l); MSA 3.550(103)(l). Whether a person's handicap is related to the individual's ability to perform the duties of a particular job is not determined solely by reference

to the employer's definition of the job. *Adkerson v MK-Ferguson Co*, 191 Mich App 129, 140; 477 NW2d 465 (1991). Thus, "an employer may not make the absence of a particular handicap part of the job description, make compliance with the job description a qualification for employment, and then use the qualification as a basis for denying employment to [or for termination of] one who has that handicap." *Id.* at 140-141 (quoting *Means v Jowa Security Services*, 176 Mich App 466, 474; 440 NW2d 23 [1989]).

In the instant case, there is undisputed evidence that plaintiff's job was that of an FSO and that plaintiff is unable, with or without accommodation, to perform the requisite duties associated with that position. Defendant presented unrebutted evidence that FSOs are called upon to respond to emergency situations and must be physically able to gain access to remote areas of defendant's facilities and assist injured workers. Defendant also supplied the job description of an FSO, which states that an FSO must be able to lift one hundred pounds with a partner and climb ladders and stairs. Although plaintiff may, in fact, be able to perform most of the duties of a security officer, plaintiff does not dispute the fact that he is unable to perform the duties of a fire marshall. Plaintiff admitted in his deposition that he could not climb a ladder and he had medical restrictions which prevented him from lifting more than twenty pounds. Thus, plaintiff cannot perform the duties of an FSO.

Furthermore, we believe that defendant has no duty to accommodate plaintiff in the instant case. Although defendant allowed employees with preexisting, continuing, medical restrictions to continue to work once the positions of security guard and fire marshal were merged into the FSO position, defendant is not required by the MHCRA to afford plaintiff such protection. Defendant essentially created a new position for FSOs who had preexisting, continuing medical restrictions. Under the MHCRA, an employer is not required to place an employee into a different job or position. *Koester v Novi*, 213 Mich App 653, 662; 540 NW2d 765 (1995); lv gtd 454 Mich 905; 564 NW2d 46 (1997).[2] The MHCRA expressly provides that "job restructuring and altering the schedule of employees under this article applies only to *minor* or *infrequent* duties relating to the particular job held by the handicapper." MCL 37.1210(15); MSA 3.550(210)(15) (emphasis added).

In this case, the FSO position involves a rotation schedule whereby plaintiff would be required to perform the duties of a fire marshal approximately one week out of each month. Plaintiff can not perform these duties. Accordingly, to accommodate plaintiff, defendant would essentially need to allow plaintiff to perform a job that no longer exists, that of a security guard. Defendant is not required to alter the FSO position in such a significant manner in order to accommodate someone with a handicap. *Hall v Hackley Hosp*, 210 Mich App 48, 57; 532 NW2d 893 (1995). The fact that defendant willingly did so for individuals with preexisting, continuing medical restrictions at the time of the merger does not affect the result in this case. Summary disposition was properly granted.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Peter D. O'Connell

[1] Joan Wild had a claim of loss of consortium in the trial court. Plaintiffs do not argue that this claim should be reinstated on appeal, therefore we will not address this issue. Our reference to "plaintiff" will include Frederick Wild only.

[2] We recognize that the Supreme Court recently granted leave in this case. Depending on the Court's resolution of the accommodation issue, the Supreme Court's decision may be outcome determinative of the case at bar.