

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THOMAS COPELAND and DEANNA  
COPELAND,

UNPUBLISHED  
February 11, 2000

Plaintiffs-Appellants,

v

No. 211109  
Wayne Circuit Court  
LC No. 96-637275-CZ

CHRYSLER CORPORATION,

Defendant-Appellee.

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Before: Bandstra, C.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

In this handicap discrimination case, plaintiff Thomas Copeland (hereinafter plaintiff)<sup>1</sup> appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I

Plaintiff was hired by defendant as a security guard in 1969. In 1988, defendant and plaintiff's union negotiated a collective bargaining agreement that included a provision to merge the separate positions of security guard and fire marshal into the single position of Fire/Security Officer (FSO). The merger of the two positions was phased in between the years 1988 and 1993. As of 1993, however, the position of security guard was eliminated.

At the time the FSO position was created, plaintiff had certain physical restrictions related to a chronic lower back problem. Although plaintiff had been able to work as a security guard with certain "physical qualification exclusions" (PQXs), these restrictions did prevent plaintiff from performing the fire marshal responsibilities now included in the position of FSO. Nevertheless, defendant allowed plaintiff (and others) to continue to work with abbreviated job responsibilities.

Eventually, problems arose because of the high number of security employees who were unable to perform the functions of a FSO. According to Michael Picaroux, defendant's Manager of Outstate Security Operations, the "inability of so many [FSOs] to respond to emergency situations or to

otherwise perform the overall responsibilities of a [FSO,] exposed Chrysler's workforce to injury, its property to damage and increased Chrysler's liability for failing to provide a safe work environment." As a result, the "PQX Committee" was formed. The committee adopted a policy to review any restricted employee holding the position of FSO who reported with a new PQX, and to refuse to allow that employee to return to work if the new PQX affected the employee's ability to perform the FSO functions.

In February 1994, plaintiff was involved in a job related automobile accident and was off work until January 1995. When plaintiff attempted to return to work, he had acquired additional PQXs that were deemed permanent by defendant's medical staff. In his deposition, plaintiff admits that he told a plant doctor at the time that he did not feel as if he was physically capable of performing the fire marshal duties assigned to the FSO position. Plaintiff received workers' compensation benefits until July 1995, when he returned to work at defendant corporation as a FSO. Thereafter, plaintiff filed suit under the Michigan Handicappers' Civil Rights Act (HCRA),<sup>2</sup> MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, seeking damages for the six-month period he was off work. Plaintiff alleged that he should have been allowed to return to work in the restricted security guard position he had been working before the automobile accident. After a hearing, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10).

At the relevant time, § 103 of the HCRA defined "handicap," in pertinent part, 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. . . .

In the employment setting, the phrase, "unrelated to the individual's ability" was defined as meaning that, "with or without accommodation, an individual's handicap does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l)(i); MSA 3.550(103) (l)(i).

## II

This Court reviews decisions on motions for summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the

opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

### III

Plaintiff first argues that summary disposition was inappropriate because a factual issue exists as to whether at the time he attempted to return to work in January 1995, plaintiff's job was that of a FSO or a security guard. We disagree. The undisputed evidence presented below indicated that the position of security guard was eliminated as of 1993. Plaintiff contends, however, that the evidence presented below indicates that even after 1993, he was permitted by defendant to continue working as security guard because his medical restrictions would not allow him to assume the more strenuous fire marshal duties that had been incorporated into the FSO position. Accordingly, plaintiff argues that defendant was required to accommodate him by allowing him to continue working as a security guard.

There is a fundamental flaw in this argument. Plaintiff's assertion that defendant has a duty to accommodate in the manner described presumes that at the relevant time, plaintiff was handicapped because he was substantially limited in performing the major life activity of working. However, plaintiff's inability to perform the duties of a FSO does not mean that he was necessarily handicapped. As this Court explained in *Stevens v Inland Waters, Inc*, 220 Mich App 212, 218; 559 NW2d 61 (1996), "[a]n impairment that interferes with an individual's ability to do a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not substantially limit the major life activity of working." Accordingly, because plaintiff has failed to demonstrate that he had a "determinable physical . . . characteristic" that substantially limited the major life activity of working, there arose no duty on the part of defendant to accommodate.

Furthermore, even if plaintiff could establish that he is handicapped, we do not believe that, as a matter of law, the duty to accommodate imposed by the HCRA includes the duty to let plaintiff continue working in a job that had been eliminated two years earlier. The fact that defendant adopted the temporary measure of permitting employees like plaintiff to continue working even though they could not satisfy the requirements of the FSO position does not mean that defendant was legally bound under the HCRA to do so. If an employer is not required under the HCRA to transfer a handicapped employee to an *existing* position, *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 30; 580 NW2d 397 (1998), then certainly the employer is not required by law to place an employee in a job that no longer exists. Cf. *Dalton v Subaru-Isuzu Automotive, Inc*, 141 F3d 667, 680 (CA 7, 1998) (observing that the American with Disabilities Act [ADA]<sup>3</sup> does not require an employer to "create new full-time positions to accommodate its disabled employees"); *White v York Int'l Corp*, 45 F3d 357, 362 (CA 10, 1995) (observing that the ADA "does not require an employer to . . . create a new position to accommodate the disabled worker"). Additionally, the HCRA does not require an employer such as defendant to accommodate an employee by restructuring a job through elimination of essential job duties. MCL 37.1210(14), (15); MSA 3.550(210)(14), (15); *Rourk, supra* at 33. The HCRA did not impose such requirements simply because an employer attempted to soften the blow of a job restructuring by taking steps not mandated by law.

Plaintiff principally relies on the federal district court case of *Taylor v Garrett*, 820 F Supp 933 (ED Pa, 1993). We find plaintiff's reliance on *Taylor* to be misplaced because it is factually distinguishable. In *Taylor*, the Navy employed the plaintiff as a "rigger." When the plaintiff became handicapped, the Navy transferred him to a different position, but eventually fired him because he was unqualified to perform the job for which he was hired (i.e., rigger). The district court denied the Navy's motion for summary judgment because it could not determine from the record whether the Navy had a policy to provide permanent light-duty positions to handicapped workers. Conversely, in the case at hand, defendant has presented evidence that the security guard position was phased out in 1993 and that, although plaintiff was allowed to continue working despite his restrictions, defendant adopted a policy to review the status of any restricted employee that reported with new or additional restrictions, which is what occurred in plaintiff's case. Plaintiff has presented no evidence that defendant adopted a policy to hold open permanently the restricted security guard position for plaintiff.

Affirmed.

/s/ Richard A. Bandstra

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

<sup>1</sup> Deanna Copeland's claim for loss of consortium is purely derivative of Thomas Copeland's discrimination claim.

<sup>2</sup> The HCRA is now known as the Person's With Disabilities Act.

<sup>3</sup> 42 USC § 12101 *et seq.*