

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES HESSEL,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

May 29, 2003

No. 242593

Chippewa Circuit Court

LC No. 01-005857-CK

Before: Smolenski, P.J., and Griffin and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court’s orders dismissing plaintiff’s cause of action in this worker’s compensation and disability discrimination case. We affirm.

Plaintiff worked for defendant since 1986 and was promoted to sergeant in 1989. In 1997, plaintiff suffered a foot injury and was awarded benefits in a worker’s compensation action. Plaintiff was given a temporary position as an assistant resident unit supervisor (ARUS). According to defendant, this position was out of plaintiff’s civil service class of sergeant. That is, plaintiff was not eligible or qualified for the ARUS position because he did not have an associate’s degree or equivalent education, but plaintiff was permitted to take the ARUS position temporarily. The civil service rules limit “out of class” positions to one year. Civil Service Rule 4-5(a). Because of this rule, defendant argued, plaintiff was returned to the position of sergeant. However, plaintiff had another foot surgery at about that time and was unable to perform his sergeant duties. Thus, plaintiff accepted defendant’s offer of a position as a corrections resident representative (CRR). Plaintiff then claimed that failure to maintain him in the ARUS position constituted an unlawful demotion under the Worker’s Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, and the Michigan Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* Specifically, plaintiff complained that the CRR position offered lower pay and fewer benefits, that his seniority status was removed, and that he had no chance of promotion. Plaintiff then filed a two-count complaint in circuit court alleging that (1) defendant retaliated against him for filing a worker’s compensation claim in violation of the WDCA, MCL 418.301(11), and (2) defendant violated the PWDCRA when it failed to maintain his position as an ARUS. On February 8, 2002, the trial court dismissed defendant’s WDCA claim on the ground that it lacked subject-matter jurisdiction concerning this tort claim against a state entity. On June 26, 2002, the trial court dismissed the PWDCRA claim under MCR 2.116(C)(10). This appeal followed.

We have reorganized plaintiff's appealed issues for review. First, we agree that the trial court correctly dismissed plaintiff's WDCA claim for lack of subject-matter jurisdiction.¹ See MCR 2.116(C)(7).

Whether subject-matter jurisdiction exists is a question of law for the court, which we review de novo. Jurisdiction does not inhere in a court; jurisdiction is conferred on a court by the power that creates it. When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void. [*Todd v Dep't of Corrections*, 232 Mich App 623, 627-628; 591 NW2d 375 (1998) (citations omitted).]

Plaintiff's claim was for retaliatory demotion prohibited by MCL 418.301(11). Plaintiff argues that because he filed a worker's compensation action against defendant, defendant demoted him in violation of the WDCA. Plaintiff's claim here is a tort cause of action against a state entity that can only be filed in the court of claims. See MCL 600.6419(1) (all actions against the state arising "ex delicto" must be filed in the court of claims); *Todd, supra* at 628 (the court of claims is the exclusive court of jurisdiction to hear claims against the state); *Phillips v Butterball Farms Co, Inc*, 448 Mich 239, 244-249; 531 NW2d 144 (1995) (MCL 418.301[11] sounds in tort, and does not arise out of an employment contract subject to the WDCA, contrary to MCL 600.6419[3]). Thus, the circuit court was justified in dismissing this claim for lack of subject-matter jurisdiction.

Second, we hold that the trial court also properly dismissed plaintiff's disability discrimination claim according to MCR 2.116(C)(10).²

The trial court held that, without reaching the issue whether plaintiff was disabled, plaintiff could not show that he was discriminated against in one of the ways prohibited by the PWDCRA. The court stated that plaintiff was able to complete his duties in the ARUS position, but that when plaintiff was returned to his sergeant position, he was not able to work in that position.

¹ We disagree with defendant's argument that plaintiff did not properly preserve this issue. Defendant claims that because plaintiff did not list the February 2002 order on his claim of appeal form or docketing statement, the WDCA issue arising out of that order is not properly preserved and plaintiff divested this Court of jurisdiction by exceeding the time limit for filing an appeal of the February order. However, a party may only appeal from a final order. See MCR 7.202(7), 7.203(A). The only final order in this case (as the February and June 2002 orders themselves indicated) was the June 2002 order, because the February order only dismissed part of plaintiff's original complaint, and the June order dismissed the last of plaintiff's claims.

² Plaintiff contends that the trial court prematurely granted summary disposition to defendant before hearing plaintiff's testimony and because discovery was previously held in abeyance. This argument is without merit. Discovery need not be extended indefinitely if, as a matter of law, no genuine issue of material fact in support of the opposing party's position would be revealed. See MCR 2.116(C)(10); *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

To establish a prima facie case of discrimination under the [PWDCRA], a plaintiff must establish (1) he has a “[disability]” as defined by the [PWDCRA], (2) the handicap is unrelated to his ability to perform the duties of a particular job, and (3) he was discriminated against in one of the ways described in the statute. [*Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 12; 618 NW2d 56 (2000).]

We agree with the trial court’s ruling. Addressing the third element of a prima facie disability discrimination case, see *id.*, plaintiff was not discriminated against by being transferred out of the ARUS position. See MCL 37.1202(1)(a)-(c), (f), (g) (an employer shall not fail to hire or promote, discharge, or otherwise discriminate against an individual, or limit or classify an employee in a way which adversely affects the status of an employee, because of a disability that is unrelated to the individual’s ability to perform the duties of a particular job, including when adaptive devices may enable that individual to perform the job).

The evidence shows that defendant did not transfer plaintiff out of the ARUS position or offer the CRR position to plaintiff because of any disability of plaintiff. Defendant transferred him out of the ARUS position because the civil service rules required it to. See Civil Service Rule 4-5(a).

The Civil Service Commission is an administrative agency that exists pursuant to the constitution and is vested with plenary and absolute authority to regulate the terms and conditions of employment in the civil service. The Civil Service Commission’s authority is constitutionally vested and exists as a separate and distinct entity from the legislatively enabled MDOCS. [*Davis v Dep’t of Corrections*, 251 Mich App 372, 377; 651 NW2d 486 (2002) (quotation and citations omitted).]

Moreover, plaintiff could not complete the duties of the sergeant position when it was offered to him again, which is why plaintiff concedes he refused it. See MCL 37.1202(1)(a)-(c). Plaintiff wanted to maintain the ARUS position but could not under civil service rules. Consequently, the fact that plaintiff accepted the CRR position was not a discriminatory action on the part of defendant. Therefore, the trial court correctly dismissed plaintiff’s PWDCRA claim pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O’Connell