

STATE OF MICHIGAN
COURT OF APPEALS

JAMES M. HACKER and JAMES M. HACKER,
P.C.,

UNPUBLISHED
September 26, 2006

Plaintiffs-Appellants-Cross-
Appellees,

v

No. 267403
Macomb Circuit Court
LC No. 04-001174-CZ

CITY OF MOUNT CLEMENS,

Defendant-Appellee-Cross-
Appellant.

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right the trial court's order granting defendant's motion for summary disposition on the ground that the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, did not apply to plaintiff's claim of weight discrimination. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant solicited proposals for the position of City Attorney. Plaintiff served in that position, and submitted a proposal to continue doing so. Plaintiff was interviewed by the city commission. Plaintiff alleged that during the interview a commissioner asked him, "If you became City Attorney, will you lose weight?" The city commission voted 4-3 against selecting plaintiff to serve as City Attorney, with the commissioner who allegedly remarked about plaintiff's weight voting in the majority.

Plaintiff filed suit alleging that defendant's refusal to hire him constituted employment discrimination on the basis of weight in violation of the ELCRA. Defendant moved for summary disposition arguing, among other things, that the ELCRA did not apply because plaintiff was not defendant's employee but rather was an independent contractor. Finding that the only reasonable

¹ For the sake of convenience, we will refer to the individual plaintiff and his professional corporation by the singular "plaintiff."

inference from the evidence was that the position of City Attorney was that of an independent contractor, the trial court granted defendant's motion.²

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition under MCR 2.116(C)(10) is appropriate where there is no genuine issue with respect to a material fact and the moving party is entitled to judgment as a matter of law. *Driver v Hanley (After Remand)*, 226 Mich App 558, 561-562; 575 NW2d 31 (1997). Under MCR 2.116(C)(10), a genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The ELCRA prohibits an employer from failing or refusing to hire, or otherwise discriminating against, an individual on the basis of, inter alia, weight. MCL 37.2202(1)(a). The ELCRA defines the term "employer" as "a person who has 1 or more employees," MCL 37.2201(a), but does not define the term "employee." Under the ELCRA, a claim for employment discrimination may only be brought by an employee. *Badiee v Brighton Area Schools*, 265 Mich App 343, 360-361; 695 NW2d 521 (2005). An independent contractor is not an employee, and cannot bring an action under MCL 37.2202. *Id.* at 361.

The economic reality test is used to determine whether a plaintiff could be considered an employee of the defendant for purposes of asserting a claim under the ELCRA. *Ashker v Ford Motor Co*, 245 Mich App 9, 11-12, 15; 627 NW2d 1 (2001). The factors to be considered in applying the economic reality test are: (1) control; (2) payment of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline. *Id.* at 12. The test considers the totality of the circumstances surrounding the work performed. *Chilingirian v City of Fraser*, 194 Mich App 65, 69; 486 NW2d 347 (1992).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition on the ground that he was not defendant's employee. We disagree.

The trial court properly found that reasonable minds could not disagree that the position of City Attorney was that of an independent contractor rather than defendant's employee. Defendant's City ordinance identifies the City Attorney as an administrative officer, and specifies that administrative officers are not city employees. Moreover, application of the economic reality test does not create a question of fact as to plaintiff's status as defendant's employee. Plaintiff served other private clients while working as City Attorney. He did not have an office in City Hall, but rather worked in a conference room when he was on the premises. Defendant controlled plaintiff's work as City Attorney in that it assigned tasks, but did not control the manner in which plaintiff performed the tasks. Plaintiff had discretion to perform the

² Because we affirm the trial court's dismissal of plaintiff's claim on this ground, we do not address defendant's cross-appeal from that portion of the trial court's order holding that, if the ELCRA applied, the remark at issue was sufficient to establish a prima facie claim of weight discrimination.

tasks in the manner in which he saw fit, including dismissing misdemeanor cases if he concluded it was appropriate to do so. Defendant did not pay plaintiff a regular wage. Rather, plaintiff billed defendant for work performed, defendant paid plaintiff's professional corporation, and plaintiff took a draw from the corporation. Plaintiff's law firm support staff assisted him in performing tasks for defendant, and plaintiff paid the staff.

“An independent contractor is one who, carrying out an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished.” *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992), quoting *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 622-623; 335 NW2d 106 (1983). The trial court properly concluded that under the economic reality test, plaintiff was not defendant's employee. Therefore, plaintiff could not maintain an action under MCL 37.2202, and the trial court correctly granted summary disposition to defendant.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder