

STATE OF MICHIGAN
COURT OF APPEALS

JOHN MONTGOMERY,

Plaintiff-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

UNPUBLISHED
October 18, 2012

No. 305574
Wayne Circuit Court
LC No. 11-001511-CD

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying in part its motion for summary disposition on the basis of sovereign immunity. Because defendant did not waive its sovereign immunity defense to plaintiff's claim under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, by participating in the arbitration of plaintiff's grievance pursuant to the parties' collective bargaining agreement (CBA), we reverse and remand for further proceedings.

In 1987, defendant hired plaintiff to work as an electrician in its Plymouth Regional Correctional Facility. Since then, plaintiff has become a master electrician and has twice been transferred to other correctional facilities. In May 2009, plaintiff was transferred to the Mound Regional Correctional Facility. Because of plaintiff's diabetes, he experiences dizziness when working at heights more than 10 feet above ground. Before his transfer to the Mound facility, electrical jobs that required climbing a ladder or riding in a lift-bucket more than 10 feet above ground were assigned to other employees.

On May 22, 2009, plaintiff's supervisor at the Mound facility asked him to sign a written position description that listed climbing as a required duty. Plaintiff told the supervisor that he could not sign the description because he had a disability that prevented him from climbing and gave the supervisor a physician's note confirming that fact. Defendant denied an accommodation for the condition, stating that because plaintiff was the only electrician at the facility, it was essential that he be able to climb ladders and work at different heights. On March 29, 2010, defendant placed plaintiff on medical leave, and, on November 15, 2010, defendant terminated plaintiff's employment. In December 2010, plaintiff gave defendant a physician's statement indicating that his condition was being successfully treated with medication and that

plaintiff was no longer restricted from working at heights. In January 2011, plaintiff resumed working for defendant.

On March 31, 2010, two days after he was placed on medical leave, plaintiff filed a grievance against defendant seeking compensation for his wages and benefits lost during the involuntary leave period. The grievance alleged that defendant violated the parties' CBA by refusing to accommodate plaintiff's disability and instead placing him on medical leave. On February 8, 2011, before the grievance was resolved, plaintiff filed a two-count complaint against defendant alleging that it violated the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, and Title I of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, by refusing to accommodate plaintiff's disability. Defendant moved for summary disposition with respect to both claims. Defendant argued that plaintiff's ADA claim was barred by sovereign immunity and that plaintiff's PWDCRA claim should be dismissed because defendant placed plaintiff on medical leave for a legitimate, nondiscriminatory reason, plaintiff's disability affected his ability to perform his job, and plaintiff failed to comply with MCL 37.1210(18) by requesting an accommodation in writing.

During the pendency of the litigation, plaintiff's grievance proceeded through a full arbitration with the American Arbitration Association (AAA). On June 10, 2011, the arbitrator granted the grievance, finding that defendant violated the CBA. The arbitrator determined that plaintiff must be compensated for the financial harm that he suffered as a result of being placed on medical leave. In response to defendant's motion for summary disposition in the trial court, plaintiff argued that summary disposition was premature because the arbitrator had just recently issued his award, and plaintiff was not yet able to obtain a full copy of the record of the arbitration. Plaintiff also asserted that he was entitled to summary disposition because the arbitrator determined that defendant's refusal to accommodate his disability violated the ADA and the principles of *res judicata* and collateral estoppel precluded defendant from relitigating that issue. Further, plaintiff argued that defendant waived its sovereign immunity defense to his ADA claim by voluntarily submitting "the identical issues" to arbitration.

The trial court granted defendant's motion for summary disposition in part and denied it in part. The court determined that discovery was necessary to determine whether defendant waived its sovereign immunity defense by participating in the arbitration. The court also granted plaintiff's oral motion to amend his complaint to add a Title II ADA claim. The trial court denied plaintiff's request for summary disposition on the basis that collateral estoppel and *res judicata* do not apply to arbitrations pursuant to CBAs. With respect to plaintiff's PWDCRA claim, the trial court denied summary disposition under MCR 2.116(C)(10), stating that plaintiff is entitled to discovery, but granted summary disposition under MCR 2.116(C)(8) on the basis that plaintiff failed to allege that he requested an accommodation in writing as required by MCL 37.1210(18). The court also granted plaintiff's oral motion to amend his complaint to assert such an allegation. Thus, in summary, the trial court denied summary disposition with respect to plaintiff's Title I ADA claim, granted summary disposition with respect to his PWDCRA claim, and allowed plaintiff to amend his complaint to assert a Title II ADA claim and reassert his PWDCRA claim. Only the trial court's denial of summary disposition with respect to plaintiff's Title I ADA claim is at issue in this appeal. The trial court's decision on that issue, being a denial of governmental immunity, was appealable as of right. MCR 7.203(A)(1); MCR 7.202(6)(a)(v); *Thurman v City of Pontiac*, 295 Mich App 381, 383 n 1; 819 NW2d 90 (2012).

We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(7) is properly granted if a claim is barred by immunity granted by law. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). When reviewing a motion for summary disposition under subrule (C)(7), "[w]e consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them."¹ *Id.*

The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

"Although by its terms the Amendment applies only to suits against a State by citizens of another State, [United States Supreme Court] cases have extended the Amendment's applicability to suits by citizens against their own States." *Bd of Trustees of the Univ of Alabama v Garrett*, 531 US 356, 363; 121 S Ct 955; 148 L Ed 2d 866 (2001). In addition, the Amendment precludes suits in both federal and state courts. *Alden v Maine*, 527 US 706, 712; 119 S Ct 2240; 144 L Ed 2d 636 (1999); *Pennhurst State Sch & Hosp v Halderman*, 465 US 89, 100; 104 S Ct 900; 79 L Ed 2d 67 (1984). A state's sovereign immunity, however, "is 'a personal privilege which it may waive at pleasure.'" *College Savings Bank v Florida Prepaid Postsecondary Ed Expense Bd*, 527 US 666, 675; 119 S Ct 2219; 144 L Ed 2d 605 (1999), quoting *Clark v Barnard*, 108 US 436, 447; 2 S Ct 878; 27 L Ed 780 (1883). Absent such a waiver or abrogation of immunity by Congress,² courts may not entertain a private citizen's suit against a state. *Virginia Office for Protection & Advocacy v Stewart*, ___ US ___; 131 S Ct 1632, 1638; 179 L Ed 2d 675 (2011). A waiver of sovereign immunity cannot arise by implication, but rather, must be "unequivocally expressed." *Fed Aviation Admin v Cooper*, ___ US ___; 132 S Ct 1441, 1448; 182 L Ed 2d 497 (2012); *Franconia Assoc v United States*, 536 US 129, 141; 122 S Ct 1993; 153 L Ed 2d 132 (2002).

In this case, the trial court erred by denying summary disposition for defendant because defendant did not unequivocally express an intent to waive its sovereign immunity with respect to plaintiff's Title I ADA claim by participating in the arbitration of plaintiff's grievance

¹ Although defendant concludes its brief by claiming that the trial court erred by denying its motion for summary disposition under both MCR 2.116(C)(7) and (C)(8), defendant fails to offer any argument pertaining to subrule (C)(8). Therefore, defendant has abandoned appellate review of that issue. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.")

² Congress has not abrogated a state's Eleventh Amendment immunity for claims brought under Title I of the ADA. *Bd of Trustees of the Univ of Alabama*, 531 US at 374 & n 9.

pursuant to the CBA. The parties engaged in arbitration of plaintiff's grievance pursuant to the CBA between the Office of the State Employer and plaintiff's union. The grievance alleged that defendant violated the CBA by refusing to accommodate plaintiff's disability, as required by the ADA. Defendant claimed that it did not violate the CBA because the ADA did not require it to accommodate plaintiff's disability. Plaintiff was represented by union representatives during the arbitration. Defendant's participation in the arbitration to resolve plaintiff's grievance did not constitute an unequivocal expression of intent to waive its sovereign immunity from being subject to suit in court. The limited purpose of the arbitration was to decide plaintiff's grievance, which alleged violation of the CBA. Plaintiff's separate Title I ADA claim had nothing to do with the CBA, and defendant's participation in arbitration of the grievance, pursuant to the CBA, was not an unequivocal expression of intent to waive sovereign immunity regarding the ADA claim. Such a conclusion mixes apples with oranges.

Our decision is consistent with *Arslanian v Oakwood Hosps (On Remand)*, 240 Mich App 540, 541, 550; 618 NW2d 380 (2000), in which this Court held that a previous arbitration proceeding pursuant to a CBA did not bar the plaintiff's claims of retaliatory discharge and sex discrimination under the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.* This Court reasoned that "because the union asserts control in the labor arbitration process and because the interests of the individual in enforcing statutory rights may be subordinated to the perceived greater interest of the bargaining unit, mandatory labor arbitration of civil rights claims is inappropriate." *Id.* at 550. This Court further stated that "the application of collateral estoppel and res judicata to [the] plaintiff's civil rights claims would effectively contravene this conclusion." *Id.* By the same token, a government defendant should not be held to have waived its sovereign immunity as a defense to a civil rights claim because it engaged in arbitration pursuant to a CBA.

We reverse the trial court's denial of summary disposition with respect to plaintiff's Title I ADA claim and remand for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane E. Beckering