STATE OF MICHIGAN

COURT OF APPEALS

ROBERT WHITE, M.D.,

Plaintiff-Appellant,

V

TRINITY HEALTH-MICHIGAN, d/b/a/ ST. JOSEPH MERCY HOSPITAL ANN ARBOR,

Defendant-Appellee.

UNPUBLISHED
February 16, 2006

No. 264451
Washtenaw Circuit Court
LC No. 04-000143-NO

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) as to plaintiff's disability and age discrimination claims. We affirm.

Plaintiff, who was a medical resident at defendant hospital, claims that he was discriminated against in violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq*., and the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., when he was terminated from defendant's residency program by defendant's failure to renew his contract for a third year.

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). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id*. A trial court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Greene v A P Products, Ltd*, 264 Mich App 391, 398; 691 NW2d 38 (2004). In ruling on a motion under MCR 2.116(C)(10), the trial court must view the pleadings, affidavits and other documentary evidence in a light most favorable to the nonmoving party. *Id*.

Plaintiff first argues that the trial court erred in granting summary disposition as to his disability discrimination claim because he presented sufficient evidence, both direct and circumstantial, that he had a disability as defined by the PWDCRA and that defendant terminated him from its program because of it. We disagree.

The PWDCRA prohibits an employer from discriminating against an employee because of a disability that is either unrelated or not directly related to his or her ability to perform the duties of a particular job or position. MCL 37.1202(1)(b); *Peden v Detroit*, 470 Mich 195, 203-204; 680 NW2d 857 (2004). Discrimination can be established by either direct or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Where a plaintiff offers direct evidence of discrimination, the plaintiff may proceed and prove the unlawful discrimination in the same manner as in any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Plaintiff contends in a one paragraph argument that he presented direct evidence of disability discrimination sufficient to survive defendant's motion for summary disposition. We conclude that plaintiff has abandoned his direct evidence argument due to his lack of citation to supporting authority and his cursory treatment of the argument. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Nevertheless, our Supreme Court has defined direct evidence as "'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazle*, *supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). Neither the Carman memo nor the unidentified documents relied on by plaintiff require the conclusion that unlawful discrimination was at least a motivating factor in plaintiff's termination.

Because plaintiff failed to present direct evidence of disability discrimination, to succeed as to this claim he must have presented sufficient circumstantial evidence to establish a prima facie case of disability discrimination. To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must show the following: "(1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute. *Peden*, *supra* at 204, quoting *Chmielewski v Xermac, Inc*., 457 Mich 593, 602; 580 NW2d 817 (1998).

MCL 37.1103(d) defines a disability 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) . . . substantially limits 1 or more of the major life activities of that individual and is unrelated[1] to the individual's ability to perform the duties of a particular job or position . . .
>
> * * *

[1] "'Unrelated to the individual's ability' means with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l)(i).

(iii) Being regarded as having [such a] determinable physical or mental characteristic described in subparagraph (i).

Thus, the PWDCRA only protects against discrimination based on disabilities, either mental or physical, that substantially limit a major life activity, but that do not prevent the disabled individual from performing his or her job duties. *Peden, supra* at 204.

Plaintiff failed to present sufficient evidence to establish a prima facie case of disability discrimination. Plaintiff's alternate theories of disability under the PWDCRA will be addressed in turn.

First, plaintiff argues that he is actually disabled under the PWDCRA. However, every impairment does not rise to the level of a disability under the PWDCRA. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 474; 606 NW2d 398 (1999). Rather, the impairment must meet the requirements of the statutory definition of a "disability." *Id*. To determine if a plaintiff has a disability under the PWDCRA this Court applies the following three-part test: (1) whether plaintiff's condition constitutes an impairment; (2) whether plaintiff identifies a major life activity affected by the impairment; and (3) whether the impairment substantially limited the major life activity as compared to the average person. *Chiles, supra* at 474-475, 476-479; *Lown v JJ Eaton Place*, 235 Mich App 721, 731; 598 NW2d 633 (1999).

Applying this three-part test to this case, while plaintiff has met the first two elements, we conclude that he cannot meet the third element of the disability test because he has not shown that his impairments substantially limit his ability to learn as compared to the average person. To the contrary, as the trial court correctly noted, plaintiff successfully completed both undergraduate and medical school without accommodations, he successfully served in the military, and he was able to work in private practice for five years before entering defendant's residency program. Therefore, plaintiff did not present evidence that he was actually disabled because he did not show that his impairments substantially limited his ability to learn.

Plaintiff argues in the alternative that he was regarded as disabled by defendant. A plaintiff need not actually be disabled to be protected by the PWDCRA. *Chiles, supra* at 475. Rather, a plaintiff who is not actually disabled may proceed under a theory that he was "regarded as disabled" by showing that the employer perceived that he or she was actually disabled under the PWDCRA. *Id*. However, showing that an employer believed that a plaintiff was impaired is not enough. *Id*. Rather, the plaintiff "must adduce evidence that [the] defendant regarded the plaintiff as having an impairment that substantially limited a major life activity – just as with an actual disability." *Id*., citing *Murphy v UPS, Inc*, 527 US 516; 119 S Ct 2133; 144 L Ed 2d 484 (1999); *Colwell v Suffolk Co Police Dep't*, 158 F3d 635, 646 (CA 2, 1998); MCL 37.1103(d)(1)(A). Here, we conclude that the evidence relied on by plaintiff does not support a conclusion that defendant regarded him as disabled. While defendant may have believed that plaintiff was unable to fulfill the requirements of its residency program because of his impairments, there is no evidence to support a conclusion that defendant believed that plaintiff's impairments substantially limited his ability to learn.

But even if plaintiff could show that he had an actual disability or that he was regarded as disabled by defendant, plaintiff still cannot satisfy the disability definition under the PWDCRA

because his impairments are related to his ability to perform his duties as a medical resident. Therefore, we conclude that the trial court did not err in granting summary disposition as to plaintiff's disability discrimination claim under the PWDCRA because he is not disabled as defined by the act.

Next, plaintiff contends that the trial court erred in dismissing his accommodation claim under the PWDCRA because defendant failed to accommodate his disability. However, because plaintiff is not disabled under the PWDCRA, defendant had no duty to accommodate him and his accommodation claim fails. *Harris v Borman's, Inc*, 170 Mich App 836, 839-840; 428 NW2d 790 (1988).

Finally, we reject plaintiff's argument that the trial court erred in dismissing his age discrimination claim under the ELCRA. The ELCRA, MCL 37.2202, et seq., prohibits discrimination in the workplace. MCL 37.2202(1)(a) states in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A plaintiff may bring a claim under the ELCRA based on disparate treatment or disparate impact discrimination because of any of the above-protected classes. *Wilcoxon v Minnesota Mining and Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). A disparate treatment claim is a claim for intentional discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Either direct evidence of discrimination or indirect or circumstantial evidence of discrimination can be used to prove a disparate treatment case. *Sniecinski, supra* at 132.

Plaintiff contends that he presented sufficient direct evidence of age discrimination to survive defendant's motion for summary disposition. To support his contention, he refers this Court to remarks made by the director of defendant's residency program regarding his age. However, we conclude that these remarks are not direct evidence of age discrimination because the director's remarks were not made in connection with her decision not to allow plaintiff to advance to being a third-year resident, but were made some time thereafter. These remarks can create no more than an inference that the director was motivated by discriminatory animus, a reasoning process inconsistent with the definition of direct evidence in discrimination cases, see, e.g., *Sniecinski, supra* at 132-133, and therefore, the remarks do not, in and of themselves, require a conclusion that unlawful discrimination was at least a motivating factor in defendant's decision to terminate plaintiff from its program. *Hazle, supra* at 462.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis