STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY WAYNE MILLER, Plaintiff-Appellee,	UNPUBLISHED January 11, 2002
v	No. 222439 Ingham Circuit Court
DEPARTMENT OF CORRECTIONS, Defendant-Appellant.	LC No. 98-087928-NZ

Before: K. F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted from the trial court's denial of its motion for summary disposition of plaintiff's employment discrimination claim under the Persons with Disabilities Civil Rights Act (PWDCRA),[1] MCL 37.1101 *et seq.* We reverse.

In July 1994, plaintiff injured his ankle while working as a Resident Unit Officer at the Oaks Correctional Facility. X-rays revealed an ankle fracture, and plaintiff began a lengthy course of treatment including two arthroscopic procedures. Plaintiff did not work again until December 1, 1994. Plaintiff returned to work under his doctor's restriction of "no continuous walking, no running, must be able to sit." Defendant assigned plaintiff to light-duty positions, such as information desk, bubble, and gun towers, pursuant to defendant's policy of placing temporarily disabled or ill officers in these positions until they are able to return to full duty. Plaintiff returned to full duty in January 1995.

On March 10, 1995, plaintiff injured his ankle again and took another leave from work. In June 1995, plaintiff asked defendant to return him to work in a sedentary position. Defendant denied plaintiff's request. According to defendant, plaintiff was told that no such positions were available and that even light-duty assignments involved limited walking.

[1] At the time plaintiff filed his complaint, the statute was known as "The Handicappers Civil Rights Act." The Legislature has since renamed the statute "The Persons with Disabilities Civil Rights Act" and has replaced the terms "handicap" and "handicapper" with "disability" and "person with a disability" respectively. See 1998 PA 20. We refer to the statute using the current terminology.

In October 1995, defendant notified plaintiff that he had exhausted the standard fifty-week leave available for worker's compensation cases. He was advised that his medical leave of absence would not be extended beyond November 1995 and that if he were unable to return to work by the specified date or obtain an approved "waived rights leave" by the same date, his employment would be terminated.[2] Plaintiff's doctors continued to restrict him to sedentary work. Defendant terminated plaintiff's employment on December 6, 1995.

Plaintiff brought this action alleging that defendant terminated his employment in violation of the PWDCRA. Plaintiff asserted that defendant failed to accommodate him, and that with the requested accommodation of sedentary work, he was capable of performing the duties of a corrections officer. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Defendant argued that plaintiff was unable to perform the essential functions of the position and therefore he was not disabled as defined by the PWDCRA. Defendant maintained that it had no duty to accommodate plaintiff, and that the requested accommodation of sedentary work was unreasonable. Defendant also argued that plaintiff's inability to perform the full range of duties of a corrections officer presented a safety risk and thus was not unrelated to his ability to do the job.

The trial court denied defendant's motion for summary disposition. The court concluded that plaintiff had shown a genuine issue of material fact on the question whether he was disabled under the PWDCRA. The court rejected defendant's argument that plaintiff's condition was not unrelated to his ability to perform the duties of a corrections officer. In doing so, the court expressly adopted the reasoning of *Miller v State of Michigan Department of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 1995, (Docket No. 158425). Additionally, the court stated that defendant had presented no evidence that accommodating plaintiff would work an undue hardship on defendant and further noted defendant's policy directives requiring it to provide reasonable accommodation.

The trial court's analysis extended beyond the pleadings and focused on the documentary evidence submitted by the parties. Accordingly, we review the denial of summary disposition pursuant to MCR 2.116(C)(10). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Review of the trial court's denial of defendant's motion for summary disposition under MCR 2.116(C)(10) requires this Court to determine whether the trial court properly found that a factual record could be developed supporting plaintiff's claim. *Spiek, supra* at 337. In making this determination, this Court conducts a de novo review of the pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties and draws all reasonable inferences in favor of the nonmoving party. *Michalski v Bar-Levav*, 463 Mich 723, 729-730; 625 NW2d 754 (2001). "The motion is properly granted if the documentary evidence presented

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[2] Plaintiff explains in his brief in response to defendant's motion for summary disposition that a "waived rights leave of absence" would not guarantee his job, but would guarantee his seniority rights in the event that plaintiff did return to work within an approved time frame. According to the affidavit of Grant Larsen, defendant's personnel director at the Oaks Correctional Facility, plaintiff did not follow the proper procedure to obtain a waived rights leave of absence.

shows that there is no genuine issue with respect to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Id.* at 730.

The PWDCRA prohibits an employer from discharging or otherwise discriminating against a person with regard to employment because of a disability unrelated to the person's ability to perform the duties of a particular job or position. MCL 37.1201(b); MCL 37.1202(b); *Chmielewski v Xermac, Inc*, 457 Mich 593, 601-602; 580 NW2d 817 (1998). To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must show that (1) he has a disability as defined by the statute; (2) the disability is unrelated to his ability to perform the duties of his job; and (3) he was discriminated against because of his disability in one of the ways prohibited by the PWDCRA. *Michalski, supra* at 730.

We begin our analysis by addressing the threshold question whether plaintiff is disabled as defined by the statute. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). The PWDCRA defines "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:
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> (A) For purposes of article 2 [employment discrimination], 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 or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> (ii) A history of a determinable physical or mental characteristic described in subparagraph (i).
>
> iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [MCL 37.1103(e); *Chmielewski, supra* at 602-603.]

"'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). Our Supreme Court has interpreted the Legislature's use of the language "to perform the duties of a particular job or position" as intending "the inquiry to focus on the job for which plaintiff was originally hired." *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 34-35; 580 NW2d 397 (1998).

Plaintiff bears the initial burden of proving that the accommodation he requested would enable him to perform the functions of his job. MCL 37.1103(l)(i); *Rourk, supra* at 28. Plaintiff requested an accommodation of sedentary work consistent with his doctor's restrictions. Plaintiff contends that defendant could reasonably accommodate him if he were not required to fill certain assignments within the ordinary job rotation that would require him to walk, run, and climb stairs. Plaintiff argues that he is capable of performing several assignments, such as working in

the control center, the gun tower, the bubble, "or any position that allows him to stay off his ankle."

It is evident from the description of the corrections officer position and the affidavit of Grant Larsen, defendant's personnel director, that these specific duties are not distinct permanent positions. Rather they are among the many duties that comprise the position of corrections officer. Defendant requires employees to be able to function in any assignment and it is defendant's practice to rotate individuals among several general duty areas. According to the job description, the corrections officer position encompasses many duty assignments and involves "[s]itting, walking, running, lifting, bending, carrying and climbing." The "accommodation" plaintiff seeks is the elimination of certain responsibilities from the position. Plaintiff has not offered evidence to show that with the accommodation of sedentary work he is able to perform the duties of a corrections officer. The evidence leaves no question of fact that plaintiff's restriction to sedentary work makes him unable to fulfill all the physical requirements of the position and unable to perform all the required duties.

Although not addressed by the trial court, defendant argued below that plaintiff's restriction to sedentary work poses a safety risk. This court has recognized that where the job involves public safety, such safety concerns may be considered in determining whether a person's impairment is related to the person's ability to perform the duties of a particular job. *Dauten v Muskegon Co*, 128 Mich App 435, 438; 340 NW2d 117 (1983). In *Dauten*, the trial court concluded that the plaintiff's history of back problems was not unrelated to her ability to perform the duties of a lifeguard. This Court affirmed the trial court's ruling that the potential that her condition could compromise public safety in a life-threatening situation justified the conclusion that that her impairment was not unrelated to her ability to perform the duties required of a lifeguard. *Id.* at 438. See also *Szymczak v American Seating*, 204 Mich App 255, 257; 514 NW2d 251 (1994) ("[A] handicap that prevents someone from doing a job with due regard for the safety of himself and others is a handicap that is related to the ability to perform that job.").

The essential function of a corrections officer is to provide security. Defendant's personnel director at the Oaks Correctional Facility, Grant Larsen, likened the function of a corrections officer to that of a police officer. Larsen's affidavit as well as the job description clearly indicate that a corrections officer must be able to respond in any emergency situation and may be given any work assignment as the needs of the facility dictate. Plaintiff testified at deposition that a corrections officer must be able to diffuse tense situations and be skilled in self-defense. Clearly, performance of the duties of a corrections officer necessarily implicates significant safety and security concerns.

Federal courts that have addressed this issue in the context of the federal Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, have recognized that the position of a corrections officer involves rotation among several different positions and that of primary import is an employee's ability to perform the duties required of each position. See, e.g., *Miller v Illinois Dep't of Corrections*, 107 F3d 483, 485 (CA 7, 1997) (corrections officers must be able to perform duties of each position so that adequate staffing is ensured in cases of unexpected demands of the facility); *Allison v Dep't of Corrections*, 94 F3d 494, 498-499 (CA 8, 1996) (corrections officers must be able to transfer among different posts and potential for emergency

situations requires ability to physically restrain inmates); *Pickering v Atlanta*, 75 F Supp 2d 1374, 1378 (ND Ga, 1999) (inmate supervision and the subsequent risks are an essential function of a corrections officer's job and employee must be able to perform essential functions), aff'd 235 F2d 1344 (CA 11, 2000). In *Frazier v Simmons*, 254 F3d 1247 (CA 10, 2001), the Tenth Circuit addressed similar facts and rejected the plaintiff's argument that responding to emergencies is an infrequent occurrence:

> [T]he very reason a corrections officer position exists is to provide safety and security to the public, as well as to [prison] employees and inmates; as such, the ability to provide safety and security, including the ability to respond without hesitation or limitation in an emergency is absolutely inherent to that position. . . . Likewise, [plaintiff] would submit that continuous running and the physical restraint of violent inmates without assistance is not an everyday occurrence. . . . *However, we believe that the potentially dire consequences of not requiring a corrections officer to have those capabilities (even if exercised only occasionally) underscores their importance.* [*Frazier, supra* at 1258-1259, quoting *Martin v Kansas*, 190 F3d 1120, 1132 (CA 10, 1999), overruled on other grounds, *Bd of Trustees of Univ of Ala v Garrett*, 531 US 356; 121 S Ct 955; 148 L Ed 2d 866 (2001) (emphasis added).]

In view of the safety concerns inherent in the position of a corrections officer, the ability to function in all duty assignments is central to the position.

In the case at bar, the issue whether plaintiff's impairment is unrelated to his ability to perform the duties of a corrections officer is a factual question. However, where the evidence presented leaves no genuine issue of material fact, the court may enter judgment as a matter of law. *Michalski*, *supra* at 730. Defendant presented evidence that a corrections officer's ability to perform all duty assignments is an integral part of the corrections officer position. Plaintiff's restriction to sedentary work makes him unable to perform in all of the capacities required of a corrections officer. Plaintiff even admitted in his deposition that a permanent light-duty work assignment would be unreasonable. Viewing the evidence in the light most favorable to plaintiff, we conclude as a matter of law that plaintiff's physical limitation is not unrelated to his ability to perform the duties of a corrections officer. Accordingly, defendant is entitled to summary disposition.

In light of our conclusion that the trial court erroneously denied defendant's motion for summary disposition, we need not address defendant's second argument on appeal regarding limitation of damages.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot

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DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

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No. 222439
Ingham Circuit Court
LC No. 98-087928

Before: K. F. Kelly, P. J., and White and Talbot, JJ.

WHITE, J. (*concurring*).

On the record before us, I agree that the circuit court erred in denying summary disposition. Defendant submitted a job description setting forth the duties of the corrections officer E-9 position. It also submitted the affidavit of Grant Larsen, the Personnel Director at the Oaks Correctional Facility. These submissions stated that the position required that the officer perform, on a regular basis, a broad range of activities, including activities inconsistent with plaintiff's sedentary restriction. These documents also established that the light-duty assignments identified by plaintiff were not separate positions, but, rather, were regular corrections officer assignments that were identified as being less physically demanding than other assignments, and that these assignments were made available to injured employees on a temporary basis. Plaintiff submitted no evidence tending to show that the light-duty assignments identified by him were, in fact, treated as separate positions, that corrections officers in his classification were not regularly and routinely required to perform a broad range of non-sedentary functions, or that corrections officers were assigned on a long-term or permanent basis to any of the positions he could perform. Nor did plaintiff provide evidence that the classification description or requirements were unreasonable or contrived. Under these circumstances, I agree that defendant was entitled to summary disposition.

/s/ Helene N. White

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Before: K. F. Kelly P.J., and White and Talbot, JJ.

K. F. Kelly, P.J. (dissenting).

I respectfully dissent. Because I believe that plaintiff put forth sufficient evidence to establish that he is "a person with a disability" as that term is defined within the statute, and that there are genuine factual issues regarding whether accommodating plaintiff's disability would place an undue hardship upon the institution, I would affirm the trial court and deny defendant's motion for summary disposition.

For purposes of the PWDCRA, "disability" is defined as:

> (i) A determinable physical . . . characteristic of an individual, which may result from . . . injury . . . if the characteristic:
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> (A) for purposes of [employment discrimination] 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 positio*n . . . . MCL 37.1103(d)(i)(A)[1]. (Emphasis added.)

"Unrelated to the individual's ability" is the operative language in MCL 37.1103(d)(i)(A) and designates those disabilities that "with or without accommodation . . . [do] not prevent the individual from []performing the duties of a particular job." MCL 37.1103(l)(i). In *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 31; 580 NW2d 397 (1998), our Supreme Court stated that the "with our without accommodation" qualification "lowers the threshold of proof of a [disability]" and "*guarantees* that an individual

[1] Before 1998 PA 20, which rewrote this particular section, the quoted provision appeared at MCL 37.1103(e)(i)(A).

otherwise qualified for a particular position *is entitled* to some accommodation if needed." (Emphasis added.)

Where an individual qualifies as a "person with a disability" for purpose of the act, then an affirmative duty arises requiring an employer to accommodate that person "unless the accommodation would impose an undue hardship." See MCL 37.1102(2).

As an initial matter, I would find that plaintiff qualifies as a person with a disability as that term is defined by the PWDCRA. The evidence available on the record indicates that the injury plaintiff sustained to his ankle substantially impairs plaintiff's ability to ambulate which is considered a "major life activity" for purposes of the act. See *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996) (citing with approval the administrative regulations to the federal ADA and the Rehabilitation Act which specifies walking as a "major life activity" for purposes of those acts.)

The issue then becomes whether plaintiff's inability to ambulate is related to his ability to perform the duties of a corrections officer. Relative to plaintiff's employment, plaintiff's disability confines him to a sit down or sedentary job only. According to plaintiff, with this "accommodation" he could perform his assignment. Consequently, to accommodate plaintiff's disability, defendant must provide plaintiff with an assignment allowing plaintiff to remain sedentary, "unless the accommodation would impose an undue hardship." See MCL 37.1102(2); *Hall v Hackley Hosp*, 210 Mich App 48, 54; 532 NW2d 893 (1995). If the accommodation required poses an undue hardship upon defendant, then the accommodation is not "reasonable" thereby obviating defendant's duty in this regard.

In the case at bar, the evidence submitted establishes that after plaintiff's initial injury, plaintiff returned to work under a "no continuous walking, no running, must be able to sit" restriction. To accommodate plaintiff's medical limitations, defendant provided plaintiff with various light-duty assignments. However, when plaintiff re-injured his ankle and returned to work with a more onerous, "sedentary only" job restriction, defendant refused to accommodate stating that there were no jobs available for plaintiff respecting plaintiff's restriction as even light-duty assignments require limited amounts of walking. Accordingly, defendant terminated plaintiff's employment.

A review of plaintiff's deposition reveals that there are at least two positions within plaintiff's classification, gun tower and bubble officer, that, according to plaintiff, would accommodate plaintiff's sedentary only restriction considering that neither of these positions would require him to respond to a duress and would otherwise allow him to circumvent strain on his ankle. While it is clear that an employer's duty to accommodate does not require "recreating the position, adjusting or modifying the job duties otherwise required by the job description, or placing the plaintiff in another position," *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 16; 618 NW2d 56 (2000), whether permanently placing plaintiff in one of these two positions is a "reasonable accommodation" that would not otherwise impose an "undue hardship" upon defendant, are factual inquiries properly resolved by the trier of fact. Indeed, whether defendant breached its affirmative duty to make reasonable accommodations turns on whether the

requisite accommodations impose an "undue hardship" upon defendant. See *Collins v Blue Cross Shield of Michigan*, 228 Mich App 560, 573; 579 NW2d 435 (1998).

The record in the case *sub judice* is devoid of evidence establishing that accommodating plaintiff's sedentary only restriction would cause defendant undue hardship especially considering that defendant accommodated plaintiff in the past. While the affidavits submitted by defendant in support of its motion for summary disposition establish that no employee has ever received permanent light duty assignments, there is not a scintilla of evidence presented demonstrating that to do so would impose an undue hardship upon defendant thereby vitiating defendant's statutory duty to make reasonable accommodations.

It very well may be that a trier of fact will conclude that plaintiff's disability along with the requested accommodations are fundamentally incompatible with the very nature of plaintiff's position as a corrections officer. Indeed, it may not be possible for defendant to accommodate plaintiff's sedentary only restriction without compromising the internal safety of the institution itself thus potentially placing the public at risk. However, these concerns, in light of defendant's ability to accommodate plaintiff in the past, create genuine factual issues relative to whether plaintiff's employment restrictions coupled with the degree of accommodation required places an *undue hardship* upon defendant thereby obviating defendant's duty to provide "reasonable accommodations."

Consequently, the ultimate resolution of these issues properly lies within the sole province of the finder of fact and cannot be determined summarily as a matter of law. I would thus affirm the trial court's decision denying defendant's motion for summary disposition and permit the matter to proceed to trial and ultimate resolution.

/s/ Kirsten Frank Kelly