STATE OF MICHIGAN

COURT OF APPEALS

CHARISA WILLIAMS, Plaintiff-Appellee,	UNPUBLISHED July 21, 2015
v	No. 321459 Wayne Circuit Court
DEPARTMENT OF CORRECTIONS, Defendant-Appellant.	LC No. 12-010927-CZ

Before: FORT HOOD, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant, the Michigan Department of Corrections (MDOC), appeals by leave granted[1] the trial court order denying its motion for summary disposition in this action under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. Plaintiff, a corrections officer employed at defendant's Special Alternative Incarceration (SAI) facility, sued for discrimination based on her kidney disability. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiff began working for the MDOC in September 2003, as a corrections officer, E-8 classification, at Western Wayne Correctional Facility. However, she had a kidney transplant on May 8, 2004, and, as a result, she stopped working for defendant on August 5, 2004.[2]

Defendant then rehired her in December 2005, as a corrections officer, E-8 classification, at its Brighton facility. Unfortunately, appellee's medical problems persisted, and she took various times off from work through medical leave.[3] Plaintiff eventually returned to work on

[1] *Williams v Dep't of Corrections*, unpublished order of the Court of Appeals, entered June 2, 2014(Docket No. 321459).

[2] She filed a grievance based on the end of her employment, although she received notification that no violation had been proven.

[3] She also took time off from work through stress leave, due to an unrelated incident involving a grievance she filed in 2008 wherein she claimed another employee touched her buttocks.

August 18, 2008, with no restrictions. Her work performance was, by and large, satisfactory, and she eventually reached the E-9 classification.

Plaintiff then applied to work at the SAI facility on December 14, 2008. As plaintiff testified, the SAI facility was different from other facilities, as it was more like a boot camp and involved running and marching the prisoners. Jack Clore, who at one time was an assistant deputy warden at SAI, testified that many of the supervisors were very active in the physical exercise with the prisoners, and there were very few duties that were light. Frederic Goff, who at one time was a deputy warden at SAI, likewise testified that SAI staff participate in calisthenics with the prisoners.

Plaintiff next received a urethra implantation in December 2009, with a recovery time of six to eight weeks. Then, in July 2010, she requested to be placed on light-duty assignments or to be transferred from SAI to a position at defendant's Mound Correctional Facility. Plaintiff submitted a doctor's note, advising that because of her medical condition she was to abstain from "strenuous exercise & stressful situations,"

On July 28, 2010, defendant sent plaintiff a letter informing her that she had exhausted her entitlement under the Family and Medical Leave Act (FMLA), her six months of sick leave, and her eligibility for light-duty assignments. Thus, plaintiff was given a choice of providing a release from her doctor and allowing her to return to her regular work duties, or requesting a waived rights leave of absence. Plaintiff submitted a second doctor's note, stating she was scheduled for a procedure on September 8th, and should be exempted from "prolonged regular calisthenics" although it was not a permanent restriction. Defendant then "separated" plaintiff from her employment on August 4, 2010.

On August 16, 2012, plaintiff filed this action against defendant, alleging a violation of the PWDCRA. Defendant eventually sought summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff failed to prove the prima facie case because her disability was not unrelated to, and did affect, her ability to perform her job. Defendant also argued that neither of the requested accommodations—light-duty assignments or a transfer—were reasonable under Michigan law. The trial court found there were genuine issues of material fact, and denied defendant's motion. Defendant now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence

submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. RELATED TO ABILITY TO PERFORM JOB

Defendant first contends that the trial court erred in denying its motion for summary disposition because plaintiff's disability was not unrelated to her ability to perform her job. We agree.

The PWDCRA prohibits discrimination against individuals due to their disability status. *Peden v Detroit*, 470 Mich 195, 203; 680 NW2d 857 (2004). "The purpose of the act is to mandate the employment of the handicapped to the fullest extent reasonably possible." *Id.* (quotation marks and citation omitted). To that end, pursuant to MCL 37.1202(1)(a)-(e), "an employer shall refrain from taking any of a number of adverse employment actions against an individual because of a disability . . . that is unrelated [or not directly related] to the individual's ability to perform the duties or a particular job or position." *Id.* at 203-204 (quotation marks and citation omitted).

Under the act, the moving party bears the burden of proof and must establish the following elements: (1) that she is disabled as defined in the act; (2) that her disability is unrelated to her ability to perform her job duties; and (3) that she has been discriminated against in one of the ways delineated in the statute. *Id.* at 204.

A disability is defined in MCL 37.1103(d) as: (*i*) a determinable physical or mental characteristic of an individual if the characteristic: (A) 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; (*ii*) a history of such a determinable physical or mental characteristic; or (*iii*) being regarded as having such a determinable physical or mental characteristic. 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*). Thus, "the PWDCRA generally protects only against discrimination based on physical or mental disabilities that substantially limit a major life activity of the disabled individual, but that, with or without accommodation, do not prevent the disabled individual from performing the duties of a particular job." *Peden*, 470 Mich at 204.

With respect to employment, the issue in this case, the PWDCRA provides that an employer shall not "[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). See also *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). If the plaintiff succeeds in presenting a prima facie case of purposeful discrimination, the burden then shifts to the defendant to rebut that evidence. *Peden*, 470 Mich at 205.

In this case, the parties agree that plaintiff is disabled as that term is defined under the statute. Thus, the first prong of the prima facie case has been met. However, the parties do not agree regarding the second prong, namely, that plaintiff's disability is unrelated to her ability to perform her job duties. *Peden*, 470 Mich at 204. As our Supreme Court has recognized, a plaintiff alleging a violation of the PWDCRA "must show that [s]he is able, with or without accommodation, to perform these functions; otherwise, [s]he may not proceed on a claim under" the PWDCR. *Id.* at 205-206. "If plaintiff shows that [s]he is able to perform the essential functions of the position, [s]he may proceed to demonstrate that the department discriminated against [her] in one of the ways set forth in the acts." *Id.*

However, the PWDCRA does not provide specific guidelines detailing the precise duties of any particular job. *Id.* at 217. Instead, "the customary responsibilities of the employer in defining the scope of job positions are unaffected by the act and . . . the judgment of the employer in terms of such scope is entitled to substantial deference by the courts under the PWDCRA." *Id.* at 217-218. We are mindful that the PWDCRA is an anti-discrimination statute, and "is not a statute designed to regulate, or to set governmental standards for, particular employment positions . . . . Nor is it a statute designed to enable judges to second-guess, or to improve upon, the business judgments of employers." *Id.* at 218. Thus, "the judgment of the employer regarding the duties of a given job position is entitled to substantial deference." *Id.* "In such circumstances, the plaintiff must prove that [s]he can, with or without accommodation, perform those duties." *Id.* at 219; MCL 37.1103(*l*)(*i*).

Here, defendant contends that plaintiff's disability prevents her from performing the essential functions of her job, and her disability is related to her ability to perform her job as a SAI corporal. Defendant argues that the trial court erred in conflating the job responsibilities of a regular corrections officer with that of a SAI corporal, and that only the latter position was relevant because that was the position plaintiff held at the time of the alleged discrimination.

The trial court found that plaintiff claimed "she is able to perform the essential duties of a typical corrections officer." The court further opined:

> [I]t is reasonable to assume that Plaintiff performed ably as a corrections officer as indicated by the fact that she was rehired after her kidney transplant. As to the essential duties of a corrections officer and an officer in the SAI program, there is a question of fact. Defendant presents to this Court no specific list of essential functions required in the duties of a corrections officer or an officer in the SAI program. Defendant merely cites Plaintiff's deposition testimony as evidence of the requirements of the job. Hence, there is a question of fact as to the essential functions of the job at issue. . . . [T]here is a question of fact as to whether or not her condition is unrelated to her abilities to perform her job, with or without accommodation.

The court further held that plaintiff's employment history creates a genuine issue of material fact regarding whether she is able to perform her job well, with or without accommodation, in the capacity of a typical corrections officer.

The trial court is correct that defendant did not present the court with a list of essential job functions of an SAI corporal. However, what the trial court failed to consider is that the key job function at issue—calisthenics—is not disputed. Plaintiff testified about the strenuous physical activity and intensity required of a SAI corporal, which is intricately connected with its boot camp environment. She explained: "You run at this facility. You march the prisoners." Clore likewise averred that the SAI program differs greatly from conventional correctional facilities and that many of the SAI staff were very active in the physical exercise with the prisoners. Goff likewise testified that the supervisors at the facility participate in calisthenics, as they run with and march the prisoners. Further, Leontyne Hines, a regional human resources manager at the MDOC, testified that for corrections workers at the SAI compound, there was a component of strenuous physical activity.

Thus, there is no genuine issue of material fact regarding whether the SAI position required physical activity connected with running and training the prisoners. Nor is there a genuine issue of material fact that plaintiff could not perform that job function. In fact, that was precisely the activity from which plaintiff requested to be relieved. The first doctor's note stated an advisory that plaintiff abstain from strenuous exercise and stressful situations. The second note requested that she be exempt from prolonged regular calisthenics, although not on a permanent basis. Plaintiff testified that her doctor's second note clarified that she could work, but just not run and exercise.

Plaintiff does not suggest that her job at the SAI facility might include other essential functions. Nor does she argue that the strenuous physical activities are not essential functions of the job of an SAI corporal. Moreover, as noted *supra*, when determining the essential functions of a job, courts defer to the employer's judgment, *Peden*, 470 Mich at 219, and "[a]n employee is qualified if he was performing his job at a level that met the employer's legitimate expectations[,]" *Town v Michigan Bell Tel Co*, 455 Mich 688, 699; 568 NW2d 64 (1997). See, e.g., *Peden*, 470 Mich at 221 ("[T]here was never a question that plaintiff's [condition] prevented him from performing the full range of duties normally required of police officers."). See also *Szymczak v American Seating Co*, 204 Mich App 255, 257; 514 NW2d 251 (1994); *Dauten v Muskegon Co*, 128 Mich App 435, 438; 340 NW2d 117 (1983). Although plaintiff and the trial court relied heavily on plaintiff's work history, that is of little relevance considering her current medical restriction prevents her from performing required tasks of her job in the SAI position.

The trial court also erred in focusing on corrections officers at large. The proper inquiry is not whether plaintiff could perform the duties of any job at all, such as a general corrections officer, but whether she could perform "*the* duties of a *particular* job or position." MCL 37.1103(*l*)(*i*) (emphasis added). As noted *supra*, the definition of disability is that a plaintiff's condition must be "unrelated to the individual's qualifications for employment or promotion." MCL 37.1103(d)(*i*)(A). "The qualifications of employees or applicants for a job is a fact-specific inquiry that is driven by the specific job for which they were hired." *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 34; 580 NW2d 397 (1998). See *Peden*, 470 Mich at 206 n 9 ("[T]he mere fact that a disabled person can perform 'some' job is not relevant; rather, [s]he must be able

to perform *the* job [s]he held or sought at the time the alleged PWDCRA violation occurred[.]") (Emphasis in original)).[4]

The job plaintiff held at the time of the alleged discrimination was that of a SAI corporal. "[T]he facts unequivocally demonstrate plaintiff could not perform the acts required for the" SAI position. *Kerns v Dura Mech Components, Inc*, 242 Mich App 1, 17; 618 NW2d 56 (2000). See MCL 37.1103(*l*)(*i*) (A disability is related to a person's ability to perform the job if, with or without accommodation, it prevents that individual from "performing the duties of a particular job or position."). We recognize that "there are certainly jobs that persons with" plaintiff's medical condition "could perform." See *Petzold v Borman's, Inc*, 241 Mich App 707, 714; 617 NW2d 394 (2000). However, plaintiff's condition renders her "unqualified to perform this particular job," which required such high intensity calisthenics. See *id.*

Because there is no genuine issue of material fact regarding this second prong of the prima facie case, the trial court erred in denying defendant's motion for summary disposition.

C. ACCOMMODATION

Defendant also contends that the trial court erred in denying its motion for summary disposition with regard to plaintiff's failure to accommodate claim. We agree.

Pursuant to MCL 37.1102(2), "[A] person shall accommodate a person with a disability for purposes of employment . . . unless the person demonstrates that the accommodation would impose an undue hardship." Thus, "[u]nder the PWDCRA, the plaintiff must prove that the defendant has failed to accommodate the disability. MCL 37.1210(1)." *Buck v Thomas M Cooley Law Sch*, 272 Mich App 93, 101-102; 725 NW2d 485 (2006). If the plaintiff meets this burden, the burden then shifts to the employer to demonstrate that it cannot reasonably accommodate the plaintiff without undue hardship. *Rourk*, 458 Mich at 28; MCL 37.1210.

Plaintiff contends that she could perform the essential functions of an ordinary corrections officer, and that defendant should have accommodated her by placing her on light-duty work or reassigning her to a position of an ordinary corrections officer. The trial court found that plaintiff's employment history created a genuine issue of material fact regarding whether she could perform the job of an ordinary corrections officer. The court also found that defendant failed to present any documentary evidence explaining why placing plaintiff in a "non paramilitary facility would pose an undue hardship on it, particularly in light of the fact that Plaintiff required no training and nor would she have to be trained for a new skill set to be placed there." The trial court took note of plaintiff's evidence that transfers and light-duty assignments occurred and that defendant presented no evidence of filled positions.

[4] "If 'a particular job or position' in this context meant 'any particular job or position,' it would remove the relevance of an employee's qualifications to hiring, recruiting, or promotion and would render impossible the task of setting objective compensation structures." *Rourk*, 458 Mich at 35.

Plaintiff first asserts that defendant could have accommodated her through placing her on light-duty assignments.[5] Yet, defendant had accommodated plaintiff in this regard throughout her illness. In the July 28, 2010 letter, defendant informed plaintiff that she had exhausted her entitlement to six months leave under the FMLA, and her entitlement to light-duty assignments. In its letter to the EEOC, defendant revealed that plaintiff had worked on light-duty assignments for six weeks, which was a form of accommodation. Plaintiff testified that she was given light-duty assignments for four to six months, although she could not remember during what time period that occurred.

Nor would the imposition of additional light-duty assignments, for an indeterminate length of time, constitute an accommodation defendant was obliged to offer. "An employer . . . has no duty to accommodate the plaintiff by recreating the position, adjusting or modifying job duties otherwise required by the job description, or placing the plaintiff in another position." *Kerns*, 242 Mich App at 16. Goff testified to the limited availability of lighter duty assignments at the SAI facility. Hines testified that working only in a light-duty capacity would render plaintiff unable to be functioning fully at the SAI facility. In other words, this so-called accommodation would be a modification of the core nature of the SAI job, and an employer is not required to recreate the position or adjust or modify job duties. *Kerns*, 242 Mich App at 16. Although MCL 37.1210(15) references job restructuring and altering the schedule of employees, it refers only to "minor or infrequent duties relating to the particular job held by the person with a disability." Here, the requested "accommodation" plaintiff seeks is the elimination of essential responsibilities of the position, which is not an accommodation defendant is legally obligated to offer. *Kerns*, 242 Mich App at 16.

Plaintiff also contends that defendant should have accommodated her by transferring her to an open position as an ordinary corrections officer. However, "the duty to accommodate does not extend to new job placement or transfers to other positions." *Tranker v Figgie Intern, Inc*, 231 Mich App 115, 124; 585 NW2d 337 (1998). In *Rourk*, 458 Mich at 30, 32, 33, the Michigan Supreme Court held that the duty to accommodate under the PWDCRA (then known as the Handicappers' Civil Rights Act (HCRA)), did not include a duty to transfer an employee with a disability in that case to another position. The Court noted that MCL 37.1202(1) prohibits employers from discrimination against employees based on disabilities that are "unrelated to the [employee's] ability to perform the duties of a particular job or position." *Id.* at 35. The Court explained its reasoning as follows:

> We find it would be illogical to conclude that plaintiff is handicapped or is entitled to a job transfer under the HCRA because she is qualified to perform another position despite her physical restrictions. To disassociate employee

[5] It is not clear from plaintiff's brief at what facility these "light duty assignments" were available. Goff testified that at SAI, technically, there were no assignments classified as light duty, but there were some assignments of a lighter nature. Because transfers to a different facility will be discussed *infra*, for purposes of this argument, we will assume plaintiff is referring to this type of lighter duty assignments at the SAI facility.

> qualifications from the jobs for which they were hired or for which they are a being considered would effectively bind employers permanently to their employees. Even when an employee is unable to perform the duties for which originally hired or currently being considered, the employer would have to place the employee in another position. It is not for the courts to impose such a burden on employers in the absence of express, unequivocal language from the Legislature.
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> An employer hires, recruits, and promotes individuals with reference to their abilities to perform specific jobs, not purely to put them on its payroll. An employer compensates an employee and sets the terms, conditions, and privileges of employment on the basis of the employee's qualifications for a specific job. If 'a particular job or position' in this context meant 'any particular job or position,' it would remove the relevance of an employee's qualifications to hiring, recruiting, or promotion and would render impossible the task of setting objective compensation structures. [*Id.* at 34-35.]

As the Court more recently explained in *Peden*, 470 Mich at 206 n 9, "we held [in *Rourk*] that the mere fact that a disabled person can perform 'some' job is not relevant; rather, he must be able to perform *the* job he held or sought at the time the alleged PWDCRA violation occurred, and any accommodation must be directed toward enabling the plaintiff to perform the duties of *that* job." (Emphasis in original). See also *Hall v Hackley Hosp*, 210 Mich App 48, 57; 532 NW2d 893 (1995) ("[D]efendant's duty to accommodate plaintiff did not require defendant to place plaintiff in another job in the [facility] because the duty to accommodate . . . does not extend to a new job placement. . . . [T]he extent of the burden to be placed on employers to provide new jobs for employees with established handicaps is a problem to be solved by the Legislature, not the judiciary." (Quotation marks and citation omitted)).

Thus, plaintiff's argument that she is entitled to an accommodation for a requested transfer fails. *Rourk*, 458 Mich at 30-35; *Peden*, 470 Mich at 206 n 9; *Tranker*, 231 Mich app at 124; *Hall*, 210 Mich App at 57. Nevertheless, she contends that given defendant's size, the ease with which employees transfer, and an open position, the refusal to allow her transfer was not reasonable. *Rourk*, 458 Mich at 35-36. However, plaintiff is relying largely on unsupported facts. Plaintiff relies on testimony relating to her meeting with Randy Franks, who supposedly testified about an open position at the Mound facility. Yet, plaintiff did not attach this deposition below, and we consider only "what was properly presented to the trial court before its decision on the motion." *Pena*, 255 Mich App at 310. Further, plaintiff highlights no evidence below regarding the ease with which employees transfer or the institutional needs of the facilities at the time she requested the so-called accommodation.[6]

[6] The trial court relied on Clore's affidavit, wherein he averred, "Employee transfers occurred occasionally. Many were due to an employee's quest for promotional opportunities, some were

Because we agree with defendant regarding its accommodation argument, we need not address its alternative arguments relating to whether it discriminated against plaintiff on the basis of her disability.

III. CONCLUSION

Because plaintiff failed to demonstrate a genuine issue of material fact that her disability was unrelated to her ability to perform her job, she failed to establish the prima facie case under the PWDCRA. Plaintiff likewise failed to demonstrate a genuine issue of material fact regarding defendant's alleged failure to accommodate her. Therefore, the trial court erred in denying defendant's motion for summary disposition. We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Michael J. Riordan

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due to personal reasons that were discussed with the Warden and HRD." On appeal, plaintiff refers to Goff's testimony that HR usually handles transfer requests. Yet, neither of these two individuals worked in the HR department, nor testified with specificity about the institutional needs at the time of the alleged discrimination. Nor "will [we] search the record for factual support for plaintiff['s] claims." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Moreover, although plaintiff relies on the EEOC ruling that found defendant failed to accommodate her, given the limited evidence of the reasoning behind that decision, we find it provides little guidance in this case.