

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KRISTAL K. SCOTT,

Plaintiff-Appellant,

v

CITY OF DETROIT and DETROIT POLICE  
DEPARTMENT,

Defendants-Appellees.

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UNPUBLISHED

May 14, 2020

No. 348516

Wayne Circuit Court

LC No. 17-011789-CZ

Before: K. F. KELLY, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

In this action involving claims under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

**I. BACKGROUND**

Plaintiff was first hired as a police officer by the City of Detroit in 2004. She was laid off in 2005, and returned as a rehire in 2006. She had been employed as a police officer in Detroit since that time until her separation from the police department pursuant to a duty disability retirement on September 22, 2017. It is this retirement separation that forms the basis of the claims at issue in this lawsuit.

Plaintiff suffered multiple injuries during the time that she was employed as a Detroit police officer. In 2011, she fell down the stairs while on duty responding to a call. On July 13, 2012, during job-required scooter training, she crashed her scooter into a metal barricade at low speed when an insect flew into her helmet and she attempted to avoid hitting a bike. On September 20, 2012, she fell out of her chair and hit her head when the chair rolled out from under her. On February 6, 2013, she fell down the stairs when her knee gave out on her. While receiving treatment for this injury, she was diagnosed with a torn meniscus in her right knee. She also discovered that she was pregnant shortly after this injury, and was allegedly told by the police medical department that she could not be provided treatment for her injury during her pregnancy.

On February 10, 2014, plaintiff was given an independent medical evaluation related to her right knee, right thigh, neck, and back. At some point in 2014, she was involved in a car accident while off duty.

Plaintiff submitted multiple grievances and complaints to the Equal Employment Opportunity Commission (EEOC) and Michigan Department of Civil Rights (MDCR) related to the above injuries and medical conditions. These complaints generally included allegations that medical treatment was improperly denied to her in some form, that she was discriminated against on the basis of her disability, or that she was discriminated against on the basis of sex due to pregnancy.<sup>1</sup>

It appears from the record that plaintiff has been on restricted duty since 2012. She was placed on permanent restricted duty on November 12, 2014, and she continued to be granted that status. Most recently, she was assigned to work as a restricted duty officer at the “gun desk,” which involved clerical duties and matters related to gun registration, stolen firearms, criminal background checks, licenses to purchase, and investigating concealed pistol license (CPL) issues. Plaintiff’s supervisor at the gun desk, Sergeant Braxton Hall, testified that plaintiff was a good worker.

Detroit Police Chief James Craig testified that at some point after he became chief of police in 2013, he began trying to “civilianize more positions that had traditionally been held by sworn officers[] [b]ecause it was [his] goal to take those officers who were in these traditionally non-sworn positions and place them back in the field.” Craig explained that this would allow more police officers to be placed in the field “doing police work” instead of being assigned to jobs that did not require a “full duty police officer” and could be carried out by civilians. Craig was “totally opposed” to “those officers who were permanently disabled staying in sworn positions.” He believed that restricted duty should be a temporary situation. Accordingly, Craig decided that permanently disabled officers—meaning that a physician had determined that the individual officer would never be able to perform the duties of a police officer—should either be “medically retired” or become a civilian employee of the department in a position that could accommodate the individual’s disability. Craig testified, “When someone says you can no longer work the field as a police officer, you are permanently disabled, that’s the trigger.”

Gail Oxendine, who was currently the assistant executive director for the City of Detroit’s general retirement system and had formerly been the director human resources for the Detroit Police Department, testified that Craig and the Mayor of Detroit had mandated hiring “as many full duty police officers as possible, and the decision was made that any officer who was deemed permanently restricted would be recommended to the retirement system for retirement.” According to Oxendine, the “objective was to determine whether or not they could perform the essential duties of a police officer in a full duty capacity.” If it was determined by a medical professional that an individual officer was permanently disabled and unable to perform all of the 24 listed essential functions of a Detroit police officer, then that individual was recommended for duty disability retirement. Oxendine also testified that every officer who was deemed permanently

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<sup>1</sup> A more thorough description of the substance of these complaints is not necessary for purposes of understanding or addressing the issues presented in the instant appeal.

disabled was recommended for retirement unless the officer was already in the Deferred Retirement Option Plan (DROP), which allowed for an officer to elect to retire but continue working. Detroit Police First Assistant Chief Lashinda Stair testified that the department recommended for retirement those officers who would never be able to return to full duty positions but did not eliminate any restricted duty positions.

On April 8, 2016, Dr. Maury Ellenberg determined that plaintiff could not perform eight of the essential job functions of a police officer involving physical requirements. Specifically, plaintiff was unable to perform numbers 1, 2, 7, 13, 14, 17, 19, and 20, which related to the ability to use force if necessary to make an arrest, navigate various physical obstacles, enter and exit vehicles quickly for purposes of emergencies or pursuing suspects, perform patrol functions for long periods without relief, physically move people or heavy objects as necessary, pursue fleeing suspects on foot, physically subdue resisting subjects, and use bodily force to enter through physical barriers for investigative or rescue functions. Ellenberg also noted that plaintiff required running, lifting, and squatting restrictions.

Ellenberg made the same findings regarding plaintiff on July 29, 2016, with the exception that plaintiff was determined to be able to perform number 17 regarding pursuing fleeing suspects on foot. Plaintiff admitted in her deposition testimony that she could not perform these specific essential functions. Hall testified that the gun desk position required plaintiff to be able to make an arrest, using force if necessary, but did not require her to perform any of the other essential functions of a police officer that plaintiff was unable to perform.

Furthermore, as previously noted, plaintiff had been continually placed on permanent restricted duty, or on some form of medical leave, since November 12, 2014. The final opinion of plaintiff's treating doctor<sup>2</sup> indicated that plaintiff had permanent restrictions. Plaintiff was recommended for duty disability retirement.<sup>3</sup>

On August 4, 2017, plaintiff was approved for a duty disability retirement. As previously noted, plaintiff's date of effective separation and retirement was September 22, 2017.

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<sup>2</sup> It is unclear from the record whether this particular final opinion was rendered by Ellenberg or some other doctor.

<sup>3</sup> Plaintiff testified that she received notice in April 2016 that she was going to be retired, although she was not actually retired and separated from the department that year. It is not clear from the record what happened procedurally with respect to finalizing or abandoning the attempt to place her on duty disability retirement between this notice and her actual retirement in September 2017. As an additional aside, plaintiff appealed the decision by the Detroit Fire and Police Retirement System Board to grant her a duty disability retirement through the System's review process, and the Board's decision was upheld. This administrative appeal and decision occurred during the pendency of the instant action in the circuit court. However, those procedural facts are not at issue in addressing the arguments presented by the parties in this appeal.

Plaintiff initiated this action and raised claims that the City violated the PWDCRA by discriminating against her on the basis of her disability and failing to provide her with a reasonable accommodation.<sup>4</sup>

Defendants subsequently moved for summary disposition under MCR 2.116(C)(10). Defendants argued as relevant to this appeal that plaintiff could not show, as required under the PWDCRA, that her disability was unrelated to her ability to perform the job duties of her position as a police officer because there was no factual dispute that she could not perform the 24 essential functions of a Detroit police officer. Accordingly, plaintiff could not establish her disability discrimination claim. Defendant's further argued that because plaintiff's requested accommodation of a permanent light-duty position would not have rendered her able to perform the 24 essential functions of a police officer, her failure-to-accommodate claim also failed. In response, plaintiff argued that because she could perform the duties of her restricted duty position, her disability was unrelated to her ability to perform the duties of her position. Plaintiff maintained that other unnamed officers were also permanently disabled but permitted to remain in their light-duty positions, and she further argued that this was a reasonable accommodation that had been provided for her for years but was revoked for a discriminatory reason.

The trial court granted defendant's motion for summary disposition and dismissed plaintiff's action. The trial court reasoned with respect to the discrimination and failure-to-accommodate claims that because there was no dispute that plaintiff could not perform the 24 essential functions of a police officer and any disability was therefore not unrelated to her qualification for employment, plaintiff could not establish the requisite "disability" for purposes of proceeding with these claims under the PWDCRA. The trial court subsequently denied plaintiff's motion for reconsideration, noting that "Plaintiff has failed to identify any accommodations that Defendant could provide which would enable Plaintiff to perform the essential functions required for the job."

This appeal ensued.

## II. STANDARD OF REVIEW

This Court reviews a trial court's summary disposition ruling de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When evaluating a motion brought under MCR 2.116(C)(10), a court "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

## III. ANALYSIS

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<sup>4</sup> Plaintiff also originally raised claims of unlawful retaliation as well, but those claims are not at issue on appeal. Plaintiff, in her appellate brief, expressly limited this appeal to challenging the trial court's rulings with respect to plaintiff's discrimination and failure to accommodate claims. Accordingly, the retaliation claims will not be discussed further.

It is the plaintiff's burden to prove a violation of the PWDCRA, which includes claims of discrimination based on disability or that the defendant failed to accommodate a disability. *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004); *Buck v Thomas M Cooley Law Sch*, 272 Mich App 93, 101; 725 NW2d 485 (2006).

Section 202(1)(b) of the PWDCRA, MCL 37.1202(1)(b), provides as pertinent to the issues raised in this case 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 . . . that is unrelated to the individual's ability to perform the duties of a particular job or position." Accordingly, to "prove a discrimination claim under the [PWDCRA], the plaintiff must show (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*, 470 Mich at 204 (quotation marks and citation omitted; alterations in original).

Additionally, § 102(2) of the PWDCRA, MCL 37.1102(2), provides that "[e]xcept as otherwise provided in article 2 [MCL 37.1201 *et seq.*], 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." For purposes of the act, a "person" includes "this state, or any other legal, commercial, or governmental entity or agency." MCL 37.1103(g).

In the employment context, which is governed by Article 2 of the PWDCRA, MCL 37.1210(1) provides as follows:

In an action brought pursuant to this article for a failure to accommodate, the person with a disability shall bear the burden of proof. If the person with a disability proves a prima facie case, the person shall bear the burden of producing evidence that an accommodation would impose an undue hardship on that person. If the person produces evidence that an accommodation would impose an undue hardship on that person, the person with a disability shall bear the burden of proving by a preponderance of the evidence that an accommodation would not impose an undue hardship on that person.

Both a disability-discrimination claim and a failure-to-accommodate claim require the plaintiff to show the existence of a "disability." MCL 37.1202(1)(b); MCL 37.1102(2). The definition of "disability" for purposes of the PWDCRA and that is applicable to the factual circumstances at issue in this case is contained in MCL 37.1103(d)(i)(A), which defines "disability" to mean 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 . . . 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." (Emphasis added.) "Person with a disability" or "person with disabilities" means "an individual who has 1 or more disabilities." MCL 37.1103(h). In the employment context, "unrelated to the individual's ability" means that "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, in *Peden*, addressed a factual scenario similar to here. In *Peden*, the plaintiff was a police officer with the Detroit Police Department who suffered a heart attack while on duty. *Peden*, 470 Mich at 198. After being diagnosed with heart disease and undergoing successful heart surgery, the plaintiff’s physician “released him to work on indefinite restricted duty.” *Id.* The plaintiff continued working on restricted duty status for approximately 10 years in two different clerical positions. *Id.* at 198-199. Subsequently, the plaintiff was placed on involuntary, nonduty, disability retirement based on a medical determination that the plaintiff was not able to perform the “ ‘24 Essential Job Functions of a Law Enforcement Officer,’ ” which the Court referred to as the “EFL.” *Id.*

The plaintiff sued and contended, as relevant to the instant case, that the City of Detroit and the Detroit Police Department violated the PWDCRA by placing him on involuntary disability retirement. *Id.* at 199. The City argued that the plaintiff could not perform the essential functions of his position as a police officer and therefore could not successfully establish his discrimination claim. *Id.* The plaintiff argued that the tasks in the EFL were not actually essential to the position he last held “because that position is essentially clerical in nature.” *Id.* at 199-200. The plaintiff alternatively argued on appeal that he could perform the EFL tasks. *Id.* at 200. Our Supreme Court noted that it was undisputed in the trial court, and “accepted as the truth by all parties,” that the plaintiff’s medical records indicated plaintiff could not perform the EFL tasks due to his heart condition. *Id.* at 221-222.

The *Peden* Court rejected plaintiff’s argument that the EFL tasks were not essential to his position:

[W]e hold that, in disputes regarding what the duties of a particular job are, the employer’s judgment is entitled to substantial deference. Consistent with the plaintiff’s burden of proving discrimination under the PWDCRA, the plaintiff bears the burden of presenting sufficient evidence to overcome this deference. Unless the plaintiff can satisfy this burden, it is to be presumed that the employer’s judgment concerning the duties of a particular job is reasonable. In such circumstances, the plaintiff must prove that he can, with or without accommodation, perform those duties.

Accordingly, the department’s judgment that the EFL tasks are duties of plaintiff’s former police officer position is entitled to considerable deference. Plaintiff here has not sustained his burden of demonstrating that the department’s judgment in this regard is not reasonable. Thus, we hold that the EFL tasks are “job duties” of a city of Detroit police officer position under the PWDCRA. . . . Unless plaintiff can, with or without accommodation, perform these functions, his claim under the PWDCRA must be dismissed. [*Id.* at 219-220.]

Next, the *Peden* Court explained that for the plaintiff to overcome the City’s summary disposition motion, plaintiff had the “burden of raising a genuine issue of material fact regarding whether he can perform the EFL tasks.” *Id.* at 220. Our Supreme Court concluded summary

disposition in favor of the City was warranted because there was no genuine issue of material fact that plaintiff was unable to perform the EFL tasks. *Id.* at 222-223.

In this case, plaintiff argues that she raised a genuine issue of material fact regarding whether her disability was unrelated to her ability to perform her job duties because she could perform the essential functions of the gun desk position to which she was assigned. Plaintiff specifically cites evidence that a civilian was hired to replace her and that this civilian undisputedly could not perform the essential duties of a police officer because, for example, the civilian could not effectuate an arrest. However, regardless of her job assignment, plaintiff ultimately wanted to retain her position as a *police officer* and the accompanying compensation, benefits, and title that went with being a police officer; she expressed no indication she wanted to be employed as a civilian. This seemingly contradictory argument is underscored in plaintiff's brief when she seemingly admits she does not have a cause of action by asserting: "Defendant's conduct in discriminatorily retiring Plaintiff, *while maybe innocent and lawful*, must be assessed by a jury." (emphasis added). Contrary to this seemingly contradictory argument, in fact, the relevant inquiry involves the essential functions of a Detroit police officer and not the limited functions of the restricted duty position. See *id.* at 205 n 9 ("[T]he EFL tasks are essential functions of all sworn police officer positions, including those . . . that are typically less demanding than patrol officer positions.").

Here, there was no genuine dispute of material fact that plaintiff was unable to perform all of the 24 essential functions of a Detroit police officer. There was no dispute that plaintiff's requested accommodation of being assigned to the gun desk did not, and could not, make her able to perform the 24 essential functions of a Detroit police officer. Thus, the trial court did not err by granting defendant's summary disposition on plaintiff's discrimination claim because plaintiff could not demonstrate that any disability that she may have had was "unrelated" to her ability to perform the job functions of a police officer and therefore could not meet the statutory definition of "disability" for purposes of her PWDCRA claims. *Id.* at 219-220; MCL 37.1202(1)(b); MCL 37.1103(d)(i)(A); MCL 37.1103(l)(i). Additionally, because a failure-to-accommodate claim under the PWDCRA requires a plaintiff to show the existence of a disability based on the same statutory definitions, MCL 37.1102(2); MCL 37.1202(1)(b); MCL 37.1103(d)(i)(A); MCL 37.1103(l)(i), plaintiff's failure to create a genuine issue of material fact regarding the existence of a disability under the applicable statutory definitions was also fatal to her failure-to-accommodate claim and the trial court also did not err by dismissing this claim.<sup>5</sup> Accordingly, plaintiff is not entitled to relief.

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<sup>5</sup> Plaintiff argues that these particular definitions of the term "disability" do not apply in this case because the general duty to provide reasonable accommodations is established in Article 1 of the PWDCRA rather than Article 2. Plaintiff misinterprets the structure of the PWDCRA. Although plaintiff is correct that MCL 37.1102(2), sets forth the general duty to accommodate, plaintiff ignores the fact that this provision requires a "disability" as a prerequisite before that duty arises. MCL 37.1102(2) provides as follows: "Except as otherwise provided in article 2, a person shall accommodate *a person with a disability* for purposes of employment, public accommodation, public service, education, or housing unless the person demonstrates that the accommodation

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would impose an undue hardship.” (Emphasis added.) Plaintiff’s claim in this case was based on defendants’ alleged failure to accommodate plaintiff in *her employment*. Employment issues are the subject of Article 2 of the PWDCRA, and Article 2 specifically contemplates failure-to-accommodate claims in the employment context. See MCL 37.1210(1) (“In an action brought pursuant to this article for a failure to accommodate, the person with a disability shall bear the burden of proof...”). Furthermore, MCL 37.1103(d) provides a general definition of the term “disability” for purposes of the entire act that also includes aspects specifically tailored to each individual article in the act, including Article 2 involving employment. MCL 37.1103 states in pertinent part as follows as follows:

(d) Except as provided under subdivision (f), “disability” means 1 or more of the following:

(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) For purposes of article 2, 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.

(B) For purposes of article 3, is unrelated to the individual’s ability to utilize and benefit from a place of public accommodation or public service.

(C) For purposes of article 4, is unrelated to the individual’s ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution.

(D) For purposes of article 5, substantially limits 1 or more of that individual’s major life activities and is unrelated to the individual’s ability to acquire, rent, or maintain property.

(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).

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(f) For purposes of article 2, disability does not include either of the following:



Affirmed. Defendant having prevailed in full may tax costs. MCR 7.219(A).

/s/ Kirsten Frank Kelly

/s/ Stephen L. Borrello

/s/ Mark T. Boonstra

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(i) A determinable physical or mental characteristic caused by the current illegal use of a controlled substance by that individual.

(ii) A determinable physical or mental characteristic caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job.

Hence, it is clear from the statutory language that the definitions of “disability” applicable to Article 2 define the term “disability” for purposes of triggering an employer’s duty to accommodate, set forth in MCL 37.1102(2), in the employment context. Moreover, our Supreme Court has taken this same approach and has specifically acknowledged that a disability is a prerequisite to establishing a duty to accommodate. See *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 29 & n 1; 580 NW2d 397 (1998) (involving the Handicappers’ Civil Rights Act, which was the predecessor to the current PWDCRA).