STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BIGGS, individually and as Personal Representative of the ESTATE OF JAMES WESLEY RIPPLE, deceased,

Plaintiff-Appellant,

v

CITY OF JACKSON,

Defendant-Appellee.

UNPUBLISHED
August 9, 1996

No. 181678
LC No. 94-068301-NZ

Before: Markey, P.J., and McDonald and M.J. Talbot,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse.

Plaintiff sought to have a parking spot in front of his home designated as a handicap parking location because his house had no driveway and he had difficulty walking any distance because of illness from HIV (Human Immunodeficiency Virus).[1] Defendant refused this accommodation, despite plaintiff's offer to pay for the signage on the public street. Instead, it recommended designating a bus stop in front of the house so the handicap bus could transport plaintiff or that plaintiff could pay to have the curb cut down and a small driveway installed on plaintiff's existing front lawn. Plaintiff's complaint against defendant alleged violations of §202 of the federal Americans with Disabilities Act (ADA), 42 USC 12132, §504 of the federal Rehabilitation Act of 1973, as amended, 29 USC 794, and the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1302; MSA 3.550(302). The trial court dismissed plaintiff's complaint as "spurious," after taking judicial notice of (1) the availability of parking on plaintiff's street and (2) defendant's policies and costs regarding handicap parking that were discussed when the handicap parking spots were designated for the courthouse. The court also awarded defendant its costs and attorney fees.

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* Circuit judge, sitting on the Court of Appeals by assignment.

I.

According to plaintiff, the trial court erred in concluding that plaintiff failed to state a claim upon which relief could be granted under the ADA, Rehabilitation Act, and the HCRA. We agree.

Although the trial court did not state the basis for its decision to dismiss plaintiff's complaint, defendants brought their motion pursuant to MCR 2.116(C)(8) and (10). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. Accepting all well-pleaded allegations as true and construing them most favorably to plaintiff, the court may grant summary disposition only where the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Shirilla v Detroit*, 208 Mich App 434, 436; 528 NW2d 763 (1995). In reviewing a summary disposition order under MCR 2.116(C)(10), we examine all relevant affidavits, depositions, admissions and other documentary evidence and construe it in favor of plaintiff to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Id*. at 437.

First, the trial court erred in finding that plaintiff failed to state a claim for relief. To establish a violation of Title II of the ADA, which requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," plaintiff must establish (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits or discrimination was by reason of plaintiff's disability. 42 USC 12132; *White v York Int'l Corp*, 45 F3d 357, 360-361 (CA 10, 1995); *Tyler v City of Manhattan*, 857 F Supp 800, 817 (D Kan, 1994). The ADA specifically includes HIV disease, symptomatic or asymptomatic, within the term "physical or mental impairment" as that term is used to define a "disability." 28 CFR 35.104. Plaintiff's complaint alleged a limitation on his ability to walk, which is a substantial limitation of a major life activity attributable to the HIV. 28 CFR 35.104. Under 42 USC 12131(2), a "qualified individual with a disability" is a disabled person who, with or without reasonable modifications to rules, policies or practices, the removal of transportation barriers, or the provision of auxiliary aids and services, meets essential eligibility requirements for receipt of services or participation in the public entity's programs or activities.

Here, plaintiff alleged that he was eligible to participate in defendant's public curbside parking program near his home, as the purpose of unrestricted curbside parking is to "provide citizens with individual parking spaces that are within a reasonable distance from a particular destination." Plaintiff asserted that defendant failed, however, to provide plaintiff with an equally effective opportunity to participate in or benefit from defendant's "aids, benefits, and services" when it denied plaintiff's request for a curbside handicapped parking space next to his residence. Thus, by denying plaintiff's request, defendant discriminated against plaintiff on the basis of his disability because the ADA "applies to action that carries a discriminatory effect, regardless of the [defendant's] motive or intent." *Tyler, supra*.

Viewing the pleadings most favorably to plaintiff, we believe that plaintiff did state a prima facie case under the ADA because defendant, by denying plaintiff's request for a curbside handicapped parking spot near his home, denied defendant the benefits of the curbside parking service that defendant offered to the public based on plaintiff's handicap. *Id.* We recognize that this case presents a unique factual scenario that might not, at first glance, appear to fit cleanly within the provisions of the ADA. We cannot say, however, that plaintiff's pleadings are so deficient that, as a matter of law, no factual development could possibly justify plaintiff's right of recovery. *Shirilla, supra* at 436. Accordingly, we find that plaintiff stated a claim under the ADA, and summary disposition was therefore inappropriate.

Likewise, to state a claim under § 504 of the Rehabilitation Act, 29 USC 794, which provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," plaintiff must establish that (1) plaintiff is a "handicapped person;" (2) plaintiff is "otherwise qualified" for participation in the program; (3) plaintiff is being excluded from participation in or denied benefits of or being subjected to discrimination under the program solely due to a handicap; and (4) the relevant program or activity is receiving federal financial assistance. *Landefeld v Marion General Hospital, Inc*, 994 F2d 1178, 1180-1181 (CA 6, 1993), citing *Doherty v Southern College of Optometry*, 826 F2d 570, 573 (CA 6, 1988). HIV positive status is itself a handicap under the act because it is a physical impairment that "substantially limits major life activities such as procreation, sexual contact, and normal social relationships." *Doe v District of Columbia*, 796 F Supp 559, 568 (DDC, 1992); *Severino v North Fort Myers Fire Control Dep't*, 935 F2d 1179, 1182-1183 n 4 (CA 11, 1991).

As with ADA, we find that plaintiff stated a claim upon which relief could be granted under the Rehabilitation Act.[2] Plaintiff is a "qualified individual with a disability," i.e., he has limited mobility as a result of the HIV disease, is otherwise qualified to participate in the curbside parking program, and is being denied the benefit of participating in defendant's unrestricted curbside parking due to defendant's denial of plaintiff's request for a handicapped parking spot.[3] Defendant, an entity that receives federal financial assistance, failed to provide plaintiff with a reasonable accommodation so he could enjoy the same benefit of unrestricted curbside parking that a person without a mobility impairment enjoys.

Further, the HCRA, MCL 37.1302(a); MSA 3.550(302)(a), prohibits the denial of access to public accommodations or public services due to a handicap that is unrelated to the person's ability to use or benefit from the service, facilities or accommodations. To establish a prima facie case of discrimination, plaintiff must allege that (1) he is "handicapped" as defined in the statute; (2) the handicap is unrelated to his ability to use and benefit from a place of public accommodation or service; and (3) he has been discriminated against in one of the ways set forth in the statute. MCL 37.1103(e)(i)(B); MSA 3.550(103)(e)(i)(B); MCL 37.1302; MSA 3.550(302); *Gazette v City of Pontiac*, 212 Mich App 162, 167-168; 536 NW2d 854 (1995). AIDS has been found to qualify as a handicap under the HCRA. *Sanchez v Lagoudakis*, 440 Mich 496, 501-502; 486 NW2d 657 (1992).

The requirements for stating a cause of action under the HCRA are substantially similar to the requirements for stating a cause of action under the ADA and Rehabilitation Act. As discussed above, plaintiff alleged he suffered from AIDS or symptomatic HIV that impaired his ability to walk relatively long distances and, that with the accommodation of a designated handicapped parking space located a reasonable walking distance from his home, he could use defendant's curbside public parking service, but defendant refused to make this reasonable accommodation for him. Accordingly, we find no basis for summary disposition pursuant to MCR 2.116(C)(8) with respect to any of plaintiff's three discrimination claims.

We also find that genuine issues of material fact exist, thereby precluding summary disposition under MCR 2.116(C)(10). First, plaintiff's deposition indicates that he had difficulty walking more than roughly fifty feet due to shortness of breath and that he did not suffer this problem before he was diagnosed with HIV. Thus, plaintiff alleged that defendant's program of curbside parking hear his home was not comparably accessible to him as a disabled person as it was to the general public. The court found, however, that plaintiff's express hardship was questionable because he had to walk up steps to enter his house. We find no evidence on the record to support the court's conclusion; rather plaintiff's inability to walk distances does not necessarily equate with an inability to climb stairs. Plaintiff also testified that commercial businesses and other apartments nearby contributed to the parking congestion on his street, contrary to the trial court's unsupported conclusion that plaintiff could alleviate his parking problem by requiring his own tenants to park away from the apartment house. We also find no import in the fact that plaintiff and Ripple purchased the house at issue after they were diagnosed HIV positive.

More importantly, as a facially reasonable modification or accommodation, plaintiff proposed the designation of a handicapped parking spot at the curb in front of his home, thereby meeting his initial burden under the ADA and Rehabilitation Act. *White, supra*; *Wood v Omaha School Dist*, 985 F2d 437, 439 (CA 8, 1993). 28 CFR 35.150(b)(1) specifies that defendant "is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with" the ADA. Contrary to defendant's assertions, federal regulations do not require it to make structural changes to the street if lesser means, such as posting a sign designating a handicapped parking space, will achieve compliance. Also, adding a handicapped parking space and sign to the curbside parking program would not be an "alteration" or a "change that affects the usability of the facility involved" within the meaning of 28 CFR 35.151. *Kinney v Yerusalim*, 9 F3d 1067, 1073 (CA 3, 1993). Because the designation of a handicapped space would not make the street or that parking space more usable by the general public, it is not an alteration that triggers the requirements of 28 CFR 35.151(b) related to making a facility generally accessible to the handicapped. Accordingly, the court erred in its analysis that federal regulations precluded merely posting a handicapped parking sign as a reasonable accommodation and that defendant was entitled to judgment as a matter of law.

Rather, once plaintiff produces evidence sufficient to make a facial showing that a reasonable accommodation is possible, the burden shifts to defendant to prove that it is unable to accommodate plaintiff or that the proposed accommodation is unreasonable. See *White, supra* at 361; *Wood, supra*. At a minimum, plaintiff raised a question of fact regarding the reasonableness of this proposed accommodation, which the trial court could not reject by taking judicial notice of how much money it

would have cost the county to designate on-street handicapped parking spots near public buildings. Nor could the trial court reject plaintiff's claim because the court erroneously concluded that federal regulations would not allow or require lesser accommodations for the disabled. See *Concerned Parents to Save Dreher Park Center v City of West Palm Beach*, 846 F Supp 986, 988-989, 993 (SD Fla, 1994). Finally, defendant's contention that it would possibly grant plaintiff a zoning variance to park his car on his own front yard does not suffice as a more reasonable accommodation, because allowing this activity would not grant plaintiff the right of equal access to public curbside parking. Moreover, it is immaterial that defendant has offered to designate a bus stop in front of plaintiff's home because public transportation is a substantially different public activity than the public service of free curbside parking without time restrictions. Cf. *Tyler, supra* at 816-817. Thus, defendant has not produced evidence or argument that undermines plaintiff's fact question regarding whether reasonable accommodation is possible here. Summary disposition was, therefore, improper.

II.

Plaintiff also argues that summary disposition was inappropriate because defendant failed to timely respond to his request for admissions. MCR 2.312. Because plaintiff failed to raise this issue below, it is not preserved for appeal. *Garavaglia v Centra Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995).

III.

Plaintiff asserts that the trial court erred in awarding attorney fees to defendant given that the claims in this lawsuit were neither wrongful nor frivolous and the taxation of fees is not authorized by statute or court rule. See MCL 600.2591; MSA 27A.2591. We agree. We review for clear error the trial court's finding that a claim is vexatious or frivolous, *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 408; 534 NW2d 143 (1995), and find, upon reviewing the entire record, that we are left with a firm and definite conviction that the trial court's factual finding was erroneous, MCR 2.613(C); *Poirier v Grand Blanc Twp*, 192 Mich App 539, 548; 481 NW2d 762 (1992). The court did not explain why it found plaintiff's claims to be "spurious." We believe that plaintiff's complaint does not, "by any stretch of the imagination, [present] an issue so one-sided that no reasonable lawyer could contest it in good faith." *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 78-79; 467 NW2d 21 (1991). Indeed, plaintiff had "a reasonable basis for belief that there was a meritorious issue to be determined on appeal." *Id.* We also believe that a public entity's obligations in this situation under the ADA, Rehabilitation Act and HCRA are largely an open question with little guiding case law on point. See *Concerned Parents, supra*. Thus, we reverse the trial court's award of attorney fees to defendant.

IV.

Finally, plaintiff requests that on remand that this case be reassigned to another judge. We agree that remanding this case to a new trial judge is appropriate in this case. The "original judge would have difficulty in putting previously expressed views or findings out of his or her mind," and reassignment

would preserve the appearance of justice and not entail excessive waste or duplication. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989). Accordingly, we remand this case to a different trial judge. *Id*.

Reversed and remanded to a different circuit judge for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Gary R. McDonald

I concur in result only.

/s/ Michael J. Talbot

[1] Plaintiff James Wesley Ripple died before these proceedings were completed at the trial court level. Plaintiff Richard Biggs, the personal representative of plaintiff Ripple's estate, also has been diagnosed with HIV, the same illness from which Mr. Ripple died. Plaintiff Biggs and Mr. Ripple jointly owned the house in question.

[2] Notably, a major purpose of the ADA is to extend the rights granted by the Rehabilitation Act, and the ADA provides people with disabilities the same rights and remedies as provided under the act. See *Coleman v Zatechka*, 824 F Supp 1360 (D Neb, 1993); 42 USC 12133. Further, Congress directed that regulations promulgated by the Attorney General under the ADA be consistent with regulations issued by the former Department of Health, Education and Welfare under § 504 of the Rehabilitation Act. *Kinney v Yerusalim*, 9 F3d 1067, 1071 (CA 3, 1993). Accordingly, if plaintiff states a claim under the ADA, it is extremely likely that plaintiff has stated a claim under the Rehabilitation Act.

[3] The same test is used to determine whether a plaintiff is "qualified" or "otherwise qualified" for purposes of the ADA and the Rehabilitation Act. *White*, *supra* at 360.