

STATE OF MICHIGAN
COURT OF APPEALS

KARL SCHILLINGER,

Plaintiff–Appellant,

UNPUBLISHED
August 9, 1996

v

No. 184643
LC No. 93-310742 CK

SISTERS OF MERCY HEALTH CORPORATION,
d/b/a CATHERINE McAULEY HEALTH CENTER,
CATHERINE McAULEY HEATH SYSTEMS, and
CENTER FOR MENTAL HEALTH AND
CHEMICAL DEPENDENCY,

Defendants–Appellees.

Before: Cavanagh, P.J., and Hood and J.J. McDonald,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10) in this wrongful discharge case. We affirm.

Prior to his termination, plaintiff worked at McAuley Health Systems’ Center for Mental Health and Chemical Dependency as a recreational therapist in a program for survivors of sexual abuse. Around July or August of 1992, plaintiff began a clandestine sexual relationship with a former patient. In September of 1992, a coordinating therapist at McAuley discovered a letter detailing plaintiff’s sexual activity with the patient. Plaintiff told his superiors that he was emotionally distressed and was placed on medical leave. After an investigation, plaintiff was discharged. Plaintiff did not end the prohibited relationship until about four months after his termination.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court

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

must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

Plaintiff first argues that the trial court erred in summarily dismissing his wrongful discharge claim. Specifically, plaintiff alleges that defendants had no legitimate cause to fire him, and moreover, that defendants failed to examine the extenuating circumstances surrounding his relationship with the patient. We disagree.

The parties do not dispute that plaintiff had a just-cause employment contract. After carefully reviewing the record, we find that the trial court did not err in finding that defendants had just cause to discharge plaintiff. According to defendants' employee handbook, "unapproved contacts with patients during or after treatment" is "misconduct that will result in immediate termination, except under the most extenuating circumstances." Plaintiff admitted that he had a sexual relationship with a former patient. Thus, defendants were justified in terminating plaintiff's employment. Cf. *Hale v Comerica Bank-Detroit*, 189 Mich App 382, 384-385; 473 NW2d 725 (1991).

Plaintiff contends that defendants failed to consider extenuating circumstances before dismissing him. Plaintiff cites stress due to his job and marital difficulties, childhood abuse, his mother's death, and the fact that he was seeing a therapist when his indiscretion was discovered. Defendants' policy states that "[w]here termination is recommended for certain violations, there may be extenuating circumstances where another course of action may be appropriate." However, the policy does not require defendants to mitigate the prescribed discipline when an employee asserts that extenuating circumstances are present. Defendants did not violate the employment contract by determining that the violation was too serious to be outweighed by the factors presented by plaintiff.

Plaintiff next argues that the trial court erred in summarily dismissing his claim under the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We disagree. The HCRA only covers plaintiffs whose disabilities are unrelated to their capacity to perform their jobs, with or without an accommodation.¹ MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A); MCL 37.1103(l)(i); MSA 3.550(103(l)(i). Plaintiff's alleged handicap, i.e., a mental disturbance which caused him to engage in an inappropriate relationship with a patient, directly affected his ability to do his job. Therefore, plaintiff cannot be considered handicapped under the statute, and summary disposition on this issue was appropriate.

Finally, plaintiff argues that the trial court erred in summarily dismissing his sex discrimination claim under the Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). Specifically, plaintiff argues that defendants treated similarly situated female employees better than they treated plaintiff. We disagree. Plaintiff failed to establish that defendants had treated similarly situated female employees differently.² See *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992). Moreover,

plaintiff failed to establish that his dismissal was a mere pretext for sex discrimination. See *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994)

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald

¹ In his appellate brief, plaintiff argues that defendants failed to accommodate his handicap. However, as plaintiff's counsel specifically stated below that "this is not a failure to accommodate case," this argument is not preserved for appellate review. See *Department of Transportation v Pichalski*, 168 Mich App 712, 722; 425 NW2d 145 (1988).

² Although plaintiff compares his situation to that of three female employees, the facts involved are similar in only one case. Joan Jensen, a nurse employed by defendants, married a former patient in 1984. However, plaintiff presented no evidence that defendants were aware of this fact. Moreover, Jensen testified that she did not know of any rule prohibiting her relationship in 1984.