

STATE OF MICHIGAN
COURT OF APPEALS

DR. RIGEL GALERA,

Plaintiff-Appellant,

v

ST JOHN HOSPITAL AND MEDICAL
CENTER,

Defendant-Appellee.

UNPUBLISHED

April 14, 2011

No. 293978

Wayne Circuit Court

LC No. 08-111450-CL

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting summary disposition in defendant's favor and dismissing plaintiff's claims under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* We find that plaintiff did not establish a prima facie case of unlawful discrimination because he failed to demonstrate that he was treated differently than similarly situated, comparable employees. We thus affirm the trial court's decision.

Plaintiff is a physician who graduated from medical school in 2002. In 2003 he interviewed for defendant's surgical residency program and was accepted. He continued in the program until 2008. As part of the contract that outlined plaintiff's duties under the program and his remuneration, plaintiff was to be evaluated quarterly in a peer review process by defendant's surgical education committee (SEC) based on various factors, including evaluations, test scores, the ACGME¹ six "cores" of "medical knowledge, patient care, technical ability, communication skills, professionalism and systems based practice," and mock oral examinations. One of the factors that defendant's SEC considers when evaluating whether a resident continues in the program is his or her scores on the ABSITE,² where a score under the 30th percentile is considered deficient. As a second-year resident, plaintiff scored less than the 30th percentile on the ABSITE and was placed on academic remediation. As a fourth-year resident, plaintiff again

¹ Accreditation Council on Graduate Medical Education.

² Apparently an acronym for the American Board of Surgery In-Training Examination.

scored less than the 30th percentile on the exam. Defendant sought and received permission from ACGME to have plaintiff repeat his fourth year. However, when plaintiff took the January 2008 ABSITE, plaintiff scored in the 10th percentile on the exam. In March 2008, the SEC decided that plaintiff should not graduate from the residency program. A special review committee concurred. Plaintiff was permitted to finish the rotations of general surgery.

Plaintiff filed suit under CRA alleging gender and national origin discrimination.³ Following defendant's motion for summary disposition, the trial court found that plaintiff had failed to establish a prima facie claim of national origin discrimination, and had failed to show that defendant's stated reasons for refusing to allow plaintiff to graduate from the program were pretexts for discrimination.

On appeal, plaintiff argues he established a prima facie showing of discrimination by proffering evidence that he was treated differently from two other non-Filipino residents who, like plaintiff, had scores of less than the 30th percentile on the ABSITE but who, unlike plaintiff, were permitted to graduate from the residency program. We review a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating the motion for summary disposition, this 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. *Coblentz*, 475 Mich at 567-568. 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. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568.

As an initial matter, we find plaintiff's argument concerning the admissibility of the affidavits unavailing. Plaintiff appears to argue that, because defense counsel maintained that certain information he sought during a deposition was privileged under peer review statutory provisions, defendant could not introduce affidavits from defendant's program directors because they were inadmissible pursuant to MCR 2.314(B)(2).⁴ However, this provision, which applies only to evidence concerning claims where a mental or physical condition of a party is at issue, MCR 2.314(A), is clearly inapplicable to the instant case. Whether plaintiff can perform his duties as a resident is not "medical information relating to [plaintiff's] mental or physical condition." MCR 2.314(B)(1). Plaintiff appears to be arguing that defendant should be precluded from offering evidence against him which it would not disclose to him. Ordinarily this would be argued under MCR 2.302 as a failure to provide discovery. The parties agree that defendant asserted a privilege during the deposition of Dr. Loyd. However, the record does not

³ Plaintiff has abandoned his concurrent claim that he also suffered gender-based discrimination.

⁴ We specifically note that plaintiff does not argue that the information he now maintains that he sought to discover concerning his and the other residents' performance records was inappropriately withheld under any applicable peer review privilege.

reveal that plaintiff filed a Motion to Compel production of the performance data. Therefore, plaintiff's argument, even if interpreted as an argument under MCR2.302, cannot succeed.

After reviewing the evidence presented by plaintiff and defendant, we concur with the trial court's finding that plaintiff has failed to establish a prima facie case of national origin discrimination.

The CRA prohibits an employer from discharging an individual from its employment or otherwise discriminate because of the individual's national origin, among other reasons. MCL 37.2202(1)(a). A plaintiff may show that his or her discharge was based on improper national origin discrimination through either direct or indirect evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 464 NW2d 456 (2001). When a plaintiff has no direct evidence of such discrimination, as is the case here, the plaintiff must establish "[a] rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination." *Id.* (citation omitted). "To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) [he] belongs to a protected class, (2) [he] suffered an adverse employment action, (3) [he] was qualified for the position, and (4) [the termination or other adverse employment action] occurred under circumstances giving rise to an inference of unlawful discrimination." *Sniecinski v BCBSM*, 469 Mich 124, 134; 666 NW2d 186 (2003). Further,

[o]nce a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. [*Sniecinski*, 469 Mich at 134.]

Here, plaintiff falls within a protected class if, as he claims, he was discriminated against because he is Filipino. There is no question that plaintiff suffered an adverse employment action when defendant chose to remove him from the residency program, and at least a question of fact exists that plaintiff was qualified to continue, because defendant considered plaintiff to be qualified for the position when plaintiff was enrolled in the program. However, the trial court did not err when it found that plaintiff had not satisfied the fourth element, i.e., that the adverse employment action occurred under circumstances giving rise to the inference of unlawful discrimination.

As the parties agree, the specific circumstances of an individual's adverse employment action may give rise to this inference if a plaintiff can show that "the plaintiff was treated differently than persons of a different class for the same or similar conduct." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999) (citation and quotation marks omitted). In order to establish that he has received disparate treatment, a plaintiff is required to show that she and a coworker "were similarly situated, i.e., 'all of the relevant aspects' of [the plaintiff's] employment situation were 'nearly identical' to those of [a coworker's] employment situation." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997).

Plaintiff argues that he has shown this to be the case, with his comparison of his treatment with the treatment of the two other residents who scored poorly on the ABSITE. However, even as to this aspect of his comparison with the other residents, his evidence is deficient. When questioned how he knew the other residents had also scored poorly on the exam, plaintiff replied that they had told him that this was the case. Neither of these individuals was deposed and plaintiff did not present affidavits from them. Thus, plaintiff attempts to rely solely on inadmissible hearsay, MRE 801; MRE 802, and has not argued that an exception applies. Plaintiff has not presented substantively admissible evidence in support of his position concerning even this ground of comparison between himself and the other physicians. *Maiden*, 461 Mich at 120-121.

Moreover, the trial court correctly noted that an ABSITE score is only one of many factors used by defendant's SEC to determine whether a resident could continue in the program. Defendant presented affidavits concerning the other factors involved in this decision. Indeed, plaintiff specifically acknowledged in his own deposition testimony that the committee reviewed other factors, such as the ACGME factors, evaluations by attending physicians, mock oral exams, and tests. Reviewing the evidence presented, plaintiff thus cannot show that he was treated disparately from the residents he seeks to use as comparable employees. Even if, as he testified, the two other residents obtained low ABSITE scores, these were only one of many factors plaintiff admits were used to decide whether residents would continue in the program. Plaintiff has not demonstrated that "all of the relevant aspects" of plaintiff's employment situation were "nearly identical" to those of the other residents' employment situations. We therefore find that plaintiff has not presented a prima facie case of national origin discrimination.⁵

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

⁵ Because plaintiff has not presented his prima facie case, we need not address his argument regarding pretext a burden placed on a plaintiff only after a defendant articulates a legitimate and nondiscriminatory reason for an adverse employment action. *Sniecinski*, 469 Mich at 134.