STATE OF MICHIGAN

COURT OF APPEALS

WILLIE AVERY, VIVIAN CLARK, NORA FORTUNE, SUE TEMBY, DEBRA MONTOSE, and TERESA PETZOLD,

Plaintiffs-Appellants,

SINAI HOSPITAL, d/b/a SINAI HOSPITAL OF GREATER DETROIT,

Defendant-Appellee.

UNPUBLISHED
October 31, 1997

No. 192191
Wayne Circuit Court
LC No. 95-505826-NZ

Before: Markman, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs filed a complaint against defendant, their former employer, alleging that plaintiff Avery, an African-American, was terminated because of his race and that the remaining plaintiffs were discharged because of their sex, in violation of Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.*; MSA 3.548(101), *et seq*. The trial court granted defendant's motion for summary disposition. The trial court ruled plaintiffs failed to produce any evidence that they were discharged because of their race or sex, and that they failed to show they were similarly situated to Dr. Michael Schwartz, a white male who was allegedly treated more favorably than plaintiffs.

Plaintiffs argue questions of fact exist as to whether they established their prima facie cases of race and sex discrimination and as to whether defendant's proffered nondiscriminatory reason for discharging plaintiffs was merely pretextual. We disagree. This Court reviews an order granting summary disposition pursuant to MCR 2.116(C)(10) de novo. *Hall v Hackley Hospital*, 210 Mich App 48, 53; 532 NW2d 893 (1995). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. Such a motion is granted "when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. This Court must consider the pleadings, affidavits, depositions, admissions, and documentary evidence in the light most favorable to the nonmoving party. *Id*.

Michigan's Elliott-Larsen Civil Rights Act provides that an employer shall not "discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202; MSA 3.548(202). In employment discrimination cases under the Elliott-Larsen Act, the order and allocation of the burden of proof is as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. Third, if the defendant meets this burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. [*Featherly v Teledyne Industries, Inc.*, 194 Mich App 352, 358; 486 NW2d 361 (1992), citing *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).]

In this case, plaintiffs are proceeding under a disparate treatment theory. In order to establish a prima facie case of race or sex discrimination under this theory, plaintiffs must show that they are members of a protected class, and, for the same or similar conduct, they were treated differently than a person who was not a member of the protected class. *Merillat v Michigan State University*, 207 Mich App 240, 247; 532 NW2d 802 (1994). In order for two persons to be considered similarly situated, all relevant aspects of the employment situation must be nearly identical. *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994).

In the case at bar, plaintiff Avery has failed to establish a prima facie case of race discrimination, and the remaining plaintiffs have failed to establish prima facie cases of sex discrimination, because the only person to whom they compare themselves, Dr. Michael Schwartz, was not similarly situated to them. Dr. Schwartz had arranged for the imaging of animals at the hospital's Rose Imaging Center, and the plaintiffs were discharged for accepting compensation for misusing hospital equipment by imaging animals. Dr. Schwartz was forced to resign his directorship of the Diagnostic Radiology Department, but his staff privileges were not revoked. Plaintiffs contend because Dr. Schwartz, a white male, was allowed to keep his staff privileges while the plaintiffs, five white females and one black male, were discharged, they have shown defendant afforded different treatment to similarly situated persons. However, Dr. Schwartz is not similarly situated to plaintiffs either in terms of skill or conduct. Plaintiffs in the instant case are not comparable to Dr. Schwartz in terms of skill level, because he is a doctor, and they were imaging technologists. These differences in skill and position entail obvious differences in job responsibilities, which show plaintiffs are not similarly situated to Dr. Schwartz. See *Thorrez Industries, Inc v Civil Rights Comm*, 88 Mich App 704, 708; 278 NW2d 725 (1979). In addition, plaintiffs' conduct was different from Dr. Schwartz's. Although Dr. Schwartz arranged for the animal imaging to occur, he did not accept compensation for the misuse of hospital equipment, which was a reason given by the hospital's CEO for the decision to discharge plaintiffs. Therefore, plaintiffs are not comparable to Dr. Schwartz. Because they have not established they were treated differently than a

similarly situated person who is not a member of a protected class, plaintiffs have failed to establish their prima facie cases under the disparate treatment theory.

Although it is not necessary for our disposition of this case, we note that even if plaintiffs had established a prima facie case, summary disposition would still have been proper. Defendant articulated a legitimate, nondiscriminatory reason for discharging plaintiffs, namely they accepted money for abusing hospital equipment by conducting imaging on animals. In order to meet their burden of establishing this reason is a pretext for discrimination and survive summary disposition, plaintiffs must present an issue of fact regarding whether defendant discriminated against them. *Lytle v Malady*, 456 Mich 1, 33; 566 NW2d 582 (1997). In *Lytle, supra*, the Michigan Supreme Court explained that in some cases, merely disproving the reason given by the employer will show discrimination, but, in other cases, this alone will not be enough. *Id.* However, in this case, plaintiffs have not presented any evidence that defendant's asserted reason was not the actual reason for the decision to discharge plaintiffs. Moreover, plaintiffs have presented no evidence that their race or sex in any way influenced defendant's decision to terminate their employment. Instead, plaintiffs rely on the fact that Dr. Schwartz, a white male, was not discharged. However, since Schwartz was not similarly situated to plaintiffs, defendant's treatment of him does not establish pretext. *Pierce, supra* at 805.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald