

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

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JAMES D. GIBSON,

Plaintiff-Appellant,  
Cross-Appellee,

v

HACKLEY HOSPITAL AND MEDICAL CENTER,

Defendant-Appellee,  
Cross-Appellant.

UNPUBLISHED

January 16, 1998

No. 197841

Muskegon Circuit Court

LC No. 95-033341-NZ

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Before: Markey, P.J. and Michael J. Kelly and Whitbeck, JJ.

PER CURIAM.

This case arises out of the claim by plaintiff, a medical doctor, that defendant discriminated against him because of his race in violation of the prohibition of the Elliott Larson Civil Rights Act, MCL 37.2302; MSA 3.548(302) (the “Civil Rights Act”) on racial discrimination in public accommodation, in failing to provide him with staff membership as a physician in April 1994. The trial court granted defendant’s motion for summary disposition. Plaintiff appeals as of right. Although the trial court’s decision amounted to a complete victory for defendant on the merits, defendant has nevertheless filed a cross-appeal and argues that the Civil Rights Act does not apply to a hospital’s decision to grant hospital staff privileges to a physician. We affirm the trial court’s decision to grant defendant summary disposition and decline to reach the issue presented by defendant’s cross-appeal.

Plaintiff, a black male, had been appointed to the medical staff of both Muskegon Mercy and Muskegon General Hospitals. In April 1994, plaintiff completed a pre-application for staff privileges with defendant. On or about April 25, 1994, plaintiff received a letter from defendant, advising him that, after checking the references he had provided in the pre-application, plaintiff did not qualify to apply for medical staff appointment. On May 20, 1994, plaintiff received a second letter from defendant explaining that he had not met the minimum criterion of having a demonstrated ability to work well within an organization and with colleagues.

Section 1 of the Civil Rights Act, MCL 37.2302(1); MSA 3.548(302)(1), provides:

Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

Plaintiff alleges that he was denied staff privileges by defendant because of plaintiff's race in violation of this provision. Defendant denies that it refused plaintiff staff privileges because of his race and alleges instead that it refused plaintiff staff privileges for valid non-discriminatory reasons. Dr. J. Michael Ratchford, the medical director of quality assurance at defendant hospital, submitted an affidavit stating that after review of the information received during the pre-screening process, plaintiff was not given an application for staff privileges based on the negative references from several of plaintiff's former colleagues about plaintiff's disruptive and abusive attitude.

## I

Plaintiff alleges that the trial court erred in granting defendant's motion for summary disposition on the ground that plaintiff failed to establish a prima facie case of disparate treatment.<sup>1</sup> A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). On appeal, we review de novo a trial court's grant or denial of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). We review the record to determine whether, when viewing the evidence in a light most favorable to the nonmovant, a genuine issue of material fact exists. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

In a case of this type, alleging violation of the public accommodation provision of the Civil Rights Act, the plaintiff has the initial burden of first showing disparate treatment. See *Clarke v Kmart Corp*, 197 Mich App 541, 545; 495 NW2d 820 (1992). To so establish a prima facie case of disparate treatment, a plaintiff must show that he or she was a member of a protected class who was treated differently than persons of a different *class for the same or similar conduct*. *Reisman v Regents of Wayne State University*, 188 Mich App 526, 538; 470 NW2d 678 (1991). See also *Merillat v Michigan State University*, 207 Mich App 240; 523 NW2d 802 (1994) (summary disposition for defendant appropriate where the plaintiff did not allege facts to demonstrate that any person in a non-protected class had engaged in similar conduct); *Alexander v Rush North Shore Medical Center*, 851 F Supp 330 (ND Ill, 1994) (discussing similar conduct or performance of physicians for purposes of determining disparate treatment). If the plaintiff meets this initial burden, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the alleged differing treatment. *Clarke, supra* at 545.<sup>2</sup> The burden then shifts back to the plaintiff to show that the reasons

proffered are merely pretextual by showing that the reasons lack credibility or that a discriminatory motive was more likely the reason for the defendant's actions. *Id.*

Plaintiff's basis for his claim of disparate treatment is that during the five years preceding his claim, 102 other applicants submitted an application request form, completed the pre-screening process, were then given an application and, subsequently, were awarded staff privileges by defendant, whereas plaintiff was not given an application after submitting his pre-application and hence was denied staff privileges. However, plaintiff submitted no evidence that he was treated differently than members of a different race who were similarly situated in this process. When the burden of proof rests upon the nonmovant at trial, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial in order to survive a motion for summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff did allege that other physicians already on staff were not removed when they behaved in a manner similar to that alleged against plaintiff by his previous professional associates. However, these physicians were not similarly situated individuals, they were already on staff at the time the behaviors were allegedly exhibited, so withdrawal of their privileges would have required a much lengthier procedure under the medical staff bylaws than the denial of an application for privileges. Plaintiff did not present *any* evidence of a *similarly situated* individual of a different race who was either given an application or granted staff privileges, i.e., plaintiff submitted no evidence that applicants of a different race who exhibited the same or a similar behavioral history had nonetheless been granted staff privileges. Therefore, plaintiff failed to establish a prima facie case under the public accommodation provision of the Civil Rights Act because he offered *no* evidence of disparate treatment. See *Merillat, supra* at 247-248. See also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW3d 441 (1994); *Civil Rights Comm v Chrysler Corp*, 80 Mich App 368; 263 NW2d 376 (1977). Thus, the trial court properly granted defendant's motion for summary disposition.

## II

Second, plaintiff argues that the trial court relied on misstated facts or facts which were not in the record in granting summary disposition. The trial court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Although the trial court had a "facts" section in its written opinion, none of the alleged factual findings that plaintiff disputes were relied upon by the trial court in making its ruling. These alleged factual findings related to defendant's reasons for denying plaintiff's request for an application. The trial court did not employ these facts in its legal analysis because it ruled that plaintiff had failed to establish a prima facie case of discrimination. Thus, plaintiff has not established that the trial court improperly made factual findings in deciding to grant defendant summary disposition. *Id.*<sup>3</sup>

### III

Because we affirm the trial court's grant of defendant's motion for summary disposition on the ground that plaintiff failed to establish a prima facie case of discrimination, we need not reach defendant's issue on cross-appeal regarding whether physicians seeking staff privileges at a hospital are protected against discrimination by the Civil Rights Act.<sup>4</sup>

Affirmed.

/s/ Jane E. Markey

/s/ Michael J. Kelly

/s/ William C. Whitbeck

<sup>1</sup> Although a claim of racial discrimination in violation of the Civil Rights Act may also be based on a theory of disparate impact even without discriminatory intent, *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 329-330; 559 NW2d 86 (1996), plaintiff does not advance the disparate impact theory.

<sup>2</sup> As this Court stated in *Dubey v Stroh Brewing Company*, 185 Mich App 561, 565; 462 NW2d 758 (1990):

There are three ways a plaintiff can establish that a defendant's stated legitimate, nondiscriminatory reasons are pretexts: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext.

Here, as we find that plaintiff did not establish a prima facie case under the public accommodation provision of the Civil Rights Act, we need not examine defendant's reasons for its actions. We do note that we find no evidence in the record to support a finding that these reasons were merely pretextual.

<sup>3</sup> Even if the trial court had made improper factual findings in deciding to grant defendant summary disposition, it is immaterial in light of our conclusion that the trial court properly granted summary disposition because plaintiff failed to present a prima facie case of disparate treatment based on race. This Court will not reverse a trial court where it reaches the right result for a wrong reason. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 170 n 5; 561 NW2d 445 (1997).

<sup>4</sup> We note that defendant did not have to bring a cross-appeal to present this argument. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994) (an appellee who has taken no cross-appeal may still present reasons rejected by the trial court to support the judgment in the appellee's favor).