

STATE OF MICHIGAN
COURT OF APPEALS

MARAM HAKIM,

Plaintiff-Appellant,

v

CITY OF SOUTHFIELD, d/b/a
SOUTHFIELD-LATHRUP CLINIC,

Defendant-Appellee.

UNPUBLISHED

March 6, 2001

No. 217855

Oakland Circuit Court

LC No. 95-497925-CZ

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

From the autumn of 1992 until the spring of 1995, plaintiff worked at defendant, a mental health clinic operated by the city of Southfield, as an intern supervisor. He was discharged from his position amidst allegations that he sexually harassed one or more of the interns under his supervision. Plaintiff subsequently filed suit, alleging breach of contract and gender discrimination. The trial court granted defendant's motion for summary disposition, finding that plaintiff was an independent contractor and therefore not entitled to protection under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and that plaintiff failed to establish a prima facie case of gender discrimination. On appeal, plaintiff raises two issues relating only to the gender discrimination claim.

A motion brought under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is subject to de novo review. *DeBrow v Century 21 Great Lakes, Inc.*, ___ Mich ___; ___ NW2d ___ (Docket No. 114615, decided January 17, 2001), slip op, p 3. The court must consider the pleadings, affidavits, admissions, depositions, and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), and determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Relying on *Falls v Sporting News Publishing Co*, 834 F2d 611 (CA 6, 1987), the trial court ruled that plaintiff was an independent contractor and, therefore, not entitled to protection under the Civil Rights Act. See MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). This Court has

similarly held that an independent contractor cannot maintain a claim under the Civil Rights Act because there is no employment relationship. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). Even assuming that plaintiff was an employee rather than an independent contractor,¹ we affirm the trial court's ruling that plaintiff failed to establish a prima facie case of gender discrimination.

Plaintiff alleges that he was subject to disparate treatment by defendant based on his gender. To establish a prima facie case of disparate treatment, plaintiff must show that he was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 698; 568 NW2d 64 (1997). The first three requirements are not disputed here. The question is whether plaintiff presented any evidence that other, similarly situated employees outside plaintiff's protected class were not treated in the same manner as plaintiff.

Taken in a light most favorable to plaintiff, he did not present evidence that he was similarly situated to any of defendant's female employees. Nor does plaintiff make any showing whatsoever that a similarly situated female employee of defendant maintained employment with defendant despite engaging in the same or similar conduct as plaintiff. In this regard, plaintiff relies on the deposition testimony of his expert witness who testified that, in her opinion, if a female supervisor had engaged in the same conduct as plaintiff, there would have been no criticism of her. This is only an opinion; it is not evidence that defendant actually treated a similarly situated female employee in a different manner than plaintiff for engaging in the same or similar conduct. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), quoting *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). Consequently, plaintiff has failed to establish a prima facie case of gender discrimination because there is no evidence that defendant treated a similarly situated female employee differently when engaging in the same or similar conduct as plaintiff.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant with regard to plaintiff's claim of gender discrimination.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald

¹ In this case, the evidence largely indicated that plaintiff was indeed an independent contractor under the economic reality test, *Wells v Firestone and Rubber Co*, 421 Mich 641, 648; 364 NW2d 670 (1984); however, plaintiff did present some evidence that he was an employee because defendant largely controlled plaintiff's duties and responsibilities at the clinic, plaintiff's duties did not constitute an integral part of defendant's business, and defendant had the authority to discharge plaintiff.