STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY PRUITT, Plaintiff-Appellant,	UNPUBLISHED April 28, 2011
v	No. 295957 Ingham Circuit Court
MICHIGAN STATE UNIVERSITY, ERICA BRACAMONTES, FRANCES CHAMES, MARGARET THOMPSON, MARY NETTLEMAN and MARSHA RAPPLEY, Defendants-Appellees.	LC No. 08-001682-NZ

Before: METER, P.J., and SAAD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals a trial court order that granted summary disposition to defendants. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Plaintiff attended Michigan State University's College of Human Medicine. In the fall of 2005, Erica Bracamontes acted as plaintiff's instructor and evaluator during a clerkship rotation. On December 24, 2005, plaintiff received a written evaluation drafted by Bracamontes, in which she stated that plaintiff engaged in inappropriate physical contact with her and that she considered the contact to be disrespectful. Plaintiff complained about the evaluation to clerkship director Dr. Frances Chames, and to assistant dean Dr. Kent Bottles. In January 2006, Dr. Bottles wrote a letter to plaintiff in which he observed that the allegation against plaintiff was very serious and that plaintiff must change his "attitude and behavior." Dr. Bottles warned that if plaintiff engaged in further unprofessional conduct, he would be subject to a formal disciplinary hearing and Dr. Bottles would include the information in plaintiff's dean's letter, which is a comprehensive performance evaluation submitted to residency programs to which the medical student has applied. Dr. Bottles further stated that "any comments from your clerkship final grade letters, including preceptor evaluations, may be included in your dean's letter."

Dr. Chames included Bracamontes's comments in the final grade memorandum for plaintiff's clerkship. According to plaintiff, he complained to Dr. Chames numerous times about her inclusion of the comments, she agreed to rewrite the letter but, with each rewrite, she included Bracamontes's comments about plaintiff's conduct. Dr. Chames set up a meeting with

the clerkship directors so that plaintiff could appeal the inclusion of the comments in his final grade. However, plaintiff maintains that Dr. Chames did not tell him when the meeting would take place, and this resulted in the denial of his appeal.

Because Dr. Bottles left Michigan State in 2006, plaintiff's dean's letter was drafted by Dr. Margaret Thompson, assistant dean of the College of Human Medicine. Dr. Thompson included Bracamontes's comments in the letter. Plaintiff appealed the matter to the chairperson of internal medicine, Mary Nettleman, and she denied the appeal in January 2007. Plaintiff then filed a grievance to the College of Human Medicine Hearing Panel. The panel concluded that plaintiff should have been given feedback right away about his touching of Bracamontes so that he could correct his behavior or otherwise respond to Bracamontes's concerns. The panel also found that Dr. Chames should have notified plaintiff about when the clerkship directors would meet to discuss his initial appeal. The panel passed the matter on to Dean Marsha Rappley, who removed Bracamontes's comments from plaintiff's dean's letter. Plaintiff received a designation of "Very Good" in the dean's letter and the letter contains primarily positive comments about plaintiff's medical school performance. However, plaintiff complains that Dean Rappley should have removed other negative comments about plaintiff and should not have added a remark that "there have been faculty and administrator concerns about communication."

Plaintiff filed his complaint on December 23, 2008, and he amended the complaint twice thereafter. Plaintiff alleged that Michigan State and its employees Bracamontes, Chames, Thompson, Nettleman and Rappley discriminated against him on the basis of his gender, in violation of the Civil Rights Act (CRA), MCL 37.2101, et seq. He specifically claimed that, because they are biased against males, defendants acted individually and in concert to violate the rules and procedures of the medical school in evaluating plaintiff and that they did so in order to give plaintiff a negative evaluation. Plaintiff also alleged that defendants treated him differently than similarly situated females and that they retaliated against him for raising allegations of gender bias.

The trial court granted summary disposition to defendants in an opinion and order filed on December 21, 2009. Specifically, the trial court ruled that plaintiff failed to establish a genuine issue of material fact that he was subject to a materially adverse action, that any actions were taken by defendants because plaintiff is male, or that defendants treated similarly situated female students differently.

II. ANALYSIS

A. STANDARD OF REVIEW AND APPLICABLE LAW

The trial court did not specify the subrule on which it relied in granting defendants' motion, but the court's opinion shows that it considered documentary evidence outside of the pleadings. Therefore, we review the decision under MCR 2.116(C)(10). As this Court explained in *Campbell v Human Services Dep't*, 286 Mich App 230, 234-235; 780 NW2d 586 (2009):

> This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Summary disposition of all or part of a claim may be granted under

> MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law." "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (citation and quotation marks omitted). The moving party must specifically identify the matters that allegedly have no disputed factual issues, and the nonmoving party must support its position that a disputed factual issue does exist by using affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

Plaintiff brought his claim pursuant to MCL 37.2402 of the CRA, which provides, in relevant part:

> An educational institution shall not do any of the following:
>
> (a) Discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.
>
> (b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, or sex.

"The CRA also prohibits employers from retaliating against a person 'because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.'" *Chen v Wayne State Univ*, 284 Mich App 172, 201; 771 NW2d 820 (2009), quoting MCL 37.2701(a).

The education provisions in MCL 37.2402 have rarely been addressed by our courts. As this Court explained in *Fonseca v Michigan State University*, 214 Mich App 28, 30; 542 NW2d 273 (1995), "[b]ecause the educational provisions of the act have received little judicial interpretation and because the statutory language employs terms of art used and judicially interpreted extensively in the specialized but extensive field of employment discrimination, we look to these decisions to help us interpret and apply the law to the facts." Plaintiff does not dispute that he lacks direct evidence of gender bias. Accordingly, he was required to present a prima facie case of discrimination under the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Borrowing from the employment context, this approach required plaintiff to show that he belongs to a protected class, he suffered an adverse action, he was otherwise qualified, and the adverse action occurred under circumstances giving rise to an inference of unlawful discrimination. See *Sniecinski v Blue Cross and Blue Shield of Mich*, 469 Mich 124, 134; 666 NW2d 186 (2003).

B. DISCUSSION

Plaintiff complains that defendants failed to adequately support their motion for summary disposition and, therefore, it was error for the trial court grant the motion. MCR 2.116(G) states that, when judgment is sought under MCR 2.116(C)(10), the moving party must submit documentary evidence in support. MCR 2.116(G) provides, in relevant part:

> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

Defendants submitted documents to support their motion for summary disposition, including a copy of the student handbook, a copy of medical student rights and responsibilities, the findings of the hearing committee, a letter from Dr. Bottles to plaintiff, an affidavit of Dr. Bottles, an affidavit of Dr. Thompson, and plaintiff's revised dean's letter. Defendants relied on the evidence to support their argument that there is no genuine issue of material fact that plaintiff ever suffered a materially adverse action, that defendants were predisposed to discriminate against males, or that they treated plaintiff differently as a male in this case. We hold that, contrary to plaintiff's assertions, defendants supported their arguments as required by the court rule. In response, plaintiff failed to submit documentary evidence setting forth specific facts to establish that there is a genuine issue for trial. Accordingly, the trial court correctly granted summary disposition to defendants.

We agree with the trial court that plaintiff failed to establish that he suffered an adverse action. To establish this element, plaintiff had to show that he suffered more than a minor inconvenience or change. In the employment context, materially adverse actions would include termination, demotion, salary cut, change to a lesser job title, or a significant loss of benefits. *Chen v Wayne State Univ*, 284 Mich App 172, 202; 771 NW2d 820 (2009). Here, plaintiff failed to present any evidence to establish that he suffered a similar action that would qualify as actionable under the CRA. It is undisputed that Bracamontes's comments about plaintiff's improper physical contact were removed from plaintiff's dean's letter. Further, Dean Rappley's comment that "there have been faculty and administrator concerns about communication" does not constitute a materially adverse action against plaintiff. If plaintiff had alleged or shown that, for example, he was dismissed from the medical school or he received a lower graduating designation for reasons related to gender bias, this may have amounted to an adverse action. But plaintiff made no such allegation, he received a "Very Good" designation in the dean's letter, and the letter contains overwhelmingly positive comments about his medical school performance.

If plaintiff had shown that the comments in the dean's letter constituted an adverse action by defendants, he was also required to show that the action was motivated by an intent to discriminate based on gender. "A plaintiff who claims a decision was discriminatorily motivated must produce some facts from which a factfinder could reasonably infer unlawful motivation." *Fonseca*, 214 Mich App at 31. Plaintiff has produced no facts to establish that defendants,

individually or in concert, had any unlawful motivation in recording plaintiff's unprofessional conduct. While the hearing panel concluded that Bracamontes should have talked to plaintiff about his unwanted physical contact, no evidence suggests that her failure to do so or any subsequent reporting of the incidents was motivated by plaintiff's gender. Moreover, plaintiff has made no factual showing to refute the accuracy or relevance of any of the comments contained in the dean's letter and he has not presented evidence to support his allegation that defendants intentionally, and with discriminatory motive, engaged in an effort to give him a negative evaluation.

Plaintiff contends that defendants treated Bracamontes more favorably because she is female. Specifically, he asserts that Bracamontes was never disciplined for failing to talk to plaintiff about his unwanted physical contact, but he was punished through the inclusion of this information in his reviews and dean's letter. Again, referring to the employment context, "[t]o avoid summary disposition under the disparate treatment theory, the plaintiff must present sufficient evidence to permit a reasonable juror to find that for the same or similar conduct the plaintiff was treated differently from a similarly situated male [or female] employee." *Duranceau v Alpena Power Co*, 250 Mich App 179, 182; 646 NW2d 872 (2002). To establish that another is similarly situated, plaintiff had to show that all relevant aspects of Bracamontes's situation were "nearly identical" to his situation. See *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997). It is undisputed that Bracamontes was a resident instructor in the clerkship program and that she was charged with instructing plaintiff and evaluating his performance in his student medical rotation. Plaintiff and Bracamontes were not similarly situated. Moreover, unlike plaintiff, there is no allegation that Bracamontes engaged in unwanted physical contact with a student, so plaintiff simply cannot establish that he was treated differently "for the same or similar conduct . . . ." *Duranceau*, 250 Mich App at 182.

Plaintiff asserts that defendants retaliated against him because he made allegations of gender bias. Our courts have ruled that, in an employment context, to establish a prima facie case of retaliation under the CRA, a plaintiff must show: "'(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.'" *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). Plaintiff claims he raised the issue of sexual bias during the grievance process and that he was punished when defendants referenced his unprofessional conduct in his dean's letter. However, the reference to Bracamontes's complaint was removed from plaintiff's letter, there is no evidence of an adverse action against plaintiff and, even if a negative comment in the letter could amount to an adverse action, plaintiff has failed to allege or document any facts to establish a causal connection between his allegation of sexual bias and any comments in the letter. Therefore, plaintiff failed to establish a claim for retaliation and the trial court correctly granted summary disposition to defendant.

Plaintiff also complains that discovery was not complete when the trial court granted summary disposition to defendants. The scheduling order in the lower court file shows that the discovery cut-off date was December 31, 2009. The trial court granted summary disposition to defendants on December 21, 2009, after the case was pending for a year. Further, in light of plaintiff's failure to even allege sufficient facts to support his claims, it does not appear that

further discovery would uncover factual support to oppose defendants' motion for summary disposition. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Accordingly, plaintiff's claim is without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Amy Ronayne Krause