STATE OF MICHIGAN

COURT OF APPEALS

ANTWAN DAVIS, Plaintiff-Appellant,	UNPUBLISHED November 29, 2011
v	No. 299505 Wayne Circuit Court
MOTORCITY CASINO, a/k/a DETROIT ENTERTAINMENT, L.L.C., Defendant-Appellee.	LC No. 09-001201-CD

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this employment discrimination case under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, plaintiff Antwan Davis appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendant MotorCity Casino. Because we conclude that the trial court properly dismissed plaintiff's claims, we affirm.

I

Plaintiff, an African American male, worked for defendant as a surveillance operator. Plaintiff's duties included the clandestine surveillance of table games, slots, food and beverage, and all casino cage operations, in addition to the audio and video recording of count-room activities. Plaintiff was required to protect the assets of the casino and detect and report suspicious activity to his supervisor. A fraternization policy in the surveillance department's procedures manual states the following:

> MotorCity Casino regulations mandate that the surveillance department shall cooperate with, yet perform independently of all other departments . . . .
>
> One of the reasons for this ruling is to discourage associates of the surveillance department from becoming too friendly with other associates or customers. It should be understood that your position in surveillance is very unique in that it would be very difficult for someone to pull off a big scam without the assistance of someone in the surveillance department. Therefore, we should be careful not to associate with others.

> We should cooperate fully with the floor whenever possible, however, while on duty, our contact with anyone outside of our department should be strictly business. All telephone conversations with other casino associates must be strictly business. This policy will be strictly enforced up to and including termination of employment for non-compliance.
>
> If at any time you are contacted by anyone who requests, or even hints that you furnish them with information on specific activities in the surveillance department, [this] should be reported to the director immediately and without delay.

A conflict of interest policy in defendant's employee handbook requires employees to avoid placing themselves in a position of conflict between personal interests and defendant's interests. The policy prohibits employees from seeking or accepting anything other than nominal gifts from guests, vendors, and other associates. The policy also requires employees to report any actual or potential conflicts of interest to their supervisors.

Plaintiff violated defendant's policies by having an intimate relationship with Tisha Powell, a female member of the drop team who handled uncounted money in the slot machines. The relationship lasted over one year. During the relationship, Powell gave plaintiff a car. And, plaintiff impregnated Powell.[1] Plaintiff failed to disclose the relationship to defendant, even though he had been assigned to monitor Powell during the "drop" of uncounted gaming revenues. After suspicions came to light by way of a Michigan Gaming Control Board agent, plaintiff initially denied but, later, admitted to the relationship. Defendant terminated his employment.[2] Plaintiff claims in this lawsuit that he was discriminated against on the basis of his race and gender because defendant treated him more severely for his work infractions than similarly situated Caucasian female coworkers.

II

We review de novo a trial court's decision whether to grant a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine

[1] Powell later gave birth to plaintiff's son.

[2] Defendant terminated plaintiff on August 11, 2008, stating in its letter of termination that plaintiff's actions were deemed to be a violation of defendant's "Conflict of Interest" and "Personal Conduct" policies and the surveillance department's "Fraternization Policy."

issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Plaintiff alleges that defendant violated MCL 37.2202(1)(a), which provides:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, 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.

To establish a prima facie case of discrimination under ELCRA, 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 Mich Bell Tel Co*, 455 Mich 688, 695 (opinion by BRICKLEY, J.), 707-708 (concurring opinion by RILEY, J.); 568 NW2d 64 (1997).[3]

Defendant does not dispute that plaintiff can satisfy the first three elements of his disparate-discrimination claims. However, defendant contends that plaintiff cannot make the requisite showing of element four: "others, similarly situated and outside the protected class, we[nt] unaffected by the employer's adverse conduct." *Id*. at 695. "To create an inference of disparate treatment, [the plaintiff] must prove that he and [his coworkers] were similarly situated, i.e., 'all of the relevant aspects' of [the plaintiff's] employment situation were 'nearly identical' to those of [the coworkers'] employment situation[s]." *Id*. at 699-700, quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994); see also *Smith v Goodwill Indus of West Mich, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000) (noting that, to show that two employees are similarly situated, a plaintiff must establish the near identity of all relevant aspects of the other person's employment situation).

The United States Court of Appeals for the Sixth Circuit has elaborated as follows concerning the meaning of similarly situated workers:

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[3] In *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998), the Court described another prima facie test as encompassing a different fourth element which necessitated a showing that the plaintiff "was discharged under circumstances that gave rise to an inference of unlawful discrimination." See also *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538 n 8; 620 NW2d 836 (2001).

> In *Mitchell v. Toledo Hospital*, we held that to be deemed similarly-situated, the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. [*McMillan v Castro*, 405 F3d 405, 413 (CA 6, 2005) (quotations and citations omitted).]

The Court continued, explaining that, although all of the *Mitchell* factors are generally relevant in cases alleging disparate disciplinary treatment, courts should not presume "that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee." *Id.* at 414. "The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered similarly-situated; rather, . . . the plaintiff and the employee . . . must be similar in all of the *relevant* aspects."[4] *Id.* (quotations omitted).

To show that he was treated differently than similarly situated Caucasian female employees, plaintiff points to Maria Haney and Amy McKee: surveillance operators who broke the surveillance department's fraternization prohibition. Haney testified that she had a two-night "fling" with a slot technician and that she revealed the relationship to the casino surveillance vice president, Ezzie Rooks, Jr., "the minute that [the casino]" assigned her to conduct surveillance of the slot technician. Haney recalled that after a five-day suspension, Rooks and another supervisor informed her "that since [she] told the truth . . . [she would] be able to keep [her] position." McKee recounted that when she and an Iridescence restaurant server had begun "discussing a relationship," she apprised Rooks of the potential relationship. Rooks ultimately told McKee "that it was okay as long as [they] did not work the same shifts and [she] was not ever allowed to do any reviews that would involve his department . . . [or] the restaurant where he worked." McKee averred that her shift never overlapped with the server's shifts and that the server no longer worked at Iridescence.

Similarities between plaintiff, Haney, and McKee include that they worked as surveillance operators, technically violated the surveillance department's fraternization prohibition, and were disciplined in part by Rooks. But, the circumstances surrounding plaintiff's fraternization-policy violation significantly distinguish his behavior from that of Haney and McKee. Plaintiff acknowledged having an intimate relationship with Powell since 2006 or 2007, receiving a car from Powell, fathering a child with her, working a shift that overlapped with Powell's shift at some point, and watching Powell perform her duties as a

[4] Our Supreme Court has observed that "[w]e are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute," even though Michigan courts "are not compelled to follow those federal interpretations." *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000); see also *Town*, 455 Mich at 699-700 (citing federal precedent relating to the standard for similarly situated employees).

member of a drop team that retrieved cash from casino slot machines. Plaintiff also conceded that he had never revealed to casino management the existence or extent of his relationship with Powell, even during an August 2008 meeting with Rooks. Rooks testified that the results of his investigation revealed that plaintiff had monitored Powell on a number of occasions during the three-week period before his suspension. Rooks emphasized that in his "30-plus years of experience in [the casino surveillance] business how egregious [plaintiff's conduct was]" considering "[t]he issue involving the car that Ms. Powell acquired for him" and that "[plaintiff] had misrepresented [the situation to him] initially and confessed or provided [him] the details" later. Rooks elaborated: "The slot drop comprises about 85 percent of our revenue. We are charged with the responsibility to monitor[] and ensur[e] that the drop occurs and that we maintain our independence and objectivity. Those things were completely out the window." John David Trafelet, "a lead regulation officer" for the Michigan Gaming Control Board's enforcement department, testified that plaintiff's conduct in "monitoring the drop of a friend" raised the potential for "[t]heft and collusion" and that, whenever a situation raises the potential for collusion and theft, "we have to notify [the Michigan State Police] the minute we suspect it per our rules."

The relevant evidence establishes that plaintiff committed a more substantial breach of the surveillance department's policy against fraternization than either Haney or McKee. Unlike Haney and McKee, over the course of at least one year, plaintiff failed to advise casino management about his involvement with Powell. Furthermore, the nature of plaintiff's misconduct, particularly his long-term concealment of the relationship and his dishonesty with Rooks, would make it challenging for him to continue successfully in his position because it would be difficult for those he had disillusioned to work with him. See, *Wright v Murray Guard, Inc*, 455 F3d 702, 711 (CA 6, 2006). The same cannot be said of Haney and McKee, as there are legitimate reasons why defendant would treat them differently. See, *Id.* at 710. In light of the evidence of significant differences between plaintiff, Haney, and McKee, plaintiff has not satisfied the fourth element of his prima facie case of employment discrimination, namely that he, Haney, and McKee "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *McMillan*, 405 F3d at 413 (internal quotation and citation omitted). Stated differently, plaintiff has failed to show that he, Haney, and McKee "engaged in acts of comparable seriousness." *Wright*, 455 F3d at 710.

The two remaining female surveillance operators who plaintiff complains received different treatment for violating casino rules are Lisa Blassic and Tracy Misiak. They engaged in a single documented instance of time-card fraud when one worker punched in for another employee before the other employee arrived to work. This lone time-card-fraud incident is substantially different and less serious than the reasons for plaintiff's discharge. *Id.*

Even when viewed in the light most favorable to him, plaintiff has not shown that defendant imposed disparate discipline on him in comparison with other similarly situated casino employees, i.e., identical in all relevant respects, *Town*, 455 Mich at 699-700; *Smith*, 243 Mich App at 449. Consequently, the circuit court properly granted defendant summary disposition under MCR 2.116(C)(10). Although the circuit court incorrectly found that plaintiff sufficiently proved the fourth element of his prima facie case with respect to Haney and McKee, we affirm a correct result reached pursuant to erroneous logic. See *Klooster v City of Charlevoix*, 488 Mich

289, 310; 795 NW2d 578 (2011) ("[A]n appellate court may uphold a lower tribunal's decision that reached the correct result, even if for an incorrect reason.").

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause