

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1170

Cir. Ct. No. 2004CV917

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ALI AMIR,

PLAINTIFF-APPELLANT,

V.

MARQUETTE UNIVERSITY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Dykman, P.J., Bridge and Gaylord,¹ JJ.

¹ Circuit Judge Shelley J. Gaylord is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Ali Amir appeals an order dismissing his complaint against Marquette University. He alleged that the University discriminated against him on the basis of his national origin, in violation of federal antidiscrimination laws, 42 U.S.C. §§ 1981 and 2000d, when it dismissed him from the School of Dentistry. On his previous appeal this court reversed a summary judgment in the University's favor, and remanded for a trial on his claim. *Amir v. Marquette Univ.*, 2006 WI App 252, ¶1, 297 Wis. 2d 326, 727 N.W.2d 63. We identified the issues for trial as to whether Amir was similarly situated to a Caucasian student named Daniel Meyers and, if so, whether the stated reason for Amir's dismissal was pretextual. *Id.*, ¶20. At the subsequent bench trial, the circuit court dismissed the matter at the close of Amir's case, finding that he had not proved that he and Meyers were similarly situated. Amir contends on appeal that the court erroneously relied on nonexistent testimony to find that Amir and Meyers were not similarly situated, and that he in fact met his burden of proving that they were similarly situated, but differentially treated. We disagree and therefore affirm.

FACTS

¶2 Amir is a United States citizen, born in Iran. In the fall of 2000, he began his freshman year at the University's dental school. In his first semester, he took courses totaling twenty-two credit hours. Of those courses, he flunked two four-credit courses and received a "D" in a two-credit course. His GPA at the end of the semester was 1.272. As a result of his poor grades, the school's Academic Review Committee voted to have him repeat his first year. Consequently, he withdrew from school and reenrolled as a freshman in the fall of 2001. In the fall 2001 term, he repeated six courses he had taken in his fall 2000 semester, worth

seventeen credits, with no failing grades or “D’s.” At the completion of the semester, he had a GPA of 2.294.

¶3 In his second semester Amir received an “F,” a “D,” three “C’s,” and a “B,” resulting in a GPA of 1.8. He remediated his “D” to a “CD,” but failed to remediate his “F.” He attended summer school in the summer of 2002 and received one “D.” In August 2002, the newly appointed associate dean of academic affairs for the school, Dr. Denis Lynch, dismissed Amir from the school. The dismissal was upheld on appeal to the Academic Appeals Committee, and on a subsequent appeal to the dean of the school.

¶4 Daniel Meyers, the student with whom Amir chose to compare himself, entered the dental school in the fall of 1998. His first semester GPA was 2.909. His spring semester GPA was 1.95, with no grades lower than “CD.” His summer school performance was comparable.

¶5 In the first semester of his sophomore year, Meyers’ performance significantly declined, and he received an “F,” one “D,” and one incomplete (“I”). He continued to perform poorly in his second semester, receiving a semester GPA of 1.593. He failed to complete his summer courses.

¶6 In the fall of 2000, Meyers repeated the first semester of his sophomore year, and recorded an “F” in a course he had previously failed, a “D” and an “I,” receiving a GPA of 1.3. In February 2001, the Academic Review Committee voted to allow Meyers a second opportunity to repeat his sophomore year in the fall of 2001. During the fall semester Meyers’ grades included an “F,” two “D’s,” a “U” and an “I.” During the spring semester he received no grades lower than “C,” but experienced difficulties again during the summer session, and withdrew. He requested and received a leave of absence until the spring semester

of the 2002-03 school year, with reenrollment conditioned on documentation from a physician indicating that he was ready to resume school. He subsequently reenrolled in four independent study courses. Dr. Lynch dismissed him in May 2003 after he failed all four courses. Dr. Lynch agreed that Meyers' academic performance while attending the school was substantially worse than Amir's.

¶7 Having selected Meyers as his comparison student from a non-protected class, Amir's burden at trial was to show that Meyers was a "similarly situated" student in all relevant aspects. See *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994) (citation omitted). At the close of Amir's case, the University moved to dismiss, arguing that the evidence was insufficient on this and other matters. The circuit court found that Amir had failed to prove that he and Meyers were similarly situated, with the principal, and ultimately determinative, difference being Meyers' successful completion of his first year of dental school. To a lesser degree, the circuit court also found a difference in the fact that the school knew that medical problems suffered by Meyers when it granted him additional chances to continue as a student, and did not know of Amir's medical problems until after his dismissal. Amir appealed after the circuit court denied reconsideration of its decision.

DISCUSSION

¶8 To the extent the circuit court's decision involves findings of evidentiary or historical facts, those findings will not be overturned unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2007-08);² see *State v. Brown*, 2006

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906. We determine as a question of law whether the facts as found fulfill a particular legal standard. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994).

¶9 The circuit court did not clearly err when it found that Meyers did substantially better than Amir as a dental school freshman. Amir claims error because the court cited Dr. Lynch’s testimony as the basis of its finding when, as the University concedes, Dr. Lynch did not in fact give the testimony in question. However, we conclude that the court’s mistaken attribution of testimony was harmless. The transcript evidence speaks for itself and shows beyond reasonable dispute that Meyers performed far better than Amir in their respective freshman years. Because the evidence speaks so clearly for itself, it makes no difference that the court misattributed the source of the facts regarding the first year performances. *See* WIS. STAT. § 805.18(1) (“The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”).

¶10 The circuit court did not clearly err when it found that the school was aware of Meyers’ medical issues when he received opportunities to continue with his dental studies, and not aware of Amir’s problems until after his dismissal. There was evidence that Meyers’ counselor appeared before the Academic Review Committee in February 2001 on Meyers’ behalf to support his request to repeat his sophomore year. Meyers’ return to school in 2003 was conditioned on successful medical treatment and a physician’s clearance. On the other hand, Amir introduced no evidence that he ever communicated with anyone at the school concerning his medical problems until after Dr. Lynch dismissed him.

¶11 The evidence available at the end of Amir’s case shows that he and Meyers were not similarly situated. Amir failed three courses and recorded two “D’s” during his freshman year. The only freshman semester he successfully completed was his repeat of the first semester, when he took a reduced case load of courses he had already completed once before. On the other hand, Meyers completed his first year with no unsatisfactory grades. Meyers thus demonstrated an academic potential that Amir never demonstrated. Additionally, when Meyers’ grades worsened, he provided at least some medical explanation. Consequently, the school had much more reason to believe that Meyers could overcome his academic difficulties, if given the opportunity. He was not, therefore, similarly situated to Amir when decisions were made on his requests to continue as a student. Determining whether individuals are similarly situated involves a flexible, common-sense approach with requirements that vary from case to case. *Barricks v. Eli Lilly & Co.*, 481 F.3d 556, 560 (7th Cir. 2007). In every case, however, the purpose of the inquiry is to determine whether there are sufficient common factors between the individuals to allow for a meaningful comparison in the context of the alleged discrimination. *Id.* Because Meyers and Amir differed in these two significant respects, they were not similarly situated.

¶12 Additionally, even if Meyers and Amir were similarly situated, Amir failed to prove that they were differentially treated. *See Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 538 (7th Cir. 2007) (plaintiff’s burden includes showing that similar-situated person not in his/her protected class were treated more favorably). Before Dr. Lynch arrived at Marquette in July 2002, previous decisionmakers afforded both Meyers and Amir the opportunity to remedy their inadequate performances. Once he became the decisionmaker, Dr. Lynch dismissed both at the first opportunity. The variable was not Meyers’ and Amir’s national origin or

race, but in what the circuit court described as Dr. Lynch's "no nonsense" approach to academic matters, as opposed to the more lenient approach of his predecessors.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

