

STATE OF MICHIGAN
COURT OF APPEALS

FLORENCE A. DAVIS,

Plaintiff-Appellant,

v

GREATER DETROIT HOSPITALS, INC.,

Defendant-Appellee.

UNPUBLISHED

April 14, 1998

No. 195552

Wayne Circuit Court

LC No. 95-521377-CZ

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

On April 28, 1995, plaintiff and another employee threatened their supervisor that they might report to authorities various violations of state regulations which plaintiff felt were endangering patients at the hospital. On April 30, 1995, Jean Zacharias, plaintiff's supervisor, was informed of a physical altercation between plaintiff and another nurse, Kristina Koski. Koski was plaintiff's subordinate. Plaintiff and Koski each claimed that the other had instigated the altercation and each claimed that she merely defended herself from the attack of the other. Zacharias consulted with the hospital's chief operating officer, Sandra Peppers, regarding the incident. Peppers spoke to a doctor in the hospital who examined plaintiff and Koski after the physical altercation. The doctor indicated that Koski had observable injuries while plaintiff did not. Plaintiff also had a history of being overly gruff, inflexible, demeaning, and verbally abusive to employees. Peppers and Zacharias both concluded that plaintiff was the aggressor. Concluding that plaintiff had been the aggressor in the physical altercation she was terminated on May 2, 1995.

Plaintiff claims she was terminated for two reasons. First, plaintiff, a black woman, and Koski, a white woman, had a physical altercation and only plaintiff was terminated. Plaintiff alleged this disparate treatment violates the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 17.428(1) *et seq.* Also, plaintiff alleged because she threatened her employer that she might go to outside authorities to report various violations of state regulations, and she called the police after the physical altercation between her and Koski, she was terminated, which violates the Whistleblowers' Protection

Act, MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.* Defendant filed a motion for summary disposition on April 12, 1996, pursuant to MCR 2.116(C)(10). The trial court granted defendant's motion for summary disposition on May 13, 1996.

On appeal, plaintiff contends that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) because there was a genuine issue of material fact. We disagree. This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). We must review the documentary evidence to determine whether a genuine issue of material fact exists. *Id.* Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome. *Id.* The initial burden of supporting a motion for summary disposition pursuant to MCR 2.116(C)(10) is on the moving party to specifically identify the matters which have no disputed factual issues by affidavits, deposition, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Then, the party opposing summary disposition has the burden of showing that a genuine issue of material fact does exist through evidentiary materials. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The existence of a disputed fact must be established by admissible evidence and, it is not sufficient to promise to offer factual support at trial to establish the existence of a disputed fact. *Cox v Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995). All inferences are to be drawn in favor of the nonmoving party. *Paul, supra*; *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

Plaintiff's first issue on appeal is that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) regarding the WPA claim. We disagree. To establish a prima facie case, plaintiff must demonstrate that: (1) she was engaged in a protected activity as defined by the act; (2) she was subsequently discharged, and (3) there existed a causal connection between the protected activity and her discharge. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 325; 559 NW2d 86 (1996).

Even assuming arguendo that plaintiff was engaged in protected activity, she failed to show a causal connection between her actions, either threatening to someday make a report or calling the police, and her discharge. *Shallal v Catholic Social Services*, 455 Mich 604, 621; 566 NW2d 571 (1997). Defendant articulated a legitimate, nondiscriminatory reason for her discharge by providing an affidavit from Zacharias and Peppers that plaintiff was terminated because of the altercation between her and Koski. In plaintiff's response to defendant's motion for summary disposition plaintiff provided no documentary evidence to show that the legitimate reason offered by defendant was only a pretext. *Hopkins v City of Midland*, 158 Mich App 361, 378; 404 NW2d 744 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Allen v Comprehensive Health Services*, 222 Mich App 426, 433-434; 564 NW2d 914 (1997). After reviewing this evidence in a light most favorable to plaintiff, there were no genuine issues of material fact on this issue and defendant was entitled to judgment as a matter of law.

Plaintiff's second issue on appeal is that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) regarding her race discrimination claim. We disagree. The plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. *Sisson v U of M Regents*, 174 Mich App 742, 746; 436 NW2d 747 (1989). Plaintiff's discrimination claim is based on a theory of disparate treatment. To establish a prima facie case of discrimination in a disparate treatment case, a plaintiff must show "(1) that [s]he was a member of the class entitled to protection under the act, and (2) that, for the same or similar conduct, [s]he was treated differently than one who was a member of a different race." *Id.* at 746-747.

In the present case, plaintiff is a black female, a member of a protected class. Plaintiff asserted that she was more severely disciplined than the white employee involved in the altercation. However, plaintiff admitted that she was in a supervisory position and Koski was not. Plaintiff failed to present evidence of any other supervisory employee at her level who was not discharged under the same or similar circumstances. *Meagher v Wayne State University*, 222 Mich App 700, 716; 565 NW2d 401 (1997). After reviewing this evidence in a light most favorable to plaintiff, she failed to establish a prima facie case of racial discrimination based on disparate treatment.

Plaintiff's third issue on appeal is that her claim for physical injury suffered in her fall down stairs on her last day of employment is not barred by the Workers' Compensation Disability Act, MCL 418.131; MSA 17.237(131), although plaintiff recovered workers' compensation benefits for her fall. Because this issue was not addressed by the trial court, it is not properly preserved for appeal. *Environair Inc v Steelcase Inc*, 190 Mich App 289, 295; 475 NW2d 366 (1991). However, even if this issue had been preserved, plaintiff's collection of workers' compensation benefits is her exclusive remedy. It is true that the exclusive remedy provision does not apply to claims arising from intentional torts. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 161; 551 NW2d 132 (1996). Plaintiff claims that via the racial discrimination claim she can prove an intentional tort. However, as previously discussed, plaintiff's racial discrimination was properly dismissed. Thus, plaintiff is bound by the exclusive remedy provision of the worker's compensation act.

Plaintiff's final issue on appeal is that the trial court erred by excluding as hearsay the incident reports plaintiff submitted. We disagree. It is within the sound discretion of the trial court whether to admit evidence and that decision will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c). All of the incident reports were introduced by plaintiff to prove the truth of the matter asserted, namely, that she did not initiate the altercation. Plaintiff claims that MRE 803(6), the business records exception to the hearsay rule, applies. However, plaintiff failed to show that the records were prepared in the regular course of business as a regular practice, as opposed to a single request by a supervisor after an event outside of the regular course of business. Plaintiff further contends that the documents could also be admitted pursuant to MRE 803(24), as having equivalent circumstantial guarantees of trustworthiness, but fails to show how

there are equivalent circumstantial guarantees of trustworthiness here. Thus, the trial court did not abuse its discretion by finding the incident reports inadmissible hearsay.

Affirmed.

/s/ Roman S. Gibbs

/s/ Mark J. Cavanagh

/s/ Henry William Saad