STATE OF MICHIGAN

COURT OF APPEALS

ABDULHASSIB RASLAN, M.D.,

Plaintiff-Appellant,

V

PROVIDENCE HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
September 11, 2001

No. 220159
Oakland Circuit Court
LC No. 97-545097-NZ

Before: Doctoroff, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

In this employment discrimination case, plaintiff, a licensed physician, appeals as of right the trial court's dismissal of his action alleging religious and ethnic (national origin) discrimination by his employer, defendant hospital. We affirm.

In his appellate brief, plaintiff presents only one question in his "statement of question presented," that being "whether the trial court eviscerated plaintiff's case through a series of erroneous evidentiary rulings, such that its ultimate decision to grant summary disposition constitutes reversible error?" In the context of the statement of the issue presented, it is important to understand the chronology of events in the trial court leading to the dismissal of plaintiff's claims.

On May 30, 1997, plaintiff filed a complaint against defendant alleging (1) ethnic and religious discrimination in violation of the Civil Rights Act, MCL 37.2201 *et seq.*, which created a hostile and offensive work environment; (2) breach of contract; and (3) defamation. In March 1998, plaintiff filed a motion to compel production of documents, seeking an order requiring defendant to answer plaintiff's second set of interrogatories and requests for production of documents. In that document, plaintiff had sought records of all disciplinary actions taken against two other doctors, including all investigation reports, peer review reports, and employee records. The trial court denied plaintiff's motion to compel. Thereafter, in July 1998, defendant filed a motion for summary disposition, arguing that it was entitled to summary disposition on each of plaintiff's claims. Having heard arguments, the trial court granted summary disposition on plaintiff's religious discrimination claim and indicated that plaintiff's ethnic discrimination claim survived only with regard to plaintiff's termination. The trial court also granted summary

disposition in defendant's favor on plaintiff's contract and defamation claims.[1] Later, in November 1998, defendant filed a motion in limine requesting, among other things, an order excluding evidence at trial of statements made by employees of defendant hospital who were not involved in the decision to terminate plaintiff's employment pursuant to MRE 401 and 403 and also excluding the testimony at trial of plaintiff's proposed expert witness. After a December 16, 1998 hearing, the trial court excluded the testimony of plaintiff's proposed expert witness and reserved a ruling on the other matter. In March 1999, defendant again filed motions in limine to exclude various evidence at trial, including evidence of statements made by individuals who were not involved in the decision to terminate plaintiff's employment. On March 31, 1999, the trial court signed an order granting defendant's motion in limine, which provided that statements by Carol Fletcher and Drs. Mariona, Maicki and Pike were inadmissible because plaintiff failed to show the requisite connection between the decision-maker, i.e., defendant's CEO, and the above-named individuals. Thereafter, the trial court entered an order of dismissal.[2]

We first address plaintiff's challenge to the trial court's evidentiary ruling regarding plaintiff's motion to compel production of documents, in which plaintiff sought production of peer review documents. This is the only challenged evidentiary ruling that the trial court issued before it granted defendant's motion for summary disposition on plaintiff's claims of religious discrimination and on plaintiff's claims of ethnic discrimination other than the claim related to his termination. Plaintiff argues that the trial court erred in denying his motion to compel production of peer review documents where plaintiff's discovery request fits an exception to the peer review privilege under MCL 333.21515. Plaintiff claims that that statute was created and intended to protect information from being used in malpractice cases and not a discrimination case brought by a hospital's own employee.

This Court reviews de novo questions of law, including whether a statute bars production of documents and statutory interpretation. *Dye v St John Hospital & Medical Center*, 230 Mich

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[1] Plaintiff does not appeal the dismissal of the contract and defamation claims.

[2] The order of dismissal states:

> Plaintiff's motion for adjournment of trial is denied. Plaintiff's motion for entry of an order dismissing the case under MCR 2.116(C)(10) is granted, in light of the agreement of counsel that this court's order granting defendant's motion in limine dated March 24, 1999 results in there being no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

It appears that the order of dismissal refers to the March 24, 1999, motion in limine renewing defendant's motion in limine regarding certain statements and the trial court's oral ruling during the hearing on the motion in limine that granted defendant's motion without prejudice. In other words, the trial court indicated that it would reconsider its decision if plaintiff provided evidentiary support that there is a direct connection between the individual who decided to terminate plaintiff's employment and the individuals who made the alleged discriminatory statements. Apparently, the March 31, 1999, order granting defendant's motion in limine excluding evidence at trial of certain statements is the written order manifesting the March 24, 1999, oral ruling.

App 661, 665; 584 NW2d 747 (1998); *Rose Hill Center, Inc v Holly Twp,* 224 Mich App 28, 32; 568 NW2d 332 (1997). "It is well established that this Court reviews a trial court's evidentiary rulings for an abuse of discretion and, in making that determination, we consider the facts on which the trial court acted to determine whether an unprejudiced person 'would say that there is no justification or excuse for the ruling made.'" *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001) (citation omitted); *Grow v W A Thomas Co,* 236 Mich App 696, 711; 601 NW2d 426 (1999). Once it is determined whether a privilege is applicable, the trial court's order is reviewed for an abuse of discretion. *Baker v Oakwood Hospital Corp,* 239 Mich App 461, 468; 608 NW2d 823 (2000).

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, *not privileged*, that is relevant to the subject matter involved in the pending case." *Reed Dairy Farm v Consumers Power Co,* 227 Mich App 614, 616; 576 NW2d 709 (1998) (emphasis supplied); MCR 2.302(B)(1). Thus, the question becomes whether the requested documents were privileged. The statute at issue in the present case, MCL 333.21515, provides:

> The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

This language clearly and unambiguously states that "the records, data, and knowledge collected by the peer review committee 'shall be used only for the purposes provided in this article,'" *Attorney General v Bruce,* 422 Mich 157, 165; 369 NW2d 826 (1985), and thus the statute must be applied as written, *Rose Hill, supra*.

Here, plaintiff sought investigation reports, peer review reports, and employee records. These discovery requests necessarily related to records concerning review of professional practices and the quality of care provided in the hospital. See MCL 333.21513(d). Because there is no exception to MCL 333.21513(d) for discrimination cases brought by a hospital's own employee,[3] the trial court did not abuse its discretion in denying plaintiff's motion to compel production of documents.

Because this is the only evidentiary ruling that plaintiff challenges that took place before the trial court's grant of summary disposition on the religious discrimination claim and the aspects of the ethnic discrimination claim other than plaintiff's termination, we cannot say that the trial court "eviscerated" plaintiff's case on those claims with an erroneous evidentiary ruling.

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[3] Although arguably there may be an exception to MCL 333.21515 related to the investigation and remediation of a specific and immediate health care crisis, see *Dye, supra* at 668-669, plaintiff's discovery requests do not fall into that category. Further, although plaintiff relies on *Dorsten v Lapeer Co General Hospital,* 88 FRD 583 (ED Mich, 1980), we are not bound by a federal court decision construing Michigan law. *Radtke v Everett,* 442 Mich 368, 381-382; 501 NW2d 155 (1993); *Allen v Owens-Corning Fiberglas Corp,* 225 Mich App 397, 402; 571 NW2d 530 (1997).

To the extent that plaintiff challenges the grant of summary disposition with regard to religious discrimination and to any aspects of the ethnic discrimination claim besides his termination on substantive grounds, we note that plaintiff failed to raise that as an issue in his statement of question presented, and therefore we need not address this unpreserved challenge. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Thus, the grant of summary disposition on those claims stands undisturbed.

Plaintiff also argues that the trial court erred in granting defendant's motion in limine regarding alleged discriminatory statements that resulted in the dismissal by summary disposition of his ethnic discrimination claim. The only adverse employment action that plaintiff claims was made on the basis of ethnic discrimination and that survived summary disposition was plaintiff's termination. Although plaintiff claims that he was terminated for discriminatory purposes, defendant asserts that plaintiff was terminated for leaving in the middle of surgery on a seventy-nine-year-old woman under general anesthesia to perform a routine delivery of a baby. In deciding whether the statements that doctors in positions superior to plaintiff's position made should be excluded from trial, the trial court focused on whether there was a sufficient connection between those individuals and the individual who made the ultimate decision to terminate plaintiff's employment.[4]

With regard to the admissibility of evidence, in *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200-201; 555 NW2d 733 (1996), this Court explained:

> MRE 401 defines relevant evidence as evidence that tends to make the existence of a material fact more probable or less probable than it would be without that evidence. All relevant evidence is admissible except when the federal or state constitutions, the court rules, or the rules of evidence provide otherwise. MRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, waste of time, or risk of misleading the jury. MRE 403.

Here, the trial court gave plaintiff multiple opportunities to provide it with evidence of the connection between the decision-maker and the individuals who made the allegedly discriminatory statements. Having concluded that plaintiff failed to show the requisite connection, the trial court excluded the following statements:

> (a) Carol Fletcher's alleged statement to the effect that she was "glad [Providence] finally [had] an all black group" … and Fletcher's alleged statements inquiring about plaintiff's beard;

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[4] See *McDonald v Union Camp Corp*, 898 F2d 1155, 1161 (CA 6, 1990) ("This circuit has held that a statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official."); cf. *Schrand v Federal Pacific Electric Co*, 851 F2d 152, 156 (CA 6, 1988).

(b) The comment allegedly made by Dr. Mariona in December 1994 concerning [p]laintiff's appeal of his suspension for failing to attend his rotation at a clinic where Dr. Mariona allegedly stated to [p]laintiff "Suck it up. You Syrians don't know how to suck it up";

(c) The statement allegedly made by Dr. Maicki in January 1996 while talking on the telephone where [p]laintiff allegedly overheard Dr. Maicki say "no Arabs, no blacks in my group"; and

(d) Dr. Maicki's deposition testimony about having Arabs in his call group; and

(e) Statements made by Dr. Pike in connection with [p]laintiff's staff privileges in an e-mail message dated July 21, 1993. [Citations omitted.]

Because there was no evidence presented connecting Carol Fletcher's statements to the decision to terminate plaintiff's employment, the trial court did not abuse its discretion in excluding her statements. The record reveals that defendant's CEO decided to terminate plaintiff and that he relied on the investigation and report of Dr. Welch. Plaintiff does not allege that Dr. Welch made discriminatory statements. With regard to the doctors' statements that the trial court excluded, we agree with the trial court that plaintiff failed to present sufficient evidence that these doctors had any substantive involvement in the decision to terminate plaintiff's employment. Moreover, the statements that were excluded were either remote in time from plaintiff's March 12, 1997 termination, made by someone who had left the hospital over a year before plaintiff's termination, or devoid of ethnic reference. Thus, even if arguably relevant, the statements had virtually no probative value. See MRE 403. Under these circumstances, we cannot say that the trial court abused its discretion in excluding these statements.

Plaintiff conceded to dismissal of the remaining claim after the trial court's evidentiary ruling. Because we find that such evidentiary ruling was not an abuse of discretion, plaintiff is entitled to no relief.[5]

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra

[5] Having determined that plaintiff is entitled to no relief from the dismissal of his claims, we need not reach the plaintiff's challenge to the trial court's evidentiary ruling excluding plaintiff's expert.