

STATE OF MICHIGAN
COURT OF APPEALS

SHARON GARSWOOD and KATHLEEN
NAIMAN,

UNPUBLISHED
September 6, 2002

Plaintiffs-Appellants,

V

No. 226908
Wayne Circuit Court
LC No. 99-901263

HENRY FORD HOSPITAL, HENRY FORD
HEALTH SYSTEM, and DIANNE HAAS,

Defendants-Appellees.

Before: Talbot, P.J., and Gage and Wilder, JJ.

Per Curiam

In this wrongful termination case, plaintiffs appeal as of right from a trial court order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

A. Introduction

On July 23, 1998, plaintiff Sharon Garswood (Garswood), was discharged from her position as Nurse Administrative Manager (NAM) of the Labor & Delivery Unit at defendant Henry Ford Hospital (hospital). She was terminated by her supervisor, defendant Dianne Haas (Haas). Haas was the Associate Administrator of the Defendant's Maternal Child Services Department. According to Haas, Garswood was fired after she discovered Garswood's violations of hospital policies and Haas' directives. Garswood contends she was discharged by Haas because she is Canadian. On August 13, 1998, plaintiff Kathleen Naiman (Naiman), an active military reservist, resigned her position as Assistant Nurse Administrative Manager (ANAM) of Labor & Delivery. According to Haas she became aware that Naiman had assisted Garswood in falsifying payroll documents in violation of hospital policy, and as a result the decision was made to terminate Naiman. Naiman resigned in lieu of being terminated and contends that defendants intended to terminate her because she took time off to perform her military duties.

Garswood began working for Henry Ford Hospital in November, 1990 as a staff nurse, and became an ANAM in 1993. She was promoted in 1994 by Haas to the position of NAM of the Labor & Delivery Unit. As NAM, Garswood was responsible for ensuring that the Labor &

Delivery Unit was staffed appropriately and that it ran effectively. The position also required Garswood to be “on-call” twenty-four hours a day, seven days a week.

Naiman originally worked for Henry Ford Hospital from 1986 until 1989, until an automobile accident forced a three-year break. Naiman returned to work at the hospital and became an ANAM in 1994, apparently replacing Garswood who had been promoted to NAM. As a member of the Army National Guard, Naiman occasionally required time off in order to fulfill her training and active duty requirements.

B. Violations of On-Call Policy

In the spring of 1997, Haas informed the NAMs and ANAMs that ANAMS could, from time to time, cover the NAMs’ administrative “on-call” duties. Haas informed the managers and their assistants that no one was to receive administrative on-call pay for this “cover duty”, and that if the assistants were unwilling to accept the responsibility of being on-call, then she would cover on-call duty when the NAMs were unavailable. Plaintiffs admitted that Haas informed them that ANAMs were not eligible to receive administrative on-call pay.

However, while Haas was away on temporary assignment, Garswood began approving administrative on-call pay for Naiman. When Haas returned and later discovered the situation, she demanded that plaintiffs provide “clear, succinct, unequivocal proof that Human Resources had . . . changed the policy and made an exception for [] Naiman” or face discipline. Plaintiffs were unable to provide such evidence and Haas directed Garswood to discipline Naiman by “direct report”. Garswood was “verbally counseled” regarding the policy violation.

C. Violations of Vacation Policy

The hospital’s written administrative policies regarding vacation time for nurses clearly states, among other things, that during the Christmas/New Year holiday, nurses are allowed a maximum of 7 consecutive days of scheduled time off. Nevertheless, in December 1997, Garswood arranged for Naiman to take eleven consecutive days off; this resulted in the Obstetrics Nursing Staff sending a written complaint to Haas, in part because the arrangement prevented all other employees from receiving time off during that time period. Neither Naiman nor Garswood denies that Naiman received the time off. However, Garswood admits the arrangement violated hospital policy while Naiman maintains she was entitled to the time off because of an arrangement she made with Garswood to forego summer vacation in exchange for switching vacation time with other nurses. Haas initially directed Garswood to place Naiman on a corrective work plan which required tighter monitoring of Naiman’s work time. After a more thorough investigation, Haas instructed Garswood to discipline Naiman in writing for violating the policy, which Garswood did.

D. Garswood Placed on Corrective Work Plan

On July 6, 1998, Haas placed Garswood on a corrective work plan because of her role in approving on-call pay for Naiman, and because of other concerns Haas had about Garswood’s “overall leadership abilities and [her] capacity to provide [her] employees with the administrative structure” needed to achieve a successful work environment. In the corrective work plan, Haas

outlined five expectations she had of Garswood, and stated that Garswood's progress would be reevaluated on September 1, 1998.

E. Garwood's Termination

On July 17, 1998, the Manager of the Risk Management Department notified Haas that Garswood had more than one hundred unprocessed Unusual Occurrence Reports (UORs) in her office. UORs were utilized by the hospital to record events that "may result in injury to or may have an adverse effect on a patient or visitor," and were required by hospital policy to be sent to risk management within 24 hours after an NAM receives the report. Risk management would then review the UORs to determine whether policies or procedures should be changed in order to reduce or eliminate additional similar events.

According to risk management, some of the UORs found in Garswood's office were months and years old. When Garswood returned from her vacation, Haas informed her that she could either resign or be terminated. After considering these choices, Garswood opted for termination.

Although Garswood did not recall the exact number of unprocessed UORs in her office, she admitted that there were "more than ten" UORs that had not been timely processed. Garswood claimed that the UORs had not been timely filed with risk management because she had an understanding with the Manager of Risk Management that only the "hot" UORs had to be forwarded within twenty-four hours and that the "non-hot" UORs could be forwarded later. However, according to Haas, all UORs were to be processed and sent to risk management within forty-eight hours and that Manager of Risk Management did not have the authority to extend that time period.

F. Naiman's Termination

The evening of Garswood's termination, Haas covered the on-call duties. While on-call, Haas received a page from Labor & Delivery's charge nurse informing her that the next day's schedule looked inadequate. The nurse then informed Haas that she was going to try to find nurses willing to work, but that she wanted to know "what kind of deals I can cut." Haas asked her to explain what she meant and the nurse informed Haas that Garswood and Naiman would pay nurses double, triple or travel pay as incentives to work outside of schedule. Hospital policy did not permit the payment of incentives and limited overtime pay to one and one-half times regular pay.

Based on this information, Haas began an investigation during which she discovered that overpayments to nurses in violation of hospital policy had been secured by Garswood and Naiman through falsified payroll documents and altered time schedules and other documents. Following the investigation, Haas decided to terminate Naiman.

G. The Instant Lawsuit

Plaintiffs filed the instant lawsuit alleging discrimination by defendants due to Garswood's Canadian citizenship and Naiman's military service. Plaintiffs also alleged defendants made defamatory statements about them, knowing these statements to be untrue.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). In support of their motion, defendants maintained that Haas terminated plaintiffs for legitimate, nondiscriminatory reasons and that neither the national origin nor military service of the plaintiffs played a role in their discharge. Defendants also claimed that plaintiffs failed to support their defamation claims with specific evidence, and that in any event, any statements made about plaintiffs by defendants were true.

Plaintiffs opposed summary disposition on the discrimination charges, contending that there were genuine issues of material fact requiring resolution at trial. Specifically, plaintiffs maintained that they had established a prima facie case of discrimination and that defendants' stated reasons for the terminations (e.g., violations of hospital policy) were merely pretext for the real reason of discrimination. Plaintiffs did not contest summary disposition on the defamation claim.¹

Following a hearing, the trial court granted defendants' motion for summary disposition. In granting defendants' motion, the trial court found that plaintiffs failed to establish a prima facie case of discrimination and also found that defendants had established a legitimate, nondiscriminatory reason for plaintiffs' terminations. This appeal ensues.

II. Standard of Review

This Court reviews de novo a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10).² *McDonald v PKT, Inc.*, 464 Mich 322, 332; 628 NW2d 33 (2001); *Oakland Co Treasurer v Title Office, Inc.*, 245 Mich App 196, 200; 627 NW2d 317 (2001). In reviewing a motion under MCR 2.116 (C)(10), we consider "the pleadings, affidavits, depositions, admissions, and any other documentary evidence in a light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that would preclude judgment for the moving party as a matter of law. *GC Timmis v Guardian Alarm*, 247 Mich App 247, 252; 635 NW2d 370 (2001), citing *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

III. Analysis

On appeal, plaintiffs contend that the trial court erred when it found that plaintiffs failed to establish a prima facie case that Haas discriminated against Garswood because of her national origin, or against Naiman because of her military service. We disagree.

A. Garswood's National Origin Claim

Garswood contends that she was discharged in violation of MCL 37.2202(1)(a), which provides:

¹ Accordingly, this issue is not before us in this appeal.

² While the trial court did not specify the subrule under which summary disposition was granted, because the trial court reached its decision after reviewing documentary evidence presented by both parties, and since defendants sought summary disposition based on MCR 2.116(C)(10), it is proper for us to review the trial court's decision under a (C)(10) analysis.

(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. [Emphasis added.]

In *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-174; 579 NW2d 906 (1998), our Supreme Court articulated the necessary steps that both parties must undergo in order to establish or rebut a prima facie case of discrimination.

To establish a prima facie case of discrimination, plaintiff must prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered an adverse employment action, in this case, . . . discharge; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. Once plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for plaintiff's termination to overcome and dispose of this presumption At this stage,

defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. specificity. *Texas Dep't of Community Affairs v Burdine*, 450 US 248; 254-255, 101 SCt 1089, 67 L Ed 2d 207 (1981) (citations omitted).]

Once the defendant produces such evidence, even if later refuted or disbelieved, the presumption drops away, and the burden of proof shifts back to plaintiff. At this third stage of proof, in this case in response to the motion for summary disposition, plaintiff had to show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination.

* * *

. . . . Therefore, . . . in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. [*Lytle, supra* at 172-174, 176.]

See also *Olde Financial v Harrison*, 225 Mich App 601; 572 NW2d 679 (1997).

Here, the first three elements of Garswood's initial burden have been met: she is a Canadian; was discharged; and was qualified for the position she held. Thus, we must determine whether "she was discharged under circumstances that give rise to an inference of unlawful discrimination." *Id.* at 173. In this regard, Garswood's prima facie case fails.

Garswood tried to establish an "inference of unlawful discrimination" through vague references of Haas' dislike for Canadians. Garswood testified at deposition that the only comments she remembered Haas making regarding her Canadian heritage was during a conversation about medical insurance several years before her discharge. In that discussion, Haas allegedly informed Garswood that "this isn't Canada." However, a review of Garswood testimony regarding this point clearly illustrates that Haas' comment was made in response to Garswood's query as to whether health maintenance organizations and other insurance were parallel to the insurance system in Canada. Garswood also testified that Haas would occasionally end sentences by saying, "eh," and then laughing. Nonetheless, Garswood went on to admit that she could not remember any specific situation when Haas used "eh" in order to mock her. In addition, we note that the record clearly established that Haas was the individual that decided to promote Garswood to the position of NAM. Further, Garswood testified that Haas was upset about the hospital's decision to pay for Garswood's work visa. However, again, it is clear that in reviewing Garswood's testimony, Haas indicated that she was upset because of the cost of the visa and that Haas believed that this expense should be incurred by Garswood and not the hospital. To this end, we note that the hospital's nursing staff was approximately 30% Canadian and that 15 to 30 % of the maternity ward staff under Haas' immediate control was Canadian. Thus, it is evident that Haas' concerns regarding the payment of Garswood's visa, and other similarly situated workers, arose out of administrative costs to the hospital and not because of her dislike of Canadians.

Moreover, even assuming Garswood established a prima facie case of discrimination, defendants, in its summary disposition motion brought forth a legitimate, nondiscriminatory reason for Garswood's termination; namely, that Garswood had been placed on a corrective work plan and that she had failed to timely process UORs. In opposing summary disposition, Garswood provided no evidence to rebut these reasons. Indeed, Garswood admitted that Haas had placed her on a corrective work plan, that she had failed to timely report several UORs, that she had permitted Naiman to be paid for administrative on-call, and that she had permitted Naiman to take eleven consecutive days off during the Christmas holiday of 1997. These reasons, all violations of hospital policy, clearly established a legitimate, non-discriminatory reason for Garswood's discharge. Accordingly, because Garswood failed to establish a prima facie case of discriminatory animus against defendants and also failed to rebut defendant's legitimate, nondiscriminatory reason for Garswood's discharge, the trial court correctly granted defendants summary disposition motion.

B. Naiman's Military Service Claim

Naiman contends that defendants discharged her because of her military service and that this action violated MCL 32.271, 32.272, which provide:

No person shall discriminate against any officer or enlisted man of the military or naval forces of the state or of the United States because of his membership therein.

No person or officer or agent of any corporation, company, or firm, or other person shall discharge any person from employment because of being or performing his duty as an officer or enlisted man of the military or naval forces of this state, or hinder or prevent him from performing any military service or from attending any military encampment or place of drill or instruction, he may be called upon to perform or attend by proper authority, or dissuade any person from enlistment or accepting a commission in the national guard or naval militia by threat of injury to him in respect to employment, trade, or business in case of his enlistment or acceptance of a commission.

In the instant case, Naiman failed to establish that Haas ever hindered, prevented, dissuaded, or threatened Naiman as a result of her having to take time off in order to attend training in the Army National Guard. At best, Naiman's deposition testimony established that Haas had expressed displeasure with Naiman having to take one weekend off due to her military service. Despite this displeasure, Naiman admitted that she had never been denied a military leave and the record established that she had been granted at least nine military leaves prior to her termination. Further, Garswood had been fired and Naiman had been placed on a corrective work plan for violating the hospital's vacation and on-call pay policies prior to Haas' displeasure over Naiman having to take a military leave. It was during that leave that Haas became aware of Naiman's complicit behavior in falsifying payroll documents so that nurses could be paid "incentives" and that Naiman had been given on-call pay – in itself a violation of hospital policy – while actually working on the floor. Thus, Naiman failed to establish a factual dispute with regard to whether her discharge was the result of discrimination based on her military service. Instead, the record clearly indicates that Naiman was discharged for violating numerous hospital policies. As such, the trial court correctly dismissed Naiman's discrimination claim.

IV. Conclusion

Because plaintiffs failed to establish that defendant's legitimate, nondiscriminatory reasons for their discharge were pretext for discrimination, the trial court properly granted defendants summary disposition.³

Affirmed.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

³ While plaintiffs alleged in their complaint that defendants defamed them, plaintiffs(1) failed to advance the claim below; (2) failed to indicate what statements were defamatory; and (3) failed to raise the issue in their questions presented on appeal. Thus, the issue has been waived. See *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997); MCR 7.212(C)(5).