STATE OF MICHIGAN

COURT OF APPEALS

JEANETTE GODFREY, Plaintiff-Appellant,	UNPUBLISHED November 16, 2010
v	No. 294188 Wayne Circuit Court
HENRY FORD HEALTH SYSTEMS, Defendant-Appellee.	LC No. 08-113350-CD

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(8) and (C)(10). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff is a registered nurse with a master of science in nursing and was previously employed by defendant. Defendant first hired plaintiff in May 1988 as a clinical nurse specialist (CNS)[1] in its behavioral health services (BHS) department. It is undisputed that plaintiff has never been certified as a CNS. When plaintiff was hired by defendant, CNS certification was not readily available. In the 1990s, however, national nursing organizations began offering CNS certification, and such certification became a prerequisite for billing Medicare and other insurance carriers for psychotherapy services provided by a CNS. Thereafter, defendant made CNS certification a requirement for all CNSs employed in its BHS department. In 2001, defendant sent plaintiff an email stating that it could not submit her enrollment packet to Medicare without copies of her licenses and certification card. Plaintiff does not recall receiving the email. In 2006, defendant began assigning plaintiff Medicare patients. Plaintiff claims that a revenue consultant for defendant, Elspeth Rajt, informed her that Medicare could be billed for her services, despite the fact that she lacked CNS certification, because she was "grandfathered." Plaintiff admitted at her deposition, however, that she never discussed the issue with Rajt;

[1] Plaintiff asserts that her first title was actually "psychiatric nurse clinical specialist," but acknowledges that she had various titles over the course of her employment with defendant.

instead, she heard from another employee that Rajt could "grandfather [her] to see Medicare patients." Plaintiff also does not dispute that such "grandfathering" is not actually permitted. Further, defendant has presented unrefuted evidence, including testimony from the director of outpatient services Dr. Catherine Frank, plaintiff's direct supervisor Dr. Lopa Rana, and other management staff, that it is the responsibility of the medical professionals in defendant's employ to be aware of the certification requirements for their positions and maintain those certifications.

In late 2007 or early 2008, Dr. Frank became aware that plaintiff was not certified as a CNS. Dr. Frank testified that she was concerned about plaintiff's continued employment as a CNS considering that defendant could not bill Medicare or other insurance providers for her services. The doctor was also concerned that some insurers may have already been improperly billed. In fact, defendant was later required to reimburse insurers that had been improperly billed for plaintiff's services. Defendant terminated plaintiff's employment in January 2008 for failing to obtain CNS certification. Patrick Irwin, a human resources vice president for defendant, testified that he decided to discharge plaintiff because, after further investigation into the matter, "it was apparent . . . that [plaintiff] had willfully not complied with her certification requirements." Other staff members, however, believed that plaintiff may have misunderstood the certification requirements that applied to her. In February 2008, defendant converted plaintiff's discharge into an unpaid leave of absence, allowing plaintiff up to one year to obtain another position with defendant for which she was qualified.

Plaintiff filed suit against defendant in May 2008, raising claims of race discrimination, age discrimination, "wrongful and/or constructive discharge," and personal and business defamation. At the time, plaintiff had not obtained another position with defendant, and there is no evidence that she was attempting to obtain CNS certification. Defendant moved for summary disposition of plaintiff's claims. The trial court granted the motion and awarded judgment in favor of defendant. Plaintiff subsequently filed a motion for rehearing or reconsideration, which the trial court denied. She now appeals as of right.

II. STANDARD OF REVIEW

On appeal, plaintiff challenges the trial court's award of summary disposition to defendant. We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden*, 461 Mich at 119. The motion should be granted only where the claim is so legally deficient that recovery would be impossible even if all well-pleaded factual allegations were true and viewed in the light most favorable to the nonmoving party. *Id*. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden*, 461 Mich at 119-120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(G)(6).

III. PLAINTIFF'S DISCRIMINATION CLAIMS

Plaintiff argues that the trial court erred in granting defendant summary disposition of her discrimination claims. We disagree.

To establish a rebuttable prima facie case of discrimination under the Michigan Civil Rights Act, MCL 37.2101 *et seq*., the plaintiff must prove that: (1) she belonged to or was a member of a protected class; (2) she suffered an adverse employment action such as discharge; (3) she was qualified for the position; and (4) she suffered the adverse employment action under circumstances giving rise to an inference of unlawful discrimination. *Sniecinski v BCBSM*, 469 Mich 124, 134; 666 NW2d 186 (2003); *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Under a "disparate treatment" theory of discrimination, in order to establish the fourth prong of a prima facie case, the plaintiff must present proof that she was treated differently than persons of a different class who engaged in the same or similar conduct. *Lytle*, 458 Mich at 181; *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997); *Meagher v Wayne State Univ*, 222 Mich App 700, 716; 565 NW2d 401 (1997). After the plaintiff makes a prima facie showing of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Lytle*, 458 Mich at 173. Once the defendant produces such evidence, the plaintiff must demonstrate that the proffered reason was not a true reason, but mere pretext for discrimination. *Id*. at 174.

In her complaint, plaintiff raised claims of race and age discrimination. Defendant moved for summary disposition of the claims under MCR 2.116(C)(8) and (C)(10), arguing that plaintiff could not establish a prima facie case of discrimination or pretext. The trial court granted defendant's motion. The court held that plaintiff could not establish that she was qualified for the position, that she was treated differently than a similarly-situated employee, or that defendant's proffered reason for removing her from her position was pretext for discrimination.

Plaintiff first argues on appeal that the trial court erred in concluding she was not qualified for the position from which she was removed. See *Sniecinski*, 469 Mich at 134; *Lytle*, 458 Mich at 172-173. Defendant claims that plaintiff was not qualified because she lacked CNS certification. Plaintiff admits that she was not certified, but claims that she was qualified for the position because she worked under the delegated authority and supervision of a physician as required by the Michigan Public Health Code.[2] See generally MCL 333.1604(1) (defining "delegation"), and MCL 333.16109(2) (defining "supervision"). Assuming for the sake of argument that defendant did, in fact, delegate authority to and supervise plaintiff within the meaning of the Code, plaintiff has not addressed the evidence presented by defendant that it made CNS certification a requirement for all CNSs employed in its BHS department, so that it could bill insurers for the services performed by each CNS. "An employee is qualified if [she] was performing [her] job at a level that met the employer's legitimate expectations." *Town*, 455 Mich at 699. Regardless of the requirements articulated in the Health Code, plaintiff cannot establish that she met defendant's additional expectation of being certified as a CNS.

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[2] Plaintiff does not cite a specific provision of the Code. We note that a party may not simply announce a position and leave it to this Court to find support for it. See *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Furthermore, even if plaintiff had raised a material question of fact regarding her qualification for the position, she has not established that she was treated differently than persons of a different class who engaged in the same or similar conduct. See *Lytle*, 458 Mich at 181; *Town*, 455 Mich at 695; *Meagher*, 222 Mich App at 716. At her deposition, plaintiff testified that she was not aware of any other person who was employed by defendant as a CNS to conduct psychotherapy and was not required to be certified as a CNS. The trial court, citing plaintiff's deposition testimony, determined that "she was not treated differently than a similarly situated employee." On appeal, plaintiff does not address that portion of the trial court's decision and points to no other proof that the adverse employment action she suffered occurred under circumstances giving rise to an inference of unlawful discrimination. See *Sniecinski*, 469 Mich at 134; *Lytle*, 458 Mich at 172-173. Therefore, we cannot conclude that the trial court erred in holding that plaintiff cannot establish a prima facie case of discrimination.

In her final argument on appeal, plaintiff challenges the trial court's conclusion that defendant's proffered reason for its adverse employment action was not pretextual. Because plaintiff cannot establish a prima facie case of discrimination, we will only briefly address this issue. A plaintiff can establish that a defendant's reasons for the adverse employment action were pretextual "(1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Here, defendant claimed that it removed plaintiff from her position as a CNS and offered her a one-year, unpaid leave of absence to obtain another position in its system because she did not meet the certification requirements for the position and it could not bill insurance providers for her services. Plaintiff asserts that defendant's true reason for removing her was her race and age.[3]

Plaintiff has not presented any direct evidence that she was discriminated against due to race or age. Instead, plaintiff points to the affidavits of two "African American women over age 40" formerly employed by defendant. Dr. Kai Anderson averred that her employment with defendant was terminated in January 2008 under "unusual circumstances." Dr. Anderson's affidavit did not state that she believed she was discharged because of her race or age; nor did it address the circumstances of plaintiff's discharge. Registered nurse Wilma Hewlett averred that she voluntarily retired from her position with defendant after repeatedly being questioned by management staff about the possibility of her retiring. Again, Hewlett did not state that she left her position because of issues related to race or age, or address the circumstances of plaintiff's discharge. The only other evidence plaintiff offers in support of her pretext argument is that she was told she could bill Medicare for her services because she was "grandfathered," newly hired CNSs were allowed three years to obtain certification, she was never advised that she lacked any necessary certification, and Dr. Frank would not permit her to seek outside psychological treatment for the emotional distress she suffered as a result of being removed from her position.

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[3] Plaintiff states in her brief on appeal that she is African American and over 40 years old. Plaintiff's specific age at the time of her removal is not readily apparent.

Plaintiff does not explain, however, how any of these alleged facts support her conclusion that she was removed because of her race or age.

For the reasons indicated, we affirm the trial court's decision to award defendant summary disposition of plaintiff's discrimination claims.

IV. PLAINTIFF'S WRONGFUL DISCHARGE AND DEFAMATION CLAIMS

In its motion for summary disposition, defendant challenged plaintiff's claim of "wrongful and/or constructive discharge" under MCR 2.116(C)(8), arguing that plaintiff failed to state a claim upon which relief could be granted. Because plaintiff did not respond to the argument, the trial court awarded summary disposition of the claim to defendant. On appeal, plaintiff raises a cursory argument that the trial court erred in dismissing her wrongful discharge claim, which was premised on defendant's alleged attempt to shift the blame for its improper billing to plaintiff.[4] Plaintiff failed to properly preserve her argument for review on appeal. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (stating that in general, an issue is not properly preserved for appeal if it has not been "raised before, addressed, or decided by" the lower court). But, even if we were to review this issue, plaintiff's argument lacks merit. Plaintiff does not dispute that she was an at-will employee, and she has not explained how any exception to the at-will employment doctrine applies to this case. See, e.g., *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982) (providing three examples of public policy exceptions to the at-will employment doctrine). Therefore, we have no basis on which to conclude that the trial court erred in granting defendant summary disposition of her claim under MCR 2.116(C)(8).

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[4] In her complaint, plaintiff alleged that she was wrongfully discharged because she always worked diligently for defendant, defendant knew or should have known what her qualifications were and what services she performed, defendant informed her that she could continue billing for her services under a "grandfather clause," and, therefore, any loss in revenue as a result of improper billing was the fault of defendant, not plaintiff. According to plaintiff, by discharging her, defendant was merely attempting to "shift the blame and responsibility" for its own billing mistakes to her. On appeal, plaintiff alleges that if defendant failed to supervise her or oversee her billing as much as other employees, it was likely because her job performance was excellent, and that her own "stellar job performance [should not be used] as a sword against her."

Additionally, we note that in its motion for summary disposition, defendant also challenged plaintiff's claim of personal and business defamation. Defendant requested summary disposition of the claim under MCR 2.116(C)(10), arguing that plaintiff could not identify any specific, defamatory statements made against her. The trial court awarded defendant summary disposition of the claim, noting that plaintiff did not respond to defendant's argument. Plaintiff has not challenged the trial court's decision on this issue; therefore, we will not address it.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Talbot