STATE OF MICHIGAN

COURT OF APPEALS

CATHY FELICE, Plaintiff-Appellant,	UNPUBLISHED February 11, 2016
v	No. 324509 Oakland Circuit Court
D. SCOTT VANDERVEEN, DDS, PLLC, Defendant-Appellee.	LC No. 13-136529-CD

Before: SERVITTO, P.J., and SAAD and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Cathy Felice, appeals as of right the trial court's October 24, 2014 order granting summary disposition to defendant, D. Scott Vanderveen, DDS, PLLC, pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

This case arises out of the termination of plaintiff's employment with defendant as a dental hygienist. On May 20, 2013, after observing a 19-year-old patient and her mother not speaking in the waiting room, plaintiff suspected that the patient may not want her mother present in the room while Dr. Vanderveen, the dentist and owner of defendant, examined the patient. Consequently, plaintiff asked the patient whether that was the case, and, according to plaintiff only, the patient purportedly answered that it was. Plaintiff then whispered to Dr. Vanderveen that the patient did not want her mother present in the room, but Dr. Vanderveen allowed the patient's mother in the room anyway. According to Dr. Vanderveen, the patient consented to her mother's presence in the room at that time. After this incident, Dr. Vanderveen expressed his concerns about this incident taking place in front of the family to plaintiff and requested that she leave privacy concerns to himself or the receptionist.

Unsatisfied with that response, plaintiff returned to work the following day and provided Dr. Vanderveen various Internet articles relating to the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d, *et seq*. After glancing at the various articles, Dr. Vanderveen asked plaintiff whether there was anything that required her to request patients' consent in addition to the privacy policy that was already in place at the time of the May 20, 2013 incident. Plaintiff indicated that she could be liable if she knowingly participated in a violation of HIPAA's privacy protections and stated that she would continue requesting verbal consent as she had done with the patient the day before (and apparently with all patients months or years prior to this incident). Dr. Vanderveen reiterated that the privacy policy in place

satisfied HIPAA's requirements, stated that privacy-related concerns were to be addressed by himself or the receptionist, and explained that plaintiff's refusal to comply with that policy would lead to plaintiff's dismissal if it continued. Plaintiff nevertheless asserted that she would continue asking patients for their consent in such matters. In response, Dr. Vanderveen advised plaintiff that she was being written up for insubordination and that, once her write-up was completed, she was to leave the office for the remainder of the day. After waiting for a period of time but before the write-up was complete, defendant left the office, allegedly believing that she had been fired.

Plaintiff subsequently filed this wrongful-termination lawsuit against defendant, alleging that her employment was wrongfully terminated after she refused to violate the law during the course of her employment. Defendant moved for, and the trial court granted, summary disposition pursuant to MCR 2.116(C)(10). This appeal followed. On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. In deciding the motion, courts are to consider the affidavits, pleadings, depositions, admissions, and other evidence in a light most favorable to the nonmoving party to determine whether the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Issues of statutory interpretation are likewise reviewed de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005). The primary goal of statutory interpretation is to discern and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of the statutory language is clear, judicial construction is neither necessary nor permitted. *Elia v Hazen*, 242 Mich App 374, 381; 619 NW2d 1 (2000).

On appeal, plaintiff argues that summary disposition pursuant to MCR 2.116(C)(10) was inappropriate because, at the very least, a question of fact exists as to whether her employment was wrongfully terminated in violation of public policy. "In general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). This general rule, however, has its exceptions. *Id*. at 695. Should an employer's grounds for terminating an employee's employment be "so contrary to public policy," a wrongful-termination lawsuit may be actionable. *Id*. There are three situations when this occurs: (1) when employment is terminated despite "explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory duty or right," (2) when "the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment," or "when the reason for a discharge was the employee's exercise of a right conferred by a well-established legislative enactment." *Id*. at 695-696. Plaintiff claims that this lawsuit "touch[es] upon all three considerations."

Plaintiff claims that "45 CFR 164.530(g) provides an explicit legislative statement prohibiting Plaintiff's discharge by defendant either because she asked for a patient's HIPAA

consent under the circumstances where consent was questionable or because she refused to violate HIPAA," which appears to implicate all three situations set forth above. 45 CFR 164.530(g) prohibits covered entities under HIPAA from intimidating, threatening, coercing, discriminating against, or retaliating against individuals who exercise "any right established, or for participating in any process provided for, by this subpart or subpart D of this part" as well as from intimidating and retaliating against individuals as provided for in 45 CFR 160.316. Plaintiff then cites 42 USC 1320d-6, which sets forth the criminal penalties for an individual who knowingly uses, causes to be used, obtains, or discloses identifiable health information, and 45 CFR 164.510(b)(2), which permits a covered entity to use or disclose protected health information if the individual agrees, if the individual does not object, or if the individual's lack of objection can be reasonably inferred from the circumstances, to support her position that she was required to verbally ask patients for their consent under HIPAA.

The trial court concluded that nothing in this statutory language supported plaintiff's assertion that she is required to verbally ask patients for their consent. We conclude the same. Defendant maintained an office policy to ensure HIPAA compliance at the time of the incident underlying this case, and there is nothing in the record that indicates that defendant's office policy was insufficient. Indeed, plaintiff admitted that she was unaware of what was included in this policy despite the fact that she was trained regarding it and was "obligated to follow" it. Specifically, under the office policy, each patient was provided and signed an acknowledgment that included information regarding his or her rights under HIPAA. We are unable to find, and plaintiff has not provided, any authority indicating that plaintiff was *also* required to obtain patients' verbal consent to have a third party present in the room. While it is apparent that plaintiff was uncomfortable with the office policy that defendant had in place, her comfortability is irrelevant to the trial court's and our inquiry. Furthermore, aside from plaintiff's own statements that the patient apparently told her that she did not want her mother in the room, the record largely contradicts plaintiff's entire position. In fact, in the patient's sworn affidavit provided by plaintiff, she indicated that she did not recall whether she told plaintiff that she did not want her mother present in the room, and Dr. Vanderveen specifically recalled the patient nodding in approval when he inquired about her mother's presence.

To the extent plaintiff claims that, while the office policy was sufficient, her actions in this case were nevertheless protected because she had a good-faith belief that HIPAA was being violated, we find those arguments equally meritless. In support of this position, she again relies on 45 CFR 164.530(g), claiming that she acted in good faith according to 45 CFR 160.316. 45 CFR 160.316 prohibits covered entities from threatening, intimidating, coercing, harassing, discriminating against, or retaliating against individuals who file a complaint under 45 CFR 160.306, participate in a hearing under that part, or who "[o]ppos[e] any act or practice made unlawful by this subchapter . . . ." As stated above, there is nothing in the record to support plaintiff's claims that defendant took "any act or practice made unlawful by this subchapter[.]" The office policy satisfied HIPAA's requirements, and plaintiff does not argue otherwise. Thus, even assuming that plaintiff's refusal to comply with the office policy was done in good faith, 45 CFR 160.316 nevertheless requires an "act or practice made unlawful by this subchapter," which did not occur in this case. The record reflects that plaintiff simply refused to abide by the HIPAA-compliant privacy policy that defendant had in place. This conclusion does not mean that the office policy "trumps" HIPAA as plaintiff contends. Instead, our conclusion means that

the office policy was complaint with HIPAA, and plaintiff's refusal to comply with that office policy does not automatically render it noncompliant with HIPAA.

We find this case analogous to *Piasecki v City of Hamtramck*, 249 Mich App 37, 38-39; 640 NW2d 885 (2001), which also involved a former employee's wrongful-termination lawsuit based on public policy. The tax director's employment with the City of Hamtramck was terminated after she refused to comply with the mayor's request to complete a status report concerning taxes owed to the city. *Id*. Plaintiff claimed that she could not complete the status report "because city ordinance and state law precluded her from divulging confidential tax information." *Id*. at 38. Defendants moved for summary disposition, and the trial court denied that motion. *Id*. at 39. This Court reversed and remanded the matter for the entry of an order granting summary disposition to the city and mayor. *Id*. at 42-43. After analyzing the underlying law, i.e., the city ordinance and state law, we concluded that, because "plaintiff would not have committed a crime had she divulged the information requested by [the mayor]," summary disposition was appropriate. *Id*. at 43.

The same is true in this case. Plaintiff refused to comply with defendant's privacy policy, and her employment was eventually terminated as a result of that refusal. While she claims that she refused to comply with the privacy policy because it violated HIPAA, we, after analyzing the law relied on by plaintiff, conclude that no violation of those statutory provisions occurred under the circumstances of this case. Thus, under *Piasecki*, summary disposition in defendant's favor is appropriate.

Accordingly, the trial court correctly concluded that defendant was entitled to summary disposition as a matter of law on plaintiff's wrongful-termination lawsuit. We therefore affirm the trial court's October 24, 2014 order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). In light of this conclusion, we need not address plaintiff's argument that a question of fact remains as to whether she voluntary quit her employment.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Henry William Saad
/s/ Colleen A. O'Brien