UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHRISTINE M. KINZELER, Plaintiff, v. VITAS HEALTHCARE CORPORATION OF OHIO, Defendant.	:	NO. 1:12-CV-00659 **OPINION & ORDER**

This matter is before the Court on Defendant's Motion for Summary Judgment (doc. 21), Plaintiff's Response (doc. 38), and Defendant's Reply (doc. 44). The Court held a hearing in this matter on July 23, 2014. For the reasons indicated herein, the Court GRANTS IN PART AND DENIES IN PART Defendant's motion.

I. BACKGROUND

Plaintiff Christine Kinzeler, a licensed practical nurse, contends Defendant Vitas Healthcare Corporation of Ohio ("Vitas") wrongfully terminated her employment after she complained about improperly altered payroll records (doc. 38). She further contends that after she was terminated Defendant spread misinformation regarding the circumstances of her termination (Id.). Defendant rejects such contentions and responds that it terminated Plaintiff's employment after she failed to follow the correct procedure in admitting a patient, and exceeded her authority in doing so (doc. 21). It further contends Plaintiff falsified an admission order for such patient (Id.).

In Plaintiff's Amended Complaint, she brings claims for

1) violation of the Fair Labor Standards Act ("FLSA") and retaliation, 2) violation and retaliation pursuant to the FLSA state analog O.R.C. § 4111, 3) retaliation for consulting an attorney in violation of Ohio public policy, 4) defamation, and 5) age discrimination in violation of federal and state law (doc. 13). Defendant filed its motion for summary judgment, contending it is entitled to judgment as a matter of law as to each of Plaintiff's claims (doc. 21). Plaintiff has responded and Defendant has replied such that this matter is ripe for the Court's consideration.

II. STANDARD

A grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; see also, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir.1993); Osborn v. Ashland County Bd. of Alcohol, Drug Addiction and Mental Health Servs., 979 F.2d 1131, 1133 (6th Cir.1992)(per curiam). In reviewing the instant motion, "this Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Patton v. Bearden, 8 F.3d 343, 346 (6th Cir. 1993), quoting in part Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52

(1986)(internal quotation marks omitted).

The process of moving for and evaluating a motion for summary judgment and the respective burdens it imposes upon the movant and the non-movant are well settled. First, "a party seeking summary judgment. . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact[.]" Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); see also LaPointe, 8 F.3d at 378; Guarino v. Brookfield Township Trustees, 980 F.2d 399, 405 (6th Cir. 1992); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The movant may do so by merely identifying that the non-moving party lacks evidence to support an essential element of its case. See Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A., 12 F.3d 1382, 1389 (6th Cir. 1993).

Faced with such a motion, the non-movant, after completion of sufficient discovery, must submit evidence in support of any material element of a claim or defense at issue in the motion on which it would bear the burden of proof at trial, even if the moving party has not submitted evidence to negate the existence of that material fact. See Celotex, 477 U.S. 317; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). As the "requirement [of the Rule] is that there be no genuine issue of material fact," an "alleged factual dispute between the parties" as to some ancillary matter "will not defeat an otherwise properly supported motion for summary

judgment." Anderson, 477 U.S. at 247-48 (emphasis added); see generally Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1310 (6th Cir. 1989). Furthermore, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 252; see also Gregory v. Hunt, 24 F.3d 781, 784 (6th Cir. 1994). Accordingly, the non-movant must present "significant probative evidence" demonstrating that "there is [more than] some metaphysical doubt as to the material facts" to survive summary judgment and proceed to trial on the merits. Moore v. Philip Morris Cos., Inc., 8 F.3d 335, 339-40 (6th Cir. 1993); see also Celotex, 477 U.S. at 324; Guarino, 980 F.2d at 405.

Although the non-movant need not cite specific page numbers of the record in support of his claims or defenses, "the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the non-moving party relies." Guarino, 980 F.2d at 405, quoting Inter-Royal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989)(internal quotation marks omitted). In contrast, mere conclusory allegations are patently insufficient to defeat a motion for summary judgment. See McDonald v. Union Camp Corp., 898 F .2d 1155, 1162 (6th Cir. 1990). The Court must view all submitted evidence, facts, and reasonable inferences in a light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith

Radio Corp., 475 U.S. 574, 587 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); United States v. Diebold, Inc., 369 U.S. 654 (1962). Furthermore, the district court may not weigh evidence or assess the credibility of witnesses in deciding the motion. See Adams v. Metiva, 31 F.3d 375, 378 (6th Cir. 1994).

Ultimately, the movant bears the burden of demonstrating that no material facts are in dispute. See Matsushita, 475 U.S. at 587. The fact that the non-moving party fails to respond to the motion does not lessen the burden on either the moving party or the Court to demonstrate that summary judgment is appropriate. See Guarino, 980 F.2d at 410; Carver v. Bunch, 946 F.2d 451, 454-55 (6th Cir. 1991).

III. DISCUSSION

As an initial matter the Court notes that Plaintiff offered little argument either at the hearing or in the briefing defending the claims for defamation, age discrimination, or retaliation for consulting an attorney. The Court is dismissing such claims as follows:

A. Defamation

Plaintiff's defamation claim, from her deposition, appears to be grounded in theories that a conversation on Facebook defamed her, as well as Defendant's reporting of her to the Ohio Board of Nursing. However, as argued at the hearing, Plaintiff has proffered no evidence regarding a Facebook page, and Defendant properly contends that its report to the Board of Nursing was privileged.

O.R.C. § 4723.341(b); Wells v. Cincinnati Children's Hosp. Med. Ctr., 860 F. Supp.2d 469, 488 (S.D. Ohio 2012). The other possible support for such a claim is rooted in a statement Plaintiff's direct manager, Sarah Klepac, made to a private investigator hired by Plaintiff. Klepac reported that she would not mind working with Kinzeler again but that Kinzeler was "sometimes too meticulous" which was not always a good thing, and that Kinzeler needed to let some things go (doc. 38). Plaintiff further testified that several post-employment prospective employers reported that she was being "blackballed" by Defendant (Id.).

Defendant contends the correct statement by Klepac, when asked about Plaintiff's weaknesses, went as follows: "I think on the same level being meticulous you get innovated (sic) with necessity of job and sometimes not being able to let things go. Being so detail oriented, sometimes some things don't need to be addressed" (doc. 44). Defendant contends such statement is not defamatory because the totality of the circumstances shows it was offered as a statement of opinion rather than a statement of fact (Id. citing Fuchs v. Scripps Howard Broad Co., 170 Ohio App. 3d 679, 693-94 (Ohio Ct. App. 2006)). Citing Snyder v. AG Trucking, 57 F.3d 484, 488 (6th Cir. 1995), Defendant further contends Klepac's statements were uttered to Plaintiff's agent, and therefore cannot form the basis for a defamation claim (doc. 44). Moreover, Defendant contends Klepac was unauthorized to make any statements regarding Plaintiff because all employees were instructed not to provide

information regarding former employees but rather to refer inquiries to a third-party company (Id.). Because Klepac lacked actual authority to speak on behalf of Defendant, Defendant contends it cannot be liable for any defamation claim (Id.).

The Court agrees with Defendant that Klepac's statement was one of opinion, and not fact, and therefore does not constitute defamation. Fuchs, 170 Ohio App. 3d at 693-94. Moreover, Plaintiff has not demonstrated that Klepac made such statement with knowledge that it was false, with deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose. O.R.C. § 4113.17. In summary, the Court simply finds inadequate evidence to support a defamation claim.

B. Age Discrimination

The record does not support an age-discrimination claim as Plaintiff has not identified individuals outside the protected class, who were similarly-situated, who replaced her. In response to a motion for summary judgment Plaintiff must present significant probative evidence demonstrating there is more than some metaphysical doubt as to the material facts, such that a jury could find for her. Conclusory allegations are patently insufficient to defeat a motion for summary judgment. McDonald v. Union Camp Corp., 898 F.2d 1155, 1162 (6th Cir. 1990). Here, beyond Plaintiff's conclusory allegation, there is no evidence of a claim for age discrimination. Plaintiff appeared to abandon the claim at the hearing, and the Court agrees it lacks support on the current

record. Accordingly, the Court grants Defendant's motion as to Plaintiff's claim for age discrimination.

C. Public Policy Claim for Retaliation for Consulting an Attorney

There is no dispute that Plaintiff did not consult an attorney until after her adverse employment action, such that it is simply not possible to establish any causal connection between the two things. Defense counsel raised such point at the hearing, and the Court finds it well-taken. Plaintiff's public policy claim based on the theory that she suffered retaliation for consulting an attorney fails as a matter of law.

D. Plaintiff's Remaining Claims Survive Defendant's Challenge

Plaintiff's remaining claims are all grounded in Defendant's alleged failure to pay her properly, and alleged retaliation against her after she complained. The Court finds a genuine question as to whether Plaintiff's complaints, which came only ten weeks prior to her termination, were the real cause for her termination.

But first, the failure to pay claim. Plaintiff contends Defendant failed to pay her for a number of hours. Some of those hours were rectified after her complaints. Some of those hours have been challenged by Defendant and are no longer contested by Plaintiff. It appears the dispute now centers on two periods ending August 13, 2011, and September 10, 2011 (doc. 44). At the hearing, counsel for both parties indicated that the remaining hours at issue amount to six to ten hours' worth of pay. Defendant contends that

because Plaintiff's regular pay rate was in excess of $23 an hour, she was paid an average wage in excess of minimum wage for all the hours she worked in the two weeks in question. Plaintiff responds she only needs to establish she was not paid for hours worked to establish a claim.

The Fair Labor Standards Act, 29 U.S.C. § 206, establishes that qualifying employees must be paid at minimum $7.25 per hour. The Court finds Plaintiff's position correct that she only needs to establish she was not paid for certain hours worked, and the record shows she was not paid for between six and ten hours. Thus the Court rejects Defendant's motion as to Plaintiff's failure to pay claim. A reasonable jury viewing the discrepancies between Plaintiff's records and those kept by Defendant could conclude Plaintiff was not accurately paid for hours worked.

As for Plaintiff's retaliation claim, Defendant argued at the hearing that it had an honest belief that Plaintiff improperly admitted a patient without the required approval of a doctor. It claims this was the real reason for the termination, not retaliation for the pay complaints.

However, Plaintiff made a strong argument at the hearing that the same person with whom Plaintiff disputed pay discrepancies, Patricia Carlyn, pressured Plaintiff's boss Sarah Klepac to go along with the termination. She also proffers evidence that Carlyn tried to paper Plaintiff's file. Carlyn ultimately wrote the memo terminating Plaintiff. Teresa Barlage, human resources business

manager, stated that Carlyn was the decision-maker in the termination. The Court finds that a reasonable jury could conclude that Carlyn retaliated against Plaintiff for having complained about her hours being improperly modified.

The Court further finds disputes of fact with regard to the incident which Defendant proffers as the basis for its honest belief that Plaintiff violated admission procedures. Although there is record evidence showing the doctor denied issuing the required order to admit, deposition testimony showed that she could not really remember. Plaintiff proffers testimony from the doctor that shows the admission could take place over the phone, in theory, within as little as three minutes. Plaintiff shows phone records that she spoke with the doctor for at least three minutes. Plaintiff wholeheartedly denies she issued the admission order or misreported on a form, and a jury can weigh her credibility.

IV. CONCLUSION

Having reviewed this matter, the Court concludes Plaintiff has viable claims for pay violations under the FLSA as well as a retaliation claim. A reasonable jury could find that her complaints regarding pay, only a few weeks before her termination, motivated Patricia Carlyn to retaliate against her. However, the balance of Plaintiff's claims, for defamation, age discrimination, and public policy violation fail as a matter of law.

Accordingly, the Court GRANTS IN PART Defendant's Motion for Summary Judgment (doc. 21) as to Plaintiff's claims for

defamation, age discrimination and public policy violation and DENIES IN PART Defendant's motion as to her state and federal claims for unpaid wages and for retaliation.

SO ORDERED.

Dated: July 29, 2014

s/S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge