

STATE OF MICHIGAN
COURT OF APPEALS

DENISE F. DAVIS,

Plaintiff-Appellant,

V

UNITED AMERICAN HEALTHCARE
CORPORATION,

Defendant-Appellee.

UNPUBLISHED

November 23, 1999

No. 204470

Wayne Circuit Court

LC No. 96-633191 CZ

Before: Talbot, J., and Neff and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing with prejudice her claim for disclosure of documents under the Bullard-Plawecki Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*; MSA 17.62(1) *et seq.* We affirm.

The essential facts are not in dispute. Defendant, a full-service healthcare management company, hired plaintiff in 1990 and eventually promoted her to the position of Senior Vice President for Planning and Development. In that capacity, plaintiff was involved in a venture in Tennessee aimed at providing managed care services to Medicare eligibles and non-Medicare eligibles. In 1994, the Tennessee Attorney General's Office and the United States Attorney's Office began criminal investigations into defendant and its subsidiary's marketing practices in Tennessee. In response, defendant's board of directors appointed a special committee to employ legal counsel to conduct an internal investigation concerning matters relating to the ongoing criminal investigation. On September 20, 1995, plaintiff was suspended with salary and benefits pending completion of the internal investigation. Thereafter, legal counsel retained by the special committee prepared a report regarding the Tennessee situation and potential or anticipated litigation, which it provided to the committee.

During plaintiff's suspension she requested that defendant produce a copy of her personnel file pursuant to the ERKA. Defendant sent plaintiff what it deemed to be a "a complete copy" of her personnel file. On March 29, 1996, defendant terminated plaintiff's at-will employment without providing a reason for termination. Subsequently, plaintiff's counsel requested by letter that defendant

provide “the reports which were at issue as a result of the investigation carried out after her suspension”, asserting that they were necessary in order to advise plaintiff regarding potential claims against defendant. Defendant refused to provide the report, claiming that it was not a “personnel record” subject to disclosure under the ERKA and that it was protected by the attorney-client privilege. In response, plaintiff filed the present action, seeking disclosure of all personnel records pursuant to the ERKA. In granting defendant’s motion for summary disposition, the trial court ruled that the report was not discoverable as plaintiff’s “personnel file” under the ERKA and was protected by the attorney-client privilege.

On appeal, plaintiff argues that the trial court erred in granting summary disposition in favor of defendant because the report prepared by defendant’s attorneys in connection with the internal investigation was a “personnel record” subject to disclosure under the ERKA. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers the documentary evidence in the light most favorable to the nonmoving party. Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455. Additionally, statutory interpretation is a question of law which we review de novo. *Oakland County Bd of Rd Comm’rs v Michigan Property & Casualty Guaranty Ass’n*, 456 Mich 590, 610; 575 NW2d 751 (1989).

Pursuant to the ERKA, an employer upon written request, must provide the employee with an opportunity to periodically review the employee’s personnel record if the employer has a personnel record for that employee. MCL 423.503; MSA 17.62(3). After review, “an employee may obtain a copy of the information or part of the information contained in the employee’s personnel record.” MCL 423.504; MSA 17.62(4). The ERKA defines an employee’s “personnel record” as:

. . . a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee’s qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. A personnel record shall include a record in the possession of a . . . corporation who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision [MCL 423.501(2)(c); MSA 17.62(1)(2)(c).]

In defining “personnel record,” the Legislature specifically excluded:

(v) Information that is kept separately from other records and that relates to an investigation by the employer pursuant to section 9. [MCL 423.501(2)(c)(v); MSA 17.62(1)(2)(c)(v).]

Section 9 provides in part:

If an employer has reasonable cause to believe that an employee is engaged in criminal activity which may result in loss or damage to the employer’s property or

disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation. Upon completion of the investigation or after 2 years, whichever comes first, the employee shall be notified that an investigation was or is being conducted of the suspected criminal activity described in this section. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it shall be destroyed. [MCL 423.509(1); MSA 17.62(9)(1).]

In the present case, it is undisputed that the report generated as a result of defendant's special committee's investigation affected defendant's decision to terminate plaintiff's employment. However, the Legislature's clearly expressed intent in MCL 423.501(2)(c)(v); MSA 17.62(1)(2)(c)(v) to prohibit access by an employee to any internal investigations relating to that employee demonstrates that it intended that access to those records be severely limited. *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215, 223; 514 NW2d 213 (1994). The evidence presented by defendant, including the affidavits from its attorney's assigned to assist the committee, suggest that the report in question was produced as a result of defendant's internal investigation into among other things, its employees' suspected criminal activity associated with its marketing practices in Tennessee. The affidavits further indicate that the report has been maintained in a separate file at all times and that it was not included in plaintiff's or other employees' individual employment records. Plaintiff did not present evidence refuting defendant's assertions or evidence. Consequently, we conclude that the report is not a "personnel record" under MCL 423.502(2)(c)(v); MSA 17.62(1)(2)(c)(v), and thus is not subject to disclosure under the ERKA.

Given our resolution of this case, we need not address plaintiff's claim that the trial court erred in determining that the report was protected by the attorney-client privilege.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad