

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CHARLES J. MAKHOUL, D.O., PREM C.  
KUNDI, D.O., and ALPHONSUS C.  
OKWEREOGU, D.O.,

UNPUBLISHED  
February 15, 2002

Plaintiffs-Appellants,

and

CENTRAL MICHIGAN ANESTHESIOLOGISTS,  
P.C.,

Plaintiff,

v

PHYSICIAN ANESTHESIA SERVICES, P.C.,

Defendant-Appellee,

and

SPARROW HEALTH SYSTEM,

Defendant.

No. 226704  
Ingham Circuit Court  
LC No. 98-088751-CK

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Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiffs appeal from an order of the circuit court granting summary disposition to defendant Physician Anesthesia Services. We affirm.

Plaintiffs are anesthesiologists who practiced together at St. Lawrence Hospital in Lansing. In 1997, St. Lawrence was acquired by Sparrow Hospital. In 1998, Sparrow Hospital issued a Request for Proposal to integrate anesthesia services between the two hospitals. Plaintiffs submitted a proposal under the name Central Michigan Anesthesiologist. Defendant, which had provided anesthesia services at Sparrow Hospital for a number of years, also submitted a proposal. Ultimately, the exclusive contract was offered to defendant.

Thereafter, defendant offered employment to Dr. Makhoul (who is Arabic). No offer was made to Drs. Kundi (a native of India) and Okwereogu (a native of Nigeria). Ultimately, Dr. Makhoul was not employed by defendant, though there is some dispute regarding whether the offer of employment was withdrawn by defendant or refused by Dr. Makhoul. Plaintiffs, however, in their brief, specifically refer us to the following statement in a sworn affidavit by Dr. Makhoul:

8. In September 1997 [sic—1998?], Dr. Adelman[defendant's president] telephoned me and offered me employment with PAS. I did not solicit that offer; Dr. Adelman telephoned me without my making any application for employment. PAS offered a contract of employment to me. In response to that offer, I told Dr. Adelman that Dr. Okwereogu and Dr. Kundi were my partners and that PAS should offer contracts of employment to them as well. Dr. Adelman made it clear to me that he would not offer contracts of employment to Dr. Okwereogu and Dr. Kundi. After I made that demand that PAS include Okwereogu and Kundi in the offers of employment, PAS withdrew its offer of employment to me.

Plaintiffs thereafter filed a complaint alleging, among other things, discrimination based upon race or national origin, retaliation and tortious interference with a business relationship. Although the trial court granted summary disposition to defendant on all claims, plaintiffs only address the discrimination claims in this appeal.<sup>1</sup>

In a discrimination case, the plaintiff initially has a burden to establish a prima facie case of discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once the plaintiff has established a prima facie case, a presumption of discrimination arises and the burden shifts to the defendant to articulate a non-discriminatory reason for its actions. *Id.* at 173. Once the defendant has done so, the burden shifts back to the plaintiff to establish that the reason for the defendant's action was, in fact, discriminatory and not the legitimate motive put forth by the defendant. *Id.* at 174. Once the burden has moved back to the plaintiff, it is not sufficient for the plaintiff to merely dispute the defendant's proffered reason. Rather, the plaintiff must establish a triable issue that the defendant's true motive was discriminatory. *Id.* at 175-176.

In the case at bar, the trial court concluded that plaintiffs had established a prima facie case and that defendant had proffered a legitimate, non-discriminatory reason for not hiring plaintiffs. Specifically, defendant maintained that it did not offer employment to Drs. Kundi and Okwereogu because they were incompetent. Defendant even offered written statements, one of which was written before the merger and Request for Proposal, by surgeons who indicated that they refused to work with Drs. Kundi and Okwereogu because of concerns over their abilities as anesthesiologists. As to Dr. Makhoul, defendant maintains that it was Dr. Makhoul who refused employment with defendant, and not defendant withdrawing the offer of employment.

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<sup>1</sup> Although Sparrow Hospital was originally a party, they were no longer a party at the time of the summary disposition.

The trial court further concluded that, with the burden shifted back to plaintiffs, plaintiffs failed to present any evidence to support the proposition that defendant's motive was, in fact, discriminatory. We agree. Plaintiffs establish that they could create a genuine issue of material fact regarding the question whether Drs. Kundi and Okwereogu are, in fact, incompetent. However, they point to absolutely no evidence in support of the proposition that defendant's true motive was discriminatory. That is, at most, plaintiffs can point to evidence to establish that defendant was incorrect in its conclusion that they are incompetent. However, in the absence of any evidence that defendant was motivated by discrimination rather than, at worst, a mistaken belief as to their competency, Drs. Kundi and Okwereogu have not met the burden necessary to survive summary disposition.<sup>2</sup>

As for Dr. Makhoul, his claim is somewhat derivative in that he was offered employment, therefore he cannot claim that he was discriminated against. Rather, his claim is based upon that offer being withdrawn in retaliation for his protesting the discrimination against his partners. However, for defendant to have improperly retaliated against Dr. Makhoul, it is necessary that its motivation in not hiring Drs. Kundi and Okwereogu was discriminatory. Because plaintiffs have presented no evidence of a discriminatory motivation against Drs. Kundi and Okwereogu, it necessarily follows that there is no evidence that defendant withdrew its offer in retaliation for Dr. Makhoul objecting to such discriminatory motive.

Finally, we note that defendant briefly discusses an interesting issue. Specifically, defendant points to the fact that Drs. Kundi and Okwereogu do not appear to ever have actually applied for employment with defendant. This raises the question whether a discrimination claim may be established on the basis that an employer did not sua sponte offer employment because of discriminatory reasons or whether the plaintiff must actually have applied for employment. However, because the trial court did not base its ruling on this point, we decline to consider it.

Affirmed. Defendant may tax costs.

/s/ E. Thomas Fitzgerald  
/s/ Harold Hood  
/s/ David H. Sawyer

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<sup>2</sup> Although not referred to by the trial court in its opinion, we also note that plaintiffs had filed complaints with the United States Equal Employment Opportunity Commission and the EEOC dismissed those complaints on the basis that "the EEOC is unable to conclude that the information obtained establishes violations of the statutes."