STATE OF MICHIGAN

COURT OF APPEALS

SHERYL LINZY,

Plaintiff-Appellant,

v

ST. MARY'S MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
June 4, 2002

No. 228627
Saginaw Circuit Court
LC No. 98-024557-NZ

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

In this wrongful discharge from employment suit, plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff, a registered nurse, claims wrongful discharge under contract and employment discrimination (race and age) theories. We affirm.

I. Facts and Procedural History

On August 27, 1997, defendant admitted a patient named Charley Martin to its cardiovascular holding unit. Plaintiff, a fifty-four or fifty-five-year-old African American, worked in defendant's cardiovascular holding unit as a cardiovascular services charge nurse. While in the unit, Martin began to complain of shoulder pain. Martin's assigned nurse, Lois Wilson, was apparently unable to contact Martin's doctor, Dr. Rehan Mahmud, or another doctor from the "Heart Group," so Wilson asked plaintiff for her advice.

Plaintiff wrote an order for Martin for the prescription drug Darvocet N100. Plaintiff maintains that, in writing the order, she followed standard operating procedures for the cardiovascular holding unit. Specifically, plaintiff asserts that doctors maintained hospital-approved standing orders to administer certain drugs without physician pre-approval. Under this system, plaintiff explained, the prescription would be noted as a verbal order and the doctor would sign the prescription after returning to the hospital. Wilson administered a dose of Darvocet to Martin before he was moved to another floor.

On August 29, 1997, John Lillistierna, a Caucasian in his thirties, took over as Martin's assigned nurse. Apparently, Lillistierna also had difficulty contacting Dr. Mahmud or the Heart Group doctors. Lillistierna wrote orders for Restoril, a narcotic drug requiring a prescription,

and requested certain physician-ordered tests from the laboratory. Martin died on August 30, 1997, from causes apparently unrelated to the administration of either Darvocet or Restoril.

When Dr. Mahmud returned to the hospital, he signed the orders for Darvocet and Restoril, but noted on both that he was "on vacation." In addition, Dr. Mahmud brought the orders to the attention of nursing supervisors and later testified that he did not authorize a standing order for Darvocet.[1] Defendant elected to discipline both plaintiff and Lillistierna for writing orders for medication requiring prescriptions. Defendant also reported the conduct to the State of Michigan for investigation.

On September 8, 1997, plaintiff received a termination letter from defendant for violating medical center policies and procedures. Defendant maintained that the letter was sent by mistake and that defendant reconsidered its position the following day. After defendant staff members met with both plaintiff and Lillistierna, defendant offered both nurses continued employment as nursing assistants while the state conducted its investigation. If appropriate, both nurses would be reinstated to their positions as registered nurses at the conclusion of the state investigation. Defendant submitted the offer to plaintiff in a letter dated September 15, 1997. Lillistierna accepted the offer, but plaintiff rejected it and resigned by letter dated September 15, 1997.[2]

Plaintiff filed a complaint on July 28, 1998 and alleged that defendant terminated her because of her age and race in violation of the Civil Rights Act, MCL 37.2101 *et seq*. Plaintiff also claimed defendant breached an express and implied employment contract. On December 22, 1999, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10).

After oral argument, the trial court granted defendant's motion for summary disposition because: (1) plaintiff failed to establish a prima facie case of age or race discrimination based on disparate treatment because she and Lillistierna received the same discipline; (2) plaintiff could not maintain a claim for intentional age discrimination because she failed to establish that defendant's articulated reason for the discipline was a mere pretext for discrimination; (3) plaintiff failed to establish the required elements of race discrimination because she failed to allege any facts supporting the proposition that defendant was predisposed to discriminate against persons in the affected class; and (4) plaintiff failed to overcome the presumption that defendant employed her on an at-will basis.

II. Contract Claims

Plaintiff argues that the trial court improperly granted defendant's motion for summary disposition regarding her contractual claims for wrongful discharge. Plaintiff says she presented sufficient evidence of an express oral agreement and her legitimate expectation that she would be discharged only for just cause. We disagree.

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[1] Another cardiovascular nurse, Nada Rangel, testified that Dr. Mahmud had a standing order for Darvocet N100.

[2] Ultimately, the state sanctioned Lillistierna but cleared plaintiff of any wrongdoing. Defendant eventually restored Lillistierna to his position as a registered nurse.

"A motion for summary disposition under MCR 2.116(C)(10), [testing] the factual support of a claim, is subject to de novo review." *Oade v Jackson National Life Ins Co of Michigan*, 465 Mich 244, 251; 632 NW2d 126 (2001), citing *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). We consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*, citing MCR 2.116(C)(10), (G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

Employment relationships are presumed to be terminable at the will of either the employer or the employee. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). However, the presumption of employment at will can be overcome by proof of a contract provision for a definite term of employment or by an agreement which prohibits discharge without good cause. *Id*. at 164, citing *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993).

Plaintiff asserts that she received oral assurances of a just-cause employment relationship during her pre-employment interview and testified that she was told that defendant did not terminate employees without good reason. However, plaintiff acknowledges that she was informed, at the same time, that employees could be summarily dismissed for a list of infractions, including stealing, substance abuse, and patient neglect.

Although a just-cause employment relationship may arise through oral assurances, the oral assurances must be both clear and unequivocal. *Lytle, supra* at 171. In addition, the oral representations must demonstrate both negotiation and mutual assent to the just-cause employment relationship, rather than simply expressions of hope for a long-term employment relationship. *Id.* at 172; *Bracco v Michigan Technological University*, 231 Mich App 578, 598-599; 588 NW2d 467 (1998). Moreover, a "'nonexclusive list of common-sense rules of behavior that can lead to disciplinary action or discharge, clearly reserves the right of an employer to discharge an employee at will.'" *Dolan v Continental Airlines*, 454 Mich 373, 388; 563 NW2d 23 (1997), citing *Rood, supra* at 142.

Viewing plaintiff's allegations in the light most favorable to her, we conclude that plaintiff inquired about job security rather than negotiating for job security. *Lytle, supra* at 172. Also, her interviewer's statements were couched in general terms, more akin to stating a policy than offering an express contract. *Rowe v Montgomery Ward*, 437 Mich 627, 645; 473 NW2d 268 (1991). Finally, plaintiff was aware that she could be summarily dismissed for a number of infractions. *Dolan, supra* at 388. In sum, plaintiff presented no evidence of a "clear and unequivocal" oral contract for just-cause employment.

Plaintiff also asserts that defendant, through its words and actions, created a "legitimate expectation" of just-cause employment. Plaintiff bases this claim, in part, on the alleged oral representations regarding job security during her pre-employment interview and also on sections in the employee manual concerning detailed discharge, fairness, and grievance procedures.

At the time plaintiff received the employee manual, she signed a statement which says clearly that the manual does not constitute an employment contract. Therefore, her reliance on

the manual's grievance and discipline provisions to create legitimate expectations of a just-cause employment contract is misplaced. See *Lytle, supra* at 166; *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 413-414; 550 NW2d 243 (1996), cert den 520 US 1142; 117 S Ct 1311; 137 L Ed 2d 474 (1997). Moreover, the acknowledgment specifically provides that employment contracts must be in writing, signed by defendant's president, and that all oral statements regarding employment contracts are invalid. Clearly, after she read and signed the acknowledgement, any alleged expectations of just-cause employment based on oral representations were no longer legitimate. Further, an employer may unilaterally change a written discharge-for-cause policy to an employment-at-will policy without reserving that right in advance, provided reasonable notice of the change is provided to affected employees. *In re Certified Question*, 432 Mich 438, 456-457; 443 NW2d 112 (1989). Because plaintiff failed to establish a genuine issue of material fact regarding either an express oral contract or legitimate expectations of just-cause employment, the trial court properly granted defendant's summary disposition motion on plaintiff's contract claims.

III. Age Discrimination

Plaintiff maintains that the trial court improperly granted summary disposition on her age discrimination claim and says that the trial court ignored evidence that other similarly situated individuals received either no discipline or more lenient discipline. We disagree.

Plaintiff alleges age discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq*. MCL 37.2202(1)(a) states, in relevant part, that an employer shall not: "discharge, or otherwise discriminate against an individual with respect to employment. . . , because of religion, race, color, national origin, age, sex, height, weight, or marital status." Plaintiff claims both intentional and "disparate impact" age discrimination. *Alspaugh v Michigan Law Enforcement Officers Training Council*, 246 Mich App 547, 563; 634 NW2d 161 (2001).

To establish a prima facie case for intentional age discrimination, plaintiff must prove, by a preponderance of the evidence, that she was a member of the protected class, she suffered an adverse employment action, she was qualified for her position, and that a younger person replaced her. *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999), remanded on other grounds 465 Mich 919 (2001). Here, plaintiff failed to present any evidence of age animus of any kind and also failed to show that she was replaced by a younger person. Therefore, her claim for intentional age discrimination fails.

To prevail under a disparate treatment theory, plaintiff must establish that she was treated more harshly than similarly situated employees for the same or similar misconduct. *Alspaugh, supra* at 564, citing *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 11; 486 NW2d 75 (1992); see also *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

Plaintiff asserts that she was treated more harshly than the younger nurses, including Wilson, the nurse who administered the drug, and Lillistierna, the nurse who was similarly disciplined for the alleged identical misconduct. However, to establish that the other younger nurses were "similarly situated," plaintiff must show that all relevant aspects of their employment situations were "nearly identical" to those of plaintiff's situation. *Town, supra* at 699-700; *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000). Because plaintiff was Wilson's superior, plaintiff failed to establish that

Wilson was "similarly situated." In contrast, Lillistierna was "similarly situated," but we find that he and plaintiff received the same discipline. Though plaintiff received a letter of termination when Lillistierna did not, the record is clear that the employer advised plaintiff that the letter was mistakenly, prematurely sent and thereafter, both Lillistierna and plaintiff were offered the same opportunity to stay as nursing assistants during the state's investigation of their alleged misconduct. Lillistierna accepted the employer's offer, while plaintiff resigned. Had plaintiff accepted her employer's offer, as Lillistierna did, the record suggests that she, like Lillistierna, would have been reinstated to her position as a registered nurse. Therefore, there is simply no evidence of disparate treatment. The trial court properly granted defendant's summary disposition motion on plaintiff's age discrimination claim.

IV. Race Discrimination

Plaintiff also argues that the trial court improperly granted summary disposition on her race discrimination claim, and asserts that the trial court ignored evidence that other similarly situated individuals received either no discipline or more lenient discipline. Again, we disagree.

Plaintiff's race discrimination claim is also based on MCL 37.2202(1)(a). Plaintiff provided no direct evidence of racial bias. See *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). Plaintiff also provided no evidence of intentional discrimination because she presented no evidence that defendant was predisposed to discriminate against plaintiff and acted on that predisposition. See *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999).

To survive summary disposition, plaintiff must first offer a prima facie case of race discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). Plaintiff was required to present evidence that (1) she belongs to a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position, and (4) was disciplined under circumstances giving rise to an inference of unlawful discrimination, i.e., that other similarly situated persons outside the protected class were treated differently. *Id*., citing *Lytle*, *supra* at 172-173; *Town*, *supra* at 695. Plaintiff failed to establish a genuine issue of material fact that similarly situated employees were treated differently. As discussed, plaintiff failed to present any evidence that any similarly situated employees, including Lillistierna, was treated differently for any reason, including race. Therefore, the trial court properly granted defendant's summary disposition motion on plaintiff's race discrimination claim.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper