STATE OF MICHIGAN

COURT OF APPEALS

LINDA MCINTIRE,

Plaintiff-Appellant,

v

MICHIGAN INSTITUTE OF UROLOGY,

Defendant-Appellee,

and

ST. JOHN HOSPITAL AND MEDICAL CENTER,

Defendant.

UNPUBLISHED
January 23, 2014

No. 311599
Wayne Circuit Court
LC No. 11-002670-CD

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant[1] in this wrongful termination action. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of the termination of plaintiff's employment with defendant. Defendant employed plaintiff, an African-American woman, as a urologist in defendant's St. Clair Shores office for roughly two years prior to her termination. The decision to hire plaintiff was made by Dr. Alphonse Santino, the president of defendant. The employment agreement between plaintiff and defendant allowed either party to terminate the agreement with or without cause after twelve months. Plaintiff did not have any existing patients when she

[1] Plaintiff only appeals the grant of summary disposition in favor of defendant Michigan Institute of Urology (MIU), and waived all rights to appeal as against defendant St. John Hospital and Medical Center by stipulation. Therefore, we use "defendant" to refer to Michigan Institute of Urology.

began working for defendant, and she was expected and encouraged by defendant's doctors to cultivate her own practice.

During the employment relationship, plaintiff believed that she was assigned a disproportionate number of uninsured and Medicaid patients. Plaintiff also believed that she was assigned a disproportionate number of the patients that accumulated during the weekend, on-call rounds at the hospital where plaintiff and other doctors employed by defendant had staff privileges. Further, patients would occasionally be placed on plaintiff's operating schedule without plaintiff's knowledge and without any prior meeting between the surgical patient and plaintiff. Also, plaintiff encountered consistent difficulty in trying to schedule follow-up care with her patients. Plaintiff was told that defendant's St. Clair Shores office did not accept Medicaid, so any Medicaid patient that plaintiff treated at the hospital should be directed to follow up with defendant's Oakwood office, where Medicaid was accepted. Therefore, plaintiff believed she was disadvantaged because she was unable to follow up with her Medicaid patients and could not develop a practice. Plaintiff believed that her race "could have been" the reason she was assigned more Medicaid patients than other doctors on staff.

Plaintiff further claimed that numerous Medicaid patients had been turned away from defendant's Oakwood office. Because plaintiff began to believe that her patients were not getting adequate care when she sent them to defendant's Oakwood office, plaintiff began accepting Medicaid patients at defendant's St. Clair Shores office. Although plaintiff believed that defendant's doctors may have been violating the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 USC § 1395dd, plaintiff never voiced her concerns regarding the legality of the doctors' actions to anyone employed by defendant, or to any state or federal authorities.

During her employment with defendant, defendant received numerous complaints about plaintiff from other doctors, medical assistants, and patients. Because of these complaints, defendant's practice manager and defendant's executive committee president met with plaintiff to discuss the problems and to explain that the unprofessional behavior in question was unacceptable. Despite this meeting, complaints about plaintiff's unprofessional behavior continued. In September of 2010, the members of defendant's executive committee were polled, and voted in favor of terminating plaintiff's employment. However, upon Santino's request, the executive committee president gave plaintiff one last chance to rectify her behavior. In November of 2010, plaintiff again yelled at a medical assistant. Santino terminated plaintiff's employment in December of 2010.

Plaintiff filed suit, alleging that defendant had unlawfully terminated plaintiff in violation of the Michigan Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and Michigan's whistleblower's protection act, MCL 15.361 *et seq*.,[2] and that her termination was wrongful as against public policy. The trial court granted summary disposition in favor of defendant, finding

[2] Plaintiff later stipulated to the dismissal of her claim under the Michigan whistleblower's protection act, MCL 15.361 *et seq*. It is not at issue on appeal.

that plaintiff had not proven, by a preponderance of the evidence, that plaintiff's race was a factor in her termination, or that plaintiff was fired for her refusal to violate the law.

II. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). We review a trial court's decision on summary disposition de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing the grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). This Court is "limited to considering the evidence submitted to the trial court before its decision on the motions." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

III. DISCRIMINATION CLAIM UNDER THE ELCRA

Plaintiff first claims that there was a genuine issue of material fact, and summary disposition was not proper as a matter of law, because plaintiff carried her burden of showing that her race was a factor in her termination. We disagree.

The ELCRA, MCL 37.2101 *et seq*., provides, in pertinent part:

> An employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

In order to establish a prima facie case of discrimination, a plaintiff must prove by a preponderance of the evidence that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once a plaintiff has established a prima facie case, a presumption of discrimination applies. *Id*. at 173. "[A] prima facie case of race discrimination can be made by showing either intentional discrimination or disparate treatment." *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991).

In order to prove intentional discrimination, a plaintiff must show that she was a member of a protected class, that she was discharged, and that the person who discharged her was predisposed to discriminate against members of the plaintiff's protected class and actually acted on that predisposition in discharging her. *Id*. A plaintiff may prove disparate treatment by showing that she was a member of a protected class and that she was treated differently than

members of a different class for the same or similar conduct. *Id*. To show that a differently treated coworker was "similarly situated," all relevant aspects of plaintiff's employment situation must be nearly identical to the coworker's employment situation. *Town v Mich Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997).

Once a plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. *Lytle*, 458 Mich at 173. This burden requires a defendant to produce evidence that its employment action was nondiscriminatory, and thus, this burden cannot be met merely through an answer to the complaint or by argument of counsel. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001). If a defendant is able to produce evidence of a legitimate, nondiscriminatory reason for termination, even if later refuted, the presumption of discrimination is rebutted, and the burden of proof returns to plaintiff. *Lytle*, 458 Mich at 174. Plaintiff must then show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that defendant's given reasons were merely pretext for underlying discrimination. *Id*.

At the summary disposition stage, the Michigan Supreme Court has adopted the "intermediate position" for employment claims under the ELCRA. See *Town*, 455 Mich at 698. "Under this position, disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle*, 458 Mich at 175.

We hold that there was no genuine issue of material fact that plaintiff was discharged from her employment with defendant for nondiscriminatory reasons. First, plaintiff was unable to establish a prima facie case of racial discrimination. Plaintiff was a member of a protected class, was qualified for the position of urologist, and was terminated. In order to establish a prima facie case of discrimination, plaintiff therefore must show that she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Malady (On Rehearing)*, 458 Mich at 172-173. To do this, plaintiff must demonstrate either intentional discrimination or disparate treatment. *Reisman*, 188 Mich App at 538.

Plaintiff failed to demonstrate intentional discrimination. Plaintiff has not shown that Santino, the individual who actually discharged plaintiff, was predisposed to discriminate against African-Americans, or that this predisposition was being acted upon when he fired plaintiff. The only racial reference plaintiff alleged to have been made by an employee of defendant was a single comment by a fellow doctor, telling plaintiff she should network with other African-American physicians in order to build her practice. Whether this comment is sufficient to show a predisposition towards discrimination against African-Americans, this statement was not made by Santino and plaintiff has not brought forth any evidence that he harbored discriminatory animus toward African-Americans. Further, it should be noted that Santino was the individual who both hired and fired plaintiff. Our Supreme Court has stated:

> [I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the

> adverse action taken by the employer. [*Town*, 455 Mich at 700, quoting *Proud v Stone*, 945 F2d 796, 797 (CA 4, 1991).]

Plaintiff provides no evidence to overcome this strong inference.

The only other evidence plaintiff has proffered to support a claim of intentional discrimination is that she allegedly was assigned a disproportionately high number of minority, uninsured, underinsured, self-pay, or Medicaid patients, simply because plaintiff was the "African-American doctor." Once again, and assuming this to be true, whether this system of patient assignment is sufficient to establish a racially discriminatory animus against African-Americans,[3] plaintiff admitted that a supervising doctor assigned most of her patients, and does not allege that Santino ever assigned her any of the Medicaid patients. Therefore, plaintiff cannot show intentional discrimination to support her prima facie case of discrimination. See *id*.

Further, plaintiff has not proven disparate treatment sufficient to establish a prima facie case of discrimination. To prove disparate treatment, a plaintiff must show that she was a member of a protected class and that she was treated differently than members of a different class for the same or similar conduct. *Id*. The only example of disparate treatment that plaintiff offers was by way of her testimony that another doctor, who was hired after plaintiff, was routinely late for work, and yet there was no mention of the junior doctor's chronic tardiness, let alone any punishment for it. However, plaintiff has proffered no evidence to show that any former or current employee of defendant has ever received so many documented complaints (as did plaintiff) related to interactions with clients, other doctors, and staff, and not been discharged. Additionally, the only evidence of the junior doctor being commonly late was plaintiff's own deposition testimony, and it was not supported by documentary evidence. Therefore, plaintiff has not demonstrated that she was similarly situated to another un-terminated employee, as is required to show disparate treatment.

Even if plaintiff had proven a prima facie case of discrimination, defendant proferred a legitimate, nondiscriminatory reason for plaintiff's termination, i.e., numerous and continuing complaints from staff and patients regarding plaintiff's behavior and demeanor. Even if a plaintiff's evidence of a legitimate, nondiscriminatory reason for termination is later refuted, the presumption of discrimination still disappears, and the burden of proof returns to plaintiff. *Lytle*, 458 Mich at 174. Plaintiff must then show, by a preponderance of evidence, that there was a triable issue that defendant's given reasons for termination were merely pretextual for underlying discrimination. *Id*. Plaintiff's own testimony showed that, apart from a fellow doctor's statement that she should network with other African-American physicians, there was no evidence that plaintiff's race was a factor in her discharge. As stated above, Santino was ultimately responsible for the decision to fire plaintiff, and therefore, any racial animus suggested by this statement by another doctor is irrelevant in determining defendant's reason for terminating plaintiff. Further, plaintiff does not dispute the truth or veracity of any of the

[3] We note that plaintiff admitted in her deposition that she had no evidence in support of her theory that patients were assigned to her based on her race.

numerous staff and patient complaints against her, and these complaints supported defendant's nondiscriminatory reason for discharging plaintiff.

On these bases, summary disposition on plaintiff's claim for unlawful termination, in violation of the ELCRA, was properly granted in defendant's favor. Plaintiff was unable to prove a prima facie case of racial discrimination because she could not show evidence of either intentional discrimination or disparate treatment. See *Reisman*, 188 Mich App at 538. Further, even if plaintiff could show a prima facie case of discrimination, she was unable to prove, by a preponderance of the evidence, that plaintiff's legitimate, nondiscriminatory reason for her termination was merely pretextual. See *Lytle*, 458 Mich at 173-174.

IV. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY CLAIM

Plaintiff next claims that summary disposition was improper because she provided record evidence that she was terminated for her refusal to violate the physician's standard of care, and therefore, there is a genuine issue of material fact that her termination was against public policy. We disagree.

Generally, and unless otherwise specified by contract, either party to an employment contract for an indefinite term may terminate the contract at any time and for any, or no, reason. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). However, some grounds for discharging an employee are so contrary to public policy that they can be actionable. *McNeil v Charlevoix Co*, 484 Mich 69, 79; 772 NW2d 18 (2009). This Court has recognized three public policy exceptions to the at-will employment doctrine: (1) when the employee is discharged in violation of an explicit legislative statement prohibiting the discharge of employees who act in accordance with a statutory right; (2) when the employee is discharged for the failure or refusal to violate the law in the course of their employment; and (3) when the employee is exercising a right conferred by a well-established legislative enactment. *Edelberg v Leco Corp*, 236 Mich App 177, 180; 599 NW2d 785 (1999). "The term 'law' may include those legal principles promulgated in constitutional provisions, common law, and regulations, as well as statutes." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485; 516 NW2d 102 (1994). However, the Michigan Supreme Court has stated that a claim for discharge in violation of public policy cannot be based upon a Michigan statute that was not intended to confer rights on employees. See *Suchodolski*, 412 Mich at 696-697.

Plaintiff only argues that the second public policy exception applies. However, plaintiff cannot prove that she was discharged for her refusal to violate a "law." Plaintiff contends that MCL 600.2912 is the "law" that she refused to violate, which led to her discharge from employment with defendant. MCL 600.2912(1) provides:

> A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.

Plaintiff essentially asks this Court to recognize a new public policy-based claim premised on medical malpractice standards. We decline to do so for two reasons. First, a cause of action based on MCL 600.2912(1) does not fall within any of the three categories enumerated above. See *Edelberg*, 236 Mich App at 180. The "standard of care" in the medical profession is not based on an objective legal source, but must be established through expert testimony on a case-by-case basis. See *Gonzalez v St John Hosp & Medical Ctr (On Reconsideration)*, 275 Mich App 290, 294; 379 NW2d 392 (2007). Its subjectivity does not provide most individuals a clear and explicit delineation or understanding of the "law." See *id*. Therefore, it cannot be said that a violation of the physician's standard of care is a violation of objective "law," and one's refusal to violate the standard of care does not meet the requirements to prove wrongful termination in violation of public policy.

Second, we recognize that the function of this Court is to correct errors. *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). Thus, "a significant departure from Michigan law" such as the recognition of a new public policy basis for termination claims, "should only come from our Supreme Court, not an intermediate court." *Teel v Meredith*, 284 Mich App 660, 666; 774 NW2d 527 (2009). Any new public policy basis for termination claims should come from our Legislature or possibly from our Supreme Court. *Id*. at 663-666; see also *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) ("[T]he proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.") (emphasis in original).

Therefore, even if plaintiff could prove that she was discharged from her employment with defendant because she refused to stop giving follow-up medical care to patients[4] on Medicaid, in violation of a physician's "standard of care," plaintiff cannot show that her discharge was the result of her refusal to violate a law. See *Edelberg*, 236 Mich App at 180. Therefore, there is no genuine issue of material fact and summary disposition in defendant's favor was proper.

Plaintiff did not carry her burden of showing that a genuine issue of material fact existed on the issue of whether her termination violated the ELCRA or was in violation of public policy. Therefore, summary disposition was properly granted in defendant's favor.

Affirmed.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra

[4] We note that Dr. Miralani, an employee of defendant, stated in deposition testimony that she would see and treat Medicaid and uninsured patients at the St. Clair office without reprisals, and that other employees of defendant also engaged in this practice that plaintiff claims resulted in her termination.