

STATE OF MICHIGAN
COURT OF APPEALS

LOWELL R. FISHER, D.O.,

Plaintiff-Appellant,

v

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellee.

FOR PUBLICATION

May 4, 2004

9:25 a.m.

No. 244678

Jackson Circuit Court

LC No. 97-081351-CZ

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

PER CURIAM.

Plaintiff appeals as of right the order denying his motion for summary disposition and granting defendant's cross-motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff is a licensed osteopathic surgeon practicing at Doctors Hospital in Jackson County. Plaintiff applied for staff privileges in the department of surgery at defendant W.A. Foote Memorial Hospital in Jackson County (the hospital). Plaintiff was informed by the hospital that he would have to seek a waiver of the department of surgery's requirement that a candidate has successfully completed an Accreditation Council for Graduate Medical Education (ACGME) approved residency training program and be certified, or eligible to be certified, by the American Boards of Medical Specialties (more specifically, the American Board of Surgery).¹ Plaintiff's request for a waiver was denied by the board of trustees on December 20, 1995, on the ground that plaintiff's training and experience did not meet defendant's criteria for granting staff privileges. The board found that plaintiff did not establish that his "training was reasonably equivalent to the ACGME-approved training." The board also stated that questions were raised about the scope of plaintiff's general surgery training experience, especially in light of the fact that twelve months of training was spent in a thoracic surgery orientation.

¹ The American Board of Medical Specialties is the allopathic (medical doctor) board and the American Osteopathic Association Specialty Board is the osteopathic board.

Plaintiff reapplied for staff privileges in October of 1996, but before a decision was made on this reapplication, plaintiff filed this action solely alleging that defendant hospital illegally discriminated against him based on his status as an osteopathic physician contrary to MCL 333.21513(e).²

Plaintiff moved for summary disposition under MCR 2.116(C)(10), and defendant filed a cross-motion for summary disposition. The trial court granted summary disposition in favor of defendant and dismissed plaintiff's claim on the ground that a hospital's staffing decisions are not subject to judicial review. The court further held that, even if the decision was subject to judicial review, plaintiff's allegation that he was subject to discriminatory treatment based on his status as an osteopath was not established in light of evidence that defendant regularly awards staff privileges to osteopathic physicians.

I

Plaintiff's complaint contains only one claim, which is brought under MCL 333.21513(e)³ of the Public Health Code.⁴ Because the code does not expressly create a private cause of action, the claim is precluded if the code provides an adequate means of enforcing its provisions. See *Mack v City of Detroit*, 254 Mich App 498, 501-502; 658 NW2d 492 (2002).⁵ Here, a number of ways exist within the code to enforce the rule. MCL 333.20165(1)(b) provides for the limitation, suspension, or revocation of a health facility license, as well as an

² The owner, operator, and governing body of a hospital licensed under this article:

* * *

(e) Shall not discriminate . . . in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

³ MCL 333.21513(e) provides:

After December 31, 1989, [the owner, operator, and governing body of a hospital licensed under this article] shall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

⁴ Plaintiff did not bring a claim under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*

⁵ Although this issue was not raised below, we find it appropriate to consider this issue because consideration of the issue is necessary to a proper determination of the case. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

administrative fine on a hospital that violates a provision contained in the code. Further, MCL 333.20176 requires the department of health to investigate a health facility upon written complaint of a person who believes that the facility violated the code. Also, MCL 333.20177 allows the director of the department of health to request that a prosecuting attorney or attorney general bring an action to restrain or enjoin actions in violation of the code. Finally, MCL 333.20199 makes violation of a provision of the code a misdemeanor punishable by a \$1,000 fine for each occurrence or day that the violations continues. Clearly, the code has adequate means of enforcing the provisions of MCL 333.21513(e). Thus, we affirm the trial court's decision to grant summary disposition in favor of defendants, albeit for different reasons. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

II

Because no cause of action exists, plaintiff's entire claim must fail and we need not address the remainder of the issues raised by plaintiff.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald