STATE OF MICHIGAN

COURT OF APPEALS

GOMER J. POUND, JR., M.D., and EMERGENCY MEDICAL ASSOCIATES, P.C.,

Plaintiffs-Appellants,

v

LEE MEMORIAL HOSPITAL, BORGESS HEALTH ALLIANCE, FRITZ FAHRENBACHER, M.D., KALAMAZOO EMERGENCY ASSOCIATES, P.C., and ANDREW LATHAM, M.D.,

Defendants-Appellants.

UNPUBLISHED
December 11, 2003

No. 239149
Cass Circuit Court
LC No. 00-000911-CK

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition, MCR 2.116(C)(10), on all of plaintiffs' claims in favor of defendants, and the trial court's order denying plaintiffs' motion to amend their complaint pursuant to MCR 2.118(A)(2). We affirm.

Plaintiff Pound provided services at defendant Lee Memorial Hospital (LMH), a wholly owned subsidiary of Borgess Health Alliance (BHA), for roughly thirteen years in LMH's emergency room. LMH contracted with Emergency Care Services, a subset of BHA, to provide LMH with emergency room staff. BHA, in turn, contracted with Kalamazoo Emergency Associates, P.C. (KEA), for KEA to provide LMH with emergency room physicians. KEA, of which defendant Latham was president, then contracted with Emergency Medical Associates, P.C. (EMA), to provide an emergency room physician to LMH. Pound was the sole employee and shareholder of EMA. At the request of Fritz Fahrenbacher, LMH's chief operating officer, Pound was expelled from LMH after January 28, 2000. The hospital's stated reasons for the expulsion were several instances of unprofessional behavior and failure to maintain an appropriate appearance at LMH. Pound's staff privileges at LMH, however, remained intact, despite his being unable to enter the hospital to exercise them.

Pound had been notified on previous occasions that his manner of dress and appearance at LMH violated hospital conduct standards. In short, there were reports that Pound wore nail polish, cosmetics and visible female undergarments while on duty at LMH. Plaintiffs contend that Pound was the victim of gender stereotyping on the basis of his clothing and grooming

habits, and that this violated the Civil Rights Act, MCL 37.2101 *et seq*. Plaintiffs further contend that the trial court erred when it denied their motion to amend their complaint to include such a claim under MCR 2.118(A)(2). We disagree.

It is not an abuse of discretion for the trial court to deny a motion to amend a complaint if the proposed claim would be futile. *Jenks v Brown*, 219 Mich App 415, 420-421; 557 NW2d 114 (1996). Differential grooming codes for men and women, regardless of whether they are in writing, do not implicate an inherent characteristic of sex. *Bedker v Domino's Pizza, Inc*, 195 Mich App 725; 491 NW2d 275 (1992). The civil rights act does not protect a person's conduct if it does not implicate an inherent characteristic of a protected status under the statute. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 165-166; 645 NW2d 643 (2002). Because differential appearance codes for men and women do not implicate an inherent characteristic of sex, plaintiffs' could not, as a matter of law, state a cognizable claim under MCL 37.2101 *et seq*, and the trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint.

Plaintiffs also contend that the trial court should have applied the economic reality test to determine whether Pound was the employee of KEA. However, this issue was not raised below, and is not properly before this Court. *Campbell v Sullins*, 257 Mich App 179, 192-193; 667 NW2d 887 (2003). Despite this, although the trial court did not label its application of the economic reality test, the trial court clearly applied the test and found EMA to be a private contractor of KEA. Consequently, no manifest injustice would accrue to plaintiffs if this Court did not consider this issue. See *Mantei v Michigan Public School Employees Retirement Sys*, 256 Mich App 64, 78-79; 663 NW2d 486 (2003) (setting forth the economic reality test).

Plaintiffs next argue that summary disposition was inappropriate on the question of whether KEA breached its contract with EMA when it acquiesced to Fahrenbacher's request to remove Pound from service at LMH. This Court reviews the trial court's decision on a motion for summary disposition, as well as questions of contract construction, de novo. *Klapp v United Ins Group Agency*, 468 Mich 459, 463; 663 NW2d 447 (2003); *Old Kent Bank v Sobczak*, 243 Mich 57, 61; 620 NW2d 663 (2000). Based on a reading of the governing contracts, summary disposition was properly granted in favor of defendants, because KEA properly terminated the contract under its immediate termination provisions upon receiving a reasonable request from LMH to remove plaintiffs from service at the hospital.[1]

A private hospital's staffing decisions are not subject to judicial review unless those staffing decisions are in contravention of public policy. *Long v Chelsea Community Hosp*, 219 Mich App 578, 588-589; 557 NW2d 157 (1996). Plaintiffs claim that Pound was expelled from LMH as the result of impermissible gender stereotyping in contravention of public policy, and that this violation of public policy puts Pound's expulsion from LMH within this Court's review.

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[1] The trial court, in a footnote, stated that none of the parties alleged a breach that would invoke the immediate termination provisions. We disagree. The necessary arguments and facts were set forth in KEA's arguments, both on appeal and before the trial court, that once LMH had requested plaintiffs' removal from the hospital, both KEA's and plaintiffs' performance on their contract was rendered impossible.

We disagree, because, as already noted, plaintiffs have not alleged a cognizable claim that public policy was violated.

Similarly, plaintiffs' claim of tortious interference with a business relationship must fail, because this Court will not review a cause of action that at heart is a review of a private hospital's staffing decisions. *Sarin v Samaritan Health Ctr*, 176 Mich App 790, 794-795; 440 NW2d 80 (1989). Additionally, tortious interference claims require that the defendants commit a malicious or per se wrongful act before such claims are cognizable. *Mino v Clio School Dist*, 255 Mich App 60, 78-79; 661 NW2d 586 (2003). Plaintiffs do not establish that any defendant acted with malice and cannot establish a violation of law constituting a per se wrongful act on the part of any defendant.

Last, plaintiffs claim that the trial court improperly made numerous findings of fact when it granted summary disposition in favor of defendants. Even if we were to agree with plaintiffs, the trial court reached the right result when it granted summary disposition in favor of defendants, and this Court will not reverse the lower court if it reached the right result, albeit for the wrong reasons. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). Having determined that plaintiffs' claims fail as a matter of law, plaintiffs fail to allege error requiring reversal on this issue.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello