IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANDREA PRICE	)	
	)	
Plaintiff,	)	4:01-cv-10558
	)	
vs.	)	
	)	
IOWA PHYSICIANS CLINIC MEDICAL FOUNDATION d/b/a IOWA HEALTH PHYSICIANS f/k/a INTEGRA HEALTH, IOWA HEALTH SYSTEM	)	ORDER
	)	
Defendant.	)	
	)	

Defendant filed a motion for summary judgment on May 12, 2003. Plaintiff filed a brief in support of her resistance on June 25, 2003. On July 11, 2003, defendant replied and filed a motion to strike unauthorized materials in plaintiff's appendix of exhibits. On July 30, 2003, defendant withdrew its motion to strike. The matter is now fully submitted.[1]

I. BACKGROUND

The following facts are viewed in a light most favorable to plaintiff, the nonmovant.

Plaintiff, Andrea Price, graduated from Case Western Reserve University School of Medicine in 1991 and became a board certified doctor of obstetrics and gynecology ("ob/gyn") in 1997.

[1] The Court notes plaintiff has requested oral argument. After reviewing the pleadings and applicable law, however, the Court finds oral argument unnecessary to the resolution of the motion.

Plaintiff's App. at 62. In 1998, Jill Williams ("Williams"), the director of physician recruitment and development at Allen Memorial Hospital ("Allen") in Waterloo, Iowa, offered plaintiff an ob/gyn position at Allen. Defendant's App. at 2-3, 10, 88. After plaintiff signed an employment contract with Allen, Williams and Dr. Jeffery Crandall ("Crandall"), Medical Director for defendant, Iowa Physicians Clinic Medical Foundation,[2] asked plaintiff to work for defendant instead of Allen. Plaintiff's App. at 63.

Plaintiff initially was unsatisfied with defendant's proposed employment agreement. She negotiated revisions with Dr. Crandall and some of defendant's other representatives. *Id.* at 63-64. During negotiations, plaintiff was told that she would be working at Allen with Dr. Gorsline, another ob/gyn. *Id.* at 6, 64.

On May 4, 1999, plaintiff signed an employment contract with defendant. Thereafter, Dr. Crandall informed her that she would not be working with Dr. Gorsline, as Dr. Gorsline's contract was not going to be renewed. *Id.* at 64-65. However, Dr. Crandall assured plaintiff that defendant would hire a new ob/gyn to replace Dr. Gorsline. *Id.*

Later in May 1999, plaintiff started working for defendant at the Cedar Falls Primary Care Facility in Cedar Falls, Iowa. Defendant's App. at 6-7, 12, 78, 81, 150. She was the first ob/gyn defendant had employed in the Waterloo region and was the only black female at the Cedar Falls Clinic. Defendant's App. at 21-22; Plaintiff's Response To Defendant's Statement of Undisputed

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[2] Iowa Physicians Clinic Medical Foundation, doing business as Iowa Health Physicians, is named as a defendant in this case. Iowa Health Physicians was formerly known as Integra Health, and Iowa Health System. For purposes of this motion, the Court will refer to these parties collectively as "defendant."

Facts, ¶ 52. Plaintiff shared office space with three doctors who specialized in internal medicine, Drs. Crandall, Schmidt and Elsayyad. *Id.* at 80.

Sometime in 1999, Dr. Reeves ("Reeves"), a board-certified ob/gyn, started working at the Cedar Falls Primary Care Facility. Before coming to the Cedar Falls Clinic, Dr. Reeves had built a large gynecology and infertility practice of his own. Defendant's App. at 71, 87, 115, 119-122. Dr. Reeves brought his patient base and his staff with him to the Cedar Falls Primary Care Facility.[3] Plaintiff's App. at 84-85. Although Dr. Reeves worked in the Cedar Falls Primary Care Facility, he was not employed by defendant.[4] Plaintiff's App. at 2.

In the beginning, Dr. Reeves was "very enthusiastic about [plaintiff] and believe[d] that she [would] be highly successful." Defendant's App. at 119. Dr. Cindy Huwe ("Huwe"), a family practitioner who practices low-risk obstetrical medicine, was also excited to meet plaintiff. *Id.* at 43, 45. Drs. Huwe and Reeves both referred a number of their patients to plaintiff. *Id.* at 14, 49, 124. Initially, they, like Dr. Crandall, believed plaintiff could take over Dr. Reeves' large gynecology practice upon his retirement and build her own obstetrical practice. Defendant's App. 74, 86, 124.

A. Plaintiff's Concerns Regarding Staffing, Equipment, and Scheduling

When plaintiff began working for defendant in May 1999, her full-time nurse, Shawn Buhrow, went on maternity leave for three months. *Id.* at 277. Defendant did not replace Nurse Buhrow until

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[3] Dr. Reeves'staff included a full-time nurse, a part-time medical assistant, a part-time surgical nurse, and a full-time receptionist. Plaintiff's App. at 84-85.

[4] It appears to the Court that Dr. Reeves was an Allen employee. *See* Defendant's Response To Plaintiff's Statement Of Additional Material Disputed Facts, ¶ 36; Plaintiff's App. at 2 (Anderson Dep. at 19); and Defendant's App. at 114-122.

sometime in July, when it hired a part-time nurse with no experience in obstetrics or gynecology. *Id.* at 65, 249. After Nurse Buhrow returned from maternity leave, plaintiff's receptionist went on maternity leave. *Id.* at 70. Thereafter, calls and scheduling responsibilities were rerouted to other employees at the clinic. *Id.;* Plaintiff's Statement of Additional Material Disputed Facts, ¶ 29. Plaintiff told Dr. Crandall and the Cedar Falls Clinic Coordinators, Meredith Anderson ("Anderson") and Shelley Boldt ("Boldt"), that she needed additional staff. Plaintiff's App. at 2, 8, 72. Boldt told plaintiff that her staff was adequate and advised her to use Dr. Reeves' staff, if needed. Plaintiff's App. at 8. Dr. Crandall advised plaintiff that she could increase her staff when her practice was full. [5] Defendant's App. at 31.

In addition to her staffing concerns, plaintiff was unsatisfied with the equipment defendant provided her. She was not given some of the equipment she needed to practice, such as a gestation wheel and a measuring tape, and a full array of speculums. Plaintiff's App. at 65. As a result, plaintiff used her own gestation wheel and measuring tape and borrowed speculums from Dr. Reeves. *Id.* at 65, 278. Defendant also did not give plaintiff a device to measure bone density, a device to remove spider veins, or the hysteroscopy equipment from Dr. Gorsline's office.[6] Plaintiff's App. at 65, 278.

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[5] In addition to plaintiff and her own staff, defendant employed two patient service representatives, one lab tech, a clinic-coordinator, a part-time transcriptionist, a part-time medical records person, and an x-ray technician at the Cedar Falls Primary Care Facility. Plaintiff's App. at 8. These employees were available to all physicians at the Cedar Falls clinic, including plaintiff. *Id.* at 2,8. Drs. Schmidt and Elsayyad, the internists at the clinic, each had a full-time nurse. Plaintiff's App. at 21. The ob/gyns who worked for defendant in Des Moines each had two assistants as well as a triage nurse and a phone nurse. *Id.* at 69. The Des Moines ob/gyns had a full array of medical equipment available to them. Plaintiff's App. at 22.

[6] Defendant denied plaintiff's requests for bone density and vain removal equipment, because defendant determined this equipment was unnecessary for plaintiff's practice. Defendant's App. at 18,

However, plaintiff concedes that by the fall of 1999, she received the basic equipment she needed for her practice. Plaintiff's App. at 65, 278; Defendant's App. at 17.

Plaintiff was also unhappy with her schedule at the clinic. She initially received one half-day off during the Monday through Friday workweek. Defendant's App. at 31-32. When plaintiff asked Dr. Crandall for a full day off, he told her that she was entitled to only a half-day off because her practice was not full. *Id.* Plaintiff then informed Dr. Crandall that two new male doctors working for defendant in the Cedar Falls/Waterloo region, Dr. Cal Christensen and Dr. Basu, received full days off, even though they were seeing fewer patients than she.[7] *Id.* She also informed Dr. Crandall that a new ob/gyn in Des Moines was given a full day off each week. *Id.* Dr. Crandall told plaintiff that he would "take it under advisement." *Id.* at 32.

B. Defendant's Decision To Terminate Plaintiff

Defendant maintains regional Practice Management Committees ("PMC") that are responsible for making hiring and termination decisions about physicians. Defendant's App. at 77, 110. Defendant's Des Moines region is overseen by a different PMC than its Waterloo region. *Id.*; Plaintiff's Brief In Support Of Resistance To Motion For Summary Judgment And Request For Oral Argument, at 9. In February 2000, the PMC governing the Waterloo region held two meetings in which it discussed concerns and complaints about plaintiff. *Id.* at 50-51, 69, 170-72, 177. Dr. Crandall led the discussion at the February 17, 2000 PMC meeting. Plaintiff's App. at 45, 52. He

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82-84.

[7] Dr. Basu is a pediatrician. Defendant's App. at 32. The record does reveal Dr. Christensen's practice area.

presented a memo outlining the following deficiencies in plaintiff's performance:

- Technical Competence–There have been observations made by office nursing personnel involving breaks in standard sterile technique.[8] A second observation of concern by a nurse was Dr. Price's accidental loss of approximately 25% of a Parenteral dose of medication which costs $400-$500 per dose, given to the patient but was charged as a full dose. A third area of concern is the observation of her unwillingness to be proficient in performing operative laparoscopies and other gynecological procedures. (see letter from Dr. Lane Reeves).

- Patient Satisfaction–Patient complaints involve inadequate preparation to discuss results of laboratory tests and familiarity with previous results and pertinent past medical history. There was one incident reported regarding inadequate protection of patient confidentiality during examination and physician-patient discussion.[9]

- Compliance–The following concerns were discussed with Dr. Price on January 6, 2000 by Jeffrey Crandall, M.D., Medical Director, Julie Brown, Coding Coordinator, Erika Linden, Director of Compliance and Coding, Meredith Anderson, Coding Specialist and Jay Willsher, Director of Operations:
  - timeliness of dictations,
  - unsigned progress notes,
  - charges for obstetrical prepartum visits when Dr. Price was not in direct patient attendance. The services were provided only by the nurse. A follow-up chart audit complete on February 15, 2000 indicated minimal improvement in each of these areas. This is unsatisfactory since Dr. Price was informed at the

[8] The record contains a memo written on January 28, 2000 by Dr. Reeves' nurse, Kathie Aschbrenner ("Aschbrenner"). Aschbrenner expresses concerns about plaintiff's sterile technique, dictation practices, and the way plaintiff charged a patient for spilled medicine. *Id.* at 165-166. Plaintiff contends that this memo was not presented to the PMC. *See* Plaintiff's Response To Defendants' Statement of Undisputed Facts, ¶ 33. Dr. Crandall does not recall having a conversation with Aschbrenner regarding plaintiff, and none of defendant's employees spoke with plaintiff to confirm or deny Aschbrenner's assertions. Plaintiff's App. at 29, 73.

[9] The record contains three patient complaints about plaintiff. *See* Plaintiff's App. at 167-169. It is not clear from the record whether the complaints themselves were presented to the PMC. Viewing the record in light most favorable to plaintiff, the Court will assume they were not.

January 6 meeting that each of these areas must be corrected immediately in accordance with Integra Health guidelines.

In addition, charts have been removed from the office in violation of Integra Risk Management policies.

- Productivity–Dr. Price has been advised of Integra's concern regarding her productivity. The Medical Director arranged for and accompanied her on a visit to the Integra OB-OB/GYN office in Des Moines with her nurse and Clinic Coordinator. The purpose was to visit and witness an efficient, busy practice. An enthusiastic response for practice growth has not been seen. She has requested a full workday off each week to compensate for being on call every fourth weekend and her office tardiness and inefficiency further reduce her availability.

Defendant's App. at 171, 174-75 (2-15-00 Crandall Letter).

Dr. Crandall also presented the PMC with a letter Dr. Reeves wrote to the Cedar Falls Clinic Coordinator on January 27, 2000. Plaintiff's App. 33-34; Defendant's App. at 26, 164, 171; Statement of Undisputed Material Facts In Support Of Defendant's Motion For Summary Judgment, ¶ 34. In his letter, Dr. Reeves stated that he was aware of Nurse Aschbrenner's concerns about plaintiff. Defendant's App. at 164. He stated that he has known and worked with Aschbrenner for 28 years, that she is "knowledgeable, experienced, fair, and totally honest," and that he had "never worked with anyone, nurse or physician, who [he] respected more than [her]." *Id.* (emphasis in original). In addition to vouching for Aschbrenner's credibility, Reeves raised concerns about plaintiff's surgical abilities. He stated:

> On 5-6 occasions I have worked with [plaintiff] in surgery . . . . She is not able to do operative laparoscopies. Operative endoscopy is the future of gynecologic surgery. I believe that she would be unable to laparoscopically remove an ovarian cyst, an ovary, or a tube. I consider that to be a major deficiency, and if she does not learn to perform operative laparoscopy and hysteroscopy she has limited herself to a career in obstetrics

. . . . I hope that [defendant] will soon recruit a capable gynecologist for the practice.

Defendant's App. at 164. (emphasis in original).

In addition to Dr. Crandall's memo and Reeves' letter, the PMC was presented with evidence that plaintiff failed to communicate with referring physicians and failed to properly code and bill medical procedures.[10] *See* Defendant's App. at 48-50, 53, 56-57, 70-71, 111. Dr. Crandall also told the PMC that plaintiff had a poor work ethic, based on her low productivity and the fact she refused to return to the office to see patients after delivering a baby at the hospital. Plaintiff's App. at 50-51.

Six PMC members were present at the February 17, 2000 PMC meeting: Drs. Adams, Woo, Wirtz, Hallberg, Marrs, and Huwe.[11] Statement of Undisputed Material Facts In Support Of Defendants' Motion For Summary Judgment, ¶ 32. After discussing plaintiff's alleged deficiencies, the PMC members discussed the possibility of terminating plaintiff with cause. Plaintiff's Appendix at 73.

After the February 17, 2000 meeting, Drs. Huwe and Woo contacted Dr. Reeves to discuss their concerns about plaintiff. *Id.* at 48a-48c, 96. Dr. Woo does not recall the specifics of her conversation with Reeves, but she remembers he conveyed a negative perception of plaintiff. *Id.* at 96. After speaking with Dr. Reeves, Dr. Huwe questioned plaintiff's ability to perform operative laparoscopic procedures. *Id.* at 48a-48c.

On February 29, 2000, PMC members again discussed concerns about plaintiff's work ethic

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[10] Dr. Huwe told the board that plaintiff failed to communicate with her regarding a patient that Dr. Huwe had referred to plaintiff. Plaintiff's App. at 43-44. Dr. Huwe stated that although she expected communication from plaintiff, plaintiff's failure to communicate was not a breach of the standard of care. *Id.*

[11] Dr. Adams is African American. *See* Plaintiff's Brief In Resistance, at 28. Drs. Woo and Huwe are women. Plaintiff's App. at 39, 91.

and compliance, as well as defendant's expectations of services needed to grow the obstetric business. *Id.* at 177. Dr. Huwe then made a motion to terminate plaintiff without cause,[12] as permitted by her employment contract.[13] Plaintiff's App. at 177. The PMC unanimously voted to terminate plaintiff. *Id.* at 69, 73, 177. Dr. Crandall gave plaintiff notice of the decision on March 3, 2000, and she was terminated on May 31, 2000. *Id.* at 29-30, 161.

C. Plaintiff Denies the Alleged Deficiencies

Although plaintiff concedes that the PMC was presented with evidence that negatively reflected her performance, she denies the substance of the allegations made against her. Plaintiff claims that defendant's administrators were hypercritical of her work and subjected her to greater scrutiny than male physicians. Plaintiff's App. at 279; Plaintiff's Response to Defendant's Statement of Undisputed Facts, ¶ 38, 39. She denies that her obstetrics practice was not growing, that she neglected to see her patients, that she employed aseptic techniques, that she has a poor work ethic, and that she lacked technical skills in advanced laparoscopic procedures. *Id.* at 283-84. She claims that Dr. Reeves was present only once when she performed laparoscopic surgery, and that she successfully removed a

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[12] Dr. Huwe concluded that plaintiff would not be a danger to patients if she were to continue her practice at another facility. Plaintiff's App. at 68. Huwe stated that she reached that conclusion based on her conversations with Dr. Reeves, "extra information from Dr. Crandall," and speaking with other obstetricians. *Id.*

[13] Plaintiff's employment contract included a clause regarding termination, providing in part:

> Either party hereto may voluntarily terminate this Agreement at any time, without a showing of cause, upon the giving of ninety (90) days written notice to the other; provided, however, Foundation shall not terminate Physician's employment under this subsection without a two-thirds (2/3) vote of the Practice Management Committee of the region in which Physician practices. Defendant's App. at 156.

patient's ovarian cyst on that occasion. Plaintiff's App. at 283..[14] Plaintiff's App. at 253-54, 279, 283-84.

Nurse Buhrow affirms plaintiff's denials. She stated that Nurse Aschbrenner's criticisms, which were referenced in Dr. Crandall's memo to the PMC, were either untrue or hypercritical. Plaintiff's App. at 278. Nurse Buhrow has not seen plaintiff engage in aseptic techniques, and she believes plaintiff is an excellent physician with an excellent work ethic. *Id.* at 278-79.

Plaintiff asserts that any problems she may have had with her record keeping habits were due, in part, to defendant's failure to provide her with adequate equipment and competent staff. *Id.* at 65-66, 74-75, 78-79, 80-81, 247-52. Plaintiff claims that she was not provided with a functioning dictation machine until October 1999, and that the transcriptionists were untimely and lost some of her dictations. Plaintiff's App. 66, 80-81. Due to under-staffing, plaintiff spent some of her time at the clinic performing nursing duties, which took away from the time she could devote to charting and dictation. Plaintiff's App. at 74-75. Plaintiff *Id.* at 247-52. A gastric bypass surgery plaintiff underwent and the ensuing complications she experienced in the fall of 1999 also contributed to her dictation delinquencies. Plaintiff's App. at 250. Defendant knew of plaintiff's health problems prior to her termination. *Id.* at 27-28.

Defendant's staff often gave plaintiff inconsistent billing and coding instructions. Defendant's App. at 22; Plaintiff's App. at 279. As a result, plaintiff was subjected to several billing and coding audits, which plaintiff believes were hostile. Plaintiff's App. at 68. Plaintiff complained to Anderson, a

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[14] Plaintiff notes that her efficiency rating improved after she and Dr. Crandall visited the ob/gyn clinic in Des Moines, Iowa in December 1999.

clinic coordinator, that was being treated differently than other doctors with respect to billing and coding. Plaintiff's App. at 71. However, plaintiff admits some of the confusion regarding billing and coding was due to the fact she was the first ob/gyn working for defendant in the Waterloo region. Defendant's App. at 22.

Plaintiff concedes that three written patient complaints were filed naming her as the "provider/staff member," and that Dr. Crandall presented information about these patient complaints to the PMC. Plaintiff's Response To Defendant's Statement Of Undisputed Facts, ¶ 35. However, plaintiff contends that the complaints were either not actually about her or were baseless. *Id.* The three complaints were made by Laurel Murray, Leanne Freyberger, and Nancy Bird, on February 8, 9, and 10, 2000. Laurel Murray complained that plaintiff ordered unnecessary tests for her daughter and did not maintain confidentiality or privacy. Defendant's App. at 167. Plaintiff disputes these allegations. Plaintiff's App. at 76-77. Leanne Freyberger complained that defendant charged her for tests that had been lost, and Nancy Bird complained that plaintiff's nurse did not call Bird with the results of her biopsy. Defendant's App. at 168-69. Freyberger and Bird were not angry with plaintiff and did not blame her for the problems they encountered at the clinic. Plaintiff's App. at 6 (Bird Dep.); 281 (Freyberger Aff. ¶ 3). Plaintiff was not aware of the Freyberger and Bird complaints until after the present lawsuit was filed. Plaintiff's App. at 75.

D. Other Male IPC Employees

Plaintiff alleges that some of defendant's male employees who received patient complaints and/or negative performance evaluations were treated better than her. John Olson, M.D. ("Olson") is a white male ob/gyn employed by defendant in its Des Moines region. Plaintiff's App. 99-112.

Numerous patient complaints have been made concerning Olson's diagnosis and treatment abilities, as well as his attitude. *Id.* Defendant's staff also complained about Olson's unprofessional language and behavior. *Id.* 108, 118. No disciplinary action has been taken against Olson, and he continues to be employed by defendant. Plaintiff's Resistance To Defendant's Motion For Summary Judgment, at 10.

Dr. William Buhrow ("Dr. Buhrow") was a surgeon employed by defendant from January 1995 to July 1998. Dr. Buhrow worked at the Rohlf Memorial Clinic in Waverly, Iowa, which is in the Waterloo region. Plaintiff's App. at 128, 133, 137, 158. Although Dr. Buhrow received numerous negative comments on patient input forms in May and June of 1998, his personnel file contains no patient complaints or performance evaluations.[15] Plaintiff's App. at 127-232. Nothing in the record suggests that defendant counseled Dr. Buhrow about the negative patient comments or that those comments affected Dr. Buhrow's decision to resign from IHP. *See Id.*

Donald Miller ("Miller") was a physician assistant for defendant from 1995 until 1999. Plaintiff's App. at 255. In 1998, Dr. Crandall discovered that Miller often failed to complete his chart dictations in a timely manner, and that some of his dictations were incomplete. *Id.* at 256-57. Although Miller's performance evaluation in October 1998 contained numerous positive remarks, it also noted that Miller was disorganized and easily distracted. *Id.* 265-70. Miller voluntarily resigned in June

[15] In her Statement of Additional Material Facts, plaintiff states that "Dr. Buhrow's personnel file is completely devoid of performance evaluations and makes no mention whatsoever about the negative patient comments." *Id.* at ¶ 5. Defendant denies this fact, claiming that the portion of the record plaintiff cited do not support plaintiff's statement. *See* Defendant's Response To Plaintiff's Statement Of Additional Material Disputed Facts. Having reviewed the relevant portions of the record, the Court finds that Dr. Buhrow's personnel file does not contain performance evaluations or patient complaints. The Court assumes that plaintiff requested the entire personnel file during the discovery process, and that the record contains the entire file plaintiff received.

1999. *Id.* at 255.

E. Dr. Linda Cooley

Plaintiff claims that defendant's treatment of Dr. Linda Cooley ("Cooley") demonstrates defendant's animosity toward women. Cooley worked as an internist for defendant from 1996 until 2000, when she was terminated.[16] Plaintiff's App. at 16, 271-74. At some point during her employment with defendant, Cooley was elected internal medicine department chair. *Id.* at 16. Upon learning of Cooley's election, Dr. Crandall made the statement, "Oh, we can't have this." Plaintiff's App. at 15. Cooley claims that Drs. Adams and Dr. Crandall tried to remove her from that position, and that when they failed, Dr. Crandall reduced the department chair position to a secretarial position. *Id.* at 14-15.

Cooley was involved in a car accident while she was employed by defendant and, as a result, was unable to work for several weeks. *Id.* For three weeks of Cooley's leave, defendant did not provide a physician to treat her patients. *Id.* at 14. Cooley claims that this caused her to fall behind with her record keeping, which led to a temporary loss of her admitting privileges at the hospital. *Id.* Cooley claims that during the same period of time, two male physicians employed by defendant at another office requested and were provided with replacements.[17] *Id.* at 272-73. When Cooley complained to Dr. Crandall about not receiving a replacement, he recommended that she attend stress

[16] The Court notes that it is not entirely clear from the record where Cooley worked when she was employed by defendant. However, because Cooley made a complaint to the regional director of the Waterloo facility, and because she worked with Dr. Crandall, the court assumes she worked in the Waterloo/Cedar Falls region. *See* Plaintiff's App. at 272.

[17] Cooley does not identify who the two male physicians are, or where the they worked. Plaintiff's App. 271-74.

management counseling. *Id.* at 273. Dr. Crandall also told another doctor that Cooley might not be returning to work after her vehicle accident "due to emotional and/or psychological problems." *Id.* at 275.

F. Workplace Comments

Plaintiff alleges that embarrassing, inappropriate remarks were made to her while working for defendant. Dr. Reeves once commented that she "was going to take all the men away because she was losing weight . . . ." Defendant's App. at 26. Dr. Reeves also made the following comments to plaintiff: "[Y]ou're not going to get married and leave us and have kids?" and "You're going to stay, right, aren't you?" *Id.* at 26-27, 133. No other comments were made to plaintiff while she was working for defendant that could be considered gender-based. *Id.* at 26. Plaintiff concedes that no one made any inappropriate racial comments to her while she was working for defendant. Defendant's App. at 25, 27, 40.

G. Plaintiff's Claims

On August 15, 2001, plaintiff filed suit in the Iowa District Court for Polk County. The action was removed to this Court on September 17, 2001. On May 31, 2002, plaintiff amended her complaint to include the following causes of action: disparate treatment, hostile work environment and retaliation in violation of 42 U.S.C. § 2000e *et seq.* (Counts I and II); discrimination and retaliation in violation of Iowa Code Chapter 216 (Count IV and V); violation of 42 U.S.C. § 1981 (Count III); wrongful discharge in violation of public policy (Count VI); breach of contract (Count VII); tortious infliction of severe emotional distress (Count VIII); breach of the implied covenant of good faith and fair dealing (Count IX); and intentional misrepresentation (Count X). *See* Amended Complaint. Plaintiff

voluntarily dismissed Counts VII (breach of contract) and VIII (tortious infliction of severe emotional distress) on April 30, 2003. *See* Plaintiff's Voluntary Partial Dismissal. Plaintiff does not resist defendant's motion for summary judgment on her claims of retaliation, hostile work environment, wrongful discharge, and intentional misrepresentation. *See* Brief In Support Of Resistance To motion For Summary Judgment And Request For Oral Argument, at 29-30. For the reasons that follow, the Court enters summary judgment in favor of defendant on plaintiff's remaining claims.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

At the summary judgment stage, the court should not weigh the evidence, make credibility

determinations, or attempt to determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court's function is to determine whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Id.* at 248. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th cir. 1996). "Because discrimination cases often turn on inferences rather than on direct evidence," the court is to be particularly deferential to the nonmovant. *EEOC v. Woodbridge Corp.*, 263 F.3d 812, 814 (8th Cir 2001) (citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994)). "Notwithstanding these considerations, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case." *Id.*

B. Title VII Race Discrimination

i. Summary Judgement Framework & Prima Facie Case

Plaintiff alleges that defendant discriminated against her because of her race and gender in violation of 42 U.S.C. §§ 2000e *et seq*. Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1965, Title VII, § 701, 42 U.S.C. § 2000e(m) (as amended by Civil Rights Act of 1991, Pub.L. No. 102-166, § 107(a), 105 Stat. 1071 (1991)). Traditionally, plaintiff's claim would be analyzed under the burden-shifting framework of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or the burden-shifting framework of *McDonnell Douglas v. Green*, 411, U.S. 792, 802 (1973). In the Eighth Circuit, the *McDonnell Douglas* framework applied where plaintiff's claim

was primarily supported by circumstantial evidence; the *Price Waterhouse* framework applied where plaintiff presented direct evidence of discrimination. *See Mohr v. Dustrol, Inc.*, 306 F.3d 636, 639-40 (8th Cir. 2002). This dichotomy was recently called into question by the Supreme Court's decision in *Desert Palace v. Costa*, 2003 WL 21310219 (2003), which interpreted the 1991 amendments to Title VII. *See also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 *affirmed by Desert Palace v. Costa*, 2003 WL 21310219 (2003). ("[N]othing compels the parties to invoke the *McDonnell Douglas* presumption. Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence–direct or circumstantial–of discriminatory intent."). In *Dare v. Walmart*, 2003 WL 21382493, at *3-*4 (D. Minn. 2003), the federal district court held that in light of the 1991 amendments to Title VII and the Supreme Court's decision in *Desert Palace*, courts are no longer obliged to apply the *McDonnell Douglas* framework when considering a motion for summary judgment on a "single motive" Title VII claim. This Court agrees with the well-reasoned opinion in *Dare* and finds that a plaintiff may bring his Title VII claim "according to the burdens articulated in [the] Civil Rights Act of 1991," without being confined to the strictures of the *McDonnell Douglas* burden-shifting framework. *Dare*, 2003 WL 21382493 at *4. *See also Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J. *dissenting*) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from the ultimate question of discrimination *vel non*. *McDonnell Douglas* has served its purpose and should be abandoned.") (internal quotation omitted). Thus, to survive summary judgment, plaintiff must simply demonstrate that a genuine issue of material fact exists as to whether race or gender was a motivating factor in an adverse employment action defendant suffered. *See Dare v. Wal-Mart Stores, Inc.*, 2003 WL 21382493, *4 (D. Minn. 2003) (permitting a

plaintiff to proceed under the allocations of burdens articulated in Civil Rights Act of 1991 with a "single-motive" claim); *Costa*, 299 F.3d at 848 ("[I]f the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of "but for" causation.").

ii. PMC's Termination Decision

The question before the court is whether plaintiff submitted sufficient evidence from which a reasonable jury could conclude that her termination was motivated, at least in part, by discriminatory animus. As the Eighth Circuit has noted, "the relevant inquiry in an employee misconduct pretext case is whether the employer believed [the] the employee [was] guilty of conduct justifying [the adverse action]." *Cronquist*, 237 F.3d at 928. (citing *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 n.2 (8th Cir. 1994). The Eleventh Circuit addressed the narrowness of this inquiry in *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991). The *Elrod* Court stated:

> We must make an important distinction before proceeding any further. Much of [plaintiff's] proof at trial centered around whether [plaintiff] was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for purposes of this opinion that the complaining employees interviewed by [one of the decision makers] were lying through their teeth. The inquiry of the ADEA is limited to whether [the decision makers] *believed* that [plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [plaintiff's] discharge. Federal Courts do not sit as a super-personnel department that reexamines an entity's business decision. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior. For an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith *believed* plaintiff's performance to be unsatisfactory.

Id. at 1470. (emphasis in original) (internal citations omitted).

In the case at bar, it is undisputed that the PMC had the power to terminate plaintiff. Before deciding whether to exercise that power, the PMC held two meetings in which evidence of plaintiff's job performance was presented. The evidence showed that plaintiff: (1) used aseptic techniques; (2) lacked skills in performing operative laparoscopies; (3) charged a patient for medicine that plaintiff spilled; (4) failed to timely complete charting and dictation; (5) failed to communicate with other physicians; (6) failed to code and bill properly; (7) displayed a poor work ethic; (8) was unproductive, and (9) received patient complaints. Much of this information was presented in a memorandum prepared by Dr. Crandall. However, the PMC also received a letter written by Dr. Reeves, the other ob/gyn at the Cedar Falls clinic. In his letter, Dr. Reeves raised concerns about plaintiff's surgical abilities. He also bolstered the veracity and perceptions of Aschbrenner, the nurse who alleged, among other things, that plaintiff used aseptic techniques when treating patients. After all this evidence was presented, two members of the PMC contacted Dr. Reeves. Only after considering all this evidence did the PMC unanimously vote to terminate plaintiff without cause.[18] Although plaintiff disputes the substance of her alleged deficiencies, she does not dispute that these deficiencies were brought to the attention of the PMC.

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[18] The Court notes that two members of the six member PMC were women, and one was an African American male. Of course, this fact alone does not mean that race or sex could not have been a motivating in the decision to terminate plaintiff. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("[N]othing in Title VII necessarily bars a claim of discrimination . . . merely because the plaintiff and the defendant . . . are of the same sex."); *Ross v. Douglas County*, 234 F.3d 391, 396 (8th Cir. 2000) ("[W]e have no doubt that, as a matter of law, a black male could discriminate against another black male ' because of such individual's race.'").

Plaintiff notes that the PMC did not contact the patients to investigate whether their complaints against plaintiff were legitimate, and it did not contact plaintiff to give her the opportunity to refute the concerns raised by Aschbrenner and Dr. Reeves. However, plaintiff presented no evidence that the PMC had a policy of independently investigating patient complaints about an employee, or that it maintained a policy of allowing physicians to respond to allegations against them. Furthermore, plaintiff presented no evidence that the PMC normally conducts such investigations or allowed such opportunities for other similarly situated physicians who faced termination. While it may have been a preferable employment practice to allow plaintiff an opportunity to respond to the allegations against her before making a decision to terminate, "the employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." *Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1109, (8th Cir. 1998) (quoting *Huston v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)). *See Elrod*, 939 F.2d 1466, 1470.

It is undisputed the PMC considered a number of concerns regarding plaintiff's performance prior to making its decision to terminate her. There is no direct evidence in the record showing that the PMC acted with a discriminatory intent, and there is no indirect evidence that the PMC treated similarly situated employees who were not members of plaintiff's protected class differently than it treated plaintiff. Therefore, the Court finds that plaintiff has failed to generate a material issue of fact that the PMC's decision to terminate her was motivated in any way by discriminatory animus. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) ("In the absence of any evidence of

discriminatory intent . . . it is not the prerogative of the courts or jury to sit in judgment of employers' management decisions.");

iii. Other Evidence of Discriminatory Animus at IPC

Plaintiff alleges that the PMC's decision was poisoned by the discriminatory animus harbored by Dr. Crandall. If a reasonable jury could find that the PMC's decision was tainted by discriminatory prejudice Dr. Crandall harbored, then plaintiff's Title VII claim survives summary judgment. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (where a committee acts "as the conduit of [plaintiff's supervisor's] prejudice–his cat's paw–the innocence of its members would not spare the company from liability"). The Court finds that there is insufficient evidence in the record from which a reasonable jury could infer that Dr. Crandall or any of defendant's other decision-makers acted with discriminatory animus.

Plaintiff concedes that none of defendant's employees made inappropriate or offensive racial comments to her. Defendant's App. at 25, 27, 40. Dr. Reeves made comments to plaintiff about her weight, marital status, and future employment plans. Even assuming Reeves' comments could somehow be attributed to defendant, the Court finds that those comments cannot reasonably be viewed as gender-based.[19]

In the absence of direct evidence, plaintiff has relied upon circumstantial evidence to prove her disparate treatment claim. She alleges that she has been treated worse than similarly situated non-members of her protected class with respect to the equipment, staff, and vacation she received, and

[19] Plaintiff seems to concede that the record lacks direct evidence of discrimination. *See* Plaintiff's brief at 5.

with respect to the way she was disciplined. The test for whether employees are similarly situated to warrant a comparison is "rigorous." *Saulsberry v. St. Mary's University of Minnesota*, 318 F.3d 862, 867 (8th Cir. 2003). The burden is on plaintiff to demonstrate that the other employees are similarly situated in all relevant respects. *Id.*

When plaintiff asked Dr. Crandall for additional time off, she told him that two other doctors who worked in the Cedar Falls/Waterloo region, Basu and Christensen, received full days off despite the fact they were seeing fewer patients than her. She also informed Dr. Crandall that a new ob/gyn in Des Moines received a full day off each week. The Court finds nothing in the record, other than plaintiff's assertions to Dr. Crandall, that these three doctors in fact received full days off during the Monday-Friday workweek. Moreover, plaintiff also has failed to present evidence of the other physicians'experience, client base or compensation. The record does not even reveal Dr. Christensen's specialty. The Court finds that plaintiff has failed to meet her burden of demonstrating that these other employees are similarly situated in all relevant respects. *See Palesch v. Missouri Comm'n on Human Rights*, 233 F.3d 560, 568 (8th Cir. 2000) (finding plaintiff failed to produce "specific, tangible evidence to demonstrate a disparity in treatment between similarly situated employees").

Plaintiff also argues that Olson, Buhrow and Miller, male employees who received patient complaints and/or negative evaluations, were treated more favorably than her. While Dr. Olson's colleagues complained about his unprofessional language and attitude, the record contains no evidence that his colleagues accused him of utilizing aseptic techniques or lacking surgical skills, or that his colleagues have made other similarly serious allegations about his skills. *See Bogren v. Minnesota,*

236 F.3d 399, 406 (8th Cir. 2000) ("To be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of 'comparable seriousness.'"). Dr. Olson and plaintiff also differ in that they were hired and employed by different PMCs; Dr. Olson was employed by the Des Moines region PMC and works in the Des Moines area, whereas plaintiff was hired and terminated by the Waterloo region PMC. *See Forest v. Kraft Foods, Inc.*, 285 F.3d 688, 692 (8th Cir. 2002) ("When different decision-makers are involved, two decisions are rarely 'similarly situated in all relevant respects.'"). The Court finds that plaintiff has failed to show that she and Dr. Olson were similarly situated.

Dr. Buhrow was the subject of several patient complaints. His personnel file does not reference these complaints, nor does it contain any performance evaluations. Plaintiff has offered no other evidence, such as affidavits or deposition testimony, that Dr. Buhrow's colleagues made complaints about him that were as serious as those her colleagues made against her. *See Bogren*, 236 F.3d at 406 (8th Cir. 2000). Dr. Buhrow's area of practice was different than plaintiff's, he practiced in a different clinic than plaintiff, and there is no evidence in the record that he and plaintiff were similarly situated in terms of the size of their practice.[20] Plaintiff "has not shown that the supervisor or supervisors responsible for her termination were also involved in the disciplinary action, or lack thereof, of" Dr. Buhrow in 1998. *Id.* The Court therefore finds that plaintiff has failed to show that she and Dr. Buhrow were similarly situated in all relevant respects.

[20] Practice size is relevant, because assuming the quantity and seriousness of patient complaints made against two doctors are approximately equal, an employer would be less likely to terminate a physician who has a larger number of patients than one who has fewer patients.

Plaintiff also claims that she was treated worse than Donald Miller, a physician assistant who received some negative comments on a patient survey and had problems with chart dictation. The Court notes that the relevancy of any comparison between Miller and plaintiff is questionable, as he is not a doctor. Even if the Court were to overlook that distinction, plaintiff has failed to establish that Miller's alleged deficiencies were as severe as her alleged deficiencies. *See Bogren*, 236 F.3d 399, 406. The Court therefore finds that plaintiff has failed to show that she and Miller were similarly situated.

In addition, plaintiff argues that defendant's alleged discriminatory motive is evinced by the way it treated Dr. Linda Cooley. There is evidence in the record that Dr. Crandall did not want Cooley acting as department chair, and that he downgraded the position once she obtained it. However, there are no facts in the record from which a reasonable jury could conclude that Dr. Crandall's issues with Cooley had anything to do with her gender. Cooley's assertion that defendant provided replacements for two unnamed male physicians who had taken leave at another office at the same time she requested but was denied a replacement, is insufficient evidence of gender-based animus. Cooley's assertion that Dr. Crandall recommended she attend a stress management counseling is similarly insufficient, as is Dr. Crandall's statement to another doctor that Cooley would not be returning to work following her vehicle accident "due to emotional and/or psychological problems." The Court finds that plaintiff failed to show that Cooley was treated worse than a similarly situated male employee, or that discrimination was a motivating factor in any adverse employment action Cooley suffered.

Plaintiff's next argument involves the staffing and equipment she received. Plaintiff concedes that she received all the basic equipment she needed by the fall of 1999. Based on the evidence in the

record, the Court finds that no reasonable jury could find that defendant's decision not to provide plaintiff with extra equipment or staff was motivated by discriminatory animus. The record suggests that some other doctors may have had more staff than plaintiff, but it does not suggest that plaintiff's client base was comparable to that of the other doctors. Thus, the Court finds that plaintiff has failed to show that an unprotected, similarly situated physician was treated better than her with regard to staffing.

Plaintiff alleges that defendant's billing and coding staff were "hypercritical of [plaintiff and subjected] her to greater scrutiny than the male physicians." Plaintiff's Response to Defendant's Statement of Undisputed Facts, ¶ 29. The only evidence plaintiff cites in the record in support of this assertion is Nurse Buhrow's general statement, "Shelly Boldt and Meredith Anderson subjected [plaintiff] to more scrutiny than Dr. Gorsline, Dr. Crandall, Dr. Elsayyad or any other doctor at the clinic[;] I felt they were hypercritical of [plaintiff]." Plaintiff concedes that some of the confusion regarding her billing and coding was due to the fact she was the first ob/gyn working for defendant in the Cedar Fall/Waterloo region. She failed to present any evidence that the other doctors in the clinic were struggling with their billing and coding. The Court finds that plaintiff has failed to create a genuine issue of material fact as to whether she was treated less favorably that similarly situated physicians who were not members of plaintiff's protected class.

In sum, the Court finds that plaintiff has failed to create a genuine issue of material fact that the PMC's decision to terminate her was in any way motivated by discriminatory animus or that she received less favorable treatment than other similarly situated physicians who were non-members of plaintiff's protected class. Therefore, the Court judgement is entered in favor of defendant on plaintiff's Title VII discrimination claim.

B. Discrimination under Iowa Code Chapter 216

Plaintiff also alleges violations of the Iowa Human Rights Act, Iowa Code § 216. "The analysis for both the federal and state claims is the same under Iowa law." *Moschetti v. Chicago, Cent. & Pac. R.R.*, 119 F.3d 707, 709 n.2 (8th Cir. 1997). *See also Valline v. Murken*, 2003 WL 21361344,* 2 (Iowa Ct. Ap. 2003). For the same reasons set forth in the previous section of the Court's Order, summary judgment is granted in favor of defendants on plaintiff's Iowa law discrimination claim.

C. 42 U.S.C. § 1981

To establish a violation of 42 U.S.C. § 1981, plaintiff must allege facts in support of the following: "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute . . . ." *Thomas v. St. Lukes Health Sys., Inc.*, 869 F.Supp. 1413, 1432 (N.D. Iowa 1994). As noted in *Thomas*, "Section 1981 requires proof of intentional discrimination, as does a disparate treatment claim under Title VII. Therefore, the elements of § 1981 claims and Title VII disparate treatment claims are the same." *Id.* at 1432-33 (internal citations omitted). Traditionally, in the absence of direct evidence of discrimination, courts have analyzed § 1981 claims under the burden-shifting framework of McDonnell Douglas. *Id.* There is a question as to whether this framework still applies post-*Desert Palace*. *See Skomsky v. Speedway SuperAmerica, L.L.C.*, 2003 WL 21382495 (D. Minn 2003) ("Federal anti-discrimination laws such as the ADA are patterned after Title VII, and as such should be evaluated similarly[;] [t]he interests of uniformity require the Court to extend the burden-shifting paradigm articulated in 42 U.S.C. § 2000e-2(m) and § 2000e-5(2)(B) to ADA

disparate treatment claims.") The Court need not make that determination in the case at bar. For the same reasons articulated in the Title VII section of this order, the Court finds that summary judgment should be entered in favor of defendants on plaintiff's § 1981 claim.[21]

D. Breach Of Implied Covenant Of Good Faith And Fair Dealing

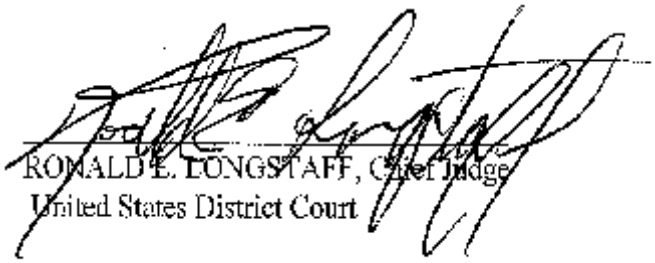
The Iowa Supreme Court has rejected the tort of breach of implied covenant of good faith and fair dealing in the employment context. *Phipps v. IASD Health Servs. Corp.*,558 N.W.2d 198, 204 (Iowa 1997). *See also* Plaintiff's Brief In Support of Resistance To Motion For Summary Judgment, at 30 (recognizing that "under the current state of Iowa law the Court may dismiss this count"). The Court therefore enters summary judgment in favor of defendant on this count.

III. CONCLUSION

The clerk of court is directed to enter judgment in favor of defendant on all counts.

IT IS SO ORDERED.

This 31st day of July, 2003.



[21] The Court would reach the same conclusion applying the *McDonnell Douglas* framework, because plaintiff has not created a genuine issue of material fact that defendant's proffered reasons were pretextual.