IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WANDA McCANN-SMITH,

OPINION and ORDER

Plaintiff,

11-cv-485-bbc

v.

MERITER HOSPITAL,

Defendant.

- -

Pro se plaintiff Wanda McCann-Smith is proceeding on claims that defendant Meriter Hospital violated her rights under Title VII of the Civil Rights Act and 42 U.S.C. § 1981 by suspending and terminating her because she is an African American and because she complained about race discrimination. Defendant has filed a motion for summary judgment, dkt. #18, which is ready for decision. Because plaintiff has failed to adduce any evidence that defendant discriminated or retaliated against her, I am granting defendant's motion.

From the proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff was a mental health specialist for defendant from October 2008 until she was

terminated in March 2010. Beginning in January 2009, plaintiff began complaining that she was being mistreated because of her race. (Neither side identifies what form this alleged mistreatment took, but emails plaintiff attached to her brief suggest that plaintiff believed that other employees were complaining about her because of her race.) Plaintiff's complaints of racial discrimination at work continued until at least November 2009, when plaintiff had a meeting with Patrick Loney (plaintiff's supervisor) and Shana Wuebben (defendant's labor and employee relations manager). Plaintiff never heard any racially derogatory remarks at the hospital.

On February 8, 2010, Bill Cheadle (a clinical nurse specialist for defendant) made "routine discharge phone calls" to former patients. One former patient complained that plaintiff had disclosed confidential information to plaintiff's ex-husband and another individual named Shirley Easter. The patient stated, "I am mad that she gave out this information" and "I thought that I could trust [plaintiff] and every staff person here." Cheadle reported the phone call to Loney.

On February 9, Loney called the patient, who told Loney that she was "extremely hurt and upset that [plaintiff] had told our mutual friend Shirley Easter that I was a patient on your psych unit." According to the patient, Easter said to the patient, "Why didn't you tell me you were struggling? You didn't have to struggle alone. You ended up going to the psych unit. You should've just talked to me."

After getting permission from the patient, Loney called Easter, who said that she was friends with plaintiff and the patient, that plaintiff had told her that the patient was on

plaintiff's unit and that plaintiff told her "some information about" the patient's "mental health issues." (In her response to defendant's proposed findings of fact, plaintiff says that Loney "never talked to" Easter, dkt. #37, at ¶ 31, but she cites no evidence to support this statement, so I cannot consider it. Although plaintiff refers to a "sign[ed] affidavit" of Easter's, the document she cites is an unsworn email sent from the account of Shikita Henderson, which states, "I Shirley Easter does not have any involvement with [name of individual] with the savage act of Wanda Smith job." Dkt. #38. Even if I treated the email as a sworn statement from Easter, it does not contradict Loney's testimony.)

On February 16, 2010, Loney spoke with plaintiff about the allegations. Initially, plaintiff denied knowing Easter, but then stated that she might have known Easter "from her past." In addition, she stated that the patient could not be trusted "because she is a psychotic patient." At the end of the meeting, Loney suspended plaintiff pending further investigation.

Because plaintiff denied the allegations, Loney called Easter again. She repeated that she was friends with plaintiff and stated that plaintiff told her that the patient had been admitted recently to the adult psychiatric unit where plaintiff worked.

Under defendant's policies, employees are required to keep patient information confidential. Plaintiff signed a confidentiality agreement when she began working for defendant and received training on the confidentiality policies. Employees who violate the policies are subject to disciplinary action, including termination.

On March 5, Loney met with Wuebben (defendant's labor and employee relations

manager) and Susan Janty (defendant's director of behavioral services) to discuss plaintiff. Loney recommended that plaintiff be terminated and Janty agreed with the recommendation. (The parties do not say what Wuebben's opinion was.)

On March 9, defendant gave plaintiff notice of her termination.

OPINION

Plaintiff brings claims for race discrimination and retaliation under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act. In particular, she alleges that defendant suspended and then terminated her because she is an African American and because she complained about race discrimination. Generally, the Court of Appeals for the Seventh Circuit has treated claims brought under these statutes as including the same elements. Davis v. Time Warner Cable of Southeastern Wisconsin, L.P., 651 F.3d 664, 671-72 (7th Cir. 2011) ("Though the statutes differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical."); Stephens v. Erickson, 569 F.3d 779, 786 (7th Cir. 2009) ("We apply the same elements to retaliation claims under Title VII and § 1981.").

As I explained to plaintiff in the order screening her complaint, she may prove her claims in various ways. For example, she may adduce evidence that defendant gave more favorable treatment to similarly situated employees who are not African American or did not complain about discrimination, Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008); Scaife v. Cook County, 446 F.3d 735, 739 (7th Cir. 2006), that defendant made

discriminatory remarks or engaged in suspicious behavior, Mullin v. Gettinger, 450 F.3d 280, 285 (7th Cir. 2006); Culver v. Gorman & Co., 416 F.3d 540, 545-50 (7th Cir. 2005), or that defendant's reason for terminating her is pretextual. Simple v. Walgreen Co., 511 F.3d 668 (7th Cir. 2007). Whatever form of proof the plaintiff chooses, it is her burden on summary judgment to show that a reasonable jury could find that defendant discriminated or retaliated against her. Id. at 670-71 (7th Cir. 2007) ("[T]he straightforward question to be answered in discrimination cases is whether the plaintiff has successfully demonstrated that she was the victim of . . . discrimination on the part of the employer.") (internal quotations omitted).

Plaintiff has failed to come forward with any evidence showing that defendant fired her because of her race or because she complained about race discrimination. Throughout her summary judgment materials, plaintiff makes conclusory assertions about racism at the hospital. Plt.'s Br. dkt. #36, at 1 ("I was the victim of workplace hate, harassment and racial discrimination."); id. at 8 ("Meriter wanted Ms. Smith fired because I was black."). Plt.'s Resp. to Dft.'s PFOF ¶ 29, dkt. #37 (defendant "wanted to believe anything negative about [me] because I was not wanted being only black"). This type of allegation might be sufficient at the pleading stage, but it is not sufficient to defeat a motion for summary judgment. Hall v. Bodine Electric Co., 276 F.3d 345, 354 (7th Cir.2002) ("It is well-settled that conclusory allegations . . . do not create a triable issue of fact."). Plaintiff admits that she never heard anyone at the hospital make racially derogatory remarks and she identifies no suspicious behavior by any of the decision makers in this case.

Plaintiff states multiple times that she was "the only black employee," but she cites no evidence to support that allegation or even explains what she means by that. (For example, does plaintiff mean that she was the only black employee in her unit or in the hospital? Or that she was the only black mental health specialist?) However, even if I assume that plaintiff was the only black employee in the hospital, that might raise a question as to why, but it would not be enough to prove that defendant fired her because she is black. There may be many reasons unrelated to discrimination for racial disparities at a particular place of employment, so a disparity is not probative unless the plaintiff takes account of other factors, which plaintiff has not done. Further, decisions regarding other employees or applicants do not necessarily shed light on the decisions relating to plaintiff. Norman-Nunnery v. Madison Area Technical College, 625 F.3d 422, 431 (7th Cir. 2010); Nichols v. Southern Illinois University-Edwardsville, 510 F.3d 772, 782-83 (7th Cir. 2007); Barricks v. Eli Lilly and Co., 481 F.3d 556, 559 (7th Cir. 2007); Baylie v. Federal Reserve Bank of Chicago, 476 F.3d 522, 523-25 (7th Cir. 2007).

It is undisputed that a patient complained to defendant that plaintiff had breached her duty of confidentiality by telling a mutual friend that the patient had been admitted to the psychiatric unit at the hospital. Plaintiff does not deny that breaching patient confidentiality is a legitimate reason for firing an employee. Instead, plaintiff accuses the patient of lying, but she identifies no reason that the patient would make up a story just to get plaintiff in trouble at work, except to say that the patient "is a mental patient and drug addict." Plt.'s Br., dkt. #36, at 3. The first characterization is true, but has no bearing on

the patient's honesty. Plaintiff does not support the second characterization with any evidence, but even if she had, it would not support her claim of race discrimination. Even if the patient *were* lying, the question in this case is not whether defendant made a mistake in believing the patient's story. Rather, plaintiff must show that *defendant* is lying about its reason for firing plaintiff. Hague v. Thompson Distribution Co., 436 F.3d 816, 824 (7th Cir. 2006)(plaintiff "must establish that [the employer] lied about its reasons for firing him—not that [the employer] was wrong for firing him for the reasons it gave"). If defendant honestly believed the patient's account, defendant did not violate Title VII or § 1981 in terminating plaintiff.

In his affidavit, Loney explains that he believed the patient's account because the story came out only after the hospital contacted her, because Easter corroborated the story and knew details that she could not have made up on her own and because plaintiff initially denied even knowing Easter before admitting that she did. Dkt. #28. Plaintiff has failed to adduce any evidence calling that explanation into question.

Plaintiff criticizes defendant's decision for various reasons, saying that defendant "should have [conducted] a better and thorough investigation" and should have conducted a "mediation" among the interested parties. Even if I agreed with plaintiff that defendant's investigation was somehow flawed, that would not support her claim. A plaintiff cannot prevail on a discrimination claim simply by arguing that the employer might have reached a different conclusion if it had handled the situation differently. Again, that might show that the employer made a mistake, but it does not show that the employer had

discriminatory or retaliatory motives. Kariotis v. Navistar International Transportation Corp., 131 F.3d 672, 677 (7th Cir. 1997).

As noted above, one way of proving retaliation or discrimination is with evidence that other similarly situated employees received more favorable treatment. Filar v. Board of Education of City of Chicago, 526 F.3d 1054, 1061 (7th Cir. 2008) ("All things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination."). However, plaintiff's supervisors testified that they are not aware of any other employees who have breached patient confidentiality. Loney Aff. ¶ 63, dkt. #28; Janty Aff. ¶ 17, dkt. #29. In response, plaintiff says, "[t]his is not true, check the records because I know for a fact RNs, CNA, Doctors and other employees get complaints and do not lose their job some get counseling or written warning." Plt.'s Resp. to Dft.'s PFOF ¶ 71, dkt. #37.

There are a number of problems with plaintiff's response. First, plaintiff fails to point to any specific examples in which other employees received more favorable treatment than she did. Again, at the summary judgment stage, plaintiff must come forward with specific facts to support her claim; conclusory allegations are not sufficient. Lucas v. Chicago Transportation Authority, 367 F.3d 714, 726 (7th Cir. 2004) (refusing to consider plaintiff's conclusory assertions that African Americans were treated "more harshly" in that they were given tougher assignments and written up for reasons non-African Americans were not where plaintiff offered no specific instances of support for his assertions).

Second, it is plaintiff's burden to identify the evidence that supports her claim,

Marion v. Radtke, 641 F.3d 874, 876-77 (7th Cir. 2011); she cannot simply direct defendant or the court to "check the records." If plaintiff is referring to the documents attached to her brief, none of these show that other employees received better treatment than she did. In fact, the only documents plaintiff provides relating to another employee involve a decision to fire that employee because she gained access to patient records without authorization. Dkt. #36 at 27. Although plaintiff does not identify the race of that other employee, it provides support for the view that defendant takes the privacy of its patients very seriously.

Finally, in response to one of defendant's proposed findings of fact about a meeting in November 2009, plaintiff says that Wuebben threatened to "wr[i]te up" plaintiff for "insub[ordi]nation" if she "keep[s] talking about racism." Plt.'s Resp. to Dft.'s PFOF ¶ 16, dkt. #37. Again, plaintiff cites no evidence to support this statement, not even her own affidavit or declaration. Further, during her deposition, plaintiff was shown a memo that was prepared summarizing the November 2009 meeting and she testified that the only inaccuracy in the memo is the inclusion of the word "tricks." Plt.'s Dep., dkt. #26, at 87. (The memo quotes plaintiff as saying during the meeting that hospital staff would be investigated for all of the "tricks" they played on her. Dkt. #32-1.) However, the memo does not include any discussion regarding a threat to discipline plaintiff for talking about racism. Rather, the only instructions to plaintiff were included in the following passage:

> Shared with Wanda that this [sic] is not to contact the unit to discuss her concerns and to make allegations that all staff would be investigated and possibly sued by her. Wanda was instructed to bring her concerns forward through the appropriate channels—which would include reporting concerns

> to her manager, her director, Human Resources or through Corporate Compliance. Reiterated that it was not appropriate to call the unit staff to air her concerns.

Dkt. #32-1. Plaintiff cannot contradict a statement she made under oath with an unsworn allegation in her response to defendant's proposed findings of fact.

I have reviewed the parties' submissions and have uncovered no admissible evidence that supports plaintiff's claims. Although I understand that plaintiff believes strongly that defendant treated her unfairly, a court may not rely on a plaintiff's subjective beliefs in evaluating the sufficiency of her claim; the plaintiff must come forward with evidence. Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir. 2007).

ORDER

IT IS ORDERED that defendant Meriter Hospital's motion for summary judgment, dkt. #18, is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 16th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge