IN THE IOWA DISTRICT COURT FOR MARSHALL COUNTY

MICHELLE D. LAMMERT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. LACI007923
	)	
MCFARLAND CLINIC, P.C., et al.,	)	ORDER
	)	
Defendants.	)	

This case came before the Court on the defendants' Motion for Summary Judgment on Friday, July 25. The plaintiff appeared personally with her attorneys, Charles E. Gribble and Luke DeSmet. The defendants appeared by Jodi Faustlin, who is both a defendant and the executive director of McFarland Clinic's Marshalltown clinic, and by attorneys Randall D. Armentrout and Keith P. Duffy. The hearing was not reported. The Court disclosed its prior relationships, both as an individual and as a practicing lawyer, with McFarland Clinic and its physicians and gave the parties an opportunity to express any concern they might have. No one expressed any concern. The Court heard arguments on the motion and took the motion under advisement.

This is a suit for claimed sexual discrimination in the termination of the plaintiff's employment. Plaintiff, a female, claims she was treated differently from her male partner in a long-term sexual relationship. She contends she was terminated because she is female and that her partner was treated more favorably because he is male.

Dr. Rodney Dempewolf was and is a certified podiatrist who opened his own podiatry practice in Marshalltown in 2002. He employed the plaintiff, Ms. Lammert, as a podiatric assistant in his own practice. In 2005, McFarland hired Dr. Dempewolf as a podiatrist and Ms. Lammert as a podiatric assistant. They worked in McFarland's Marshalltown Clinic. Dr. Dempewolf had a written employment agreement with McFarland Clinic. Ms. Lammert was an at-will employee. Dr. Dempewolf became a shareholder in McFarland in 2007. He subsequently became a member of McFarland's board of directors.

In approximately April of 2008, Dr. Dempewolf and Ms. Lammert began a sexual relationship that was consensual on both sides. That relationship continued off and on until October of 2012. On Friday, October 5, 2012, Dr. Dempewolf advised Ms. Faustlin of the existence of the relationship and told her that he did not wish to continue working with Ms. Lammert. This contradicted statements Dr. Dempewolf had made to Ms. Lammert as recently as earlier that same day.

On Monday, October 8, 2012, Ms. Faustlin and Mr. Franco, the human resources coordinator at McFarland, met with Ms. Lammert at the end of the day. Ms. Lammert brought a voice recorder to the meeting and secretly recorded the proceedings. Despite the recording, the parties have significantly different views about what happened at the meeting. Ms. Lammert contends her employment was terminated in the October 8 meeting. The defendants contend she was placed on paid administrative leave while the defendants investigated the affair between Ms. Lammert and Dr. Dempewolf and assessed the impact the affair had on McFarland Clinic. It is clear Ms. Lammert did not come back to work at the McFarland Clinic after October 8, 2012. It is also established that Ms. Lammert was paid through December 31, 2012, that she was given the opportunity to apply for other employment at McFarland Clinic as a current employee, and that she could come back to work for McFarland Clinic within a year without losing certain benefits that she had earned in her employment up to that time.

Dr. Dempewolf's employment at McFarland was the topic of a joint meeting of the Board of Directors and the Ownership Committee held on Monday, October 29, 2012. The discussion identified three possible outcomes, one of which was the termination of Dr. Dempewolf's employment. The other two involved the continued employment of both Dr. Dempewolf and Ms. Lammert, either working together in podiatry or separately. Nothing in the minutes of the joint meeting suggests that any option involving keeping Dr. Dempewolf and terminating Ms. Lammert's employment was ever discussed. The unanimous conclusion was to terminate Dr. Dempewolf's employment "without cause" (a reference to part 9(a)(ii) of the Physician Employment Agreement signed June 29, 2005), unless there was a mutual agreement between McFarland and Dr. Dempewolf to end his employment.

If termination had proceeded under part 9(a)(ii), ninety days notice specifying the date of termination would have been required. Immediate termination of employment might occur under part 9(b) of the Physician Employment Agreement, but no suggestion is made in this record that any provision of 9(b) would have applied.

The clinic and Dr. Dempewolf entered into a Separation Agreement on November 15, 2012. In relevant part, that agreement provided:

(1) Termination was by agreement;

(2) The covenant not to compete in part 11 of the Employment Agreement would be waived;

(3) In response to requests for reference, McFarland would provide only Dr. Dempewolf's title and date of employment;

(4) An agreed-upon letter would be sent to all patients "treated by Dr. Dempewolf in the past 12 months";

(5) A mutual release;

(6) An agreement that the employment termination was permanent and that the podiatry department (and inferentially, Dr. Dempewolf's services) would be wound up by December 21, 2012. The Court calculates that Dr. Dempewolf was thus gone in 53 days from October 29, (or 74 days from October 8) rather than the 90 days provided by part 9(a)(ii).

There were additional provisions, including paragraph 9, that provided Dr. Dempewolf left "all documents, files and other materials." Thus, while he was permitted to write to all of his patients of the past 12 months, he would be dependent on patient requests to obtain patient files from McFarland.

While the plaintiff contends her employment was terminated on October 8, the clinic contends it was not terminated until the podiatric clinic was closed on Dr. Dempewolf's departure. Ms. Lammert was paid until December 31, 2012, although she never worked after October 8. She left on terms that would permit her to return if she successfully applied for a suitable position at McFarland; if she returned within a year, certain benefits would continue to accrue as if she had never left.

The defendants have moved for summary judgment on three bases that apply to all three defendants, and two bases that would result only in partial summary judgment

for the two individual defendants. This Court concludes that all three defendants are entitled to dismissal on the third basis they propose, that Ms. Lammert was not similarly situated to Dr. Dempewolf.

Summary Judgment Standard

The plaintiff accurately summarizes the standard for considering a motion for summary judgment in the following two paragraphs, taken from pages 2 and 3 of her resistance:

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fitzgerald v. Salsbury Chem., Inc.,* 613 N.W.2d 275, 280 (Iowa 2000). The burden rests on the moving party to show the non-existence of a material fact issue, *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995), and the court must view all of the evidence in the light most favorable to the non-moving party. *Ule v. City of Sioux City*, 490 N.W.2d 69, 74 (Iowa Ct. App. 1992). The court must afford all reasonable inferences to the non-moving party. *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 802 (Iowa 2003). The party resisting summary judgment must offer admissible evidence showing the existence of a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. *See McComas-Lacina Constr. Co. v. Able Constr.,* 641 N.W.2d 841, 843 (Iowa 2002).

An issue of fact is "material" when its determination may affect the outcome of the suit under governing law. *Baratta v. Polk County Health Servs.*, 588 N.W.2d 107, 109 (Iowa 1999). In comparison, an issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the party resisting the motion for summary judgment. *Id.* In determining whether a motion for summary judgment shall be granted, the court must determine whether "reasonable minds would differ on how the issue should be resolved." *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 813 (Iowa Ct. App. 1999)(citing *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996)).

Ms. Lammert and Dr. Dempewolf Were Not Similarly Situated

The plaintiff is also correct in her resistance to defendants' Motion for Summary Judgment (filed May 15, 2014) when she says: "The fighting issue on this Motion for Summary Judgment is whether Ms. Lammert was disciplined more severely than a

similarly situated male employee, Dr. Dempewolf, for the same conduct." (Resistance, p. 4; italics added) The resistance does not contain a heading for an argument that addresses whether, in fact, Ms. Lammert and Dr. Dempewolf were *similarly situated.* She points out that she and the doctor engaged in identical conduct, a consensual sexual relationship.

The identical nature of the conduct by Ms. Lammert and Dr. Dempewolf is a part of the analysis in determining whether two employees are similarly situated. It is not, however, the sole test or the complete test. For two employees to be similarly situated, their employment situations must also be similar. That is not the case here, as a matter of law.

The primary case upon which the plaintiff relies for her contention that identical conduct establishes the employees were similarly situated is *Lathem v. Department of Children & Youth Services*, 172 F.3d 786, 793 (11th Cir. 1999). It is true the *Lathem* opinion focused on the comparative seriousness of the conduct between the plaintiff in that case and the comparator she offered. But that comparison was made only after the 11th Circuit said this: "If two employees are not 'similarly situated,' the different application of workplace rules does not constitute illegal discrimination. (Citations omitted.) The relevant inquiry is not whether the employees hold the same job titles, but whether the employer subjected them to different employment policies. (Citation omitted.) 'When an individual proves that he was fired but one outside his class was retained although both violated the same work rule, this raises an inference that the rule was discriminatorily applied. . . .' (Citation omitted.) *As the district court noted, DCYS offered no evidence that Smith and Lathem operated under different workplace rules or policies.*" (Emphasis added.) Thus, similarity of the two positions was established.

Lathem was a female. She contended that DCYS discriminated against her based on sex because DCYS had terminated her, but had not terminated Larry Smith, a male employee who she contended was similarly situated and had committed more egregious violations of DCYS's rules.

The 11th Circuit separated the "similarly situated" question from the issue of whether the misconduct was the same or similar. It was only after deciding that Smith and Lathem were similarly situated (without any real discussion of the issue other than

to say that different job titles did not make the two employees dissimilarly situated) that the court went on to consider the comparative seriousness of their misconduct.

This understanding of "similarly situated" is consistent with *Jones v. University of Iowa,* 836 N.W.2d 127, 148 (Iowa 2013). In that case, an African-American Dean of Students and Vice President of Student Services was said to be similarly situated to the University's General Counsel, a Caucasian who was also terminated. Both individuals were terminated for the same failure to properly address a case of sexual assault, but in saying they were similarly situated, the court appeared to look at their employment positions at the university and not to their relative responsibility for the failure.

In *Houck v. Iowa Bd. of Pharmacy Examiners*, 752 N.W.2d 14, 21 (Iowa 2008), the Iowa Supreme Court considered a pharmacist's contention that a regulation of the Board of Pharmacy Examiners violated the equal protection clauses of the Federal and Iowa Constitutions because it unfairly discriminated against pharmacists with respect to compounding of nonprescription substances. The Court observed that Houck was a licensed pharmacist and therefore not similarly situated to a non-pharmacist. The context was different (equal protection instead of employment civil rights) but the use of the phrase "similarly situated" was similar.

In a decision by the Court of Appeals, the court, speaking through then-Judge Hecht, rejected a defendant's claim that the plaintiff must show "similarly situated persons 'engaged in the same or similar opprobrious conduct'…." *Tabbara v. Iowa State University*, 2005 WL 839406, *6, fn 10 (Iowa Appeals 2005)." That is, the requirement for "similarly situated" was considered apart from the similarity of conduct.

It seems to be a widely-followed, and perhaps universal, rule that different job situations of different persons may mean they are not similarly situated and it is proper to treat them differently. The Supreme Judicial Court of Massachusetts has discussed what evidence a plaintiff must produce to prove two individuals are similarly situated for purposes of proving differential treatment in violation of that State's law. In *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 130, 686 N.E.2d 1303, 1310 (1997), the court said: "The plaintiff must identify other employees to whom [s]he is similarly situated 'in terms of performance, qualifications and conduct, "without such differentiating or mitigating circumstances that would distinguish" their situations.'" This

is entirely consistent with *Castro v. New York University*, 5 App. Div. 3d 135, 136, 773 N.Y.S.2d 29, 30 (1st Dept., 2004), where the court held the plaintiff and his comparator were not similarly situated because they did not have the same duties or responsibilities.

In *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 985 (7th Cir. 2001), the conduct, a refusal to sign an employment agreement, was identical, but the president of the company was one-of-a-kind and thus not similarly situated to other managers and professional-level staff such as the plaintiff.

And, of course, "decisions of the Eighth Circuit Court of Appeals [sic] also make clear that the employees identified for comparison must be 'similarly situated in all relevant respects,' not simply in terms of whether they were accused of the same conduct." *Michaelson v. Waitt Broadcasting, Inc.*, 187 F. Supp. 2d 1059, 1071 (N.D. Iowa 2002)(citing cases). The Iowa Court of Appeals has noted this Eighth Circuit rule as well. *Federal Express Corp. v Mason City Human Rights Comm'n*, 2014 WL 1714422, *5 (Iowa App. 2014), further review denied July 16, 2014. *See also Brown v. School Board of Orange County, Florida*, 459 Fed. Appx. 817, 819, 2012 WL 613758 ** 2 (11th Cir. 2012) (relying upon *Lathem*, as well as other 11th Circuit cases, and saying "Employees with different areas of responsibility were not similarly situated to Brown 'in all relevant respects,' (citation omitted) and their conduct cannot be considered 'nearly identical' to that of Brown." (Citation omitted.); *Houck*, 752 N.W.2d at 21.

In argument, the plaintiff correctly cited *Pippen v. The State of Iowa*, 2014 WL 3537028 (Iowa 2014) for the proposition that the Iowa Supreme Court is free to interpret state law differently than federal law. This was not new to *Pippen*, but more importantly, this court would not predict that the Iowa Supreme Court would depart from the widely-followed definition of "similarly situated" that this court is using here. Of greater importance than a simple count of judicial noses is that this rule--that "similarly situated" requires a comparison of work duties, professional responsibilities and obligations, and, in this case, recognition that contract employment and at will employment are different--is more sensible and a better measure of legitimate differences than mere consideration of similarity of conduct as the plaintiff proposes.

Dr. Dempewolf was a contract employee. As previously noted, there has been no argument, and appears to be no basis for any argument, that immediate termination under Physician Employment Agreement section 9(b) was available. Thus, Dr. Dempewolf's termination necessarily required either the time needed to reach a mutual agreement in writing pursuant to 9(a)(i) or 90 days written notice pursuant to 9(a)(ii). Ms. Lammert was an at-will employee.

As a physician, Dr. Dempewolf's duties to patients were different than Ms. Lammert's. McFarland was at least entitled, and probably obligated, to consider Dr. Dempewolf's duties to patients, both from a desire to provide good patient care and from a desire to avoid incurring potential legal liability.

As between Dr. Dempewolf and Ms. Lammert, McFarland Clinic could maintain a podiatric clinic in Marshalltown with Dr. Dempewolf and without Ms. Lammert. The reverse was not true.

Finally, Ms. Lammert contends that her employment was terminated on October 8, 2012, by defendant Jodi Faustlin and defendant Matt Franco. If the Court assumes that was the case, then the record shows that Ms. Lammert and Dr. Dempewolf were terminated by different decision makers. There is nothing in this record that would suggest that Ms. Faustlin and Mr. Franco would have the power to terminate a stockholder/physician with a written employment agreement. It is true that Dr. Dempewolf finally left his employment as the result of an agreement, but that agreement was reached only after the unanimous decision by the Board of Directors and the Ownership Committee that Dr. Dempewolf's employment would be terminated either without cause or pursuant to a mutual agreement. "When employees have been terminated by different decision makers, it would be rare for them to be considered similarly situated because any difference in treatment may well be attributable to nondiscriminatory reasons." *Kight v. Auto Zone, Inc.,* 494 F.3d 727, 734 (8th Cir. 2007) (citing *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 606 (8th Cir. 1983)).

Ms. Lammert complains that Dr. Dempewolf was permitted to resign and that McFarland waived the non-compete clause, Section 11 of the employment agreement. She also complains that he was allowed to contact patients he had seen in the twelve months previous to his departure. The fact that he was allowed to resign relates to the

fact that he was a contract employee. The undisputed facts show that the Board of Directors and the Ownership Committee decided on October 29, 2012, that Dr. Dempewolf's employment was to be terminated. The only question was how. The fact that the mutual agreement method was chosen arises out of one of the differences in the situations between Dr. Dempewolf and Ms. Lammert: Dr. Dempewolf had an employment contract.

A termination by mutual agreement will, by its nature, involve bargaining. The agreement meant McFarland Clinic was able to permanently move Dr. Dempewolf off the premises without litigation with Dr. Dempewolf and without extended proceedings, in spite of the fact the record shows that Dr. Dempewolf would have preferred to stay.

McFarland did not insist on the non-competition clause. After Dr. Dempewolf's departure, McFarland did not have a podiatry clinic in Marshalltown for several months, until the summer of 2013. Dr. Dempewolf came to McFarland as a fully trained and licensed podiatrist with his own previously established practice in Marshalltown. In order to enforce the non-compete clause, the clinic would have had to show that the agreement was reasonably related to protecting McFarland's interests and that it did not adversely affect the public. See generally, T. Foley, Freedom of Contract vs. The Right to Work: An Analysis and Some Thoughts on Iowa's Covenant Not to Compete Law, 61 Drake L.Rev. 205, 208-222 (2012). There is no certainty that McFarland would have been successful in enforcing the covenant if it had tried. In any event, the handling of the non-competition clause and of Dr. Dempewolf's communication with recent patients are both results of the difference in his situation than that of Ms. Lammert.

The record as a whole when taken in the light most favorable to Ms. Lammert demonstrates that she and Dr. Dempewolf were not similarly situated. Ms. Lammert's claims must fail.

IT IS, THEREFORE, ORDERED that the plaintiff's Petition is DISMISSED. Costs are taxed to the plaintiff.

Copies to:
Charles E. Gribble/Luke DeSmet
Randall Armentrout/Keith Patrick Duffy

State of Iowa Courts

Type: OTHER ORDER

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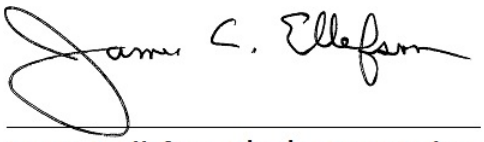
LACI007923	MICHELLE D LAMMERT VS MCFARLAND CLINIC PC ET AL

So Ordered



James C. Ellefson, District Court Judge
Second Judicial District of Iowa