[Cite as Sarach-Kozlowska v. Iniv. Of Cincinnati College of Medicine, 2004-Ohio-1926.]

IN THE COURT OF CLAIMS OF OHIO

MARIA SARACH-KOZLOWSKA, M.D.	:	
Plaintiff	:	CASE NO. 2001-07505 Judge Fred J. Shoemaker
v.	:	DECISION
UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE	:	
Defendant	:	

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{¶1} Plaintiff brought this action against defendant alleging national origin discrimination and harassment based upon her national origin, in violation of R.C. 4112.02(A), as well as breach of an implied contract and promissory estoppel. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} Plaintiff was born in Poland where she obtained a medical degree and board certification before immigrating to Canada in 1989. She moved to the United States in July 1994 after being accepted into a residency program in the Department of Anesthesia of defendant, University of Cincinnati College of Medicine (UC).

{¶3} Faculty members typically evaluated residents throughout each academic quarter, as was also true while plaintiff was at UC. The evaluations were submitted to the Clinical Competence Committee (Committee) which would review them quarterly. The results would then be tabulated within a single document that contained both

numerical values and written comments. The Committee's job was to determine whether each of the residents was progressing satisfactorily or, if not, what action needed to be taken.

{¶4} Plaintiff received high numerical scores at the end of each of her first two quarters. She also received many positive written comments. However, the written comments also reflected that plaintiff was having difficulty communicating effectively and that she needed to improve her English language skills. (Plaintiff's Exhibits 4 and 6.) One evaluator stated that: "[plaintiff's] language barrier is interfering with safe patient care." (Plaintiff's Exhibit 4.)

{¶5} In the third quarter, the residents' responsibilities increased. Plaintiff's numerical evaluation dropped for that period and her communication difficulties remained a concern. (Plaintiff's Exhibit 12.) Subsequently, a majority of the Committee voted to place plaintiff on academic probation for the final quarter of her first year; the period from April 1 to June 30, 1995.

{¶6} At the time of the Committee's decision, plaintiff was on vacation. She did not learn that she had been placed on probation until late April. As a result, she contends that she had only six weeks to solve her language difficulties and to be released from probation. When she did learn of the Committee's decision, she immediately sought and obtained faculty assistance. Dr. Dirk Younker, who was assigned to help plaintiff, contacted the department chair, Dr. Phillip Bridenbaugh, on her behalf. In a letter dated May 3, 1995, (Plaintiff's Exhibit 16) Dr. Younker stated, in pertinent part:

{¶7} "At the suggestion of Ed Lowe, M.D., [Director of Anesthesia Education] I met today with Maria Sarach, M.D. who has been placed on academic probation ***. Ed acceded to the

[Committee's] request with grave misgivings, all of which I share. *** I feel that the vast majority of her problems in an operating room stem from her lack of facility with spoken technical English. Dr. Sarach agrees strongly that this is a problem but *** she feels that she could improve this impediment to her academic progress with appropriate guidance and counselling [sic]. ***. I urge that we accommodate her in this respect. She was, after all, accepted into our program, presumably following the recommendation of a majority of our interviewers. This qualifies as an ethical imperative in my mind."

{¶8} Dr. Younker's letter continued with several suggestions for the chairman's consideration, which included that plaintiff receive instruction in "technical spoken English" from a provider approved by the department. Dr. Younker concluded by stating: "In summary, Dr. Sarach was admitted by us into our family of residents. I feel that the criticism directed at her to this point has been destructive. I offer this plan as a constructive mechanism for removal from probation, since dismissal at this point with no evidence of compassion from us may indeed ruin not only her career but her life." During plaintiff's fourth quarter she was assigned to the pediatric surgery unit; she maintains it was considered one of the most difficult rotations for anesthesiology residents.

{¶9} Despite Dr. Younker's suggestion, plaintiff received no instruction in technical spoken English. At the end of that quarter, she received a numerical score of 76 percent. As in her previous evaluations, plaintiff also received many positive written comments. Some of her evaluators also expressed sympathy for her situation. For example, Dr. Tobias noted: "[a]nxious and worsened by being placed on probation. Unsure of herself at present.

Currently knowledgeable and appears to be clinically competent — but this needs to be keep [sic] under surveillance."

{¶10} The comments make it clear that plaintiff was continuing to have communication problems. Some of her evaluators opined that plaintiff's communication problems could be overcome with time. Others, such as Dr. Patkar, apparently found it did not create a significant problem: "[i]n spite of having poor command of English, [plaintiff's] answers were correct and presentation was good."

{¶11} Notwithstanding Dr. Younker's support, and the many positive comments of faculty evaluators, a majority of the Committee voted that plaintiff remain on probation for an additional six months and receive no course credit for the second half of her first year of residency. The Committee also imposed a condition at this point, which required that plaintiff enroll in a formal course to strengthen her English skills.

{¶12} As a result of the Committee's decision, plaintiff met with Dr. Lowe to discuss her options. According to Dr. Lowe's deposition testimony, he advised plaintiff that she could remain at UC and work through her problems, or she could consider applying to other residency programs. Plaintiff chose the latter option and in August 1995 she transferred to Syracuse University School of Medicine where she successfully completed her first year of residency. At the time of trial she was a practicing anesthesiologist.

{¶13} With respect to her discrimination claim, plaintiff contends that UC engaged in unlawful practices by failing to properly accommodate and deal with her language difficulties. She contends that her difficulties are based in large part upon her

foreign accent, and that the accent is inextricably intertwined with her national origin. Further, she maintains that because she was hired on the basis of her credentials and her face-to-face interview with UC staff, UC was aware of her communication abilities at the time she was hired. Additionally, plaintiff contends that certain UC staff; specifically, Dr. Diann Bridenbaugh (who was married to Department Chair Dr. Philip Bridenbaugh) made disparaging comments about her national origin, and that her written evaluations became worse when she worked with Dr. Bridenbaugh. Finally, plaintiff alleges, based upon the deposition testimony of Dr. Henry Johnston, that several of the anesthesia faculty had formed opinions about plaintiff based upon her language difficulties and that, in Dr. Johnston's opinion, it would be difficult for them to change their minds during the course of her residency.

{¶14} R.C. 4112.02 provides, in relevant part:

{¶15} "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment. ***"

{¶16} Pursuant to *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 582, 1996-Ohio-265, Ohio courts may rely on federal anti-discrimination case law when interpreting and deciding claims brought under R.C. 4112.02 and 4112.14. According to both federal and Ohio standards, a plaintiff may establish a prima facie case of discrimination through either direct or indirect evidence. Absent direct evidence, indirect evidence may be used to raise an inference of

discriminatory intent where a plaintiff establishes that she: 1) was a member of a statutorily protected class; 2) was subject to adverse employment action; 3) was qualified for the position; and 4) that comparable, non-protected persons were treated more favorably than plaintiff. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792; *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501. Once a plaintiff succeeds in establishing a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption of discrimination by articulating some legitimate, nondiscriminatory reason for its adverse action. Then, assuming the employer presents such reasons, the burden shifts back to plaintiff to show that the purported reasons were a pretext for invidious discrimination. To succeed in carrying the ultimate burden of proving intentional discrimination, a plaintiff may establish a pretext either directly, by showing that the employer was more likely motivated by a discriminatory reason, or indirectly, by showing that the employer's proffered reason is unworthy of credence. *Fragante v. City & Cty. of Honolulu* (C.A. 9, 1989), 888 F.2d 591, 595, citing *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253.

{¶17} Based upon the totality of the evidence presented in this case, the court finds that plaintiff failed to establish a prima facie case of national origin discrimination. While she was a member of a protected class and was the subject of an adverse employment action, the court is not persuaded that she was qualified for the position or that other persons outside the protected class were treated more favorably.

{¶18} With respect to qualifications for the position, the court is mindful that plaintiff demonstrated that she was a highly intelligent and well-educated individual; however, the court finds that learning and practicing the medical profession clearly demands

the ability to communicate effectively. In this regard, the court finds that plaintiff was not qualified for her residency position. Although plaintiff has correctly noted in her brief that, pursuant to Section 1606.1, Title 29, C.F.R., national origin discrimination is defined broadly, and includes denial of equal employment opportunities based upon the "physical, cultural or linguistic characteristics of a national origin group," the evidence in this case demonstrates that plaintiff's difficulty with speaking the English language was not simply the result of talking with a foreign accent; was a deficiency in plaintiff's ability to articulate "technical spoken English."

{¶19} The court recognizes that to deny employment opportunities based upon an individual's foreign accent, insofar as it creates an inability to communicate well in English, has in some cases been found to be a "cover" for unlawful discrimination. See, e.g., *Berke v. Ohio Dept. of Public Welfare* (C.A. 6, 1980), 628 F.2d 980. However, it has also been held that: "[e]mployers may lawfully base an employment decision upon an individual's accent when — but only when — it interferes materially with job performance. There is nothing improper about an employer making such an honest assessment of a candidate for a job when oral communication skills pertain to a [bona fide occupational qualification]." *Fragante*, supra at 596, citing EEOC Compliance Manual (CCH) paragraph 4035 at 3877-3878. (Additional citations omitted.)

{¶20} While the individuals who hired plaintiff had an opportunity to assess plaintiff's language skills, the evidence shows that her difficulty in communicating increased when she was under stress, which would be especially true in her chosen field of

anaesthesiology. Thus, it is unlikely that plaintiff's communication problems could be fairly evaluated in a less stressful setting such as an interview. In addition, plaintiff worked primarily in an operating room environment, where her mouth would have been covered by a surgical mask, which factor, coupled with an underlying inability to speak clearly and precisely, could certainly "interfere materially" with her job performance. As stated previously, faculty who worked with plaintiff noted that her language difficulties were interfering with safe patient care; for example, Dr. Gibbons commented: "[s]urgeons fearful that [plaintiff] wasn't 'with' them. Seems intimidated and poorly prepared for end of CA-1 year. Hopefully just 'opening day jitters.'" In sum, the court concludes that plaintiff did not prove by a preponderance of the evidence that she was qualified for the position.

{¶21} Moreover, even assuming that plaintiff had been fully qualified for her residency position, the evidence fails to demonstrate that other persons outside the protected class were treated more favorably; rather, the weight of the evidence leads to the contrary conclusion. Of the nine residents who began UC's program with plaintiff, three others had been trained in foreign countries: two, in India and one, in Syria. All three successfully completed the program; plaintiff and one American resident did not. The evidence simply does not show that any UC staff or Committee member singled plaintiff out and treated her differently due to her Polish heritage. If plaintiff were treated differently at all, it was because of her communication difficulties which, in the court's opinion, would have warranted scrutiny irrespective of any consideration of her national origin.

{¶22} Finally, with regard to plaintiff's contention that Dr. Diann Bridenbaugh had made disparaging comments and that certain faculty had formed "opinions" of her that were unlikely to change, the court has examined the evidence and finds no merit in these assertions. Specifically, plaintiff maintains that Dr. Bridenbaugh made discriminatory comments concerning her native country; however, the evidence shows that the alleged remarks, if they were made at all, concerned the quality of health care and medical education in Eastern Europe. The court finds that a general, innocuous comment of this nature does not — assuming it was offered for such purpose — constitute direct evidence of a discriminatory animus, nor does it raise an inference that plaintiff was singled out and treated differently.

{¶23} With respect to the comments attributed to Dr. Johnston, the court finds that, the statements contained in his deposition do not reflect any discriminatory attitude alleged by plaintiff. First, Dr. Johnston made the remarks in a reference letter (Plaintiff's Exhibit 19) to Syracuse University, presumably to both support plaintiff and present her in the best possible light. In such letter, he acknowledges that plaintiff "has had some interpersonal relationship problems with a few faculty and as a result of her feelings of pressure, it would appear that perhaps her actual, and certainly her perceived, clinical performance deteriorated when working with them." He goes on to state that "[s]ome faculty have had little tolerance for her accented English" and, finally, that "I fully understand her reasons for wishing to transfer, as I feel that some of my faculty colleagues will continue to not give her a fair chance in this program."

{¶24} In the court's view, these remarks, when considered in context, are as general and innocuous as those attributed to Dr. Bridenbaugh. A "lack of tolerance for accented English" in and of itself is not sufficient to establish a discriminatory animus. Moreover, the comment concerning some of Dr. Johnston's colleagues not giving plaintiff a fair chance, could easily be a reference to those who had "interpersonal relationship problems" with her, as opposed to those who had little tolerance for her accented English.

{¶25} Second, taken in its entirety, the deposition testimony on this issue demonstrates that Dr. Johnston did not make the remark as a statement of fact. He could not name any specific faculty member who had such an attitude toward plaintiff, nor could he state whether any such attitude was a result of plaintiff's accented English or national origin. Rather, Dr. Johnston stated that he was reflecting upon his own experience in working with residents about whom he had formed irrevocable initial impressions. He stated that he was "probably transcribing some of my own thoughts into this sentence." (Transcript p. 39.) For all of these reasons, the court concludes that plaintiff's claim of national origin discrimination must fail.

{¶26} Having so found, the court would nevertheless offer that, even if plaintiff had proved a prima facie case, the court would find that her English language difficulties constitute a legitimate, nondiscriminatory reason for the decision to place her on probation and deny her course credit and that plaintiff failed to show that UC's motives were either "motivated by discriminatory reasons" or "unworthy of credence." *Fragante*, supra, at 595.

{¶27} To the extent that plaintiff asserts a claim of national origin harassment, the court finds that any such claim must also fail. In analyzing this type of claim, the federal courts have adopted the guidelines followed in sex-based harassment cases. See *Meritor Savings Bank, FSB v. Vinson* (1986), 477 U.S. 57; *Risinger v. Bur. of Workers' Comp.* (C.A. 6, 1989), 883 F.2d 475, 484 fn. 3. Thus, in order to prevail on such claim, one of the elements plaintiff must show is that the alleged harassment was sufficiently severe or pervasive to affect the "terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." *Hampel v. Food Ingredients Specialities*, 89 Ohio St.3d 169, 2000-Ohio-128.

{¶28} Here, the evidence is clearly insufficient to satisfy the *Hampel* standard. Even assuming that the alleged comments were made, the court finds, for the same reasons given above, that the comments did not rise to the level of being "severe or pervasive" and that such comments did not interfere with the terms or conditions of plaintiff's employment. To the contrary, the most adverse impact expressed by plaintiff was that she took pride in her nationality and that she was offended by comments made about her native country. Accordingly, the court concludes that the totality of the evidence fails to demonstrate that plaintiff was subjected to national origin harassment.

{¶29} Plaintiff has also alleged that UC violated its own university policies, as set forth in its Institutional Responsibility for Graduate Medical Education (the GME), and that such violation constitutes a breach of contract or, in the alternative, a breach of an implied contract. The same conduct is

also asserted as the basis for plaintiff's promissory estoppel claim.

{¶30} Plaintiff contends that Section II(F)of the GME (Plaintiff's Exhibit 27 p.5), mandates that UC had to provide an appropriate probationary period within which she would have been able to improve her performance. Additionally, plaintiff contends that in accordance with Section II(F) she should have been notified of her probationary status at least six months before the end of her first year appointment, specifically, by January 1995, rather than late April of that year. However, even a cursory review of that provision reveals that it was directed to dismissal of residents. The provision states: "No house officer may be terminated without first being placed on written probation at least six months prior to the expiration date of the appointment year."

{¶31} In this case, there has been no showing that UC intended to dismiss plaintiff. Rather, it appears that despite a few detractors, she had a great deal of support and faculty interest in helping her to achieve her goals. In fact, Plaintiff's Exhibit 10 shows that, as of February 22, 1995, she had been notified in writing that her residency position would continue through July 1, 1996. While it was subsequently decided that she would be continued on probation and denied credit for the second half of her first year of residency, the totality of the evidence demonstrates that dismissal was not at issue.

{¶32} Additionally, since the GME provision does not apply to plaintiff's circumstances, the court finds that there was no breach of any actual or implied promise. Furthermore, there can be no implication in the GME of a promise that UC could "reasonably expect to induce an action or forbearance" on the part of the plaintiff for

the purposes of establishing a promissory estoppel claim. See Restatement of the Law, Contracts 2d (1973), Section 90; *McCroskey v. State* (1983), 8 Ohio St.3d 29, 30. Accordingly, the court concludes that these claims also must fail.

{¶33} For the reasons set forth above, the court finds that plaintiff failed to prove any of her claims by a preponderance of the evidence. Accordingly, judgment shall be entered in favor of defendant.

{¶34} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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FRED J. SHOEMAKER
Judge

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