SECOND DIVISION
September 5, 2017

No. 1-16-2989

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIAHANNA THOMPSON-MILLER, Plaintiff-Appellant, v. ADVOCATE HEALTH AND HOSPITALS CORPORATION, d/b/a/ SOUTH SUBURBAN HOSPITAL, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County No. 14 L 6823 Honorable Margaret Ann Brennan, Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly granted defendants summary judgment in plaintiff's employment discrimination case because plaintiff adduced no evidence that defendant's decision to terminate her employment was based on her race.

¶ 2 Plaintiff Diahanna Thompson-Miller was terminated from her nursing position at South Suburban Hospital, a facility owned and operated by Advocate Health and Hospitals Corporation. She claimed her termination was racially motivated. When her charge filed with the Illinois Department of Human Rights was dismissed for lack of substantial evidence, Miller-Thompson elected, instead of appealing that determination,

to sue Advocate in the circuit court of Cook County asserting a claim for discrimination under the Illinois Human Rights Act (775 ILCS 5/2-102(a) (West 2012)) and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (2012)). Advocate moved for summary judgment, which, after briefing and argument, the trial court granted. Because the trial court correctly found that the evidence adduced during discovery, viewed in the light most favorable to Thompson-Miller, established no connection between her race and her termination, we affirm.

¶ 3 Thompson-Miller worked as a registered nurse at Advocate from March 2006 to May 2013. During the course of her employment, Thompson-Miller received the title of charge nurse, a position that entails overseeing the unit to which the nurse is assigned, making staffing assignments and assisting staff nurses. The charge nurse is also responsible for the quality of patient care and responding to patient crises. Before her termination, Thompson-Miller consistently received favorable performance reviews and was praised for her "competence in charge and in leadership roles."

¶ 4 At the time she was terminated, Thompson-Miller was assigned to Unit 2 East, a telemetry unit where patients' cardiac activity is monitored through connections to heart monitors. Staff nurses on Unit 2 East are assigned in pairs to provide care to a specific group of patients in the unit. Doubling up on assignments allows the nurses to cover for each other on lunch breaks or other absences during the shift.

¶ 5 The heart monitors to which patients are connected send information to an internal communications system known as Emergin. Nurses are provided pagers connected to the system so that when Emergin sends an alert or alarm regarding a patient, the nurse's pager receives a message showing the patient's room number, heart rate and

alarm code. Emergin sends an alarm when the patient is in critical condition. Before the spring of 2013, the Emergin system was programmed so that all nurses on Unit 2 East received all alarms on their pagers for every patient on the unit. Beginning in the spring of 2013, the procedure changed so that staff nurses received alarms only for patients to whom they were assigned on that particular shift. Both before and after the change, charge nurses received all patient alarms. The charge nurse and staff nurses are required to respond to any patient alarm received on their pagers.

¶ 6 On Sunday, April 21, 2013, Thompson-Miller worked the 7:00 a.m. to 7:00 p.m. shift as charge nurse on Unit 2 East. Staff nurses Holly Gertz and Jessica Gamlin were assigned to care for the patient in room 264, bed 2. On their pagers, the patient would be identified as 264-2 and that is how we shall refer to her. The Emergin system first sent an alarm relating to patient 264-2 to Thompson-Miller's pager at 12:42 p.m. Thompson-Miller was not on Unit 2 East at the time the alarm was received. The system sent 10 more alarms to Thompson-Miller's pager over the next 27 minutes indicating that patient 264-2's heart rate was asystole (not beating). Neither Thompson-Miller nor any other staff nurse responded to any of the alarms. Thompson-Miller noticed the alarm for patient 264-2 when she returned to the unit and looked at the central telemetry monitors. She and Gertz called a code blue and attempted to resuscitate patient 264-2, but she died.

¶ 7 In the wake of this incident, Advocate launched an investigation to determine why nursing staff did not respond to the alarms. Joseph Newsome, the Director of Inpatient Care at South Suburban, interviewed Thompson-Miller, Gertz and Gamlin. All three confirmed that they had their pagers on, the pagers were working and were receiving pages, but all three denied receiving any alarms for patient 264-2.

¶ 8 Newsome obtained a log from the Emergin system that showed that all alarms for patient 264-2 were received by Thompson-Miller's pager and none of the alarms were received by Gertz's or Gamlin's pagers. Newsome later determined that only Thompson-Miller's pager had been programmed to receive messages from patient 264-2's monitor on April 21, 2013. Usually it is the responsibility of the charge nurse on the prior shift to program the pagers for the next shift. Newsome was unable to determine whose fault it was that the staff nurse pagers were not programmed for patient 264-2 because one nurse called off on the 21st and it may have been necessary to re-program the pagers at the beginning of the shift. No one was disciplined as a result of the failure to program the pagers.

¶ 9 After Newsome determined that all of the alarms for patient 264-2 had been received by Thompson-Miller's pager, he further questioned Thompson-Miller regarding her activities on the 21st. Thompson-Miller told Newsome that during the time alarms were sent for patient 264-2, she was off the floor in the main lobby discharging a patient. According to Thompson-Miller, she waited with the patient in the main lobby for the patient's ride to arrive and when it did not, she returned the patient to Unit 2 East.

¶ 10 Newsome reviewed security camera video from various locations in the lobby and did not see Thompson-Miller in the lobby during, before or after the alarms for patient 264-2 were sent to her pager. Because, based on all the information he had gathered, Newsome did not believe Thompson-Miller was telling the truth about failing to receive the pages or about being in the lobby with another patient, he decided to recommend her termination for patient neglect.

¶ 11 Newsome consulted with Daylashunta Randolph, South Suburban's Vice President for Human Resources, who agreed with his recommendation to terminate Thompson-Miller. Newsome and Randolph met with Thompson-Miller on May 8, 2013, and gave her a termination letter, which recited that she was terminated due to patient neglect.

¶ 12 At the time she was terminated, Thompson-Miller was also working at Little Company of Mary Hospital. After she was discharged by Advocate, Thompson-Miller was able to work more hours at Little Company and so suffered no monetary loss as a result of her termination. Her termination also had no effect on her nursing license.

¶ 13 In her complaint filed on June 27, 2014, Thompson Miller asserted an employment discrimination claim under the Illinois Human Rights Act, as well as claims for libel, intentional interference with prospective economic advantage and intentional infliction of emotional distress (IIED). In her second amended complaint, the pleading at issue on this appeal, Thompson-Miller included a single combined count for employment discrimination under federal and state law. Although Thompson-Miller raises arguments here regarding her IIED claim, her failure to include that claim in her second amended complaint precludes us from considering them. See *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17; *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983). Thus, we confine our discussion to Thompson-Miller's employment discrimination claim.

¶ 14 The parties conducted discovery, including the depositions of Thompson-Miller, Gertz, Gamlin, Newsome, Randolph and others. Thompson-Miller sought and obtained an order directing Advocate to disclose the contact information for the patient she

brought to the lobby on April 21st, but by the time Advocate disclosed the information, the contact information was no longer accurate and counsel was unable to locate that individual. The court refused to direct Advocate to disclose contact information for the deceased patient's family. Although Thompson-Miller claimed to be aware of other instances in which Advocate disciplined minority employees disproportionately to non-minority employees, she could not relate any specifics. Thompson-Miller admitted that before this incident, she had not experienced any negative treatment or harassment and, in particular, none that she considered racially motivated.

¶ 15 Advocate explained that neither Gertz (who was Caucasian) nor Gamlin (who was Hispanic) was disciplined because the data from Emergin showed that neither of their pagers received alarms on April 21st for patient 264-2. As noted, Advocate also failed to discipline either Thompson-Miller or the charge nurse on the overnight shift on April 20-21, who was also African-American, for the pager programming error because it was unable to determine whose responsibility it was to program staff nurses' pagers for Thompson-Miller's shift on the 21st. Advocate additionally provided evidence that in the three years preceding Thompson-Miller's termination, it had terminated three nurses for patient-related errors: one Hispanic, one Caucasian and one African-American.

¶ 16 During its oral ruling, the trial court noted that it was sensitive to the proscription against weighing evidence in order to resolve Advocate's summary judgment motion. But after reviewing the evidence in the light most favorable to Thompson-Miller, the court determined that no verdict in her favor could stand because there was no evidence that

Advocate was motivated by anything other than a good faith belief that she was guilty of patient neglect. Thompson-Miller timely appealed.[1]

¶ 17 Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Although all reasonable inferences are drawn in favor of the non-moving party, the court must still be convinced that there exists admissible evidence that would support a judgment in the non-moving party's favor. *Robinson v. Village of Oak Park*, 2013 IL App (1st) 121220, ¶ 21; *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 472 (2010) (although the non-moving party "need not prove his case at the summary judgment stage, he must come forth with some evidence that arguably would entitle him to recover at trial."). "[S]ummary judgment requires the responding party to come forward with the evidence it has—it is ' "the put up or shut up moment in a lawsuit." ' " *Eberts v. Goderstad*, 569 F.3d 757, 767 (7th Cir. 2009) (quoting *Schacht v. Wisconsin Department of* Corrections, 175 F.3d 497, 504 (7th Cir. 1999)). We review the trial court's summary judgment order *de novo*. *The Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34.

¶ 18 The Illinois Human Rights Act and Title VII of the Civil Rights Act of 1964 both provide remedies for unlawful discrimination in employment. Illinois courts often rely on cases decided under the federal law as a framework for deciding whether unlawful

[1] We took with the case Advocate's motion to strike Thompson-Miller's brief for failure to comply with Illinois Supreme Court Rules 341 (eff. Jan. 1, 2016) and 342 (eff. Jan. 1, 2005). While we agree with Advocate's criticisms, the brief is sufficient to enable our review and, therefore, the motion is denied. *John Crane, Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 698 (2009).

discrimination has occurred. See *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178-79 (1989) (applying same standards to claim under Illinois Human Rights Act as applied to Title VII claim); *Robinson*, 2013 IL App (1st) 121220, ¶ 19.

¶ 19 Evidence of discrimination may be direct or indirect. *Lalvani v. Human Rights Comm'n*, 324 Ill. App. 3d 774, 790 (2001). When a plaintiff proves by direct evidence that the adverse employment action was motivated by a prohibited factor, such as race, "the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision even if the prohibited factor had not been considered." *Id.* at 791. On the other hand, indirect evidence of discrimination requires the plaintiff to satisfy the three-part test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), which our supreme court adopted in *Zaderaka*, 131 Ill. 2d at 178-79. Under the *McDonnell Douglas* test, the plaintiff must first establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination; that *prima facie* case gives rise to a rebuttable presumption of discrimination requiring the employer to articulate a legitimate, nondiscriminatory reason for the employment decision; finally, once the employer articulates a legitimate reason for its action, the plaintiff must prove that the reason was merely a pretext for unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802-04; *Zaderaka*, 131 Ill. 2d at 179. The "ultimate burden remains at all times with plaintiff." *Zaderaka*, 131 Ill. 2d at 179.

¶ 20 Here there is no direct evidence of discrimination. None of the evidence surrounding Thompson-Miller's termination suggests that her dismissal was racially motivated. Thus, her claim of discrimination rests on inferences drawn from the

circumstances of her termination and, as a result, she must satisfy *McDonnell Douglas*'s three-part test.

¶ 21 Although the trial court did not expressly discuss the application of the *McDonnell-Douglas* test, Advocate argues and we agree that Thompson-Miller failed to make out a *prima facie* case of discrimination. Thompson-Miller was undeniably a member of a protected class, but beyond that fact, there is nothing else that suggests that Advocate's decision to terminate her was racially motivated. Based on the evidence in the record, Thompson-Miller's pager received 11 alarms for patient 264-2 to which she did not respond. The explanation she offered for her extended absence from Unit 2 East was not supported by available footage from security cameras. And even if we accept that South Suburban's security cameras may not have captured everyone who was in the hospital's lobby areas, the fact remains that Thompson-Miller did not respond for 27 minutes to alarms the Emergin system showed were sent to her pager. This is an objectively sufficient, non-discriminatory reason supporting her termination. And given the lack of any other evidence suggesting that South Suburban's decision to terminate Thompson-Miller was motivated, even in part, by her race, she has not made out a *prima facie* case of discrimination.

¶ 22 Thompson-Miller theorizes that when patient 264-2 died, Advocate needed a scapegoat to blame for her death. Even assuming this is true, it does not suggest that race had anything to do with placing the blame on Thompson-Miller. Particularly since neither Gertz nor Gamlin received alarms for patient 264-2 on their pagers on April 21st, it does not appear that Advocate had a number of "scapegoats" from which to choose and elected to pick the only African-American.

¶ 23 Thompson-Miller also contends the trial court erred in refusing to require Advocate to disclose the contact information for the family of patient 264-2. Thompson-Miller claimed conversations Advocate representatives had with patient 264-2's family would shed light on what Advocate told the family about the patient's demise, which Thompson-Miller theorized might conflict with the accusation against her of patient neglect. But again, even if we assume that Advocate informed family members of a reason for patient 264-2's death that did not implicate Thompson-Miller (or Advocate, for that matter), such evidence would be insufficient to raise a genuine issue of material fact as to Advocate's objectively sufficient reasons for terminating her. Given the invasion of privacy that disclosure of the family's contact information would entail measured against the marginal relevance, at best, of the evidence Thompson-Miller sought, the trial court properly declined to order disclosure and we need not separately address whether this information was privileged under either the Health Insurance Portability and Accountability Act (45 C.F.R. §§ 160 through 164 (2012)) or the physician-patient privilege (735 ILCS 5/8-802 (West 2012)).

¶ 24 Affirmed.