IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

DR. PRESTON BOLES	**PLAINTIFF**
v.	**CASE NO.: 4:21-cv-88-DMB-JMV**
GREENWOOD LEFLORE HOSPITAL	**DEFENDANT**

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT MOTION

Defendant Greenwood Leflore Hospital (GLH) employed Plaintiff Dr. Preston Boles, a Black podiatrist, and Dr. Joseph Assini, a White podiatrist. In 2015, GLH gave Dr. Assini a large raise which it did not give to Dr. Boles. When Dr. Boles challenged GLH's actions, it initially said the difference was "productivity." But at that time - in 2019 - Dr. Boles's productivity was comparable to Dr. Assini's. When this explanation fell apart in litigation, GLH repeatedly changed tack and relied on a host of new, equally false explanations. It claimed to the Equal Employment Opportunity Commission that Dr. Assini's work was billed and coded differently because he had Board certification, only to later acknowledge that was false. It now claims that that the key is "minimum WRVU production expectations" and that the higher this contractual minimum is, "the higher a physician's [bonus] conversion factor will be." Docket 48-2 (Denton Declaration) at ¶ 6. This is flatly contradicted by the actual contracts, which show Dr. Boles's minimum WRVUs going up by 70% in 2020, with no change in his bonus factor, whilst Dr. Assini's bonus factor goes up in 2015 as his minimum WRVUs actually fall. These false, after-the-fact efforts to create a pretext are strong circumstantial evidence of racially discriminatory pay. For these reasons, Defendant's motion should be denied.[1]

[1] Plaintiff is no longer pursuing the breach of contract claim, and will be briefing only the race discrimination claims under Title VII and 1981.

FACTS

1. The "per-WRVU" payment system

Both Dr. Boles and Dr. Assini had similar contract structures. Exhibit 1 (Boles Contracts); Exhibit 2 (Assini Contracts). Although the payment system appears complex at first, the issue is ultimately fairly straightforward. The key concept is a productivity measurement called "work relative value units" (WRVUs). The WRVU is a way of counting the number and complexity of procedures performed: each procedure will be worth a certain number of units. As Defendant's brief explained, this WRVU system is used because it corresponds to the coding system the Hospital uses to obtain payment from insurance companies. Thus, the doctors' pay will correspond to the revenue they generate for the Defendant. Although the contract appears to provide a "base salary" plus "bonus" structure, in reality both the "salary" and "bonus" are productivity compensation based solely on the WRVUs performed.

To illustrate, consider Dr. Boles's first relevant contract for this case, which ran from July 2017 to June 2019. Exhibit 1 (Boles Contracts) at pp. 52-55. His "base salary" was $115,000, and he received a bonus or "conversion rate" of $45 per WRVU. *Id.* However, the bonus did not start until he had worked 2556 WRVUs. *Id.* Thus, in reality, Dr. Boles was paid $115,000 for his first 2556 WRVUs. By simple arithmetic, this translates to a salary-per-WRVU [115000/2556 =] of $45. In addition, the salary would be clawed back - not coincidentally, at a rate of $45 per WRVU - if he did not work a minimum of 2500 WRVU. Thus, even though Dr. Boles superficially appeared to have a salary and bonus structure, in reality he was paid $45 per WRVU for every single WRVU he worked. The so-called "salary" was actually just an advance on a portion of that straight $45-per-WRVU performance pay, called the "conversion factor." No

matter if the salary was $100,000 or $250,000, the total pay rate will be mathematically identical so long as there is the same per-WRVU "conversion factor."

2. The per-WRVU pay rate of Dr. Boles and Dr. Assini.

When Dr. Assini was hired in 2012, his conversion factor was $43 per WRVU, while his minimum WRVUs was 5300. Meanwhile, Dr. Boles had a $44 conversion factor in 2012, and a minimum WRVUs of 2500. Again, although their salaries (i.e., their advances) were very different, as just discussed, mathematically that had no effect on overall compensation. Their contracts were comparatively equitable. Dr. Boles was paid a slightly better rate than Dr. Assini.

That changed in 2015, when Defendants gave Dr. Assini a large raise and not Dr. Boles. From 2015 to the end of his employment, Dr. Assini was paid a conversion factor of $52 per WRVU, while his minimum WRVUs actually fell to 4800. Exhibit 2 (Assini Contracts). Meanwhile, Dr. Boles made around $45 per WRVU during this same time period. Exhibit 1 (Boles Contracts) at pp. 52-59. This is a $7 difference, or roughly a 15% difference in pay.

3. Dr. Boles tries to negotiate for better pay in line with Dr. Assini.

Plaintiff discovered the disparity in compensation between himself and Dr. Assini on or around September 3, 2019. On or around September 17, 2019, Plaintiff asked Defendant's then-CEO Gary Marchand why Defendant compensated him differently than Dr. Assini. Mr. Marchand told Plaintiff that the difference was based on the fact that Dr. Assini had higher "productivity" - i.e., that his gross pay was higher because he worked more WRVUs. The CEO did not address why Dr. Assini was paid more per WRVU.

4. In response, Defendant raises Dr. Boles minimum WRVU expectation by over 70% but still refuses to raise his conversion factor, which remains at $45 per WRVU.

Defendant refused to raise Dr. Boles' per-WRVU pay in line with Dr. Assini's. Instead, it increased Dr. Boles's WRVU minimum and salary (i.e, his advance), but that only created the

appearance of a raise, without actually giving Dr. Boles much change in the rate of pay. His salary was made $215,000 but the minimum WRVUs covered by that salary was also raised to 4285 WRVUs. Exhibit 1 (Boles Contracts) at pp. 57-58. The conversion rate did not change.

Under this new contract, though Dr. Boles's minimum expected WRVU's increased 70%, his conversion factor remained at the very same $45 per WRVU as before. *Id*. (Boles Contracts) at p. 58. In short, the Defendant refused to raise Dr. Boles's rate of pay per WRVU, even though he told them of the discrepancy and tried to bargain for a raise.

DISCUSSION

As this Court has recognized, in general "'summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent.'" *Dulin v. Board of Commissioners of Greenwood Leflore Hospital*, 2009 WL 2922984 (N.D. Miss. Sept. 8, 2009) (*quoting Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 640-41 (5th Cir. 1985)). Unlawful motive in employment cases is usually proven by circumstantial evidence because "direct evidence is rare." *E.g. Vance v. Union Planters Corp.*, 209 F.3d 438, 443 n.6 (5th Cir. 2000) (quoting *Scott v. University of Miss.,* 148 F.3d 493, 504 (5th Cir.1998)). After all, "[a]n employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent." *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991).

Under both 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, intent can be proven using the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Shackelford v. Deloitte Touche*, 190 F.3d 398, 403 n.2 (5th Cir. 1999) (same framework for 1981). Under this framework, a court "asks whether the plaintiff has established a prima facie case of discrimination, whether the defendant has offered a legitimate,

nondiscriminatory reason for the challenged conduct, and whether the plaintiff has established that the proffered reason was pretext for unlawful discrimination." *Benford v. Milwaukee Electric Tool Co.*, 2021 WL 735642 (N.D. Miss. Feb. 25, 2021) (citing *Sanders v. Christwood*, 970 F.3d 558, 561-62 (5th Cir. 2020)). Once a plaintiff shows pretext, "[n]o further evidence of discriminatory animus is required because 'once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation.'" *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000)).

Here, Plaintiff has produced sufficient evidence to both establish a prima facie case of racial pay discrimination and show that Defendant's purported reasons for its disparate compensation decisions are pretextual.

A. PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CASE OF RACIAL PAY DISCRIMINATION.

To establish a prima facie case, "[a]n individual plaintiff claiming disparate treatment in pay . . . must show that his circumstances are nearly identical to those of a better-paid employee who is not a member of the protected class." *Taylor v. United Parcel Service*, 554 F.3d 510, 523 (5th Cir. 2008). That is exactly what happened here.

Defendant concedes that it has paid Plaintiff a lower rate of pay than Dr. Assini. Exhibit 3 (Defendant's Interrogatory Responses) at pp. 11-12. Nor do the contracts leave any room for disputing the matter. The only question left in Plaintiff's prima facie case is whether Dr. Assini and Plaintiff worked under "nearly identical" circumstances.

Whether two employees are proper comparators for an employment discrimination case is a question of fact. *Andy Mohr Truck Center, Inc. v. Volvo Trucks North America*, 869 F.3d 598, 603 (7th Cir. 2017); *Beck-Wilson v. Principi*, 441 F.3d 353, 362 (6th Cir. 2006); *Graham v. Long*

Island R.R., 230 F.3d 34, 39 (2d Cir. 2000). Here, there is sufficient evidence from which a reasonable juror could find that Plaintiff and Dr. Assini were comparators working in nearly identical circumstances.

The Fifth Circuit has been clear that "'nearly identical' is not synonymous with 'identical.' Applied to broader circumstances of a plaintiff's employment and that of his proffered comparator, a requirement of complete or total identity rather than near identity would be essentially insurmountable, as it would only be in the rarest of circumstances that the situations of two employees would be totally identical." *Turner v. Kansas City Southern Ry. Co.*, 675 F.3d 887, 893 (5th Cir. 2012) (internal quotations and citation omitted). Two employees' circumstances are considered "nearly identical" if "the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories." *E.g. Wiseman v. New Breed Logistics*, 72 F.Supp.3d 672, 679 (N.D. Miss. 2014) (quoting *Lee v. Kan. Cty S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009)).

There can be no disputing that both doctors are podiatrists, that they have the same supervisor, and that there is no relevant difference in their employment "violation histories" related to their pay. Nonetheless, Defendant attempts to challenge the first and third factors. These efforts fail.

i. Plaintiff and Dr. Assini held the same job.

Plaintiff and Dr. Assini both worked for Defendant as podiatrists. They clearly held the same job. Defendant's only argument in response is that Dr. Assini's better compensation was based on his "additional duties, including medical staff liaison and director for [Defendant's] Center for Excellence." Docket 49 (Defendant's Summary Judgment Memorandum) at p. 11.

However, the evidence shows that these "additional duties" were not the cause of Dr. Assini's higher pay rate per WRVU.

The contract is clear that, in March 2014, when he started these "additional duties" Defendant did not change his per-WRVU compensation. Instead, Defendant gave Dr. Assini a separate, extra stipend of $2,000 per month, entirely separate and apart from the amount he was paid for his medical practice. This is essentially like a second job, and can be easily separated from the primary jobs being compared here.

Dr. Assini was not paid $52 per WRVU because of this second job - that was separate - and so these separate duties have no bearing on whether his pay for podiatry (the $52 per WRVU) can be fairly compared to Dr. Boles's pay for podiatry (the $45 per WRVU). Dr. Boles is not arguing he should get the extra $2000 per month for the separate job. He is arguing that he should get the $52 per WRVU for the primary job. For this, they are comparators.

Further, this argument fails to acknowledge a more fundamental problem: that Defendant offered these additional duties to its White podiatrist instead of its Black podiatrist. This is strange, as these additional duties essentially amounted to building and maintaining relationships throughout Defendant's local community, and Dr. Boles was the local doctor with more seniority, already deeply rooted in that community. Exhibit 4 (30(b)(6) Transcript) at 47:1-6. Meanwhile, at this time Dr. Assini was woefully behind in his production targets and owed Defendant a lot of money because of this "negative production." Yet, Defendant assigned these duties to its White podiatrist who had just moved to the community in 2012 instead of its Black podiatrist who had lived and worked in the community since 1992. Docket 49 (Defendant's Summary Judgment Memorandum) at p. 2. Certainly, an employer should not be able to avoid liability for racial pay

discrimination by relying on its (also racially discriminatory) decision to assign special duties to its White employee over its better-qualified Black employee.

Regardless, there is nothing to suggest that these additional duties actually played any role in setting Dr. Assini's per-WRVU pay, and so they have no bearing on whether the two doctors can fairly be compared to infer discriminatory intent.

ii. There is no relevant difference in "violation histories."

Defendant further argues that Plaintiff and Dr. Assini cannot be comparators because of Plaintiff's purported performance issues and "administrative difficulties." Of course, as Defendant notes, differences in conduct are only relevant to differences in pay when the "difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." Docket 49 (Defendant's Summary Judgment Memorandum) at p. 11 (quoting *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009)). Here, Defendant's argument about this factor fails for three reasons.[2]

First, it is factually incorrect: Dr. Assini also had similar issues. Arguably, Dr. Assini had worse issues. In its deposition, Defendant admitted that Dr. Assini had "negative productivity." Exhibit 4 (30(b)(6) Transcript) at 38:9-12. Dr. Assini's productivity issues were so serious that they caused him to owe Defendant "$87,649.13 for the years of 2013 and 2014." Exhibit 5 (Settlement Agreement) at p. 1. Moreover, for a time, Dr. Assini failed to pay back the money he owed Defendant. Exhibit 6 (Email Discussing Balance). Ultimately, Defendant had to enter into a settlement agreement to collect on Dr. Assini's large debt. Exhibit 5 (Settlement Agreement). Meanwhile, according to Defendant's own records, Plaintiff exceeded his performance

[2] Initially, it is worth considering whether this factor can logically have any bearing in pay discrimination cases. This factor is typically cited in discriminatory discipline cases - such as a wrongful termination - where prior disciplinary history is frequently considered by the employer in deciding on termination. Pay is entirely different. Unless there is some reason to think that "violation history" was a factor in giving Dr. Assini a raise to $52 per WRVU and not Dr. Boles - and there is none here - then it should not be considered as a distinguishing factor.

expectations throughout this time period. Exhibit 7 (Boles WRVU Records). This led to Plaintiff earning a bonus of $25,493.06 for his work in fiscal year 2013 and a $3,364.98 bonus for his work in the second half of 2014 alone. Exhibit 8 (Bonus Records). There is no record of Plaintiff ever failing to pay a debt to the hospital. In light of this evidence, a reasonable jury could conclude that Dr. Assini and Plaintiff had (at least) similar "violation" histories.

Second, Plaintiff's discipline does not line up with any change in his pay, nor is there any other reason to think it had any bearing on the fact he was paid less than Dr. Assini. The Fifth Circuit has made clear that this factor concerns how an employer viewed an employee's disciplinary history at the time of the disparate decision. *Turner*, 675 F.3d at 893.The problems that Defendant identifies occurred between 2009 and 2012 and then in 2022. But the relevant time period here begins in 2017, so a problem that was five years in the past has no bearing. Defendant's own evidence shows that it considered Dr. Assini and Plaintiff to be comparable employees at least when it made the 2019 decision to continue to pay Plaintiff less than Dr. Assini. In the minutes from the board meeting that led to this decision, the individual making the recommendation–referred to as "SB"–explains that "[Plaintiff] and Dr. Assini do an excellent job." Docket 48-1 at p. 91 (Board Meeting Minutes). SB further stated: "[Plaintiff] is a hard worker. So, he always exceeds the RVU so he gets almost double–a bonus is almost double of his base salary. Nothing wrong with that." *Id*. So, while Defendant now argues that its disparate compensation is based on Plaintiff's alleged problems from around 2012, this record shows that Defendant viewed Plaintiff and Dr. Assini similarly when it was making these decisions.

Finally, these issues were not disciplinary in nature. There is nothing in the record to show that any of these alleged problems were "violations" of any kind. Defendant has not

offered any evidence that it ever formally reprimanded or disciplined Plaintiff for any of these problems at the time they happened.[3]

In short, there is no reason to think that these performance issues from around 2012 had any bearing on the difference in pay between Dr. Assini and Dr. Boles between 2017-2022, such that they cannot be considered comparators for that time period.

Plaintiff has provided sufficient evidence to establish that Defendant compensated its White podiatrist more generously than its Black podiatrist in nearly identical circumstances.

B. THE EVIDENCE SHOWS THAT DEFENDANT'S PURPORTED REASONS FOR ITS DISCRIMINNATION ARE PRETEXTUAL.

In an effort to justify the pay discrepancy after the fact, the Defendant has pointed to a constantly changing array of additional distinctions between the White and Black podiatrists - all of which are contradicted by Defendant's own records. Beyond that, Defendants' summary judgment motion includes no evidence that Defendant actually relied on any of them at the time it was setting Dr. Boles' and Dr. Assini's pay. This post-hoc misdirection likely will not be believed by the jury, leaving race as a reasonable explanation.

As the courts have held, an employee can establish pretext by showing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence that the employer did not act for the asserted non-discriminatory reasons." *E.g. Straughan v. Vibra Rehabilitation Hospital of El Paso*, 2020 WL 10758973 (W.D. Tex. Nov.

[3] The only disciplinary action Defendant has taken is the suspension of Plaintiff on April 22, 2022. Docket 48-3. Again, at this time Dr. Assini was no longer working for Defendant. And there is no reason to think that anything which happened in 2022 has a bearing on Dr. Boles's pay rate in 2015-2021. It is also worth observing that this suspension was issued in the midst of this litigation, after the Complaint was filed and around the time of Dr. Boles's deposition. It could easily be considered retaliatory given this timing.

29, 2020) (quoting *Stennett v. Tupelo Public School Dist.*, 619 Fed.Appx. 310, 317 (5th Cir. 2015)). Specifically, an employee can demonstrate pretext by showing that the employer "offer[ed] inconsistent explanations for its employment decisions at different times." *Staten v. New Palace Casino*, 187 Fed.Appx. 350, 359 (5th Cir. 2006) (collecting cases).

i. The first explanation: "Productivity"

Plaintiff first asked Defendant about the difference in his and Dr. Assini's compensation on or around September 17, 2019. Defendant claimed that this disparity was based on "productivity." This explanation was factually false. As just discussed, Dr. Assini's productivity was actually a significant problem for the Defendant. He repeatedly failed to meet the mandatory production targets in his contract and went into debt to the hospital.

Meanwhile, in the minutes from the board meeting that led to Dr. Boles's change in pay in 2019, the individual making the recommendation–referred to as "SB"–explains that "[Plaintiff] is a hard worker. So, he always exceeds the RVU so he gets almost double–a bonus is almost double of his base salary. Nothing wrong with that." Docket 48-1 at p. 91 (Board Meeting Minutes).

Defendants make much of productivity reports from before the relevant time period, claiming that Dr. Boles was paid less because his productivity was lower. The problem is that, when these facts changed in 2019, Defendants still refused to raise Dr. Boles's pay, suggesting that these were not the true reason for the lower pay at all. Productivity during the relevant time period was as follows:

FISCAL YEAR[4]	DR. ASSINI	DR. BOLES	DIFFERENCE
2018	6734.16	6093.43	640.73

[4] Exhibit 3 at p. 11.

2019	6766.05	6409.45	356.6
2020	4357.77	5151.51	-793.74
2021	476.48	5117.19	-4640.71

This does not reflect an unproductive Dr. Boles. And yet, even after proving himself productive in 2018 and 2019, and even after allowing the Defendant to raise his minimum expected WRVUs by 70%, Dr. Boles remained at the $45 rate.

It is true that, from 2012 to 2018, Dr. Boles generally worked fewer total WRVUs than Dr. Assini. Yet, even considering that, Dr. Boles's rate of compensation was still low for his productivity. A 2018 report commissioned by Defendant found that Dr. Assini's productivity was between the median and the seventy-fifth percentile while his compensation was between the seventy-fifth and ninetieth percentile. Exhibit 9 (Compensation Report). That is, Dr. Assini's compensation percentile was higher than his productivity. Meanwhile, Plaintiff's productivity was between the twenty-fifth percentile and the median, but his compensation was below the twenty-fifth percentile. *Id*. That is, Plaintiff's compensation was in a lower quartile than his productivity, while Dr. Assini's compensation in a higher quartile than his productivity.

Again, by 2019, at the time Dr. Boles confronted the hospital about the disparity in his pay, his actual productivity had come basically on par with Dr. Assini's. And then, beginning in 2019, Dr. Boles's productivity surpassed Dr. Assini's. Yet Dr. Boles's rate of pay per WRVU never approached Dr. Assini's - nor did Dr. Assini's rate decrease. In short, neither doctors' rate of pay per WRVU ever changed in response to their actual productivity.

ii. The second explanation: Board certification and being "coded differently for billing purposes"

Defendant changed its approach in its EEOC position statement dated March 11, 2020. Exhibit 10 (Position Statement). This time, Defendant claimed that it compensated Plaintiff and

Dr. Assini differently because "Dr. Assini . . . is board certified whereas Dr. Boles is not" and therefore that "Dr. Assini's board certification allow[ed] him to perform ankle and foot surgery and he [was], therefore, coded differently for billing purposes. In contrast, [Plaintiff]--who is not board certified--is coded for general podiatry." *Id*. at p. 2.

Defendant later revealed that this explanation was also not true. At deposition, Defendant explained that it is "reimbursed by a CPT code" and that the CPT code does not change based on the particular provider's certifications. Exhibit 4 (30(b)(6) Transcript) at 69:19, 70:20-71:20. Defendant admitted that the certifications of its providers has nothing to do with how much Defendant is reimbursed. *Id*. at 71:23-72:1. In other words, Dr. Assini's board certification does not actually change how he is coded for billing purposes, nor does it increase the reimbursement rate of the hospital. The Defendant had misled the federal government in the EEOC position statement.

Given the prima facie case here, the jury could easily see this false statement as strong evidence that the Defendant is trying to hide race discrimination.

iii. The third explanation: "expected WRVUs" and "MGMA data"

Defendant changed its position again when it provided interrogatory responses on March 11, 2022. In those responses, Defendant claimed that "physician' compensation is based on the expected work RVU's (WRVUs) to be produced in a particular year." Exhibit 3 (Defendant's Interrogatory Responses) at p. 4. Defendant also twice stated that it considered guidance from the Medical Group Management Association (MGMA) in determining physician compensation. *Id.* at pp. 3, 12. Defendant had not mentioned expected WRVUs or MGMA guidance in its past explanations.

It appears that the "expected WRVUs" argument is that a physician that agrees to work a higher "base" level of WRVUs in the contract is more valuable to the hospital in some way, which justifies a higher per-WRVU compensation rate. Although the 30(b)(6) deponent did not mention this theory at deposition, she now tries to resurrect it in her declaration.

The declaration claims that the higher "a physician's minimum WRVU production expectation [in the contract], the higher a physician's conversion factor will be." Docket 48-2 (Denton Declaration) at ¶ 6. But that is belied by what happened with Dr. Boles and Dr. Assini in 2012, in 2015, and again in 2020 as the contracts show. In 2012, Dr. Assini made $43 per WRVU to Dr. Boles's $44 per WRVU, even though Dr. Assini's minimum WRVU production expectation was more than double Dr. Boles's (5300 vs. 2500).[5] Then in 2015, Dr. Assini's pay went up to $52 per WRVU even though his minimum production expectation actually fell (from 5300 to 4800). Then, in 2020, Dr. Boles allowed his minimum production expectation to be raised some 70%, from 2500 to 4300, and yet his pay per WRVU remained completely unchanged at $45 per WRVU. In short, not once did any change in the contracts reflect any connection between the conversion rate and the expected WRVUs.[6]

Defendant also backed away from the "MGMA data" rationale at deposition. At one point, Defendant testified, "we don't really look at it that much." Exhibit 4 (30(b)(6) Transcript) at 77:3-4. Later in the deposition, Defendant claimed that it looked at MGMA data for recruiting

[5] Dr. Assini was also Board certified in 2012, so that cannot be the reason for his unexplained raise to $52 per WRVU in 2015.

[6] Defendant even goes so far as to claim that "the pay differences among ***all*** GLH physicians were based on differing WRVU expectations," as if there is a concrete formula. Docket 49 (Defendant's Summary Judgment Memorandum) at p. 13 (emphasis in original). And in footnote 75 of their brief, Defendants suggest that there is an actual direct proportionality between expected WRVUs and conversion rate, such that when Dr. Boles's expected WRVUs were 85% of Assini's, then Dr. Boles's conversion rate was therefore also 85% of Dr. Assini's conversion rate. This is misleading the Court, as these proportions did not hold in 2012 or in 2015.

physicians but not for setting the conversion rate for tenured physicians. *Id*. at 78:23-25, 79:25-80:3.

Again, Defendant's flailing for an explanation will be transparent to the jury, which will readily and reasonably infer discrimination

iv. The fourth explanation: "billing issues"

At deposition, on May 5, 2022, Defendant tried to bring forward the "billing issues" in 2009-2012, discussed above. Exhibit 4 (30(b)(6) Transcript) at 99:12-14. However, Defendant admitted that Dr. Assini had also had billing issues and that Dr. Assini's billing issues had no effect whatsoever on his conversion rate. *Id*. at 101:1-3.

Also at deposition, Defendant attempted to resurrect the initial "productivity" explanation but had to admit that it did not say any such thing in its EEOC position statement. *Id*. at 117:4-7; 96:12-14.

v. Miscellaneous other pretexts.

After failing to identify a plausible explanation at deposition, the 30(b)(6) witness now tries to add in a number of other factors in her declaration supporting this motion, including "malpractice expenses," "[p]lace of service factors," and "Geographic Practice Cost Indices." Docket 48-2 (Denton Declaration) at ¶ 4. Before this declaration, Defendant had never mentioned these factors in explaining how it compensates physicians. It has offered no reason to think any of these factors actually played a role in setting Dr. Boles's and Dr. Assini's pay.

vi. The truth: Defendant has no evidence any of the above was actually considered in setting pay.

The reality here is that Defendant has offered no evidence that any of its various explanations are anything but an after-the-fact effort to come up with a justification for the pay discrepancy. Defendant's only declarant, Lea Denton, carefully states that she is "familiar" with

how pay is set in a general way, but she does not say she was a decisionmaker concerning Dr. Boles' or Dr. Assini's pay - because she was not. The declaration offers no first-hand, actual personal knowledge that these factors were actually considered. There is no evidence any of the above factors ever actually crossed the mind of the people who set Dr. Boles's and Dr. Assini's pay. These are all *post hoc* rationales.

Indeed, at deposition, this witness admitted that Defendant did not determine Plaintiff's initial compensation using any of the above factors. Instead, the witness claimed that it determined Plaintiff's initial compensation by "taking his past three year W-2s and adding $20,000." Exhibit 4 (30(b)(6) Transcript) at 19:12-15. And it knowingly refused to adjust Dr. Boles's pay to be equitable when it gave a White podiatrist on the staff a 15% raise in rate of pay.

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The truth is, as Defendant admitted at deposition, it has no written policy or customary method for determining initial physician compensation. Exhibit 4 (30(b)(6) Transcript) at 20:21-21:5. It does whatever it wishes each time it sets pay. This leaves open a very realistic likelihood that the hiring official might stereotype and assume that a White doctor is more competent, more in-demand, more deserving of high pay than a Black doctor, and give discriminatory raises. And the jury could reasonably find - given the many misstatements and shifting explanations given by the Defendant - that this is precisely what happened here.

CONCLUSION

Michelle Alexander wrote: "In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't." This problem of hidden, covert discrimination is exactly what the

McDonnell-Douglas framework was created to address. This case perfectly illustrates the need for that approach and how it can and should work.

For all of these reasons, Defendant's motion should be denied and the matter set for a jury trial.

Respectfully submitted on July 27, 2022,

/s/ Joel Dillard

Joel Dillard (MSB No. 104202)
JOEL F. DILLARD, P.A.
775 North Congress Street
Jackson, Mississippi 39202
(601) 509-1372, ext. 2
joel@joeldillard.com

CERTIFICATE OF SERVICE

I certify that, on July 27, 2022, I served the foregoing via the CM/ECF system on all counsel of record, including the following:

Susan Fahey Desmond
Jackson Lewis P.C.
601 Poydras Street
Suite 1400
New Orleans, LA 70130
504-208-5839
504-208-1759 (fax)
susan.desmond@jacksonlewis.com

Michael Brian Taylor
Jackson Lewis PC
601 Poydras Street
Ste 1400
New Orleans, LA 70130
504-208-1755
504-208-1759 (fax)
michael.taylor@jacksonlewis.com

/s/ Joel Dillard
Joel Dillard