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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000785-MR

CATHERINE FLOWITT, M.D. — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 98-CI-00250

ASHLAND HOSPITAL CORPORATION, D/B/A KING'S DAUGHTERS MEDICAL CENTER — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES, AND KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Catherine Flowitt, M.D., appeals from a February 13, 2006 order of the Boyd Circuit Court dismissing her breach of contract and disability discrimination claims against Ashland Hospital notwithstanding a jury verdict in her favor. Ashland Hospital does business as King's Daughters Medical Center (KDMC), and in addition to its 385 bed regional hospital in Ashland operates a number of family

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

care centers in Boyd, Carter, and Greenup counties. Flowitt, a physician who was hired to work primarily at the family care centers, alleges that KDMC breached her employment contract and unlawfully discriminated against her when it conditioned her continued employment on her participation in an Impaired Physicians Program (IPP) provided by the Kentucky Physicians Health Foundation. She contends that the trial court erred by setting aside the jury's finding in her favor on those allegations. We agree with Flowitt that the trial court should not have set aside the jury's breach of contract verdict. For reasons somewhat different than the trial court's, however, we agree that the jury's discrimination verdict must be set aside. Accordingly, we affirm in part, reverse in part, and remand for entry of an amended judgment.

As the parties correctly note, a motion for judgment notwithstanding the verdict under CR 50.02 is similar to a motion for a directed verdict under CR 50.01 and is assessed according to the same standards.

> When either motion is made the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give h[er] the advantage of every fair and reasonable intendment that the evidence can justify.

Lovins v. Napier, 814 S.W.2d 921, 922 (Ky. 1991). Neither motion should be granted unless the failure of proof is such that no reasonable juror could find in favor of the non-movant. *Bierman v. Klapheke,* 967 S.W.2d 16 (Ky. 1998). On appeal, this Court

> must review all the evidence presented to the jury and must uphold the trial court's decision if after all the evidence is construed most favorably to the verdict winner, a finding in h[er] favor would not be made by a reasonable [person].

Moore v. Environmental Construction Corporation, 147 S.W.3d 13, 16 (Ky. 2004) (citation and internal quotation marks omitted).

Construed thus favorably to Flowitt, the record shows that she and KDMC began their relationship in September 1996 under a twelve-month contract that authorized KDMC to terminate the agreement at any time either with or without cause. If the termination were with cause, then the employee would reimburse the employer for certain bonus, moving assistance, and other non-salary payments, and if it were without cause, then the employer would provide severance pay equal to three months base salary. Flowitt began work in November 1996, and was assigned primarily to a family care clinic in Grayson, Kentucky, although apparently she also worked at other clinics. In addition, she saw patients at the Ashland hospital.

According to Flowitt, her move to Kentucky and the beginning of her new job unfortunately coincided with several personal difficulties. She and her husband were Canadian citizens, and her husband's job necessitated his return to Canada, leaving her to care for their three children. Two of the children were having trouble adjusting to the move, one enough trouble to require therapy and home-bound schooling. In the winter of 1996 and spring of 1997, Flowitt faced the two-year anniversaries of what had been the unexpected deaths of both her father and brother. Those anniversaries stirred up painful feelings of guilt and remorse. Flowitt also had a history of migraine headaches, and in late April 1997 she experienced severe headaches and dizzy spells, which, together with her upset emotions, led her in a period of only about two weeks to be late for work three

or four times, to call in sick two or three other days, and to leave work early another time. On May 6, 1997, a KDMC administrator, Gayla Harvey, confronted Flowitt and warned her that her attendance and punctuality needed to improve.

At about this same time, Harvey also requested that the quality control administrator, Kristi Estep, investigate complaints that Flowitt had failed to make rounds at the hospital. After reviewing seventy-five patient charts and interviewing nurses at the hospital and some of Flowitt's hospital patients, Estep reported on May 19, 1997, that on seven occasions Flowitt had failed to visit a patient; that two patients had complained about Flowitt's unresponsiveness to their questions; that several nurses had characterized Flowitt as distracted and unsure of herself and had complained about her habit of asking them for treatment advice, particularly advice about pediatric medications; and that on one occasion the pharmacist had questioned Flowitt's order of 750 milligram doses of Solumedrol for a 105 pound geriatric patient, and the order was changed to 50 milligram doses.

Flowitt testified that she had never failed to visit any of her patients, but had only failed to chart some of her visits. She also testified that her Canadian training had emphasized a team approach to treatment so that it was natural for her to consult others, particularly, she said, the pharmacists at the hospital. Solumedrol, she testified, is an anti-inflammatory medicine similar to Pregnazone and generally not a dangerous drug. She had prescribed large doses of it in the past to ensure that patients with

breathing problems would not need to be ventilated. The pharmacist at KDMC was not comfortable with that treatment, however, and she deferred to the local approach.

Estep's report led a Peer Review sub-committee of the Medical Executive Committee to recommend on May 27, 1997, that certain consultation and review restrictions be placed on Flowitt's staff privileges and that she be referred to the Impaired Physicians Program. These recommendations would eventually have been submitted to the full Medical Executive Committee, and before adopting them the Committee would have given Flowitt an opportunity to address the concerns raised by Estep's report. Apparently, too, any restrictions ultimately placed on Flowitt's privileges would have been reported to a national physician's data base and so could have affected Flowitt's employment prospects. Events, however, took a different course.

Flowitt's spate of headaches in late April and early May 1997 made her worry that she might be experiencing the recurrence of a tumor. In about 1988 she had been diagnosed with a left, frontal meningioma, a non-cancerous tumor of the meninges, the thin membranes enveloping the brain. In that year, she had had the tumor removed and after recuperating for about four months had resumed her employment as a family practitioner. Since then she had not experienced any tumor or surgery related problems, although the migraines she had suffered since her childhood continued. Apparently there is a risk that meningiomas will recur, however, and in the spring of 1997, when she was having headaches more frequently than usual, Flowitt worried that her tumor might have come back. While Estep was making her investigation and the Peer Review Committee

was considering her report, Flowitt discussed her concerns with one of her colleagues on the medical staff, Dr. Hollis, who had reviewed Flowitt's medical history prior to her employment. They agreed that she should have a brain scan, and so Dr. Hollis arranged for an MRI and for a meeting with a neurologist, Dr. Shields. Flowitt testified that she had not realized that Dr. Hollis was formally "referring" her to Dr. Shields and that during her meeting with Dr. Shields to review the MRI he performed only a cursory examination. However, on June 5, 1997, Dr. Shields reported to Dr. Hollis that though there was no indication of a tumor, his testing suggested "a frontal lobe defect" affecting Flowitt's ability to calculate, to distinguish left from right, and her memory. He recommended "neuropsychological testing to determine her cognitive abilities and function," and referred her to a neuropsychologist, Dr. Phifer.

Flowitt met with Dr. Phifer four times between June 18 and June 27, 1997. During those meetings he gave her a full battery of neuropsychological tests, and in particular employed tests designed to expose the sort of frontal lobe deficits Dr. Shields had noted. In almost all the areas of mental functioning that Dr. Phifer tested, Flowitt scored in the high average or superior range. He concluded that there was "no evidence of clinically significant cognitive deficits." He did note, however, that on a test requiring her "to alter problem solving strategies in response to environmental feedback, she scored in the mildly to moderately impaired range." He testified that such an impairment could have resulted from her tumor or its removal. He reported, however, that any such impairment was unlikely to affect her work performance except possibly "under high-

stress conditions in which her typically superior coping skills are over-taxed." To help ensure that she remained organized even in the sometimes stressful and chaotic hospital environment, he recommended that she employ a memory tool, such as a personal digital assistant and that she receive training in stress management techniques. He also recommended that she address her family and grief concerns by "participat[ing] in short-term psychotherapy." Otherwise, he noted that she exhibited a "pattern of distractibility," but concluded that the distractibility "does not appear to be of sufficient magnitude to preclude her from competently executing the duties of her occupation as a family care physician."

Before Dr. Phifer had made his examination or issued his report, Dr. Shields's exam came to the attention of KDMC administrator Gayla Harvey. There was evidence suggesting that Harvey contacted Shields prior to his meeting with Flowitt, and the record also includes what is apparently a memorandum of a mid-June 1997 telephone conversation between Shields and Harvey in which Shields seems to have characterized Flowitt as physically impaired and possibly unfit to practice. Armed with Shields's impressions, with Estep's report, and with the Peer Review Committee's recommendations, Harvey apparently brought the matter to Anne O'Hare, KDMC's then Vice President for Legal and Administrative Affairs. On June 19, 1997, the day following Flowitt's first meeting with Dr. Phifer, O'Hare met with Flowitt and expressed the hospital's concern that her medical condition might be affecting her ability to practice. O'Hare requested that Flowitt take an immediate leave of absence from the

medical staff, continue testing with Dr. Phifer, and undergo an evaluation by the IPP. Otherwise, she explained, the Medical Executive Committee could impose the restrictions recommended by the Peer Review Committee and those restrictions would appear on Flowitt's national database record. Not wanting to risk the blot on her record, Flowitt agreed to O'Hare's terms. She took a leave of absence, continued testing, and on June 23, 1997, met with Dr. Burns Brady, the Director of the Impaired Physicians Program.

The Impaired Physicians Program was apparently conceived as a support program for physicians suffering from addiction and substance abuse problems. Physicians serious enough about confronting such problems to enter a five year "moral contract" with the program, during which the program closely monitors the physician's work performance and sobriety, receive in return sobriety assistance and help resolving workplace conflicts. Flowitt did not have a substance abuse problem, and the hospital's concerns about her did not fit easily into the program's model. Nevertheless, in a July 14, 1997 letter, Dr. Brady reported to O'Hare that he had interviewed Flowitt and had reviewed the reports by Drs. Shields and Phifer. He accepted those doctors' exams as sufficient for his purposes, and stated that if she would agree to a "moral contract" he would accept Flowitt into the program, requiring her to carry out Dr. Phifer's PDA, stress management, and therapy recommendations. Although Brady's July 14 letter did not otherwise specify what Flowitt's "moral contract" would entail, Flowitt testified at trial that he demanded a commitment far beyond Dr. Phifer's short-term recommendations:

> [B]asically, the gist of what he explained [was], if I signed on with them this would be a five year program where I would be involved with this Kentucky Physician Health Foundation, signing on as being an impaired physician, and they would be involved on a constant basis with me as having an impairment. They would be in constant supervision at all times.

Neither Brady nor KDMC ever disputed this characterization of Brady's requirements. In discovery, KDMC had produced a memorandum of a phone conversation between Dr. Brady and O'Hare from that same day, July 14, 1997. The note reflects, and O'Hare so testified, that during the conversation Brady had said that the best course of action with respect to Flowitt "was to try to work out a way to get rid of her." Although Flowitt had not been aware of Dr. Brady's remark at the time, she testified that his insistence that she commit to his five-year program as an impaired physician was more consistent with that "get rid of her" approach than with the July 14 letter's purported concern that she satisfy Dr. Phifer's "short term" counseling recommendations. Because she felt that a five-year commitment to the Impaired Physicians Program was inappropriate in her case, and because she did not want to risk creating the impression that she had substance abuse problems, Flowitt decided against participating in the IPP. Instead, she testified, she tried several times to meet again with O'Hare to discuss a more reasonable means of demonstrating compliance with Phifer's limited recommendations, but O'Hare refused to see her.

Flowitt also decided to explore employment opportunities elsewhere. According to her trial testimony, by late June she was convinced that Harvey at least and

possibly others were determined to oust her, and thus she had begun looking for other opportunities. In early July, she negotiated a Guaranteed Professional Fee contract with officials of the Magnolia Regional Health Center in Corinth, Mississippi. The agreement, apparently, was for Flowitt to undertake a private practice in Corinth and for the Health Center to provide assistance, including a guaranteed income, during the first year while the practice was being established. The agreement was conditioned on Flowitt's providing satisfactory Kentucky references. On about August 22, 1997, Flowitt, accompanied by counsel, met with O'Hare. Flowitt explained her objections to the Impaired Physicians Program and asserted that she had essentially carried out Dr. Phifer's recommendations, but O'Hare reiterated the hospital's insistence that Flowitt join the IPP or face proceedings before the Medical Executive Committee. The parties then, apparently, negotiated a severance arrangement whereby Flowitt would be released from her KDMC contract without having to reimburse the hospital for any non-salary payments, and the hospital would provide at least a neutral recommendation to the Corinth Health Center.

On September 8, 1997, however, the Chairman of the Corinth Health Center's Recruiting Committee wrote to Flowitt informing her that because her Kentucky references did not meet its standards the Health Center was withdrawing its guaranteed fee offer. Convinced that KDMC officials had breached the agreement to provide at least a neutral recommendation, on October 6, 1997, Flowitt's counsel wrote to O'Hare demanding that Flowitt be permitted to return to work. Then, on March 13, 1998, after

O'Hare had again asserted the hospital's insistence that Flowitt participate in the IPP, Flowitt brought the present action seeking damages for breach of her KDMC contract, for interference with her Corinth Health Center contract, for violation of the Kentucky Civil Rights Act, and for emotional distress. She alleged that KDMC had constructively discharged her without cause and without providing severance pay, that it had discriminated against her on the basis of what it mistakenly believed was a disabling brain condition, and that it had wrongfully made negative comments about her to the Corinth Health Center officials.

Following extensive discovery and numerous preliminary proceedings, the matter was finally tried in the Boyd Circuit Court from September 26 through October 3, 2005. At the conclusion of Flowitt's proof, the trial court dismissed her contractual interference claim because she had failed to show that KDMC had done anything but provide the neutral reference it promised. Her breach of contract and civil rights claims were permitted to go to the jury, however, and the jury resolved both in Flowitt's favor, finding that KDMC had lacked just cause to condition Flowitt's return to work on her participation in the IPP and that KDMC had discriminated against Flowitt because of a mistaken belief that she was substantially impaired. The jury awarded Flowitt $43,333.32 for lost wages and $500,000.00 for emotional or mental distress. KDMC timely moved for judgment notwithstanding the verdict and for a new trial, and by order entered February 13, 2006, the trial court granted the JNOV motion. The court ruled essentially that, contrary to the jury's finding, KDMC established legitimate, non-

discriminatory reasons for insisting that Flowitt participate in the IPP and that her refusal to participate constituted good cause for her dismissal. On appeal, Flowitt contends that substantial evidence supported the jury's findings and that the trial court erred by substituting its judgment for that of the fact finder.

As the parties correctly note, one of the purposes of the Kentucky Civil Rights Act is to "provide for execution within the state of the policies embodied in . . . the Americans with Disabilities Act of 1990," as well as the other federal civil rights acts. KRS 344.020(1). Accordingly, our Courts have interpreted the Kentucky Act consistently with federal law. *Howard Baer, Inc. v. Schave,* 127 S.W.3d 589 (Ky. 2003). Both laws make it an unlawful employment practice for an employer to "fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment . . . because the person is a qualified individual with a disability." KRS 344.040(1), and see 42 U.S.C. §§ 12101 *et seq*. Under both laws, furthermore, in the absence of direct evidence of disability discrimination, a plaintiff may seek to establish a prima facie case of discrimination by proving the following elements: (1) that she is a disabled person within the meaning of the law, (2) that she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation, and (3) that she suffered an adverse employment decision due to her disability. *Howard Baer, Inc. v. Schave, supra; Sullivan v. River Valley School District,* 197 F.3d 804 (6th Cir. 1999). By establishing a prima facie case, the plaintiff shifts the burden to the employer to offer a

legitimate, non-discriminatory reason for the adverse decision. The burden then shifts back to the plaintiff, who must show that the employer's proffered reason is pretextual and that the real reason for the adverse decision was discrimination. *Howard Baer, Inc. v. Schave, supra; Sullivan v. River Valley School District, supra.*

To establish her prima facie case, Flowitt was first required to show that she is a disabled person within the meaning of the law. KRS 344.010 defines "disability" as

> (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
> (b) A record of such an impairment; or
> (c) Being regarded as having such an impairment.

Flowitt relied on part (c). She maintained that, though she is not disabled, KDMC regarded her as disabled and discriminated against her on the basis of that misperception. Flowitt was thus required to show that KDMC regarded her as having an impairment that substantially limited one of her major life activities. *Substantially* limited, the United States Supreme Court has emphasized, means what it says: limited "to a large degree," "unable to perform," or "significantly restricted." *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491, 119 S. Ct. 2139, 2150-51, 144 L. Ed. 2d 450 (1999). Where the major life activity is working, the plaintiff must show that she is perceived as being "unable to work in a broad class of jobs." *Id.* at 491, 2151. It is not enough to be deemed precluded from "one type of job, a specialized job, or a particular job of choice." *Id.* at 492, 2151. Nor is it enough to have been required to submit to a fitness for duty exam. As KDMC notes, federal courts have held that where health problems raise doubts about an employee's

ability to perform her job, the employer's insistence upon an independent medical exam to address those doubts is not enough, by itself, to show that the employer regarded the employee as disabled. *Sullivan v. River Valley School District, supra; Tice v. Centre Area Transportation Authority,* 247 F.3d 506 (3rd Cir. 2001).

Flowitt alleged that KDMC regarded her as substantially limited in the major life activities of thinking and working. Her proof, however, failed to meet the Supreme Court's substantiality standard. Even if KDMC believed that Flowitt had suffered a cognitive impairment, there was no evidence that it believed the impairment "significantly" or "to a large degree" limited her cognitive abilities. On the contrary, Dr. Phifer's testimony tended to show, and the hospital did not dispute, that Flowitt's cognitive abilities are generally well above average. The hospital's concern, based on Dr. Shields's exam as well as Dr. Phifer's, was apparently that Flowitt's abilities to calculate, to remember, and to deal with extreme stress were possibly not as good as a practicing physician's should be. This is simply not a perception of a substantially limiting impairment under the disability statutes. As the Supreme Court has explained, the disability discrimination laws allow

> employers to prefer some physical attributes over others and to establish physical criteria. . . . Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.

Id. at 490-91, 2150. Flowitt's proof established no more than that KDMC regarded her as less than ideally suited for the highly demanding job of hospital physician.

Similarly, there was no proof that KDMC regarded Flowitt as suffering from an impairment that precluded her from a broad class of jobs. At most KDMC thought Flowitt was precluded from her particular job with it, and if one accepts at face value KDMC's assertion that Flowitt might have kept her job by entering the IPP, then even that statement is too strong. KDMC's willingness to provide Flowitt with a neutral reference also indicates that it did not regard her as precluded from a broad class of jobs. Because Flowitt failed to prove that KDMC regarded her as having an impairment that *substantially* limited either her ability to think or her opportunities to work, she failed to establish the first element of her prima facie case and accordingly the trial court should have directed a verdict against her discrimination claim. It was proper, therefore, for the court to dismiss that claim in its judgment notwithstanding the jury's verdict.

We are aware that during the lengthy discussion about the jury instructions, KDMC stipulated that it believed Flowitt cognitively impaired and that the impairment bore upon her fitness for her job. As just discussed, these admissions do not amount to an admission that KDMC regarded Flowitt as disabled within the meaning of the anti-discrimination laws. Nevertheless, the court instructed the jury that "as a matter of law . . . the Defendant regarded the Plaintiff as being impaired in a fashion that substantially limited her major life activities of working and thinking." This "finding" by the trial court is a palpable error under CR 61.02, and manifest injustice would result

from failing to recognize it. *Carrs Fork Corporation v. Kodak Mining Company,* 809 S.W.2d 699 (Ky. 1991). We note the error on our own motion, therefore, and hold that notwithstanding that error the post verdict dismissal of Flowitt's discrimination claim must be upheld because Flowitt failed to prove that KDMC regarded her as disabled.

The trial court should not, however, have disturbed the jury's verdict on Flowitt's breach of contract claim. As noted above, under Flowitt's contract, KDMC could terminate her employment at any time with or without cause, but if the termination was without cause then the hospital was obligated to pay her three months severance pay. The jury found that Flowitt's termination was without cause and that the severance provision therefore applied. In overturning the verdict, the trial court ruled that as a matter of law KDMC was justified in requiring Flowitt to participate in the IPP and that her refusal to participate provided just cause for her termination.

The law the trial court relied upon was federal anti-discrimination law. The Americans with Disabilities Act (ADA) generally prohibits covered employers from requiring disability-related medical examinations "unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). As just noted above, the federal courts construing this provision have held that once an employee's ability to perform her job has come into doubt, the employer can, consistent with the statute, require her to undergo an examination designed to determine her ability to work. *Sullivan v. River Valley School District, supra; Tice v. Centre Area Transportation Authority, supra; Krocka v. City of Chicago,* 203 F.3d 507

(7th Cir. 2000); *Cody v. CIGNA Healthcare of St. Louis, Inc.,* 139 F.3d 595 (8th Cir. 1998). Requiring an exam is not lawful, however, unless there is "significant evidence that could cause a reasonable person to inquire" about the employee, *Sullivan v. River Valley School District,* 197 F.3d at 811, and the examination "must, at minimum, be limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue." *Tice v. Centre Area Transportation Authority,* 247 F.3d at 515. *See also Davis v. Ashcroft,* 355 F.Supp.2d 330 (D.D.C. 2005) (denying employer's summary judgment motion where there was evidence that the examination was not sufficiently fitness related).

The trial court ruled, and we agree, that under this authority Estep's report, the Peer Review Committee's recommendations, and Dr. Shields's report raised sufficiently significant concerns about Flowitt's ability to perform her job to justify KDMC's requirement that she take a leave of absence and undergo the exam by Dr. Phifer. The same authority, the trial court ruled, also supported KDMC's further requirement that Flowitt participate in the Impaired Physicians Program, and thus the IPP requirement—and Flowitt's termination when she failed to meet it--could not, consistent with the federal authority, be deemed a breach of Flowitt's contract.

We appreciate the trial court's reasoning, but we reject the premise that federal law necessarily authorized KDMC's insistence that Flowitt join the Impaired Physicians Program. On the contrary, as noted, under the federal law an employer's right to order medical examinations is limited to examinations reasonably calculated to address

bona fide concerns about the employee's fitness. In this case, a reasonable juror could have found that following extensive testing Dr. Phifer determined that Flowitt was not significantly impaired and was fit for her employment. A reasonable juror could then have found that a five-year assignment to the IPP, a program principally designed for an altogether different problem, was not reasonably calculated to address bona fide fitness concerns, or to address Dr. Phifer's modest recommendations that Flowitt pursue memory enhancement, stress reduction techniques, and "short-term psychotherapy." Because Flowitt's unrebutted testimony concerning the five-year commitment asked of her, particularly in conjunction with Dr. Brady's "get rid of her" remark, was thus substantial evidence tending to show that KDMC's Impaired Physicians Program requirement did not meet ADA standards for fitness exams, the federal law posed no obstacle to Flowitt's breach of contract claim. Moreover, because this evidence tended to show that KDMC's IPP requirement was not reasonable, the same evidence also tended to show that KDMC lacked good cause for terminating Flowitt's contract when she refused the IPP assignment. The jury's finding that KDMC breached the contract, therefore, while not the only finding supported by the evidence, was nevertheless a reasonable interpretation of the evidence and so should not have been disturbed by the trial court's JNOV.

We come then to the question of damages. The jury did not make separate damage awards for breach of contract and for discrimination, but awarded Flowitt $43,333.32 in lost wages and $500,000.00 for emotional or mental distress. We must

decide what portion of this award, if any, survives the dismissal of Flowitt's discrimination claim. Generally, tort damages such as punitives or, as here, damages for emotional distress, are recoverable for breach of contract only if the breach involved conduct that was independently tortious and outside the risks contemplated by the contract. *Ford Motor Company v. Mayes,* 575 S.W.2d 480 (Ky.App. 1978). The only tort-like wrong Flowitt alleged was the violation of the Kentucky Civil Rights Act. Apart from her discrimination claim, therefore, Flowitt's breach of contract claim is governed by the general rule limiting recovery for breach of contract to economic losses and will not support the award of emotional distress damages.

Even if emotional distress damages were available, moreover, the jury's award of such damages could be upheld only if supported by substantial evidence of an actual emotional injury. *Motorists Mutual Insurance Company v. Glass,* 996 S.W.2d 437 (Ky. 1997); *Kentucky Commission on Human Rights v. Fraser,* 625 S.W.2d 852 (Ky. 1981). We agree with the trial court that Flowitt's proof of emotional injury did not meet this substantial evidence standard. The evidence of emotional distress consisted of brief remarks during Flowitt's testimony and a comment in Dr. Phifer's report. Flowitt testified that she was "quite upset" by Gayla Harvey's reprimand and by being forced to take a leave of absence, a leave she would thereafter be forced to explain to prospective employers. Dr. Phifer noted that Flowitt was angry about the way KDMC was treating her and that she had had some "sleep difficulty [and] incredible dreams." The context of Dr. Phifer's note, however, was Flowitt's report of her family concerns and her grief as

well as her conflict with KDMC, and the suggestion was that her dreams were as related to those other family matters as to the employment conflict. Indeed, Flowitt denied having symptoms of depression and claimed that despite the several stresses in her life she was able to "compartmentalize things." Dr. Phifer recommended counseling not for Flowitt's work-related distress but for her grief. Moreover, we have noted that KDMC's requiring Flowitt to take a leave of absence and undergo Dr. Phifer's examination was not wrongful given the employer's legitimate concerns about Flowitt's fitness following Estep's report and Dr. Shields's exam. Distress flowing from those lawful requirements could not be the basis for an award of damages. Flowitt presented no evidence of any emotional upset flowing specifically from the requirement that she participate in the IPP. In short, although the jury could certainly infer that Flowitt's conflict with KDMC had been unpleasant, aggravating, and worrisome, there was no evidence of an actual injury —of any disruption of Flowitt's affairs or personality flowing from the breach of contract or KDMC's wrongful acts—which would support the substantial emotional distress damages award in this case. For this reason, too, then, we agree with the trial court that the jury's award of emotional distress damages must be overturned.

Finally, under Flowitt's contract, if KDMC terminated the agreement without cause, as the jury found it did, then Flowitt was entitled to "three months base salary as severance pay." Flowitt's base salary was $130,000.00 per year, and a fourth of that (three months worth) is $32,500.00. The jury awarded Flowitt $43,332.32 as lost wages. Although the parties have not indicated how the $43,332.32 figure was

calculated, the difference between that amount and $32,500.00 apparently reflects the fact that Flowitt's discrimination claim alleged four rather than three months of lost salary. Because Flowitt's contract claim entitles her only to the three-month amount, the award of lost wages must be vacated and remanded for entry of the amount provided by the parties' contract--$32,500.00.

In sum, although for somewhat different reasons, we agree with the trial court that KDMC's concerns about Dr. Flowitt's fitness to practice could not be found to imply that KDMC regarded her as disabled and thus did not bring Dr. Flowitt within the protections of the Kentucky Civil Rights Act. Notwithstanding the jury's contrary verdict, therefore, the trial court properly overturned the disability-based award of emotional distress damages and dismissed Flowitt's disability discrimination cause of action. The trial court erred, however, by overturning the jury's finding that KDMC lacked good cause under Dr. Flowitt's contract when it conditioned her return to practice on her five-year participation in the Impaired Physicians Program. Accordingly, we affirm that portion of the February 13, 2006 order of the Boyd Circuit Court setting aside the jury's discrimination verdict and its award of emotional distress damages, reverse that portion of the February 13, 2006 order setting aside the jury's breach of contract verdict, and remand for entry of a new judgment awarding Flowitt damages under her contract equal to three months base salary.

ALL CONCUR.

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