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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001163-MR

LEISA C. VANHOOK — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 03-CI-01011

BRITTHAVEN OF SOMERSET, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Leisa C. Vanhook appeals from an order of the Pulaski Circuit Court which granted summary judgment to Britthaven of Somerset, Inc. Vanhook, a registered nurse, had claimed she was wrongfully discharged from her employment at Britthaven, a nursing home, for filing a complaint with her supervisor that a patient's health had been jeopardized by inadequate care. Because we believe that a genuine issue of material fact exists, we reverse and remand.

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

Kentucky Revised Statutes (KRS) 216B.165 imposes an affirmative duty upon employees of health care facilities to report when they know or reasonably believe that a patient's health or safety is in jeopardy. It states in pertinent part:

> (1) Any agent or employee of a health care facility or service licensed under this chapter who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy shall make an oral or written report of the problem to the health care facility or service, and may make it to any appropriate private, public, state, or federal agency.
>
> (2) Any individual in an administrative or supervisory capacity at the health care facility or service who receives a report under subsection (1) of this section shall investigate the problem, take appropriate action, and provide a response to the individual reporting the problem within seven (7) working days.

The statute also contains a provision specifically prohibiting retaliation against an employee for making such a report:

> (3) No health care facility or service licensed under this chapter shall by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any agent or employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility or service the circumstances or facts to form the basis of a report under subsections (1) or (2) of this section. No health care facility or service shall require any agent or employee to give notice prior to making a report, disclosure, or divulgence under subsections (1) or (2) of this section.

Leisa Vanhook was employed as a registered nurse at Britthaven of Somerset Inc. from January 2001 through June 26, 2003, when she was discharged. We review the events immediately preceding Vanhook's termination in the light most favorable to the party opposing the summary judgment. *Steelvest v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). The following account is based on Vanhook's deposition testimony: On June 23, 2003, at the end of her shift at around 6:15 a.m., Vanhook observed a patient exhibiting symptoms of a urinary tract infection. She documented the condition on the patient's 24-hour report and his medical record, and also verbally reported it to the oncoming charge nurse. She explained that because the situation was not an emergency, a physician was not contacted immediately because it was still very early in the morning. However, a physician should have been contacted later in the day. Vanhook was next on duty on the evening of June 25, 2003, when she observed that the patient's condition had drastically worsened and he was running a fever. She discovered that a physician had not been contacted. Vanhook immediately called a physician and administered treatment to the patient. On the morning of June 26, 2003, before she went off her shift at 7:00 a.m., Vanhook placed in the office mailbox of her supervisor, Director of Nursing Lela Putnam, a complaint alleging that the facility had failed to contact a physician in a timely fashion to treat the patient.

When she arrived back at work that evening at 6:30 p.m., she was called into Putnam's office, where she was informed that she was being terminated from her employment. Putnam informed her that she was a good nurse, but explained that there

had been "too many complaints." Vanhook asked if she were referring to complaints "made about me or by me." Putnam replied, "a complaint is a complaint." No copy of Vanhook's complaint has been produced. Vanhook claims that she had placed a copy of the complaint in a file in her desk at work, but was not allowed to retrieve it after her termination. Putnam denied ever receiving the complaint. After her termination, Vanhook also filed a complaint in connection with the incident with the Inspector General of the Department for Health and Human Services. This report confirms that the incident with the patient suffering the infection had occurred, and that although symptoms of his infection were observed on June 23 at 6:15 a.m., a physician was not contacted to prescribe treatment until June 25, 2003, at 9:30 p.m.

On September 29, 2003, Vanhook filed suit against Britthaven in Pulaski Circuit Court, alleging that she had been terminated in retaliation for filing the complaint with her supervisor. The trial court granted summary judgment to Britthaven on the grounds that there was no credible evidence that Vanhook had filed the complaint, whereas there was significant and substantial evidence in the record that her termination was for good cause based on her work history. During the course of her employment with Britthaven, Vanhook was the subject of numerous complaints from her co-workers and from residents. These complaints mainly concerned her personnel skills and the allegedly abrasive manner in which she criticized or communicated with other staff members. On December 12, 2002, Vanhook received a disciplinary warning notice that listed the following problems: that some labs were late, that Vanhook had disclosed and

discussed her pay with other staff members, and that she had been discourteous and rude to other staff members. On June 2, 2003, she received another disciplinary warning notice that she had excessive unexcused absences.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest*, 807 S.W.2d at 480. Even though the trial court may believe the party opposing summary judgment may not succeed at trial, it should not render summary judgment if there is any genuine issue of material fact. *Williams v. City of Hillview*, 831 S.W.2d 181, 183 (Ky. 1992).

To establish a prima facie case of retaliation, Kentucky law requires a plaintiff to show that (1) he engaged in a protected activity; (2) the defendant knew that the plaintiff had done so; (3) adverse employment action was taken; and (4) that there was a causal connection between the protected activity and the adverse employment action. *See Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004).

The crux of this case is the fact that the only evidence that Vanhook submitted a complaint to Putnam is Vanhook's own deposition testimony. Britthaven

maintains that an employee should not be permitted to create an "issue of fact" merely by alleging that a complaint was filed and that the complaint was the reason for her termination, when all the evidence indicates that the termination was for well-documented performance issues and there was no corroborating evidence that a complaint was filed.

But Vanhook's testimony, however self-serving it may be, was nonetheless evidence that could be presented to a jury. "It is the function of the jury to determine questions of credibility and issue of fact where the evidence is conflicting." *Embry v. Turner*, 185 S.W.3d 209, 213 (Ky.App. 2006).

> On a motion for summary judgment, the circuit court must examine evidence not to determine any question of fact but to discover if there is a real issue. Summary judgment must not be used to end the rights of litigants to a trial if they have a triable issue.

Williams, 831 S.W.2d at 183.

Moreover, we disagree that there is no corroborating evidence. The report from the Inspector General substantiates with great specificity and detail the incident of alleged patient neglect which occurred immediately before Vanhook's termination.[2] Although it may be purely coincidental that this episode occurred immediately prior to Vanhook's termination, the very close proximity between the well-documented incident

[2] The appellee contends that the Inspector General's report implicates Vanhook in the neglect of the patient. We see no indication of this in the report, beyond a plan of correction which requires a nurse who observes a change in a patient's condition to record it in the acute episode charting guide.

of patient neglect and Vanhook's termination make the timing of her discharge sufficiently suspect to defeat a motion for summary judgment at this point.

Additionally, the disciplinary warning notices issued to Vanhook, one of which is dated December 12, 2002, and the other which recounts unexcused absences observed on June 2, 2002, are both marked "final warning," yet there is nothing to indicate why Vanhook was terminated more than three weeks after the second report.

Finally, since KRS 216B.165(1) expressly permits employees to make oral reports of problems concerning quality of care, the only evidence that such a complaint was made may necessarily consist only of testimony.

For the foregoing reasons, the order granting summary judgment to the appellee is reversed, and this case is remanded to the Pulaski Circuit Court for further proceedings in accordance with this opinion.

ALL CONCUR.

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