

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001958-MR

DIANNA HEREFORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 13-CI-005590

NORTON HEALTHCARE, INC. D/B/A NORTON
AUDUBON HOSPITAL AND PHYLLIS VISSMAN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Dianna Hereford appeals from two Orders of the Jefferson Circuit Court granting the Motions of Norton Healthcare, Inc. d/b/a Norton Audubon Hospital and Phyllis Vissman for Summary Judgment. Hereford argues that genuine issues of material fact remain for adjudication and that the matter was

prematurely dismissed. For the reasons stated below, we find no error and AFFIRM the Orders on appeal.

The facts are not in controversy. Hereford is a registered nurse who was formerly employed by Norton Healthcare, Inc. d/b/a Norton Audubon Hospital (referred to hereinafter as “Norton” or “Audubon Hospital”). On May 7, 2013, she was assigned to the Post Anesthesia Care Unit (“PACU”) at Audubon Hospital. Hereford and an echocardiogram technician were present with a physician for the purpose of assisting in a transesophageal echocardiogram. The patient, who had Hepatitis C, was situated in an examination area behind a privacy curtain. Other patients and/or medical personnel allegedly were nearby.

Prior to the echocardiogram, Hereford performed a “Time Out” procedure to ensure that the patient understood what was about to happen, to clearly mark the site of the procedure (when required), to make sure that all diagnostic tools were available, and otherwise ensure that the procedure would run smoothly. During or just after the Time Out phase, Hereford informed the physician and technician that they should wear gloves because the patient had Hepatitis C.

Sometime thereafter, the patient filed a complaint with Audubon Hospital alleging that confidential health information was improperly disclosed because Hereford’s voice was loud enough to be heard by other patients and medical personnel in the patient’s immediate presence. Hereford was placed on administrative leave. After an investigation, Hereford’s employment with Norton

was terminated on May 9, 2013. As a basis for the termination, Norton determined that Hereford violated the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) for unnecessarily disclosing confidential health information.

On October 30, 2013, Hereford filed the instant action in Jefferson Circuit Court alleging that Norton wrongfully terminated her employment. As a basis for the claim, and while acknowledging that she was an “at-will” employee at Audubon Hospital, Hereford argued that her termination violated public policy because she was fired despite having strictly complied with HIPAA regulations. She further maintained that at most she engaged in “incidental disclosure” which is not actionable under HIPAA. Hereford also asserted that she was defamed when Norton employee and Appellee herein, Phyllis Vissman, improperly investigated the incident and then made defamatory statements about Hereford to members of the Metropolitan Louisville Healthcare Consortium.¹

After some discovery, Norton filed a motion to dismiss, or in the alternative, a motion for summary judgment, as to all of Hereford’s claims. On April 24, 2014, the Jefferson Circuit Court rendered an Order denying Norton’s Motion to Dismiss Hereford’s claim for defamation and granting Norton’s Motion to Dismiss the claim from wrongful termination. In support of the dismissal of the wrongful termination claim, the court determined that Hereford’s termination from

¹ According to the record, the mission of the Consortium is to bring together hospital leaders in the Louisville area to identify recruitment, training, and retention strategies for their prospective and current employees in the areas of nursing and health science.

employment did not fall within one of the narrow exceptions to the employment at will doctrine.

At the close of discovery, Norton moved for summary judgment on Hereford's remaining defamation claim. On October 23, 2015, the court dismissed the defamation claim. It determined that Hereford unnecessarily disclosed the patient's Hepatitis C status during the Time Out procedure, that a physician should not require being told that a patient has an infectious disease as a reminder to wear personal protective equipment such as gloves, and that as a matter of law, Norton and Vissman could not have defamed Hereford by speaking the truth that Hereford was terminated for a HIPAA violation. Having determined that Summary Judgment was warranted, the circuit court dismissed Hereford's action with prejudice and this appeal followed.

Hereford, through counsel, first argues that she presented evidence to the circuit court that she was wrongfully terminated.² She contends that she was improperly discharged despite following established protocols and procedures. After noting Norton's argument that HIPAA is not a state legislative enactment, and is therefore not supportive of a wrongful discharge claim, Hereford maintains that HIPAA provisions are so integrated into Kentucky statutory law as to support a wrongful discharge claim. The corpus of her argument on this issue is that she engaged in compliant behavior with respect to the confidentiality requirements of HIPAA and state law, that she followed the correct Time Out procedure and

² Hereford does not expressly argue that the Jefferson Circuit Court erred in its entry of Summary Judgment.

protocol, and that she should be allowed to present her wrongful discharge claim to a jury.

As the parties are well aware, Kentucky follows the employment at will doctrine, which provides that an employer may discharge an at will employee for “good cause, for no cause, or for a cause that some might view as morally indefensible.” *Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) (citation omitted). *Firestone* recognized a narrow exception to this rule, when the discharge from employment is contrary to a fundamental and well-defined public policy as evinced by existing constitutional or statutory law. *Id.* at 731. This exception was clarified two years later to include instances where the alleged reason for the discharge from employment was the refusal to violate the law, or the employee’s exercise of a statutorily-conferred right. *Grzyb v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985).

The question for our consideration, then, is whether the Jefferson Circuit Court erred in rendering Summary Judgment on this issue in favor of Norton. That is to say, did the circuit court improperly conclude that the facts fell outside the narrow exceptions set out in *Firestone* and *Grzyb*? We must answer this question in the negative. The record does not demonstrate, nor even suggest, that Hereford’s employment was terminated because she 1) refused to accede to a demand from Norton that she violate the law, nor 2) that she exercised a statutorily-conferred right. Hereford’s employment was terminated based on Norton’s conclusion that Hereford violated the patient confidentiality provisions of

HIPAA. As properly found by the circuit court, Hereford does not allege that she was asked to violate the law. Rather, she argues that she was terminated despite *following* the law. *Arguendo*, even if Norton were objectively wrong that Hereford violated HIPAA's patient confidentiality provisions, Hereford cannot rely on HIPAA as a basis for a wrongful discharge claim since HIPAA's confidentiality provisions exist to protect patients and not healthcare employees. See generally, *Shrout v. TFE Group*, 161 S.W.3d 351, 355 (Ky. App. 2005), holding that "the public policy must be defined by statute and must be directed at providing statutory protection *to the worker* in his employment situation." (Emphasis added).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, 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 a judgment as a matter of law." CR³ 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of

³ Kentucky Rule of Civil Procedure.

review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). When viewing the record on this issue in a light most favorable to Hereford and resolving all doubts in her favor, we conclude that Jefferson Circuit Court correctly found that there were no genuine issues of material fact and that Norton was entitled to a judgment as a matter of law.

Hereford also argues that Norton and Vissman published defamatory language about her in her work record and to the Consortium. She directs our attention to the elements of defamation as set out in *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 282 (Ky. 2015), including 1) a false and defamatory statement concerning another person, 2) an unprivileged publication to a third party, 3) fault amounting to at least negligence on the part of the publisher, and 4) either actionability or special harm caused by the publication. Hereford asserts that Vissman’s publication of Hereford’s purported HIPAA violation proves the existence of these elements. Hereford also argues that she was forced to “self-publish” the defamatory information by acknowledging to several potential employers the basis for her termination from Norton. In support of her argument, Hereford tendered the decision of an unemployment insurance referee’s finding that she did not violate HIPAA, as well as an affidavit of Norton employee Frances Berry who stated that she was caring for a patient two beds away from Hereford at the time of the incident and did not hear Hereford mention Hepatitis C. Hereford

alleges damages in the form of reduced income and loss of reputation and claims entitlement to have this matter presented to a jury.

In addressing the defamation argument below, the circuit court cited *Stringer v. Wal-mart Stores, Inc.*, 151 S.W.3d 781, 795 (Ky. 2004) (overruled on other grounds by *Toler, supra*), for the proposition that truth is an absolute defense to a claim of defamation. The question then presented to the circuit court was whether the purported defamatory statements - to wit, that Hereford's employment was terminated because of a HIPAA violation - were true. If so, then Norton and Vissman had an absolute defense to Hereford's claim of defamation.

In examining this question, the circuit court noted that it was not bound by the unemployment insurance referee's finding that Hereford did not violate HIPAA. Rather, the court examined the entirety of the record to conclude that Vissman's alleged defamatory statements were true. This finding was grounded on the court's recognition that a medical provider must use the minimum amount of protected health information to accomplish the necessary purpose. 45 C.F.R.⁴ 164.502. The court concluded that, "Under HIPAA, Hereford's statement was not the minimum amount necessary to accomplish the warning. As a matter of law, the Defendants could not have defamed Hereford by speaking the truth that she was terminated for a HIPAA violation."

Because the dismissal of Hereford's defamation claim was accomplished via Summary Judgment, the standard of review is whether the trial

⁴ Code of Federal Regulations.

court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres, supra*. The record reasonably supports the circuit court’s determination that Hereford’s employment was terminated based on a HIPAA violation. It also supports the court’s conclusion that Norton and Vissman could not have defamed Hereford for publishing the truth that Hereford’s employment was terminated for a HIPAA violation. Additionally, Hereford’s contention that she was forced to self-publish defamatory information to potential employers is not supported by the record, as it is true that she was fired for a HIPAA violation. There are no genuine issues of material fact, and as truth is an absolute defense to a defamation claim, *Stringer, supra*, Norton and Vissman were entitled to a judgment as a matter of law. The defamation claim was properly dismissed and we find no error.

ALL CONCUR.

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