

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0206

MARLA B. WHITTINGTON

VERSUS

HOSPICE CARE SERVICES OF LOUISIANA, L.L.C.

Judgment Rendered: September 10, 2010

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RHB
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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. C559169, Division I, Section "24"

Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of the grant of a partial summary judgment in favor of Hospice Care Services of Louisiana, L.L.C. (Hospice Care) and against Marla Whittington, dismissing Ms. Whittington's claims of recovery pursuant to the Louisiana Whistleblower Statute.¹ For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Ms. Whittington was employed by Hospice Care, a Department of Public Health and Hospitals (DHH) licensed hospice, as its Administrator. Pursuant to her duties as Administrator, she was instructed to hire a new Director of Nursing (DON). Ms. Pamela Alexander was recommended by Dr. Richard Rathbone, Hospice Care's Medical Director, and was interviewed for the position on August 1, 2007. Both Ms. Whittington and Mr. Richard Mahoney, Hospice Care's President, conducted the interview. Upon its conclusion, Ms. Whittington did not feel that Ms. Alexander possessed the requisite one year of full-time experience in providing direct patient care in a hospice, home health, or oncology setting. Nevertheless, Mr. Mahoney offered Ms. Alexander the position. Ms. Alexander accepted the position and began working for Hospice Care on August 20, 2007.

DHH requires that a "Key Change Personnel Form" be sent to it regarding the change of the DON. Because Ms. Whittington believed that Ms. Alexander was unqualified for the position, she refused to sign the form. Ms. Alexander faxed the form to DHH without a signature. Ms. Whittington claimed that when DHH inquired as to the lack of a signature, she was forced to sign the form by Mr. Mahoney.

¹ The Whistleblower Statute, LSA-R.S. 23:967, provides protection to employees against reprisal from employers for reporting or refusing to participate in illegal workplace practices.

On September 4, 2007 Ms. Alexander attempted to resign by submitting to Ms. Whittington a letter of resignation indicating that her reason for leaving was due to her inability to work with Ms. Whittington. As a result, Mr. Mahoney called a meeting attended by Dr. Rathbone, Ms. Whittington, and Ms. Alexander, wherein he advised that he would not accept Ms. Alexander's letter of resignation.

Still unconvinced of Ms. Alexander's qualifications, Ms. Whittington began contacting Ms. Alexander's previous employers in an effort to independently verify the employment history given by Ms. Alexander. During those efforts, Ms. Whittington was advised by Lane Regional Medical Center (Lane Regional) that Ms. Alexander was still employed with them on a PRN (as needed) basis, but had not actually worked since August 19, 2007, the day before she began work at Hospice Care. In addition to the requirement that a DON have one year of full-time experience in providing direct patient care in a hospice, home health, or oncology setting, DHH regulations also mandate that a DON not be simultaneously or concurrently employed by any other licensed health care agency. Ms. Whittington phoned Mr. Mahoney to inform him of Ms. Alexander's ineligibility. Ms. Whittington alleged that at that time she was fired from Hospice Care.

Ms. Whittington filed suit against Hospice Care alleging damages for her termination, including a cause of action pursuant to the Whistleblower Statute. Ms. Whittington claimed that she was fired because she exposed Hospice Care's violation, the hiring of an unqualified DON, to DHH. Hospice Care contended that because DHH eventually determined that Ms. Alexander was a qualified DON, it had committed no violation, and Ms. Whittington's whistleblower claim should be dismissed via summary judgment. The trial court granted Hospice Care's partial motion for

summary judgment, and dismissed Ms. Whittington's claim under the Whistleblower Statute.² This appeal followed.

LAW AND DISCUSSION

1. Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered if, and only if, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Allen v. State ex rel. Ernest N. Morial--New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Schroeder v. Board of Supervisors of Louisiana State University**, 591 So.2d 342, 345 (La. 1991). In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

² An order granting the summary judgment and dismissing Ms. Whittington's whistleblower claim was signed on November 10, 2009 and was designated as a final judgment with no just reason for delay for purposes of appeal by separate order signed November 23, 2009.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and only then is summary judgment appropriate. *Id.* at 765-66.

Pursuant to LSA-C.C.P. art. 966(C)(2), the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. Only if the non-moving party fails to do so is there no genuine issue of material fact so that summary judgment should be granted. See **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Under this court's decision in **Accardo v. Louisiana Health Services & Indem. Co.**, 2005-2377 (La. App. 1 Cir. 6/21/06), 943 So.2d 381, to prevail in a whistleblower action, an employee must show both that the employer committed an actual violation of law, and that the disclosure of that violation caused his or her termination. **Accardo**, 943 So.2d at 386. Therefore, in this case, Ms. Whittington must produce evidence to show that: 1) Ms. Alexander did not meet DHH regulatory standards and therefore, Hospice Care committed a violation in hiring her, and 2) Ms. Whittington was fired because she reported that violation to DHH.³

³ At the hearing on the motion for summary judgment, the issues regarding whether Hospice Care knew that Ms. Whittington had reported the violation to DHH and whether Ms. Whittington was fired as a result of that disclosure were not argued and we will not address those issues in this appeal.

2. DHH Regulations

The requirements for a DON, as set forth by DHH in LAC 48:1.8217, are as follows:

E. Director of Nurses (DON). A person designated, in writing, by the Governing Body to supervise all aspects of patient care, all activities of professional staff and allied health personnel, and responsible for compliance with regulatory requirements. The DON, or alternate, shall be immediately available to be on site, or on site, at all times during operating hours, and additionally as needed. If the DON is unavailable he/she shall designate a Registered Nurse to be responsible during his/her absence.

1. Qualifications. A registered nurse must be currently licensed to practice in the State of Louisiana:

- a. with at least three years' experience as a registered nurse. One of these years shall consist of full-time experience in providing direct patient care in a hospice, home health, or oncology setting; and
- b. be a full-time, salaried employee of only the hospice agency. The Director of Nurses is prohibited from simultaneous/concurrent employment. While employed by the hospice, he or she may not be employed by any other licensed health care agency.

Ms. Whittington alleged that Ms. Alexander was not eligible to hold the DON position for two reasons: 1) she remained simultaneously/concurrently employed with Lane Regional after she took the position with Hospice Care, and 2) she failed to prove that she had the requisite one year of full-time experience in providing direct patient care in either a hospice, home health, or oncology setting.

A. Simultaneous/Concurrent Employment

A review of the record reveals the following evidence offered in support of the position that Ms. Alexander violated DHH's prohibition against simultaneous/concurrent employment:

1. A letter from Susan Pearson of Lane Regional Medical Center stating that while Ms. Alexander's status was changed from full-time to part-time as needed on 8/19/2007, Ms. Alexander was employed at Lane Regional from 9/21/1998 until 6/04/2008.
2. A Form LDOL 77 which reads that Ms. Alexander's separation date from Lane Regional was 06/04/2008.
3. A letter dated September 7, 2007 from Susan Pearson of Lane Regional Medical Center to Hospice Care stating that Ms. Alexander "is currently employed as a PRN registered nurse for the intensive care unit."
4. An affidavit by Susan Pearson verifying the contents of her September 7, 2007 letter.
5. An affidavit executed by Marla Whittington attesting to the fact that on September 7, 2007 she spoke with a Lane Regional representative who advised that Ms. Alexander was still employed at Lane Regional.
6. A July 29, 2009 letter from DHH's attorney stating that "it appears that Ms. Tate and the Department are saying the simultaneous/concurrent regulation cannot be enforced when an employee of a hospice agency chooses to work at another licensed healthcare facility while not on duty or not on call with the hospice agency."

The lower court reasoned that:

[i]t's a question of law. Was there a violation of law...the law is very well settled that the court must give great weight to an agency's interpretation of its own rules and regulations. And what we're talking about here is an alleged violation of DHH rules and regulations. Not a statute that appears in the revised statutes in the State of Louisiana, but rules and regulations promulgated by DHH. **DHH's interpretation of its rules is that there is no violation of law.** Were this here on appeal from an administrative decision to that effect, it would --- my standard of review would be whether there was an abuse of discretion or a clear misapplication of the law. I don't see either one. (Emphasis added.)

It appears that the trial court's ruling was based on its determination that it had a duty to defer to an agency decision, that the July 29, 2009 letter drafted by counsel for DHH amounted to an agency decision, and that the

agency decision was that no violation had occurred. However, this is not an appeal of an administrative decision. Under the Whistleblower Statute, “an employee may *commence* a civil action in a *district court* where the violation occurred.” As such, the district court had original jurisdiction over the claim and owed no deference to the purported administrative decision.

Moreover, we disagree with the district court’s conclusion that DHH’s ultimate determination that Ms. Alexander was eligible to hold the DON position, based on the letter of DHH’s attorney, was evidence that DHH had interpreted its regulations to find no violation had been committed. After a *de novo* review, we find that the evidence in the record does not establish that such an interpretation was made by DHH. In fact, DHH’s representative, Marion Tate, arguably admitted that a violation had occurred:

Q. You would agree and it is true that Pamela Alexander was employed as PRN at Lane Regional Medical Center and as the director of nurses for Hospice Care Services of Louisiana LLC at the same time concurrently, is that true?

A. I would have to look at the dates but I would think that is true.

* * * *

A. Your question is based on the knowledge that we have today whether or not -- today I would say she was qualified?

Q. Yes, ma’am.

A. No, she was not qualified.

(1442 Deposition of DHH through its representative, Marion Tate, RN)

According to the evidence, DHH’s only determination was that the rule allegedly violated by Ms. Alexander could not be *enforced*: “it appears that Ms. Tate and the Department are saying the simultaneous/concurrent regulation cannot be enforced when an employee of a hospice agency

chooses to work at another licensed healthcare facility while not on duty or not on call with the hospice agency.” Thus, only because DHH chose not to enforce the prohibition against concurrent employment was Ms. Alexander considered qualified. Enforceability of the rule, however, is not the issue. The issue is whether or not a violation of that rule occurred. We find that the record contains ample evidence to meet the burden of establishing that a violation indeed occurred. Moreover, we find that whether Ms. Whittington’s termination was a result of her disclosure of that violation is yet another question of fact to be resolved at a trial on the merits. This matter was not properly disposed of via summary judgment.

B. Work Experience

Because we have determined that this matter should be remanded, we preterm discussion regarding Ms. Alexander’s work experience.

CONCLUSION

The judgment granting the partial motion for summary judgment filed by Hospice Care is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed against defendant/appellant, Hospice Care of Louisiana, L.L.C.

REVERSED AND REMANDED.