Dismissed in Part, Reversed and Rendered in Part, and Majority and Dissenting Opinions filed February 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00017-CV

PHYSIO GP, INC., PHYSIO, LTD., TANJA SAADAT, AND SHAWN SAADAT, Appellants

V.

NATALIE NAIFEH, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2006-48316

MAJORITY OPINION

Appellants Tanja Saadat and Shawn Saadat appeal[1] the trial court's judgment holding them individually liable for firing appellee Natalie Naifeh for the sole reason that she refused to perform an illegal act. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). Because we hold that the *Sabine Pilot* doctrine should not be extended to impose liability on individual employees rather than the plaintiff's employer, we reverse and render.

[1] Physio GP, Inc. and Physio, Ltd. filed a notice of appeal but did not file briefs or otherwise pursue their appeal. Therefore, we dismiss their appeal for want of prosecution. TEX. R. APP. P. 42.3(b).

BACKGROUND

Physio GP, Inc. and Physio, Ltd. (collectively "Physio") operated an occupational and physical therapy clinic. The Saadats own Physio. Naifeh began working for Physio in 2003 as a therapist and was fired in 2005. The reason for her termination is the crux of this litigation. Naifeh claims that Tanja Saadat was consistently falsifying Naifeh's patient treatment documents to include additional services that were not performed and thereby obtain higher payments from insurers. Naifeh repeatedly refused to sign these altered treatment documents and was eventually fired. The Saadats assert they fired her for various performance infractions, including unauthorized treatment on a patient and misuse of company time. Naifeh claims these reasons were manufactured in an attempt to cover up terminating her for refusing to sign off on fraudulent paperwork, which she claims was unethical and illegal under 18 U.S.C. § 1035 (2006).[2]

Naifeh sued Physio and the Saadats alleging wrongful termination against all defendants and that the Saadats were the alter egos of Physio.[3] The trial court granted summary judgment to the Saadats as to alter ego.[4] When the case was called for trial, the defendants appeared and stated that they were not going to defend the case any further, based on lack of resources to pay their attorney. The case proceeded to a bench trial, and the trial court found that Naifeh was fired solely for refusing to perform an illegal act. The trial court assessed damages and attorney's fees against all defendants jointly and severally and exemplary damages separately against Physio, Ltd., Tanja Saadat, and Shawn Saadat. The Saadats now appeal.

[2] Section 1035 criminalizes behavior relating to, among other things, false statements regarding health care made in connection with the payment for health care benefits.

[3] Naifeh also alleged that the Saadats tortiously interfered with her employment contract with Physio, but no issue regarding that claim has been brought in this appeal.

[4] Naifeh has not challenged on appeal the trial court's summary judgment on her alter ego allegation.

ANALYSIS

In their first issue, the Saadats argue that the trial court erred in holding them personally liable for the *Sabine Pilot* violation. Naifeh argues, and the trial court agreed, that in a corporate setting, individuals can be personally liable for their own torts, including wrongful discharge under *Sabine Pilot*. We review a trial court's legal conclusions de novo. *BMC Software Belguim, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

Texas is an employment at will state, meaning that employment contracts can be terminated at will by either party unless they have bargained otherwise. *See Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993); *see also Armijo v. Mazda Int'l*, No. 14-03-00365-CV, 2004 WL 1175335, at *3 (Tex. App.—Houston [14th Dist.] May 27, 2004, pet. denied) (mem. op.) (holding that an employment at will agreement is an enforceable contract until terminated by either party). The one common-law exception to the employment at will doctrine is set forth in *Sabine Pilot*: an employer cannot fire an employee for the sole reason of refusing to perform an illegal act. 687 S.W.2d at 735. The Texas Supreme Court created this tort to promote the public policy of preventing an employee from being forced to choose between keeping his job and facing criminal liability. *See Winters v. Houston Chronicle Publ'g Co.*, 795 S.W.2d 723, 724 (Tex. 1990); *Sabine Pilot*, 687 S.W.2d at 735. The issue of whether an individual, as opposed to the employer, can be held personally liable for a *Sabine Pilot* violation appears to be an issue of first impression in Texas. Neither party identified any cases that are on point to this issue, either in the trial court or in this court.[5] However, several other states have

[5] Naifeh argues that two cases from the First Court of Appeals "suggest that an individual can be liable for wrongful termination in violation of *Sabine Pilot* without the necessity of showing that the individual was the alter ego of the company," citing *University of Texas Medical Branch v. Hohman*, 6 S.W.3d 767 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.) and *Nguyen v. Technical & Scientific Application, Inc.*, 981 S.W.2d 900 (Tex. App.—Houston [1st Dist.] 1998, no pet.). In *Hohman*, the only mention of *Sabine Pilot* is in the court's holding that government officials cannot be sued in their official capacity because of sovereign immunity. *See* 6 S.W.3d at 777. The only issue in *Nguyen* was whether an employee who was constructively discharged rather than fired could still bring a *Sabine Pilot*

addressed the issue of individual liability under their version of a tort of wrongful discharge in violation of public policy.

Some states allow individual liability, reasoning that individuals are liable for their own torts, even agents acting on behalf of their employers. *See, e.g.*, *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 775–76 (Iowa 2009); *Ballinger v. Del. River Port Auth.*, 800 A.2d 97, 110–11 (N.J. 2002); *Harless v. First Nat'l Bank in Fairmont*, 289 S.E.2d 692, 698–99 (W. Va. 1982). According to their logic, employees can therefore be liable for a *Sabine Pilot* violation the same as any other tort. *See, e.g.*, *Jasper*, 764 N.W.2d at 775–76; *Ballinger*, 800 A.2d at 110–11; *Harless*, 289 S.E.2d at 683–85. They further reason that individual liability promotes deterrence and better decision making because it allows the active wrongdoer to be held directly responsible. *See Borecki v. E. Int'l Mgmt. Corp.*, 694 F. Supp. 47, 59 (D.N.J. 1988); *Jasper*, 764 N.W.2d at 776.

We disagree with this analysis and are persuaded by the courts holding that individual liability is inappropriate in such circumstances. The employment relationship is the source of the duty in wrongful discharge torts such as *Sabine Pilot*. *See Miklosy v. Regents of Univ. of Cal.*, 188 P.3d 629, 644–45 (Cal. 2008); *Schram v. Albertson's, Inc.*, 934 P.2d 483, 490–91 (Or. Ct. App. 1997). The employment relationship exists only between the employer and employee, not between two employees, even when one of those employees is a supervisor or even the owner. *See Miklosy*, 188 P.3d at 644–45; *Buckner v. Atl. Plant Maint., Inc.*, 694 N.E.2d 565, 569 (Ill. 1998); *Schram*, 934 P.2d at 490–91. Only the employer has the power to hire and fire, and supervisors merely exercise that power on the employer's behalf. *See Miklosy*, 188 P.3d at 644–45; *Smith v. Waukegan Park Dist.*, 896 N.E.2d 232, 235–36 (Ill. 2008); *Schram*, 934 P.2d at 490. Corporate employees cannot, in their personal capacity, wrongfully discharge an employee because they have no personal authority to fire an employee. *See Miklosy*, 188 P.3d at 644; *Smith*, 896 N.E.2d at 235–36; *Schram*, 934 P.2d at 490–91. Furthermore,

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claim. *See* 981 S.W.2d at 900–01. The court does not discuss individual liability at all. We see nothing in either of these cases suggesting that individual liability would be appropriate in a *Sabine Pilot* case.

individual liability is not necessary to promote deterrence because liable employers will likely take their own measures to deter agents or employees from wrongfully exercising termination authority. *See Buckner*, 694 N.E.2d at 570. Fear of financial responsibility for a potential lawsuit could discourage supervisors from terminating employees in legitimate situations. *Cf. Reno v. Baird*, 957 P.2d 1333, 1347 (Cal. 1998) (analyzing supervisor liability under state discrimination statute). Moreover, it can be difficult to determine—or limit in scope—the individuals who might be held accountable for a decision to terminate. This is particularly true in a corporate environment involving group evaluation of employees and collective decisionmaking for terminations. *See id.* at 1346–47.

Naifeh argues, and the trial court found, that liability is appropriate because individuals are liable for their own torts in the corporate setting. *See Walker v. Anderson*, 232 S.W.3d 899, 918 (Tex. App.—Dallas 2007, no pet.); *Ennis v. Loiseau*, 164 S.W.3d 698, 707 (Tex. App.—Austin 2005, no pet.). However, these cases involve torts such as fraud that can be committed by an individual.[6] *See Ennis*, 164 S.W.3d at 700–01. The purpose of individual liability in the corporate setting is to prevent an individual from using the corporate structure or agency law as a blanket to insulate himself from liability for his otherwise tortious conduct. *See Walker*, 232 S.W.3d at 919. But only an employer can wrongfully terminate the employment relationship, so the individual's conduct logically could not be otherwise tortious. *See Miklosy*, 188 P.3d at 644–45; *Buckner*, 694 N.E.2d at 570; *Schram*, 934 P.2d at 490–91. Moreover, *Sabine Pilot* is an extremely specific and narrow exception to the employment at will doctrine, and both the Texas Supreme Court and this court have consistently rejected attempts to expand its scope. *See Ed Rachal Found. v. D'Unger*, 207 S.W.3d 330, 332–33 (Tex. 2006); *Mayfield v. Lockheed Eng'g & Scis. Co.*, 970 S.W.2d 185, 187–88 (Tex. App.—Houston

[6] We note that the Saadats may have been subject to individual liability under Texas law pursuant to more traditional legal theories. However, for reasons that are unclear, Naifeh chose to pursue their individual liability only under a *Sabine Pilot* theory.

[14th Dist.] 1998, pet. denied); *see also Buckner*, 694 N.E.2d at 568. Naifeh has a remedy against Physio,[7] and expanding *Sabine Pilot* to impose individual liability against the Saadats is more appropriately the task of the Texas Supreme Court or the Texas Legislature. *See Ed Rachal*, 207 S.W.3d at 333; *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 273 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Mayfield*, 970 S.W.2d at 188.

Absent a finding of alter ego, we conclude that the trial court erred in finding that the Saadats were personally liable on Naifeh's *Sabine Pilot* claim. We sustain the Saadats' first issue. We need not reach the Saadats' other two issues, which challenge the validity of a *Sabine Pilot* claim in these circumstances on other grounds. We reverse the trial court's judgment against the Saadats and render judgment that Naifeh take nothing against them.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates and Sullivan and Senior Justice Hudson (dissenting).*

* Senior Justice J. Harvey Hudson, sitting by assignment.

[7] Indeed, Naifeh actually has a judgment against Physio.