

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000373-MR

PAMELA E. SAPP

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-02048

MARY JANE COWHERD

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, HUDDLESTON, and SCHRODER, Judges.

COMBS, JUDGE: Pamela E. Sapp appeals from an order of the Franklin Circuit Court dismissing her complaint against Mary Jane Cowherd. We affirm.

Before her complaint was filed, Sapp was employed by the Workforce Development Cabinet and served as a computer operations analyst for Owensboro Technical College. She also suffered from major depression -- so severely as to require her hospitalization on at least two occasions.

Cowherd is a licensed psychologist working with the Kentucky Employee Assistance Program ("KEAP"). KEAP is a

creature of statute designed to "coordinate employee assistance programs that exist in state agencies and to supplement them with additional services." 101 KAR 2:160 §1. A case history prepared by Cowherd and appended to her motion to dismiss this action indicates that she first became aware of various personnel problems at Sapp's workplace when, on February 6, 1996, Sapp's supervisor, Ellis Ray Gillaspie, contacted her by telephone. As a result of this conversation, Cowherd recommended that Sapp be referred to KEAP. During a meeting with various officials of the Workplace Development Cabinet, Cowherd learned the names of Sapp's treating psychiatrist and therapist.

On April 22, 1996, Sapp contacted Cowherd directly. During this conversation, Sapp outlined to Cowherd her perception of the causes of her workplace difficulties, described accommodations she sought from her employer, and provided the names of her psychiatrist and therapist. To facilitate her involvement in KEAP, Sapp agreed to permit her therapist to disclose confidential information to Cowherd and signed a consent form to this effect. Sapp declined, however, to authorize a meeting between her mental health care providers and her supervisors.

On April 26, 1996, a Workforce Development Cabinet administrator, June Thompson, contacted Cowherd and reported that Sapp had made a distressing telephone call to the Cabinet and that she (Thompson) was now concerned about Sapp's potential for violence at the workplace. Cowherd advised that Sapp could be

placed on agency-directed sick leave until a mental health professional could certify Sapp's fitness to return to work.

On April 29, 1996, Sapp's therapist, Sandra Kelly, returned a telephone call placed by Cowherd. The question of whether Sapp might require hospitalization was discussed. Ms. Kelly advised Cowherd that Sapp's case was about to be closed due to her failure to comply with certain requirements; she suggested that Sapp schedule an appointment immediately. Cowherd relayed this information to Sapp. Shortly thereafter, Sapp learned that she was to be placed on agency directed sick-leave.

On May 30, 1996, Sapp wrote to Cowherd cancelling KEAP's services and requesting that Cowherd not have further contact with her mental health care providers. Several months later, Sapp filed a formal complaint against Cowherd with the Kentucky Board of Psychology.¹

On September 9, 1998, Sapp filed a seventy-five paragraph complaint against Cowherd and others. Pertinent to this appeal, Sapp alleged that her "rights as a mental health care client" and her "rights to therapist/client confidentiality" had been abused; that Cowherd and others had attempted to have her hospitalized against her will; and that as a result of Cowherd's communications with her mental health care providers, she had been placed on inappropriate medication. No exhibits or affidavits were attached to the complaint.

¹The State Board of Psychology determined that no action was necessary on the matter and closed its file in early March 1997.

On September 22, 1998, Cowherd filed a motion to dismiss or, in the alternative, for the entry of summary judgment. In support of her motion, Cowherd alleged that she had not spoken with Sapp's psychiatrist; that her discussions with Sapp's therapist did not involve a breach of any therapist/client relationship; and that her limited discussions were otherwise entirely proper. Cowherd noted that she had not served in the capacity as "therapist" to Sapp but rather as a kind of coordinator of services. Attached to Cowherd's memorandum in support of her motion were numerous exhibits - including copies of correspondence, a detailed case history report, and the affidavit of the Cabinet's personnel administrator.

On February 10, 1999, the trial court entered its opinion and order dismissing Sapp's action against Cowherd, holding as follows:

[T]he court is of the opinion that Sapp's therapist/client confidentiality claims cannot survive Cowherd's motion. The entire claim is based upon Sapp's assertion and belief that Cowherd was her therapist, and that Cowherd improperly communicated confidential information to parties outside of the therapist/client relationship. Cowherd is entitled to dismissal of the complaint on both of these grounds.

First, Sapp is simply in error when she alleges that Cowherd was her therapist. In her complaint, Sapp makes the allegation that KEAP is a "confidential counseling service provided employees of the commonwealth (sic) of Kentucky." This allegation is not only unsupported, but is contradicted by the statutes and regulations which create the KEAP program. In reviewing those statutes and regulations, this Court is unable to conclude that it was the intention of the drafters that Cowherd would act as Sapp's therapist. Cowherd's role under the statutes and regulations is to coordinate the assistance available to Sapp--not to act as a publically-funded (sic) counselor or therapist. As such, the Court is of the determined belief that there exists no set of facts which might be proven to

establish that Cowherd and Sapp stood in a therapist/client relationship. On this point alone, dismissal of this claim is warranted.

However, even assuming that Cowherd and Sapp stood in something akin to a therapist/client relationship, it is clear that any such relationship was by virtue of and limited by Sapp's involvement in the KEAP program. As such, and given Cowherd's duty to coordinate Sapp's participation therein, it is reasonable to conclude that Cowherd must have enjoyed the privilege of communicating with others who may have naturally been implicated by Sapp's involvement with the program--most notably, her supervisors and her private mental health care-givers.

Sapp's complaint appears to focus on the fact that Cowherd may have communicated certain information and intentions from Sapp's employers to her therapists. There is no claim that Cowherd communicated any information she received from Sapp to Sapp's employers. The communications which Cowherd had admitted making do not entitle Sapp to judgment on her claim of therapist/client confidentiality. Rather, these communications are a necessary part of the KEAP program and its design as a program of employee-benefits coordination. Even though the plaintiff is entitled to access the benefits of the KEAP program, she is not entitled to dictate the exact manner in which the program will be operated or the judgment involved in attempting to resolve a problem.

This appeal followed.

Sapp argues that the trial court erred by concluding that she and Cowherd did not stand in a client/therapist relationship. She also maintains that Cowherd engaged in a prohibited "dual relationship" by counseling her supervisors and that she violated regulations forbidding therapists from "stereotyping" clients. Having carefully reviewed the record, we affirm the trial court's entry of judgment.

Because the trial court's order of dismissal was based on matters in addition to the pleadings, it must be treated as a summary judgment. CR 12.02, CR 12.03. Pursuant to CR 56.03,

summary judgment is proper if it is shown that there is no genuine issue of material fact and that the party seeking summary judgment is entitled to it as a matter of law. Palmer v. International Ass'n of Machinists and Aerospace Workers, AFL-CIO, Ky., 882 S.W.2d 117 (1994).

As the movant in this case, Cowherd bore the burden of showing that no genuine issues of material fact precluded the entry of judgment. Smith v. Higgins, Ky., 819 S.W.2d 710 (1991). "Simply by moving for summary judgment, a defendant cannot force a plaintiff to come forward with evidence to defeat the motion." Id. at 712. However, once Cowherd presented evidence showing the non-existence of a genuine issue of material fact, it became incumbent upon Sapp to show that genuine issues of material fact did indeed exist. Hubble v. Johnson, Ky., 841 S.W.2d 169 (1992). Sapp failed to meet this burden.

As we have noted, Cowherd attached numerous exhibits to the memorandum submitted in support of her motion. These exhibits indicate that Cowherd worked in an intake and/or referral role with respect to Sapp and her supervisors; that she had never spoken to Sapp's psychiatrist; that she had not endeavored to have Sapp committed against her will; and that she had no other influence over treatment decisions. Faced with this evidence, Sapp was required to come forth with some evidence to counter Cowherd's proof.

Although Sapp alleges that Cowherd was providing what amounted to therapy-type services to her, these allegations are wholly unsupported. Cowherd's evidence indicated that she acted

to coordinate efforts aimed at assisting Sapp. Moreover, 101 KAR 2:160 specifically provides that "[e]mployees shall participate in counseling or treatment on their own time, or take leave as provided by law." The trial court did not err by concluding that Sapp did not stand in a protected relationship or that privileged information was not improperly shared. Because Sapp has failed to meet her burden of showing the existence of a genuine issue of material fact which would counter Cowherd's evidence, summary judgment was entirely proper in this case.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT *PRO SE*:

Pamela E. Sapp
Owensboro, KY

BRIEF FOR APPELLEE:

Daniel F. Egbers
Frankfort, KY