RENDERED: MAY 16, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001848-MR

JILL M. THOMPSON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 04-CI-002292

SYSCO LOUISVILLE FOOD SERVICES COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Jill Thompson, *pro se*, appeals from an order of the Jefferson Circuit Court granting summary judgment in favor of Appellee, Sysco/Louisville Food Services Company, Inc. Finding no error, we affirm.

Sysco hired Thompson on May 12, 2002, as an "order picker," filling product orders at Sysco's warehouse. On July 15, 2002, Thompson reported right hand swelling and numbness to her supervisor, who wrote an accident report and sent her to the Caritas emergency room for evaluation. The physician at Caritas, Dr. George

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Nobile, diagnosed Thompson with carpal tunnel syndrome, prescribed an anti-inflammatory steroid and sent her back to work the following day.

Sysco thereafter referred Thompson to Dr. Sherrell Nunnelley, an occupational medicine physician under contract with Sysco to evaluate employees claiming to have suffered work-related injuries. Dr. Nunnelley confirmed the carpal tunnel diagnosis and sent Thompson back to work with instructions that she limit the use of her affected hand and minimize the time that she spent in the cold storage area. However, after about twenty minutes of work, Thompson felt she could not perform even the modified duties she was assigned, and she was instructed to see a hand specialist before returning to work.

On July 24, 2002, Thompson was evaluated by Dr. Geoffrey Durham-Smith, who also confirmed the carpal tunnel diagnosis. Dr. Durham-Smith instructed Thompson to remain off work until further notice. At the request of Sysco's employee relations manager, Ray Klein, Dr. Nunnelley contacted Dr. Durham-Smith's office and was informed by a staff member that Thompson could return to work with occasional lifting. Klein thereafter received a letter from Dr. Nunnelley indicating that Dr. Durham-Smith had revised his restrictions and released Thompson to return to work with certain restrictions. On August 5, 2002, Klein contacted Thompson and, after explaining that she had been released to return to work, requested that Thompson report later that day. Thompson refused, claiming it was too short of notice. The following day she again refused to report to work and insisted that Dr. Durham-Smith had not instructed her to return to work. Regardless, Thompson was aware that if she did not report to work, she would be terminated. Klein called Thompson on July 7, 2002, and told her she was terminated for failing to report to work.

In June 2003, Thompson filed a workers' compensation claim for her carpal tunnel syndrome. On August 5, 2003, in lieu of a complaint, Thompson filed a sworn statement in the Jefferson District Court against Dr. Nunnelley. In October 2003, Thompson filed an amended complaint in the Jefferson Circuit Court adding Sysco and Klein as additional defendants. The complaint alleged that Dr. Nunnelley and Klein tortiously interfered with her employment at Sysco and that her termination constituted a wrongful discharge.

On December 19, 2003, an ALJ dismissed Thompson's workers' compensation case on the grounds that there was no causal connection between her two-month employment at Sysco and her injury. The workers' compensation board affirmed that decision.

In November 2005, Sysco and Klein moved for summary judgment. Dr. Nunnelley thereafter also filed a motion for summary judgment. On February 3, 2006, the trial court granted summary judgment in favor of all defendants. The court held that, as a matter of law, a corporation acts only through its employees and agents, and since Klein's actions could only be characterized as the actions of Sysco, there was no third party to satisfy a tortious interference claim against either party. Further, the court ruled that Thompson failed to prove that Dr. Nunnelley intentionally interfered with Thompson's employment relationship with Sysco with an improper motive. With respect to Thompson's retaliatory or wrongful discharge claim, the trial court held that her allegation that she was discharged in violation of KRS 345 was without merit since she had not suffered a work-related injury.

On June 22, 2006, Thompson filed her notice of appeal in this Court naming only Sysco as an Appellee. In November, 2006, Dr. Nunnelley moved this Court to clarify that he was not a party to the appeal based on Thompson's failure to

name him in either her notice of appeal or pre-hearing statement. Thompson filed a response objecting to Dr. Nunnelley's motion and requesting that he and Ray Klein be named as Appellees. On January 17, 2007, a panel of this Court denied Thompson's motion to add Dr. Nunnelley and Klein as parties, noting that the doctrine of "substantial compliance . . . cannot be applied to retroactively create jurisdiction." (Citation omitted).

Notwithstanding this Court's January 2007 order, Thompson devotes the majority of her brief on appeal arguing that summary judgment in favor of Klein and Dr. Nunnelley was improper and that she has a viable cause of action against both. However, as Thompson failed to name either Klein or Dr. Nunnelley in her notice of appeal, neither is a party to this appeal and the Jefferson Circuit Court's order of summary judgment is conclusive. Thus, the only issues herein pertain to whether the trial court properly granted summary judgment in favor of Sysco.

Summary judgment is appropriate "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." CR 56.03. Summary judgment is properly granted "where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)(*citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). When considering a motion for summary judgment, the trial court must view the record "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, supra*, (*citing Dossett v. New York Mining & Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine

issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992)(*citing Steelvest, supra*, at 480).

As stated previously by this Court, "[t]he standard of 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. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citations omitted).

Kentucky is an "at-will" employment state, and an employer may discharge an at-will employee for any cause at any time. *Scroghan v. Kraftco Corp*., 551 S.W.2d 811 (Ky. App. 1977). And while an employee may have a claim for tortious interference with a business relationship under certain circumstances, he or she must prove that there is a third party involved in the controversy who acted intentionally to interfere with the relationship through wrongful conduct. *Hunt Enterprises, Inc. v. John Deere Industrial Equipment Co.*, 18 F.Supp.2d 697, 702-703 (W.D. Ky. 1997).

As noted by the trial court, a corporation can only act through its agents and employees. *See McCarthy v. KFC Corporation*, 607 F.Supp. 343, 345 (W.D. Ky. 1985); *Caretenders, Inc. Commonwealth*, 821 S.W.2d 83, 86 (Ky. 1991). Sysco, acting through Klein, could not have interfered with its own business relationship with Thompson. As Klein was acting in his official capacity for Sysco, he cannot be characterized as a third party. Thus, we agree with the trial court that, as a matter of law, Thompson could not have prevailed on her claim of tortious interference with respect to Sysco. *McCarthy, supra*.

We similarly find that Thompson's claim for retaliatory or wrongful termination must fail. Thompson claims that she was discharged for exercising her right

under the Kentucky Workers' Compensation Act to receive medical treatment for her work-related injury. Again, however, we wholly agree with the reasoning of the trial court:

> It has already been determined by Administrative Law Judge John B. Coleman and affirmed by the Department of workers Claims that Thompson's carpal tunnel syndrome is not a work-related injury. Thus, the issue cannot be readdressed under KRS 345.125 as Thompson has not presented evidence of fraud, new evidence, or mistake. In addition, Thompson fails to establish either of the two situations that are considered to be actionable under a claim for wrongful termination. Pursuant to *Grzyb, et al. v. Evans*, 700 S.W.2d 399, 402 (Ky. 1985) . . . those reasons are: (1) that the reason for the discharge was the failure or refusal to violate a law in the course of employment or (2) the reason for discharge was the employee's exercise of a right conferred by well-established legislative enactment. Therefore, Thompson's claim that she was discharged in violation of KRS 345 is without merit.

Moreover, Thompson had the burden of proving that the possibility of her filing a workers' compensation claim was a "substantial and motivating factor" behind the termination of her employment. *First Property Management Corporation v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993). *See also Willoughby v. Gencorp, Inc.*, 809 S.W.2d 858 (Ky. App. 1990). Although Thompson concedes in her brief that there is no affirmative evidence to show the necessary connection between her pursuit of medical treatment and her termination, she argues that Klein's behavior could be sufficient for a jury to find in her favor. We disagree. "[T]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

Finally, Thompson argues that the trial court erred in denying her motion to alter, amend or vacate the summary judgment pursuant to CR 59.05. In her motion, she argued that newly discovered evidence in the form of depositions that were taken

during the pendency of the summary judgment proceedings and documents received during discovery established genuine issues of material fact.

Again, the bulk of Thompson's arguments on appeal concern Klein and Dr. Nunnelley, who are not parties herein. Nevertheless, under CR 59.01(g) newly discovered evidence is evidence that could not, with reasonable diligence, have been discovered and produced prior to judgment. And relief afforded under CR 59.05 is "an extraordinary remedy which should be used sparingly." *Guilon v. Guilon*, 163 S.W.3d 888, 893 (Ky. 2005).

Thompson filed her amended complaint in the circuit court in October 2003. Yet, she did not conduct any depositions or formal discovery until November 2005. In fact, Thompson did not depose Klein until eighteen months after her own deposition and five weeks after Sysco filed its motion for summary judgment. We are of the opinion that the evidence Thompson wished the trial court to consider "after the fact," was neither timely nor relevant to overcome summary judgment.

The order granting summary judgment in favor of Sysco/Louisville Food Services Company is affirmed.

ALL CONCUR.

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