RENDERED: JULY 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000931-MR

JENNIFER PATTON — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 07-CI-01240

APPALACHIAN REGIONAL HEALTH CARE, INC. AND BRAD BURKHART — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

KELLER, JUDGE: Jennifer Patton (Patton) appeals from the trial court's summary judgment. On appeal, Patton argues that the trial court erred because she

[1] Senior Judge David C. Buckingham 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.

presented genuine issues of material fact which precluded summary judgment. Patton also argues that the trial court incorrectly determined that issues regarding whether she was evaluated fairly involved the collective bargaining agreement (the CBA) and were not appropriate issues for state court resolution. Finally, Patton argues that statements made by Brad Burkhart (Burkhart) regarding her ability to perform her job and her evaluation results were defamatory and not privileged. Burkhart and Appalachian Regional Healthcare, Inc. (ARH) argue that Patton has admitted that the allegedly defamatory statements by Burkhart are true and Patton's arguments to the contrary are merely an attempt to re-frame a tortious interference with contract claim as a defamation claim. Having reviewed the record and the arguments of counsel, we affirm the trial court.

FACTS

In March 2007, union employees of ARH went on strike. After thirty days, the strike ended when employees ratified the CBA. In pertinent part, the CBA provided that an employee who was faced with a lay-off could "bump" an employee in another department with less seniority, taking that employee's job. The CBA also provided that, to successfully "bump" a less senior employee, the person with seniority must be qualified to perform the job.

Patton began working at ARH in the early 1980's and had approximately twenty-eight years of seniority at the time of the strike. Before the strike, Patton was working as a pharmacy tech in ARH's pharmacy. The pre-strike

pharmacy included both in-house and retail operations; however, post-strike, ARH eliminated the retail pharmacy operation and Patton faced a lay-off.

In an attempt to avoid that lay-off, Patton notified the manager of the human resources department that she wanted to bump into a clerk position in ARH's clinic. Patton had worked as a clinic clerk for approximately six months several years before the strike and she testified that she was familiar with the position. At the time Patton exercised her right to bump, there was only one clinic clerk, Anita Little (Little). Little had significantly less seniority than Patton and, if Patton had been given the job of clinic clerk, Little would have had to bump someone else or face a lay-off.

The manager of human resources notified Burkhart that Patton intended to bump into Little's job as clinic clerk. Therefore, pursuant to his interpretation of the CBA, Burkhart gave Patton a brief orientation to the clinic, after which Patton began working as a clinic clerk. One of a clinic clerk's duties is to enter data into ARH's computer system, using the "Physician Practice Plus" program. Patton had used that program when she previously worked as a clinic clerk. However, ARH updated the program after Patton left the clinic clerk's position, and Patton had not received any training regarding the update.

Burkhart testified that, before he could provide Patton with a code that would give her unlimited access to the Physician Practice Plus program, she had to demonstrate her proficiency in using it. In order to give Patton an opportunity to work with the program, Burkhart provided her with access to the "test" system.

However, because the CBA stated that training was not to be provided, Burkhart did not provide Patton with any training. After nine days on the job, Burkhart gave Patton a written test regarding the Physician Practice Plus program, which Patton failed. Burkhart advised Patton that "she had not demonstrated the capabilities to fully use all the applications and that as the contract language dictates, without providing her training she would not be able to perform the job." Burkhart then advised the human resources manager and the CEO of Physician Services that Patton had failed the test and therefore she was not "able to perform all functions of the job." ARH then laid-off Patton.

On November 1, 2007, Patton filed a complaint in Floyd Circuit Court alleging that Burkhart had defamed her by stating that she failed a competency test and that Burkhart had interfered with her contractual relationship with ARH. Because Patton's employment with ARH was governed by the CBA, the Appellees sought to remove this case to federal court. Patton moved to dismiss her tortious interference claim, which the federal district court granted. Because that court believed that Patton's defamation claim was not dependent on an interpretation of the CBA, it remanded this matter to the Floyd Circuit Court for additional proceedings on that claim.

The Appellees filed a motion for summary judgment, which the circuit court denied. The Appellees then filed a second notice of removal, arguing that, as postured by Patton, her defamation claim required interpretation of the CBA, a federal issue. However, the federal district court was not convinced and

again remanded this matter to the Floyd Circuit Court. The Appellees renewed their motion for summary judgment, which the circuit court granted. In doing so, the circuit court found that Burkhart's statement that Patton failed the test was true and that the parties had stipulated that any issues regarding interpretation the CBA were subject to arbitration. Patton made a motion to alter, amend, or vacate, which the circuit court also denied. It is from that order that Patton appeals. We set forth additional facts as necessary below.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to view the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. In *Steelvest* the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

At the outset of our analysis, we note that Patton argues in her reply brief that the Appellees violated this Court's order regarding citation to matters outside the record. Based on this alleged violation, Patton asks this Court to either dismiss the appeal or strike portions of the Appellees' arguments and brief from the record. For the following reasons, we decline to do so.

On appeal, Patton filed a motion to strike "the appendix and references thereto" in the Appellees' brief. This Court granted that motion and ordered both the Appellees' brief and Patton's reply brief stricken from the record. The order granted the Appellees fifteen days to "file a brief without attaching as an appendix document the arbitration opinion and without reference to the opinion and order in the brief." The order gave Patton ten days thereafter to file her reply brief. The Appellees filed a second brief and Patton filed a second reply brief.

In her second reply brief, Patton states that this Court's Order prohibited the Appellees

> from introducing, discussing and relying upon matters outside the record in this case. This Court justly ruled that all such matters should be stricken from the record and ordered Appellees to amend their brief so as not to include such improprieties. Despite the Court's clear directive, Appellees discuss the unrelated arbitration proceeding (which did not reach a conclusion until <u>after</u> the state law case was on appeal) and the independent federal action in their brief. (Emphasis in original.)

Patton characterizes this as "blatant disregard of this Court's ruling regarding evidence not made part of the record."

Patton embellishes what our order said. We ordered the Appellees to delete any reference to the arbitration opinion and order from their brief and to remove that opinion and order from their appendix. We did not state that the Appellees should remove any reference to arbitration or the federal action from their brief. Furthermore, we note that the record is replete with references to arbitration as related to the CBA and with references to the Appellees' two attempts to remove this action to federal court. Therefore, references to arbitration and the federal action are not outside the record.

We have reviewed the Appellees' brief and the allegedly offensive passages therein as designated by Patton and discern no violation of our Order. The Appellees do mention that the CBA provided for mandatory arbitration of disputes arising under the agreement and that Patton sought relief through arbitration. However, the Appellees do not refer to the arbitration opinion and order or even state whether the arbitration process has been completed. Furthermore, the Appellees did not attach a copy of that opinion and order to their brief. Therefore, we will not dismiss this appeal nor order the Appellees' brief or any part thereof stricken.

Having disposed of this procedural issue, we turn our attention to the substantive issues raised by Patton.

1. Defamation

In order to prove defamation, Patton was required to establish that Burkhart used defamatory language about her which he "published," and that she

suffered injury to her reputation as a result. *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). A statement that might otherwise be defamatory is not actionable if true. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 795-796 (Ky. 2004).

Although it is not clear from Patton's brief, it appears to us that she is complaining about two interrelated statements by Burkhart. The first is that Patton failed the test. The second is that she therefore was not qualified to perform the job of clinic clerk. We address each statement separately.

Patton testified that Burkhart's statements to the director of human resources and to the CEO of Physician Services that she failed the test were defamatory and that she suffered injury as a result. The Appellees argue that the statements were true, and that this fact acts as a complete defense to Patton's claim. Despite Patton's arguments to the contrary, we agree with the Appellees.

In her deposition, Patton admitted that she had failed the test and that Burkhart correctly said as much. However, when confronted with her admission that Burkhart's statement was true, Patton argued before the trial court and argues herein, that the court must look beyond that simple statement. According to Patton, Burkhart

> told third parties that [she] failed when he knew or should have known that the test was administered differently to [her] than to any other clinic clerk. Saying that Mrs. Patton took and failed the competency test implies that she was given the test under the same conditions as everyone else. Therefore, because the test

> was administered differently to Mrs. Patton, Burkhart's statement that she failed was false.

While we admire Patton's argument for its creativity, it simply does not accurately reflect the law of defamation. In examining whether a defamation claim is viable, the court must determine if the allegedly defamatory statement is true. The court is not required to determine if the person making the statement could have said more to clarify it. Whether Patton took the test under the same circumstances as other employees may be relevant to other issues; however, it is not relevant to whether the statement that she failed was true.

Furthermore, we discern no inaccuracy in the statement that Patton was not qualified to perform all of the job duties of a clinic clerk. Patton testified that putting data into the Physician Practice Plus program is a part of a clinic clerk's job. Burkhart testified that clinic clerks were not permitted to enter data into the program until they had passed a competency test. Patton failed the written portion of the competency test; therefore, she was not permitted to enter data into the program. Because entry of such data is a part of a clinic clerk's job, Burkhart's statement that Patton could not perform all that job's duties was true.

Patton argues that her defamation action does not implicate the CBA; however, we disagree. In the course of her brief, Patton supports her argument regarding defamation by stating that "none of the other clerks were testing (sic) in the same manner;" the testing "was unfair, improper, and different from the manner in which usual clinic clerks were tested;" she was denied the opportunity to

perform a clinic clerk's job duties; and "she was not evaluated in the same manner as the other employees." These statements, if anything, are evidence of management's mistreatment of Patton and place her claim squarely within the purview of the CBA. They do nothing to prove the accuracy or inaccuracy of Burkhart's statements and are not relevant to her claim of defamation.

Finally, because we agree with the Appellees that Burkhart's statements were true, we do not need to and will not address whether those statements were privileged.

CONCLUSION

Truth is an absolute defense to a claim of defamation. Patton admitted that the allegedly defamatory statements were true. Therefore, the circuit court properly granted the Appellees' motion for summary judgment.

ALL CONCUR.

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