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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000735-MR

SARAH HYSERMAN

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 09-CI-00128

BLUEGRASS MENTAL HEALTH-MENTAL
RETARDATION BOARD, INC.;
BLUEGRASS OAKWOOD, INC.;
DAVID PHELPS; and MICHELLE PHELPS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

COMBS, JUDGE: Sarah Hyserman appeals an order of the Pulaski Circuit Court granting summary judgment to Bluegrass Mental Health-Mental Retardation Board, Inc.; Bluegrass Oakwood, Inc.; David Phelps; and Michelle Phelps. At issue was Hyserman's claim for wrongful discharge. After our review, we affirm.

Bluegrass Oakwood (Oakwood) is a residential hospital for adults suffering from mental retardation. At one time, Oakwood was primarily funded by the federal government. However, the federal government revoked its funding in 2001 after Oakwood received multiple citations of a serious nature. The Commonwealth of Kentucky then entered into a memorandum of understanding with the United States Department of Justice. Under the terms of the memorandum, Kentucky's Department for Mental Health and Retardation Services (the Department) would oversee the management of Oakwood in order to insure compliance with federal standards. The Department is a division of Kentucky's Cabinet for Health and Family Services (the Cabinet). Kentucky Revised Statute[s] (KRS) 12.020(6)(c). Actual day-to-day management was contracted out to private companies. Bluegrass Regional Mental Health-Mental Retardation Board (Bluegrass) was the private company that assumed management of Oakwood in 2006.

Hyserman was employed at Oakwood in 2007 as a clinical specialist. Her job duties involved observing patients; reviewing their progress; revising programs based on individual needs and performance; insuring that adequate environmental supports and assistive devices were available to promote patient independence; conducting behavioral assessments; and designing, training, monitoring, and reporting on patients' behavior support plans. She was subject to requirements of state law and to the policies and procedures of Bluegrass.

During a team meeting in August 2008, an employee of Oakwood mentioned that employee Michelle Phelps¹ had put a patient at risk by allowing her to eat Snickers bars. Hyserman and her supervisor were both in the meeting. Following the meeting, they discussed Phelps's violation and decided to report it to their department director, Dr. Beebe. They made an oral report but did not commit anything to writing. In her deposition, Hyserman indicated that she did not remember who said what during the conversation with Dr. Beebe; *i.e.*, whether she or her supervisor actually made the report. Hyserman was also not aware of whether Dr. Beebe followed up on the report. Hyserman did not take any further action regarding the violation or the report.

In October 2008, Oakwood reorganized, and Hyserman's position was eliminated. She was invited to search for another position within Bluegrass. Hyserman did not find another job, and on October 30, 2008, her employment was terminated. On January, 28, 2009, Hyserman filed this lawsuit against the Department, Bluegrass, Oakwood, David Phelps, and Michelle Phelps. The complaint alleged that Hyserman was discharged in retaliation for reporting a policy violation committed by Michelle Phelps. Hyserman claimed that she was entitled to damages based on breach of contract, wrongful discharge, and violations of Kentucky's Whistleblower Act. KRS 61.102.

The defendants filed a motion for summary judgment. On January 4, 2010, the trial court entered an order granting the motion regarding the wrongful

¹ Phelps's husband, appellee David Phelps, was the Facility Director at Oakwood.

discharge claim and the whistleblower claim only as to the Phelps. The trial court denied summary judgment in all other respects. Hyserman's appeal is only from the trial court's grant of summary judgment regarding the wrongful discharge claims.

Summary judgment is a procedure utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists. The movant is not entitled to prevail "unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id.*

The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to prevent entry of summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id.* On appeal, our standard of review 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgments do not involve fact finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.2d 188, 189 (Ky. App. 2006).

Kentucky is a “terminable-at-will” state, meaning that an employer may discharge an employee “for good cause, for no cause, or for a cause that some might view as morally indefensible.” *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1984). The exception occurs when the discharge is “contrary to a fundamental and well-defined public policy as evidenced by existing law” that is based on a constitutional or statutory provision. *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). Three elements must coincide to support a valid claim of retaliatory discharge: 1) that the employee was engaged in a statutorily protected activity; 2) that the employee was discharged; and 3) that there was a connection between the protected activity and the discharge. *Bishop v. Manpower, Inc. of Cent. Kentucky*, 211 S.W.3d 71 (Ky. App. 2006). The existence of the exception is purely a question of law to be determined by the court. *Grzyb, supra*.

Hyserman argues that she engaged in activity protected by KRS Chapter 209. However, the court found that she did not perform an activity that the statutes protect. We agree.

KRS Chapter 209 provides for protection of adults. It mandates that anyone who suspects that an adult is being abused must report the abuse to the Cabinet. KRS 209.030(2). The report must include specific information concerning the details of the suspected abuse. KRS 209.030(4). The statute then details what action the Cabinet must take upon receiving such a report. KRS 209.030(5) – 209.030(10). At the time that Hyserman was employed by Bluegrass, its employee

policies incorporated the state's reporting requirements and prohibited retaliatory action against someone who had followed the reporting guidelines.

Hyserman asserts that by reporting Phelps's alleged violation to her supervisor and to Dr. Beebe, she followed the reporting procedures set forth in the statutes. She reasons that Oakwood was under the oversight of the Cabinet because of its contract with Bluegrass. Therefore, she reasons that her supervisor and Dr. Beebe were representatives of the Cabinet. We disagree.

KRS 209.030(1) charges that authorized agencies may act under the authority of the Cabinet. Thus, a report of a violation to such an authorized agency would constitute a report to the Cabinet. KRS 209.020(17) defines an *authorized agency* as

- (a) The Cabinet for Health and Family Services; (b) A law enforcement agency or the Kentucky State Police; (c) The office of a Commonwealth's attorney or county attorney; or (d) The appropriate division of the Office of the Attorney General.

Bluegrass does not fall within any of the criteria defining an authorized agency under the statute. Hyserman did not report to any of the entities listed in the statute. Therefore, she did not perform the protected activity contemplated by the statute. Hyserman acknowledged the distinction in her own deposition. She admitted that she had not called the Cabinet directly to make a written or oral report. She also indicated that if she had perceived the violation as being more serious, she would have contacted the Cabinet directly. Her admission indicated that she was aware of the proper procedures for filing an abuse report -- procedures

that she did not follow. Accordingly, the statute was neither implicated nor complied with.

Hyserman also contends that summary judgment for the wrongful discharge claims is an inconsistent outcome since the court left intact her whistleblower claims (except as to the Phelps). We disagree. As we discussed, the summary judgment on the wrongful discharge claim was based on absence of behavior as described by KRS Chapter 209.

The whistleblower claim, however, was based on KRS 61.102. Our Supreme Court has summarized the four elements necessary for a successful claim pursuant to this statute:

First, . . . the employer must be an officer of the state or one of its political subdivisions. Second, the employee must be a state employee or an employee of a political subdivision. Third, the employee must make a good faith report of a suspected violation of state or local statute or administrative regulation to an appropriate body or authority. Fourth, the defendant must be shown to act to punish the employee for making this report or to act in such a manner so as to discourage the making of this report.

Woodward v. Commonwealth, 984 S.W.2d 477, 480-81 (Ky. 1998). The court found that a question of fact remained on the threshold element of whether Hyserman was a state employee based on *Cabinet for Families and Children v. Cummings*, 163 S.W.3d 425 (Ky. 2005). Cummings, like Hyserman, was an employee of the University of Louisville, which performed services subject to a contract with the Cabinet. The Supreme Court held that summary judgment on a

whistleblower claim was inappropriate because a question remained concerning how much control the Cabinet had over Cummings's work, thus affecting his status as an employee.

Likewise, the trial court did not proceed to reach the behavior element of the whistleblower claim, which is still remaining and which relates to behavior distinct and separate from the behavior described in Chapter 209. The court refrained from finding that Hyserman was or was not an employee of the state when it granted summary judgment on the wrongful discharge claim, basing its ruling upon KRS 209.020(17) as discussed earlier.

A factual question still remains as to whether Hyserman is an employee of the state. Therefore, the claim filed pursuant to the Whistleblower Statute remains viable while the wrongful discharge claim was properly dismissed by way of summary judgment. The outcome is not inconsistent because distinct statutes permitting such a result are involved.

We affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

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