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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000287-MR

JUNLIAN ZHANG — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 07-CI-01933

WESTERN KENTUCKY UNIVERSITY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Dr. Junlian Zhang appeals a jury verdict in favor of Western Kentucky University (WKU) regarding her claim of gender discrimination under the Kentucky Civil Rights Act (KRS[1] 344.010, *et seq*.) and from a partial summary judgment dismissing her claims for invasion of privacy, intentional infliction of

[1] Kentucky Revised Statute(s).

emotional distress, and violation of the Kentucky Wages and Hours Act (KRS 377 *et seq*.). After a thorough review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Junlian Zhang, a native of China, entered into a one-year contract for employment with the Institute for Combustion Studies and Environmental Technology (ICSET), a division of Western Kentucky University's Applied Research and Technology Program, after completing her Ph.D. in chemistry at Northwestern University. Dr. Zhang was terminated on February 5, 2007, just seven months after the commencement of her employment, following a series of poor performance evaluations and after having informed her superiors that she was pregnant, upon their questioning of her.

Dr. Zhang alleged that ICSET's director, Dr. Wei-Ping Pan, required more from the Chinese workers than he did from the American ICSET employees. She further alleged that the Chinese were expected to work much longer hours than their American co-workers. She also asserted that she and the other Chinese employees of ICSET felt coerced into working long hours because loss of their employment would result in a change of their visa status which could require immediate return to China. Dr. Zhang revealed her pregnancy on January 17, 2007, after being asked by her direct supervisor, Pauline Hack Norris, if she was pregnant because of Dr. Zhang's frequent use of the restroom. At the time Dr. Zhang revealed her pregnancy, she was seven months pregnant. Dr. Zhang

suspected that Norris had merely asked in order to confirm that she was pregnant and that Norris and Dr. Pan had discussed her pregnancy prior to that date.

After confirming that Dr. Zhang was pregnant, Norris and Dr. Pan met with her regarding her pregnancy, during which Dr. Zhang reported that Dr. Pan seemed very angry at the meeting. Afterward, Dr. Zhang was placed on a different job duty in what appears to have been an effort to reduce her exposure to hazardous substances present in the lab. On February 5, 2007, Tony Glisson, director of WKU's Department of Human Resources, provided Dr. Zhang with a termination letter due to her alleged failure to adequately perform her job duties.

Dr. Zhang brought this action in Warren Circuit Court alleging wrongful termination on the basis of gender under the Kentucky Civil Rights Act and Title VII of the Civil Rights Act, intentional infliction of emotional distress, invasion of privacy, and violation of the Kentucky Wages and Hours Act. The trial court granted partial summary judgment in favor of WKU with respect to Dr. Zhang's Wages and Hours claim. It determined that, although WKU was not immune from a claim under the Kentucky Wages and Hours Act, Dr. Zhang had been employed in a professional capacity. Therefore the act was not applicable to Dr. Zhang's employment. The trial court likewise dismissed Dr. Zhang's IIED claim on the basis that it was subsumed by her claim under the Kentucky Civil Rights Act.

WKU brought a second motion for partial summary judgment regarding Dr. Zhang's invasion of privacy claim. The trial court, having denied

WKU's first motion for summary judgment on this issue, granted WKU's motion. In doing so, it rejected Dr. Zhang's argument that ICSET was engaged in a proprietary function, instead determining that Dr. Zhang's invasion of privacy claim was barred by governmental immunity.[2]

At trial, the sole issue to be determined was whether WKU terminated Dr. Zhang in violation of the Kentucky Civil Rights Act. The jury determined that Dr. Zhang's pregnancy was not a substantial factor in WKU's decision to terminate her employment. Dr. Zhang now appeals.

II. ANALYSIS

A. Wrongful Termination on the Basis of Gender

I. Jury Instructions

Dr. Zhang first argues that the tendered jury instructions were improper, confusing, and warrant a new trial. The trial court tendered the following instructions:

> QUESTION NO. 1:
>
> State whether you are satisfied with the evidence as follows (if you are not so satisfied, answer "No"):
>
> Junlian Zhang's pregnancy was a substantial motivating factor in Western Kentucky University's decision to terminate her employment.
> ___ Yes
> ___ No

[2] The trial court determined that Dr. Zhang's invasion of privacy claim was alternatively barred by the Kentucky Worker's Compensation Act.

> If your answer to Question No. 1 is "No," return to the courtroom. If your answer is "Yes", proceed to Question No. 2.
>
> QUESTION NO. 2:
>
> Are you satisfied from the evidence (if you are not so satisfied, answer "No"):
>
> But for Junlian Zhang's pregnancy, Western Kentucky University would not have terminated her employment.
> ___ Yes
> ___ No

On the other hand, Dr. Zhang proposed the following instruction:

> The Plaintiff must prove by preponderance of the evidence that her pregnancy was a determining factor in Western Kentucky University's decision to discharge her.
>
> Plaintiff's pregnancy was a determining factor if you find that Western Kentucky University would not have discharged the Plaintiff but for her pregnancy; it does not require that pregnancy was the only reason for Western Kentucky University's decision to discharge her.
>
> You will find for the Plaintiff under this instruction if you are satisfied from the evidence that her pregnancy was a substantial motivating factor in Western Kentucky University's decision to terminate her employment but for which Western Kentucky University would have not discharged her. Otherwise you will find for Western Kentucky University under this instruction.

Dr. Zhang points to several questions posed by the jury during its deliberations in support of her argument that the instructions were confusing and misleading to the jury. However, Dr. Zhang overlooks the fact that the trial court, after conferring with counsel, responded to each of the jury questions. And, Dr. Zhang agreed that the form and substance of each of the trial court's answers to the

jury's questions was sufficient to address the jury's questions. Dr. Zhang makes no further demonstration as to how these questions prejudiced the outcome at trial.

Dr. Zhang also contends that the trial court erred by tendering two instructions to the jury, as opposed to the singular instruction that she proposed. She argues that under the tendered jury instructions, the jury was required to make a finding of liability two times in order for Dr. Zhang to prevail.

Kentucky favors the practice of "bare bones" jury instructions. *Mendez v. University of Kentucky Bd. of Trustees*, 357 S.W.3d 534, 541 (Ky. App. 2011); *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). "'Bare bones' instructions are proper if they correctly advise the jury about 'what it must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.'" *Olfice*, 173 S.W.3d at 229 (quoting *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1992)). "'If the statements of the law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.'" *Mendez*, 357 S.W.3d at 539 (quoting *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 208 S.W.2d 940, 943 (Ky. 1948)). Further, an erroneous jury instruction is subject to harmless error analysis. *Commonwealth v. McCombs*, 304 S.W.3d 676, 680 (Ky. 2009). "That test . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 680-81 (internal citations and quotations omitted).

Although it appears that the jury instructions requiring the jury to find that Dr. Zhang's pregnancy was both a "but for" cause and a "substantial motivating factor" in WKU's decision to terminate her employment were unnecessarily duplicative, *see Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 825 (Ky. 1992) (concluding that the "but for" test and the substantial factor standard were essentially synonymous), this amounts only to harmless error. Dr. Zhang does not argue that the instructions misstated the law in any way or that they were calculated to mislead the jury. Her sole argument is that she was prejudiced because the trial court placed the "but for" and substantial factor language in two separate questions, rather than tendering her proposed instruction containing both the "but for" cause and substantial factor language in one longer question. Thus, Dr. Zhang's proposed instructions would have nevertheless required the jurors to consider both factors. And, more importantly, under the jury instructions tendered by the trial court, the jury determined that Dr. Zhang's pregnancy was not a substantial motivating factor in WKU's decision to terminate Dr. Zhang, and, as such, never reached the second "but for" question. Accordingly, division of the instructions into two questions could not have contributed to the verdict obtained.

II. Exclusion of Evidence Regarding Release of Liability

Dr. Zhang next contends that the trial court erred when it excluded a post-termination letter sent to Dr. Zhang by WKU.[3] The letter, in pertinent part, states:

> In response to your request, I am writing to advise that the University is in agreement to continue you in a paid status through April 30, 2007. You are aware that the original notice of termination of employment, as communicated by Tony Glisson, Director of Human Resources, continued you in a paid status through February 16, 2007. The decision to extend your paid status is being made as an act of good will and helpfulness considering your pregnancy and immigration implications.
>
> In consideration of the University's offer to continue you on paid status through April 30, 2007, you acknowledge and agree that this action does not constitute an admission on the part of WKU of any liability, or an admission of the correctness of any of the claims which you presented to WKU concerning your termination, your pregnancy status or your gender, and that the original decision to terminate your employment was based on legitimate documented job-related factors.
> . . .
>
> My signature above indicates agreement with the University's decision to continue me in a paid status through April 30, 2007, and further acknowledges that there are no unresolved issues concerning my employment with Western Kentucky University.

Dr. Zhang refused to sign the letter, but WKU nevertheless decided to continue Dr. Zhang's pay as a good faith gesture until April 30, 2007. However, Dr. Zhang's visa status was changed, apparently at the request of Dr. Zhang, on

[3] WKU offers no response to this argument in its appellate brief. Although we are permitted to treat WKU's silence on the issue as a confession of error, *see* CR 76.12(8)(c)(iii), Dr. Zhang does not request that we do so. Thus, we believe it is appropriate to address the merits of the issue.

March 13, 2007. Consequently, WKU was prohibited by law from keeping Dr. Zhang on the payroll after that date.

When granting WKU's motion in limine to exclude the letter, the trial court concluded that admission of the letter would create confusion because there was an issue of fact as to whether the letter was in fact an offer of settlement, that there were possible implications regarding exclusion of offers of settlement under KRE[4] 408, and the letter was merely a "side issue" which did not add anything to the case in chief. However, the trial court permitted WKU to inquire at trial as to WKU's decision to extend Dr. Zhang's pay.

The following question was posed at trial: "Did you tell [Dr. Zhang] that [the extension of pay] was being done as a gesture of goodwill as opposed to some kind of admission that she had a claim of pregnancy discrimination?" Dr. Zhang argued that this questioning opened the door to the admission of the letter. The trial court reiterated its initial decision, finding that the questioning was narrow enough to not open the door to the issue of the alleged settlement offer and that bringing in the letter would merely confuse the jury. Dr. Zhang maintains that the letter should have been admitted for the purpose of showing that, contrary to the testimony given, Dr. Zhang did not request an extension of pay. Dr. Zhang argues that when the trial court allowed WKU to present that they continued to pay her in good faith but disallowed her an opportunity to rebut this with the letter, prejudice resulted. We disagree.

[4] Kentucky Rule(s) of Evidence.

As mentioned, the trial court never made a determination as to whether the letter constituted an offer to compromise for the purposes of KRE 408, nor did Dr. Zhang ask the court to make a definitive ruling in this regard. Even assuming *arguendo* that the letter was not excluded under KRE 408, it was not an abuse of discretion for the trial court to exclude the letter. *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (review of a trial court's decision to exclude evidence on the basis of relevancy is under an abuse of discretion standard); *see* KRE 403. Rather, the trial court reasoned that the admission of the letter would not add anything to Dr. Zhang's gender discrimination claim and would merely create confusion for the jury.

Moreover, Dr. Zhang fails to demonstrate how she was prejudiced by not being permitted to demonstrate that WKU did not extend Dr. Zhang's pay as a gesture of goodwill rather than in exchange for a release of liability when, in fact, WKU did extend Dr. Zhang's pay for no consideration. This letter might have been relevant if it contradicted WKU's statement that Dr. Zhang's pay extension constituted no admission that Dr. Zhang had a claim of pregnancy discrimination. But, this letter offers no such contradiction. Rather, it flatly represents to Dr. Zhang that she has no claim for anything and simply asks for an acknowledgement. At best, this is a settlement offer that Dr. Zhang did not accept, and it would be speculative for any jury to draw an admission of liability solely from the facts that Dr. Zhang rejected this offer and WKU paid part of it anyway. Thus, the trial court did not abuse its discretion when excluding the letter.

III. Multiple Corporate Representatives/Presence of Deputy Wilkins

a. Deputy Wilkins

Dr. Zhang also asserts that she was prejudiced by the presence of Deputy Wilkins, husband of WKU's general counsel Deborah Wilkins, who acted as bailiff during the trial. While Dr. Zhang initially made a general objection to Deputy Wilkins's presence in the courtroom, the trial court addressed this issue outside the presence of the jury by instructing Deputy Wilkins that he was to have no contact with the jury.

In doing so, the trial court attempted to clarify Dr. Zhang's objection, noting that it did not believe that Dr. Zhang's objection was directed toward Deputy Wilkins's presence in the courtroom. Rather it was directed at the possibility that he might have contact with the jurors. When asked if this clarification was correct and whether the trial court's resolution was "fair," Dr. Zhang's counsel agreed that it was adequate to admonish Deputy Wilkins to not have any contact with the jurors. Accordingly, Dr. Zhang waived her objection by conceding that the court action was adequate to cure her objection. Further, Dr. Zhang does not allege that Deputy Wilkins violated the court's order by having any contact with the jurors.

Additionally, nothing prevented Dr. Zhang from requesting an additional admonition from the trial court to address her concerns or for further clarification. *See, e.g., Curtis v. Commonwealth*, 474 S.W.2d 394, 397 (Ky. 1971) ("It was incumbent on [the party alleging the prejudice], if [s]he felt that the

admonition was inadequate, to move the trial court for a further admonition or to move for a mistrial.") (citing *Reeves v. Commonwealth*, 462 S.W.2d 926 (Ky. 1971)). Nothing prevented Dr. Zhang from requesting the court to clarify or reemphasize its admonition. Thus, any contention regarding prejudice due to Deputy Wilkins's presence in the courtroom was waived.

b. Norris and Attorney Wilkins

Dr. Zhang also argues that she was prejudiced because the trial court permitted two witnesses to remain in the courtroom during trial, Pauline Norris Hack as corporate representative for ICSET, and Wilkins as general counsel for WKU.

KRE 615 governs the exclusion of witnesses from the trial court for the purpose of preventing them from hearing the testimony of other witnesses and, consequently, altering their own. *Hatfield v. Commonwealth*, 250 S.W.3d 590, 594 (Ky. 2008) (citing *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky. 2004)). The exclusion is mandatory, unless the witness is shown to fall under an exception to the rule either as a party's representative as designated by its attorney or as any "person whose presence is shown by a party to be essential to the presentation of the party's cause." KRE 615(2)-(3); *Hatfield*, 250 S.W.3d at 594. The Sixth Circuit, when interpreting FRE 615, which is identical in pertinent part to KRE 615, held that a party may request that two witnesses remain in the courtroom, one

as a corporate representative and the other as a party essential to the party's cause. *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991).

However, the party seeking to have the witness participate at trial is required to make a showing that the witness is essential to its cause, and also that the concurrent presence of two witnesses is essential. KRE 615; *Pulley*, 922 F.2d at 1286. It is squarely within the trial court's discretion to determine if the witness is essential. *Hatfield*, 250 S.W.3d at 594. Absent a demonstration that a witness is essential to the party's cause, "failure to separate witnesses may [nevertheless] be harmless error under the particular circumstances of the case." *Id*. at 595. And, "[t]he mere threat or speculation that a witness could tailor testimony is not persuasive of its own accord to warrant prejudicial error." *Id*.

As mentioned, Norris was permitted to participate in the trial as the corporate representative of ICSET. *See* KRE 615(2). Additionally, WKU offered that Wilkins was essential because she had been instrumental in the preparation of the defense. An entity has a right to be represented at trial by an agent capable to give insight into the internal operations of the organization, and it is likewise essential that general counsel be permitted to participate in the defense of its client. Given that Wilkins had no knowledge of the day-to-day operations at ICSET and that Norris is not an attorney permitted to practice law, it is apparent that neither was capable of performing both functions. Thus both representatives were essential to WKU's cause, and the trial court was properly within its discretion to allow both to participate at trial.

IV. Exclusion of Rebuttal Testimony

Dr. Zhang also argues that the trial court abused its discretion when it excluded rebuttal testimony proffered by Bobby Chen, Dr. Han, and Dr. Zhang. "'Rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and should consist of nothing which could have been offered in chief.'" *Commonwealth of Kentucky Dept. of Highways v. Ochner*, 392 S.W.2d 446, 448 (Ky. 1965) (quoting 53 Am.Jur. 107 (Trial, §121)). A trial court may nevertheless permit evidence in chief at the rebuttal stage upon "'good reasons in furtherance of justice.'" *Id* (quoting CR[5] 43.02(d)). However, a court's refusal to permit evidence that should have been introduced as part of the case in chief is reviewed under an abuse of discretion standard. *Id*.

Preservation for review of a trial court's exclusion of such testimony is accomplished only by entering the testimony into the record by avowal. KRE 103; *Hart v. Commonwealth*, 116 S.W.3d 481, 483-84 (Ky. 2003). "A reviewing court requires more than the general substance of excluded evidence in order to determine whether a [party] has suffered prejudice . . . 'Counsel's version is not enough. A reviewing court must have the words of the witness.'" *Id*. at 483 (quoting *Partin v. Commonwealth*, 918 S.W.2d 219, 223 (Ky. 1996) (*overruled on other grounds* by *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295-96 (Ky. 2008)). "A decision in favor of [the] Appellant would require us to assume that there was a substantial possibility the jury would have reached a different verdict if

[5] Kentucky Rule(s) of Civil Procedure.

the evidence had not been excluded. We decline to engage in such guesswork without the actual evidence before us. 'Without an avowal, or a crystal ball, reviewing courts can never know with any certainty what a given witness's response to a question would have been . . . Appellate courts review records; they do not have crystal balls.'" *Id*. at 483-84 (internal citations and quotations omitted).

The trial court permitted Dr. Zhang's counsel to summarize the testimony of Bobby Chen because, for reasons undisclosed from the record, Bobby Chen did not appear when called to testify by avowal. Likewise, the trial court indicated that it was unnecessary for Dr. Zhang to proffer her excluded testimony by avowal because the court believed that the nature of her testimony was sufficiently evident from the trial court's discussions with counsel. Dr. Zhang's counsel complied with the court's direction by summarizing the testimony of Bobby Chen and failed to lodge an objection that the trial court's approach was insufficient to preserve the record for review. It was counsel's duty to object to the trial court's approach as improper for the purpose of preservation. KRE 103(a)(1). Accordingly, the trial court's exclusion of Bobby Chen and Dr. Zhang's rebuttal testimony was not preserved for our review.[6]

[6] We recognize that opposing counsel agreed that Dr. Zhang's excluded testimony had been sufficiently outlined to preserve review on appeal. We do not believe that this is of any consequence because, in light of the authority cited above, we are nevertheless unable to consider the proffered testimony for error where the substance of Dr. Zhang's testimony is unavailable for our review.

Dr. Han's testimony, however, was properly admitted by avowal. Dr. Han, who had no connection with Dr. Zhang, testified regarding the long hours worked by the Chinese ICSET employees and the fear that they had of Dr. Pan because he was a "powerful man." The trial court concluded that Dr. Han's testimony should have been elicited during Dr. Zhang's case in chief, that Dr. Zhang had testified regarding the long hours required at ICSET, and that no one had refuted Dr. Zhang's testimony in this regard. The trial court further noted that, even if Dr. Han's testimony had been brought forth during the case in chief, it had little relevance to Dr. Zhang's claim of pregnancy discrimination. Thus, because Dr. Han's testimony was not regarding the substance of Dr. Zhang's discrimination claim and was not designed to address any testimony offered by the defendant, we find no abuse of discretion when the trial court excluded it during rebuttal.

B. Issues Disposed of via Summary Judgment

Dr. Zhang also raises several assignments of error regarding the disposition of issues at the summary judgment stage.[7] We conclude summary judgment was proper for the reasons stated below.[8]

Summary judgment serves to terminate litigation where "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. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Cas. Co. v. Belknap Hardware & Mfg. Co*., 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not

[7] As mentioned previously, the trial court disposed of Dr. Zhang's claims via two orders of summary judgment. The first order, dated June 24, 2010, disposed of Dr. Zhang's claims under the Kentucky Wages and Hours Act (KRS Chapter 337) and of intentional infliction of emotional distress. The order indicates that "[t]his matter is final and appealable." However, Dr. Zhang made no appeal from this order until February 11, 2011. We nevertheless review this appeal as timely, because the trial court did not make the additional determination that "there is no just reason for delay" necessary to make an order of summary judgment immediately appealable. *Watson v. Best Fin. Serv., Inc.*, 245 S.W.3d 722, 726 (Ky. 2008). Thus, the order was interlocutory until the case became final, and we will treat Dr. Zhang's appeal from this order as timely. *See* CR 54.02(1)-(2).

[8] Although the trial court dismissed portions of Dr. Zhang's claims on alternate bases, we can affirm the lower court on any basis that is supported by trial court record. *Commonwealth Nat'l Res. & Envtl. Cabinet v. Neace*, 14 S.W.3d 15, 20 (Ky. 2000).

create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky.1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment.") Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

I. Intentional Infliction of Emotional Distress

The trial court dismissed Dr. Zhang's claim of intentional infliction of emotional distress because it determined that her claim was subsumed by her claim of discrimination based upon gender pursuant to KRS Chapter 344. However,

viewing the evidence in the light most favorable to Dr. Zhang, we will accept Dr. Zhang's contention that the basis of her IIED claim is sufficiently distinct from her discrimination claim to warrant an evaluation of the merits of her IIED claim. *See Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996).

In order to bring a successful claim for IIED, a party must prove that the wrongdoer's conduct was intentional or reckless; the conduct must have been outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; there must be a causal connection between the wrongdoer's conduct and the emotional distress; and the emotional distress must have been severe. *Id*. at 65 (citing *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984)). The final requirement that the emotional distress must be severe is a high one, and "the injured party must suffer distress that is 'substantially more than mere sorrow.'" *Benningfield v. Pettit Envt'l, Inc.*, 183 S.W.3d 567, 572 (Ky. App. 2005) (quoting *Gilbert v. Barkes*, 987 S.W.2d 772, 777 (Ky. 1999)). Embarrassment does not satisfy this requirement. *Id*.

Dr. Zhang bases her claim upon being subjected to regular questioning by Dr. Pan regarding her whereabouts when he could not find her in the laboratory, her intentions to marry her boyfriend and find another job to be with him in California, her ability to purchase an automobile, and multiple requests for her cellular telephone number. Dr. Zhang also cites to the fact that Dr. Pan regularly yelled at Dr. Zhang, noting that she was lazy and that her work ethic was consistent with that of the American ICSET employees, and required much longer

hours of her than he did of the American employees. Once, Dr. Pan came to Dr. Zhang's residence very late in the evening to take her back to work because she had not completed a sample due that day. She asserts that these actions and comments were particularly disturbing because WKU controlled her visa status and Dr. Pan's approval was necessary in order to maintain her employment on which her visa status was dependant. Thus, Dr. Zhang argues that she felt that she was in "servitude" to Dr. Pan because he "controlled her visa."

Summary judgment was nevertheless appropriate because, even when viewing the facts in the light most favorable to Dr. Zhang and assuming that the first three elements were met, Dr. Zhang did not produce any evidence regarding the severity of distress she exhibited as a result of Dr. Pan's conduct. A party must produce at least some affirmative evidence regarding each element of her claim in order to survive summary judgment. *See Steelvest,* 807 S.W.2d at 481. Although Dr. Zhang stated that she had difficulty sleeping and was depressed after her termination, she simply does not demonstrate that these conditions manifested in emotional distress in any degree of severity. Absent affirmative evidence of its effect on her emotional state, her belief that she was in servitude to Dr. Pan is insufficient to survive summary judgment. *Humana*, 796 S.W.2d at 3. Thus, the trial court properly determined that there was no genuine issue of material fact regarding Dr. Zhang's IIED claim.

II. Invasion of Privacy

Based upon our *de novo* review of the record, we likewise conclude that summary judgment was appropriate regarding Dr. Zhang's invasion of privacy claim. Kentucky has adopted the standards for invasion of privacy set forth in the Restatement (Second) of Torts (1976). Section 652B of the Restatement provides the necessary element for establishing a claim for intrusion upon seclusion:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

In support of her claim, Dr. Zhang reiterates the facts cited as the basis of her IIED claim. She further contends that her privacy was invaded because Dr. Pan requested that an employee look through Dr. Zhang's desk to ascertain if she was seeking alternate employment.

However, Dr. Zhang ignores the fact that, in order to maintain an action for intrusion upon seclusion, an invasion of one's privacy must have actually occurred. *See id*. The facts alleged by Dr. Zhang do not show that Dr. Pan, or any other ICSET employee, involved themselves in her private affairs or concerns in such a manner as to impinge upon her seclusion. Although the questions posed by Dr. Pan were certainly personal, they merely constituted a request for information. Dr. Zhang does not allege that she felt compelled to answer these questions or that she was forced to reveal any personal information as a result of Dr. Pan's questioning.

Likewise, Dr. Zhang reasonably should have anticipated that items left on her desk could be accessed by her co-workers, thus eradicating any expectation of privacy. And, more importantly, she does not allege that a search of her desk, although the parties contest if what was being searched for was actually in relation to her employment, revealed anything of a personal nature. Likewise, knocking on someone's door, even where Dr. Pan directed an ICSET employee to do so in order to require that she return to work, simply cannot be construed as an invasion into one's private affairs. Accordingly, Dr. Zhang failed to demonstrate that she suffered any invasion of her privacy; therefore, summary judgment was appropriate.

III. Kentucky Wages and Hours Claim

Dr. Zhang's final contention is that the trial court erred when it determined that she was employed in a "professional capacity" and therefore did not qualify as an employee pursuant to KRS 337.010(2)(a)(1) entitled to the time-and-a-half pay set forth in KRS 337.285(1).

The definition of "professional capacity" as it relates to exemption from eligibility for time-and-a-half pay pursuant to KRS 337.285(1) is found in 803 KAR 1:070 §4:

> (1) The term "individual employed in a bona fide professional capacity" in KRS 337.010(2)(a)(2) shall mean any employee:
>
> (a) Compensated on a salary or fee basis at a rate

> of not less than $455 per week, exclusive of board, lodging, or other facilities; and[9]
>
> (b) Whose primary duty is the performance of work:

1. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction;

. . .

(2) Learned professionals.

> (a) To qualify for the learned professional exemption, an employee's primary duty shall be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three (3) elements:

1. The employee shall perform work requiring advanced knowledge;

2. The advance knowledge shall be in a field of science or learning; and

3. The advanced knowledge shall be customarily acquired by a prolonged course of specialized intellectual instruction.

> (b) The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical, or physical work. An employee who performs work requiring advanced knowledge uses the advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. Advanced

[9] Dr. Zhang does not contest that her salary meets this requirement.

> knowledge shall not be attained at the high school level.
>
> (c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.
>
> (d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.

Dr. Zhang does not contest that the position for which she was initially hired would fall under this definition. And, the record clearly reveals that Dr. Zhang's employment was dependent upon her possession of a Ph.D. in chemistry, as well as her ability to perform analysis with sophisticated equipment. However, Dr. Zhang contends that the position she held at the time of her termination would not fall within the exemption because she was performing a job that was described by Dr. Pan as being "a job for an undergraduate student." We do not find this argument persuasive. Dr. Zhang's assignment at the time of her termination still required she perform "elemental analysis." This was a task that undoubtedly required "advanced knowledge in a field of science" and "customarily

acquired by a prolonged course of specialized intellectual instruction." Moreover, the definition appears to permit consideration of any advanced knowledge acquired in a post-secondary educational environment. *See* 803 KAR 1:070 §4(b)(2)(3)(b) ("Advanced knowledge shall not be attained at the high school level"). Therefore, the exclusion does not cease to apply simply because the necessary education was not obtained in a Ph.D. program.

Given the disposition of the issues above, the question regarding WKU's immunity, in addition to any other bases of the trial court's dismissal with respect to these claims, is moot.

III. CONCLUSION

For the aforementioned reasons, we affirm.

ALL CONCUR.

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