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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000292-MR

SONYA HACKNEY — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 12-CI-01039

MOUNTAIN COMPREHENSIVE
CARE CENTER, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Sonya Hackney has appealed from the Floyd Circuit Court's entry of summary judgment in favor of Mountain Comprehensive Care Center, Inc. ("MCCC"), in her action for retaliatory and wrongful termination. Following a careful review, we affirm.

Hackney began working for MCCC on May 11, 1993, and was terminated from her employment on May 2, 2011, for failure to perform her job duties in a satisfactory manner. At the time of her discharge, Hackney held a supervisory position and was in charge of overseeing seven office coordinators and thirty-three employees in several MCCC clinics in Eastern Kentucky. Following her firing, Hackney instituted the instant action, alleging she was wrongfully terminated in retaliation for reporting illegal activity occurring at an MCCC clinic. Only a brief recitation of the historical facts is necessary for proper resolution of this matter.

On March 31, 2011, Melanie Blunk, an MCCC nurse practitioner, contacted Promod Bishnoi, MCCC's executive director and CEO, to report an incident which occurred at the Belfry clinic operated by MCCC. It had recently been discovered Nicki Cooke, a clinic coordinator in that office, had written an unauthorized prescription to a patient using a pre-signed blank prescription pad belonging to an MCCC therapist. Contemporaneously, Blunk reported the incident to the Belfry office coordinator and Hackney. The following day, Bishnoi and MCCC's ombudsman met with Blunk to discuss the matter. Cooke was suspended pending a further investigation.

One week later, on April 8, 2011, Cooke was allowed to resign. That same day, Bishnoi met with Hackney to discuss staff reorganization. During the meeting, Bishnoi inquired why Hackney had not contacted him regarding Cooke's

illegal activities or the therapist's practice of leaving signed blank prescription pads available in the clinic. Hackney stated her belief others had already contacted him about Cooke, then restated what she had been told about the incident.

In the aftermath of Cooke's departure, additional personnel were temporarily assigned to assist at the Belfry site. During this time, the transient employees discovered numerous substantial deficiencies in the Belfry staff's work and reported these to Bishnoi who again met with Hackney to discuss the issues. A short time later, Hackney's employment was terminated due to the numerous deficiencies which had recently been uncovered along with her failure to perform essential supervisory job duties.

On October 8, 2012, Hackney sued MCCC, arguing she had been subjected to retaliation and wrongfully terminated in violation of both common law principles and the express provisions of KRS[1] 216B.165[2] for reporting Cooke's activities to MCCC administration. Following a period of discovery, MCCC moved for summary judgment alleging Hackney had admitted she was not, in fact, a whistleblower as she had never reported Cooke's improprieties, and was therefore not a member of the class of persons entitled to protection under KRS

[1] Kentucky Revised Statutes.

[2] This statute specifically applies to whistleblowers from healthcare facilities or providers and requires any "employee of a health care facility . . . who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy" to "make an oral or written report of the problem to the health care facility[.]" KRS 216B.165(1). The statute also prohibits any "health care facility or service" from retaliating "against any agent or employee who in good faith reports[.]" KRS 216B.165(3).

216B.165, citing *Foster v. Jennie Stewart Medical Center, Inc.*, 435 S.W.3d 629 (Ky. App. 2013). Further, because Hackney was an at-will employee, and she had failed to produce any evidence of violation of a clearly defined public policy, her discharge could not support an action for wrongful termination. In response, Hackney alleged she had personally reported Cooke's illegal activities to Bishnoi during their April 8, 2011, meeting, thereby qualifying her for protection from retaliation as a whistleblower under KRS 216B.165; disputed the applicability of *Foster*; and posited the record clearly revealed MCCC's retaliatory motives in terminating her employment. On December 17, 2014, the trial court granted summary judgment to MCCC. Hackney's subsequent motion to alter, amend or vacate the judgment was overruled and this appeal followed.

Before this Court, Hackney contends she was terminated in retaliation for her oral report of Cooke's improper activity, thereby entitling her to the protections afforded under KRS 216B.165. She also alleges the trial court improperly disregarded certain deposition testimony as inadmissible hearsay. We disagree with Hackney's contentions.

As an initial matter, we note Hackney's failure to comply with CR[3] 76.12(4)(c)(v) which requires "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner."

[3] Kentucky Rules of Civil Procedure.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (1987)). Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis,* 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the brief or dismiss the appeal for Hackney's failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

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 Casualty Co. v. Belknap Hardware & Manufacturing Co.,*

281 S.W.2d 914 (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. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not 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 Service Center, 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 trial court correctly determined there were no genuine issues of material fact and 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).

The trial court's order fails to state why summary judgment was granted in this matter. In the absence of any specificity, we will presume the trial court's order is based upon each of the grounds MCCC asserted in its motion for summary judgment, and that the trial court considered and rejected each of the opposing arguments offered by Hackney in her response to MCCC's motion. *See, e.g., Sword v. Scott*, 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established."). Accordingly, we will presume the trial court found Hackney was an at-will employee, she did not report Cooke's illegal activities to anyone at MCCC, the public policy exception to the at-will doctrine set forth in KRS 216B.165 was inapplicable, and her termination was neither wrongful nor actionable. We will also presume the trial court rejected Hackney's arguments to the contrary.

Hackney does not dispute she was an at-will employee who could be terminated for any reason—or no reason at all. Thus, the sole issue before us is whether any of the arguments Hackney offered below were sufficient, for purposes of summary judgment, to create an issue of fact regarding her entitlement to the protections of KRS 216B.165 and whether she can sustain an action for wrongful

termination. We will then briefly comment on Hackney's allegation regarding the trial court's alleged improper disregard of deposition testimony.

To prevail on her claim under KRS 216B.165, Hackney must show (i) she engaged in a statutorily-defined protected activity, (ii) MCCC knew about her protected activity, and (iii) MCCC took an adverse employment action against her because of it. *See Colorama, Inc. v. Johnson*, 295 S.W.3d 148, 152 (Ky. App. 2009). Our review of the record reveals Hackney has failed to make the initial required showing of engaging in a protected activity. In light of that failure, it would be impossible to satisfy the other two elements.

Throughout this litigation, in her attempt to fit into the mold required by KRS 216B.165, Hackney has asserted she made a "report" about Cooke's improper activities to Bishnoi. However, her own deposition testimony reveals she spoke to Bishnoi about the matter only at the April 8, 2011, meeting and that the conversation was initiated by Bishnoi. In her brief before this Court, Hackney contends she made the report in response to questioning from Bishnoi but admits Bishnoi "only asked about the incident with Ms. Cooke in passing and there was no extended discussion about the issue." As below, Hackney fails to offer any support for her position that this conversation constituted a protected activity apart from her self-serving proclamation that she was a whistleblower. When presented with MCCC's motion for summary judgment, Hackney failed to present any affirmative evidence tending to prove this fundamental matter nor to affirm

existence of a disputed material fact. She still has not done so. In the absence of proof she was engaged in a protected activity as enumerated under KRS 216B.165(1), Hackney is not entitled to the statutory protections. *See Foster*, 435 S.W.3d at 633 (dismissal of claim for unlawful retaliation was proper where claimant was not actually a whistleblower because claimant made no report). Thus, being an at-will employee who did not engage in a protected activity, Hackney has failed to show her termination was improper. She simply cannot prevail on a claim of retaliatory discharge or wrongful termination. Therefore, summary judgment was properly granted.

Finally, we briefly comment on Hackney's contention the trial court improperly concluded deposition testimony offered by one of Hackney's co-workers constituted double hearsay and was inadmissible. Nowhere in the record can we locate such a ruling, nor can we find where Hackney presented this matter to the trial court for its consideration. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted). As the trial court was not presented with this additional argument, nor given the opportunity to rule thereon, we shall not consider it for the first time on appeal. Therefore, we conclude the question is not properly before us and requires no further discussion.

For the foregoing reasons, the judgment of the Floyd Circuit Court is AFFIRMED.

ALL CONCUR.

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