

RENDERED: DECEMBER 14, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000794-MR

JOHN DOE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 13-CI-006329

SAINT JOSEPH HEALTH SYSTEM, INC.;
KENTUCKYONE HEALTH, INC.;
KENTUCKYONE HEALTH PARTNERS, LLC;
CATHOLIC HEALTH INITIATIVES, INC.; AND
CONIFER REVENUE CYCLE SOLUTIONS, LLC

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * **

BEFORE: DIXON, D. LAMBERT AND SMALLWOOD, JUDGES.

LAMBERT, D., JUDGE: John Doe appeals from orders of the Jefferson Circuit Court which granted summary judgment in favor of Appellees, denied his motion to alter, amend, or vacate, and denied his motion to disqualify counsel. Doe argues

that summary judgment was improperly granted, that he was not allowed to complete discovery, and that trial counsel for Conifer Revenue Cycle Solutions, LLC should have been disqualified. We find that summary judgment was granted in error as to some claims raised by Doe and that further discovery is necessary. We also find that the trial court did not err in refusing to disqualify Conifer's trial counsel. We, therefore, affirm in part, reverse in part, and remand for additional proceedings.

Doe brought suit against Appellees after he discovered that one of their employees allegedly disclosed his protected health information and his HIV positive status at a social gathering. Neither Doe nor his wife attended the party but heard about the disclosure from others. The only information Doe had about the identity of the person who disclosed his medical information is that her name was Kimberly and she might have worked at Saint Joseph Jessamine RJ Corman Ambulatory Care Center in Nicholasville, Kentucky.

Doe filed his original complaint in December of 2013 and filed an amended complaint in January of 2014. Doe alleged that an employee named Kimberly impermissibly disclosed his medical information at a party. He also alleged that Kimberly, whom he believed worked at the reception desk of Saint Joseph Jessamine, should not have had access to his medical information; therefore, another employee of Appellees impermissibly disclosed his medical

information to her. Doe brought claims against Appellees for the following: invasion of privacy; negligence; negligence *per se* due to the violation of federal and state statutes; negligent hiring, training, and retention; grossly negligent or reckless hiring, training, and retention; violation of the Kentucky Consumer Protection Act; defamation; negligent and intentional infliction of emotional distress; and punitive damages.

Three witnesses to the party were deposed. None of the witnesses knew the person who disclosed Doe's medical information, but they believed her name to be Kim or Kimberly. After the depositions, Appellees produced personnel information relating to all the women with the name Kim whom they employed. The case then became relatively dormant until early 2016 when Conifer filed a motion for summary judgment and Doe requested discovery from the corporate defendants. Summary judgment was denied, but the trial court limited the amount of discovery available to Doe. The court wanted Doe to determine the identity of the person who disclosed his medical information at the party and allowed him to depose the Kims identified by Appellees. The sole purpose of these depositions was to determine which one of the Kims, if any, was at the party.

After this, Doe began focusing on Kimberly Middleton, a Conifer¹ employee, as the person who disclosed his medical information.² It appears as though Doe began focusing on Middleton as the person who disclosed his medical information because he had previously filed a complaint with Saint Joseph about her rude behavior. This complaint was filed around the time Doe's medical information was disclosed at the party. Middleton was deposed, and she denied being at the party and denied disclosing Doe's medical information.

After this deposition, additional motions for summary judgment were filed and on February 22, 2017, the trial court entered an order granting summary judgment in favor of Appellees. The court found that if Middleton were the one who disclosed Doe's medical information, it was done outside the scope of her employment and acted contrary to the defendants' interests. Later, Doe moved to alter, amend, or vacate the summary judgment and to disqualify Conifer's trial counsel. Conifer's counsel represented Middleton at her deposition and Doe believed this would be a conflict of interest. The court denied these motions and this appeal followed.

The 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. . . . "The record must be viewed in a light

¹ Conifer is not a hospital, but its employees staff hospitals.

² Middleton was not added as a defendant to the cause of action.

most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]”

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996) (citations omitted).

Doe’s complaint deals with two separate and allegedly improper disclosures of his medical information. The primary disclosure occurred at the party. The other alleged disclosure presumably occurred at the hospital. We will begin with the disclosure at the party.

All but one of Doe’s claims against Appellees requires an analysis of *respondeat superior*. In order for an employer to be liable for the actions of his or her employee, a plaintiff must prove that the employee’s wrongful acts “were calculated to advance the cause of the principal or were appropriate to the normal scope of the [employee’s] employment.” *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000). We agree with the trial court that if Middleton were the person who disclosed Doe’s medical information at the party, she was acting outside the scope of her employment and was not advancing the cause of any of the appellees. Appellees’ interests were in no way advanced by the disclosure of Doe’s HIV status and Middleton was not acting within the scope of her employment at the

party. Summary judgment was properly granted as to most of the claims arising from the disclosure at the party.

Summary judgment, however, was improperly granted as to Doe's claim of improper hiring, training, and retention. A "plaintiff may assert and pursue in the same action a claim against an employer based under *respondeat superior* upon the agent's negligence, and a separate claim based upon the employer's own direct negligence in hiring, retention, supervision, or training." *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 337 (Ky. 2014).

Negligent hiring and retention claims differ, however, from liability based on "respondeat superior." These claims require that an employer use reasonable care in the selection or retention of its employees. Here, under "respondeat superior," the employer is strictly liable for the act, while under the theory of negligent hiring/retention, the employer's liability may only be predicated upon its own negligence in failing to exercise reasonable care in the selection or retention of its employees.

Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705, 732 (Ky. 2009) (citation omitted). Here, assuming Middleton was the person who disclosed Doe's medical information,³ Doe's claims against Appellees as to their own negligence in hiring, training, and retaining her are still viable at this juncture. This cause of action does

³ Appellees ask this Court to affirm the summary judgment because Doe failed to provide sufficient evidence that Middleton was the person who disclosed his medical information at the party. The trial court did not address this issue in its order granting summary judgment; therefore, we decline to examine it.

not require *respondeat superior*, but is focused on Appellees' own actions. Doe would be entitled to additional discovery as to this issue as well.

We will now turn to the other alleged improper disclosure of Doe's medical information, which the trial court did not address in its order granting summary judgment. Although little attention was given to this disclosure in the parties' briefs or at oral argument, Doe alleged that Middleton did not have access to his medical records at Saint Joseph; therefore, another employee must have impermissibly shared his medical information with her.

The evidence provided by Appellees and included in the record seems to indicate that Middleton's job at Saint Joseph did not allow her access to Doe's medical records. Further, Appellees provided documents showing the individuals who accessed Doe's information during the relevant time period and Middleton's name was not listed on those documents. It is conceivable that Middleton might have overheard someone else discussing Doe's records or been directly told of his HIV status by another employee. This could possibly satisfy the requirements for *respondeat superior* and could also implicate negligent hiring, training, and retention. Because the trial court did not address this issue, discovery was limited, and it does not seem impossible at this time for Doe to prevail at trial on this issue, we must remand for additional proceedings as to this other disclosure.

The final issue for our consideration is Doe's argument that counsel for Conifer should have been disqualified because he represented Middleton at her deposition and this representation was a conflict of interest. The trial court denied the motion to disqualify and we find no error. "[D]isqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary." *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 560 (Ky. 2001) (citation omitted). Here, counsel for Conifer only represented Middleton at a single deposition and Middleton has not been made a party to this action. In addition, both Conifer and Middleton argue that Middleton is not the person who allegedly disclosed Doe's medical information; therefore, their legal positions are not in conflict.

Based on the foregoing, we affirm in part, reverse in part, and remand for additional proceedings.

ALL CONCUR.

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HEALTH SYSTEM, INC.,
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