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# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-001091-MR

MICHAEL NICHOLS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 16-CI-002236

NORTON HEALTHCARE, INC.; AND
KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS AND MAZE, JUDGES.

ACREE, JUDGE: Michael Nichols appeals the Jefferson Circuit Court's order granting summary judgment in favor of Norton Healthcare, Inc. He argues the circuit court's ruling was erroneous because he engaged in a protected activity

when he reported safety concerns to his employer and that, he claims, was the unlawful reason he was terminated. Finding no error, we affirm.

## BACKGROUND

Nichols worked as a biomedical equipment technician for Norton from April 2013 to November 2015. He was responsible for performing preventive maintenance and repairs on medical equipment used by all six Norton facilities in the greater Louisville area. Nichols and Kara Fautz, the lead technician, were the only two employees servicing equipment for Norton.

Around January 2015, Norton decided to cut costs by terminating the services of a third-party vendor that had supplemented the servicing and repair work of Nichols and Fautz. Thereafter, Nichols and Fautz were solely responsible for such servicing and repair work. This required Nichols and Fautz to split on-call responsibilities outside their regular 8:00 a.m. to 4:30 p.m. work schedule.[1] Consequently, and on occasion, Nichols would be called to do repair work in the middle of the night after having worked a full or extended shift.

After several months of this new work schedule, Nichols sent an email to his supervisor, Director of Clinical Engineering Scott Skinner, describing his exhaustion and fatigue. That email played a key role in the circuit court's grant of summary judgment. It states as follows:

[1] Each was on-call two weeks a month.

Hey Scott,

I know we had spoken previously about on call, but I'm sending this email in a second attempt to leave on call responsibilities. It was my understanding that if we ever felt overwhelmed or "burned out" with on call, that we would have the option to remove the on call responsibilities. The last time we had spoken in regards [sic] to on call I had been in [sic] doing on call responsibility for about 6 months, I explained how I was getting burned out, and I would like to turn down the responsibility. From there you informed me, "I don't have a choice", I again tried to explain to you how much after work activities I have with 3 children while we were on our yearly lunch in. I feel as though this position has become a bait and switch, I was hired in under the premise that I would have to work late nights if needed, but neither my contract or the job description explained the need for on call responsibilities

During the interview, that you sat in on, I explained that I would have no problem working late on evenings to get a unit back up, as long as it wasn't on a regular basis. When confronted with the on call idea, both yourself and Mike Robinson[2] both informed me that if we had become "[b]urned out" that we could simply move the responsibilities over to Getinge.[3] I can understand why you may have problems with seeing why I have become burned out, not having children doesn't leave you with this burden, and doesn't leave you to the literal point of exhaustion every night. I just ask that we push forward to have Getinge cover my week of on calls.

Please let me know if you have any concerns.

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[2] Mike Robinson was the supervisor before Skinner.

[3] Getinge is the third-party vendor Norton used in the past and the vendor Nichols wanted to utilize to perform on-call work assigned to him.

Thanks,

Mike Nichols

(Record (R). 260).

After Skinner received the email, Nichols met Skinner in person and asked to be relieved of his on-call responsibilities, again stating he was "burned out" and exhausted due to family responsibilities. During his conversation with Skinner, Nichols maintained a hypothetical concern about fatigue such that, to quote Nichols:

> I might not feel like I'm mentally in the right state of mind to even work on equipment, let alone equipment that could possibly hurt me, you know, being around steam or something along that lines, . . . it could either hurt myself or even bring the equipment down for unneeded reasons.

(R. 398-99). Skinner advised Nichols that being on-call was a part of his job duties, and no other employment position was available at the time. He agreed to continue the on-call responsibilities until a solution could be found. Nichols's sharing of on-call responsibilities with Fautz continued through October 2015.

As part of his job duties, Nichols had to complete annual preventive maintenance on sterilizer equipment. Fautz monitored Nichols's progress with the maintenance. Nichols denied needing help and assured Fautz the work would be completed. Nichols closed out the maintenance work orders with the notation "completed" but, without authority to do so, contacted a third-party vendor to

perform the work at additional cost to Norton. When confronted by Fautz, Nichols eventually confessed to engaging the vendor. Fautz then reported Nichols's unauthorized act to Skinner.

Skinner investigated. He concluded Nichols completed paperwork indicating he performed certain work personally, and that certain work was completed on certain dates. In fact, much of this was false. He had taken credit for work performed by the unauthorized third-party vendor. Nichols claimed it was mere reporting error. He said he completed the quarterly maintenance but called the vendor to complete the annual maintenance and made the mistake of closing out the work orders by failing to indicate a pending situation by the correct notation of "awaiting information." Nichols asserted he was unable to complete the full annual maintenance because of an increase in the number of trouble calls to which he responded that month.

After the investigation, Skinner concluded Nichols: (1) abandoned his duties; (2) falsified records; (3) inappropriately used Norton's resources; and (4) violated standard operating procedures for vendor service and performance expectations. Skinner placed Nichols on administrative leave. After a subsequent conversation with Norton's human resources department, Skinner terminated Nichols on November 9, 2015.

Nichols sued Norton alleging retaliation, in violation of KRS[4] 216B.165, and wrongful discharge, in violation of public policy. He claims his cause of action arises because he brought patient safety concerns to light–protected activity under that statute–and that terminating his employment for doing so was wrongful discharge because it was violative of public policy.

Norton filed a motion for summary judgment on February 2, 2018, stating Nichols's claims fail as a matter of law because he did not engage in a protected activity and, even if the activity was deemed protected, there was no causal connection between his alleged protected activity and his termination. On the contrary, argued Norton, Nichols was terminated for deliberate violation of Norton's policies. The circuit court agreed, granted summary judgment in favor of Norton, and dismissed Nichols's case with prejudice on April 10, 2018. This appeal followed.

STANDARD OF REVIEW

"The proper standard of review on appeal when a trial judge has granted a motion for summary judgment is whether the record, when examined in its entirety, shows there is 'no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010) (quoting Kentucky Rules of Civil Procedure (CR)

[4] Kentucky Revised Statutes.

56.03). "Because summary judgment does not require findings of fact but only an examination of the record to determine whether material issues of fact exist, we generally review the grant of summary judgment without deference to either the trial court's assessment of the record or its legal conclusions." *Id.* (citing *Malone v. Ky. Farm Bur. Mut. Ins. Co.*, 287 S.W.3d 656, 658 (Ky. 2009)).

ANALYSIS

Nichols alleges the circuit court erred in granting summary judgment because he can establish a *prima facia* case for retaliatory termination. Retaliatory termination is governed in this case by KRS 216B.165. It provides:

> (1) Any agent or employee of a health care facility or service licensed under this chapter 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 shall make an oral or written report of the problem to the health care facility or service, and may make it to any appropriate private, public, state, or federal agency.
>
> (2) Any individual in an administrative or supervisory capacity at the health care facility or service who receives a report under subsection (1) of this section shall investigate the problem, take appropriate action, and provide a response to the individual reporting the problem within seven (7) working days.
>
> (3) No health care facility or service licensed under this chapter shall by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent,

> interfere with, coerce, or discriminate against any agent or employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility or service the circumstances or facts to form the basis of a report under subsections (1) or (2) of this section. No health care facility or service shall require any agent or employee to give notice prior to making a report, disclosure, or divulgence under subsections (1) or (2) of this section.

KRS 216B.165(1)-(3). To prevail, Nichols must show: (1) he engaged in a statutorily defined protected activity; (2) Norton knew about his protected activity; (3) Norton took an adverse employment action against him because of it; and (4) there was a causal connection between the protected activity and adverse employment action. *See Colorama, Inc. v. Johnson*, 295 S.W.3d 148, 152 (Ky. App. 2009). Our review of the record reveals Nichols failed to make the required showing that he engaged in a protected activity. Because of that failure, it would be impossible to establish his claim, even if the other elements could be proven.

Throughout this litigation, Nichols asserted he reported safety concerns to Norton. This claim is not supported by the record. Nothing in the email (set forth above) includes any statement of concern for patient safety, nor any expression of concern for the facility's equipment that would not be remedied by Nichols performing his duties. The email concerns his own inconvenience and the fatigue he experienced by the change in those duties. The same can be said of his meeting with Skinner.

In that meeting, again, he primarily addressed concerns about his own exhaustion. Nichols discussed how his work life was not conducive to his demanding family life. (R. 398-400). After discussing his issues with his on-call responsibilities, he said:

> But, I mean, that's pretty much it. I mean, there's other things, like the fact that we – we live in Valley Station, and **no fault to the company** or anything like that, but me leaving at 2:00 o'clock in the morning isn't very ideal for my – my wife.

(R. 400 (emphasis added)). He emphasized, again, that the company was not to blame, stating, "So like I said, its, I mean, **no fault to the company**. We're trying to get out of there as soon as possible, but having me leave in the middle of the night is – is very, very upsetting." (R. 401 (emphasis added)).

Only briefly, and in passing, does Nichols mention how exhaustion could lead to mistakes, or to his own injury, or to "bring[ing] the equipment down for unneeded reasons." Nichols acknowledged that it was his after-work, family obligations that made his on-call responsibilities difficult to satisfy. We question neither Nichols's work ethic nor the challenge of his home life. However, like the circuit court, we cannot conclude that any of Nichols's complaints constitute an expression of his belief that "the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy . . . ." KRS 216B.165(1). It was not until Skinner asked Nichols how relieving him of on-call duty would

benefit Norton that Nichols seemed to consider any impact beyond his own mental and physical well-being. (R. 407). His only response was:

> I guess it would cost them more money, specifically, to have a vendor come in. If I were to come in and I weren't in the right state of mind, like I said, and I mistroubleshot [sic] a piece of equipment, I could bring that piece of equipment down for longer than what it needs to be and ultimately, you know, shutting the unit down causing – .

(R. 407-08).

Norton's motion for summary judgment tested Nichols's post-termination contention that he was concerned with patient safety. He failed to present any affirmative evidence tending to prove the fundamental element of his claim that he was engaged in a protected activity. Absent such evidence, he is not entitled to claim the protections of KRS 216B.165(1). *See Foster v. Jennie Stuart Med. Ctr., Inc.*, 435 S.W.3d 629, 633-34 (Ky. App. 2013) (dismissal of claim for unlawful retaliation was proper where claimant was not actually a whistleblower because claimant made no report). The circuit court found that Nichols's evidence "only indicates . . . his unwillingness to continue having on-call" responsibilities. (Opinion and Order, April 10, 2018, p. 8). We conclude, as did the circuit court, that the evidence presented does not create a genuine issue of material fact regarding the nature of Nichols's complaints–those complaints were personal to him and did not constitute protected activity. Therefore, we conclude Nichols

failed to present to the circuit court a *prima facie* cause of action based on KRS 216B.165.

Notwithstanding this conclusion, the circuit court considered the case in a light most favorable to Nichols and held that, even if his conduct constituted protected activity, "his claims still fail" because he did not present sufficient evidence that his complaints (regardless of their nature) were the reason for his discharge.

After noting a proximity between Nichols's complaints and his termination, the circuit court correctly held that temporal proximity alone is rarely sufficient to establish a causal connection. The court correctly rejected Nichols's "bare assertion that Norton does not follow [its] policies [regarding maintenance] in practice with no affirmative evidence to support it . . . ." (Opinion and Order, April 10, 2018, p. 10). We share this view of the record that there is no evidentiary support for that assertion; therefore, we agree that Nichols failed to create a genuine issue regarding the material fact of any "causal connection between his activity and his termination . . . ." (*Id*.). Nevertheless, just as the circuit court continued the analysis, in part because it facilitated the subsequent consideration of Nichols's public-policy-based wrongful termination claim, we shall do the same.

Presuming a plaintiff establishes a *prima facia* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason to terminate

employment. *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 497 (Ky. 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000)); *see also Niswander v. Cincinnati Ins. Co*. 529 F.3d 714, 720 (6th Cir. 2008).

Norton did "produce evidence of a legitimate, nondiscriminatory reason for its actions." *Niswander*, 529 F.3d at 720 (citing *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir.1997)) . An employer's honest belief that an employee violated a company policy is such a legitimate nondiscriminatory reason. *Id*. at 728. Norton's reasons for the termination, described above, fit that description. However, Nichols attempts to circumvent these facts by contending his termination was pretextual.

There are three ways Nichols could prove pretext; establishing: (1) that the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision; or (3) that the reasons given were insufficient to motivate the decision. Williams, 184 S.W.3d at 497 (citing *Manzer v. Diamond Shamrock Chems. Co*, 29 F.3d 1078, 1083 (6th Cir. 1994)). Nichols argues the last way.

Nichols suggests Norton departed from its established practice of permitting employees to utilize services of an outside vendor in the event they were unable to complete assigned work. The evidence shows no such departure. Rather, it shows Nichols's admission of workplace error, unauthorized engagement

of a third-party vendor, and further evidence of employee misconduct. There is no evidence of bias, but proof of Norton's deliberative, incremental discipline, first placing Nichols on administrative leave following investigation of his conduct that led to his ultimate discharge. There is no evidence tending to prove pretext.

We affirm the circuit court's grant of summary judgment and dismissal of Nichols's retaliatory discharge claim.

Nichols also argues for reversing the dismissal of his wrongful termination claim. Wrongful termination requires a showing that the employer discharged the employee for a reason contrary to an articulatable public policy. As more than adequately addressed by the analysis under the retaliatory discharge claim, Nichols presented no evidence sufficient to create a genuine issue of material fact that his discharge was against any public policy unrelated to KRS 216B.165. Therefore, we affirm the circuit court's dismissal of Nichols's public-policy-based wrongful termination cause of action.

Finally, Nichols argues the summary judgment should be reversed because Norton withheld work orders that would have served to prove pretext. We are not persuaded. To quote the circuit court in which Nichols first raised this issue, "he ignored the fact that he already possessed this discovery in the form of document review, deposition testimony, emails, and discovery responses. Indeed,

he had the information for a very long time." (Opinion and Order, July 11, 2018, p. 2). We find no error in the circuit court's finding and conclusion.

## CONCLUSION

For the foregoing reasons, we affirm the Jefferson Circuit Court's April 10, 2018 order, granting summary judgment in favor of Norton Healthcare, Inc.

ALL CONCUR.

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