NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1878

ROBIN TRENETTE DILLON

VERSUS

LAKEVIEW REGIONAL MEDICAL CENTER AUXILIARY, INC. AND KELO McKAY

Judgment Rendered: JUN 13 2012

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On Appeal from the 22nd Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Docket No. 2009-16431

The Honorable William J. Crain, Judge Presiding

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* * * * * * * * * *

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a summary judgment in favor of the defendants, dismissing the plaintiff's case based on the Whistleblower Statute. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Robin Trenette Dillon was hired as a nurse by Lakeview Regional Medical Center, LLC (Lakeview)[1] on or about June 19, 2006. Her employment was terminated on July 14, 2009. Ms. Dillon initially filed a claim with the Equal Employment Opportunity Commission (EEOC), asserting that she had been subjected to racial discrimination; however, the EEOC notified her in August, 2009, that they were unable to substantiate that a violation had occurred. Thereafter, Ms. Dillon filed the instant suit, on October 28, 2009,[2] contending that she was fired because she had reported a threat to her employer, allegedly made by another nurse to a patient, and that the termination of her employment violated Louisiana's Whistleblower Statute, LSA-R.S. 23:967.

In this suit, Ms. Dillon named as defendants: Lakeview; her Lakeview supervisor, Kelo McKay; and Lakeview's insurer, XYZ Insurance Company. The plaintiff sought reinstatement, back pay, benefits, compensatory damages, attorney fees, court costs, and all other equitable relief to which she was entitled.

Lakeview and McKay answered the suit, denying the allegations and specifically alleging that Ms. Dillon's termination was "legitimate, justified, and non-retaliatory." Claiming they were not in violation of LSA-R.S.

[1] Although the plaintiff named Lakeview Regional Medical Center in her petition as "Lakeview Regional Medical Center Auxiliary, Inc.," Lakeview indicated in its answer that its correct name was "Lakeview Regional Medical Center, LLC."

[2] The plaintiff's petition was filed by facsimile on October 28, 2009 and the filing was deemed complete at that time, pursuant to LSA-R.S. 13:850, since the original was later filed within the requisite five days, on November 2, 2009.

23:967 and asserting that the plaintiff's suit was brought in bad faith, the defendants also alleged in their answer that they were entitled to collect, from the plaintiff, attorney fees and court costs under the statute.[3] The defendants thereafter filed a motion for summary judgment, which was granted by the trial court, and a judgment was signed on February 11, 2011 dismissing the plaintiff's suit. The plaintiff has appealed this judgment, asserting on appeal that the trial court erred: in failing to find there were no genuine issues of material fact precluding summary judgment; in failing to recognize the Nurse Practice Act, LSA-R.S. 37:911 et seq.; and in failing to recognize that Nurse Melissa Creath's action (in threatening a patient under her care) was in violation of LSA-R.S. 14:36.[4]

LAW AND ANALYSIS

Motion for Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern a district court's consideration of whether summary

[3] Louisiana Revised Statute LSA-R.S. 23:967(D) provides that if a suit or complaint is brought in bad faith or if the court determines that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

[4] Louisiana Revised Statute 14:36 provides: "Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery."

judgment is appropriate. **Samaha v. Rau**, 2007-1726 (La. 2/26/08), 977 So.2d 880, 882; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072 (La. 4/9/03), 842 So.2d 373, 377; **Boudreaux v. Vankerkhove**, 2007-2555 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30.

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.**, 876 So.2d at 765-66.

On motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. See LSA-C.C.P. art. 966(C)(2).

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere

allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in LSA-C.C.P. art. 967, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B). See also **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 79-80; **Cressionnie v. Intrepid, Inc.**, 2003-1714 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 879 So.2d at 738-39.

The instant action is based on Louisiana's Whistleblower Statute, LSA-R.S. 23:967, which provides:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
>
> (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.
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> B. An employee may commence a civil action in a district court where the violation occurred against any employer who engages in a practice prohibited by Subsection A of this Section. If the court finds the provisions of Subsection A of this Section have been violated, the plaintiff may recover from

> the employer damages, reasonable attorney fees, and court costs.
>
> C. For the purposes of this Section, the following terms shall have the definitions ascribed below:
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> (1) "Reprisal" includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such.
>
> (2) "Damages" include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal.
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> D. If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

Thus, under the provisions of the Whistleblower Statute, it is apparent that an employee is entitled to damages, attorney fees, and court costs thereunder, if his employer fires him, lays him off, causes a loss of his benefits, or takes any discriminatory action against him, as a reprisal for the employee advising the employer that the employer has violated the law and thereafter the employee: (1) discloses or threatens to disclose a workplace act or practice that is *in violation of state law*; (2) provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into *any violation of law*; or (3) objects to or refuses to participate in an employment act or practice that is *in violation of law*.

In **Accardo v. Louisiana Health Services & Indemnity Company**, 2005-2377 (La. App. 1 Cir. 6/21/06), 943 So.2d 381, 383, this court examined LSA-R.S. 23:967 to determine whether the statute provided protection to a plaintiff who reports what he believes, in *good faith*, is a violation of law. Noting that the statute provides protection to employees,

against reprisal from employers, for reporting or refusing to participate in illegal work practices, the court stated that whether a plaintiff must prove an *actual violation of state law* to establish a Louisiana Whistleblower claim was a *res nova* issue. **Id.**, 943 So.2d at 383. After applying pertinent principles of statutory construction, this court concluded that the statute requires an employee to prove an *actual violation of state law* by the employer in order to prevail on the merits under the Whistleblower Statute. **Id.**, 943 So.2d at 387.

Attached to the defendants' motion for summary judgment, in this case, were various Lakeview employment records, including a "Record of Employee Conference" dated November 19, 2008, in which it was noted that Nurse Melissa Creath was suspended for one day following an incident involving a patient in the hospital, during which the patient allegedly spit his medication onto Nurse Creath (who was pregnant at the time), whereupon, Nurse Creath told the patient that if her baby got sick, she would "f[**]king kill him." The employee conference record further stated that Nurse Creath was informed that if she threatened or cursed a patient again, her employment would be terminated.

The plaintiff's deposition was also filed into the record in support of the defendants' motion for summary judgment. Ms. Dillon testified that she was not personally present during the incident involving Nurse Creath and the patient (as she was not working that day) and that she had no personal knowledge whether Nurse Creath was making a "real" threat to the patient. Further, Ms. Dillon admitted that she had no reason to believe that, if there was an investigation into the Creath incident, she would be questioned since she had no personal knowledge about the incident. Ms. Dillon did not indicate either in her deposition or in the affidavit she filed into the record

that she reported Nurse Creath to either the Nursing Board or the Department of Health and Hospitals, although she argued that she thought Nurse Creath's behavior should have been reported.[5]

After a thorough review of the record presented in this case and the applicable law, we conclude that the plaintiff in this case failed to show that she will be able to bear her burden of proof under the Whistleblower Statute, which requires the employee/plaintiff to prove an *actual violation of state law* by the employer in order to prevail. Ms. Dillon contends that the threatening words uttered by Nurse Creath to the patent at issue constituted an assault and were therefore criminal. Since an assault is "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery" (pursuant to LSA-R.S. 14:36), in order to prove that Nurse Creath assaulted her patient, it would be necessary to show that she attempted to commit a battery on the patient or that she placed her patient in fear of receiving a battery. There is simply no indication in the record that Nurse Creath either attempted to batter the patient or that the patient was actually placed in fear that Nurse Creath would commit battery upon his person.

The plaintiff further contends that Nurse Creath's statement to her patient violated the Nurse Practice Act (LSA-R.S. 37:911 et seq.), particularly LSA-R.S. 37:921, which provides:

> The board may deny, revoke, suspend, probate, limit, or restrict any license to practice as a registered nurse or an advanced practice registered nurse, impose fines, and assess costs, or otherwise discipline a licensee and the board may

[5] Ms. Dillon has asserted that Lakeview had a duty to report the Creath incident to either the Louisiana Nursing Board or the Department of Health and Hospitals; however, she cites no legal authority that would impose such a duty. While we note that the "Louisiana Health Care Professionals Reporting Act," LSA-R.S. 37:1745.11 - 37:1745.17, requires the reporting of adverse actions taken against health care professionals, or a surrender of clinical privileges in lieu thereof, due to an impairment or possible impairment resulting from alcohol or drug dependency, we can find no statutory reporting requirement applicable to the particular facts and circumstances of this case.

> limit, restrict, delay, or deny a student nurse from entering or continuing the clinical phase of nursing education upon proof that the licensee or student nurse:
>
> * * *
>
> (8) Is guilty of moral turpitude.

Although "moral turpitude" is not defined in the Nurse Practice Act, in Title 40, "Public Health and Safety," Chapter 5, "Miscellaneous Health Provisions," Part VII, "Emergency Medical Services," "moral turpitude" is defined as an "act of baseness, vileness, or depravity in the duties which one person owes another, or to society in general, which is contrary to the usual, accepted, and customary rule of right and duty which a person should follow." LSA-R.S. 40:1231(18).[6]

At most, the plaintiff in this case has demonstrated that Nurse Creath, in response to a patient's actual or threatened spitting upon her person, cursed and threatened her patient, and although the threat contained the word "kill" there was no proof in the record that Nurse Creath, who was allegedly pregnant at the time, had any intent or ability to carry out the threat, or that the patient feared that she would do so. Nurse Creath's employer, Lakeview, obviously determined that Nurse Creath responded in anger to the situation, rather than determining that Nurse Creath actually intended to kill the patient, since the hospital administered only a one-day suspension and warning to her that future such behavior would result in the termination of her employment. Ms. Dillon produced no evidence to the contrary in opposition to the motion for summary judgment.[7] We further note that there

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[6] We note that this definition of "moral turpitude" is substantially the same as that found in Black's Law Dictionary, which defines "moral turpitude" as an "act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man." Black's Law Dictionary 910 (5th ed. 1979).

[7] We also note that Ms. Dillon made an additional argument that Nurse Creath's statement to her patient violated a nurse's "first do no harm" creed; however, she cited no authority imposing a duty of this nature, statutory or otherwise.

were no allegations of illegal activity on the part of Ms. Dillon's supervisor, Kelo McKay, who was also made a defendant in this case.

Furthermore, it is not a foregone conclusion that the actions of Nurse Creath would be dispositive in this case. The Whistleblower Statute provides a cause of action to an employee "against any ***employer who engages in a practice*** prohibited by [LSA-R.S. 23:967] Subsection A," which is described in Subsection A as being a violation of the law. (Emphasis added.) Thus, it could be concluded that the employer must be the actor who violated the law, in order for there to be a cause of action under this statute. Although it is unnecessary to resolve this point in order to dispose of the issue presented in this case (since we have determined that, regardless, the act of the plaintiff's co-worker was not established as having, in fact, been a criminal act, as alleged), we think it worth noting, and observe that the employer in this case, Lakeview, did not condone the act of Nurse Creath, but rather suspended her, as a disciplinary action, and determined that any further act of this nature would result in termination of the nurse's employment. Therefore, the *actions taken by the hospital/employer* could not be said to have been illegal in any way.[8]

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere allegations or denials, but must respond with affirmative evidence. See **Thomas v. Hodges**, 2010-0678 (La. App. 1 Cir. 10/29/10), 48 So.3d 1274, 1281, writ denied, 2010-2637 (La. 2/11/11), 54 So.3d 1109. The plaintiff has failed to meet her burden to show a violation of law was committed by

[8] We note, though do not decide herein, that there is no indication in the provisions of LSA-R.S. 23:967, in referencing an "act or practice" of the employer, that such would encompass unauthorized acts of its employees. But cf. LSA-C.C. art. 2317 (imposing tortious liability on an employer, for employee's act, under certain circumstances).

her employer, or by her co-worker, in this case; therefore, we find no error in the summary judgment granted by the trial court, dismissing the case.[9]

CONCLUSION

For the reasons assigned herein, the summary judgment granted by the trial court is affirmed. All costs of this appeal are to be borne by the plaintiff/appellant, Robin Trenette Dillon.

AFFIRMED.

[9] Having decided the appeal on this basis, we find it unnecessary to address other issues raised on appeal.