[Cite as *Croskey v. Universal Health Servs.*, 2009-Ohio-5951.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | |
|---|---|
| DARCY J. CROSKEY | JUDGES: |
| Plaintiff-Appellant | Hon. William B. Hoffman, P. J.<br>Hon. John W. Wise, J.<br>Hon. Patricia A. Delaney, J. |
| -vs- | Case No. 09 CA 37 |
| UNIVERSAL HEALTH SERVICES, INC., et al. | |
| Defendants-Appellees | O P I N I O N |

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 07 CV 774H

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 6, 2009

APPEARANCES:


| For Plaintiff-Appellant | For Defendants-Appellees |
|---|---|
| TIMOTHY B. PETTORINI<br>ADAM B. LANDON<br>CRITCHFIELD, CRITCHFIELD<br>& JOHNSTON, LTD<br>10 South Gay Street<br>Mount Vernon, Ohio 43050 | PAUL L. BITTNER<br>AARON L. GRANGER<br>AMANDA L. WICKLINE<br>SCHOTTENSTEIN, ZOX & DUNN<br>250 West Street, Suite 700<br>Columbus, Ohio 43215 |

*Wise, J.*

**{¶1}** Plaintiff-Appellant Darcy J. Croskey appeals the February 3, 2009, and February 27, 2009, decisions entered in the Richland County Common Pleas Court granting summary judgment in favor of Defendants-Appellees Universal Health Services, Inc. and Keystone Richland Center, L.L.C.

**STATEMENT OF THE FACTS AND CASE**

**{¶2}** In September, 2005, Plaintiff-Appellant, Darcy J. Croskey, was hired by Appellees Universal Health Services, Inc. and Keystone Richland Center LLC, d.b.a. Foundations for Living as an LPN to work second shift.

**{¶3}** As an LPN, Appellant's duties consisted of being responsible for administering medication, transcribing physician orders, documenting treatment received by residents and counseling residents on medical treatments and medications.

**{¶4}** Appellees have a progressive discipline process. Generally, employees receive counseling and a written corrective action notice based upon the seriousness of their violation of company policy. When appropriate, employees are advised that further violations could result in the termination of their employment.

**{¶5}** During her employment with Appellees, Appellant received a number of complaints resulting in correction action notices or reports, including, but not limited to: withholding a requested medication from a resident and being verbally abusive at the time; committing a medication error which resulted in a patient being deprived of treatment; failing to examine a patient after the patient had been physically restrained; arguing with a fellow employee; having a verbal altercation

with a resident, refusing to assist staff members and yelling at staff members over the radio; revealing a resident's last name in violation of HIPAA; and, providing a resident with a double dose of two different prescription medications.

**{¶6}** Appellant sought medical attention for “stress” and took leave pursuant to the FMLA from November 20, 2006, through December 4, 2006.

**{¶7}** On December 4, 2006, Appellant returned to work.

**{¶8}** On December 7, 2006, Appellees terminated Appellant’s employment.

**{¶9}** Subsequent to Appellant’s termination, Appellees provided copies of Appellant’s Correction Action Reports to the Ohio Board of Nursing.

**{¶10}** On May 31, 2007, Appellant Croskey, initiated an action in the Richland County Court of Common Pleas by filing a Complaint against Defendants-Appellees Universal Health Services, Inc. and Keystone Richland Center LLC, d.b.a. Foundations for Living. Appellant alleged five separate counts in her Complaint including Whistleblower Discrimination, in violation of R.C. §4113.42, termination in violation of a public policy, intentional infliction of emotional distress, Family Medical Leave Act discrimination and defamation.

**{¶11}** On October 8, 2008, Appellees filed a Motion for Summary Judgment as to all counts in Appellant's Complaint.

**{¶12}** On February 3, 2009, the trial court issued an Order granting Appellees’ Motion for Summary Judgment.

**{¶13}** On February 27, 2009, the trial court issued a Final Judgment Entry granting Appellees’ Motion for Summary Judgment, dismissing Appellant’s case in

its entirety with prejudice, and specifying that there was "no just cause for delay." The trial court's Judgment Entry was journalized on March 2, 2009.

**{¶14}** Appellant now appeals from this decision, raising the following assignment of error:

**ASSIGNMENT OF ERROR**

**{¶15}** "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS, UNIVERSAL HEALTH SERVICES, INC. AND KEYSTONE RICHLAND CENTER, LLC'S MOTION FOR SUMMARY JUDGMENT. "

**I.**

**{¶16}** As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

**{¶17}** Civ.R. 56(C) provides, in pertinent part:

**{¶18}** "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * "

**{¶19}** Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-207.

Whistleblower Discrimination, R.C. §4113.52

**{¶20}** R.C. §4113.52, Ohio's "Whistleblower Act," states in pertinent part:

**{¶21}** "If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. * * *."

**{¶22}** Such statute establishes guidelines by which an employee can bring to the attention of the employer or appropriate authorities illegal activity by either the employer or a co-employee without being discharged. *Keefe v. Youngstown Diocese of the Catholic Church* (1997), 121 Ohio App.3d 1, 5. In order for an employee to be afforded protection as a "whistleblower," such employee must strictly comply with the dictates of R.C. §4113.52, and the failure to do so prevents the employee from claiming the protections embodied in the statute. Id., citing *Contreras v. Ferro Corp*. (1995), 73 Ohio St.3d 244, syllabus.

**{¶23}** Appellant argues that Appellees terminated her employment in retaliation for her complaints about nursing staff and for notifying her supervisors that certain medications were missing and/or being mismanaged.

**{¶24}** Upon review of the record, we find that the record does not support Appellant's claims. Instead, the record supports the finding that Appellant was terminated after a series of disciplinary actions.

**{¶25}** We further find that Appellant admits she committed the offenses and/or engaged in the conduct which resulted in disciplinary action being taken against her, and which ultimately culminated in her termination.

**{¶26}** We fail to find evidence in the record to support Appellant's allegations that such corrective action taken against her was in retaliation for the complaints she made to her supervisors.

**{¶27}** Appellant made a number of complaints to her supervisors about the drug Topomax missing and about patient case which she claims resulted in her termination.

Upon review of such, we find that Appellant failed to establish sufficient evidence that she was engaged in a "protected activity" when making such complaints.

**{¶28}** While it does appear that she did notify her supervisors that up to forty pills of Topomax were missing, we do not find that Appellant presented evidence that such would result in an eminent risk of physical harm or cause a public hazard.

**{¶29}** Likewise, we find that the complaints she may have made with regard to patient care, were vague, and we do not find support in the record that Appellant believed that such complaints were criminal offenses which would result in an imminent risk of physical harm or create a public hazard.

**{¶30}** Accordingly, upon review, we conclude summary judgment was properly granted in favor of Appellees in regard to the statutory whistleblower claim.

Termination in Violation of Public Policy

**{¶31}** Appellant also claims that her termination was in violation of public policy.

**{¶32}** Pursuant to *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, a discharged employee has a private cause of action sounding in tort for wrongful discharge when his or her discharge is in contravention of a "sufficiently clear public policy." Id. at 233. In *Greeley*, the Ohio Supreme Court recognized that the public policy was "sufficiently clear" when the General Assembly had adopted a specific statute forbidding an employer from discharging or disciplining an employee on the basis of a particular circumstance or occurrence. *Greeley* noted other exceptions might be recognized when the public policy could be deemed to be "of equally serious import as the violation of a statute." Id. at 235. "The existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the

Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law." *Painter v. Graley* (1994), 70 Ohio St.3d 377, 384.

**{¶33}** In order to establish a claim for wrongful termination in violation of Ohio public policy, a plaintiff must demonstrate:

**{¶34}** "1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).

**{¶35}** "2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).

**{¶36}** "3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).

**{¶37}** "4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element)." (Emphasis added.) Id. at 384. See also *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994.

**{¶38}** The clarity and the jeopardy elements are questions of law and policy to be determined by the court. *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 70. The causation and overriding-justification elements are questions of fact to be determined by the trier of fact. Id.

**{¶39}** In the case sub judice, Appellant was required to identify a clear source of public policy separate and apart from the public policy embodied in R.C. §4113.52. See *Lesko v. Riverside Methodist Hosp.,* Franklin App. No. 04AP-1130, 2005-Ohio-3142. It was Appellant's burden to indicate the specific public policy at issue and to establish

how that clear public policy was violated by her termination. *Poland Twp. Bd. of Trustees v. Swesey,* Mahoning App. No. 02 CA 185, 2003-Ohio-6726.

**{¶40}** We concur with the trial court that Appellant failed to do so. Appellant failed to identify an additional source of public policy separate and apart from the public policy embodied in R.C. §4113.52. Appellant was terminated by Appellees pursuant to their progressive disciplinary policy. Appellant has failed to show how Ohio's public policy was violated by her discharge.

**{¶41}** We therefore find summary judgment was appropriate as to Appellant's termination in violation of public policy claim.

Intentional Infliction of Emotional Distress

**{¶42}** Section 35, Article II of the Ohio Constitution and R .C. §4123.74 provide an employer under Ohio's Workers' Compensation system is immune from suit by its employees for occupational injuries except for injuries resulting from intentional torts. See *Jones v. VIP Development Company* (1984), 15 Ohio St.3d 90.

**{¶43}** To state a claim for intentional infliction of emotional distress, a plaintiff must be able to establish that: (1) the defendant either intended to cause emotional distress, or knew or should have known that its actions would result in serious emotional distress; (2) defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency, and would be considered utterly intolerable in a civilized community; (3) defendant's actions proximately caused injury to plaintiff; and (4) the mental anguish plaintiff suffered is serious and of such a nature that no reasonable person could be expected to endure. *Ashcroft v. Mt. Sinai Medical Center* (1990), 68 Ohio App.3d 359.

**{¶44}** The Ohio Supreme Court has described the outrageous behavior that supports this type of claim as requiring something beyond a “tortious or even criminal” intent to cause harm. *Id.* at ¶ 50 (quoting *Yeager v. Local Union 20,* 6 Ohio St.3d 369, 374-75, 453 N.E.2d 666 (1983), abrogated on other grounds by *Welling v. Weinfeld,* 113 Ohio St.3d 464, 2007-Ohio-2451). It is not sufficient for a plaintiff to set forth facts tending to prove that the defendant's “conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.” *Id.* (quoting *Yeager,* 6 Ohio St.3d at 374-75).

**{¶45}** Appellant has failed to set forth any evidence in the record creating a genuine issue of material fact regarding whether Appellees “intended to cause emotional distress, or knew or should have known [its] actions would result in serious emotional distress” or whether Appellees’ “conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community.” *Rigby v. Fallsway Equip. Co. Inc.,* 150 Ohio App.3d 155, 2002-Ohio-6120, at ¶ 48 (quoting *Jones v. White* (Oct. 15, 1997), 9th Dist. No. 18109.

**{¶46}** Upon review, we find nothing in the record to support that Appellees’ actions in terminating Appellant for documented disciplinary reasons rises to the level of “extreme and outrageous conduct”.

**{¶47}** We therefore find the granting of summary judgment appropriate on such claim.

Defamation

**{¶48}** In her Complaint, Appellant claims that Appellees "… wrongly reported [Appellant] to the State of Ohio with regard to her certification and has [sic] made disparaging remarks about her to potential employers."

**{¶49}** To establish her defamation claim, Appellant had to prove the following four elements:

**{¶50}** "(a) a false and defamatory statement concerning another;

**{¶51}** "(b) an unprivileged publication to a third party;

**{¶52}** "(c) fault amounting at least to negligence on the part of the publisher; and

**{¶53}** "(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." (Internal citations and quotations omitted.) A*kron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601.

**{¶54}** "A statement is false and defamatory if it is directed against an individual with an intent to injure his reputation or to expose him to public hatred, contempt, ridicule, shame, or disgrace or to affect him injuriously in his trade, business or profession." *McWeeney*, 2004 WL 602306 at ¶ 26, citing *Robb v. Lincoln Publishing (Ohio), Inc.* (1996), 114 Ohio App.3d 595, 616, 683 N.E.2d 823, see also *Heidel*, 2003 WL 21373164 at ¶ 14, citing *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 345-346, 94 S.Ct. 2997, 41 L.Ed.2d 789.

**{¶55}** Moreover, even if a plaintiff can establish a claim for defamation, truth is an absolute defense*. Ed Schorey & Sons, Inc. v. Society Natl. Bank* (1996), 75 Ohio St.3d 433.

**{¶56}** Once the plaintiff sets forth a *prima facie* case of defamation, the defendant may avoid liability by invoking the defense of qualified privilege which requires him to show that:

**{¶57}** "(1) he acted in good faith; (2) there was an interest to be upheld; (3) the statement was limited in its scope to the purpose of upholding that interest; (4) the occasion was proper; and (5) the publication was made in a proper manner and only to the proper parties." *Mosley v. Evans* (1993), 90 Ohio App.3d 633, 636, 630 N.E.2d 75, citing *Hahn, supra,* at 246, 331 N.E.2d 713.5 *Baker v. Spinning Road Baptist Church, Inc.* (Sept. 11, 1998), Montgomery App. No. 17052, unreported.

**{¶58}** The purpose of the privilege is to ensure "the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits." *Hahn, supra,* at 246, 331 N.E.2d 713. (Citations omitted.)

**{¶59}** Under Ohio law, a qualified privilege exists as to communications of an employer concerning the discharge of a former employee to that employee's prospective employer. *Rinehart v. Maiorano* (1991), 76 Ohio App.3d 413, 421; *Rainey v. Shaffer* (1983), 8 Ohio App.3d 262, 264. In order to prevail over this privilege, plaintiff must make a showing that defendants exceeded the privilege by acting with actual malice. *Evely v. Carlon Co.* (1983), 4 Ohio St.3d 163, 165; *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244. In the context of a defamation action, a person acts with actual malice when they act "with knowledge that the statements are false or with reckless disregard of whether they were false or not." *Hahn, supra,* at paragraph two of the syllabus.

**{¶60}** In the instant case, there is no evidence in the record that the statements made to the State of Ohio Board of Nursing and to potential employers, were not true statements. As stated above, Appellant admitted that she committed the violations set forth in the Corrective Action Notices which were given to the Ohio Board of Nursing.

**{¶61}** We further find that any such communications made by Appellees were privileged and Appellant failed to show the existence of actual malice.

**{¶62}** Upon review, we find Appellant supplied no evidence in response to Appellees' Motion for Summary Judgment that would show any issue of material fact. We therefore hold that summary judgment in favor of Appellees was not erroneous under the facts and circumstances presented.

**{¶63}** Accordingly, Appellant's sole assignment of error is overruled.

**{¶64}** Based on the foregoing, the judgment of the Court of Common Pleas, Richland County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 1015

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| DARCY J. CROSKEY | : | |
| Plaintiff-Appellant | : | |
| -vs- | : | JUDGMENT ENTRY |
| UNIVERSAL HEALTH SERVICES, INC., et al. | : | |
| Defendants-Appellees | : | Case No. 09 CA 37 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ PATRICIA A. DELANEY

JUDGES