Affirmed and Opinion Filed February 23, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00670-CV

LOYDS OF DALLAS ENTERPRISES, LLC, Appellant
V.
TAMMY JENNINGS, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-09018

MEMORANDUM OPINION

Before Justices Fillmore, Stoddart, and O'Neill[1]
Opinion by Justice Stoddart

This is an interlocutory appeal[2] from an order denying Loyds of Dallas Enterprises, LLC's motion to dismiss an alleged health care liability claim (HCLC) for failure to file an expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2015).

Tammy Jennings filed this statutory employment-retaliation claim against Loyds after she was fired as a caregiver at an assisted living facility operated by Loyds. She alleges she was fired for reporting violations of the health and safety code consisting of failures by Loyds to make adequate medication and food available for residents. *See* TEX. HEALTH & SAFETY CODE ANN. § 260A.014 (West Supp. 2015). After the time expired for filing an expert report, Loyds moved to dismiss Jennings's suit, arguing her claim was an HCLC and she failed to file an expert report as

[1] The Hon. Michael J. O'Neill, Justice, Assigned

[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West Supp. 2015).

required by Section 74.351 of the civil practice and remedies code. The trial court denied the motion. In a single issue on appeal, Loyds argues Jennings's claim is an HCLC under the supreme court's holding in *PH Management–Trinity NC, LLC v. Kumets*, 404 S.W.3d 550 (Tex. 2013) (per curiam). For the reasons discussed below, we disagree and affirm the trial court's order.

A. Background

Because no evidence was presented in the trial court, we take the facts from Jennings's petition. Jennings was employed by Loyds as a caregiver. She was responsible for giving residents their medication. She alleges that at times, the medication would run out and Loyds instructed her to falsify documents indicating the medication had been given, even though the medication was not available. Jennings was also responsible for preparing meals and snacks for residents. She alleges that on numerous occasions, Loyds did not have enough food to prepare adequate meals and snacks.

Jennings complained to her manager about the meals and medication issues, but was scolded and told she was not being a "team player." She later reported the issues to Loyds's management and asked for a meeting to discuss her concerns. Loyds refused to meet with her. A few days later, Loyds terminated Jennings's employment. She alleges she was terminated in retaliation for complaining about resident neglect.

B. Standard of Review

The Texas Medical Liability Act (TMLA) requires a claimant in an HCLC to file expert reports within 120 days after each defendant's original answer is filed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). If the reports are not filed within that time period, the trial court, on motion of the defendant, must dismiss the HCLC with prejudice and award the defendant reasonable attorney's fees and costs. *Id.* § 74.351(b). The issue in this appeal is whether Jennings's statutory retaliation claim is also an HCLC and subject to the expert report

requirements.

Whether a claim is an HCLC is a question of statutory construction and is reviewed de novo. *Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012). Section 74.001(a)(13) defines a HCLC as:

> (13) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13).[3]

Under this definition, an HCLC has three elements: (1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant. *Rio Grande Valley Vein Clinic, P.A. v. Guerrero*, 431 S.W.3d 64, 65 (Tex. 2014); *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 179–80 (Tex. 2012), *clarified by Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 502, 504–05 (Tex. 2015). No one element, occurring independently of the other two, will recast a claim into an HCLC. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 758 (Tex. 2014). In order to determine whether a claim is an HCLC, we consider the underlying nature or gravamen of the claim. *Omaha Healthcare Ctr., LLC v. Johnson*, 344 S.W.3d 392, 394 (Tex. 2011); *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010). Artful pleading cannot alter that nature. *Omaha Healthcare Ctr., LLC*, 344 S.W.3d at 394; *Yamada*, 335 S.W.3d at 196.

[3] This definition was amended effective September 1, 2015 to add the following language at the end of the definition: "The term does not include a cause of action described by Section 406.033(a) or 408.001(b), Labor Code, against an employer by an employee or the employee's surviving spouse or heir." We refer to the version of the definition in effect at the time this cause of action accrued. *See* Act of May 24, 2015, 84th Leg., R.S., ch. 728, § 2, 2015 Tex. Sess. Law Serv. 2210, 2210 (West) (continuing law in effect prior to amendment for causes of action accruing before effective date).

C. Statutory Retaliation Claim

Jennings alleges a cause of action under section 260A.014 of the health and safety code. TEX. HEALTH & SAFETY CODE ANN. § 260A.014. Section 260A.014 gives an employee a cause of action against a facility for retaliation:

> An employee has a cause of action against a facility, or the owner or another employee of the facility, that suspends or terminates the employment of the person or otherwise disciplines or discriminates or retaliates against the employee for reporting to the employee's supervisor, an administrator of the facility, a state regulatory agency, or a law enforcement agency a violation of law, including a violation of Chapter 242 or 247 or a rule adopted under Chapter 242 or 247, or for initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the facility.

Id. § 260A.014(b). Under this section, the plaintiff must show: (1) she was an employee of a hospital, mental health facility, or treatment facility; (2) she reported a violation of law; (3) the report was made to a supervisor, an administrator, a state regulatory agency, or a law enforcement agency; (4) the report was made in good faith; and (5) she was suspended, terminated, disciplined or otherwise discriminated against. *Id.*; s*ee Barron v. Cook Children's Health Care Sys.*, 218 S.W.3d 806, 810 (Tex. App.—Fort Worth 2007, no pet.) (construing Section 161.134 of the health and safety code which provides a similar retaliation claim for employees of hospitals, mental health facilities, and treatment facilities). Chapter 260A also imposes a duty to report on any person who has cause to believe a resident's physical or mental health or welfare has been affected by abuse, neglect, or exploration.[4]

The employee has the burden of proof, except there is a rebuttable presumption that the employee was terminated for reporting the violation of law if "the person is suspended or terminated within 60 days after the date on which the person reported in good faith." TEX.

[4] A person, including an owner or employee of an assisted living facility, has a duty to report abuse, neglect, or exploitation if they have cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation by another person. TEX. HEALTH & SAFETY CODE ANN. § 260A.002. Failure to report when required is a criminal offense. *Id.* § 260A.012. Facilities must require employees to sign a statement that the employee realizes that the employee may be criminally liable for failure to report abuses. *Id.* § 260A.002(b).

HEALTH & SAFETY CODE ANN. § 260A.014(f). If the statutory presumption is rebutted, the employee must prove causation. *See Capps v. Nexion Health at Southwood, Inc.*, 349 S.W.3d 849, 856 (Tex. App.—Tyler 2011, no pet.). The general causation standard applied in whistleblower and similar cases requires proof that the employee's protected conduct, reporting a violation of law, was such that, without it, the employer's prohibited conduct, termination, would not have occurred when it did. *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995); *Town Hall Estates-Whitney, Inc. v. Winters*, 220 S.W.3d 71, 81 (Tex. App.—Waco 2007, no pet.) (considering prior version of Section 260A.014).

D. Analysis

Loyds contends this case is controlled by the decision in *Kumets*, 404 S.W.3d 550. We disagree.

In *Kumets*, a patient was admitted to a nursing home to recover from a stroke. *Id.* at 551. After she suffered a second stroke, her family alleged several causes of action against the nursing home claiming inadequate care caused the second stroke. *Id.* They alleged several causes of action, including medical negligence, against the nursing home. *Id.* They also alleged the nursing home discharged the patient from the home in retaliation for complaints the family made about her care. *Id.* The retaliation claim was based on section 260A.015 of the health and safety code, which creates a statutory cause of action against a nursing facility that retaliates against a resident or family member who makes a complaint or files a grievance concerning the facility. *Id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. § 260A.015(a). The trial court in *Kumets*, dismissed all of the family's causes of action except the retaliation claim for inadequate expert reports. *Kumets*, 404 S.W.3d at 551; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b). A divided panel of the court of appeals affirmed the trial court. *Kumets*, 404 S.W.3d at 551.

The supreme court reversed the court of appeals, concluding the retaliation claim was based on the same factual allegations as other undisputed HCLCs. *Id.* at 550. The court

recognized that the Kumetses did not challenge the findings that their other claims were HCLCs and one of those claims was based on the same factual allegations as the retaliation claim. *Id.* at 552. The court held:

> When a plaintiff asserts a claim that is based on the same underlying facts as an HCLC *that the plaintiff also asserts*, both claims are HCLCs and must be dismissed if the plaintiff fails to produce a sufficient expert report.

Id. (emphasis added). Thus, if a plaintiff asserts an HCLC and another cause of action based on the same underlying facts, both claims are HCLCs. The court explained the limited nature of its holding:

> We do not decide in this case that a claim for retaliation or discrimination under the Health & Safety Code is always an HCLC, or even that the Kumetses' claim for breach of fiduciary duty was an HCLC. Because the Kumetses did not appeal the trial court's determination that their breach of fiduciary duty claim was an HCLC, we must accept for purposes of this case that it was. And because their retaliation claim was based on the same underlying facts, the trial court should have dismissed that claim as an HCLC as well.

Id.

The limited holding in *Kumets* is not applicable in this case. Here, Jennings did not assert an HCLC in addition to her employment-retaliation claim. Accordingly, her retaliation claim is not based on the same facts as a HCLC "that the plaintiff also asserts." *Kumets*, 404 S.W.3d at 552.

Loyds asserts that Jennings's claim is based on the same facts as an HCLC, but never explains what that HCLC is. Loyds seems to contend that someone, such as the affected residents, could potentially assert an HCLC based on the alleged failure to provide medication or food. But Jennings's retaliation claim cannot be an HCLC merely because it is based on facts that could hypothetically give rise to an HCLC by another person.

Because Jennings's retaliation claim does not share the same factual basis as an HCLC, we next consider whether her claim is otherwise an HCLC.

Loyds argued in its motion to dismiss that a cause of action is an HCLC if either the acts

alleged are an inseparable part of the rendition of health care service, or if the acts alleged are based on a claimed departure from accepted standards of health care or professional or administrative services directly related to health care.

Loyds provides no analysis to support its statement that the act alleged—terminating an employee for reporting a violation of law—is an inseparable part of the rendition of health care services. We decline to find that breaching a statutory duty not to retaliate against employees is an inseparable part of the rendition of health care services.[5]

We also reject the argument that Jennings's claim is based on a departure from accepted standards of health care. A claim arising under the health care prong of section 74.001(a)(13) must involve a patient–physician relationship. *Tex. W. Oaks Hosp.*, 371 S.W.3d at 180–81; *McKelvy v. Columbia Med. Ctr. of McKinney Subsidiary, L.P.*, No. 05-13-00990-CV, 2015 WL 169656, at *3 (Tex. App.—Dallas Jan. 14, 2015, pet. denied). Jennings's claim does not involve a patient–physician relationship and does not arise under the health care prong of section 74.001(a)(13).

Loyds further argues the retaliation claim is for departure from accepted standards of professional or administrative services[6] directly related to health care. Health care is defined as "any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider *for, to, or on behalf of a patient* during the *patient's medical care,*

[5] Loyds cites several opinions in this section of its brief, but none of the cases involve a claim by an employee for damages resulting from termination of employment. *See Omaha Healthcare Ctr., LLC*, 344 S.W.3d at 393 (claim based on patient's death as result of spider bite in nursing home); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010) (patient claim for injuries in fall from unsafe hospital bed); *Diversicare Gen. Partners, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005) (patient claim for sexual assault by another patient in nursing home); *Walden v. Jeffery*, 907 S.W.2d 446, 447 (Tex. 1995) (patient claim for injuries from improperly fitting dentures). These cases do not support the argument that the act of allegedly retaliating against Jennings is an inseparable part of the provision of health care. *See Reddic v. E. Tex. Med. Ctr. Reg'l Health Care Sys.*, 474 S.W.3d 672, 674 (Tex. 2015) (per curiam) (distinguishing cases that did not involve a non-patient's claim for violation of premises-related safety standards).

[6] Professional or administrative services are defined as "those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(24).

treatment, or confinement." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10) (emphasis added). Based on this definition, the professional or administrative services at issue must "directly relate to an act or treatment that was or should have been performed or furnished for, to, or on behalf of a patient." *Hendrick Med. Ctr. v. Tex. Podiatric Med. Ass'n*, 392 S.W.3d 294, 298 (Tex. App.—Eastland 2012, no pet.) (claim based on dispute between medical center and podiatrists on its staff as to scope of the practice of podiatry was not an HCLC under the professional and administrative services prong of section 74.001(a)(13)).

The act at issue in this retaliation claim is not the rendition of services to the patients at the facility, but termination of Jennings's employment for making a report. The statutory duty not to retaliate against employees for reporting violations of law does not directly relate to treatment that was or should have been performed for a patient.

Furthermore, causation in an employment-retaliation claim is different from causation in an HCLC. Causation in a retaliation claim requires proof that the employer would not have terminated the employee when it did but for the employee's report. *See Hinds* 904 S.W.2d at 636; *Winters*, 220 S.W.3d at 81. Thus, Jennings will have to prove, if the statutory presumption is rebutted, that Loyds would not have terminated her employment when it did but for her report.

In an HCLC, the departure from an accepted standard of care must proximately result in injury to or death of a claimant. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13). Jennings does not contend the departure from those standards—e.g., inadequate food or medication for patients—proximately caused injury to her. Her claim is that her good faith reporting of violations of the health and safety code resulted in the termination of her employment causing her to lose wages and benefits and causing her mental anguish. It was her report, not the underlying violations, that caused her termination. She contends that but for her report of the alleged violations of law, Loyds would not have terminated her when it did. *See Hinds*, 904 S.W.2d at 636; *Winters*, 220 S.W.3d at 81.

We conclude the gravamen of Jennings's complaint does not fall within the statutory definition of an HCLC.

E. Conclusion

"The purpose of the TMLA's expert report requirement is not to have claims dismissed regardless of their merits, but rather it is to identify and deter frivolous claims while not unduly restricting a claimant's rights." *Ross*, 462 S.W.3d at 502 (citing *Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011)). The "Legislature did not intend for the expert report requirement to apply to every claim for conduct that occurs in a health care context." *Id.* (citing *Loaisiga*, 379 S.W.3d at 258).

Jennings's statutory retaliation claim does not fall within the definition of an HCLC. Accordingly, we overrule Loyds's sole issue on appeal. We affirm the trial court's order denying the motion to dismiss.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LOYDS OF DALLAS ENTERPRISES, LLC, Appellant

No. 05-15-00670-CV V.

TAMMY JENNINGS, Appellee

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-09018.
Opinion delivered by Justice Stoddart.
Justices Fillmore and O'Neill participating.

In accordance with this Court's opinion of this date, the trial court's May 7, 2015 order denying appellant's motion to dismiss is **AFFIRMED**.

It is **ORDERED** that appellee Tammy Jennings recover her costs of this appeal from appellant Loyds of Dallas Enterprises, LLC.

Judgment entered this 23rd day of February, 2016.