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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000529-MR

GARY LAYNE HIGGASON, M.D. — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN ADAMS, JUDGE
ACTION NO. 99-CI-02044

NAZARETH HEALTH, INC. — APPELLEE

OPINION

AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND KNOPF, JUDGES; EMBERTON, SENIOR JUDGE.[1]

KNOPF, JUDGE: Gary Higgason, M.D., appeals from a judgment of the Fayette Circuit Court, entered February 11, 2003, summarily dismissing his tort-based claim for damages against Nazareth Health, Inc. Higgason claims that Nazareth, doing business as St. Joseph Hospital in Lexington, wrongfully discharged him from

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

employment and subjected him to extreme emotional distress. The trial court ruled that Higgason's emotional-distress claim failed because the hospital's alleged behavior could not be deemed outrageous, as that cause of action requires, and that Higgason's wrongful-discharge claim failed because Higgason was not an at-will employee. This latter ruling was erroneous, requiring us to reverse in part and remand for additional proceedings.

Pursuant to CR 56.03, a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The rule should be "cautiously applied," and "the record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[2] "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."[3]

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[2] Steelvest, Inc. v. Scansteel Service Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991).

[3] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

Viewed favorably to Higgason, the record indicates that in March 1994 he and another physician contracted with the hospital to provide physician services to Primary Care Associates (PCA), an outreach division of the hospital. Patty Mason was the hospital vice-president in charge of PCA. Apparently PCA was principally a general practice serving adult clients on an appointment-only basis. In conjunction with other physician groups in the hospital's outreach program, however, PCA would periodically accept walk-in patients from the hospital's medworks program, a program that provides services to workers with on-the-job injuries. Because the walk-in patients tended to disrupt an office's appointment schedule, medworks duty was not popular among the physicians in the various practice groups. Higgason, however, liked the industrial medicine, and in the fall of 1995 PCA volunteered to supply all of the medworks services.

On the heels of that undertaking, however, in November 1995, Higgason became aware of what he deemed serious ethical breaches by his PCA practice colleague. The breaches included improprieties with patients and the altering of records. On November 27, 1995, Higgason filed a complaint against his colleague with the Kentucky Board of Medical Licensure. That same day he notified Mason of the complaint.

According to Higgason, the hospital responded to his action with outrage. Just hours after Higgason let Mason know what he had done, a hospital attorney came to Higgason's office to chastise him for failing to keep his complaint in-house and to threaten him with "repercussions" if he did not thereafter allow the hospital's legal representative to handle the matter. Instead, a few days later Higgason agreed to meet with a Board investigator. When Higgason informed the attorney of the meeting, the attorney again responded angrily and promised "to set him straight." Higgason met with the investigator as arranged and turned over to him certain patient records. Soon thereafter the colleague resigned his employment.

In the aftermath of this episode, Higgason claims, the hospital essentially withdrew its support of PCA. Mason, who had previously been cordial and had contacted Higgason regularly, not only ceased to initiate calls but failed to return Higgason's calls to her. Although it knew that PCA was seeing both medworks patients as well as its regular patients, the hospital made no attempt to replace Higgason's colleague or to reassign the medworks patients. As a result, Higgason was left alone to try to cope with the conflicting demands of both a walk-in and a scheduled clientele. Patient complaints mounted, and Higgason began to fear that the quality of his care was being compromised. In May 1996, after a few months of waiting

in vain for Mason to return his calls, Higgason resigned from the hospital.

In June 1999, Higgason filed his complaint against the hospital, which, as amended, alleges that the hospital effectively discharged him when it failed to provide relief from what it knew was an unreasonable case load and that it did so in retaliation for his complaint to the Board. He also alleges that the hospital deliberately subjected him to extreme emotional distress.

As the trial court noted, a cause of action in tort for retaliatory discharge is recognized when an employee is discharged in violation of a clearly mandated public policy. The cause of action has been held to lie when the employee was dismissed for his "failure or refusal to violate a law in the course of employment."[4] Here, KRS 311.606 imposes a duty on licensed physicians who observe another licensed physician violate a provision of KRS Chapter 311 to report the violation to the Board within ten days. A breach of this duty is a class-B misdemeanor.[5] We agree with Higgason that if he was discharged for fulfilling this duty, then his discharge was wrongful.

As noted above, the trial court dismissed Higgason's

[4] Grzyb v. Evans, Ky., 700 S.W.2d 399, 402 (1985).

[5] KRS 311.990(20).

wrongful discharge claim because it thought that that cause of action was limited to at-will employees. Although it is true that wrongful-discharge claims typically arise in the context of at-will employment, this Court has held that the cause of action lies for other employees as well.[6] Indeed, we can think of no compelling reason why other employers, unlike at-will employers, should be at liberty to violate the Commonwealth's fundamental public policies. The trial court erred when it ruled to the contrary.

Of course there can be no wrongful discharge if there is no discharge. The hospital contends that Higgason's voluntary resignation precludes his claim that he was discharged. As Higgason correctly notes, however, an employee may be deemed constructively discharged if, based upon objective criteria, the employer creates working conditions "so intolerable that a reasonable person would feel compelled to resign."[7] Whether Higgason has proffered sufficient evidence of intolerable working conditions to survive a motion for summary judgment is a question best addressed in the first instance by the trial court.

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[6] Willoughby v. Gencorp, Inc., Ky. App., 809 S.W.2d 858, 860 (1990) (citing Bednarek v. United Food and Commercial Workers Intertnational Union, Local Union 227, Ky. App., 780 S.W.2d 630 (1989)).

[7] Northeast Health Management, Inc. v. Cotton, Ky. App., 56 S.W.3d 440, 445 (2001) (internal quotation marks omitted).

Finally, Higgason contends that the trial court erred when it dismissed for lack of evidence his claim alleging extreme emotional distress. We need not review the evidentiary question because Higgason's separate emotional-distress claim is precluded by his wrongful-discharge claim. As this Court explained in Rigazio v. Archdiocese of Louisville,[8]

> where an actor's conduct amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action. The tort of outrage was intended to supplement the existing forms of recovery, not swallow them up.

Wrongful discharge is an intentional tort the recovery for which includes damages for emotional distress.[9] Clearly, moreover, Higgason's alleged distress was incidental to the alleged wrongful discharge; it was not inflicted for its own sake. Higgason's claim for emotional-distress damages thus rises or falls with his claim for wrongful discharge. The trial court did not err by dismissing the separate claim.

In sum, Higgason's fixed-term employment contract does not preclude his claim for wrongful discharge. His good-faith

[8] Ky. App., 853 S.W.2d 295, 299 (1993).

[9] Annotation 44 ALR4th 1131 (1986).

report to the Kentucky Board of Medical Licensure was a protected activity under KRS Chapter 311. The hospital's alleged retaliation against him for that report, if proved, would be wrongful. Accordingly, we reverse that portion of the Fayette Circuit Court's February 11, 2003, judgment dismissing the wrongful discharge claim and remand for additional proceedings consistent with this opinion. In all other respects, we affirm the trial court's judgment.

ALL CONCUR.

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