RENDERED: AUGUST 14, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001231-MR

JEANNE ANNE WELSH — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 05-CI-01345

PHOENIX TRANSPORTATION SERVICES, LLC;
AND KEVIN B. WARREN, AS OWNER OF PHOENIX
TRANSPORTATION SERVICES, LLC AND
INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

NICKELL, JUDGE: Jeanne Anne Welsh (Welsh) appeals from the Scott Circuit Court's award of summary judgment to her former employer, Phoenix Transportation Services, LLC (Phoenix), on a claim of wrongful discharge in violation of public policy and to Kevin B. Warren (Warren), the co-owner and president of Phoenix, on a claim of tortious interference with her employment. She also appeals from an opinion and order denying her motion to alter, amend or vacate the award of summary judgment to Phoenix and Warren. Welsh contends Phoenix and Warren fired her when she refused to engage in a tax fraud scheme as they had directed. Because Welsh did not establish that Phoenix and Warren had asked her to violate the law, or that she was terminated for her refusal to do so, we affirm.

FACTUAL BACKGROUND

Phoenix, jointly owned by Warren and his wife, is a limited liability company based in Scott County, Kentucky. It transports automobile parts throughout the United States. For about two years, Welsh, a certified public accountant, was employed as controller for the company and acted as its chief financial officer.

Phoenix had an unwritten agreement with Pilot Fuel (Pilot) in which Pilot provided rebate checks to Phoenix when Phoenix used Pilot's fuel. On August 6, 2002, Warren sent an e-mail to a Phoenix employee, Mark Harmon (Harmon), asking that he give the Pilot rebate checks to Warren for deposit into his personal account. Warren copied Welsh and Phoenix Vice President Paul Wade on

the e-mail. Warren intended to use the rebate checks to pay off a loan he had personally guaranteed when starting a failed truck driving academy.

Welsh believed the proposed plan constituted tax evasion, tax fraud, and fraud on the company books.[2] She told Warren "he could not do that" but there is no evidence that Warren responded, or if he did, what he said or did. However, it is clear, and admitted by Welsh, that Warren never indicated her job would be jeopardized if she did not go along with the alleged scheme.

Pilot checks never came to Welsh personally; she never received or handled them. Additionally, she did not prepare tax returns for either Phoenix or Warren. The company's financial records indicated both Phoenix and Warren ultimately declared the Pilot rebate checks as income and paid any taxes due.[3] Upon learning Harmon had given a Pilot check to Warren, Welsh told Warren she would not sign financial documents for Phoenix as required by her job description. An audit of Phoenix, conducted by the accounting firm of Dean, Dorton & Ford, revealed nothing noteworthy about the handling of the rebate checks and a representative of the accounting firm signed the financial documents Welsh refused to sign. Neither Phoenix nor Warren was ever investigated or charged with tax crimes due to the checks.

[2] Welsh maintains use of unreported income from Phoenix to pay a personal debt of $94,000.00 was a violation of 18 U.S.C. § 371 and other unspecified federal and state laws.

[3] Warren amended his 2002 tax return in late 2004.

Meanwhile, in late September 2002, Phoenix hired an independent consulting firm, the George S. May International Company (May), to evaluate its business. As a result of its review, May issued a report dated October 2, 2002, describing Welsh as "incompetent" and recommending her immediate termination to improve employee morale. Thereafter, Welsh was asked to, and did, resign from Phoenix at the behest of Wade on October 3, 2002.[4] Welsh, however, did not believe her firing had anything to do with lackluster job performance. She attributed it entirely to the e-mail she had received from Warren on August 6, 2002, and her refusal to participate in the alleged conspiracy to commit tax fraud.

On June 2, 2003, Welsh filed a complaint for wrongful termination in violation of public policy against Phoenix in Jefferson Circuit Court. She also alleged tortious interference with her job against Warren. Welsh sought reinstatement of her job, including retroactive reinstatement of any lost benefits, and damages in excess of the jurisdictional limit of $4,000.00.

In late June 2003, Phoenix and Warren answered the complaint. The next month they removed the action to federal district court, but it was remanded to state court in September 2003. In November 2003, Phoenix and Warren moved the Jefferson Circuit Court to dismiss the complaint for lack of venue. On February 24, 2004, citing KRS 452.105, the Jefferson Circuit Court transferred the action to the Scott Circuit Court.

[4] Since November 17, 2003, Welsh has been employed with the Internal Revenue Service as a revenue agent in the Washington, D.C. area.

In May 2006, Phoenix and Warren moved for summary judgment arguing Welsh was terminated at the recommendation/insistence of May because she was creating havoc in the workplace and could not do her job. Welsh responded that there were genuine issues of material fact for jurors to decide because the timing of her termination was suspicious in that Warren had hired May to evaluate the company shortly after Welsh had told Warren he would be committing tax fraud if he deposited the Pilot checks into his personal account. Welsh contended the hiring of May was a pretext for firing her. Finding Welsh was never asked to violate the law; there was no nexus between her termination and the alleged wrongdoing by Phoenix and Warren; and any inferred relationship between Welsh's termination and her refusal to participate in the alleged scheme was "negated by the uncontested evidence that [Welsh] was fired based on a recommendation of an outside consultant and her immediate supervisor's observations of her as an employee,"[5] the circuit court granted summary judgment to Phoenix and Warren on May 15, 2007. Welsh subsequently filed a motion to alter, amend or vacate the award of summary judgment pursuant to CR 59.05. That motion was denied too, because there was no proof Welsh had ever been asked to violate the law. This appeal followed.

[5] Six Phoenix employees signed affidavits stating Welsh: made employees feel inferior; took credit for work performed by others, failed to communicate job responsibilities professionally; "was abusive and demeaning;" engaged in lengthy personal phone calls on company time; had employees run personal errands on her behalf; and "would pit employees against one another." According to the affidavits, Phoenix Vice President Wade spoke regularly with Welsh about "her treatment of fellow employees." Additionally, Phoenix's software provider requested that Welsh no longer contact them due to her inappropriate conduct. Finally, it was stated that May had refused to go forward with its business analysis of Phoenix until Welsh was terminated.

ANALYSIS

The main issue in this case is whether an employee claiming wrongful discharge due to her refusal to violate the law must prove she was actually asked to violate the law. Here, the trial court granted summary judgment after determining Welsh had failed to adequately prove she was asked to violate the law by Warren and terminated as a result of her refusal. After reviewing the record, we agree with the trial court and affirm the award of summary judgment to Phoenix and Warren.

When a trial court grants a motion for summary judgment, the relevant standard of review 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." *Lewis v. B & R Corporation,* 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996)). Summary judgment is proper only when the moving party has shown "no genuine issue of material fact exists," and the party opposing summary judgment has presented "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis*, 56 S.W.3d at 436 (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991)). The trial court must "view the evidence in the light most favorable to the nonmoving party" and should grant summary judgment "only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Steelvest*, 807 S.W.2d at 480-82. Because summary judgment involves only legal issues, "an appellate court need not defer to

the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436.

Employment relations in Kentucky are generally terminable-at-will. *Benningfield v. Pettit Environmental, Inc.,* 183 S.W.3d 567, 570 (Ky. App. 2005) (citing *Firestone Textile Co. v. Meadows,* 666 S.W.2d 730 (Ky. 1984)). That means "[a]n employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." *Firestone Textile,* 666 S.W.2d at 731 (citing *Production Oil Co. v. Johnson,* 313 S.W.2d 411 (Ky. 1958); *Scroghan v. Kraftco Corp.,* 551 S.W.2d 811 (Ky. App. 1977)). However, an employee may sue for wrongful discharge "when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law . . . ." *Id.* (quoting *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834, 840 (1983)). In other words, the filing of a wrongful discharge action is permitted when an employee was terminated in violation of a well-defined public policy, but only if the statute declaring the unlawful act does not specify the civil remedy available to the claimant. *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985).

In *Grzyb*, 700 S.W.2d at 402, our Supreme Court further developed the terminable-at-will doctrine by stating:

> [w]e adopt, as an appropriate caveat to our decision in *Firestone Textile Co. Div. v. Meadows, supra*, the position of the Michigan Supreme Court in *Suchodolski v. Michigan Consolidated Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982). The Michigan court held that only

> two situations exist where "grounds for discharging an employee are so contrary to public policy as to be actionable" absent "explicit legislative statements prohibiting the discharge." 316 N.W.2d at 711. First, "where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." Second, "when the reason for a discharge was the employee's exercise of a right conferred by well-established legislative enactment." 316 N.W.2d at 711-12. Here the concept of an employment-related nexus is critical to the creation of a "clearly defined" and "suitably controlled" cause of action for wrongful discharge. These are the limitations imposed by *Firestone Textile Co. Div. v. Meadows, supra* at 733.

Welsh claims she was terminated because she refused to violate the law in the course of her employment. However, as the trial court found, there was no evidence Welsh was ever asked or directed by her superiors to violate the law, or that she was terminated for her failure to participate in an alleged tax evasion scheme.

Viewing the evidence in the light most favorable to Welsh, as we must under *Steelvest*, the record shows Warren sent an e-mail to Harmon *asking him* to send Pilot checks to Warren so he could deposit them into his personal account and repay a loan. Welsh and Wade were copied on the message, but neither was asked to act or refrain from acting. The e-mail arrived in close proximity to Welsh's refusal to act and ultimately to her termination, but it was an outside consultant, May, that recommended she be fired. Welsh characterizes the hiring of May as a pretext for her termination, but it could just as easily be labeled a coincidence. There was no evidence, only Welsh's speculation, that Phoenix

hired May as a pretext for firing her. Welsh's own deposition testimony confirmed the absence of any proof that Warren ordered Welsh to do anything with the Pilot checks or conditioned her continued employment on participating in the alleged tax evasion scheme. Wade testified via deposition that he made the decision to terminate Welsh unilaterally, without discussing it with Warren. Welsh admitted in her deposition that she had no proof Warren told Wade to fire her. Additionally, evidence from May's investigator and numerous Phoenix employees supported the conclusion that Welsh's discharge was based on her poor performance and unprofessional conduct.

In dissecting Warren's e-mail, we uncovered no proposed illegal activity or request that Welsh violate the law. Warren did not expressly state in his e-mail that he would not declare the checks as income and pay taxes on those sums. In fact, Warren filed amended returns declaring the checks as income and paid all taxes owed. Unlike the scenario in *Northeast Health Management, Inc. v. Cotton*, 56 S.W.3d 440 (Ky. App. 2001), where the employer asked two employees to perjure themselves and falsify records contrary to an explicit statute -- both unmistakable and unambiguous violations of the law -- Welsh merely stated it was *her personal opinion* that the e-mail proposed illegal activity. However, we will not thwart application of the terminable-at-will employment doctrine based solely upon a difference of opinion.

Dean, Dorton & Ford audited Phoenix's books. They did not uncover an underlying tax evasion scheme. Furthermore, the Internal Revenue Service has

never charged or prosecuted either Phoenix or Warren for tax evasion or fraud. Therefore, Welsh has offered no evidence that any of the parties proposed, nor engaged in, any illegal activity.

Welsh argues the trial court erroneously ruled against her because it required proof that she had been requested or directed to violate the law. Quoting *Gryzb*, 700 S.W.2d at 402, she contends all that is required is that "the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment." While Welsh has correctly quoted *Gryzb,* the development of this line of cases did not end with the rendition of that case in 1985. We rendered *Cotton,* one of the cases relied upon by Welsh, in 2001. It states,

> [w]e believe Cotton and Howell sufficiently met the first prong of the two-part test in *Gryzb* that is required to qualify as an exception to the terminable-at-will doctrine. *Specifically, in the course of their employment, Dennis asked Cotton and Howell to violate a law by requesting that they perjure themselves.*

Cotton, 56 S.W.3d at 447 (emphasis added). Lest there be any confusion or doubt, we hold an employee claiming wrongful discharge due to a refusal to violate the law must show an affirmative request to him/her by the employer to violate the law. Stated otherwise, a claim of wrongful discharge in violation of a well-defined public policy will not stand when an employee has never been instructed to violate the law by her employer. The employees in *Cotton* made the required showing. Welsh did not. Therefore, she did not establish the necessary nexus between her

firing and her belief that she was asked to engage in fraud or a tax evasion scheme. These flaws are fatal to her claim. Therefore, as a matter of law, there were no circumstances under which Welsh could have prevailed. Hence, the trial court's award of summary judgment to Warren and Phoenix was proper.

For the foregoing reasons, we affirm the trial court's orders awarding summary judgment to Warren and Phoenix and denying Welsh's motion to alter, amend or vacate the grant of summary judgment.

ROSENBLUM, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Keith B. Hunter
Louisville, Kentucky

Laurence J. Zielke
Louisville, Kentucky

Hays Lawson
Louisville, Kentucky

BRIEF FOR APPELLEE:

Matthew B. Gay
Louisville, Kentucky