RENDERED: MAY 22, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001611-MR

RUSSELL H. WILLIAMS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 11-CI-01381

SEVEN COUNTIES SERVICES, INC.;
AND VITAL N. SHAH APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, JONES, MAZE, JUDGES.

JONES, JUDGE: Appellant, Russell H. Williams, appeals from the August 23, 2013, order of the Jefferson Circuit Court denying his motion to amend his complaint, and the September 4, 2013, order granting Seven Counties Services,

Inc., summary judgment on his claims against it. For the reasons set forth below, we AFFIRM IN PART, REVERSE IN PART, AND REMAND.

I. BACKGROUND

Dr. Russell Williams ("Dr. Williams") was employed by Seven Counties Services, Inc., ("Seven Counties"), from July of 2008 through August of 2010. Dr. Williams was originally assigned, by Seven Counties, to Central State Hospital, ("Central State"), as the Director of Psychology. In March of 2009, Dr. Williams was promoted to Director of Clinical Services at Central State.

Dr. Vital N. Shah ("Dr. Shah") is also an employee of Seven Counties. Dr. Shah has served as the Hospital Director since December of 2009 and was Dr. Williams' direct supervisor at Central State.[1]

Part of Dr. Williams' duties at Central State involved overseeing patients who were committed to the facility by the Commonwealth after having been determined incompetent to stand trial on the criminal charges pending against them. In 2004, M.V. was committed to Central State after a Jefferson County court determined that he was incompetent to stand trial on pending rape and murder charges. Pursuant to statute, M.V.'s competency was reevaluated every 360 days. In 2009, as part of this reevaluation process, personnel at Central State sent a letter to the court advising that, in their opinion, M.V. no longer met the

[1] Prior to being appointed to the position of Hospital Director, Dr. Shah served as the Associate Hospital Director for Clinical Services and Medical Staff Director at Central State. In December of 2009, Dr. Shah was appointed as the Interim Hospital Director. He was later appointed the non-interim Hospital Director in August 2010. Dr. Williams also applied to be the Hospital Director.

criteria for continued involuntary hospitalization.[2] The court held a hearing on the matter on August 23, 2010. Dr. Williams along with M.V.'s treating psychologist attended, but did not testify at the hearing. Despite the prior letter, the court determined that M.V. should remain committed to Central State for another 360 days, at which time his competency would be reevaluated pursuant to statute.

Immediately following the hearing, Dr. Williams indicated to the Assistant Commonwealth Attorney that Central State would most likely send another letter to the court, the following day, outlining Central State's concerns regarding M.V.'s continued involuntary commitment. Dr. Williams also contacted Dr. Shah regarding the hearing and his suggestion that Central State send another letter to the court.

Although the source is not entirely clear, it is undisputed that later that evening a local television news station ran a story on M.V.'s hearing. The story included a reference to Dr. Williams' conversation with the Assistant Commonwealth's Attorney. The story indicated that despite the court order to the contrary, Central State would not be able to continue M.V.'s involuntary

---

[2] Kentucky Revised Statutes (KRS) 202A.026 provides that:

> No person shall be involuntarily hospitalized unless such person is a mentally ill person:
>
> (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness;
>
> (2) Who can reasonably benefit from treatment; and
>
> (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

commitment. The following day, the *Courier-Journal* ran a substantially similar story in which it named Dr. Williams as the Central State administrator who indicated that M.V., an accused murderer, would be released onto the streets by Central State in contravention of the court order.

Following this unwanted, negative media attention, Dr. Shah reached out to Josie Goodman, who worked in Central State's Human Resources Department. Thereafter, Dr. Williams, Dr. Shah and Goodman met to discuss the media reports. During the meeting, Dr. Williams denied the media's characterization of his statements following the hearing. Specifically, he denied ever stating to anyone that Central State would release M.V. in violation of the court's order.

Thereafter, Dr. Shah and Goodman met with and participated in various meetings and/or conference calls with members of the Cabinet for Health and Family Services ("the Cabinet") regarding Dr. Williams. Eventually, it was recommended that Goodman review Dr. Williams' work performance. A report of Goodman's review was provided to the Cabinet and a determination was made that Dr. Williams should not remain at Central State. Both Dr. Shah and Goodman concurred with this determination.

During the review of Dr. Williams' work performance, Goodman was in contact with Lisa Leet ("Leet"), a Human Resources representative for Seven Counties. On August 27, 2010, an email was sent to Leet (hereinafter referred to as the "August email"). This email, in pertinent part, stated:

> It's believed portrayal of the facility/Department could have been avoided had the Psychology Director [Dr. Williams] been honest concerning his conduct and action following the court proceeding. He informed court officials the hospital could not continue to hold the patient, which would have been a direct violation of the court order just ruled upon, and only sought approval in retrospect. In addition, he exceeded his authority without approval by representing himself as an administrator of this organization and speaking on our behalf.

According to the record, the email was initially drafted by Goodman and was revised by other personnel, including Dr. Shah. Both Goodman's and Dr. Shah's names appeared at the bottom of the email. It was also transmitted to the Cabinet.

Later that same day, Dr. Williams met with Dr. Shah and Goodman. At the meeting, Dr. Williams was asked to resign from Central State; reluctantly, he did so. The following Monday, because no lateral positions were available, Dr. Williams was terminated as an employee of Seven Counties.

On September 1, 2010, an open records request was made by the *Courier-Journal* for documents relating to Dr. Williams' termination from Central State and Seven Counties. Dr. Shah's office provided the Cabinet with another copy of the August email so that it could be turned over to the *Courier-Journal* in response to the open records request.

Also, on September 1, a letter was sent to Leet by the Assistant Commonwealth Attorney regarding Dr. Williams' conduct following M.V.'s competency hearing. The letter stated that Dr. Williams' conduct after the hearing was both "professional and appropriate" and that "Dr. Williams informed [her] that

Central State may be sending a letter to the Court regarding the order of commitment." It appears that this letter was not turned over to the Cabinet in response to the *Courier-Journal*'s open records request.

An article was published by the *Courier-Journal* on September 10, 2010. The article's language was substantially similar to the August email. The article indicated that Dr. Williams was "forced to resign" and further stated:

> In its letter to Seven Counties on the same day of Williams' resignation, Central State said releasing [MV] would have been "a direct violation of the court order just ruled upon" and Williams "only sought approval in retrospect."
>
> The hospital wrote that although Williams was highly skilled, he had insubordination problems and had been given several verbal reprimands, clear directives he is not an administrator, reduction of job duties and demotion of managerial status to a department head, without success.

On February 22, 2011, Dr. Williams filed a complaint in the Jefferson Circuit Court against both Dr. Shah and Seven Counties. Against Dr. Shah, Dr. Williams originally alleged: 1) defamation; 2) interference with a contractual relationship and prospective economic advantage; and 3) intimidating a witness. Against Seven Counties, Dr. Williams originally alleged: 1) violation of the Kentucky Civil Rights Act (KCRA); and 2) defamation.

On July 26, 2013, Dr. Williams motioned to amend his complaint. In his motion, Dr. Williams proposed to amend "Count 1" from his original complaint, "violation of the KCRA by Seven Counties" to "'violation of public policy and/or law' or as a common law wrongful discharge claim." He also sought to add this

claim against Dr. Shah. Dr. Williams also asked the circuit court to amend "Count 2," his defamation claim, "so that the complaint alleges that Dr. Shah made the defamatory comments or 'caused' them to be made."

By order dated August 28, 2013, the circuit court granted, in part, Dr. Williams' motion as related to the defamation count. However, the circuit court refused to allow Dr. Williams to amend his complaint to add the common law wrongful discharge claim after determining that any such amendment would be futile because it could not withstand a motion to dismiss.

The circuit court then took up Seven Counties' motion for summary judgment. Ultimately, the trial court granted Seven Counties' summary judgment on all Dr. Williams' remaining claims against it. This appeal followed.[3]

II. Standard of Review

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.,* 90 S.W.3d 46, 49 (Ky.2002). "[T]he trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence

[3] Dr. Williams settled his claim against Dr. Shah. On May 8, 2014, this Court dismissed, as resolved, Dr. Williams' and Dr. Shah's appeals and cross-appeals.

at trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480–82 (Ky. 1991).[4]

"Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo.*" *Lewis v. B & R Corporation,* 56 S.W.3d 432, 436 (Ky. App. 2001).

III. Analysis

A. Defamation Claim against Seven Counties

On appeal, Dr. Williams argues that the circuit court erred in granting summary judgment in favor of Seven Counties on his defamation claim. He asserts that as an agent of Seven Counties, the actions of Dr. Shah are attributable to Seven Counties under Kentucky law. Specifically, he contends that because the issue of Dr. Shah's intent must be determined by a jury, summary judgment was wrongfully granted and Seven Counties' liability is an issue for the jury.

"To establish an action for defamation four elements are necessary: (1) defamatory language; (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation." *Biber v. Duplicator Sales & Serv. Inc.*, 155 S.W.3d 732, 736 (Ky. App. 2004). The law distinguishes between defamatory statements

[4] "While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense, not in an absolute sense.'" *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992)).

that are actionable *per se* and those that are *per quod*. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 870 (Ky. App. 2007). The difference between the two is that damages are presumed if the statements are *per se* defamatory. *See id.*

"Published words are actionable *per se* if they directly tend to the prejudice or injury of any one in his profession, trade or business." *Tucker v. Kilgore*, 388 S.W.2d 112, 114 (Ky. 1964). Such a statement is one that "ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit." Restatement (Second) of Torts § 573 (1977).

However, our courts have recognized a limited, conditional privilege with respect to communications that are made during the course and scope of one's employment where the communication is one in which the party has an interest and it is made to another having a corresponding interest. *See Harstad v. Whiteman*, 338 S.W.3d 804, 811 (Ky. App. 2011). "The significance of the defense of qualified or conditional privilege is that it removes the conclusive presumption of malice otherwise attaching to words that are actionable *per se* and thereby casts on the plaintiff a technical burden of proof in that respect." *Tucker*, 388 S.W.2d at 114.

The key word, however, is conditional; the privilege is not absolute. "The immunity is forfeited if the defendant steps outside of the scope of the privilege, or

abuses the occasion." *Tucker*, 388 S.W.2d at 115; *see also* Restatement (Second) of Torts § 599 (1977) ("One who publishes defamatory matter concerning another upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege."). Abuse of the privilege is shown where the publication of the defamatory matter was made for some improper purpose; by excessive publication; or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged. Restatement (Second) of Torts § 596 cmt. a (1977).

Having laid out the elements necessary for Dr. Williams to sustain a defamation action against Dr. Shah, we must determine whether the circuit court correctly determined that the proof was sufficient, for the purposes of summary judgment, for Dr. Williams' defamation claim against Dr. Shah to reach a jury. We have little trouble agreeing with the circuit court that Dr. Williams satisfied the elements necessary to establish a *prima facie* case of defamation against Dr. Shah. The statements at issue concerned Dr. Williams' honesty and abilities as a director. Furthermore, because part of Dr. Williams' job duties included working with court personnel on matters affecting competency, any statement to the effect that he would not follow court orders implied an inability and/or unwillingness on his part to perform his job duties. It is likewise undisputed that Dr. Shah, in conjunction with Goodman, caused the statements to be transmitted to Leet, who in turn, transmitted the statements to the Cabinet. The Cabinet later forwarded the statements to the *Courier-Journal*.

Because Dr. Williams presented proof indicating that the statements were at least, in part, untrue, we agree with the circuit court that the proof could cause a jury to determine that Dr. Shah, in conjunction with Goodman, caused defamatory statements concerning Dr. Williams' professional abilities to be published. *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412, 425 (Ky. 2010).

Because the statements were made in part by Dr. Shah in conjunction with his employment and duties as the person responsible for overseeing Dr. Williams, the conditional privilege is implicated. We do not believe, however, that in this instance summary judgment on the basis of the conditional privilege would have been appropriate because Dr. Williams presented evidence from which a jury could conclude that Dr. Shah knew the statements to be false and caused them to be published for an improper purpose; *i.e.*, minimizing the negative press by painting Dr. Williams as a rogue employee who acted improperly without the proper authority and/or as retribution for Dr. Williams having competed with Dr. Shah for the permanent director position after Dr. Shah had been appointed interim director.[5]

[5] The circuit court also embarked upon a lengthy discussion of whether Dr. Shah was entitled to qualified governmental immunity in relation to the statements as set forth in *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). This issue is not directly before us. However, we pause to observe that such immunity would only exist if Dr. Shah was determined to have been an employee of a governmental entity. As set forth in the circuit court's opinion, Dr. Shah and Dr. Williams were both employees of Seven Counties, not Central State. They were assigned to perform various tasks at Central State by way of a contract between Seven Counties and Central State. No Kentucky authority holds that Seven Counties is a governmental or state agency. And, at least one federal court to have examined Seven Counties' status as a governmental agency has determined that it does not satisfy *Comair, Inc. v. Lexington–Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009). *See In re Seven Counties Services, Inc.,* 511 B.R. 431, 470 (Bkrtcy.W.D.Ky. 2014).

We must next consider whether there are any circumstances under which Dr. Williams could potentially subject Seven Counties, Dr. Shah's employer, to liability for the statements.

A master can be responsible for the torts of its servant where "the act is one that the agent was employed to perform, or that it accrued substantially within the authorized time and space limits of the employment or that the employee was actuated at least in part by a purpose to serve the master." *Mid-States Plastics, Inc. v. Estate of Bryant ex rel. Bryant*, 245 S.W.3d 728, 732 (Ky. 2008). It has long been the law in Kentucky that a master need not have expressly consented to, directed or authorized a defamatory statement of its agent to be held liable. *Case v. Steele Coal Co.*, 171 S.W. 993, 995 (Ky. 1913).

Like any other intentional tort, the master can be held liable if the servant's "purpose, however misguided, is wholly or in part to further the master's business." *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005). If, however, an employee

> acts from purely personal motives ... which [are] in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the master is not liable. This [sound] approach conforms to the economic theory of vicarious liability, because when the employee acts for solely personal reasons, the employer's ability to prevent the tort is limited.

Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705, 731-732 (Ky. 2009). Thus, under Kentucky law, an employer can be held liable for the defamatory statements of its employee if the employee's actions are in furtherance of the employer's

business. *Id*.; *Papa Johns Intern. Inc. v. McCoy*, 244 S.W.3d 44, 52 (Ky. 2008); *Scottsdale Ins. Co. v. Sandler*, 381 Fed. App'x 554, 556 (6th Cir. 2010) (applying Kentucky law).

The circuit court found that: (1) Dr. Shah was an agent of Seven Counties; (2) that Dr. Shah made the statements at issue while employed by Seven Counties and in conjunction with his role as Dr. Williams' supervisor; and (3) that Dr. Williams presented enough evidence to overcome summary judgment on his defamation claims against Dr. Shah where it was possible a jury could conclude that Dr. Shah made the statements "either because Central State wanted to avoid negative publicity or impacting its relationship with court system or because Dr. Shah wanted to remove a potential rival for the position of Facility Director at Central State." Despite these findings as related to Dr. Shah, the circuit court concluded that Seven Counties was entitled to summary judgment because "an employer cannot be held liable for torts that were committed outside its direction or authority."

The circuit court erred in this regard. As the above-cited law clearly indicates, an employer need not expressly authorize the agent to make the defamatory statement. The determinative question is whether the defamatory statement was motivated, at least in part, by the agent's desire to benefit his employer. As explained in the Restatement (Third) Of Agency § 7.07(2) (2006):

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

> An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

Id.

In analyzing Dr. Williams' defamation claim against Dr. Shah, the circuit court concluded that it was an issue of disputed fact whether Dr. Shah's actions were to "deal with media fallout from the competency hearing" or were solely personal, *i.e.*, "to remove a potential rival." The media fallout, noted by the circuit court, was related to the negative press that Central State/Seven Counties received after the television news story and the first *Courier-Journal* article. Lessening the negative press would not have been an action that would have benefited Dr. Shah in only his personal capacity. It would have been for the benefit of the organization. Therefore, making the statements to paint Dr. Williams as a rogue employee so that he would be terminated was an action, however misguided, that a jury could find to have been undertaken at least in part to benefit Seven Counties.

The issue of whether the statements were made within the scope of Dr. Shah's agency such that they could give rise to vicarious liability was a factual one for the jury. Suffice it to say, the evidence is unclear as to Dr. Shah's motives. In the end, we believe that it was at least possible for the jury to have determined that Dr. Shah acted, in part, with malice out of a misplaced desire to benefit Seven Counties and/or Central State by making false statements regarding Dr. Williams' statements, honesty, and track record. Accordingly, we conclude that the circuit

court erred in granting summary judgment to Seven Counties with respect to Dr. Williams' defamation claim.

Lastly, we pause to recognize that Seven Counties has injected a new issue into this appeal--the effect, if any, of Dr. Williams' settlement with Dr. Shah during the pendency of this appeal. Relying primarily on *Copeland v. Humana*, 769 S.W.2d 67 (Ky. App. 1989), Seven Counties asserts that the settlement Dr. Shah and Dr. Williams agreed to during the pendency of this appeal mandates that we affirm the circuit court because it is clear that Dr. Williams is now barred from pursuing any claim based on vicarious liability against Seven Counties. It urges us to affirm on this basis even if we believe that the logic relied on by the circuit court in granting Seven Counties summary judgment was incorrect.

Copeland involved a case where a doctor and a hospital were sued; the plaintiff reached a settlement with the doctor. The plaintiff gave the doctor a covenant not to sue. The court then dismissed the action against the hospital. The court held that the defendants were not actually joint tortfeasors, but instead, the action against the hospital was dependent on the action against the doctor, since it was based on vicarious liability. The court held, therefore, that the release of a servant/agent will also release the master/principal.

While *Copeland* is similar to the case at hand, there is at least one very important distinction--the covenant not to sue was part of the record. Here, it is apparent that Dr. Williams and Dr. Shah entered into some sort of settlement with respect to their appeals and cross-appeals against one another. The settlement,

however, is not part of the record before us. We have no way to analyze its scope and nature.

If Seven Counties believes that *Copeland* dictates dismissal against it by virtue of the settlement, it is free to move for dismissal based on that basis after remand. Such a procedure will allow for the settlement agreement to be entered into the record and for the circuit court to reach an enlightened determination after full consideration of its scope and effect. Suffice it to say, it would be improper for us to hold that a settlement we have never seen and which is not part of the record is a sufficient basis upon which to affirm.

B. Violation of Public Policy and/or Law

Next, we address Dr. Williams' contention that the circuit court erred when it denied his motion to amend his complaint to add a claim for violation of public policy and/or law. In other words, Dr. Williams sought to amend his complaint to add a cause of action for common law wrongful discharge.

As the circuit court correctly noted, while amendments should be allowed where the opposing party will suffer no prejudice, a court is not required to allow an amendment that would be futile. A futile amendment is one that could not survive a motion to dismiss. *Farler v. Perry County Bd. of Ed.*, 355 S.W.2d 659, 661 (Ky. 1961).

Generally, an at-will employee can be terminated for any reason, even a morally indefensible one. *See Firestone Textile Co. Div., Firestone Tire and Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) ("Ordinarily an

employer may discharge his at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible."). Our Supreme Court has carved out one notable exception to the terminable-at-will doctrine and acknowledged a cause of action for wrongful discharge, but only in those limited circumstances in which (1) the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law; and (2) the policy is evidenced by a constitutional or statutory provision. *Id.*

In *Grzyb v. Evans*, 700 S.W.2d 399, 400 (Ky. 1985), the Kentucky Supreme Court further clarified *Firestone* by stating:

> We 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.

It is well-established that whether the public policy asserted meets the criteria outlined by our Supreme Court for the public policy exception is a question of law for the court to decide, not a question of fact. *Grzyb*, 700 S.W.2d at 401.

First, Dr. Williams argues that the comments he made about M.V.'s mental health were comments and opinions protected under the First Amendment by free

speech. For this contention, Dr. Williams relies on the United States Supreme Court decision in *Lane v. Franks*, —— U.S. ——, 134 S.Ct. 2369, 2379, 189 L.Ed.2d 312 (2014). In *Lane*, the Court reasoned that the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under consideration is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. *Id.* The Court ultimately held in that case that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. *Id.* at 2374–75.

Having thoroughly reviewed *Lane*, we cannot agree that it requires a decision in Dr. Williams' favor. Dr. Williams explicitly pled that evaluating patients and reporting to the court on whether they continued to meet the requirements necessary for commitment was a regular part of his job duties. Therefore, unlike the employee in *Lane*, Dr. Williams' comments were made within the scope of his ordinary job duties. Additionally, Dr. Williams did not necessarily publically comment on M.V.'s status as did the employee in *Lane*. And, he certainly did not make those statements while under oath. He made the comments privately to the Commonwealth's Attorney after the formal hearing. *See Holt v. Pennsylvania*, Civil Action No. 10–5510, 2014 WL 4055864, *5 (E.D.Pa. Aug. 14, 2014) (concluding that the holding in *Lane* does not lead to the

conclusion that "the First Amendment also protects Holt for having approached the District Attorney outside of a formal court setting.").

Next, Dr. Williams argues that the circuit court erred when it ruled that KRS 202A, the Kentucky Mental Health Hospitalization Act, did not fit within the public policy exception to Kentucky's terminable-at-will doctrine as set forth in *Gryzb*. Dr. Williams does not argue that he was discharged for refusing to violate a law, but rather he was discharged for exercising a right conferred by the Kentucky Mental Health Hospitalization Act. We disagree.

Gryzb is clear, that the statute serving as the "public policy" grounds must "clearly [be] defined by statute and directed at providing statutory protection to the worker in his employment situation." *Id*. at 400.

Having thoroughly reviewed the Mental Health Hospitalization Act, we cannot find any language indicating that the Act's purpose is directed toward offering protection to mental health experts. Rather, the Act appears in all ways to be directed toward establishing proper procedures to ensure that individuals committed against their wills are afforded proper due process. *See Vitek v. Jones*, 445 U.S. 480, 491–92, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980) ("For the ordinary citizen, commitment to a mental hospital produces a massive curtailment of liberty, and in consequence requires due process protection."). There is simply nothing to suggest that the Act was enacted to protect medical personnel who offer their opinions regarding the continued involuntary commitment of a patient.

Furthermore,

there is no evidence that Dr. Williams was acting according to the dictates of the Act when he spoke to the Assistant Commonwealth Attorney after the court hearing. As part of that conversation, he was not offering an opinion to the court; Central State had already provided an opinion letter to the court. Rather, he was expressing disagreement with the court's decision to continue M.V.'s commitment and indicating that Central State might file another letter with the court. Thus, we find no error with respect to the circuit court's conclusion that Dr. Williams' termination was not in violation of the public policy expressed in the Act.

Likewise, we cannot agree with Dr. Williams that this case is analogous to the *Hill* case. *See Hill,* 327 S.W.3d 412. *Hill* involved an employer's termination of an employee for testing truthfully under oath. By contrast, Dr. Williams alleges that he was terminated after a private, post-hearing conversation with a Commonwealth Attorney during which he indicated that Central State *might* send another letter to the court, an act not required under the Mental Health Hospitalization Act. We do not believe that Dr. Williams has presented us with the same type of conduct at issue in *Hill*.

Finally, Dr. Williams argues he was terminated in violation of the public policy expressed in the Kentucky Whistle Blower Act, KRS 61.102. Specifically, under this theory, Dr. Williams is arguing that he was discharged for calling attention to the public policy concerns surrounding the continued commitment of M.V.

"KRS 61.102 was designed to protect [public] employees from reprisal for the disclosure of violations of the law." *Boykins v. Housing Authority of Louisville*, 42 S.W.2d 527, 529 (Ky. 1992). In this case, as the facts have been alleged by Dr. Williams, he was not reporting any violation. He was expressing an opinion to the Commonwealth Attorney and indicating that Central State might send the court another letter. There are simply no facts from which one could conclude that Dr. Williams' was reporting a violation of the law.[6]

IV. CONCLUSION

For the above stated reasons, the orders of the Jefferson Circuit Court are AFFIRMED IN PART and REVERSED IN PART. This matter is REMANDED for further proceedings consistent with this Opinion.

ALL CONCUR.

[6] Even so, we again note that the Whistleblower Act covers only public employees. It is undisputed that Dr. Williams was an employee of Seven Counties, not Central State. We believe there are substantial issues regarding whether Dr. Williams' employment with Seven Counties can be considered to be public employment. Because the parties have not addressed this issue, we decline to explore it further as the record before us is inadequate to make such a determination.

BRIEF FOR APPELLANT:

Don Cox
Scott S. Spiegel
Petersen S. Thomas
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Don Cox
Louisville, Kentucky

BRIEF FOR APPELLEES:

Craig L. Johnson
M. Tyler Reynolds
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Craig L. Johnson
Louisville, Kentucky