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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001275-MR

BELINDA TYGRETT — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 16-CI-000499

BAPTIST HEALTHCARE SYSTEM, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND K. THOMPSON, JUDGES.

KRAMER, JUDGE: Belinda Tygrett appeals from an order of the Jefferson Circuit Court dismissing her claim of retaliation under KRS[1] 216B.165(3), *i.e.*, Kentucky's healthcare whistleblower law, against Baptist Healthcare System,

[1] Kentucky Revised Statute.

Inc. (BHS).[2] The circuit court entered a detailed and well-reasoned judgment which we now affirm.

FACTUAL AND PROCEDURAL HISTORY

Tygrett began working as a registered nurse in the emergency department (ED) at BHS in August 2015. She received the assignment as an employee of a temporary medical staffing agency and was scheduled to work at BHS until April 2016.[3] Tygrett was not at any time an employee of BHS, nor was she in a managerial or supervisory position. Soon after starting in the ED, Tygrett began expressing dissatisfaction to her superiors who were employees of BHS.[4] Tygrett repeatedly complained that (1) she was assigned more patients of greater acuity than other nurses; (2) technicians and nurse's aides were not performing their duties and/or refused to assist her; and (3) she felt she had a greater workload than other nurses.

Complaints were also being made *about* Tygrett soon after she began her assignment at BHS. These complaints came from nurses, physicians, other staff members, and patients. Many complaints about Tygrett were that she was

[2] The circuit court also granted summary judgment in favor of BHS regarding Tygrett's claims of wrongful discharge and punitive damages. Those matters are not appealed.

[3] Tygrett's original assignment was until February 2016, but BHS extended the contract.

[4] According to Tygrett's deposition, she complained orally to Charge Nurses Josh Tillery, Misty Warren, Michael Metcalf, and two other charge nurses named Emily and Hope (whose surnames are not included in the record before us).

rude and abrasive to staff and patients and had a bad attitude.[5] She frequently requested to leave her shift early. There were reports from staff that Tygrett would sit at the nurse's station and complain aloud to anyone who happened to be within earshot (including physicians, patients, family members, and other hospital staff). Other complaints about Tygrett directly related to patient care and errors. Those complaints asserted, for example, that she incorrectly inserted a Foley catheter into a patient on or about November 1, 2015, and she repeatedly failed to chart patients' vital signs and medications. Tygrett failed to administer antibiotics to a patient on one occasion. On another occasion, potential tragedy was narrowly averted when Tygrett failed to chart that she had given narcotic medication. The patient nearly received a second dose from an oncoming nurse who was unaware Tygrett had already given the medication.

Due to the negative feedback from staff, patients, and physicians, BHS cut the number of shifts Tygrett was permitted to work each week, reducing her weekly working hours from sixty (60) to forty-eight (48). The record shows that this reduction happened at the end of October 2015. Tygrett was counseled by charge nurses and/or upper management regarding most, if not all, of the

[5] In describing one instance of a patient complaint, Nurse Manager Brittany Hicks testified that a male patient "had complained that [Tygrett] was more concerned with his [ ] branding or maybe [a] tattoo than the complaint of why he was here."

complaints made against her. She also spoke with BHS Employee Educator Mary Lang after at least one instance.

On November 28, 2015 at 6:49 a.m., Charge Nurse Josh Tillery emailed Nurse Manager Brittany Hicks. He asked Nurse Manager Hicks to speak to Tygrett. He stated that Tygrett had started complaining about the technicians less than thirty minutes into her shift. Charge Nurse Tillery explained that the technicians were working hard and that each has a minimum of eight patient rooms to which they must attend. He also stated that Tygrett complained that she did not need to get patients assigned to her when other nurses' rooms are open. He told Nurse Manager Hicks that this particular complaint from Tygrett "has been an issue for a while." According to Charge Nurse Tillery, Tygrett also asked him for permission to leave early every night he worked with her.

Tygrett also sent an email to Nurse Manager Hicks on November 28, 2015, at 10:57 p.m. It is unknown from the record before us if she knew about Charge Nurse Tillery's email earlier in the day. Tygrett's email, approximately five and one-half pages in length, detailed her complaints and concerns regarding the ED, many of which had previously been brought to the attention of the charge nurses. She complained of a hostile environment; technicians not performing tasks; that she was assigned high acuity patients back-to-back; that certain staff "doesn't like" her and staff attitude toward her had changed; and ED staff was

often involved in "Facebook drama," including taking "selfies." She felt patients were at risk because her workload was so high, stating she received "nearly every patient that comes through the door."

Approximately six hours after her first email, Tygrett sent a second email to Nurse Manager Hicks.[6] This email was also approximately five and one-half pages in length. Tygrett started out by saying "I have been working on a white paper to help you solve the problems in the E[D]." The email went on to detail Tygrett's apparently unsolicited plan for ED staff, which she designated "ACIDIC Accountability." The acronym "ACIDIC" referred to a list of attributes Tygrett deemed necessary for every ED worker at BHS.[7] Her plan referred generally to technicians and indicated that Tygrett believed they were not performing their duties. She went on to delineate in great detail what she believed should be the hourly tasks for technicians during an entire shift.

Tygrett sent a third email to Nurse Manager Hicks on November 30, 2015. This email referenced an incident that occurred with a kidney stone patient earlier in the day. Tygrett did not timely chart that she had given the patient medication, but complained that the oncoming nurse and her orientee "just took it

[6] The second email was sent on November 29, 2015, at 5:04 a.m.

[7] Tygrett felt the characteristics necessary for an ED worker were attitude, customer service, integrity, desire, intelligence, communication, and accountability.

among [sic] themselves to give the medication that was already given."[8] Tygrett blamed the incident referenced in her email entirely on the oncoming nurse and claimed she did not err by not timely charting when the medication was given.

It is undisputed that Nurse Manager Hicks investigated the allegations and concerns contained in Tygrett's emails.[9] She spoke with charge nurses, technicians, other employees, and had a face-to-face conversation with Tygrett. Nurse Manager Hicks ultimately concluded that the allegations in Tygrett's emails were unsubstantiated. Nurse Manager Hicks also showed the emails to Faye Collins, the Interim Director of Emergency Services at BHS.

On or about December 4, 2015, Nurse Manager Hicks received an email from a staff member stating that Tygrett had turned off her cellular telephone and left the ED without informing anyone. She was unable to be reached by staff in the event of a true emergency. Tygrett returned to the ED during her shift after apparently being outside for a period of time. Sometime thereafter, Nurse Manager Hicks had another conversation with Interim Director Faye Collins and

[8] Although Tygrett's email implies a double dose of medication *was* given to the patient, it is unclear from the record if this was the same incident that Nurse Manager Hicks referred to in her deposition when she described a situation in which a patient *almost* received a double dose of a narcotic medication from an oncoming nurse at shift change.

[9] On pages 2-3 of her brief to this Court, Tygrett states that "[i]n response to Tygrett's emailed complaints, Hicks undertook the investigation by herself and ultimately decided Tygrett's complaints about risks to patient safety were unfounded."

recommended that BHS end Tygrett's assignment. Tygrett's assignment at BHS was terminated on or about December 31, 2015.

After her termination, Tygrett repeated her complaints regarding BHS to various state agencies, including the Office of Inspector General. There is no evidence in the record to suggest any state agency took adverse action toward BHS as a result of Tygrett's complaints. Tygrett filed the instant action in Jefferson Circuit Court shortly after her assignment with BHS was terminated, alleging retaliation in violation of KRS 216B.165(3), wrongful termination under common law, and demanding punitive damages. The circuit court eventually granted BHS's motion for summary judgment on all of Tygrett's claims. Tygrett appeals only her retaliation claim pursuant to KRS 216B.165(3).

STANDARD OF REVIEW

When a trial court grants a motion for summary judgment, the standard of review for the appellate court is *de novo* because only legal issues are involved. *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Summary judgment is appropriate where "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." Kentucky Rule of Civil Procedure (CR) 56.03. The movant bears the initial burden of

demonstrating that there is no genuine issue of material fact in dispute. The party opposing the motion then has the burden to present, "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). A party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*., 281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant (*i.e.*, Tygrett) and must further consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 780 (Ky. App. 1996). If the summary judgment is sustainable on any basis, it must be affirmed. *Fischer v. Fischer,* 197 S.W.3d 98, 103 (Ky. 2006).

ANALYSIS

Before analyzing the issues before us, a brief discussion of KRS 216B.165 is helpful for context. For the purpose of this appeal, it is necessary to state only the first three subsections of KRS 216B.165. The statute reads as follows:

> (1) Any agent or employee of a health care facility or service licensed under this chapter who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, or the health care facility's or service's safety is in jeopardy shall make an oral or written report of the problem to the health care facility or service, and may make it to any appropriate private, public, state, or federal agency.
>
> (2) Any individual in an administrative or supervisory capacity at the health care facility or service who receives a report under subsection (1) of this section shall investigate the problem, take appropriate action, and provide a response to the individual reporting the problem within seven (7) working days.[10]
>
> (3) No health care facility or service licensed under this chapter shall by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any agent or employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility or service the circumstances or facts to form the basis of a report under subsections (1) or (2) of this section. No health care facility or service shall require

[10] Tygrett makes no claims related to KRS 216B.165(2).

> any agent or employee to give notice prior to making a report, disclosure, or divulgence under subsections (1) or (2) of this section.

KRS 216B.165(1)-(3).

The statute is Kentucky's healthcare whistleblower law. KRS 216B.165(1) imposes a duty on any employee or agent of a healthcare facility or service to report any concerns related to quality of care and patient safety to the healthcare facility or service or to an appropriate agency. KRS 216B.165(3) prohibits a healthcare facility or service such as BHS from retaliating against an employee or agent who reports unsafe medical practices in good faith. The statute does not provide a cause of action or remedy. Rather, we agree with the rationale in *MacGlashan v. ABS Lincs KY, Inc.*, 84 F. Supp. 3d 595, 601-02 (W.D. Ky. 2015), that Tygrett is able to maintain a retaliation suit pursuant to KRS 216B.165(3) because KRS 446.070 provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

Although KRS 216B.165(3) prohibits retaliation against a healthcare worker who reports concerns regarding patient safety and patient care in good faith, we turn to caselaw to define what constitutes retaliation in an employment setting. A case of retaliation may be established through either direct or

circumstantial evidence. "Direct evidence is evidence, which if believed by the trier of fact, will prove the particular fact in question without reliance on inference or presumption." *Kentucky Dep't of Corrections v. McCullough,* 123 S.W.3d 130, 135 (Ky. 2003) (quoting *Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001)). In the absence of direct evidence, a plaintiff may establish a case for retaliation through circumstantial evidence using the burden-shifting test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). Under the burden-shifting test, a plaintiff bears the initial burden of establishing a *prima facie* case. 411 U.S. at 802, 93 S. Ct. at 1824. A *prima facie* case of retaliation requires a plaintiff to demonstrate (1) that plaintiff engaged in protected activity; (2) that the exercise of the plaintiff's rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 803 (Ky. 2004) (internal citations and quotations omitted). If a plaintiff establishes a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the decision. The employee must then demonstrate that the employer's stated reason is merely pretext to cover up for retaliation. *Kentucky Center for the Arts v. Handley*, 827 S.W.2d 697, 699 (Ky. App. 1991).

BHS does not dispute that Tygrett has established the first three elements of her *prima facie* case. The arguments before us focus on whether Tygrett satisfied the fourth element of the *prima facie* case to show a causal connection between the protected activity and termination by BHS. Tygrett argues that the record demonstrates a causal connection due to (1) the close temporal proximity of her protected activity to her termination; and (2) statements and writings by Nurse Manager Hicks regarding her termination. We disagree.

Temporal proximity between Tygrett's protected activity and her termination is, in this instance, speculative at best. KRS 216B.165(1) states that an employee or agent shall provide to the healthcare facility "an *oral or written* report of the problem to the health care facility or service[.]" (Emphasis added.) Tygrett's temporal proximity argument focuses primarily on the series of emails sent to Nurse Manager Hicks at the end of November 2015. However, KRS 216B.165 does not give greater weight to written reports, and Tygrett fails to account for the fact that no adverse action was taken against her for the many oral reports she made from August through November 2015. In her brief to this Court, Tygrett states that she is "required to demonstrate a causal connection between her protected activity, *i.e.* the complaints regarding patient safety she made to *various supervisors*, and the adverse employment action taken against her[.]"[11] (Emphasis

[11] *See* Tygrett's brief, page 14.

added.) By specifying her complaints to "various supervisors," Tygrett acknowledges her oral complaints to the charge nurses constitute protected activity under KRS 216B.165 because written complaints were made only to Nurse Manager Hicks. Although BHS terminated Tygrett's assignment approximately one month after she sent the series of emails, the record supports BHS's assertion that Tygrett was terminated for her attitude towards ED employees and patients, as well as repeated mistakes related to patient care. Nurse Manager Hicks testified that complaints against Tygrett continued to escalate even after Tygrett sent the series of emails. For example, the record shows that she turned off her cellular telephone and left the ED without telling anyone on December 4, 2015.[12]

To be sure, there is no bright line rule regarding how close the adverse employment action must be to the protected activity for temporal proximity alone to be sufficient to show a causal connection. However, we note that

> [w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation. But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality. See *Little* [*v. BP Exploration & Oil Co.*], 265 F.3d [357,] 365 [(6th Cir.

[12] Tygrett does not dispute this, she instead points out that this is the only *documented* complaint against her after she sent the series of emails to Nurse Manager Hicks.

> 2001)] ("[T]emporal proximity, when considered with the other evidence of retaliatory conduct, is sufficient to create a genuine issue of material fact as to" a causal connection.).

Mickey v. Zeidler Tool and Die Co., 516 F.3d 516, 525 (6th Cir. 2008).

Also,

> 'Close temporal proximity' does not mean that the employee must be terminated within days or even weeks of the filing of a [ ] claim. Such a requirement would shield the employer from liability by merely waiting months or even years to terminate the employee. The logical approach is for the court to view the time between the two events in the context of the entire circumstances.

Dollar General Partners v. Upchurch, 214 S.W.3d 910, 916 (Ky. App. 2006).

While a close temporal proximity may be troubling in determining a retaliatory claim, we must review the claim in context of all of the evidence in the record. And, in doing so, we agree with the trial court that Tygrett failed to establish the necessary causal connection, particularly in light of all the circumstances and the evidence regarding numerous complaints about Tygrett's conduct. Because Tygrett's complaints were so frequent in nature, any adverse employment action would have occurred within close temporal proximity to a complaint, regardless of when it happened. In evaluating her case, we must keep in mind that an employer does not have to condone inappropriate conduct despite claims of protected activity so long as the protected activity is not the basis for the employment action.

Tygrett further argues that statements and writing by Nurse Manager Hicks also demonstrate a causal connection between the protected activity and her termination, thereby establishing the fourth element of her *prima facie* case. We disagree.

Tygrett asserts that "Hicks admits that complaints about patient assignments were the only issue with Tygrett that could not be resolved. Any other issues Hicks had with Tygrett were not a lingering concern." This is a mischaracterization of Nurse Manager Hicks's deposition testimony. She was being asked about counseling and conversations with Tygrett after complaints about Tygrett were brought to her attention. Nurse Manager Hicks's general testimony was that she felt Tygrett understood her concerns and the re-direction offered. She testified that she believed that Tygrett would conform her behavior appropriately in the future; she did not testify that Tygrett necessarily *did* conform her behavior. Furthermore, her statement about the parties not being able to "get beyond" was due to Tygrett's continuing belief that she had more patient assignments than other nurses, even if she did not. Nurse Manager Hicks testified

> I felt like she continued to come to not agree with patient – her assignments. I felt like that's something that we could not get beyond, and I – I don't know why she could not get beyond that, because her assignments were not any more – or they were as balanced as anyone else's. So that, I guess, is something that she – that I felt like she was not going to agree with, so . . . .

Indeed, there is no documented evidence in the record showing Tygrett's workload was any greater than other nurses in the ED.

Tygrett further argues that Nurse Manager Hicks's email to the staffing agency that employed Tygrett shows a causal connection between the protected activity and her termination from BHS. We agree with BHS that the "complaints" referenced in the email are not the sort of complaints that are protected by KRS 216B.165. Specifically, the email in question states, in relevant part, that Tygrett would

> sit at the desk and complain about staff not working and how this place is so horrible and it is no surprise we need agency. She doesn't say this to any one particular person, she just sits there and talks aloud.

This generalized complaining to anyone within earshot was not directly "to the health care facility or service" nor "to any appropriate private, public, state, or federal agency." KRS 216B.165(1). It is therefore not protected by the statute. Moreover, KRS 216B.165(3) requires that a report must be made in good faith. Tygrett knew to address genuine complaints to charge nurses or Nurse Manager Hicks. A complaint to *any person* who happened to be at or near the nurse's station about how "horrible" Tygrett believed BHS to be was not because she "believe[ed] that the quality of care of a patient, patient safety, or the health care facility's or service's safety [was] in jeopardy." KRS 216B.165(1). Tygrett's complaining was not the only issue Nurse Manager Hicks stated in the email. She

also addressed patient safety by recounting an instance when Tygrett failed to chart that she had given medication. Nurse Manager Hicks also stated that Tygrett was "rude and very abrasive to staff and patients." Under no reasonable inference do the statements and writings by Nurse Manager Hicks demonstrate a causal connection between the protected activity and Tygrett's termination.

We agree with the circuit court that Tygrett failed to establish a *prima facie* case of retaliation because she failed to establish a causal connection between the protected activity and her termination from BHS.

Tygrett also argues that BHS's alleged reason for terminating her (*i.e.*, poor performance) is pretextual. She asserts that complaints *about* her did not actually motivate her termination and that BHS failed to follow established practices in their decision to terminate her. Because Tygrett failed to establish a *prima facie* case, we agree with the circuit court's reasoning and incorporate it herein as follows:

> Even if the evidence cited by Tygrett did indicate circumstantial evidence of [retaliation], her claims would also fail due to her failure to demonstrate that the legitimate, nondiscriminatory reasons for her termination were merely pretext. "Once the employee presents sufficient evidence to make out a *prima facie* case [which she did not do here], the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for its actions." *Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 720 (6th Cir. 2008); *See also EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir. 1997). If the employer satisfies this burden, the

> employee must then demonstrate that the legitimate reason offered by the employer was in fact only a pretext designed to mask retaliation. *Id.* A plaintiff who is trying to show that the employer's stated reason for termination is pretextual must show by a preponderance of the evidence either: (1) that the proffered reasons had no basis in fact; (2) that the proffered reasons did not actually motivate the discharge; or (3) that the reasons were insufficient to motivate the discharge. *Niswander*, 529 F.3d at 728…
>
> The facts are undisputed that the proffered reasons for Tygrett's termination did have a basis in fact. Although Tygrett opined without direct evidence that the actual motivation for her termination was due to her patient safety complaints, the evidence of record indicates that this is not the case. Tygrett has seemingly made no argument that the proffered reasons were insufficient to motivate the discharge, and such explanations usually suffice.
>
> [BHS] indicated through evidence from two former charge nurses responsible for the Supervision of Tygrett, Mr. Tillery and Ms. Warren, as well as those involved in the decision to terminate Tygrett, Ms. Hicks and Ms. Collins, that Tygrett's contract was terminated because of her poor performance… all evidence of record tends to indicate that [BHS] would have terminated Tygrett's contract irrespective of her patient safety complaints[.]

We further agree with the circuit court that BHS had no set policy for dealing with termination because different situations necessarily gave rise to different courses of action (*e.g.*, whether to involve BHS's Department of Human Resources; whether to put an employee on Performance Improvement Plan (PIP) prior to termination, etc.). The circuit court found, and we agree that,

> [c]ontrary to Tygrett's interpretation of the testimony, Ms. Scaglione, Vice President of Human Resources may not be involved in circumstances involving discipline, termination, assessment of clinical abilities, and investigation of patient safety complaints. She also spoke about what was "good practice," but never mentioned circumstances similar to those of Tygrett's in which policy required that Human Resources be involved. Ms. Hicks and Ms. Collins also indicated that the patient safety complaints were investigated and Tygrett's complaints were addressed with her, which also constituted direct evidence that is contrary to Tygrett's interpretation of the record.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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