Missouri Court of Appeals

Southern District

Division Two

SHANTI S. YERRA, M.D.,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SD34448 and SD34545 Consolidated
	)	
MERCY CLINIC SPRINGFIELD COMMUNITIES, f/k/a ST. JOHNS HEALTH SYSTEM, INC.,	)	FILED: November 01, 2017
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Michael J. Cordonnier, Judge

REVERSED AND REMANDED WITH DIRECTIONS

Dr. Shanti Yerra successfully sued Mercy Clinic for wrongful discharge on a whistleblower theory. Mercy appeals, urging in part that Dr. Yerra failed to make a submissible case.[1] We agree, reverse the judgment, and remand with directions to enter judgment in Mercy's favor.

General Legal Principles

Generally, an at-will employee can be discharged for any reason or no reason. ***Fleshner v. Pepose Vision Inst., P.C.***, 304 S.W.3d 81, 92 (Mo. banc 2010). A

[1] Mercy actually filed two appeals which we consolidated for all purposes.

"very narrowly drawn" public-policy exception, often called the wrongful-discharge doctrine (***Margiotta v. Christian Hosp. NE NW***, 315 S.W.3d 342, 346 (Mo. banc 2010)), applies to both at-will and contract employees. ***Keveney v. Missouri Military Acad.***, 304 S.W.3d 98, 103 (Mo. banc 2010).[2]

In this context, a public-policy claim "must be based on a constitutional provision, a statute, a regulation based on a statute or a rule promulgated by a governmental body." ***Margiotta***, 315 S.W.3d at 346. "Absent such explicit authority, the wrongful discharge claim fails as a matter of law." ***Id***. "Moreover, not every statute or regulation gives rise to an at-will wrongful termination action." ***Id***. "A vague or general statute, regulation, or rule cannot be successfully pled under the at-will wrongful termination theory, because it would force the court to decide on its own what public policy requires." ***Id***.

That said, "a plaintiff need not rely on an employer's *direct* violation of a statute or regulation." ***Fleshner***, 304 S.W.3d at 96. "Instead, the public policy must be *reflected by* a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." ***Id***. The pertinent inquiry is whether the cited authority "clearly prohibits the conduct at issue in the action." ***Margiotta***, 315 S.W.3d at 347.

Subject to these parameters, Missouri's public-policy exception protects an employee who reports legal violations or wrongdoing to superiors or third parties ("whistleblowing") or refuses to perform an illegal act. ***Id***. at 346, 347; ***Fleshner***, 304 S.W.3d at 92. An employee terminated for either reason has a common-law tort

[2] ***Keveney***, ***Margiotta***, and ***Fleshner*** were companion opinions handed down the same day.

action for wrongful discharge. ***Fleshner***, 304 S.W.3d at 92.[3]

To summarize, a whistleblower plaintiff must demonstrate that: (1) she reported serious misconduct that constituted a violation of the law and of well-established and clearly-mandated public policy; (2) her employer discharged her; and (3) her report causally contributed to the discharge. ***Van Kirk v. Burns & McDonnell Eng'g Co., Inc.***, 484 S.W.3d 840, 844-45 (Mo.App. 2016).

However, the public-policy exception affords no "protected status for making complaints about acts or omission he merely believes to be violations of the law or public policy." ***Margiotta***, 315 S.W.3d at 348. To merely cite a statute, regulation, etc., without *demonstrating* how the reported conduct violated it cannot form the basis for a wrongful-discharge action. ***Id***.

Thus it is essential that a reported act *did* violate public policy, not merely that the plaintiff so believed, even if her belief was reasonable. ***Newsome v. Kansas City, Missouri Sch. Dist.***, 520 S.W.3d 769, 779 (Mo. banc 2017).[4] Whether a reported act violated public policy is a legal question for the trial court in determining whether the plaintiff has made a *prima facie* case. ***Id***.

---

[3] Effective August 2017, a new "Whistleblower's Protection Act," RSMo § 285.575, purports by its terms "to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts," and "in addition to chapter 213 and chapter 287, [to] provide the exclusive remedy for any and all claims of unlawful employment practices."

[4] Or in a preventative-whistleblowing claim (*see* ***Newsome***, 520 S.W.3d at 778), that the reported act actually would have violated public policy, not just that the plaintiff thought it would. ***Id***. at 779. Note 9 *infra* suggests a reason – the reprehensibility of an employee's report of wrongdoing playing any role in her discharge justifies 100% employer liability for as little as 1% causation, but if the reported act was *not* illegal or against public policy (the plaintiff just *thought* so), it would be 100% liability for 0% causation or reprehensible employer behavior. Statutory civil actions for non-retaliation, of course, may have different requirements. *See, e.g.*, RSMo § 213.070.1(2) & § 213.111 (human rights), § 287.780 (worker's compensation).

> In other words, only after the circuit court decides an act constitutes a violation of public policy as "*reflected by* a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body," *Fleshner*, 304 S.W.3d at 96, may the circuit court then submit an instruction to the jury based on the act.

Id.

Case Background[5]

Dr. Yerra worked for Mercy as an internal medicine physician. She treated a patient in her 60's who had been hospitalized several times over several weeks for heart issues and other conditions. The patient's condition stabilized and Dr. Yerra referred her to a surgeon, Dr. Cavagnol, for gall bladder removal.

Dr. Cavagnol accepted the referral, admitted the patient, and asked a cardiologist to confirm that the patient could tolerate anesthesia and surgery. Dr. Yerra learned of the planned cardiac consult and canceled it, deeming it unnecessary given her prior evaluation of the patient.

Dr. Cavagnol re-ordered the consult and a cardiologist cleared the patient for surgery. When Dr. Yerra learned of this, she called Mercy's Medical Staff Services, where her complaint was summarized and emailed to several administrators:

> Dr. Yerra called me this afternoon around 2:30. I made no statements to her except to request the patient's medical record number. When Dr. Yerra was finished with her comments, I told her I would convey the message that follows:
>
> Dr. Yerra admitted a patient (Medicare) for surgery by Dr. Cavagnol. Dr. Yerra's documentation did not indicate a need for a cardiology consult but Dr. Cavagnol called for one anyway which was inappropriate and resulted in unnecessary cost. Dr. Yerra said there was no difference in what she documented and what Dr. Cochran documented. She said again, Dr. Cavagnol's action was

[5] Limited to the submissibility issue, which the parties agree that we review *de novo*.

> inappropriate, resulted in unnecessary cost and was disrespectful to her—she will not tolerate it. She will report this to Medicare if it continues. "This type of care sucks!" "If we are an [Accountable Care Organization], these things should not happen."

Mercy's investigation concluded that the cardiology consult was appropriate, within the standard of care, and not an unnecessary cost. But issues were discerned regarding Dr. Yerra, who had been put on several improvement plans previously. A new improvement plan was devised for her, but after further events, including an intensive care incident, Mercy terminated Dr. Yerra's employment.

Dr. Yerra sued, citing RSMo §§ 334.100 & 197.285 as public-policy sources for her claim that Mercy wrongfully discharged her for reporting the cardiology consult obtained by Dr. Cavagnol. At trial, the court agreed to give the whistleblower verdict-directing instruction requested by Dr. Yerra, but was skeptical:

> The Court is concerned that the statutes cited by the Plaintiff do not support a clear public policy prohibiting or supporting the conduct of the Plaintiff. The Court's concern that the statute [*sic*] cited, both of which I've had an opportunity to read this morning, are nonspecific, and therefore do not state a clear public policy that is not vague and is not general and is a rule or regulation or constitutional requirement supporting the Plaintiff's conduct.

The jury returned a verdict for Dr. Yerra, leading to this appeal. We must decide whether Dr. Yerra's cited statutes reflect a clear public-policy mandate that applied to the facts in this case. ***Kirk v. Mercy Hosp. Tri-County***, 851 S.W.2d 617, 621 (Mo.App. 1993).

Analysis

Dr. Yerra's first-cited statute requires designated healthcare facilities[6] to offer

[6] Given our disposition, we need not reach Mercy's claim that it was not subject to this statute.

protection for employees who report certain matters; Dr. Yerra claims her complaint could have fit three such categories: facility mismanagement, fraudulent activity,[7] or violations of applicable laws related to patient care. *See* § 197.285.1-.2. She cites the other statute for a physician's duty not to "willfully and continually" perform "inappropriate or unnecessary treatment, diagnostic tests or medical or surgical services." *See* § 334.100.2(4)(c).

The record does not demonstrate that Dr. Cavagnol's request for a pre-surgery cardiac consult violated any such provision[8] or was serious misconduct contrary to well-established, clearly-mandated public policy reflected by the cited statutes. *See* ***Newsome***, 520 S.W.3d at 779; ***Fleshner***, 304 S.W.3d at 96; ***Van Kirk***, 484 S.W.3d at 844-45. Thus, Dr. Yerra was not entitled to a whistleblower instruction for reporting what Dr. Cavagnol did. *See* ***Newsome***, 520 S.W.3d at 779, which also debunks Dr. Yerra's theory that "reasonable belief" was enough for common-law whistleblower liability. "Whether a plaintiff reasonably believes an act violates public policy is irrelevant to a wrongful discharge claim." ***Id***. (citing ***Margiotta***,

---

[7] In closing argument, Dr. Yerra's counsel denied that Dr. Yerra's complaint had accused anyone of fraud or Medicare fraud, which may explain the record's dearth of relevant proof:

> To commit health-care fraud, one must "knowingly and willfully execute[ ], or attempt[ ] to execute, a scheme or artifice to defraud any health care benefit program" or fraudulently obtain "any of the money or property owned by, or under the custody or control of, any health care benefit program in connection with the delivery of or payment for health care benefits, items, or services." 18 U.S.C. § 1347. A conviction under this statute requires that the government prove beyond a reasonable doubt that the defendant (1) knowingly devised a scheme or artifice to defraud a health care benefit program in connection with the delivery of or payment for health care benefits, items or services; (2) executed or attempted to execute this scheme or artifice to defraud; and (3) acted with intent to defraud.

U.S. v. Persaud, 866 F.3d 371, 380 (6th Cir. 2017) (citations and some quotation marks omitted).

[8] Or would have violated any such provision if repeated in the future, should Dr. Yerra's complaint be cast in terms of preventative whistleblowing per ***Newsome***, 520 S.W.3d at 778.

315 S.W.3d at 348).[9]

We find further support for reversal in Dr. Yerra's own cited statute, which authorizes state action against a physician who seeks, by intimidation or coercion, to directly or indirectly "discourage the use of a second opinion or consultation." § 334.100.2(4)(b). Since § 334.100 expressly *protects* second opinions and consults, it cannot reflect a clear public policy *against* those practices, and there is no basis to disharmoniously construe § 197.285.

In short, Dr. Yerra failed to show that public policy forbade Dr. Cavagnol to have a cardiologist confirm this heart-troubled patient's cardiac fitness for surgery. If anything, Missouri law and public policy purported to protect Dr. Cavagnol in seeking the "second opinion or consultation" that Dr. Yerra tried to cancel and of which she later complained. § 334.100.2(4)(b).

Dr. Yerra did not make a submissible whistleblower case. We need not reach Mercy's other points. We reverse the judgment and remand the case to the trial

---

[9] Alongside ***Newsome***'s reasoning, consider also ***Fleshner***'s explanation for requiring only contributing-factor causation in wrongful-discharge cases; *i.e.*, if illegality played a role in the firing, "[t]he employer's action is no less *reprehensible* because that factor was not the only reason," so if an employee's report of legal violations or refusal to violate law or public policy contributed to her discharge, "the discharge is still *reprehensible* regardless of any other reasons of the employer." 304 S.W.3d at 94-95 (our emphasis). This concern with employer behavior so "reprehensible" that slight causation justifies full recovery (1) assumes there <u>*actually was*</u> reprehensible behavior, not merely an unproved claim, allegation, or belief; and (2) tracks our high court's insistence, in common-law wrongful-discharge claims, that:

- It is not enough to cite a law without <u>*demonstrating*</u> how reported conduct violated it. ***Margiotta***, 315 S.W.3d at 348.
- A plaintiff's <u>*belief*</u> that an act violated public policy is <u>*irrelevant*</u>, even if such belief is reasonable. ***Newsome***, 520 S.W.3d at 779.
- The trial court must <u>*determine*</u> that an act <u>*constituted*</u> a public-policy violation before it can submit a jury instruction based on the act. ***Id***.

court with directions to enter judgment in Mercy's favor.

DANIEL E. SCOTT, J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, C.J./P.J. – DISSENTS IN SEPARATE OPINION

JEFFREY W. BATES, J. – CONCURS

Missouri Court of Appeals

Southern District

Division Two

SHANTI S. YERRA, M.D.,	)	
	)	
Respondent,	)	
	)	
vs.	)	Nos. SD34448 & SD34545
	)	(Consolidated)
MERCY CLINIC	)	
SPRINGFIELD COMMUNITIES, f/k/a	)	**Filed: November 1, 2017**
ST. JOHNS HEALTH SYSTEM, INC.,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Michael J. Cordonnier, Judge

DISSENTING OPINION

I respectfully dissent from the majority opinion. We are in agreement that: there need not be a "*direct* violation of a statute or regulation" and we look to the "public policy [that is] *reflected by* a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body." ***Fleshner v. Pepose Vision Institute, P.C.***, 304 S.W.3d 81, 96 (Mo. banc 2010) (emphasis in original). Here, we must look at the statute or constitutional provision or regulatory public policy in general to determine whether Petitioner

properly made a submissible case under the "whistleblower" exception to at will employment.[1] Respondent relies upon her complaint to the proper authority at the Clinic that the second test was "unnecessary, duplicative, and overly costly care to a patient" and that she would report "fees, charges or other compensation obtained through fraud, deception or misrepresentation, overcharging or over treating patients, inappropriate or unnecessary treatment, diagnostic tests or medical or surgical services[.]" She further claims that the clinic was "acting in a manner that public policy would encourage objecting to and reporting said suspected unethical and/or illegal behaviors to [Mercy]" is what caused her to be fired.

The statute at issue in this case is section 197.285, RSMo Cum. Supp. 2001, which provides:

> 1. Hospitals, ambulatory surgical centers, and abortion facilities shall establish and implement a written policy adopted by each hospital, ambulatory surgical center, and abortion facility relating to the protections for employees who disclose information pursuant to subsection 2 of this section. This policy shall include a time frame for completion of investigations related to complaints, not to exceed thirty days, and a method for notifying the complainant of the disposition of the investigation. This policy shall be submitted to the department of health and senior services to verify implementation. At a minimum, such policy shall include the following provisions:
> (1) No supervisor or individual with authority to hire or fire in a hospital, ambulatory surgical center, or abortion facility shall prohibit employees from disclosing information pursuant to subsection 2 of this section;
> (2) **No supervisor or individual with authority to hire or fire in a hospital, ambulatory surgical center, or abortion facility shall use or threaten to use his or her supervisory authority to knowingly discriminate against, dismiss, penalize or in any way retaliate against or harass an employee because the employee in good faith reported or disclosed any information pursuant to subsection 2** of this section, or in any way attempt to dissuade, prevent or interfere with an employee who wishes to report or disclose such information;
>
> . . . .

[1] Respondent properly points out Appellant's noncompliance with Rule 84.04(c) in her statement of facts; however, because I am able to ascertain the facts with the assistance of Respondent's brief, it is proper to address the merits of the complaint.

> **2. This section shall apply to information disclosed or reported in good faith by an employee concerning:**
> **(1) Alleged facility mismanagement or fraudulent activity;**
> **(2) Alleged violations of applicable federal or state laws or administrative rules concerning patient care, patient safety or facility safety . . . [.]**

(Emphasis added.) Section 197.285 then has established as the policy of Missouri that hospitals and ambulatory surgical centers SHALL establish a written policy adopted by the hospital and ambulatory surgical centers to protect employees who disclose information "in good faith" of fraudulent activity or violations of applicable federal or state law.

Section 334.100.2(4)(c), RSMo Cum. Supp. 2011, states:

> 2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes:
>
> . . . .
>
> (4) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter, including, but not limited to, the following:
>
> . . . .
>
> (c) Willfully and continually performing inappropriate or unnecessary treatment, diagnostic tests or medical or surgical services[.]

"Willfully and continually performing inappropriate or unnecessary treatment, diagnostic tests or medical or surgical services[,]" ***id.***, is specifically listed as an example of an activity that could cause a physician to lose her license.

We have a long history of cases allowing whistleblowers to proceed to trial for accusations that a hospital failed to comply with the Nursing Practice Act (***Farrow v. Saint Francis Medical Center***, 407 S.W. 3d 579 (Mo. banc 2013)), for wrongful discharge of a

registered nurse alleging that she was directed to alter or destroy a progress note that criticized a physician's action (***Hughes v. Freeman Health System***, 283 S.W. 3d 797 (Mo.App. S.D. 2009)), and a registered nurse suing for wrongful discharge after raising a concern about the manner in which a hospital was treating a patient (***Kirk v. Mercy Hosp. Tri-County***, 851 S.W. 2d 617 (Mo.App. S.D. 1993)). The majority opinion makes no effort to distinguish these cases from the case before us. Instead, the majority opinion relies upon a statement made in ***Newsome v. Kansas City, Missouri School District***, 520 S.W.3d 769 (Mo. banc 2017).

The holding in ***Newsome*** was that a submissible case was made in a suit brought by a purchasing manager for a school district. ***Id.*** at 774, 778. The manager objected to a change in a contract between the school district and an independent contractor and alleged that the contract was altered after the fact. ***Id.*** at 774. He further objected to a car purchase deal which was for different vehicles and a different price than approved by the school board. ***Id.*** The school district claimed that the purchasing manager reported only a request to purchase, rather than the actual purchase. ***Id.*** at 778. The court rejected the school district's claim and noted,

> To hold otherwise would mean no whistleblower protection for preventive reporting, which would be inconsistent with this Court's reason for adopting the public policy exception. *See Fleshner [v. Pepose Vision Institute, P.C.]*, 304 S.W.3d [81,] 92 [(Mo. banc 2010)] (adopting the public policy exception because, otherwise, employers would be able "to discharge employees, without consequence, for doing that which is beneficial to society").

Id.

Section 197.285 mandates that the hospital have such an appropriate avenue to raise concerns that are beneficial to society. Section 197.285 further provides that Respondent not be disciplined for making such a complaint, if made in good faith.[2] The jury found that the complaint was made in good faith. I do not understand how much sense the statute would make

[2] Even Respondent's section chair at trial seemed to understand that it was appropriate to raise suspected issues of quality, costs and improper care of patients.

if the hospital was mandated by the legislature to make available to the staff of the clinic a way to complain about fraudulent activity or violations of federal or state law but, if any member of the staff did complain, the staff member could be fired. Because the whole point of the statute is to encourage employees to report fraud (the spending of public money in the case of welfare fraud) and unnecessary medical spending, the majority opinion will have the opposite effect.

If, as the majority opinion concludes, a whistleblower must not only prove the elements as set forth in ***Van Kirk v. Burns & McDonnell Engineering Co., Inc.***, and its progeny, but must also prove that the hospital is engaging in actual fraud, that collateral issue will subsume the cause of action. In other words, a private cause of action for hospital or clinic actions is created in the context of a whistleblower suit under section 197.285. It will be relevant and necessary evidence in a whistleblower case as to how many other complaints of overtreatment exist in order to show a pattern of abuse. I cannot think the legislature contemplated this type of suit within a suit, nor do I think case law supports that interpretation of the statute. Finding no merit in this point or Appellant's others, I would affirm the judgment.

Nancy Steffen Rahmeyer, P.J. – Dissenting Opinion Author