

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION AT KNOXVILLE

FILED
June 10, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

SHEILA FAYE SMITH,)
)
Plaintiff/Appellant)
)
and)
)
DIANE KINSEY,)
)
Plaintiff/Appellant)
v.)
)
PENINSULA HOSPITAL, INC.,)
THE LIGHTHOUSE TREATMENT)
CENTER, THE KESTNER GROUP,)
INC., and JAMES E. KESTNER,)
Individually)
)
Defendants/Appellees)

KNOX CHANCERY

NO. 03A01-9510-CH-00372

AFFIRMED

Jerrold L. Becker and Samuel W. Brown, Knoxville, for Appellant Sheila Faye Smith and for Appellant Diane Kinsey.

Lewis R. Hagood, Robert N. Townsend and Douglas G. Brehm, Knoxville, for Appellees.

OPINION

_____ INMAN, Senior Judge

These plaintiffs jointly filed a single complaint against the appellees for damages allegedly arising out of their refusal to remain silent concerning or to participate in alleged illegal activities connected with their employment. They alleged collectively or singly (1) breach of contract, (2) violations of the Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 *et seq.*, (3) invasion of privacy, (4) intentional infliction of emotional distress, (5) tortious interference with contractual and non-contractual rights of employment, and (6) retaliatory discharge in violation of common law and the Public Protection Act of 1990, TENN. CODE ANN. § 50-1-304, *et seq.* The plaintiffs were admittedly at-will employees.

The complaint was in course ordered to be severed. In each case all of the

asserted claims were dismissed either on motion or voluntarily. Each plaintiff appeals only the adverse ruling on her claim for common law retaliatory discharge, the propriety of which is presented for review. In the interest of economy and good practice, these appeals were by consent consolidated.

The retaliatory discharge action was dismissed pursuant to Rule 12.02, T. R. C. P. for failure to state a claim. Since a Rule 12 motion tests the legal sufficiency of a complaint, all properly pleaded allegations are assumed to be true. *Alexander v. Inman*, 825 S.W.2d 102 (Tenn. Ct. App. 1991). Each plaintiff restated her complaint, but the prolixity of each (18 pages) remained constant under the asserted guise of 'pragmatism.' To the extent possible, we have sought to extract the well-pleaded allegations relevant to the issue of retaliatory discharge.

The plaintiff Kinsey alleges she was "retaliated against for making claims of sex discrimination in violation of the Tennessee Human Rights Act," and for complaining about overloading the adolescent psychiatric program which she alleged was in violation of the regulations promulgated by the Joint Commission on Accreditation of Health Care Organizations and the State Department of Mental Health.

The latter allegation prompted the filing of an affidavit of the defendant Kestner, President of the defendant Kestner Groups, Inc. He deposed that (1) the Lighthouse Treatment Center is not an entity, but merely a trade name, (2) it is exempt from the requirement to obtain a Certificate of Need, (3) it is accredited by the JCAHO, even though such accreditation was not required.

No countervailing affidavits or other documentary evidence were filed by the plaintiffs, and the Chancellor apparently treated the Rule 12.02 motion as one for summary judgment under Rule 56, which provides, as paraphrased, that in Rule 12.02 motions alleging failure to state a claim where matters outside the pleading are presented to the Court - here, the Kestner Affidavit - the motion shall be treated as one for summary judgment.

The cases are clear on the point that when a party is "faced with a motion for

summary judgment based upon affidavits, that party may not rest upon her pleadings to defeat the motion. *Mason v. Pearson*, 668 S.W.2d 656 (Tenn. Ct. App. 1983).

We say ‘apparently treated,’ since the memorandum opinion, incorporated in the judgment, recites that the affidavit was considered, notwithstanding the Opinion *prima facie* referred to the motion to dismiss or to strike without expressly treating it as one for summary judgment.

In reviewing a summary judgment, the court must view all the pleadings and affidavits in a light most favorable to the opponent of the motion and all conclusions of fact derived therefrom must be similarly construed. *Wyatt v. Winnebago Industries*, 566 S.W.2d 276 (Tenn. App. 1976).

We conclude, therefore, that the motion for summary judgment was properly granted as to the specific allegation that the retaliatory discharges were in response to the plaintiff’s criticism that the adolescent psychiatric program was overloaded.

The appellants argue that the allegations of their complaints, assumed to be true under Rule 12.02, are sufficient to establish a *prima facie* case of actionable retaliatory discharge. They do not brief the issue of summary judgment, which is essentially dispositive; rather, they argue that the alleged violations of laws and regulations concerning the accreditation process involve considerations of public policy. In *Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993), the Supreme Court recognized that an employee’s refusal to violate public policy resulting in his at-will discharge was actionable. Anderson, a truck driver, was discharged for refusing to violate the Motor Carriers Act. The hurdle confronting the plaintiffs is the unrefuted Kestner Affidavit, previously discussed. Thus it is that the plaintiffs accuse the defendants of violating laws, rules and regulations to which they are not subject. Hence, public policy is not implicated. Moreover, we are mindful of the mandated instruction in *Harvey v. Middlebrook Nursing Home*, 784 S.W.2d 921 (Tenn. 1990) that the courts have no license to enlarge on the employee-at-will rule or create other exceptions to public policy or common law in the absence of some constitutional or legislative precedent.

The issue of whether the common law claim of retaliatory discharge is pre-empted by the Human Rights Commission Act is not briefed by the appellants, and we therefore preterm it.

The judgment is affirmed in each case, with costs assessed to the appellants.

William H. Inman, Senior Judge

CONCUR:

Herschel P. Franks, Judge

Don T. McMurray, Judge