RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001270-MR

PAUL KEARNEY, M.D. APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 15-CI-00551

UNIVERSITY OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND SPALDING,[1] JUDGES.

SPALDING, JUDGE: On February 12, 2015, Dr. Paul Kearney ("appellant") filed a complaint in Fayette Circuit Court against the University of Kentucky

[1] Judge Jonathan R. Spalding authored this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

("appellee" or "UK") alleging violations of Kentucky's Whistleblower Act, KRS[2] 61.101 *et seq*. On August 3, 2018, the circuit court granted summary judgment in favor of the appellee. This appeal followed.

The events giving rise to the allegations contained in appellant's complaint find their genesis in appellant's employment and disciplinary history with UK, his employer. For nearly three decades, appellant was employed by UK in a dual capacity – both as a trauma surgeon and as a professor at the University of Kentucky College of Medicine. Appellant's tenure with UK was not without turbulence, however. Throughout his career with appellee, appellant was disciplined for or otherwise accused of engaging in "rude, offensive, impolite, arrogant, and loud" behavior. This type of behavior led to appellant being issued a written reprimand in December of 2012. This reprimand cautioned appellant that failure to correct the aforementioned behavior would "subject [appellant] to corrective action."

On January 21, 2014, the University of Kentucky College of Medicine Faculty Council (the "Council") held a meeting. Appellant was in attendance, as was Dr. Davy Jones. During the meeting, Dr. Jones and appellant discussed the University of Kentucky College of Medicine's Practice Plan Committee. It is an entity that serves as the faculty's oversight committee regarding sources of income

[2] Kentucky Revised Statutes.

within the college. They noted the fact that the Practice Plan Committee had failed to meet between June 2009 and April 2014 – which, arguably, did not comport with UK's Administrative Regulation 3:14, Article X (requiring the Committee to meet periodically, but without a required schedule, to review operational aspects of the plan(s)).[3] The Council determined that the best path forward would involve contacting the Dean of the College of Medicine at the time, Dr. Frederick de Beer. Dean de Beer responded via memorandum, informing the Council that the Executive Vice President for Health Affairs at the time, Dr. Michael Karpf, would meet with them in April 2014 to address the issues.

On April 15, 2014, the Council held a meeting with Dean de Beer, Executive Vice President Karpf, General Counsel for UK Bill Thro, and the faculty-elected trustee to the University Board of Trustees, Dr. John Wilson. During this meeting, appellant made two statements. First, appellant expressed his concern that an external attorney was needed to examine the practice plan contracts and the manner in which they were developed. Second, appellant opined that an independent audit of the Kentucky Medical Services Foundation – a nonprofit

[3] Administrative Regulation 3:14, Article X, provides, in pertinent part, as follows: "The Committee shall meet periodically and shall review the operation of the Plan and the College Addendum, including matters relating to the applicability of the Plan to sources of income, standard schedules of charges for services, and any other aspects of the operation of the Plan. The Committee shall make such recommendations as it may deem appropriate to the dean of the college, with respect to the modification of the policies and procedures provided by this Plan or utilized in its operation. In the event that changes are deemed necessary by the dean, they shall be brought before the college Plan members by the Chair of the Committee."

organization tasked with collecting bills owed to UK physician staff – was necessary.

Then, in August 2014, despite appellant's receipt of the December 2012 reprimand, UK received notification via complaint from a medical student that appellant had utilized profanity and derogatory language during one of his lectures. Additionally, in September of 2014, UK received notification from an individual whose son was hospitalized at UK that appellant had called her son, a quadriplegic patient, a series of offensive terms and had made an offensive suggestion regarding said patient to a subordinate. As a result of the first transgression, appellant was forbidden from taking part in guest lectures; due to the latter, he was placed on administrative leave pending the completion of an investigation to be conducted by UK.

Thereafter, in January of 2015, appellant was suspended for violations of the UK Healthcare Medical Staff Bylaws, as well as for violations of the Behavioral Standards in Patient Care Commitments to Performance. The issue was eventually taken up by the Medical Staff Executive Committee (the "Committee"), which determined that an independent investigation was necessary moving forward. In early February of 2015, two of the Committee's members presented their findings to the full Committee. The Committee subsequently voted to affirm appellant's suspension, recommending revocation of clinical privileges.

Appellant subsequently invoked his right, pursuant to university procedure, to a hearing before three of his medical colleagues. After a hearing, during which a wide array of evidence was introduced, including testimony and exhibits, a written decision was issued unanimously concluding that appellant had violated both the UK Healthcare Medical Staff Bylaws and the Behavioral Standards in Patient Care Commitments to Performance. The decision recommended revocation of appellant's medical staff privileges.

Appellant appealed this decision to UK's Board of Trustees Health Care Committee. However, appellant fared no better at this stage of UK's internal proceedings. The panel unanimously recommended permanent revocation of privileges. This decision was later unanimously affirmed. The end result for appellant was while he was still employed at the university it was at a reduced role and salary.

During the described disciplinary process, appellant filed the action that would become the basis of this appeal. Throughout the proceedings below, appellant specifically claimed that he was a "whistleblower" in that he made four separate disclosures for which he asserts he was retaliated against. The first disclosure concerns the aforementioned April 15, 2014 meeting, during which appellant contends he relayed that Administrative Regulation 3:14 had been violated, that an outside attorney was needed to examine the practice plan

contracts, and that an independent audit of the Kentucky Medical Services Foundation would be in order. Second, appellant claims an email sent from appellant's counsel to Cliff Iler, Associate General Counsel to UK, in which it is stated that appellant had been retaliated "for his public disclosure of Dr. Karpf's impropriety[,] i.e.[,] attempting [to] gain control of KMSF [(the Kentucky Medical Services Foundation)] practice plan funding contrary to University regulations[,]" constituted a protected disclosure. Third, appellant points to the actual filing of the complaint that underlies this appeal as a disclosure. Fourth, appellant avers the affidavit of Daryl Griffith, the former Chief Executive Officer of Kentucky Medical Services Foundation, in which Mr. Griffith states that the Kentucky Medical Services Foundation had loaned the child development center $5,000,000, but that, as of May of 2014, only $2,500,000 had been paid back was an act of whistleblowing.

Summary judgment is proper 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." CR[4] 56.03. When considering a trial court's grant of summary judgment, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary

[4] Kentucky Rules of Civil Procedure.

judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted). Because factual findings are not at issue, a trial court's grant of summary judgment is reviewed *de novo*. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citations omitted). When we engage in *de novo* review, "we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

In order to set forth a *prima facie* case under KRS 61.102, the operative statute in this matter, and demonstrate that he or she attempted to, "in good faith report[], disclose[], divulge[], or otherwise bring[] to the attention of [government or enforcement officials] any facts or information relative to actual or suspected mismanagement, waste, fraud, abuse of authority, or a substantial and specific danger to public health or safety[,]"[5] an employee must establish four elements: (1) first, the employer must be an officer of the state; (2) second, the employee must be employed by the state; (3) third, the employee must have made or attempted to make a good faith report or disclosure of a suspected violation of

[5] KRS 61.102(1).

state or local law to an appropriate body or authority; and (4) finally, the employer must have taken some action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure. *Davidson v. Commonwealth, Dep't of Military Affairs*, 152 S.W.3d 247, 251 (Ky. App. 2004) (citations omitted). Furthermore, "[t]he employee must show by a preponderance of evidence that 'the disclosure was a contributing factor in the personnel action.'" *Id.* A "contributing factor" means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision." KRS 61.103(1)(b). If the employee is successful in demonstrating that the disclosure was a contributing factor in the adverse personnel action, the burden then shifts to the employer "to prove by clear and convincing evidence that the disclosure was not a material fact in the personnel action." KRS 61.103(3).

The court below held that the appellant satisfied the first two elements of a claim made under KRS 61.102. The university is a public agent of the Commonwealth and that, by virtue of his employment with UK, the appellant was a state employee. However, the third element of a claim under the statute – that is, the employee made a good faith report or disclosure of a suspected violation of law to the appropriate authority – is what is in question in this matter.

Before turning our attention to each of the alleged disclosures made by appellant in the underlying case, we first make note of the fact that "disclosure" means "a person acting on his own behalf, or on behalf of another, who reported or is about to report, either verbally or in writing, any matter set forth in KRS 61.102." KRS 61.103(1)(a). The Kentucky Supreme Court has further distilled this definition: "Each of the words used in [KRS 61.103(1)(a)] to denote the protected conduct of the employee . . . describes behavior that **brings to light facts not otherwise known to the recipient**." *Pennyrile Allied Community Services, Inc. v. Rogers*, 459 S.W.3d 339, 345 (Ky. 2015) (emphasis added). Furthermore, "[t]he phrases 'in good faith' and 'brings to the attention of' [utilized in KRS 61.102] clearly denotes an **intent** on the part of the employee to reveal or impart what is **known** to the employee to someone else who lacks that knowledge and . . . **is in a position to do something about it**." *Id.* (emphasis added).

Turning to the April 15, 2014 meeting, we agree with the circuit court that the statements made there fail to fit into the meaning of a "disclosure," as that term is defined by Kentucky case law and statutory authority. As mentioned above, in order to qualify as a "disclosure," a statement must illuminate facts not known to the recipients of said statement. *Pennyrile*, 459 S.W.3d at 345. The statements at issue were made to Dean de Beer, General Counsel Thro, and Dr. Wilson. At the January 21, 2014 meeting, it was reported that the Committee had

not met since its creation in 2009 by appellant and Dr. Jones. These statements were recorded in the meeting minutes and were thus available and known to Dean de Beer, General Counsel Thro, and Dr. Wilson. Also, in that the Practice Plan Committee was not required to meet at any set date or regularity, that it had not met during this period of time was not an accusation of wrongdoing in the first place. The statements made at the April 15, 2014 meeting, therefore, do not constitute a protected "disclosure".

Furthermore, the statements regarding the Kentucky Medical Services Foundation at the April 15, 2014 meeting fail to constitute a valid disclosure. Appellant's statements in his deposition were couched in vague, flexible terms, reflecting a lack of the requisite knowledge and intent, *see Pennyrile*, *supra*, on the part of appellant, and fails to disclose any mismanagement, fraud, waste, abuse of authority, or danger to the public, as required by KRS 61.102(1). The following exchange is illustrative:

> A: I didn't say anything specifically other than, "We need an audit of KMSF."
>
> Q: Did you elaborate why you thought an audit was needed?
>
> A: No. . . . I said I was concerned about the way the practice plan rolled out, the Practice Plan Committee. That raise concerns, a violation of Administrative Regulation 3:14 that governs the flow of money back to the physicians and their incentive plans. Just by connection, since the practice plan is an integral part of

> the KMSF, I was concerned about fund mismanagement at KMSF. So I said, "We need an audit."

Deposition of Paul Kearney, M.D. at 24. The language utilized by appellant throughout his deposition does not reflect or denote an intent to expose wrongdoing. It simply recommended an audit.

Also important to this determination is that the Kentucky Supreme Court has interpreted the phrase "any other appropriate body or authority," as used in KRS 61.102, to mean "any public body or authority with the power to remedy or report the perceived misconduct." *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789, 793 (Ky. 2008). Here, Dean de Beer, General Counsel Thro, and Dr. Wilson – employees of UK all – lack the authority over Kentucky Medical Services Foundation, a private corporation. Reinforcing this conclusion is *Pennyrile*'s clear rule that a disclosure be made to someone "in a position to do something about it." *Pennyrile*, 459 S.W.3d at 345. None of the above-identified individuals were in a position to exercise any influence over Kentucky Medical Services Foundation.

Additionally, the Kentucky Medical Services Foundation is a private entity. Disclosures about its wrongdoing would not come under the whistleblower statute. It is not a government entity. Thus, the alleged disclosure of April 15, 2014, was not a protected disclosure under KRS 61.102.

In regard to the November 3, 2014 email, we agree with the circuit court's decision that it, too, fails to qualify as a protected disclosure. As the circuit court pointed out, the email was addressed to the office of UK's General Counsel, alleged to have been involved in the retaliation of which appellant initially complained from the beginning. Such an entity cannot be construed to constitute one "who lacks that knowledge" of the suspected violation, as is required by *Pennyrile*, nor as someone or an entity who could take action about the wrongdoing as he was committing the wrongdoing.

Moving to the asserted disclosure contained within appellant's pleadings, we are, again, unwilling to construe the statement at issue as a protected disclosure. In order to be protected under KRS 61.102, an alleged disclosure must be an initial report, not repeated or subsequent reports. *See Moss v. Kentucky State University*, 465 S.W.3d 457, 460 (Ky. App. 2014); *Pennyrile*, 459 S.W.3d at 345 (tacitly recognizing that repeated disclosures are not protected under the Whistleblower Act since KRS 61.103(1)(a) requires a disclosure "bring[] to light facts not otherwise known to the recipient"). Here, the sum and substance of the alleged disclosure contained in appellant's complaint is the same as that contained in the report from the April 15, 2014 meeting. It therefore is not an initial disclosure and is not entitled to protection under the Whistleblower Act.

The final disclosure appellant maintains that he made concerns the affidavit of Daryl Griffith, the former Chief Executive Officer of Kentucky Medical Services Foundation. As alluded to previously, and as correctly recognized by the circuit court, the Kentucky Medical Services Foundation is a private entity, not a public one. As a private company, it lies outside the scope of government entities subject to the provisions of KRS 61.102. Further, even if that were not the case, the affidavit at issue was not introduced until February 10, 2016, well after the supposed retaliatory measures taken by UK against appellant.

Because we find that there was no genuine issue of material fact regarding the third element of appellant's KRS 61.102 claim, we need not reach the issue raised by the fourth element, *i.e.*, whether UK took action or threatened to take action to discourage appellant's alleged disclosures.

The final issue addressed by appellant on appeal concerns the trial court's prohibition on appellant's deposing Dr. Wendy Hansen, a member of one of the disciplinary panels before which appellant was brought throughout the above-described process. UK responded to appellant's motion to compel by relying upon the deliberative process privilege. We need not address appellant's argument that such a privilege is not recognized in Kentucky, however, because appellant fails to argue how the circuit court's refusal to allow appellant to move forward with deposing Dr. Hansen prejudiced him would have changed or affected

the result below or the substantial rights of the parties. Since the holding of this Court is based on the statements alleged by appellant to be whistleblowing were not about the university's reaction to the statements, we find appellant's final argument to be irrelevant to the decision reached by this Court.

Based on the foregoing, we affirm the judgment of the Fayette Circuit Court in its entirety.

ALL CONCUR.

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