2005 WL 5768027 (Md.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Maryland,
Baltimore City.
Baltimore City County

Judith BERLIN, Plaintiff,

v.

HOME FOR INCURABLES OF BALTIMORE CITY, INC. d/b/a/ Keswick Multi-Care Center, Defendant.

No. 24-C-03-008985.
February 28, 2005.

Plaintiff's Response to Motion for Summary Judgment Memorandum of Points and Authorities

I. Statement of the Case

Plaintiff Judith Berlin, a registered nurse, was fired by Defendant Home for Incurables of Baltimore City, Inc. Defendant's stated excuse for the firing was Nurse Berlin's reluctance to use the chemical restraint Ativan on an agitated 89 year old patient and her attempt instead to use more humane (though less institutionally convenient) methods of calming the woman. After Plaintiff was terminated, Defendant fabricated a charge of abuse against Plaintiff to the Baltimore City Police Department, the Ombudsman of the Commission on Aging and Retirement Education, the Maryland Department of Health and Mental Hygiene Office of Health Care Quality, the Patient Abuse Coordinator of the Office of the Attorney General, the Maryland State Board of Nursing, and, in an effort to deprive Plaintiff even of the meager income offered by unemployment insurance, to the Maryland Department of Human Resources. Plaintiff was completely exonerated by all these agencies.

On the unseasonably hot evening of May 7, 2003, when air conditioning in the South Building of Keswick was, as usual, malfunctioning, and Plaintiff was the only registered nurse in charge of eighteen demented patients, some violent, Plaintiff placed an agitated patient in a room where she could be supervised, dimmed the lights in an attempt to cool the room, and closed, but did not lock, the door. Plaintiff then attempted for perhaps thirty minutes to quiet the patient by taking her to the toilet, giving her a baby doll to hold, and bathing her face while ministering to the other seventeen patients and attempting to shield Jane Doe from a violent patient who had assaulted patients and staff in the past.

When the unit manager arrived after, at most, thirty minutes, she demanded to know why Plaintiff was spending so much time on one patient, and directed Plaintiff to apply a chemical restraint, noting that the institution was concerned about “wandering eyes.” Plaintiff took this comment to mean that the institution feared complaints from visitors and was more concerned with its image than with the welfare of individual patients. Plaintiff complied with her supervisor's demand, administered the chemical restraint, and the troublesome patient was quieted.

Three days later, Keswick summoned Plaintiff to a meeting and fired her. Fearful too late of legal repercussions, and eager to find a scapegoat for Keswick's many substantiated deficiencies in care, Keswick then fabricated a charge of elder abuse against Plaintiff and reported this charge to six government agencies; the three agencies that bothered to investigate the allegations all exonerated Plaintiff.

Plaintiff's conduct at all times conformed with accepted and approved practices. That Defendant finds Plaintiff's efforts to seek justice disconcerting is not surprising; far more disconcerting, however, is that Defendant feels free not only to discharge this caring employee, but to ruin her career.

II. CORRECTED STATEMENT OF UNDISPUTED FACTS

This corrected statement is necessary because Defendant's "Statement of Undisputed Facts" in reality contains falsehoods, omissions, misrepresentations, opinions, and matters in dispute. Plaintiff addresses each point in turn. 1-13. Stipulated.
14. Incomplete. Reports of abuse must be made in good faith. Md. Code Ann. Health-Gen. S 19-347(g)(2000), Md. Courts and Judicial Proceedings Code Ann. S5 631 (a)(2002), Md. Code Ann. Health-General Article S 19-347(g); COMAR 10.07.09.15(D)(2).

15. Misleading. Jane Doe was in fact in temporary monitored seclusion. At the time of the incident, neither the Medical Director nor the Director of Nursing was available; Plaintiff exercised her professional judgment to remove Jane Doe from the floor. (Affidavit of Judith Berlin, #18, 19, 21).

16-21 Stipulated.
22. Misleading. While Jane Doe was alone in the room, Plaintiff took pains to place her in a room where Plaintiff could observe her as she went about her assigned duties. (Affidavit of Judith Berlin #18).

23. Stipulated.

24. Misleading. "Time out" is not a punishment, and Jane Doe was not being punished. (Affidavit of Judith Berlin #19).

25. Stipulated.

26. Stipulated except for the final sentence, which is not a fact, but an opinion, and is false.

27. Stipulated except for the final sentence, which is not a fact but a judgment, and is false.

28-33.Stipulated.
34. Plaintiff objects to the characterization that she "tried to claim" that Supervisors Somrajit and Kess-Gardner knew that she had tried to calm Jane Doe by non-chemical means. This characterization does not belong in an undisputed statement of facts.

35. Misleading. "Time out" is not a term of art, and the exact wording is irrelevant. (Affidavit of Judith Berlin # 19).

36. See objection to #35.

37. See objection to #35.

38. Irrelevant.

39. Misleading. "Time out" is not a form of punishment. (Affidavit of Judith Berlin #19).

40. This statement is false. Plaintiff did indeed try to calm Jane Doe during the thirty minute lapse in staffing, though she was not able to stay with the patient for any extended length of time due to the demands of the other seventeen patients in her care. (Affidavit of Judith Berlin #10, 20).

41. Misleading. Plaintiff was familiar with Jane Doe's chart; Plaintiff exercised her professional judgment to avoid using the chemical restraint since it was not medically necessary (Affidavit of Judith Berlin, #14, 15).

42. Stipulated. Matters of professional judgment are not automatically “right” or “wrong.”

43. Stipulated.

44-52 Misleading. Keswick's investigation was perfunctory, and its conclusions were never in doubt. The investigation never included an interview with Plaintiff. Plaintiff was summoned to Keswick not to be interviewed, but to be fired. (Affidavit of Judith Berlin #27).

53 Stipulated.

54. This is not a fact, but an opinion. Plaintiff acted at all times with complete professionalism and in accord with accepted standards of care. (Affidavit of Judith Berlin #29).

55. Plaintiff does not accept that her termination was “based upon the information gathered,” but because the institution needed a scapegoat. (Affidavit of Judith Berlin #29).

56. Irrelevant.

57. Irrelevant.

58. Irrelevant.

59. The phrase “as reported by law” is an incorrect statement of the law. Reporting is only required in case of a *good faith* belief that abuse has occurred; malicious prosecution is never required by statute. Further, the COMAR regulation cited provides that a report be made to the police, the Department of Mental Hygiene *or* the ombudsman, not necessarily to all three. Reporting to the Attorney General is not required by regulation. Subsequently, in an attempt to deprive Plaintiff of unemployment benefits, Keswick listed the reason for her termination as “gross misconduct.” The Unemployment Commission found no evidence of any misconduct, gross or other, by Plaintiff (Affidavit of Judith Berlin, #7, 8).

60. Stipulated, except for the characterization that Director Salley acted “discreetly,” which is not a statement of fact but an opinion, and is false.

61. Stipulated.

62. This statement is false. The fact that of the six agencies to whom abuse was reported, not one found even enough evidence to begin an investigation is proof of the unreasonable nature of Keswick' s allegations. (Affidavit of Judith Berlin #8).

63-64 Stipulated.

65-67 Stipulated.

II. Legal Standard for Summary Judgment

Standards Governing Motion to Dismiss, or in the Alternative, for Summary Judgment

Maryland Rule 2-501 provides that “the trial court must decide whether there is any genuine dispute as to material facts and, if not, whether either party is entitled to judgment as a matter of law.” *Bagwell v. Peninsula Regional Medical,* 106 Md. App. 470 (1995). *See also Warner v. German,* 100 Md. App. 512, 516, 642 A.2d 239 (1994); *Beatty v. Trailmaster Products, Inc.,* 330

Md. 726, 625 A.2d 1005 (1993); *Bits "n " Bytes Computer Supplies, Inc. v. Chesapeake & Ptomoac Telephone Co. of Md.*, 97 Md.App. 557, 576-77, 631 A.2d 485 (1993), *cert. den.* 333 Md. 385, 635 A.2d 425 (1994); *Seaboard Surety Co. v. Richard F. Kline, Inc.*, 91 Md.App. 236, 242-45, 603 A.2d 1357 (1992). *Nelson v. Debbas*, 160 Md.App. 194, 862 A.2d 1083 (2004).

As shown above, at least fourteen of the "facts" cited by Defendant are false, misleading, incomplete, or matters of opinion; moreover, the facts of the case fail to show that the Defendant is entitled to judgment as a matter of law.

Furthermore, in considering the motion for summary judgment, the court must draw all reasonable inferences in favor of the non-moving party. See *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md.App. 180, 190, 702 A.2d 422 (1997).

III. Legal Argument

A. Plaintiff Has Demonstrated a Violation of Public Policy in her Termination

Defendant complains that Plaintiff has advanced no public policy under which a court could find wrongful discharge. However, Plaintiff has clearly articulated the public policy that a health professional is obliged to t[Text redacted in copy.] reat her patients humanely without interference from an institution concerned with its image.

COMAR 10.27.19.02 outlines the ethical responsibilities of a registered nurse in Maryland:
A. A nurse shall:

(1) Provide services with respect for human dignity and the uniqueness of a client unrestricted by consideration of social or economic status, religious affiliation, personal attributes, or the nature of health problems;

...

(4) Assume responsibility and accountability for individual nursing judgments and actions.

COMAR clearly defines the public policy in allowing a registered nurse to make professional decisions.

Even if the policy were not clearly defined by COMAR 10.27.19.02, our Court of Special Appeals has stated in dicta that courts may find public policy in sources other than statutes, regulations, and the Constitution (*Sears, Roebuck and Co. v. Wholey*, 139 Md.App. 642, 779 A.2d 408 (2001)). Given COMAR and *Wholey*, the court cannot say to a legal certainty that there is no public policy under which Plaintiff can prevail on a claim of wrongful discharge.

Indeed, courts throughout the country have found a public policy in allowing health-care professionals to place the welfare of their patients above the convenience of employers. See 52 ALR 5th 405, "Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes"; 23 Val. U.L.Rev. 33, 73* (1988), "Employment-at-will and Codes of Ethics: The Professional's Dilemma." Thus, in *LoPresti v. Rutland Regional Health Services*, 2004 WL 2365402 (Vt., 2004), Vermont recognized as public policy the right of a physician to refuse to refer patients to specialists favored by the employer when the physician in his professional judgment considered other specialists preferable. In *Deerman v. Beverly California Corp.*, 518 S.E.2d 804, (1999), North Carolina recognized a public policy in the protection of public health and safety by ensuring a competent level of nursing care. In *O'Sullivan v. Mallon*, 390 A.2d 149 (1979), New Jersey found a public policy in the protection of public health and safety in the case of an X-ray technician terminated for justifiably refusing to catheterize patients. In *Kalman v. Grand Union Co.*, 443 A.2d 728 (NJ, 1982), a breach of public policy was found in the wrongful discharge of a pharmacist who refused to close the pharmacy section of a store when other sections of the store were open. In *Carl v. Children's Hospital*, 702 A2d 159 (1997), the DC Court of Appeals found a public policy in the responsibility of a nurse to advocate for patients' rights in legislative hearings against the wishes of her employer but in obedience to her Code of Ethics. In *Kirk v.*

Mercy Hospital Tri-Charity, 851 SW2d 617 (1993), Missouri found a public policy in a nurse's obligation to faithfully serve the interest of his patients.

Because Plaintiff has clearly articulated the public policy that a health professional is obliged to treat her patients humanely without interference *from* an institution concerned with its image, her case for wrongful discharge should be allowed to go forward.

B. Immunity Does Not Cover Reports Made in Bad Faith

Defendant makes much of the qualified immunity extended to persons required to report suspected child abuse, but pays little heed to the fact that such reports must be made in good faith. Md. Code Ann. Health-Gen. S 19-347(g)(2000), Md. Courts and Judicial Proceedings Code Ann. S5 631 (a)(2002), Md. Code Ann. Health-General Article S 19-347(g); COMAR 10.07.09.15(D)(2); *Rite Aid v. Hagler. infra.* Of six administrative agencies to whom the "abuse" was reported, three declined to investigate, and three issued reports that exonerated the Plaintiff completely. No reasonable person could have characterized Plaintiff's reluctance to apply a chemical restraint or her non-coercive attempts to calm Jane Doe as "abuse." It follows that Defendant's trumped-up charges were made for some improper purpose, for example to distract the "wandering eyes" that so concerned Plaintiff's supervisor, or as a smokescreen to cover the wrongful discharge after the fact.

As noted in *Miller v. Lear Siegler, Inc*, 525 F.Supp. 46, 60 (D. Kansas, 1981):

> A privilege may be abused by excessive publication, use for an improper purpose, or by "actual malice" - that is, ill-will, knowledge of falsity, or reckless disregard as to the truth or falsity of the defamatory matter.

In Caldor v. Bowman, 330 Md.632 (1993), the Court wrote:

> Although we do not wish to discourage the reporting of criminal activity, we also do not wish to encourage harassment or wasting of law enforcement resources by the investigation of false, maliciously made complaints...There is no benefit to society or the administration of justice in protecting those who make intentionally false and malicious statements to the police. The countervailing harm caused by the malicious destruction of another's reputation can have irreparable consequences. We believe the law should provide a remedy in situations such as this. (Cites omitted).

Courts in other jurisdictions have noted the same principle. *Clavenger v. Catholic Social Service of Archdiocese of Kansas City in Kansas, Inc.*, 901 P.2d 529 (KS, 1995)(persons acting with malice in reporting possible child abuse to proper authorities are not granted immunity); *Rice v. Chase*, 765 N.Y.S.2d 648 (2003)(qualified immunity from civil liability for reports of suspected child abuse may be defeated by showing that person making report was guilty of misconduct or gross negligence).

Moreover, the Court has written that questions of good faith involving intent and motive are ordinarily not resolvable through summary judgment:

> The Court of Special Appeals has also held that summary judgment was inappropriate in a case involving defamation, false imprisonment, malicious prosecution and abuse of process. (In another case) the intermediate court determined that it was error to dismiss, on the basis of FL S 5-708's statutory immunity, the appellant's negligence and malicious prosecution actions against a social worker who conducted an investigation resulting in the appellant's prosecution for child abuse when the question of her good faith remained in *issue.(Rite Aid, supra,* at 681, cites omitted).

In *Rite Aid*, the Court did carve out a narrow exception involving cases in which the facts are not in dispute; however, as Plaintiff has shown, many of the facts remain in dispute.

As shown below, questions of good faith/bad faith are jury questions.

C Good Faith is a Jury Question -- No Presumption of Good Faith

Summary judgment is not available in cases depending on "good faith." As the court wrote in *Laws v. Thompson*, 78 Md.App, 665, 677, 533 A.2d 1264, 1270 (1987):
(G)enerally summary judgment is inappropriate where motive is at issue since inferences must be resolved against the moving party. The rationale is "(W)hen the disposition of a case turns on a determination of intent, courts must be especially cautious in granting summary judgment, since the resolution of that issue depends so much on the credibility of witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witness during direct and cross-examination." (Cites omitted).

Defendant has invented a presumption of good faith that would protect all allegations of elder abuse, however far-fetched or malicious. While some states may have such a presumption, Maryland does not. *Freed v. Worcester County Department of Social Services*, 69 Md.App. 447 at n. 12, 518 A.2d 159 (1986), *cert. denied* 309 Md. 47, 522 A.2d 393 (1987), *appeal dismissed*, 484 US 84, 108 S.Ct. 49, 98 L.Ed. 2d 14 (1987).

Defendant claims that Plaintiff cannot point to positive facts that would conclusively establish that Defendant acted in bad faith. However, bad faith can be proven circumstantially by a course of conduct. Were the case otherwise, judgments in tort would almost never be possible. In the instant case, Defendant's bad faith is shown by the unit manager's statement against interest that the chemical restraint should be used against Jane Doe to protect the institution from "wondering eyes."

Conceding that none of the six agencies to which the fabricated charge of abuse was reported found even enough evidence to begin an investigation, Defendant maintains that mere negligence will not support a judgment for defamation. This contention is a misstatement of the law. In *Gertz v. Robert Welch, Inc.* 418 US 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the U.S. Supreme Court held that negligence will afford at least compensatory damages. Further, the court held, if, beyond negligence, a reckless disregard for the truth is proved, punitive damages are available as well. See *Marchesi v. Franchino*, 283 Md. 131, 387 A.2d 1129 (1978); *General Motors Corp. v. Piskor*, 277 Md. 165, 175, 352 A.2d 810, 817(1976); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). Moreover, Defendant, by virtue of its position as a licensed health care provider, was in a position to know what conduct constituted abuse. Discussing differing standards of S.1983 liability, the Court, in *Ritchie v. Donnelly*, 324 Md. 344, 597 A.2d 432 wrote
In contrast, qualified or good faith immunity for other government officials varies with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action." (at 361 cites omitted) (1972).

Further, even Defendant's claim of simple negligence is belied by its tenacity and persistence in making the false reports. Defendant reported the "abuse" not to one, but to *six* government agencies, one after the other, perhaps on the theory that if it threw enough charges at Plaintiff, one would be bound to stick. None did. COMAR 10.07.09.15(C)(1), the regulation on which Defendant leans so heavily, provides:
C. Reports of Abuse

(1) A person who believes that a resident has been abused shall promptly report the alleged abuse to the:

(a) Appropriate law enforcement agency;

(b) Licensing and Certification Administration within the Department; or

(c) The Office on Aging.

Note that the regulation uses the disjunctive "or" at the end of (b). Assuming, *arguendo*, that Keswick reasonably believed abuse had occurred, it was required by regulation only to report the incident to one of the listed agencies. Once Keswick had informed been informed by the Baltimore City Police, the Department of Mental Hygiene or the Office on Aging - whichever was first contacted - that no **abuse** had occurred, it was on notice and should have desisted, sought counsel, or investigated further before resuming its attack. Certainly after the second, third, or fourth agency had found no evidence of **abuse**, Keswick should have been convinced of Plaintiff's innocence.

Nor did Defendant's determination to injure Plaintiff cease with the six reports of **abuse**: to this day, Defendant persists in threats to contact Plaintiff's employer in order to secure her termination and compound the injury to her reputation.

A jury could reasonably infer that Defendant's behavior rose to the level of a reckless disregard for the truth in light of Defendant's position as a licensed health care provider and of six official findings that no **abuse** occurred.

D. Claim for Breach of Implied Covenant of Good Faith and Fair Dealing is Moot

This claim, presented in Plaintiff's original Complaint, has been dropped from the Amended Complaint.

Nevertheless, the Court could reasonably find that Keswick had breached its implied covenant of good faith and fair dealing. Defendant is correct in asserting that Maryland courts have declined to read a general implied covenant of good faith and fair dealing into employment relationships. However, this reservation does not mean that courts will *never* find such a requirement. Instead, the courts have resorted to a case-by-case evaluation. Indeed, in at least two cases, *Samuels v. Tschechtelin,* 763 A.2d 209 and *University of Baltimore v. Iz,* 716 A.2d 1107 (1998), Maryland courts have found just such a requirement based on employee handbooks similar to those issued by Defendant to Plaintiff.

Conclusion

In any motion for summary judgment, the burden is on the moving party to show that the non-moving party has not presented a sufficient case to go to the jury. Moreover, each claim must be viewed in the light most favorable to the non-moving party.

Plaintiff has clearly articulated a public policy argument that would support her claim for wrongful discharge. She has pointed to Defendant's justification for using the chemical restraint - that the procedure was motivated by the facility's fear of "wandering eyes" - as an admission that Defendant's use of the chemical restraint was not motivated by medical necessity. In addition Defendant's course of conduct in fabricating a charge of **elder abuse**, a charge rejected by six government entities to which it was reported, is clear evidence of bad faith that could lead a jury to find against Defendant.

Defendant expresses outrage that a caring professional, fired for placing the welfare of her patients above that of the institution, then maliciously defamed by her erstwhile employer, would have the "temerity" to sue her employer, but the jury's outrage will point in another direction entirely.

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