

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH DUFFY : CIVIL ACTION  
 :  
 v. :  
 :  
 KINDRED HOSPITALS EAST, :  
 L.L.C. : NO. 03-6655

**MEMORANDUM**

**Padova, J.**

**June 30, 2004**

Plaintiff Joseph Duffy has brought this action under Pennsylvania statutory and common law alleging that the termination of his employment by Defendant, Kindred Hospitals East, L.L.C. ("Kindred"), constituted wrongful discharge. Kindred has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56 ("Rule 56 "). The matter has been fully briefed, and oral argument was held on June 22, 2004. For the reasons that follow, the Court grants Kindred's Motion for Summary Judgment in its entirety.

I. BACKGROUND

Plaintiff was employed by Kindred as a respiratory therapist and director of respiratory care and radiology services from April 9, 2001 to December 4, 2002. (Duffy Aff. ¶ 1.) Throughout Plaintiff's employment, Kindred used an Hours Per Patient Days ("HPPD") staffing model for the purpose of determining staffing levels for respiratory and nursing personnel. (Id. ¶ 2.) This model based staffing solely on the number of patients per day multiplied by a budgeted number of hours allowed per patient day.

(Id. ¶ 4.) Plaintiff claims that Kindred's HPPD staffing model for respiratory therapists and nurses violated Pennsylvania regulations in that it did not consider the needs of the patients. (Id. ¶ 23.) Plaintiff informed Kindred on numerous occasions throughout his employment that its staffing model was inconsistent with codes and regulations. (Id. ¶ 14.) Plaintiff attempted to consider the needs of the patients in scheduling his staff, and in response he received chastisement for overstaffing and reminders that the budget controlled staffing. (Id. ¶ 6.)

At a meeting of all department and section heads on or about April 3, 2002, which was held to prepare for an upcoming evaluation by the Joint Commission on the Accreditation of Health Care Organizations ("JCAHO"), the person in charge of Kindred's Corporate JCAHO survey stated that, if asked by a JCAHO surveyor, department heads should state that staffing at Kindred was based on patient needs. (Id. ¶ 16.)

On December 4, 2002, at a meeting that Plaintiff requested for the purpose of discussing the plan for reducing staffing levels that he was required to produce, Plaintiff was informed that there was a serious philosophical difference of opinion on staffing and that Kindred was going to sever its relationship with Plaintiff at that time. (Id. ¶ 21-22.)

Plaintiff claims that he was wrongfully discharged from his employment without advance notice, and that the discharge violated

the public policy of the Commonwealth of Pennsylvania and the Pennsylvania Whistleblower Law ("Whistleblower Law"). Plaintiff alleges that he was discharged because of his refusal to willingly participate or condone Kindred's utilization of an hours per patient day staffing model. Plaintiff seeks monetary damages in excess of \$100,000.

## II. LEGAL STANDARD

The court should grant summary judgment if "the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law." Fed R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met

simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

### III. DISCUSSION

#### A. Whistleblower Law Claim

In his response to Kindred's Motion for Summary Judgment, Plaintiff concedes that the claims under the Whistleblower Law cannot be maintained because there is insufficient evidence to

establish that Kindred is a public body under the terms of the Whistleblower Law. (Pl's Opp. Summ. J. Mem. at 1). The Court therefore grants Kindred's Motion for Summary Judgment with respect to Plaintiff's claim under the Whistleblower Law.

#### B. Wrongful Discharge Claim

Kindred argues that Plaintiff does not have a viable claim for wrongful discharge because Plaintiff was an at-will employee, and there is no public policy exception applicable to his case. Under Pennsylvania law, an at-will private employee can be discharged "for good reason, bad reason, or no reason at all." Nix v. Temple Univ., 596 A.2d 1132, 1135 (Pa. Super. Ct. 1991). Pennsylvania courts only recognize three situations in which an exception to the at-will rule allows a plaintiff to bring a wrongful discharge claim alleging a breach of public policy: 1) if the employer requires the employee to commit a crime, 2) if the employer prevents the employee from complying with a statutorily imposed duty, or 3) if the employer discharges the employee when he is specifically prohibited from doing so by statute. Hennessy v. Santiago, 708 A.2d 1269, 1273 (Pa. Super. Ct. 1998).

Courts have narrowly construed these three exceptions. See Clark v. Modern Group, Ltd., 9 F.3d 321, 330 (3d Cir. 1993) ("Only three reported Pennsylvania cases have ever granted relief from wrongful discharge on the basis of public policy and in each there was either an infringement of constitutional rights or an actual

violation of . . . a statute designed to protect the public from serious harm." ). Courts have specifically refused to recognize a public policy exception for whistleblowing activity when the employee has no legal duty to report the acts in question. See, e.g., Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 113 (3d Cir. 2003) (affirming summary judgment on employee's wrongful termination claim in part because employee had no legal duty to report alleged violations of law); Geary v. U.S. Steel Corp., 319 A.2d 174, 184 (Pa. 1974) (holding that there was no breach of public policy that substantiated a wrongful termination claim when a salesman pointed out unsafe products); Hunger v. Grand Cent. Sanitation, 670 A.2d 173, 176 (Pa. Super. Ct. 1996) (finding that employee's discharge for reporting that a client was illegally dumping hazardous materials without a license was not protected by the public policy exception to the employment at-will doctrine).

Kindred maintains that Plaintiff cannot point to any statute or regulation that mandates an objective standard or staffing level for nurses or respiratory therapists at Kindred Hospital or that required Plaintiff to report his belief that adequate staffing was not maintained. Furthermore, Kindred points out that Plaintiff concedes that he never reported alleged violations to JCAHO or any outside agency, only to his superiors. See Duffy Dep. at 63-64 ("[H]ad you filed a complaint with any other organization or entity outside the hospital? A. No."). Kindred further asserts that

Plaintiff's subjective belief that Kindred violated the law is insufficient to establish a common law claim for wrongful discharge.

Plaintiff contends that Kindred's staffing model and schedules violated 28 Pa. Code § 109.6 ("Section 109.6"). Plaintiff furthermore contends that he was asked to disregard the requirements of this section. Section 109.6 states:

(a) There shall be staffing schedules reflecting actual nursing personnel required for the hospital and for each patient unit, including but not limited to the surgical and obstetrical suites, the outpatient unit, special care units, and the emergency service unit. *Staffing patterns should reflect consideration of nursing goals, standards of nursing practice, and the needs of the patients.*

(b) Staffing schedules shall accomplish the following:

(1) Staffing patterns which reflect the equality and quantity of various categories of nursing personnel necessary to carry out the nursing care program.

(2) Assignment of personnel in a manner which minimizes the risk of cross-infections.

(3) The patient care assignment is commensurate with the qualifications of each nursing staff member, the identified nursing needs of the patient, and the prescribed medical regimen.

(c) Schedules which contain an indication of personnel attendance by date, service unit, and time of actual attendance shall be kept on file for a minimum of one year.

28 Pa. Code § 109.6 (1980) (emphasis added). Plaintiff argues that this section contains a clear, specific requirement that the needs of patients must be a factor in determining staffing schedules for

nurses, and that staffing schedules must accomplish, or at least seek to accomplish, patient care assignment consistent with the patients' identified nursing needs and prescribed medical regimens. Plaintiff claims that Kindred's staffing model was never adopted or implemented so as to accomplish the mandated staffing requirements of this statute.

A wrongful discharge claim may be valid if it is based on a disagreement with an employer about the legality of a course of action and the action the employer wants to take actually violates the law.<sup>1</sup> Clark, 9 F.3d at 328. However, a wrongful discharge claim will not lie if the alleged violation of the law is a matter of judgment or if the law is a "'general' expression of [Pennsylvania's] attempt to monitor a particular industry." McGonagle v. Union Fidelity Corp., 556 A.2d 878, 885 (Pa. Super. Ct. 1989) (finding no wrongful discharge where an insurance company employee was terminated after refusing to approve mailings that he believed violated insurance laws). The court stated that "when the act to be performed turns upon a question of judgment, as to its legality or ethical nature, the employer should not be precluded

---

<sup>1</sup>Thomas McMullen, Chief Financial Officer of Kindred, stated in his affidavit that during the period of Plaintiff's employment at Kindred, the JCAHO (which, according to McMullen conducts periodic audits of Kindred to ensure compliance with its general codes of conduct) did not find the facility's scheduling practices or other aspects of the department's practices deficient under its standards. (McMullen Aff. ¶ 17-18.) Plaintiff has not contested this fact.

from conducting its business where the professional's opinion is open to question." Id. (citing Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980)).

The terms of Section 109.6 do not set forth specific guidelines for staffing schedules. Instead, the terms of the statute generally dictate that "[s]taffing patterns should reflect consideration of nursing goals, standards of practice, and the needs of the patients." 28 Pa. Code § 109.6. Plaintiff asserts that Section 109.6 does set forth specific factors that must be considered when staffing nurses, including the needs of the patients, and that the regulation is therefore sufficiently specific and objective to provide a basis for a wrongful discharge claim. However, because these factors are not defined objectively in the regulation, determining whether a hospital's staffing model, such as the HPPD model at issue in this case, considered these factors would necessarily entail a degree of judgment. Accordingly, the law in question is a "general" expression of Pennsylvania's attempt to govern hospitals, and Plaintiff cannot base a viable claim of wrongful discharge on violation of this law. Furthermore, the provisions of Section 109.6 apply to nursing services, and not to respiratory care and radiology services. Plaintiff contends that the "nursing and respiratory therapy staffs and departments at Kindred were directly interrelated since the respiratory care of patients was under the dual responsibility of

both nurses and respiratory therapists . . . ." (Duffy Aff. ¶ 9.) However, Plaintiff has presented no evidence that he was personally responsible for the staffing of nurses at Kindred. Accordingly, even if Section 109.6 could provide a basis for a wrongful discharge claim, there is no evidence that Plaintiff was responsible for complying with this regulation, much less that the hospital prevented Plaintiff from complying with any statutorily imposed duty mandated by the regulation.

Plaintiff does assert that Kindred actively attempted to cover up its alleged violations of Section 109.6. (Duffy Aff. ¶ 16.) Although this assertion provides evidence that Kindred itself believed that it might have been violating the law, Pennsylvania courts have held that such evidence is not sufficient for a finding of wrongful discharge. In McLaughlin v. Gastrointestinal Specialists, Inc., 696 A.2d 173 (Pa. Super. Ct. 1996), the plaintiff believed that her employer was violating health and safety regulations, and she reported her concerns to the employer. Even though the employer told McLaughlin "to keep quiet" so that the company would not be faced with workers' compensation claims from other employees, the court found that there was no valid claim for wrongful discharge. Id. at 175, 178. Similarly, the United States Court of Appeals for the Third Circuit has held that Pennsylvania case law does not provide recovery for wrongful discharge "based only on a showing that an employer faced with

ambiguous law was willing to engage in a course of conduct it wanted to pursue without regard to its legality." Clark, 9 F.3d at 333. In Clark, the plaintiff refused his employer's request not to report auto expense reimbursements as taxable income. Id. at 325. After he was terminated, the plaintiff filed a wrongful discharge action against his former employer. Id. at 326. The court held that the plaintiff had failed to show that his discharge violated a clear mandate of public policy. Id. at 336.

Although Plaintiff's allegations against Kindred suggest that Plaintiff had legitimate concerns about the staffing policy at Kindred, "the good intentions of an employee who refuses to carry out an employer's orders which he believes unlawful fail to make out a claim for wrongful discharge." Id. at 330. Even viewed in the light most favorable to Plaintiff, Plaintiff's wrongful termination claim does not fall under any exception to the employment at-will doctrine as defined by the Pennsylvania courts, and this claim must fail.

#### IV. CONCLUSION

For the foregoing reasons, the Court grants Kindred's Motion for Summary Judgment in its entirety.<sup>2</sup> An appropriate order

---

<sup>2</sup>Kindred has moved to strike Plaintiff's demand for a jury trial pursuant to Rule 39(a)(2) of the Federal Rules of Civil Procedure. Kindred argues that no right to a jury trial exists for Plaintiff's public policy wrongful discharge claim, because under Pennsylvania law, Plaintiff is not entitled to a jury trial where no cause of action for such a claim was recognized at the time of the framing of the Pennsylvania Constitution. See William Goldman

follows.

---

Theatres Inc. v. Dana, 173 A.2d 59, 64 (Pa. 1961) (“[T]he individual is entitled to a public trial by an impartial jury of the vicinage in every situation in which he would have been entitled to such a trial at the time of the adoption of our State Constitution in 1790 and ever since under our succeeding constitutions.”).

However, the United States Supreme Court’s decision in Simler v. Conner, 372 U.S. 221 (1963), unambiguously states that the question of a plaintiff’s right to a jury trial is a procedural one that is determined in federal court by federal law, even in diversity cases. The right to a jury trial in federal court is dictated by the 7th Amendment to the U.S. Constitution, which provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .” U.S. Const. Amend. VII. Thus, where the underlying claim is a legal claim, as opposed to an equitable claim, a plaintiff has a right to a jury trial in federal court. See First Union Nat. Bank v. United States, 164 F. Supp. 2d 660, 662 (E.D. Pa. 2001). Accordingly, Defendant’s motion to strike Plaintiff’s demand for a jury trial is denied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH DUFFY : CIVIL ACTION  
 :  
 v. :  
 :  
 KINDRED HOSPITALS EAST, :  
 L.L.C. : NO. 03-6655

**O R D E R**

**AND NOW**, this 30th day of June, 2004, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 17), Plaintiff's response to Defendant's Motion for Summary Judgment (Docket No. 20), Defendant's Motion to Strike Demand for Jury Trial (Docket No. 19), all related submissions, and the oral arguments held in open court on June 22, 2004, **IT IS HEREBY ORDERED** as follows:

- 1) Defendant's Motion to Strike Demand for Jury Trial is **DENIED**.
- 2) Defendant's Motion for Summary Judgment is **GRANTED** in its entirety. Judgment is entered in favor of Defendant and against Plaintiff with respect to all claims. This case shall be closed for statistical purposes.

BY THE COURT:

\_\_\_\_\_  
John R. Padova, J.