IN THE COURT OF APPEALS

8/12/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00946 COA

PATSY M. WHITT APPELLANT

v.

MISSISSIPPI METHODIST HOSPITAL AND

REHABILITATION CENTER, INC. APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. DENISE OWENS

COURT FROM WHICH APPEALED: HINDS COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: JOHANNA M. MCMULLAN

WAYNE FERRELL, JR.

ATTORNEYS FOR APPELLEE: MARK D. MORRISON

GENE D. BERRY

NATURE OF THE CASE: WRONGFUL TERMINATION

TRIAL COURT DISPOSITION: COMPLAINT DISMISSED AFTER TRIAL

MOTION FOR REHEARING FILED: 8/27/97

MANDATE ISSUED: 10/28/97

BEFORE McMILLIN, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

This is an appeal from a wrongful discharge suit filed by the appellant, Patsy Whitt (Whitt) against Mississippi Methodist Hospital and Rehabilitation Center, Inc. (MMRC). The Hinds County Chancery Court entered a judgment against Whitt after concluding that the *McArn* public policy exception to the employee at will doctrine was inapplicable to Whitt. *McArn v. Allied Bruce-Terminix Company, Inc.*, 626 So. 2d 603, 607 (Miss. 1993). Aggrieved, Whitt asserts the following issues on this appeal: (1) that the lower court erred in holding that the *McArn* exception did not apply to the present case, and (2) that the lower court erred in refusing the presumption that documents were prejudicial against MMRC because the originals were not produced. Finding no reversible error, we affirm.

FACTS

Patsy Whitt was employed as a home health nurse at the Hazlehurst branch of MMRC's Home Health Division from April 1992 until September 1992. From the beginning of her employment, Whitt was a probationary employee. In other words, she was on probation for her first six months of employment.

Whitt claims that she was wrongfully discharged because she refused to falsify medical records as requested by her supervisors. MMRC maintains that it never asked Whitt, nor any of its employees, to falsify medical records. MMRC claims that Whitt was terminated after a six-month probationary period due to poor job performance and insubordinate conduct.

Early in her employment, Whitt was required to attend a training course for new employees. At this course, the concept of negative charting was introduced to Whitt. The difference between negative charting and false charting is that false charting is lying; whereas, negative charting is a form of documentation used by home health care nurses which focuses on the problems of the patient, and not the positive aspects of the patient's health. By focusing on the negative, Medicare payments are assured. Whitt testified that she had problems with the concept of negative charting from the beginning. Whitt provided three instances where post-it notes were attached to three different patients' records instructing her to make changes to the records.

Whitt's supervisor, Melinda Adams, testified that Whitt was terminated for poor job performance and insubordination. According to MMRC's procedure, several staff concerns were recorded regarding Whitt's actions and job performance including an incident where co-workers testified that they may have smelled alcohol on Whitt's breath, tardiness in completing paperwork, and an incident where she felt as if she were being harassed when her supervisor called her to ask if she was going to work that particular day. After repeated warnings, Whitt was terminated. DISCUSSION

WRONGFUL TERMINATION

Whitt argues that the present case falls squarely under the *McArn* public policy exception to the employee at will doctrine. Before the *McArn* case, an employee at will may be terminated for any reason, with or without justification, at the will of either party. In *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603, 607 (Miss. 1993), the court held that there should be a narrow public policy exception to the employment at will doctrine regardless of whether there is a written contract or not. The court, however, did provide two narrow exceptions to the employee at will doctrine. *Id.* Based on this public policy exception, an action at law exists in either of two circumstances: (1) an employee who refuses to participate in an illegal activity, or (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else. *Willard v. Paracelus Health Care Corp. et al.*, 681 So. 2d 539, 542 (Miss. 1996). This is a very limited exception that is applicable only where the employee was discharged for the sole reason that the employee refused to perform an illegal act. *See Laws v. Aetna Finance Co. et. al*, 667 F.Supp. 342, 349 (N.D.Miss. 1987) . The burden lies with the plaintiff to prove that his discharge was motivated solely for that reason. *Id.*

In the present case, Whitt claims that she was asked to document conditions of patients which were not true--to falsify records. She maintains that the issue is not whether the question of negative charting is appropriate, but that she was terminated because she refused to falsify charts. Whitt alleges three specific instances where post-it notes were attached to charts asking her to change what she had written. Kathy Welch, the author of the notes, testified that the notes were routine efforts to try and have the home health care nurses comply with individual doctor's orders.

MMRC contends that Whitt was instructed by MMRC to use negative charting in her nursing notes. Negative charting is a widely accepted practice within the profession. MMRC claims that Whitt was terminated because of poor work performance and insubordination.

McArn does not preclude terminations with cause. The disagreement between Whitt and MMRC regarding negative charting may have been, at best, one of several reasons for her termination. The lower court found ample cause for Whitt's termination. Therefore, the *McArn* public policy exception does not apply in this case. We find no merit to this issue.

DOCUMENTS

Whitt argues that she was entitled to a default judgment because MMRC deliberately altered, modified, or changed portions of her personnel file. Whitt claims that portions of her personnel files were either destroyed, or copies which were produced were illegible and unreadable. Citing to *Delaughter v. Lawrence County Hospital*, 601 So. 2d 818, 822 (Miss. 1992), Whitt argues that the law requires us to presume that the documents which were destroyed were adverse to MMRC. Whitt

claims that because original portions were destroyed, she was left in a position where she was unable to prosecute her claim effectively.

The lower court was unpersuaded by this line of argument, as are we. As to the home health care nurses' personnel files, there are usually three copies of the file because of the nature of the home health care nurses' work. There is one copy that is kept at the branch office where the nurse works, one copy of the file in the main office in Flowood, Mississippi, and one copy in the human resources office. Stephen Hope, Vice President of Human Resources at MMRC testified that the reason there were both originals and duplicates of documents in Whitt's personnel file was because after an employee is terminated MMRC retains the file for seven years in a storage facility. Hope usually consolidates all documents into one file choosing the most legible copy, whether it be an original or a duplicate, to put in the final file. Hope testified that Whitt's entire personnel file was produced during discovery.

Whitt bore the burden of proving that she fell within the *McArn* public policy exception to the employee at will doctrine. In order to do so she must show that she was terminated solely because she either refused to perform an illegal activity, or that she was fired because she reported an illegal activity to her employer or anyone else. There is plenty of evidence in the record that supports the fact that she was terminated for poor work performance and insubordination. Whitt has not shown that she was asked to falsify records, but merely asked to change the records to reflect proper negative charting, a procedure widely recognized in the home health care industry. The chancellor was acting well within her discretion in this instance.

Finding no merit to this appeal, we affirm the judgment of the lower court.

THE JUDGMENT OF THE HINDS COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

HERRING, J., NOT PARTICIPATING.