

IN THE COURT OF APPEALS 10/31/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00614 COA

LINDA W. PYLE

APPELLANT

v.

MELTON L. SHARP

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LOWNDES COUNTY

ATTORNEY FOR APPELLANT:

CHARLES D. EASLEY, JR.

ATTORNEY FOR APPELLEE:

H. RUSSELL ROGERS

NATURE OF THE CASE: CIVIL: PERSONAL INJURY/INTENTIONAL TORT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO MELTON L. SHARP

BEFORE FRAISER, C.J., BARBER AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Linda Pyle appeals the granting of summary judgment in favor of Melton Sharp. Pyle contends that

the trial court erred when it decided that her tort claims against Sharp were preempted by the exclusivity provisions of the Mississippi Workers' Compensation Law and that she had failed to develop evidence of a violation of her constitutional rights. We affirm.

FACTS

Pyle and Sharp were employees of the East Lowndes Water Association. One day in 1990, Pyle delivered messages to Sharp in his office. Sharp got up from his desk and, with a smile on his face, told Pyle that she had "bugged" him enough with messages for the day. As Pyle was leaving his office, Sharp took hold of her by her shoulders and raised his knee a few inches to strike Pyle's buttocks. Pyle characterized the event as a joke and "like kids horse playing around."

Following the incident, Pyle claimed that she suffered back pain and received medical treatment for a low back injury. Pyle received workers' compensation temporary total disability and medical benefits for a period of several months following the incident. She filed a workers' compensation Petition to Controvert when her benefits were terminated. Nearly one year after the incident, she filed this civil action against Sharp claiming that she suffered injury because of Sharp's willful conduct and that she was deprived of her constitutional rights.

Sharp filed a motion for summary judgment, seeking dismissal of Pyle's claims. Sharp argued that workers' compensation provided Pyle's exclusive remedy. The Lowndes County Court agreed and granted summary judgment. The court also concluded that Pyle had failed to develop sufficient evidence to support her claimed constitutional injury. The circuit court affirmed.

DISCUSSION

We review *de novo* the granting of summary judgment by the trial court. In doing so, we recognize that a motion for summary judgment should be granted only where there is no genuine issue of material fact. It is not a substitute for a trial of disputed issues. *Brown v. Credit Ctr.*, 444 So. 2d 358, 362 (Miss. 1983). All evidence presented must be viewed in the light most favorable to Pyle, the opponent to the motion. *Id.* With this standard in mind, we conclude that the trial court was correct in granting judgment as a matter of law to Sharp on Pyle's claims.

"Assault" Covered Exclusively By Workers' Compensation

The legal question on appeal is whether an injury which results from horse play is compensable exclusively by workers' compensation. We will address later the factual question of whether an intent to injure arises under these facts.

The Mississippi Code provides:

The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . on account of . . . injury [within the meaning of the Mississippi Workers' Compensation Law].

Miss. Code Ann. § 71-3-9 (1972). While the language of the statute addresses the liability of the

employer to a claimant, it has also been applied to claims against a fellow employee. *Sawyer v. Head*, 510 So. 2d 472, 474 (Miss. 1987). Thus, Sharp can claim privilege from civil suit by Pyle provided that Pyle suffered an "injury" that arose "out of and in the course of employment." Miss. Code Ann. § 71-3-7 (1972). The supreme court has concluded that workers' compensation benefits are properly payable when an injury occurs as a result of a claimant "being about his business at his place of employment." *Kerr-McGee Corp. v. Hutto*, 401 So. 2d 1277, 1281 (Miss. 1981). If benefits are payable for a negligently caused injury under this statutory scheme, the statute is the exclusive remedy. *McCulskey v. Thompson*, 363 So. 2d 256, 264 (Miss. 1978).

We must also decide whether Pyle's "injury" falls within the definition given to that term by the Mississippi Workers' Compensation Law. The code defines "injury" as "accidental injury or accidental death arising out of and in the course of employment . . . and also includes an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job" Miss. Code Ann. § 71-3-3(b) (1972). A factually similar case is *Joe N. Miles & Sons v. Myatt*, 215 Miss. 589, 61 So. 2d 390 (1952). In *Myatt*, the claimant was good-naturedly bear-hugged by a fellow employee. Injury resulted. *Myatt*, 215 Miss. at 592-94. The supreme court concluded that the injury was covered by workers' compensation. When employment and the nature of work bring a claimant and a fellow employee in close contact with each other, one of the hazards of that contact is the potential for an assault to occur. *Id.* at 595 (citations omitted). In this case, regrettably one of the hazards of Pyle's employment with the Water Association was the possibility of a physical injury from the good natured but ill-conceived play of a co-worker. The injury that resulted from the incident was accidental and it occurred within the context of Pyle's employment. Therefore the claim for accidental injury is covered exclusively by workers' compensation law.

A "wilful tort" by the employer is not, however, within the reach of workers' compensation benefits. *Miller v. McRae's*, 444 So. 2d 368, 371 (Miss. 1984); see *Peaster v. David New Drilling Co., Inc.*, 642 So. 2d 344, 346 (Miss. 1994). Pyle argues that an issue of fact exists concerning whether this incident was a wilful tort. Both Sharp and Pyle described nearly identical situations in their depositions. Sharp, in the context of being swamped with messages provided by Pyle, jokingly struck Pyle in the buttocks. Pyle testified she thought Sharp was "horsing around" and joking. Pyle's legal argument regarding an intentional tort does not create a fact issue. In order to demonstrate a fact issue regarding wilfulness, there must be "credible evidence in support of that claim. . . ." *Stevens v. FMC Corp.*, 515 So. 2d 928, 931 (Miss. 1987). The only evidence here is the victim's own characterization that this was "horse play."

The definition of a 'wilful tort' . . . has been refined by the Court to mean an 'intentional' tort, which . . . is defined to be an 'act of intentional behavior to bring about the injury.' The . . . Plaintiff [must] present credible evidence in support of the claim of intentional behavior.

Vardaman S. Dunn, *Mississippi Workers Compensation* § 22, at 18 (3d ed. Supp. 1990) (footnotes omitted). No such credible evidence was introduced. The issue of wilfulness has not survived summary judgment.

Constitutional Claim

In her complaint, Pyle alleged that Sharp "unlawfully and intentionally violated [her] civil rights . . . as guaranteed by the Constitution[s] of the United States of America and the State of Mississippi." Pyle described her constitutional injury as one which was a consequence of the violation of her "right to live, be happy and safe." Pyle does not make a claim for the violation of any recognized constitutional right. We decline to create one. *See generally United States v. Bigham*, 812 F.2d 943, 949 (5th Cir. 1987) (holding that passing thumps, technical batteries, or angry words are an insufficient basis for a claim of constitutional dimensions); *Luciano v. Galindo*, 944 F.2d 261, 263-64 (5th Cir. 1991) (holding that "significant injury" is required for action under § 1983); *Barrett v. Miller*, 599 So. 2d 559, 563-65 (Miss. 1992) (holding that police officer's execution of invalid search warrant did not amount to a constitutional violation of civil rights).

The claim is solely one sounding in state tort law. That claim is exclusively within the coverage of workers' compensation law.

THE JUDGMENT OF THE CIRCUIT COURT OF LOWNDES COUNTY IS AFFIRMED WITH ALL COSTS OF THIS APPEAL TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.