

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 15, 2006 Session

**THOMAS E. BRIGHT, JR. v. MMS KNOXVILLE, INC.**

**Appeal from the Circuit Court for Davidson County  
No. 03C-1642 Thomas W. Brothers, Judge**

**No. M2005-02668-COA-R3-CV - Filed on August 7, 2007**

This appeal involves a retaliatory discharge claim. A medical supply company terminated the employment of a delivery technician following complaints from a customer that the technician had caused her to be evicted from an assisted living facility. The technician filed suit in the Circuit Court for Davidson County, asserting both common-law and statutory claims for retaliatory discharge. The trial court granted the employer's motion for directed verdict at the close of the technician's case-in-chief, and the technician appealed. We have determined that the technician's actions did not constitute the reporting of illegal activities for the purpose of a common-law or statutory retaliatory discharge claim.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Stephen W. Grace, Nashville, Tennessee, for the appellant, Thomas E. Bright, Jr.

Luther Wright, Jr., Nashville, Tennessee, for the appellee, MMS Knoxville, Inc. d/b/a Med of Tennessee.

**OPINION**

**I.**

MMS Knoxville, Inc. ("MMS") is a supplier of durable medical equipment in four Tennessee cities. On March 18, 2003, MMS hired Thomas Bright, Jr. to work as a delivery technician in its Nashville office. Prior to his employment with MMS, Mr. Bright had worked for two other medical supply companies in essentially the same capacity. Mr. Bright's duties consisted of delivering medical equipment, including medical oxygen, to MMS customers. Medical oxygen is highly combustible, and patients are routinely warned not to smoke when it is in use. The oxygen tanks are marked as combustible, and MMS customers are given "No Smoking" placards to place on their doors.

On Friday, May 2, 2003, less than two months into his tenure with MMS, Mr. Bright made a delivery to Jewel Henderson, a resident of Sycamores Terrace Retirement Community (“Sycamores Terrace”). Initially, Mr. Bright delivered a conservant device – an instrument that regulates the flow from oxygen containers. However, as he was leaving Sycamores Terrace, Mr. Bright received a telephone call from his manager stating that Ms. Henderson had requested MMS to provide her with additional oxygen. Mr. Bright returned to Sycamores Terrace to deliver the oxygen tanks to Ms. Henderson.

According to Mr. Bright, Ms. Henderson was holding a cigarette<sup>1</sup> and exhaled smoke into his face when she opened the door to her apartment. Mr. Bright was troubled by the fact that Ms. Henderson might have been smoking while using oxygen. He was concerned that he or MMS could be held liable if Ms. Henderson was injured. Accordingly, he lectured Ms. Henderson about the dangers of smoking while using oxygen.

As Mr. Bright left Sycamores Terrace, he stopped by the office to make sure that the manager was also aware of the dangers of allowing persons to smoke while using oxygen. Mr. Bright discussed the hazards of smoking around medical oxygen in general terms,<sup>2</sup> but the manager knew he was talking about Ms. Henderson because he had seen Mr. Bright and Ms. Henderson together earlier in the day. When he returned to MMS, Mr. Bright discussed the incident with his supervisor, Ernest Frierson.

As a result of Mr. Bright’s conversation with Sycamores Terrace’s manager, Sycamores Terrace notified Ms. Henderson that it was evicting her because she had been smoking while using oxygen. After Ms. Henderson received the eviction notice, she telephoned MMS to complain and stated her intention to take her medical oxygen business elsewhere.

On May 7, 2003, Mr. Frierson and MMS’s office manager, Christy Capps, talked with Mr. Bright about the incident. They informed him about Ms. Henderson’s telephone call and expressed their concern that Ms. Henderson’s physician might stop referring patients to them. Ms. Capps also told Mr. Bright that his actions had violated Ms. Henderson’s patient privacy rights.<sup>3</sup> At the conclusion of the meeting, Mr. Bright’s employment was terminated. MMS also intervened with Sycamores Terrace on behalf of Ms. Henderson. Sycamores Terrace eventually agreed not to evict Ms. Henderson after she agreed to complete an MMS in-service training session regarding the proper use of medical oxygen.

On May 12, 2003, Mr. Bright filed a complaint against MMS with Tennessee’s Equal Employment Opportunity Commission. On June 6, 2003, he filed suit in Davidson County Circuit Court, seeking damages for common-law wrongful termination and violation of the

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<sup>1</sup> Mr. Bright was unable to state with certainty that the cigarette was lit at the time.

<sup>2</sup> Mr. Bright indicated at trial that The Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations and patient privacy concerns were probably the reason he intentionally omitted any reference to Ms. Henderson.

<sup>3</sup> HIPAA contains a “Privacy Rule” regarding certain health care facilities’ treatment of patient privacy information. The most recent version of the Privacy Rule had taken effect on April 14, 2003. *See* 67 Fed. Reg. 53182-01 (Aug. 14, 2002). MMS was evidently unaware that the Privacy Rule permits a disclosure of patient information in order to prevent a threat to public safety. 45 C.F.R. \_ 164.512(j) (2006).

Tennessee Public Protection Act.<sup>4</sup> The matter proceeded to a jury trial on October 4 and 5, 2005.

As part of his case-in-chief, Mr. Bright called Michael Spinazzola, the owner of MMS. Mr. Spinazzola agreed that Mr. Bright's conversation with the manager of Sycamores Terrace about Ms. Henderson's smoking led directly to Mr. Bright's termination. However, Mr. Spinazzola explained that Mr. Bright's actions were in violation of company policy requiring safety violations to be reported immediately to management.<sup>5</sup> Mr. Spinazzola testified that it was not Mr. Bright's place to report the incident. He stated that the delicate nature of patient privacy laws and other customer relations considerations made the situation one in which a delivery technician should have passed on the report to his supervisor. According to Mr. Spinazzola, Mr. Bright refused to acknowledge that he should have handled the situation differently and in accordance with MMS company policy. Mr. Spinazzola stated that this insubordination also provided a basis for Mr. Bright's termination.

MMS moved for a directed verdict at the close of Mr. Bright's case. The trial court granted the motion after finding that Mr. Bright had not engaged in an activity protected by the statutory or common-law theory of retaliatory discharge.<sup>6</sup> Mr. Bright perfected this appeal.

## II.

Directed verdicts under either Tenn. R. Civ. P. 50.01 or 50.02 are appropriate only when reasonable minds cannot differ as to the conclusions to be drawn from the evidence. *Alexander v. Armentrout*, 24 S.W.3d 267, 271 (Tenn. 2000); *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994); *Ingram v. Earthman*, 993 S.W.2d 611, 627 (Tenn. Ct. App. 1998). A case should not be taken away from the jury, even when the facts are undisputed, if reasonable persons could draw different conclusions from the facts. *Gulf, M. & O.R. Co. v. Underwood*, 182 Tenn. 467, 474, 187 S.W.2d 777, 779 (1945); *Hurley v. Tenn. Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995). A trial court may, however, direct a verdict with regard to an issue that can properly be decided as a question of law, because deciding purely legal questions is the court's responsibility—not the jury's.

In appeals from a directed verdict, the reviewing courts do not weigh the evidence, *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995); *Benton v. Snyder*, 825 S.W.2d 409, 413 (Tenn. 1992), or evaluate the credibility of the witnesses. *Benson v. Tenn. Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993). Instead, they review the evidence in the light most favorable to the motion's opponent, give the motion's opponent the benefit of all reasonable inferences, and disregard all evidence contrary to that party's position. *Alexander v. Armentrout*, 24 S.W.3d at 271; *Eaton v. McLain*, 891 S.W.2d at 590; *Smith v. Bridgestone/Firestone, Inc.*, 2 S.W.3d 197, 199 (Tenn. Ct. App. 1999).

## III.

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<sup>4</sup> Tenn. Code Ann. § 50-1-304 (2005).

<sup>5</sup> The MMS employee handbook entered into evidence states that an employee who observes a safety hazard should immediately report the hazard to a supervisor.

<sup>6</sup> The trial court also ruled that Mr. Bright had not presented evidence sufficient to justify punitive damages, and the trial court also made rulings with respect to issues of front pay, back pay, and reinstatement.

Tennessee adheres to the common-law doctrine of “at-will” employment, which provides that employment contracts of indefinite duration are terminable at the will of employer or employee for any or no cause. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534-35 (Tenn. 2002). However, a narrow exception to this doctrine – the “public policy exception” – restricts an employer’s right to terminate an employee when such an action violates a clearly established public policy. *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552, 555-56 (Tenn. 1988). To prevail on a claim of common law retaliatory discharge, an employee must prove (1) that an at-will employment relationship existed between the employee and the employer, (2) that the employee was discharged, (3) that the employee was discharged for attempting to exercise a statutory or constitutional right, or for any other reason that violates a clear public policy, and (4) that such action was a substantial factor in the employer’s decision to discharge the employee. See *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d at 535; see also *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 557-58 (Tenn. 1993).

In addition to a common-law action for retaliatory discharge, the Tennessee General Assembly has adopted a statutory cause of action under the Tennessee Public Protection Act, commonly referred to as the “Whistleblower Act.” Tenn. Code Ann. § 50-1-304(a) (2005) provides that no employee shall be discharged solely for refusing to participate in or to remain silent about illegal activities, Tenn. Code Ann. § 50-1-304(a). “Illegal activities” include state and federal criminal and civil violations, as well as violations of any regulation affecting public health, safety, and welfare. Tenn. Code Ann. § 50-1-304(c). The first three elements of statutory retaliatory discharge are identical to the elements of the common-law claim. The fourth element differs from the common law in that, to benefit from statutory protection, an employee must demonstrate that his or her refusal was the sole reason for his or her discharge. Tenn. Code Ann. § 50-1-304(a); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d at 535-37.

The common-law and statutory protection afforded to whistleblowers stems from the principle that an employee should not be placed in the dilemma of being forced to choose between reporting or participating in illegal activities and keeping a job. *Franklin v. Swift Trans. Co.*, 210 S.W.3d 521, 530 (Tenn. Ct. App. 2006). It is a recognition of the “power of a few courageous individuals to make a lasting contribution to improving our public and private institutions.” *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 733 (Tex. 1990) (J. Doggett, concurring).

Whistleblower protection is intended to remain a narrow exception to the at-will employment doctrine. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 n.3 (Tenn. 1997); *Chism v. Mid-South Milling Co.*, 762 S.W.2d at 556. Therefore, in analyzing a whistleblower case, we are not limited to a determination of whether a law or regulation was violated, *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d at 538, and, indeed, an employee’s actions will not qualify him or her for protection merely because the employee has pointed out an illegal activity. *Franklin v. Swift Trans. Co.*, 210 S.W.3d at 530-31. It is the court’s task to determine whether the whistleblowing activity that brought to light an illegal or unsafe practice has furthered an important public policy interest. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d at 538. Toward that end, it is essential that the employee’s attempt to expose illegal or unsafe practices do more than merely advance the employee’s private interest. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d at 538 n.4. Furthermore, while an employee need not report suspected illegal activities directly to

law or regulatory enforcement officials, *Emerson v. Oak Ridge Research, Inc.* 187 S.W.3d 364, 371 & n.1 (Tenn. Ct. App. 2005), an employee must make a report to some entity other than the person or persons who are engaging in the allegedly illegal activities. *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d at 371 & n.1.

#### IV.

Both Mr. Bright and MMS agree that the impetus for Mr. Bright's termination was his conversation with the manager of Sycamores Terrace about the dangers of smoking near medical oxygen. They disagree about whether such action was sufficient to qualify as a protected activity for the purposes of a retaliatory discharge claim. We have determined that Mr. Bright's conversation with the Sycamores Terrace manager was not a protected report of illegal activity that would satisfy a claim for common-law or statutory retaliatory discharge.

There is no dispute that state and local regulations exist to curtail the dangers of smoking in retirement communities and nursing homes. Mr. Bright draws our attention to (1) Tenn. Comp. R. & Regs. 1200-8-25-.08(15) (May 2003) which provides that smoking shall be allowed in assisted living facilities only in designated areas and under supervision, (2) Code of the Metropolitan Government of Nashville and Davidson County, Tenn. \_ 10.76.140 (2005) ("Metro Code") which prohibits smoking in sleeping quarters of nursing, convalescent, or old age homes, unless supervision is provided, and (3) the Fire Prevention Code of the National Fire Protection Associations 19.7.4(1) (2000) ("NFPA Code"), which prohibits smoking in any location where medical oxygen is used or stored.<sup>7</sup> Mr. Bright asserts that, because of the existence of these regulations, his conversation with the manager of Sycamores Terrace constituted the "reporting" of "illegal activities" and triggered the common law and statutory protection against retaliatory discharge.<sup>8</sup>

In this case, however, Mr. Bright has simply not demonstrated that he was "blowing a whistle" on illegal activity. First, the regulations pertaining to smoking near medical oxygen apply to the retirement facility, not the individual smoker. Therefore, illegal activities would have transpired only if Sycamores Terrace was allowing residents to smoke despite its rules restricting smoking. *See* Tenn. Comp. R. & Regs. 1200-8-25-.02(1), (5), -03(1)(b); Metro Code \_ 10.76.020; NFPA Code \_ 19.1.1.1.2. To the contrary, and no doubt thanks to Mr. Bright's warning, Sycamores Terrace did not allow the smoking and promptly moved to evict Ms. Henderson for doing so. Further, even if Sycamores Terrace had been in violation of the smoking regulations, Mr. Bright's conversation with the manager could, at most, have constituted notification of the offense to the offender itself, which does not rise to the level of "reporting" of illegal activities.

Finally, it is hard to reconcile Mr. Bright's claim for whistleblower status with his testimony regarding the event. Mr. Bright testified that his "legal concern" was that he or MMS could incur liability for any damage caused by Ms. Henderson's smoking. He also testified that he specifically declined to mention Ms. Henderson by name, and he stated that his objective was

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<sup>7</sup> The Metropolitan Government of Nashville and Davidson County has adopted the NFPA Code. Metro Code \_ 10.64.010.

<sup>8</sup> The trial court determined that MMS had waived the right to dispute that Sycamores Terrace was a facility falling under the scope of these regulations. MMS has not raised the issue on appeal.

to ensure that Sycamores Terrace management was properly educated about the hazards of smoking near medical oxygen. Indeed, Mr. Bright testified that the reason he did not call his manager or fill out paperwork documenting his experience at Sycamores Terrace was that he did not consider the event to be one of significant consequence to warrant a formal incident report. The circumstances of this case present a well-intentioned employee who sought to avoid legal responsibility for a potentially hazardous situation. This simply does not fall within the scope of the protection provided by the statutory or common-law actions for retaliatory discharge.

Throughout this matter, no one has disputed that Mr. Bright's decision to speak with Sycamores Terrace management stemmed from a good faith attempt to prevent a safety hazard. Unfortunately, Mr. Bright by-passed MMS's policy that management should address these matters when they arise and thereby placed MMS in an uncomfortable position vis-à-vis one of its customers. In Tennessee, employers may discharge at-will employees for good reason, bad reason, or no reason without being guilty of a legal wrong. *Stein v. Davidson Hotel Co.*, 945 S.W.2d at 716. While there may be room to question whether Mr. Bright should have been terminated, reasonable persons cannot disagree that MMS's decision was not based on an illegal reason. Accordingly, we find that the trial court did not err when it entered a directed verdict in favor of MMS.

## V.

We affirm the judgment<sup>9</sup> and remand the case to the trial court for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal to Thomas E. Bright, Jr. and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

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<sup>9</sup> Because we have determined that the trial court properly granted MMS a directed verdict on Mr. Bright's substantive claims, we need not address Mr. Bright's issues with regard to punitive damages or back pay.