

SUPREME COURT OF WASHINGTON

Snyder v. Medical Service Corp. of Eastern Washington

Snyder v. Medical Service Corp., 145 Wash. 2d 233 (2001) · Decided December 13, 2001

OPINION

SANDERS, J.

Sanders, J. We review a Court of Appeals decision affirming summary dismissal of Michelle Snyder's civil suit against her employer, Medical Service Corporation of Eastern Washington. Snyder presents four issues for review.

First, she argues her original action presented a cognizable claim for constructive discharge. Second, she claims Medical Service Corporation failed to make a reasonable accommodation for her mental disability. Third, she claims she made a prima facie case for the tort of outrage. Fourth, and finally, she claims she presented a prima facie case for the tort of negligent infliction of emotional distress.

We respond to each assertion in the negative and affirm the trial court's dismissal, as well as the Court of Appeals which affirmed that dismissal. Facts Pursuant to the summary judgment standard we state the facts in the light most favorable to the appellant Snyder. Michelle Snyder began working as a case manager for Medical Service Corporation of Eastern Washington (MSC) in January 1996.

A few months later Celestine Hall was hired as her supervisor. Shortly thereafter several persons resigned from MSC citing Ms. Hall as the reason for their departure. Ms. Hall is apparently an imposing and physically intimidating figure who, it is claimed, uses her size to terrorize those *237around her. Employees describe her as an "authoritarian," "belligerent," and "harassing-type supervisor" who routinely embarrasses her subordinates in front of their peers.

As Ms. Snyder took on more and more workplace responsibility she frequently discussed with Ms. Hall the possibility of having her salary increased. In May 1996 Ms. Snyder was given a raise as well as an admonition from Ms. Hall. She was told if she sought a further increase in salary she would be disciplined. Nevertheless when Snyder filled out her supervisor evaluation form in July 1996, she described Ms. Hall as wonderful, understanding, and not "out of line." In February of the following year Ms. Hall told Ms. Snyder she would receive another raise, but Ms. Hall also warned she would literally hunt Ms. Snyder down and "kill her" if she told anyone at MSC about that raise.

The events which form the basis of this litigation occurred on February 13, 1997. On that day Ms. Hall convened a staff meeting at which she proposed a "push-day" where all employees would

come in and work on a Saturday without extra compensation. Ms. Snyder objected, stating she was expecting to spend the weekend with her children. Ms. Hall mocked her in front of the group and Ms. Snyder left the meeting.

After the meeting Ms. Hall confronted Ms. Snyder. She poked Ms. Snyder in the chest and accused her of being insubordinate. That afternoon Ms. Snyder went to see her therapist and did not return to the office. Her doctor advised her to take two weeks off work.

On February 26, 1997, MSC was advised Ms. Snyder would be out of the office for an additional two weeks. During the second week in March Ms. Snyder met with Dr. Norman Charney, Ms. Hall's supervisor. Snyder told Dr. Charney she suffered from posttraumatic stress disorder. This was the first time MSC was made aware of her condition. Ms. Snyder indicated she could no longer work under Ms. Hall and asked Dr. Charney if she could either report directly to him or be transferred to another department.

Dr. Charney stated he would like to have Ms. Snyder back in the office but that she would have to report to Ms. Hall as Hall was still the manager of Snyder's department, and he said he had not yet determined whether disciplinary action should be taken against Hall.

On April 10, 1997, Ms. Snyder took a full time position with another company. She did not return to MSC claiming she could not, and her physician would not allow her to, work under Ms. Hall's supervision. Snyder filed suit against MSC alleging handicap discrimination, constructive discharge, outrage, and negligent infliction of emotional distress. MSC then moved for summary judgment of dismissal.

The motion was granted. Snyder appealed, Division Three affirmed. We granted review. Analysis i. Constructive Discharge Snyder claims she was constructively discharged from her position when MSC created an intolerable working environment. She further asserts the lower court erred when it dismissed her constructive discharge claim.

We disagree. Washington law does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive. *Riccobono v. Pierce County*, 92 Wn. App. 254, 263, 966 P.2d 327 (1998).

The general rule in Washington is "an employer has the right to discharge an employee, with or without cause, in the absence of a contract for a specified period of time." *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977) (citing *Webster v. Schauble*, 65 Wn.2d 849, 400 P.2d 292 (1965)).

We recognize an exception to the terminable-at-will doctrine by permitting a cause of action for wrongful discharge only "where the discharge contravenes a 'clear mandate of public policy.' "

Roberts v. Dudley, *239140 Wn.2d 58, 63, 993 P.2d 901 (2000) (quoting Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)).

To avail herself of this narrow exception to the terminable-at-will doctrine Snyder “must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened.” Thompson, 102 Wn.2d at 232.

Because Snyder does not assert her constructive discharge contravened a recognized public policy, she has failed to state a claim for which relief may be granted. This claim was therefore properly dismissed on summary judgment. n. Disability Discrimination Snyder asserts it was error to dismiss her handicap discrimination claim because MSC failed to meet its obligation to accommodate her disability.

Employers do have an affirmative obligation to reasonably accommodate the sensory, mental, or physical limitations of disabled employees unless the accommodation can be shown to impose an undue hardship on the employer’s business. Jane Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993). But the duty to reasonably accommodate an employee’s handicap does not arise until the employee makes the employer aware of the disability.

Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 643, 9 P.3d 787 (2000). See also Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (citing Holland v. Boeing Co., 90 Wn.2d 384, 391, 583 P.2d 621 (1978); accord Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1994) (requiring reasonable accommodation for “known” disabilities)).

As of February 1997 Ms. Snyder had applied for, and been rejected for, three open positions within MSC. But Snyder did not make her employer aware of her alleged disability until March 11, 1997, and within a month she accepted a permanent position with another company.

Thus the denial of her prior requests for transfer cannot support *240a handicap discrimination claim based on failure to accommodate because as of March 11, 1997, MSC had no duty to accommodate. We have previously held a prima facie case for handicap discrimination requires a plaintiff to prove (1) she is handicapped, (2) she is qualified to fill a vacant position, and (3) the employer failed to take affirmative measures to make such opportunities known to her and to determine whether she is in fact qualified.

Dean v. Mun. of Metro. Seattle, 104 Wn.2d 627, 639, 708 P.2d 393 (1985). See also Staub v. Boeing Co., 919 F. Supp. 366, 370 (W.D. Wash. 1996) (citing Wheeler v. Catholic Archdiocese, 65 Wn. App. 552, 560-61, 829 P.2d 196 (1992), rev’d on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994); Curtis u. Sec. Bank, 69 Wn. App. 12, 17, 847 P.2d 507 (1993)). Similarly when seeking reassignment as an accommodation “the employee must prove that he or she was qualified to fill a vacant position, and that the employer failed to take affirmative measures to make such job

opportunity known to the employee and to determine whether the employee was in fact qualified for such position.” Pulcino, 141 Wn.2d at 643-44.

Snyder asserts when she spoke to Dr. Charney in March 1997 one of the positions for which she had previously applied was still open. But this is immaterial; she had already been considered for the position and the determination had been made that she did not qualify.

Because Snyder did not inform MSC of her disability prior to seeking a transfer to another position in the company, no duty to accommodate that disability ever arose. Further, even if a duty to accommodate had arisen, Snyder has not shown MSC failed to consider her for a position for which she was in fact qualified. Nor does she point to any case under Washington’s Law Against Discrimination (WLAD), chapter 49.60 RCW, or the ADA where an employer was required to provide an employee with a new supervisor as a reasonable accommodation to a disability.

As the Court of Appeals correctly noted, no Washington case has addressed whether refusal to provide a new *241supervisor violates WLAD. However several of the United States courts of appeal have found there is no duty under the ADA to provide an employee with a new supervisor as reasonable accommodation.

For example, in *Weiler v. Household Fin. Corp.*, 101 F.3d 519 (7th Cir. 1996) Sherry Weiler asserted she could perform the essential functions of her job, but not while she was working under her current supervisor. *Weiler*, 101 F.3d at 525.

The Seventh Circuit rejected Weiler’s claim holding, “If Weiler can do the same job for another supervisor, she can do the job, and does not qualify under the ADA.” *Id.* at 525. The court further held that the ADA did not require Weiler’s employer to transfer Weiler or her supervisor as an accommodation. *Id.* at 526. Similarly, in the instant case Snyder claims she could continue to perform the essential functions of her position so long as she did not have to report to Ms. Hall.

However if Snyder can perform the job, then she has no disability requiring accommodation simply because she has a personality conflict with her supervisor. Other courts have also held that the duty to reasonably accommodate a disability under the ADA does not extend so far as to require an employer to provide an employee with a new supervisor. See *Taylor v. Phoenixville Sch.*

Dist., 184 F.3d 296, 319 n.10 (3d Cir. 1999) (“We would hasten to add that a disabled employee is not entitled to a supervisor ideally suited to his or her needs.”); *Gaul v. Lucent Techs. Inc.*, 134 F.3d 576, 581 (3d Cir. 1998) (holding a request to be transferred away from individuals causing an employee stress is unreasonable as a matter of law under the ADA and its New Jersey counterpart); *Palmer v. Circuit Court of Cook County*, 905 F. Supp. 499, 507 (N.D.

Ill. 1995) (holding a personality conflict with a supervisor is not a disability under the ADA, “ ‘A disability is a part of someone and goes with her to her next job. A personality conflict, on the other hand, is specific to an individual....’ ” (quoting *Weiler v. Household Fin. Corp.*, 1995 U.S. Dist. LEXIS 10566, at *12, 1995 WL 452977, at *5)), *aff’d*, 117 F.3d 351 (7th Cir.

1997). *242 We find these cases persuasive and conclude that there is no duty under WLAD to reasonably accommodate an employee’s disability by providing her with a new supervisor. Consequently the dismissal of Snyder’s handicap discrimination claim was proper. *in. Outrage To state a claim for the tort of outrage a plaintiff must show “ ‘(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.’ ”* Birkliid v. Boeing Co., 127 Wn.2d 853, 867, 904 P.2d 278 (1995) (quoting *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987))).

Moreover “ ‘[t]he conduct in question must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” ’ ” Birkliid, 127 Wn.2d at 867 (quoting *Dicomes*, 113 Wn.2d at 630) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975))).

Snyder’s claim for outrage may have been able to survive a summary judgment challenge had she brought suit against Ms. Hall personally, as the determination of whether conduct is sufficiently outrageous to warrant recovery is generally a question of fact for the jury. Birkliid, 127 Wn.2d at 867 (quoting *Dicomes*, 113 Wn.2d at 630).

However Snyder’s outrage claim was against MSC, not Ms. Hall, and consequently it must fail. *Niece v. Elmview Group Home*, 79 Wn. App. 660, 664, 904 P.2d 784 (1995) noted, “When an employee’s intentionally tortious or criminal acts are not in furtherance of the employer’s business, the employer is not liable as a matter of law, even if the employment situation provided the opportunity or means for the employee’s wrongful acts.” *Id.* at 664 (citing *Bratton v. Calkins*, 73 Wn.

App. 492, 498, 870 P.2d 981 (1994); *Kuehn v. White*, 24 Wn. App. 274, 278, 600 P.2d 679 (1979)). We affirmed *Niece* holding, “[C]urrent Washington *243 law clearly rejects vicarious liability for intentional or criminal conduct outside the scope of employment.” *Niece v. Elmview Group Home*, 131 Wn.2d 39, 56, 929 P.2d 420 (1997). MSC forbids its supervisors to use physical force or threats of physical force.

MSC is not liable, as a matter of law, for the intentional torts committed by Ms. Hall acting outside the scope of her employment. Consequently Snyder’s claim for outrage was properly dismissed on summary judgment as well. *iv. Negligent Infliction of Emotional Distress Finally,*

Snyder asserts she has presented a cognizable claim for negligent infliction of emotional distress, and the trial court erred when it dismissed it.

We reexamined liability for negligent infliction of emotional distress in *Hunsley v. Giard*, 87 Wn.2d 424, 433, 553 P.2d 1096 (1976). There we held a cause of action for same does exist in Washington but cautioned: “Not every act which causes harm results in legal liability.” *Id.* at 434.

As with any claim sounding in negligence, where a plaintiff brings suit based on negligent infliction of emotional distress “we test the plaintiff’s negligence claim against the established concepts of duty, breach, proximate cause, and damage or injury.” *Id.* at 434. “The existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.’ ” *Lords v. N. Auto.*

Corp., 75 Wn. App. 589, 596, 881 P.2d 256 (1994) (quoting *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985)). Snyder fails to clearly articulate what duty she would have us impose on her employer. There is no duty for an employer to provide employees with a stress free workplace.

As Division Three of the Court of Appeals observed in *Bishop v. State*, 77 Wn. App. 228, 233 n.5, 889 P.2d 959 (1995), “Since Hunsley, courts have recognized the limitations of direct actions for negligent infliction of emotional distress.” (citing *Calhoun v. Liberty N.W. Ins. Corp.*, 789 F. Supp. 1540, 1548 (W.D. Wash. 1992) (routine discharge for *244poor work performance does not give rise to cause of action for negligent infliction of emotional distress); *Lords*, 75 Wn.

App. at 595 (absent “a clear mandate of public policy,” an employee has no cause of action against employer for negligent infliction of emotional distress when employment at will is terminated)). We believe Bishop correctly articulates the law in this state: “[A]bsent a statutory or public policy mandate, employers do not owe employees a duty to use reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes.” *Bishop*, 77 Wn.

App. at 234-35. See also *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 907 P.2d 1223 (1996) (holding employers have no duty to avoid infliction of emotional distress on employees when responding to employment disputes). Other jurisdictions have found the tort of negligent infliction of emotional distress does not exist in the employment context or, if it does, it is severely limited.

See *Antalis v. Ohio Dep’t of Commerce*, 68 Ohio App. 3d 650, 589 N.E.2d 429, 431 (1990) (“Ohio courts have not recognized a separate tort for negligent infliction of emotional distress in employment situations.”); *Herman v. United Bhd. of Carpenters & Joiners*, 60 F.3d 1375 (9th Cir. 1995) (Nevada law precludes emotional distress claims in the employment context.); *Tischmann v. ITT/Sheraton Corp.*, 882 F. Supp. 1358 (S.D.N.Y.

1995) (New York law does not permit a former employee to utilize claims for intentional or negligent infliction of emotional distress to avoid the employment at will doctrine.); *Armstrong v. Paoli Mem'l Hosp.*, 430 Pa. Super. 36, 633 A.2d 605 (1993) (Pennsylvania recognizes negligent infliction of emotional distress only where the plaintiff is a bystander or where the defendant has a contractual or fiduciary duty.); *Parsons v. United Techs.*

Corp., 243 Conn. 66, 88-89, 700 A.2d 655, 667 (1997) (“[N]egligent infliction of emotional distress in the employment context arises only where it is ‘based upon unreasonable conduct of the defendant in the termination process.’ ” *245(quoting *Morris v. Hartford Courant Co.*, 200 Conn. 676, 682, 513 A.2d 66 (1986))).

In *Hunsley* we observed, “Our experience tells us that mental distress is a fact of life.” *Hunsley*, 87 Wn.2d at 435. Further, we held actions predicated on mental distress, like actions predicated on products liability or medical malpractice, must be subject to limitations imposed by the courts. *Id.* To set such limitations we stated “ ‘the defendant’s obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous.’ ” *Hunsley*, 87 Wn.2d at 436 (emphasis added) (quoting *Rodrigues v. State*, 52 Haw.

156, 174, 472 P.2d 509 (1970)). “Conduct is unreasonably dangerous when its risks outweigh its utility.” *Bishop*, 77 Wn. App. at 234 (citing *Wells v. City of Vancouver*, 77 Wn.2d 800, 810 n.3, 467 P.2d 292 (1970)). As Division One of the Court of Appeals observed in *Bishop*: The utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms of emotional distress as a result.

The employers, not the courts, are in the best position to determine whether such disputes should be resolved by employee counseling, discipline, transfers, terminations or no action at all. While such actions undoubtedly are stressful to impacted employees, the courts cannot guarantee a stress-free workplace. *Id.* (footnote omitted). *Snyder* claims dismissal of her negligent infliction claim creates a conflict with *Chea v. Men’s Wearhouse, Inc.*, 85 Wn.

App. 405, 932 P.2d 1261 (1997). In *Chea*, Division One upheld a negligent infliction verdict where a supervisor inflicted emotional damage on an employee. *Chea* is however limited by its facts. The *Chea* court specifically recognized, and concurred with, precedent that an employer’s disciplinary decisions in response to a workplace personality dispute will not give *246rise to a negligent infliction claim.

Chea, 85 Wn. App. at 413 (citing *Bishop*, 77 Wn. App. at 235). Notwithstanding, the *Chea* court permitted the employee to recover because the employer did not argue at trial the incident at issue was a disciplinary act or in response to a personality dispute. *Chea*, 85 Wn. App. at 413.

In contrast, the trial court in the instant matter did find MSC defended on the basis that Snyder's claim encompassed a workplace dispute or personality difference. Consequently Snyder's reliance on Chea is misplaced. Conclusion For the foregoing reasons we affirm the trial court dismissal as well as the Court of Appeals opinion which affirmed it. Medical Service Corporation of Eastern Washington shall recover its costs on appeal.

Smith, Madsen, and Bridge, JJ., and Guy, J. Pro Tern., concur.