



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT ELWELL, :
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 :
 Plaintiff-Below, Appellants, : No. 237,2014
 :
 :
 v. :
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 :
 Appeal from the Superior Court of the
 THRIFT DRUG, INC. d/b/a RITE : State of Delaware in and for New Castle
 AID, : County,
 :
 :
 Defendant-Below, Appellee. : C.A. No. N12C-05-013-JAP
 :
 :

**ANSWERING BRIEF OF
APPELLEE RITE AID CORPORATION**

Dated: September 5, 2014

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NATURE OF THE PROCEEDINGS

On May 1, 2012, Appellant, Robert Elwell (“Elwell”), filed suit against Appellee, Rite Aid Corporation (“Rite Aid”), improperly pled as Thrift Drug, Inc., alleging that he was wrongfully terminated under the Delaware Whistleblowers’ Protection Act for reports he made to his supervisor about heating issues in a Rite Aid store. On February 12, 2014, Rite Aid moved for summary judgment.

On March 4, 2014, the Honorable John A. Parkins of the Superior Court of New Castle County, Delaware heard oral argument and properly granted Rite Aid’s Motion for Summary Judgment by oral Order. Elwell subsequently filed a Motion for Reconsideration. Under the mistaken assumption that the Superior Court ruled on his Motion for Reconsideration, Elwell filed a Notice of Appeal in this Court on May 8, 2014. Upon learning of his mistake, Elwell filed a Motion to Remand this matter to the Superior Court for disposition on his Motion for Reconsideration. The Court granted the Motion to Remand and Elwell withdrew his Motion for Reconsideration when the case returned to the Superior Court.

This appeal resumed on June 18, 2014, and Elwell submitted his Opening Brief on August 6, 2014 (“Op. Br.”). This is Appellee Rite Aid Corporation’s Answering Brief.

SUMMARY OF ARGUMENT

- A. Rite Aid denies Paragraph A of Elwell's Summary of Argument in its entirety. The Superior Court properly held that Elwell's alleged whistleblowing activity did not play any role, let alone the primary role, in Rite Aid's decision to terminate him. No evidence indicates the decision-makers who fired Elwell – Dennis Yoney, Sandra Biss, and Keith Carr – were aware of Elwell's heating complaints regarding Rite Aid's Milford store. Moreover, it is undisputed that Elwell failed to report for work, failed to follow Rite Aid procedures and used foul language towards a supervisor before he was discharged. Elwell's insubordination served as the sole basis for his discharge.
- B. Rite Aid denies Paragraph B of Elwell's Summary of Argument in its entirety. For the reasons stated above, the Superior Court properly held that Elwell failed to produce sufficient evidence to show that his heating complaints were protected by the Whistleblowers' Protection Act and the primary basis for his discharge.

STATEMENT OF FACTS

A. Elwell Serves As a Pharmacist in One of Rite Aid's Milford Stores

Rite Aid hired Elwell as a pharmacist in 2008, and Elwell was eventually assigned to one of Rite Aid's stores in Milford, Delaware (the "Milford Store"). (B51-53).¹ The Milford Store is located 50 minutes to 1 hour from Elwell's home in Middletown, Delaware. (B49-50, 57).

As a pharmacist in the Milford Store, Elwell reported directly to Pharmacy Manager Felix Nwoko, who in turn reported to Percy Dhamodiwala ("Dhamodiwala"), Pharmacy District Manager for Region 32, District 10.² (B93-94).

B. Elwell Complains of Heating Issues in the Milford Store

In January and February 2010, the Milford Store's heating system was having problems, and occasionally not operating properly. (B76). Accordingly, in February 2010, Elwell sent two very brief e-mails to Dhamodiwala to bring to Dhamodiwala's attention that the Milford Store was experiencing heating issues, but Dhamodiwala never responded.³ (B42-43; B54). Elwell had no idea whether Dhamodiwala was handling the heating issues or otherwise acting on the information. (*Id.*). While Dhamodiwala does not specifically recall how it

¹ Citations to Rite Aid's Appendix are identified by numbers with the prefix "B."

² Contrary to Elwell's representation, Dhamodiwala was not Elwell's "first-line supervisor" (Op. Br. at 3).

³ Elwell testified he sent Dhamodiwala a total of four e-mails regarding the heating issues in the Milford Store, but only two e-mails have been located.

occurred, maintenance was contacted in follow up to Elwell's e-mails and Dhamodiwala believed that the heating problem would be fixed in short order. (B77-79).

C. Rite Aid Terminates Elwell for Blatant Insubordination

A snowstorm was forecast for Delaware for February 10, 2010. In light of this forecast, Dhamodiwala called Elwell on February 9 and asked him to book a hotel room close to the store so that he would be able to open the pharmacy. (B86-87). Elwell agreed to do so, but was unable to book a hotel room in Milford or Dover.⁴ (*Id.*). Elwell did not inform Dhamodiwala or any other supervisor that he was unable to reserve a hotel room until 7:00 a.m. the next morning, two hours before store was scheduled to open. (B55, 90).

At that time, with the storm already in full force, Elwell called Dhamodiwala from his home in Middletown and left a phone message informing Dhamodiwala that he would not be at work due to the snow. (B56-57). When Dhamodiwala returned Elwell's call, Dhamodiwala asked Elwell why he did not stay at a hotel, to which Elwell responded that he had tried to book a hotel but was unable to secure a reservation. (B44-45). Dhamodiwala asked Elwell why he did not inform Dhamodiwala of his inability to secure a hotel room the previous evening, and expressed that it was now very difficult to find another pharmacist to open the

⁴ Elwell disputes that Dhamodiwala called him on February 9, 2010, but confirms that he attempted to book a hotel room because he was required to do so with a previous snowstorm. (B55, 86-88).

Milford Store. (*Id.*). Dhamodiwala told Elwell that it was useless for him to attempt to make it in to work from Middletown, and asked Elwell to inform him by that afternoon whether he would be able to appear for work the next day. (*Id.*; B91).

Around 9:00 a.m. that morning, Elwell called Dhamodiwala in a rage. Unbeknownst to Dhamodiwala, Elwell purportedly hurt his back attempting to shovel out his car so he could travel to work, despite admitting that Dhamodiwala never told him to do so.⁵ (B59-60, 63-64, 92). Dhamodiwala specifically recalls Elwell calling him a “son of a b----” and a “m-----f-----.” (B92-93). Elwell believes that he left a phone message for Dhamodiwala around 9:00 a.m. and does not recall speaking with Dhamodiwala directly. Nonetheless, Elwell admits that he was upset, and used a raised voice, an expletive, and otherwise “inappropriate language” when he left the message. (B61, 64, 67). Elwell also threatened to contact Rite Aid’s Chief Executive Officer, Mary Sammons, because he was upset about going to work in a snowstorm:

Q. Were you going to contact the CEO, Mary Sammons, because you thought it was unfair for Percy to impress on you that you thought you had to drive in that day?

⁵ Elwell’s assertion that he was unable to travel during the state of emergency on February 10, 2010 (Op. Br.at 4), is unsupported by the factual record. Indeed, the only document to which Elwell cites for this proposition is his May 1, 2012 Complaint. (*Id.*). Both Dhamodiwala and Yoney testified that pharmacy personnel were typically permitted to travel during a state of emergency. (B89, 110-11).

A. I had gone to work in a number of snowstorms and have talked to numerous pharmacy supervisors during snowy days, and I had never been spoken to like Percy spoke to me about—when he made me feel I had to go into work. And all I had ever gotten was, gee, it is snowing out, I realize, try to make it into work, but your safety is the primary concern. And I had the distinct impression Percy was wanting me out in that snowstorm and that it was going to endanger my life.

Q. Were you angry with Percy?

A. No, just upset about the situation.

Q. Do you think it was appropriate to tell your supervisor that you were going to the CEO of his company to complain about him?

A. If you are asking an employee to go out in a dangerous, state-of-emergency snowstorm, yes.

(B65-66). Later in his deposition, Elwell attempted to revise his position, stating that the threat to contact Mary Sammons was related to both his anger about going to work in a snowstorm *and* Dhamodiwala's unresponsiveness regarding the heating complaints in the store. (B68-69). On redirect, however, Elwell admitted that he never conveyed to Dhamodiwala that he intended to speak to Mary Sammons about the heating issues, and that Dhamodiwala would not have known that he was talking about reporting the heating issues up the ladder:

Q. Mr. Elwell, just a few follow-up questions on Yoney Exhibit 1. I believe it was your testimony just now that the "I will call Rite Aid corporate and will talk with Mary Sammons and all the HR people" is in line with that you said, but the second

clause, “and I will make sure you are in big trouble and I mean it,” was something you did not say; is that correct?

A. I do not recall saying that, no.

Q. Okay. Previous to “I will call Rite Aid corporate and talk to Mary Sammons and all the HR people,” what were you griping about on the voicemail or to Percy, whatever the situation was?

A. I did not say anything about HR people...But I said I threatened to call Mary Sammons.

Q. Did you give a reason why you were going to call Mary Sammons?

A. No, I did not.

Q. The nature of the message or the phone conversation, whatever it was, was it about driving in the snow or was it about heating issues?

A. Both. Both.

Q. Did you say heating issues?

A. I did not elaborate.

Q. Did you bring up the heat in the store at all during—

A. I did not—I just said it was snowing like---“Son of a b---, it is snowing like gangbusters.”

Q. And do you recall earlier in your testimony, during the direct deposition that you gave with me, you said the reason you wanted to call Mary Sammons was because you thought he was going to make you drive in the snow?

A. I felt he was going to drive—I felt between the driving in the snow issues and the heating and

ventilation issues that it would be enough ammunition, if I went to a CEO, things would not be good.

Q. Is that something, is that another reason you thought of afterwards, or was that in your mind at the time you said this?

A. That was in my mind.

Q. Does Percy have any reason to know that's what you were threatening him with?

A. Just what I had specifically said to him.

Q. And what you specifically said to him was complaints about driving in the snow that day?

A. Yes.

Q. And there was nothing said that day, on February 10th, to Percy, voicemail or otherwise, about the heating issues in the store?

A. That's correct.

(B70-73).

Following this phone call, Dhamodiwala was stunned and rightfully upset. In his nine years in a supervisory role with Rite Aid, Dhamodiwala had never been spoken to in this "very brutal" way. (B44). Shaken, Dhamodiwala immediately called his supervisor, Dennis Yoney, Regional Pharmacy Vice President, to report the incident and find out what he should do as far as directing customers to the next closest Rite Aid store and responding to Elwell's insubordination. (B82-83, B107, 109-114). He then followed up with an e-mail to Yoney that copied two

members of human resources: Sandra Biss, Senior Human Resources Manager, and Keith (Ivan) Carr, Human Resources Manager. (B83-84, 112-16). Following the e-mail, Dhamodiwala spoke with Biss and Carr. (B98-101). Importantly, neither Dhamodiwala nor Elwell ever informed Yoney, Biss, or Carr of Elwell's hearing complaints or the hearing issues at the Milford Store. (B80-81, 102-03, 109-10).

Rite Aid's human resources personnel ultimately terminated Elwell for his insubordination. (B98, 117). Specifically, Elwell's termination recommendation was a collaborative decision made by Biss and Carr, then passed along to Yoney, whose typical practice was to follow along with a decision unless he disagreed. (B114-15). The termination recommendation for Elwell was then given to Dhamodiwala. (B115). Dhamodiwala did not suggest nor was he asked whether Elwell should be terminated. (B99-100).

D. Elwell Files Suit Against Rite Aid

On May 1, 2012, Elwell filed a single-count Complaint against Rite Aid, alleging wrongful termination pursuant to Delaware's Whistleblowers' Protection Act, 19 *Del. C.* § 1701 *et seq.* (B36-41). In the Complaint, Elwell alleged that he was terminated for reporting that Rite Aid was "improperly and dangerously storing prescription drugs at incorrect temperatures." (B40).

E. The Superior Court Grants Rite Aid's Motion for Summary Judgment

On February 12, 2014, Rite Aid filed a Motion for Summary Judgment. On March 4, 2014, the Honorable John A. Parkins of the Superior Court in New Castle County, Delaware heard oral argument and properly granted Rite Aid's Motion by oral Order. (B1-35). To reach its holding, the Court determined that there was not any evidence "that the alleged whistleblowing activity by the plaintiff played any role, let alone the primary role in the decision to terminate him." (B34). Specifically, the Court held that no evidence indicates the decision-makers who fired Elwell – Yoney and Biss – were aware of Elwell's hearing complaints. (*Id.*). The Court further held that it was undisputed that Elwell failed to follow Rite Aid procedures before he was discharged. (*Id.*).

Elwell subsequently filed a Motion for Reconsideration but ultimately withdrew the motion to pursue this appeal.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RITE AID

A. Question Presented

Did the Superior Court properly grant summary judgment to Rite Aid as to Elwell's Whistleblowers' Protection Act claim when there was no evidence that Elwell's heating complaints were the primary basis for his termination?

B. Scope of Review

The Supreme Court exercises *de novo* review over decisions to grant or deny motions for summary judgment. *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006); *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010). A motion for summary judgment must be granted if the moving party establishes that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001); Super. Ct. Civ. R. 56. The court must accept as true all uncontroverted evidence offered in support of the motion. *Guardian Const. Co. v. Tetra Tech. Richardson, Inc.*, 583 A.2d 1378, 1381 (Del. Super. Ct. 1990). Once the moving party has properly supported its motion, the burden shifts to the non-moving party to demonstrate that there exists material issues of fact so as to make the granting of summary judgment inappropriate. *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979). The non-movant cannot create a genuine issue for

trial with bare assertions or conclusory allegations, but must produce specific facts which would sustain a verdict in its favor. *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. Ct. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

C. Merits of Argument

Under the Delaware Whistleblowers' Protection Act, an employer shall not discharge or otherwise discriminate against an employee "[b]ecause the employee reports verbally or in writing to the employer or to the employee's supervisor a violation,^[6] which the employee knows or reasonably believes has occurred or is about to occur" 19 *Del. C.* § 1703(4). The burden of proof in any action brought under the Act "shall be upon the employee to show that the primary basis for the discharge . . . alleged to be in violation of [the Act] was that the employee undertook an act protected pursuant to § 1703" *Id.* § 1708. Elwell falls far short of his burden, as the uncontroverted evidence shows that Elwell was terminated for insubordination.

1. Rite Aid Discharged Elwell for Flagrant Insubordination

It is undisputed that Elwell – a licensed pharmacist critical to the operation of the Milford Store's pharmacy – failed to show up for work on February 10,

⁶ "Violation" means "an act or omission by an employer . . . that is: (a) Materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of [Delaware], a political subdivision of [Delaware], or the United States, to protect employees or other persons from health, safety, or environmental hazards while on the employer's premises or elsewhere" 10 *Del. C.* § 1702(6).

2010. It is further undisputed that Elwell did not inform Dhamodiwala that he was unable to book a hotel room close to the Milford Store, and thus unable to travel to work during the snowstorm, until two hours prior to his scheduled shift. As a result, Dhamodiwala had to scramble to find a replacement and ultimately could not open the Milford Store's pharmacy. When Dhamodiwala confronted Elwell about not securing a hotel room the previous night so as to be closer to the store (as per company policy) or, at minimum, not communicating his inability to secure a hotel room the previous night, thereby allowing time to find a replacement, Elwell lashed out with verbal attacks that left Dhamodiwala "very shaken." (B110, 113-14, 119-20).

Dhamodiwala reported Elwell's unacceptable conduct to his direct supervisor, Dennis Yoney, and human resources personnel, Sandra Biss and Keith Carr. Upon review of Dhamodiwala's report, Biss and Carr recommended to terminate Elwell for insubordination, and Yoney agreed.⁷ (B114-17). Carr thereafter informed Dhamodiwala of the termination decision. It is clear from these facts that Elwell's termination stemmed from his insubordinate conduct on

⁷ Elwell's argument that Dhamodiwala, and not Biss or Yoney, was involved in the termination decision (Op. Br. at 13) wholly disregards the deposition testimony provided in this matter. Yoney testified that, in accordance with Rite Aid's ordinary business practices, the termination recommendation was issued by Biss and Carr, and that he had authority to reject the recommendation if he disagreed. Dhamodiwala, however, played no role in the decision to terminate Elwell, but only relayed the termination recommendation upon receipt. In short, the persons who had authority to recommend or negate a decision to terminate Elwell were Sandra Biss, Keith Carr, and Dennis Yoney. None of these three individuals knew of Elwell's hearing complaints regarding the Milford Store when making the decision to terminate Elwell.

February 10, 2010 and nothing more.

Elwell, however, argues that any claim of insubordination is unfounded because Dhamodiwala testified that Elwell made good faith efforts in his attempt to secure a hotel room prior to the snowstorm. (Op. Br. at 5 n.1). This argument misses the mark, as the insubordination was not based solely on Elwell's failure to secure a hotel room, but also his failure to notify his immediate supervisor or Dhamodiwala of his inability to do so until two hours prior to the time at which the Milford store was supposed to open, and the foul language he directed at Dhamodiwala. It is this unacceptable conduct that served as the basis for Elwell's termination.

2. Elwell's Alleged Whistleblowing Activity Did Not Factor Into, Let Alone Serve as the Primary Basis for, His Discharge

There is no evidence on record to establish a causal connection between Elwell's termination and his purported complaints about the heating drops in the Milford Store.⁸ Neither Yoney, Biss, nor Carr was aware of Elwell's reports

⁸ Elwell's contention that Rite Aid violated Delaware law when the heating system in the Milford store became inoperable for a time is based on the premise that the Board of Pharmacy maintains authority to suspend the store's ability to dispense medicine if the medicine is not stored at appropriate temperatures. According to Elwell, this alleged failure to properly store the drugs was a "violation" that potentially implicates both the pharmacy and pharmacist. This is a red herring created after the fact of Elwell's termination and is insufficient to survive summary judgment. Assuming, *arguendo*, that Rite Aid failed to timely report the heating issues to the Board of Pharmacy and failed to properly store drugs at the Milford Store, and that these were sufficient violations under the appropriate regulations, and further assuming Elwell appropriately reported these violations, Elwell must still prove his complaints were the primary basis for his termination. The record does not and cannot support a finding that Elwell's e-mails served as the primary basis, or any basis, for Rite Aid terminating Elwell's employment.

regarding the Milford Store, much less ongoing heating issues at the store, when they decided to terminate Elwell. (B102-03, 108, 110, 118). Rather, their decision was informed by the events of February 10, 2010, specifically, Elwell's insubordination following his failure to report to work. The Superior Court correctly acknowledged these key facts in its holding:

The Court concludes that there is no genuine dispute of material fact that his status as a whistleblower was not the primary reason for his discharge. In particular, there is absolutely no evidence in the record that the persons making the decision to discharge the plaintiff -- and, that is, Mr. Yoney and Ms. Biss -- were even aware of the complaint that had been made by the plaintiff about the heat at the pharmacy in Milford or the lack of heat at the pharmacy in Milford. And, therefore, there is no reason to believe that this played any role whatsoever in their decision to terminate the plaintiff.

Supporting this, although unnecessary for the defendant to prove, is the idea that it is undisputed that once the plaintiff was unable to obtain a motel room in the area, he failed to promptly notify his supervisor of his inability to obtain a motel room and only contacted his supervisor roughly two hours before he was due at work during the height of a wicked snowstorm.

(B33-34). The Superior Court's observation that decision-makers would have to know of any alleged whistleblowing activity is consistent with the spirit of the Whistleblowers' Protection Act, which provides protection for employees who have been discharged only when the primary basis for the discharge is the employee's report of a violation. 19 *Del. C.* § 1708. Logic dictates that a violation

can only be the primary basis of discharge if those who decide to fire the employee actually know of the violation. To find otherwise would make employers vulnerable to employees' speculations about the "real" reason for discharge, despite clear record evidence to the contrary.

A prime example of this conspiracy-theory approach is Elwell's speculation that Dhamodiwala's true purpose in reporting Elwell's insubordination and foul language was to "eliminate" the source of the heating complaints. (Op. Br. at 15). There is no evidence that Dhamodiwala was in fear of Elwell reporting his unresponsiveness to the heating complaints to Rite Aid's corporate office. (B70-73 (Elwell's testimony that he never referred to his heating complaints in connection with the threat to call Chief Executive Officer, Mary Sammons); B95 (Dhamodiwala's testimony that he did not know what Elwell meant by the threat to call Mary Sammons). Therefore, Dhamodiwala had no need to "eliminate" Elwell. Because Elwell has not produced, and cannot produce, specific facts in support of his theory, he has not created a genuine issue of material fact sufficient to defeat summary judgment. *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. Ct. 2003) (the non-movant on summary judgment cannot create a genuine issue for trial with bare assertions or conclusory allegations, but must produce specific facts which would sustain a verdict in its favor).

CONCLUSION

In light of the foregoing, it is respectfully suggested this Court should affirm the Superior Court's March 4, 2014 Order granting summary judgment in favor of Rite Aid Corporation, as all portions of the Order were correct on the law and facts.

Dated: September 5, 2014

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