IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT ELWELL,	)	
	)	C. A. No. 237, 2014
Appellant, Plaintiff -below	)	
	)	
v.	)	
	)	
THRIFT DRUG, INC. d/b/a RITE AID,	)	
	)	
	)	
Appellee, Defendant-below.	)	

APPEAL FROM ORDER ENTERED IN THE SUPERIOR COURT OF THE STATE OF DELAWARE AT C. A. No. N12C-05-013 (JAP)

APPELLANT ROBERT ELWELL'S REPLY BRIEF

MARTIN & ASSOCIATES, P.A.

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I. SUMMARY OF ARGUMENT

A. Appellee's recitation of facts demonstrates that there are numerous factual issues that must be resolved by a jury.

B. Appellee's argument that the "ultimate decision-makers" must have knowledge of the violation would thwart the unambiguous language of the statute.

II. ARGUMENT

ARGUMENT I

APPELLEE'S RECITATION OF FACTS DEMONSTRATES THAT THERE ARE NUMEROUS FACTUAL ISSUES THAT MUST BE RESOLVED BY A JURY.

While there are several factual discrepancies set forth by the parties, the following three issues have perhaps the most impact on Plaintiff's underlying cause of action.

A. *Decision to Terminate*

Appellee offered, in its Answering Brief, differing and inconsistent identities of the decision-makers responsible for Plaintiff's employment termination. AB-2,9.[1] While Appellee initially argued that VP Yoney and the Human Resources team of Biss and Carr terminated Mr. Elwell, this representation was made to the Court contrary to the explicit testimony of Yoney to the contrary and without any sworn statements or deposition testimony from either Biss or Carr. AB-2. Appellee then declared that Mr. Elwell's termination was decided upon only by Human Resources personnel as the result of a "collaborative decision" by Biss and Carr. AB-9. No record evidence supports these assertions.

[1] The citations to the Answering Brief will be "AB-___" while the Opening Brief citations will be designated "OB-___".

Five times in Appellee's Brief, Appellee referred to Yoney, Biss and Carr as having had no knowledge of Appellant's reports to his supervisor regarding the heating deficiencies at the Milford store. AB-2, 10, 13n, 14, 15. While Mr. Yoney testified that he did not know of the heating conditions, there is no evidence as to the knowledge of Biss and Carr despite Appellee's repeated arguments to the Court (and the Court below) that the Human Resources team had no knowledge of the heating conditions or Elwell's reports of same. However, there is no record evidence to support this.

Finally, while Appellee acknowledged that the "termination recommendation" from Human Resources was given to Elwell's supervisor, Percy, Appellee argued that Percy was not asked to terminate Elwell or that Percy took no further action after receiving the "termination recommendation" from Human Resources. AB-13, A-225. Percy, through his deposition testimony, appears to have acknowledged his termination of Plaintiff but stated that it was mandated by Human Resources. A-070.

The record does not contain any uncontroverted evidence as to who terminated Mr. Elwell.

B. *Facts Supporting "Violation" under WPA*

Appellee represented to this Court that the heating in the Milford store was "occasionally not operating properly." AB-3. The sworn testimony, however,

provided by Percy was that he was aware that there was a "severe" heating problem in the Milford store for well over a week. A-141. He did not dispute reports that indicated that the temperature in the store was 43° at the end of the first week of February 2010. A-175.

Percy acknowledged in his testimony that the lack of heat in the Milford store was reportable to the Delaware Board of Pharmacy and could have caused his store to have been closed. A-171. This was echoed by his supervisor, Dennis Yoney, who testified that Percy never advised him as to the heating problem in the store and that Percy may be exposed to disciplinary action for his failure to report. A-175, A-227. Both Percy and Yoney acknowledged the severity of the reported heat loss issues.

Contrary to Appellee's assertion in its Brief that this was a short term problem (the loss of heat), Percy acknowledged that the problem had begun sometime in January 2010 and was not resolved until March 2010. AB-4, A-174.

There is no factual basis for Appellee's assertion that the heating loss of the Milford store did not rise to the level of a "violation" within the meaning of the WPA inasmuch as the heat loss was "materially inconsistent with, and a serious deviation from …[a] regulation promulgated under the laws of this State…to protect employees or other persons from health, safety or environmental hazards while on the employer's premises." 19 Del. C. § 1702 (6)(a).

C. *Final Communications between Plaintiff and his Supervisor*

There is a wide discrepancy between the accounts of the final communications between Bob Elwell and Percy Dhamodiwala on the morning of February 10, 2010. While Appellee accused Plaintiff of "lashing out" against his supervisor and the use of profanity, directed at his Supervisor, this was adamantly denied by Plaintiff. AB-5, 13; OB-5.

The characterization of these communications is essential to Appellee's position that Bob Elwell was terminated for insubordination. It is alleged that at that point, no one in management knew of the "severe" heating conditions at the Milford store and Percy acknowledged that Elwell was the only employee who was reporting the heating loss to Percy. A-074. Following these incidents and prior to his termination, Mr. Elwell was not heard by anyone in Appellee's management or Human Resources. A-141, A-142, A-226. While Mr. Yoney was surprised that Bob Elwell was not interviewed in connection with his termination process, the only evidence as to Elwell's misconduct came from his supervisor. *Id.*

It can therefore be argued that Plaintiff's continued employment ***and termination*** was under the direct ***control*** of his supervisor.

ARGUMENT II

APPELLEE'S ARGUMENT THAT THE "ULTIMATE DECISION-MAKERS" MUST HAVE KNOWLEDGE OF THE VIOLATION WOULD THWART THE UNAMBIGUOUS LANGUAGE OF THE STATUTE.

In defense of its termination of Plaintiff, Appellee offers its own policy argument to support the discharge of Mr. Elwell:

> "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 employee's speculations about the "real" reason for discharge despite clear record evidence to the contrary." (AB-15, AB-16).

Plaintiff respectfully argues that there is no place in the application of the WPA to the instant case for deviation from the clear language of the WPA statute. Indeed, this Court in one of its first decisions under the WPA, found that where the language of the statute is unambiguous, there is no need for interpretation and that plain meaning of the words controls. Tomei v. Sharp, Del. 918 A.2d 1171 (2007).

Contrary to the desire of Appellee, to add language and thereby another requirement for the application of the statute, the WPA statute does not contain any language about ultimate decision-makers and/or their knowledge of the violation. Instead, one need only give a report of a "violation" to the employee's supervisor and provide evidence that the report of the violation was the "primary basis for the

discharge." 19 Del. C. § 1709. There is no dispute as to this sequence of events in the case at bar.

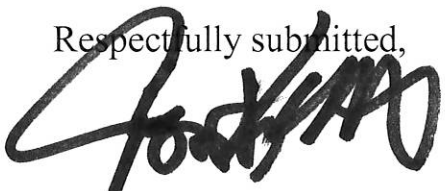
Further, there is no dispute that Percy had a significant impact upon Plaintiff's employment. Percy wrote an e-mail condemning Plaintiff's behavior and had immediate discussions with his supervisor, Vice President Yoney, as well as the two Human Resources individuals; the Human Resources head Sandra Biss and the HR associate Keith Carr. While the record is devoid of who actually made the termination decision, Mr. Yoney testified that the "termination recommendation" was given to Percy and Percy appears to have acted on the recommendation. A-225, A-070.

It was Percy who took the ball and ran with it resulting in Bob Elwell's termination. There is no doubt that the intent of the legislature was to prevent such a scenario wherein a supervisor who received a report of a violation of health or safety could brush it under the rug and instead terminate the only source of the report of the violation. The means were at Percy's disposal and he used them to circumvent any financial loss to his employer caused by the closing of the store or a disciplinary process against Percy for his failure to report a serious condition that should have been reported to his supervisor and a violation that was reportable to the Board of Pharmacy.

III. CONCLUSION

Appellant, Plaintiff-below respectfully requests that for the reasons set forth in this Opening Brief, this matter be remanded to Superior Court for Trial.

Respectfully submitted,



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