Filed 3/25/14 Courey v. Kindred Healthcare Operating, Inc. CA4/3 (unmodified opn. attached)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MESCHELLE M. COUREY, Plaintiff and Appellant, v. KINDRED HEALTHCARE OPERATING, INC., et al., Defendants and Respondents.	G048380 (Super. Ct. No. 30-2012-00557416) ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT

The opinion filed March 14, 2014, is hereby modified in the following particulars:

(1) On page 2 of the slip opinion, in the third line of the second complete paragraph, substitute "Kindred Healthcare Operating, Inc. or 'KHOI'" for "THC-Orange County."

(2) On page 2 of the slip opinion, in the sixth line of the second complete paragraph, substitute "KHOI" for "THC."

(3) On page 3 of the slip opinion, in the only complete paragraph on the page, substitute “KHOI” for “THC-Orange County” in the two instances where “THC-Orange County” appears.

These modifications do not affect a change in the judgment.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.

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MESCHELLE M. COUREY, Plaintiff and Appellant, v. KINDRED HEALTHCARE OPERATING, INC., et al., Defendants and Respondents.	G048380 (Super. Ct. No. 30-2012-00557416) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed in part and reversed in part.

Ames Law Office and Douglas A. Ames for Plaintiff and Appellant.

Alston & Bird, Martha S. Doty and Sayaka Karitani for Defendants and Respondents.

* * *

On August 5, 2011, plaintiff Meschelle Courey informed both Charlotte Cook, a nursing manager at Kindred Hospital in Westminster, and Maria Laureano, a human resources coordinator at the hospital, that nursing assistant Sandra Barragan had been coming to work under the influence crystal meth. At the time, Courey had accumulated six points under Kindred's tardy and absence policy. If her total reached eight, she would be subject to termination. Under the point system, an unexcused full absence would result in one point. Later on in the month of August (on the 18th and 19th) Courey was absent, but had a doctor's note. On September 14, 2011, Courey had a "performance review" from Enjano Trajano, one of her night-shift supervisors. It was a positive review. Courey was told she "met all expectations for absenteeism or tardiness" and was given no indication she had, as of that date, accumulated the fatal eight points that would result in her firing. However, on September 28, 2011, Courey was informed in a meeting attended by Cook that she was being fired for having accumulated nine tardy-absence points in the previous rolling 12-month period. It is undisputed that Courey incurred no absences or tardies cognizable under Kindred's point system between September 14 and September 28.

Courey sued Kindred, alleging three causes of action: (1) whistleblower retaliation (based on both Health and Safety Code section 1278.5 and Labor Code section 1102.5) against Kindred and its parent company THC-Orange County; (2) wrongful termination in violation of public policy (essentially a common law version of her statutory causes of action) against the same two defendants; and (3) breach of contract against Kindred, THC, Cook, and Laureano, on the theory they had violated a confidentiality agreement signed prior to Courey's informing them about Barragan's alleged drug use. The trial court granted summary judgment for all defendants on all causes of action.

We now reverse the judgment as it applies to Kindred on the whistleblower cause of action. Kindred has conceded that the temporal proximity between Courey's

whistleblowing and her termination is enough to make out a prima facie case of retaliation, and of course we may take as a given that Kindred has offered in rebuttal a legitimate, nonretaliatory reason for her discharge, namely excessive absences and tardies. That leaves the issue of whether the proffered legitimate nonretaliatory reason can be shown to have been pretextual. In that regard it is well settled that inconsistencies, as well as implausibilities, incoherencies, or contradictions can show an employer did not act for the asserted legitimate reason. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 75; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807; *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) Here, the September 14 review establishing that, as of that date, Courey had "met all expectations" in regard to tardiness or absenteeism, combined with the fact she incurred no tardies or absences in the interim between September 14 and 28, shows sufficient inconsistency to create a triable issue of fact as to whether Kindred's proffered legitimate reason was a pretext used to retaliate against Courey for her whistleblowing. Kindred's point that the supervisor who made the September 14 evaluation did not have access to Courey's personnel file merely goes to the weight of the evidence of the alleged retaliation.

Because Courey has identified a statutory basis on which her discharge may be said to be wrongful, we must also reverse the summary judgment as to her wrongful discharge cause of action. We may, however, uphold the dismissal of Kindred's parent company THC-Orange County on all causes of action. There is no indication in this record that THC-Orange County was acting as Kindred's *agent* for purposes of any allegation of whistleblower retaliation against Courey. (See *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990.)

Finally, we also uphold the dismissal of the third cause of action, for breach of the confidentiality agreement, against all defendants. Courey's only evidence that

Cook and Laureano breached the confidentiality agreement signed on August 5 is the hearsay statement from a coworker named Veronica.

Any issue of punitive damages on Courey's whistleblower and wrongful discharge causes of action is premature. The trial court certainly did not focus on the issue and the parties have given it only cursory treatment. On remand the trial court can deal with the issue. (See *State Farm General Ins. Co. v. Wells Fargo Bank, N.A.* (2006) 143 Cal.App.4th 1098, 1119-1120.)

Because the September 14 performance review is sufficient to raise a triable issue of pretext, there is no need to address other, related issues raised by the parties. The judgment is affirmed in all respects except (1) as to Courey's first cause of action against Kindred for whistleblower retaliation and (2) her second cause of action for wrongful discharge in violation of public policy. Because of the essentially interlocutory nature of our decision here, in the interests of justice we do not award appellate costs now but rather commit the issue to the trial court to make such award as appropriate at the conclusion of the litigation.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.