

In the Circuit Court of Jackson County, West Virginia

DIANA BOONE,

Plaintiff,

vs.)

CONSTELLIUM ROLLED PRODUCTS

RAVENSWOOD,

USIMC OF WEST VIRGINIA

MEDICAL CORP,

ACTIVATE HEALTHCARE, LLC,

CONSTELLIUM ROLLED

PRODUCTIONS,

HEALTH CENTER ET AL,

Defendants

Case No. CC-18-2018-C-96

ORDER GRANTING MOTION TO DISMISS ACTIVATE HEALTHCARE, LLC

This matter came before the Court for hearing on August 26, 2019. Plaintiff Diana Boone appeared by counsel, Walt Auvil, and Defendant Activate Healthcare, LLC (“Activate”), appeared by counsel, David Fenwick. After reviewing the applicable pleadings, hearing oral arguments from counsel, and researching the applicable law, the Court **FINDS** as follows:

FINDINGS OF FACT

1. Plaintiff worked at Constellium Rolled Products Ravenswood, LLC (“Constellium”).
2. On July 3, 2017, Constellium assigned Plaintiff to its casting department.
3. In May 2017, Constellium assigned Plaintiff to train for and operate the overhead cranes at the facility.
4. Plaintiff informed Constellium she could not undergo crane training and provided a medical restriction from her physician on June 12, 2017. The medical restriction stated Plaintiff should be exempted from “training in high positions since she suffers from acrophobia.”

5. Constellium referred Plaintiff for evaluation to Activate, its on-site clinic.
6. After several weeks of evaluations, Activate concluded on June 25, 2017, “Patient is to avoid heights” and further indicated that the restriction was “permanent.”
7. On June 26, 2017, Activate restricted Plaintiff from operating an overhead crane.
8. Plaintiff provided the restriction to Constellium’s human resources department, which communicated to Plaintiff that all of its jobs require working at heights.
9. Plaintiff asserted a claim through Constellium’s grievance process, and Constellium denied the grievance as follows: “The employee was unable to perform all of the duties associated with her position and the company was (and continues) to accommodate two employees senior to her in the department. Since she was unable to work there is no contractual obligation to pay for duties not performed. Grievance denied.”
10. Plaintiff filed a lawsuit against Constellium, certain supervisors, and Activate.
11. As it relates to Activate, Plaintiff asserted one cause of action—“aiding and abetting the other Defendants’ refusal to accommodate Plaintiff’s disabilities.”
12. Activate moved to dismiss the complaint pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*.
13. Plaintiff responded in opposition by asserting the complaint should survive because it asserts viable claims against Activate.

STANDARD OF REVIEW

14. Dismissal of a civil action pursuant to Rule 12(b)(6) is proper where “it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.” Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). The Court must construe “the factual allegations in the light most favorable to the plaintiff.” *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (citing *SER*

McGraw v. Scott Runyan Pontiac-Buick, 194 W. Va. 770, 775-76, 461 S.E.2d 516, 521-22 (1995)).

15. Especially in the wrongful discharge context, sufficient facts must be alleged which outline the elements of the plaintiff's claim. The Supreme Court of Appeals for West Virginia has stated that:

[D]espite the allowance in Rule 8(a) that the plaintiff's statement of the claim be 'short and plain,' a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint [,]' *see Chaveriat v. William Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993), or where the claim is not authorized by the laws of West Virginia. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.

Williamson v. Harden, 214 W. Va. 77, 79, 585 S.E.2d 369, 371 (2003) (quoting *SER McGraw*, 194 W. Va. at 776, 461 S.E.2d at 522).

CONCLUSIONS OF LAW

16. West Virginia law recognizes civil liability may be imposed on a party who aids and abets tortious conduct. "[F]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Taylor v. Robert W. Ackerman, P.C.*, No. 14-0961, 2015 WL 3875763, at *6 (W. Va. June 22, 2015) (memorandum) (quoting Syl. Pt. 5, *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991)).

17. The Supreme Court of Appeals for West Virginia held civil claims for aiding and abetting require the alleged aider and abettor (1) had knowledge that the other's conduct would constitute the breach of a duty; and (2) gave "substantial assistance or encouragement to the other" to enable that breach. *Courtney* at Syl. Pt. 5.

18. Activate provided Plaintiff a medical restriction from operating an overhead crane. Activate's conclusion mirrored the conclusion reached by Plaintiff's personal physician.

19. Plaintiff alleges other Defendants unlawfully discriminated against her by refusing to accommodate her disability (acrophobia). Plaintiff does not allege Activate had any involvement in Constellium's decisions regarding Plaintiff's employment, which occurred after Activate provided Plaintiff her desired medical restriction.

20. Based upon the review and analysis of allegations pled by Plaintiff against Activate, including exhibits to Plaintiff's Complaint, the Court **FINDS** Plaintiff has failed to plead a claim for aiding and abetting under West Virginia law that can survive summary dismissal under W. Va. R. Civ. P. 12(b)(6).

21. Activate also argues the West Virginia Medical Professional Liability Act ("MPLA") governs Plaintiff's claims. Therefore, this Court will address whether MPLA applies to this case.

22. W. Va. Code § 55-7B-2(i) defines "Medical professional liability" as

any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

23. W. Va. Code 55-7B-2(g) provides, in applicable part:

"Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment

pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment.

24. Plaintiff alleges Activate is liable to her solely for "refusing to review Plaintiff's medical documentation and by repeatedly issuing erroneous 'PCR's' without interacting with Plaintiff regarding her actual accommodation request."

25. The Supreme Court of Appeals of West Virginia construed the stated statutory scope of the MPLA as encompassing all cases where the alleged unlawful action "occurred within the context of rendering medical services." *Gray v. Mena*, 218 W. Va. 564, 570, 625 S.E.2d 326, 332 (2005); *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 702, 656 S.E.2d 451, 453 (2007).

26. The critical inquiry is whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care. *Minnich v. MedExpress Urgent Care, Inc.*, 238 W. Va. 533, 538, 796 S.E.2d 642, 647 (2017).

27. When causes of action are dependent upon "core allegations" that "center upon the performance of" health care services provided or that allegedly should have been provided, the MPLA governs. *See Blankenship v. Ethicon, Inc.*, 221 W. Va. at 707, 656 S.E.2d at 458.

28. In the instant case, Plaintiff's "aiding and abetting" claim against Activate is based solely upon Activate's actions in assessing and issuing work restrictions in the PCR's for Plaintiff and at Plaintiff's request.

29. The Court finds that Plaintiff's allegations against Activate are made against a "health care provider" acting in the context of rendering "health care."

30. Pursuant to the MPLA, "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." W. Va. Code § 55-7B-6(a).

31. W. Va. Code § 55-7B-3 provides:

The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
- (2) Such failure was a proximate cause of the injury or death.

32. Plaintiff does not allege the required elements of a medical negligence claim under the MPLA, and the facts alleged cannot be construed to allege or support facts that comply with the MPLA.

33. W.Va. Code 55-7B-6(b) requires a health care provider expert state under oath certain matters with particularity, including “the applicable standard of care at issue,” “how the applicable standard of care was breached,” and “how the breach of the applicable standard of care resulted in injury or death.” Plaintiff does not allege compliance with these requirements.

34. Failure to abide by these requirements can support dismissal of the cause of action, particularly in light of the length of time this applicable law has been in effect. *Gray*, 218 W. Va. at 564, 625 S.E.2d at 333.

35. Plaintiff failed to adhere to the procedural prerequisites of the MPLA.

ORDER OF THE COURT

WHEREFORE, based on all of the foregoing, it is hereby **ORDERED**:

1. Defendant Activate Healthcare, LLC's Motion to Dismiss is **GRANTED**;
2. As to Defendant Activate Healthcare, LLC, Civil Action Number 18-C-96 is

DISMISSED WITH PREJUDICE;

3. The objections and exceptions of any aggrieved party are noted and preserved;
4. This is a **FINAL ORDER**, which is appealable to the West Virginia Supreme

Court of Appeals;

5. The Circuit Clerk **SHALL** enter this Order and distribute attested copies to all parties of record.

All of which is, accordingly, **ORDERED**.

/s/ Lora A. Dyer
Circuit Court Judge
5th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.