STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0222

Karyn Larson Smith,
Appellant,

vs.

Argosy Education Group, Inc., et al.,
Respondents,

Family Networks, Inc.,
Respondent.

Filed November 25, 2008
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. 62-C0-07-005769

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Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Karyn Larson Smith challenges the district court's order granting judgment on the pleadings in favor of respondents Argosy Education Group, Inc., and Family Networks, Inc., on appellant's breach of contract and whistleblower claims. Appellant also argues that the district court abused its discretion by denying her request to amend her complaint.

Because appellant's complaint failed to set forth a legally sufficient claim for relief, and because appellant's proffered amendments did not cure this problem, the district court did not err by dismissing the complaint and denying the amendment. We therefore affirm.

D E C I S I O N

We review de novo the district court's decision dismissing a complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted, to determine whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). Under this standard, the plaintiff must merely allege a legally sufficient case; it is immaterial whether the plaintiff will actually be able to prove the allegations at trial. *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980). Our review is confined to the facts alleged in the complaint, which we accept as true, and the reasonable inferences, which must be drawn in favor of the nonmoving party. *Hebert*, 744 N.W.2d at 229.

Breach of Contract Claim

Appellant alleged a breach of contract claim against respondent Argosy, a private corporation providing post-secondary training and education, through which she was studying to obtain a doctorate in psychology. According to the complaint allegations, appellant had completed the necessary academic work and needed to "successfully" complete a 2,000-hour internship. Argosy placed appellant in an internship with respondent Family Networks. Before she could complete 2,000 hours, Family Networks terminated her internship after a dispute over the handling of a mother's request to view her son's medical records. Appellant alleged that Argosy required "[a]s a precondition to completing her internship . . . [appellant] was now conditionally subject to additional requirements, including 'specific behavioral changes,'" writing a summary paper, and providing a release so that Argosy could discuss information with the staff of Family Networks.

To establish a breach of contract, appellant must plead facts showing that (1) a contract was formed; (2) appellant performed all conditions precedent; and (3) respondent Argosy breached the contract. *Commercial Assocs., Inc. v. The Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). In an action against an educational institution, a student may allege breach of contract if the institution failed to perform specific promises made to the student, so long as the claim does not involve a comprehensive inquiry into the nuances of educational theory or procedures. *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473 (Minn. App. 1999). Cases involving nuances of education theory or procedures tend to involve claims of ineffective teaching or

educational malpractice. *See id.* at 471-73 (discussing claims of educational malpractice). Certain concrete allegations support a breach of contract claim. *See, e.g.*, *Alsides*, 592 N.W.2d at 474 (failing to provide instruction on installation or upgrade of operating systems or providing fewer instructional hours than promised); *Squires by Squires v. Sierra Nev. Educ. Found. Inc.*, 823 P.2d 256, 258 (Nev. 1991) (failing to provide specifically promised diagnostic and remediative services); *Malone v. Academy of Ct. Reporting*, 582 N.E.2d 54, 56, 58-59 (Ohio Ct. App. 1990) (failing to be certified or accredited as represented).

Appellant's claims question Argosy's decision that she did not "successfully" complete her internship. Inevitably, the district court would have to determine whether Argosy improperly imposed additional educational conditions on appellant before she could successfully complete the internship, thus entering into a discussion of Argosy's education judgment or procedures, the sort of claims this court rejected in *Alsides*. 592 N.W.2d at 474. Thus, the district court did not err by dismissing the breach of contract claim because appellant has failed to plead a legally sufficient claim for relief.

Whistleblower Claims

Appellant alleged statutory whistleblower claims against both Argosy and Family Networks. Appellant's complaint states that she "in good faith, reported to both [respondents] and refused a request for a medical file that would be a violation or suspected violation of federal law, HIPAA [Health Insurance Portability and Accountability Act]." Appellant alleges an adverse employment action, the termination

of her internship, and further alleges a causal connection between the report of the HIPAA request and termination of her internship.

In addition to these bare statements, appellant alleges the following facts in her complaint to support her whistleblower claim: (1) a particularly difficult parent requested her child's medical file; (2) because of HIPAA, appellant told the parent that the file could not be provided without written authorization; (3) appellant consulted her supervisor for assistance; the supervisor directed her as to which parts of the file could be released, and appellant released those parts of the file; (4) appellant directed the parent to other personnel for assistance; (5) the parent complained about appellant; (6) appellant was called into a meeting to discuss her handling of the parent's request and the complaints regarding appellant's handling of the request; (7) a second meeting was held to discuss additional concerns; and (8) appellant's internship was terminated because of the HIPAA matter and the parent's complaint.

According to the Whistleblower Act, an employer shall not discharge or penalize an employee for making a good faith report of a violation or suspected violation of federal or state law or rule to an employer, government body, or law enforcement official. Minn. Stat. § 181.932 (2006). The employee has the initial burden of presenting a prima facie case. *Hitchcock v. Fedex Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006).

To establish a prima facie case, the employee must show (1) statutorily protected conduct; (2) an adverse employment action; and (3) a causal connection between the two. *Freeman v. Ace Telephone Assoc.*, 404 F. Supp.2d 1127, 1139 (D. Minn. 2005), *aff'd* 467

F.3d 695 (8th Cir. 2006). "Statutorily protected conduct" occurs when the employee makes a report in good faith for the purpose of exposing an illegality that appears to violate a law or rule. *Id.* The statute is intended to protect the conduct of a neutral party who "blows the whistle for the protection of the general public or, at the least, some third person or persons in addition to the whistleblower." *Obst v. Mictrotron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000) (quotation omitted). The district court may rule as a matter of law whether a party's conduct constituted a report. *Rothmeier v. Inv. Advisers, Inc.*, 556 N.W.2d 590, 593 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997).

The district court concluded that appellant did not report a violation of law, was not ordered to perform an unlawful act, and was not an employee within the meaning of the statute. In order to be statutorily protected conduct, the whistleblower's report must implicate an actual or suspected violation of state or federal law or rule. *Borgersen v. Cardiovascular Sys., Inc.*, 729 N.W.2d 619, 624 (Minn. App. 2007). Appellant has alleged no illegal conduct on the part of respondents; at most, she has alleged an improper request by a patient's mother. The district court properly dismissed appellant's whistleblower claims for failure to plead a prima facie case.

Motion to Amend

Appellant asserts that the district court abused its discretion by refusing to permit her to amend her complaint to include a breach of contract claim against Family Networks and a broader factual basis for her whistleblower claims. Appellant moved for amendment after the district court made its initial ruling dismissing her complaint.

Once a responsive pleading has been filed, a party may amend a pleading only by leave of the court or by written consent of the adverse party. Minn. R. Civ. P. 15.01. Leave to amend is to be freely given "when justice so requires." *Id.* We review the district court's decision on a request to amend for an abuse of discretion. *Ag Servs. of America, Inc. v. Schroeder*, 693 N.W.2d 227, 235 (Minn. App. 2005). A court does not abuse its discretion by denying a motion to amend when the additional claims would not withstand summary judgment. *Id.*

Appellant's additional factual allegations regarding the whistleblower claims add nothing to her claim: she still has not pleaded a violation of law. She alleges that she could have avoided a complaint by the parent who requested the file if she had released the entire file in violation of HIPAA, but she does not allege that Family Networks or Argosy ordered her to do so, or any other unlawful conduct on their part. Thus, appellant still does not make a legally sufficient claim of a whistleblower violation against respondents.

The new breach of contract claim alleges that Family Networks promised appellant 2,000 hours of training and did not provide it, resulting in a breach of the agreement and damages to appellant. In support of her claim of a guarantee of 2,000 hours of internship, appellant appended a "Training Agreement" to her proposed amended complaint. The agreement was signed on February 24, 2005, approximately six months after appellant began her internship on September 1, 2004. According to the agreement, she is to work five days per week for 2,000 hours per year. There are no start

and end dates. As part of the agreement, appellant agreed to abide by all Family Networks procedures as set forth in their handbook.

Generally, absent specific agreement, the employment relationship is considered to be at will and terminable by either party at any time. *Borgersen*, 729 N.W.2d at 625. A unilateral contract, in which an employee is guaranteed job security beyond an at-will relationship, can be created if the employer makes specific written or oral promises to the employee. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 741 (Minn. 2000). Whether the promises create a unilateral contract is a question of law to be determined by the court. *Id.* at 740. A unilateral contract must be evidenced by language specific enough so that the court can discern the employer's intent and whether the employer's conduct in terminating the employer breaches the contract. *Id.* at 742.

The language of the training agreement lacks the specificity necessary to create a unilateral contract: appellant must still act in accordance with the Family Network policies and procedures, and must "successfully" complete a 2,000 hour internship, implying that certain standards must be met to continue in the internship. Further, the terms of the internship, lacking start and end dates, are not specific enough to create a unilateral contract.

We conclude that given the extreme tardiness of the motion to amend and the probability that any amended complaint would not withstand summary judgment because it would fail to present a legally sufficient claim, the district court did not abuse its discretion by refusing to permit amendment of the complaint.

Affirmed.