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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2007 JAN 11 A 10:13

THERESA D. MESSER

Plaintiff

ADELL CHANDLER
CIRCUIT CLERK
CABELL WV

v.

**Civil Action No. 02-C-0635
(Judge Cummings)**

HUNTINGTON ANESTHESIA GROUP, et al.

Defendants

ORDER

On 4th day of January, 2007, the parties appeared for a hearing on Defendants' Motions for Summary Judgment. Defendants Huntington Anesthesiology Group, Inc., Farouk Abadir, Hosney Gabriel, Ricardo Ramos, Alfredo Rivas, and Michael Vega appeared by Counsel, William D. Levine. Defendants Mark Newfeld, Stephen Shy, and Stanislas Striz appeared by Counsel, Thomas Scarr. Plaintiff appeared by her Counsel, Walt Auvil. The Court, having reviewed all Defendants Motions for Summary Judgment, as well as exhibits, pleadings, and pertinent legal authorities, makes the following findings:

The basis of Plaintiff's claim is that her physician restricted the time during which she should work. She contends that although her employer, Huntington Anesthesiology Group, Inc, ("HAGI") was aware of this restriction, it failed to limit her hours of employment. Plaintiff further alleges that as a consequence of this failure, an existing physical condition was exacerbated. In addition to her employer, HAGI, Plaintiff alleges that each individual shareholder of HAGI is liable not only

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because each had complicity in HAGI's alleged failure to accommodate, but also because Huntington Anesthesiology Group, Inc was their alter ego.

By Order entered on August 18, 2003, this Court dismissed Plaintiff's complaint reasoning that because Plaintiff had alleged that the failure to accommodate had resulted in a physical injury, Workers Compensation was her exclusive remedy. Plaintiff appealed. In its opinion, the Supreme Court of Appeals upheld this Court's decision with respect to Plaintiff's alleged physical injuries but remanded the case stating that nonphysical injuries resulting "directly and proximately" from a violation of the West Virginia Human Rights Act were not "barred by the exclusivity provisions of the Workers Compensation Act." *Messer v Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144 (WV 2005).

During the 18 months that elapsed subsequent to that decision, Plaintiff's complaint has never changed. At this time the only allegations relating to the consequences of HAGI's alleged failure to accommodate the Plaintiff is that her physical condition was exacerbated. Accordingly, if Plaintiff established every allegation in her complaint, the Court could not grant relief since her claimed damage resulted from her physical conditions and/or the effect her physical conditions had on her inability to remain employed. According to the Supreme Court of Appeals, such a claim falls within the exclusivity of the Workers Compensation Act.

Even if the Court were inclined to treat Plaintiff's allegations as a mere failure in pleading, after having reviewed the entire record in this matter and after having considered the arguments and representations of counsel which were made in their respective legal memoranda and during oral presentations, the Court has concluded that there is no dispute about any material fact, and that

summary judgment is appropriate.

From the affidavits submitted, from the exhibits attached, and from the deposition testimony referenced, those facts about which there is no dispute and upon which the Court has based its decision are:

1. Plaintiff was actively employed by Huntington Anesthesiology Group, Inc("HAGI") as a Certified Registered Nurse Anesthetist ("CRNA") until September 2000. Plaintiff performed her duties at St. Mary's Hospital. According to the claim she filed with Workers Compensation, she ceased working because of an exacerbation of a pre-existing physical condition.
2. CRNAs are not assistants to anesthesiologists. CRNAs work independently and have primary responsibility for providing anesthesia services to a patient during surgery. In the majority of surgical procedures, a CRNA is the only anesthesia provider in the operating room.
3. HAGI did not schedule patient surgery. It received the surgery schedule from St. Mary's Hospital. That schedule indicated the anticipated starting time for the first procedure in each operating room.
4. The initial surgical procedure might not start at the scheduled time because of factors outside of HAGI's control. Subsequent procedures could not commence until the completion of the preceding procedure. The factors which might have had an effect on the starting time of any procedure, none of which were within HAGI's control, included unforeseen complications, emergency procedures, and the surgeon's schedule.
5. Because the starting times of each procedure could not be determined with certainty, it was not possible to assign CRNAs to specific procedures. Rather, each CRNA would be assigned to an operating room and would be responsible for the procedures that were performed therein.
6. HAGI and each of its anesthesiologists was aware that Plaintiff's physician had suggested

that her work day should be limited to eight hours.

7. Because HAGI could not control the surgery schedule, to accommodate Plaintiff's time constraints, the on-call anesthesiologist would assign Plaintiff to the particular operating room in which he believed all scheduled procedures could be completed within the eight hour limitation.

8. In September 1999, Plaintiff and representatives from the West Virginia Division of Rehabilitation met with HAGI's business manager to discuss the conditions of Plaintiff's employment.

9. It was agreed at that meeting, that to accommodate Plaintiff's limitation, she should insist that the hospital staff do all lifting because lifting was the hospital's obligation, not the responsibility of a CRNA. Plaintiff was further instructed that she could refuse to begin any procedure which she thought would not be completed within her eight hour work limitation.

10. According to the records of the West Virginia Division of Rehabilitation Plaintiff reported that these accommodations were effective. The Division closed its file in December 1999.

11. On every occasion when Plaintiff was not involved in a surgical procedure, if she requested to be allowed to leave early, her request was granted. Plaintiff did not submit any affidavit or point to any evidence in the record to suggest that HAGI ever denied her request to leave under these circumstances.

12. If Plaintiff requested to be allowed to leave during a procedure, because medical standards and patient welfare prohibited an anesthetist from abandoning a patient, her request could only be granted when a replacement anesthetist became available. Plaintiff did not submit any affidavit or point to any evidence in the record to suggest that if a replacement anesthetist was available, HAGI ever denied her request for relief.

13. The un-contradicted affidavit of each individual defendant established that each was aware of

Plaintiff's limitations and that each made an effort to accommodate her. Plaintiff did not submit any contradictory affidavit nor did she point to any evidence in the record to suggest that any individual defendant ever committed any act which would have prevented her from completing her work during an eight hour shift except in those occasional instances in which she requested to leave during a procedure but a replacement anesthetist was unavailable. Although *Holstein v Norandex*, 461 S.E. 2d 473 (WV 1995) brought other employees within the purview of the term "person" as used in the Human Rights Act, it did not impose liability on a co-worker merely because that employee was a person. The employee must have engaged in some activity which violated the Act. The undisputed and un-contradicted affidavits submitted by each of the individual defendants establish that none engaged in any activity which could form the basis for individual liability.

14. The un-contradicted affidavits of Dr. Gabriel, Dr. Newfeld, and William Frazier, Esq. demonstrate that HAGI was a valid corporation, that it maintained an identity that was separate and distinct from its shareholders, and that it complied with all corporate formalities. Plaintiff did not submit any contradictory affidavit nor did she point to any evidence in the record to suggest that HAGI's corporate identity was ever disregarded by its shareholders, to suggest that HAGI was not a valid corporation, or to suggest that HAGI failed to comply with all corporate formalities.

15. Although in her letter to HAGI in November 2000, Plaintiff claimed that if she worked more than eight hours, her pain would increase and produce an energy loss there was no suggestion that this caused Plaintiff to be unable to perform the duties of her employment. To the contrary, it was undisputed that Plaintiff continued to perform her duties as a CRNA in a satisfactory manner until she filed a claim with Workers Compensation contending that a pre-existing physical condition prevented her from performing any work.

Based upon the foregoing undisputed facts, the Court makes the following conclusions:

1. Under the facts of this case, it is not necessary for the Court to evaluate the efficiency of the accommodation which HAGI made or whether other alternatives were available. It was undisputed that HAGI through its business manager engaged in discussions with Plaintiff and representatives of the Department of Rehabilitation. As a consequence of this interactive process, all agreed upon an accommodation. First, Plaintiff agreed to refuse to do any patient lifting because that was not part of her CRNA job but rather was the responsibility of the hospital employees. Second, Plaintiff was authorized to refuse to begin any procedure that she believed would not be completed by the end of her eight hour shift. Plaintiff reported to the Department of Rehabilitation that because of these accommodations, her working conditions had improved, so the Department closed its file.
2. The only complaint which Plaintiff made to HAGI about these accommodations was in a letter which was written in November 2000 after she had stopped working. In that letter she did not complain about the efficacy of her accommodation. Her only expressed dissatisfaction was that she was not comfortable having to assert her rights. She did not claim that she had been unable to perform the duties of her employment. Rather she stated that working more than eight hours increased the level of her discomfort and resulted in greater fatigue. Although Plaintiff's suggestion was made after her employment ceased so it could not be effectuated, it does establish that she was able to adequately perform her job duties until her pre-existing physical condition prevented her from engaging in any employment activity.
3. The duty to make a reasonable accommodation does not obligate the employer to accede to the demands of an employee. The employer is only required to make whatever reasonable

modifications may be needed to enable the employee to perform the essential functions of the job. *Baisden v West Virginia Secondary Schools Activities Commission*, 568 S.E.2d 32 (WV 2002); *Alley v Charleston Area Medical Center*, 602 S.E.2d 506 (WV 2004).

4. According to *Scaggs v Elk Run Coal Company, Inc.*, 479 S.E.2d 561 (WV 1996) reasonable accommodation is an interactive process that requires flexibility, courtesy, and cooperation between both the employer and the employee. It requires only that an employer “be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.”

5. Here, the undisputed facts establish that HAGI exhibited flexibility, courtesy, and cooperation and that it attempted to make changes in its work rules, facilities, terms, and conditions to enable Plaintiff to remain employed as a CRNA. It is further undisputed that this accommodation achieved its intended purpose because the Plaintiff continued to perform the duties of a CRNA until she allegedly became unable to be employed in any capacity.

6. Even if other accommodations were possible, it would not matter to the resolution of this case. An employer must make only those modifications which are necessary to enable the employee to perform the essential functions of the job. The employee is not empowered to dictate the nature and scope of the accommodation. If the accommodation enables the employee to perform the duties of his job, the employer has satisfied its obligation. The regulations that have been promulgated by the Human Rights Commission do not mandate more. The requirement is simple: “an employer shall make reasonable accommodation . . . where necessary to *enable a qualified individual with a disability to perform the essential functions of the job.*” [emphasis added] 77 CSR § 4.5. Since it is

undisputed that the Plaintiff was able to perform the essential functions of her job as a CRNA and to remain employed as a CRNA until she quit, HAGI satisfied this standard.

7. If an accommodation is sufficient to enable an employee to perform the job, it is not appropriate for the Court to evaluate all possible accommodation options and to "second guess" the employer's decision. Likewise, the employee can not establish a violation of the Human Rights Act merely because some other, and perhaps more desirable, accommodations may exist. The salutary purpose of the Human Rights Act, as it relates to accommodation, is to allow disabled employees to remain employed if possible, not to create a mechanism for subjecting an employer to litigation for not acceding to their demands.

8. In this case the accommodation of HAGI satisfied the Human Rights Act because Plaintiff remained employed.

WHEREFORE, this Court hereby ORDERS that the Summary Judgment Motions of all Defendants are GRANTED.

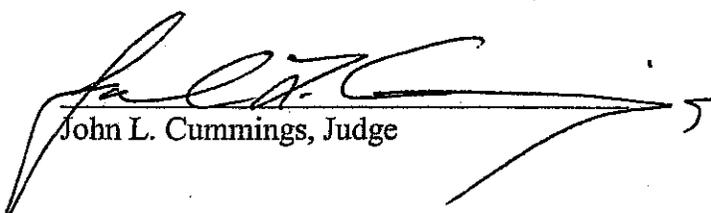
The Circuit Clerk of Cabell County is directed to distribute a copy of this Order to the following:

William D. Levine, Esquire
St. Clair & Levine
717 Sixth Avenue
Huntington, West Virginia 25701

Walt Auvil, Esquire
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, West Virginia 26101

Thomas E. Scarr, Esquire
Jenkins Fenstermaker, PLLC
P.O. Box 2688
Huntington, West Virginia 25726

Entered this 11th day of January, 2007.



John L. Cummings, Judge

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No. _____ Page _____ this

STATE OF WEST VIRGINIA
COUNTY OF CABELL,
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON JAN 11 2007
GIVEN UNDER MY HAND AND SEAL OF SAID
COURT THIS JAN 11 2007

 , CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA