

#306569

Division III

~~No. 86351-2~~

FILED

NOV 28 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES R. KEYES

Appellant,

v.

ALEX KEIFFER, LIZ JOHNSON, and SCOTT ARMSTRONG,
individually, as representatives of their respective marital communities, and
as representatives of GROUP HEALTH COOPERATIVE; and GROUP
HEALTH COOPERATIVE, a Washington non-profit Corporation,

Respondents.

2011 DEC -6 PM 3:37
CLERK
JAMES R. KEYES

REPLY BRIEF OF APPELLANT

James R. Keyes
Petitioner
P.O. Box 463
Spokane, WA 99210-0463
(509) 796-5152

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I. INTRODUCTION

Appellant James Keyes offers the following reply to Group Health's response brief arguments.

In continuing, for simplicity purposes, the name Group Health will be used to identify all of the defending/responding parties to this action, including the individual parties.

II. ARGUMENT

Group Health tenders their wording of issues they claim as "best stated as" that are in fact not the best statements. The court should not be sidetracked by this sleight of hand. The issues in this matter are twofold: were the decisions of the trial court determining facts to be other than as presented in the Amended Complaint appropriate decisions to be made when considering a CR 12(b)(6) motion?; and if so, were the decisions the correct determinations of fact as a matter of law?

1. Was Group Health Mr. Keyes' employer?

Group Health claims that "*because the allegation in Mr. Keyes's Complaint established that he was not employed by GHC.*" This is not a truthful statement. Mr. Keyes has at all times alleged that he was an employee of Group Health. Mr. Keyes alleged in the Complaint and Amended Complaint that "On or about 11/16/2010 the plaintiff began

working for the Defendant Group Health Cooperative as a temporary employee contracted through Provisional Staffing Services (CP 4 ¶ 3.1); and "On or about 11/16/2010 the plaintiff began working for the Defendant Group Health Cooperative as a borrowed servant provided by Provisional Staffing Services," (CP 118 ¶ 3.1) respectively.

Group Health asserts that Mr. Keyes' borrowed servant status precludes a wrongful termination claim and they base this argument on *Awana*. *Awana* is distinguished because, as Group Health put it, "*The only fact that the court found salient to its decision was that Alpha [the subcontractor] had the ability to terminate the plaintiff's employment and the Port did not.*" (Brief of Respondents page 10) If the Port had been a borrowing employer with the authority to totally supervise the employees of Alpha, including the authority to terminate them, the final opinion would have been different.

In this case, Group Health was a borrowing employer with total supervisory control over all employees borrowed from Provisional, including the authority to terminate, making them the employer in fact, and totally distinguishing their position from the Port's position in *Awana*.

Further, it must be noted that Mr. Keyes' termination was only from Group Health. Group Health argues that it is Provisional that should be held legally liable, however Provisional did not wrongfully terminate Mr.

Keyes. Provisional merely stated that they did not have another client company to which they could loan Mr. Keyes. Holding Provisional, an innocent party, responsible for the misdeeds of Group Health, the culpable party, goes against the very foundations of our legal system.

The cases Group Health cite to are predominately subcontractor cases, where the subcontractor retained supervisory control over the employee - the contractor supervised the subcontractor, not the individual employees of the subcontractor. In this case Group Health acquired full supervisory control over the borrowed employee, up to and including the right to terminate. CP 118-119.

The only sensical way look at employer-employee status is to consider whether the same result would be desirable, and consistent with existing law, if the retaliatory issue was not whistleblowing, as in the instant case, but some other public policy issue such as discrimination on racial, or disability, or sexual harassment grounds. Group Health's position is tantamount to asking the court to decide that the many thousands of people who work through staffing agencies are not really borrowed employees and should be precluded from enjoying the same protections of the law from employer misconduct or abuse that regular employees have.

This is not a desirable outcome as it violates the principle of equal protection.

2. Was there a violation of public policy?

Group Health asserts that Mr. Keyes "*failed to identify a clear public policy that was jeopardized by his alleged termination of employment.*" This is not a true statement. The Amended Complaint alleged that Group Health "decided to terminate the plaintiff's employment with Group Health Cooperative specifically and deliberately in retaliation against the plaintiff because the plaintiff raised concerns that Group Health Cooperative was acting unethically, violating its own internal policies and the consumer protection and product liability laws (including but not limited to RCW 19.86 et seq. and RCW 62A.2-315) of the State of Washington while taking actions which harmed consumers and unjustly enriched Group Health Cooperative." (CP 119 ¶ 4.1)

This clearly identifies a whistleblower complaint to an employer for violating the law and that the body of law violated was for the protection of Washington consumers, which our Supreme Court recognized by affirmatively citing *Harless v First National Bank of Fairmont*, 246 S.E.2nd 270 (W. Va. 1978). See *Hubbard v. Spokane County*, 146 Wn.2d 699, 715 (2002).

Group Health argues that whistleblowing on potential Consumer Protection violations does not invoke public policy protections because the CPA contains its own remedy for injured parties. The difference between consumer protection issues and other public policy issues, such as discrimination, is that the victim of an unfair business practice often is never cognizant of the fact.

For example, while working for Group Health, Mr. Keyes was contacted by a member of Group Health on a billing issue. During the investigation of the issue, Mr. Keyes noticed that the member, who used an IUD, had recently had a pregnancy termination. Because her policy was from a federal employer it did not contain coverage for this procedure. Group Health demanded that she pay for the procedure, cash up front, before they would serve her. Part of what the member had done was the removal of the IUD, and after the procedure, the placement of a new IUD. The removal, new IUD and placement of the new IUD were covered by her policy, however Group Health had included the costs of these items in the amount they demanded from her up front. This amounted to several hundreds of dollars that was demanded from the member and kept by Group Health even though it should have been covered by her Group Health insurance policy. If Mr. Keyes had not noticed it, and it wasn't the issue she was calling about, Group Health would have been forever

unjustly enriched at the expense of a regular working person who didn't realize she was being ripped off.

Group Health argues that Mr. Keyes has failed to clearly state and identify the relevant CPA issues, however this is like someone complaining that an observer cannot tell the color of an object held behind his back. Group Health created this issue with its refusal to comply with the court rules and provide requested discovery. Mr. Keyes simply does not know exactly which case or interaction was the basis for Group Health's decision to retaliate and terminate him.

Group Health also argues, primarily in footnotes on pages 19-20, that prevention of a violation of law, with respect to the CPA, does not count because some other remedy is available. This is the same argument rejected by the Supreme Court in Hubbard, which found that complaints to prevent the injury caused by law violations by preempting the violation, invoked public policy protection.

Here it should be noted that Mr. Keyes was punished, retaliated against, terminated, for committing some very reasonable actions intended to protect consumers and Group Health. Mr. Keyes requested a service credit to offset a questionable billing practice and noted that they were violating their own published policy as well as law. Mr. Keyes specifically requested a meeting with a supervisor to discuss a couple of cases where

Group Health actions were inappropriate under the law, requesting supervisor intervention in the case(s) and specifically asking for direction on how Group Health wanted him to handle or document such cases. See *Dicomes v. State*, 113 Wn.2d 612, 619 (1989) citing 1 L. Larson, *Unjust Dismissal* §7.02 (1989) where, with respect to whistleblowing, "The court expressly declined to limit the scope of what constitutes contravention of public policy to clear statutory violations. A finding that the employer violated either the letter or the purpose of the law is sufficient." *Farnam v. Crista Ministries*, 116 Wn.2d 659, 668-69, 807 P.2d 830 (1991).

Group Health takes issue with the customer service case described in the footnote on page 31 of the Brief of Appellant concerning a second billing for a procedure that was already paid for but improperly done and frames it as a UCC issue, but clearly demonstrating that they consider it acceptable to bill someone a second time for something the person already paid for but did not properly receive.¹ The real problem is

¹ If you paid a mechanic \$100 to diagnose a problem with your car and the mechanic made a diagnosis and sold you a replacement part to fix the problem, but the replacement part didn't fit and the problem was not resolved, under the Fitness for Purpose statute should you have to pay the mechanic another \$100 to examine and diagnose the problem with your car?

that such billing is common even though Group Health's cost share policy² prohibits such a billing. There is a definite lets-see-what-we-can-get-away-with attitude with such billing so the policy is inconsistently conformed to. If the member presents as someone who will push the issue, and push, and push, then the charges will be dropped. If the member presents as someone who will maybe complain, then acquiesce, then the billing, even though inappropriate, will remain, and Group Health will take, and keep, the money.

3. The claim for replevin.

Group Health asserts that the "*replevin claim [was] [n]ever properly before the trial court.*"

In the trial court's colloquy with Group Health with respect to the Amended Complaint, the trial court clearly indicated a willingness to entertain a motion to strike, all or part of the amended complaint. However, counsel stated "*I don't have a motion to strike . . . we have no objection to Mr. Keyes amending the Complaint because it will not cure the deficits that we have addressed in our motion.*" (RP 3-4) And when the trial court then said stated that it would grant the motion to amend the

² Which Group Health refused to provide in response to a discovery request.

complaint, counsel for Group Health replied "*And I will argue then based on the Amended Complaint because, as I said, it doesn't really change our argument.*"³

Group Health's argument now is that they didn't mean what they said, they didn't agree to accept the amended complaint and they now want the part about replevin to be stricken.

CONCLUSION

While refusing to properly provide discovery, Group Health complains that the allegations of Mr. Keyes are not sufficiently specific.

Mr. Keyes, working under the complete control and supervision of Group Health was, according to the principles of agency and the borrowed servant doctrine, an agent or employee of Group Health.

Mr. Keyes was terminated in retaliation for his identification and reasonable reporting of internal policy and public law violations while attempting to preempt them, to the protection of consumers and Group

³ It is nonsensical that Group Health argues that the replevin issue was not included in Mr. Keyes' Memorandum Opposing CR 12(b)(6) Dismissal (Brief of Respondents, page 6) when that document was filed before the Amended Complaint which included the replevin issue.

The replevin issue did not exist when the original Complaint was filed. It was not known until two weeks after that date that Group Health would choose to steal, rather than return, Mr. Keyes' personal property.

Health. Group Health clearly did not want someone working for them who could recognize when the law was being broken.

Group Health was given reasonable opportunity to object to the replevin claim in the Amended Complaint but instead agreed to accept the Amended Complaint as written. Since Group Health was served with a demand to preserve everything at Mr. Keyes' workstation mere days after his termination, it is reasonable to believe that Group Health still holds Mr. Keyes' equipment, but, inexplicably, holds the same we-keep-what-we-can-get-away-with attitude used in billing.

RESPECTFULLY SUBMITTED this 28th day of November, 2011.



JAMES R. KEYES
Appellant, pro se

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on November 28, 2011 I personally served the Defendants in this matter with the foregoing document by personally depositing a copy into the U.S. Mail, postage prepaid, and addressed to Tracy M. Miller, Karr-Tuttle-Campbell, 1201 Third Avenue, Seattle, WA 98101.

Signed and dated this 28th Day of November, 2011 in Lincoln County, Washington.



JAMES R. KEYES