UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PADUCAH
BOWLING GREEN DIVISION
CIVIL CASE NO. 1:98CV-131-R

IVAN WELLS PLAINTIFF,

v.

HUISH DETERGENTS, INC. DEFENDANT.

MEMORANDUM OPINION

Defendant Huish Detergents, Inc., filed a Motion for Summary Judgment (Doc. #72). This Court **GRANTS** Defendant's Motion for Summary Judgment.

BACKGROUND

Plaintiff Ivan Wells brought this action against Defendant Huish Detergents, Inc., following his firing in February 1998.

Huish hired Wells in 1995. Shortly after his hiring, Wells attended an orientation where orientation leaders described Huish's rules, policies and procedures. Wells signed a form acknowledging the explanation of this material. During his orientation, Wells also received a copy of Huish's Policy Book. He signed a form attesting to the receipt of the book and his responsibility to become familiar with its provisions. The book explicitly stated that all employees were at-will employees and that only a written statement by the president could change this status. That book also had an anti-self dealing provision.

Wells worked at Huish for three years. During this period he received promotions, regular salary increase and good work evaluations.

In January 1998, approximately one month before his discharge, Wells slipped on a stairway at Huish. He injured his knee during this fall. The parties disagree as to who knew

about Wells' fall, the severity of the injury, and the company's knowledge of the injury. Wells asserts he hobbled and wore a knee brace to work. He did not take time off from work. Wells alleges he told two security guards of his injury and in an affidavit swears that he told them to fill out any appropriate paper-work. Huish alleges Wells' said his injuries were minor and that he told people he would probably be okay.

In February 1998, Plant Manager Mahdavi learned that Wells had set up an outside company that sold items to Huish in contravention of Section 6.016 of the employee handbook. On Monday, February 11, 1998, Mahdavi met with Wells. Wells admitted owning a company that sold goods to Huish. Wells alleges that he told Mahdavi that Parts Manager Ron Anglin had given him permission to sell the goods in spite of the policy. He corroborates his position with testimony from at least three individuals who overheard the alleged conversation between Wells and Anglin. Mahdavi gave deposition testimony that he spoke with several employees including Anglin regarding Wells' actions and that all claimed no knowledge of the self-dealing. Mahdavi gained permission from the Human Resources Manager and fired Wells on February 13, 1998.

After his termination, Wells elected not to continue his insurance coverage with Huish in favor of the policy of his new employer (although Wells maintains that he always expected the Huish policy to cover the surgery to his knee). His insurance through Huish terminated on February 28, 1998. Wells began working for a new employer in March 1998 at a higher wage than he received at Huish. Wells underwent surgery for his knee on March 13, 1998. His new insurance carrier did not cover the surgery.

STANDARD

Summary Judgment is available under Fed.R.Civ.P. 56(c) if the moving party can

establish that the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

"[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is "whether the party bearing the burden of proof has presented a jury question as to each element in the case." *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of the evidence. To support his position, he must present evidence on which the trier of fact could find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

ARGUMENT

1. Breach of Express and Implied Contract

Under Kentucky law, parties can alter an at-will employment contract only with a clear statement of their intent to do so. *See Shah v. American Synthetic Rubber Corp*., 655 S.W.2d 489, 492 (Ky. 1983). Here, the parties have already expressly agreed that the at-will agreement can only be altered by a written statement by the president of Huish:

> All employees of the company are employees at will and, as such, are free to resign at any time without reason. The company, likewise, retains the right to terminate an employee's employment at any time with or without reason. Nothing contained in this manual or any other document provided to the employee is intended to be, nor should it be, construed as a guarantee that employment or any benefit will be continued for any period of time.

> I understand and agree that no one in the company has offered me employment or terms different from what is stated on this page and that no one in the company is authorized by the company to promise me in the future that the terms of employment will be different than what is stated on this page.

Wells Depo. 52-54 and Exh. 4.

> No supervisor, manager or other representative of Huish Detergents, Inc. – other than the President – has the authority to make any agreement or promise of employment for any specified period, or to change the at-will status of employment. The President of Huish Detergents, Inc., is authorized to make an employment agreement only if it is in writing.

Exh. 2 to Mahdavi Depo., at 1.

> No employee should assume or infer that any statement or promise purporting to limit the Company's right to terminate any employee is a statement or promise by or on behalf of the Company. Any such statement or promise should be taken as nothing more than an ill-advised and unauthorized act, contrary to Company policy. In no event will the Company be bound by any such statement or promise.

Exh. 2 to Mahadvi Depo., at 33. Plaintiff signed a statement indicating that he would review and become familiar with company policy. Collectively and individually, these statements demonstrate that short of an act by the president, the at-will status of employment could not be altered.

Plaintiff argues that following the rule in *Hammond v. Heritage Comm., Inc.*, the statement of a Huish employee that Plaintiff would not be fired for self-dealing creates a factual question whether an oral contract exists that modifies the employee's at-will status. 756 S.W.2d 152 (Ky.Ct.App. 1988). In *Hammond*, a company representative told Lisa Hammond that she would not be fired for appearing nude in a magazine. She was fired after appearing nude. The court held that despite her original at-will employment, the verbal statement created a factual issue as to whether Hammond's employment contract had been modified. The instant case is

distinguishable from *Hammond*. *Hammond* did not present the court with an employee handbook with such clear language on the issue of at-will employment. As such, some ambiguity may have existed. Here, no ambiguity exists. Anglin's statement, if true, could not have changed Wells' employment status. The handbook is clear that an employee's at-will status cannot be changed without a written statement by the company president and only such a written statement would satisfy the *Shah* rule and show an intent to alter the at-will employment agreement. No party argues that such a written statement exists.

2. Covenant of Good Faith & Fair Dealing

Although it questionable whether such a cause of action exists under Kentucky law, this Court need not reach that issue. *See McCart v. Brown-Forman Corp*., 713 F.Supp. 981, 983 (W.D.Ky. 1988); *Gryzb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). Plaintiff's breach of an implied covenant of good faith and fair dealing fails for the same reason his breach of contract claim fails; Huish policy is clear that only the president may modify an at-will contract.

3. Intentional Infliction of Emotional Distress, Outrage

To establish a claim for intentional infliction of emotional distress ("IIED") or outrage, a plaintiff must show that the defendant (1) acted intentionally and recklessly (2) with conduct that is outrageous and intolerable such that it offends the commonly accepted standards of decency (3) in a way that causes emotional distress (4) that is severe. *See Humana of Ky. v. Seitz*, 796 S.W.2d 1 (Ky. 1990). This standard is very difficult to meet.

Plaintiff fails to satisfy the requirements necessary to establish a claim. Most notably, Plaintiff cannot demonstrate outrageous behavior. Behavior must be extreme and outrageous in the truest sense of these terms to establish a claim for IIED. "Liability has been found only

where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community." *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984). Behavior such as telling a woman who gave birth to a stillborn child to "shut up" when asking about her baby and informing her that the baby's body would be disposed of in the hospital has been deemed insufficiently outrageous. *See Humana*, 796 S.W.2d at 4. Assuming Plaintiffs version of the story to be true, he would not qualify as firing an individual for having a disability would be insufficiently outrageous. It may be repugnant in society, but it does not reach the level of outrageousness necessary to establish a valid IIED claim.

4. KRS 342.197 – Retaliatory Termination

KRS 342.197 provides that no "employee shall be harassed, coerced, discharged, or discriminated against in any manner for filing and pursuing a lawful" claim. Kentucky law does not require that a party file a formal claim so long as the plaintiff proves he intended to file and pursue a lawful workers' compensation claim. *See First Property Manage. Corp. v. Zarebidaki*, 867 S.W.2d 185, 189 (Ky. 1994).

Here, Wells has filed no claim and taken no action to indicate an intent to file a claim. On October 18, 1999, Wells gave an affidavit stating that he reported his fall to security and that this reporting put Defendant on notice of his intent to file a worker's compensation claim. He claims he was terminated before he could file an official claim. Despite his affidavit to the contrary, this Court finds that a reasonable jury could not find that Wells intended to file a worker's compensation claim. There is no evidence that Wells took any action to follow up on his claim. He has been represented by an attorney, yet he did not check to see if a first report of

injury was filed, he did not make a formal complaint during his employment, he did not file a claim subsequent to his injury and he has taken no action other than his affidavit to indicate any intent to file a worker's compensation claim. Defendant terminated Wells on February 13, 1998. In the year and a half between the termination and the affidavit, Wells had ample opportunity to pursue some type of worker's compensation remedy. He never took steps to pursue this remedy and cannot today claim damages for retaliatory termination.

5. KRS 207.130 – Kentucky Equal Opportunities Act ("KEOA")

KRS 207.150 provides that "no employer shall fail or refuse to hire, discharge, or discriminate against any individual with a disability with respect to wages, rates of pay, or other terms and conditions of employment because of that person's physical disability unless the disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible." KRS 207.130(2) defines "physical disability" as "the physical condition of a person whether congenital or acquired, which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques."

Kentucky courts have provided little interpretation of KEOA. Although the Kentucky Court of Appeals applied section 207.130(2) in the case of *Whitlow v. Kentucky Mfg. Co.*, 762 S.W.2d 808, 809 (Ky.Ct.App. 1988), to hold that a plaintiff suffering from coordination and vision problems, varicose veins, and some type of mental disability was not "physically disabled," the court engaged in no analysis of section 207.130(2). In an unpublished opinion, the Sixth Circuit held that this Court cannot supplant the language of KRS 207.130(2) with that of the ADA because the two do not similarly define disability. *See Reid v. Contel Cellular of Louisville*, 96 F.3d 1448, 1996 WL 506372, *2 (6th Cir. Sep. 4, 1996). This Court must look at

the plain language of the statute. *See id.*

This Court holds that there is no factual question as to whether Wells suffered from a substantial disability. No evidence suggests Wells missed excessive work due to his injury or that he considered himself seriously injured while working for Huish. In his deposition, Wells stated that "after it happened I was hobbling around . . . it got worse . . . shortly after I fell, it started getting stiff and, once again, I hoped it would just work itself out . . ." (Wells Depo. at 75-77). Wells did have knee surgery for his injury[1] after leaving Huish and there is no suggestion that he did not suffer some pain and discomfort from his fall. Wells, however, fails to present evidence that his injury was a substantial disability. He immediately moved into a more lucrative position after his termination and after surgery does not consider himself disabled. Wells has failed to produce any evidence of a "substantial" disability.

6. KRS 344.040 – Kentucky Civil Rights Act

The Kentucky Civil Rights Act ("KCRA") requires that a person be disabled in a fashion analogous to the Americans With Disabilities Act ("ADA"). *See Maddox v. Univ. of Tennessee*, 62 F.3d 843, 846 n.2 (1995) Under the KCRA " 'disability' means, with respect to an individual: (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual; (b) A record of such impairment; or (c) Being regarded as having such impairment." K.R.S. § 344.010(4). The ADA contains the same language. *See* 42 U.S.C. § 12102(2). Wells makes his claim under (1) alleging that he had a physical impairment at the time of the firing.

Wells claims he suffered from impairments that substantially limited his major life

[1]He had previously had knee surgery while working at Huish for a motorbike injury.

activity of working. In order to demonstrate that Wells is substantially limited in the major life activity of working, Wells must prove that he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. 1630.2(j)(3)(i). A court should consider: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* at 1630.2(j)(2).

Analyzing the above-quoted regulations, Wells' impairments did not substantially limit the major life activity of working, and thus, Wells is not a disabled person under the ADA or the Kentucky Civil Rights Act. Wells' impairments were temporary and corrected by surgery. Wells does not assert that his injury caused him to miss excessive work at Huish, has not presented evidence that he was unable to perform his job tasks, and has not presented evidence that he is unable to work today or that his impairments restricted his ability to perform his job or a class of jobs. In fact, Wells reports that he does not consider himself disabled today.

> A. I have no disability, as far as I know at this time. . . to go back for just a moment on the disability, I have an old back injury that, from time to time, acts up. I have – both knees that have been injured and from time to time. I do feel discomfort. I do feel pain. I do have good days. I do have bad days. Okay.
>
> Q. But those are not active disabilities that you consider yourself?
>
> A. I would not – I really would not try to let that interfere with me not being able to do my job.
>
> Q. Okay. What about physical activities or hobbies that you do on your off time.
>
> A. Physical activities that I do on my off time would be working around the house.
>
> Q. What kind of work?

A. Trying to improve the property.
Q. Painting
A. Painting, occasionally, hanging a door.
Q. Yard work?
A. Yard work, some landscaping.

(Wells depo. at 36-37).

Generally, short-term temporary restrictions on a major life activity are not substantially limiting and cannot render a person "disabled" under the ADA. *See Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996). In *Roush*, the plaintiff suffered from a serious kidney condition for about two years. She underwent several medical procedures and only worked about ten weeks a year for two years. Because the plaintiff no longer had kidney problems that affected her ability to work, the court found that her condition was temporary, not substantially limiting, and therefore, not a disability. Here, Wells impairments were temporary and not substantially limiting. There is no genuine issue of material fact.

This is the ____ day of November 1999.

_____
Thomas B. Russell, Judge
United States District Court

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ORDER

Upon Defendant's Motion for Summary Judgment (Doc. #72) and the Court being sufficiently advised,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted.

This is a final and appealable order. There is not just cause for delay.

This is the ____ day of November 1999.

_____
Thomas B. Russell, Judge
United States District Court

cc: Counsel