IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

SAMANTHA SWAIN	)	
	)	**Civil Action No. 7:03CV00505**
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OPINION**
	)	
ADVENTA HOSPICE, INC.	)	**By: Samuel G. Wilson**
	)	
Defendant.	)	**Chief United States District Judge**

This is an action by plaintiff, Samatha Swain, against her former employer, Adventa Hospice, Inc. ("Adventa"), claiming that Adventa wrongfully discharged her. Swain is a Virginia resident and Adventa is a Tennessee corporation with its principal place of business in that state, and the amount in controversy exceeds $75,000. Accordingly, there is diversity jurisdiction pursuant to 28 U.S.C. § 1332. Swain, a registered nurse, claims that another Adventa nurse over-medicated a patient, that Swain decreased the patient's medication thereby saving the patient's life, but that Adventa fired Swain because the incident embarrassed Adventa. The matter is now before the court pursuant to Adventa's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This court finds that Swain's discharge does not implicate an exception to Virginia's employment at-will doctrine and grants Adventa's motion to dismiss.

I.

Adventa employed Swain as an at-will hospice nurse. Swain's supervisor asked Swain to visit a patient, Opal Powers. Jennifer Williams, another nurse employed by Adventa, had been caring for Powers, and Williams had reported that Powers' death was imminent. When Swain visited Powers the following day, however, she determined that Williams had over-medicated Powers which was

contributing to Powers' failing condition. Swain promptly reduced Powers' medication, treated her for over-medication, and Powers' health improved dramatically.

Days later, Swain's supervisor and Williams confronted Swain about her handling of the matter. Swain's supervisor told Swain that her actions embarrassed Adventa and that Swain should not have adjusted the medication. The next day, Adventa fired Swain, claiming it had received adverse reports about her.

Swain filed this suit claiming Williams' treatment of Powers would have resulted in Powers's death if Swain had not intervened and that her termination was in violation of the public policy of Virginia, an exception to Virginia's employment at-will doctrine.

II.

The Supreme Court of Virginia has recognized three narrowly proscribed public policy exceptions to Virginia's employment at-will doctrine. Swain claims that her discharge falls within one of those exceptions–an exception prohibiting an employer from discharging an employee for refusing to engage in a criminal act, in this case, manslaughter. The court finds, however, that since Adventa did not request Swain to violate the law, Adventa did not discharge her for *refusing* to violate the law, a necessary element to Swain's wrongful discharge claim.

"Virginia strongly adheres to the common-law employment at-will . . . 'rule that when the intended duration of a contract for the rendition of services cannot be inferred by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice.'" Lawrence Chrysler Plymouth, Corp. v. Brooks, 465 S.E.2d 806, 808 (Va. 1996) (quoting Lockhart v. Commonwealth Education Systems, 439 S.E.2d 328, 330

(Va. 1994)). Since 1985, however, the Supreme Court of Virginia has recognized a narrowly proscribed public policy exception to Virginia's employment at-will doctrine. Bowman v. State Bank of Keysville, 331 S.E.2d 797 (Va. 1985). It has recognized three factual scenarios where an at-will employee may bring a claim for wrongful discharge in violation of public policy: (1) when "an employer violated a policy enabling the exercise of an employee's statutorily created right"; (2) "when the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy"; and, (3) when "the discharge was based on the employee's refusal to engage in a criminal act." Rowan v. Tractor Supply Co., 559 S.E.2d 709, 711 (Va. 2002).[1]

Virginia first recognized the third public policy exception, discharge based on an employee's refusal to commit a criminal act, in Mitchem v. Counts, 523 S.E.2d 246 (Va. 2000). In Mitchem, the employee alleged that her employer fired her after she refused to engage in a sexual relationship. Id. at 248. The Supreme Court of Virginia reasoned that if the employee had engaged in the sexual relationship, she would have violated criminal statutes prohibiting fornication and lewd and lascivious behavior. Id. at 250. According to the court, the "General Assembly did not intend that the employment at-will doctrine . . . serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity." Id. Consequently, the Court held that an employer may not discharge an employee for refusing to engage in clearly unlawful act without facing

[1]Although the Supreme Court of Virginia has recognized a cause of action in these three situations, the public policy exception "has remained a relatively narrow exception, and attempts to expand the doctrine have met with resistance . . ." Anderson v. ITT Industries, Corp., 92 F. Supp. 2d 516, 520 (E.D. Va. 2000).

civil liability. Id. at 253.

The refusal to perform an unlawful act element– an element the court finds lacking here – serves as a benchmark preventing this exception from swallowing the employment at-will doctrine, and nowhere is that fact any more apparent than when safety or health intersect decision-making. Swain claims that Williams acted incompetently and that Swain saved Powers' life. For purposes of Adventa's motion to dismiss, the court must accept that allegation as true. Whether Swain would prove it so in the crucible of trial is another matter, and that underscores three important points. First, without a refusal to perform a unlawful act element, very little would focus the factual inquiry, and the employment at-will doctrine would lose considerable vitality.[2] Second, where the unlawful act alleged is a failure to conform to a standard of care or reach an appropriate professional judgment, there is no bright line to guide and limit the employer – a hallmark of the public policy exception Swain claims to satisfy. See Jenkins v. Akzo Noble Coatings, Inc., 35 Fed. Appx. 79 (4th Cir. 2002) (mentioning "importance of bright line rules governing the employment relationship" for North Carolina's employment at-will presumption). Third, when the challenged decision falls within the professional's or expert's domain, not only do bright lines informing the employer's decision disappear, but employment litigation also digresses. In the present case, for example, if the court found Swain's allegations sufficient the jury would have to determine whether Williams appropriately medicated Powers or whether, as Swain alleges, Powers would have died without her intervention. These determinations

[2] Moreover, "the reason for a business decision may be hard prove, and the costs of proof plus the risk of mistaken findings of breach may reduce the productivity of the employment relation." See Kumpf v. Steinhaus, 779 F.2d 1323, 1326 (7th Cir. 1985)

would be appropriate in a medical malpractice case. However, they would be expensive digressions in the guise of public policy in a wrongful discharge suit by an employee at-will, and they would substantially erode Virginia's employment at-will doctrine.

In short, Swain does not allege that she refused an unlawful order–a necessary element of the public policy exception Swain advances. Therefore, if this court were to recognize Swain's claim it would be expanding that exception, and a federal court exercising diversity jurisdiction only is permitted to "rule upon the state law as it currently exists and not to surmise or suggest its expansion." Tritle v. Crown Airways, Inc., 928 F.2d 81, 84 (4th Cir. 1990) (citing Washington v. Union Carbide Corp., 870 F.2d 957, 962 (4th Cir. 1989)). Consequently, Swain has failed to satisfy a necessary element of the tort of wrongful discharge as formulated by the Supreme Court of Virginia in Mitchem, and this court is compelled to dismiss her claim.

III.

Because Swain has not alleged that she refused an order to perform an illegal act, her wrongful discharge in violation of public policy claim is not cognizable under Virginia law, and the court grants Adventa's motion to dismiss.

ENTER: This _____ of December, 2003.

_____
Chief United States District Judge

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ROANOKE DIVISION

SAMATHA SWAIN	)	
	)	**Civil Action No. 7:03CV00505**
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
ADVENTA HOSPICE, INC.	)	**By Samuel G. Wilson**
	)	
Defendant.	)	**Chief United States District Judge**

In accordance with the court's memorandum opinion entered this day, it is **ORDERED** and **ADJUDGED** that defendant's motion to dismiss is **GRANTED**.

This action is hereby **STRICKEN** from the active docket of this court.

ENTER this December _____, 2003.

_____
CHIEF UNITED STATES DISTRICT JUDGE