Luu v. Fallon Service, Inc.

Appeals Court of Massachusetts

October 7, 2024, Argued; January 30, 2025, Decided

No. 23-P-340.

Reporter
105 Mass. App. Ct. 236 *; 2025 Mass. App. LEXIS 12 **

NIAL LUU *vs*. **FALLON SERVICE, INC.**, & another.[1]

Prior History: [1]** Worcester. CIVIL ACTION commenced in the Superior Court Department on December 27, 2021.

The case was heard by *J. Gavin Reardon, Jr.*, J., on a motion for judgment on the pleadings.

Counsel: *Nial Luu*, pro se.

Timothy O. Egan for the defendants.

Judges: Present: BLAKE, DITKOFF, & D'ANGELO, JJ.

Opinion by: DITKOFF

Opinion

DITKOFF, J. The plaintiff, Nial Luu, filed a complaint in the Superior Court alleging whistleblower, wrongful termination, and tort claims against Fallon Service, Inc. (Fallon), and its vice-president, Kevin Mont, arising from his termination as an emergency medical technician (EMT) after he photographed an in- **[*237]** jured patient and used that photograph to report alleged medical misconduct by Fallon to the Office of Emergency Medical Services (OEMS). A judge dismissed the complaint for failure to state a claim. Concluding that G. L. c. 149, § 187 (*b*), prohibits retaliation by an ambulance service against an EMT employed by it for reporting medical misconduct to the government, we reverse the dismissal of the whistleblower claim. Further concluding that, based on the arguments raised in the Superior Court, the judge properly dismissed the **[**2]** other counts, we otherwise affirm.

1. *Background*.[2] On November 30, 2019, the plaintiff, an EMT employed by Fallon, responded to a call at Encompass Health Rehabilitation Hospital to transport a patient experiencing an altered mental status to a hospital. The plaintiff and his partner placed the patient in the ambulance. The partner remained in the back of the ambulance with the patient, where he was supposed to provide care to the patient, while the plaintiff drove the ambulance to the hospital. The plaintiff alleges that he witnessed his partner on his cell phone and neglecting to provide care to the patient as they traveled.

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[1] Kevin Mont.

[2] "We summarize the facts alleged in the complaint, which we accept as true in reviewing the allowance of the motion to dismiss, and supplement those facts with the procedural history … ." *SurTan Mfg. Co.* v. *Flagship Ins. Agency, Inc.*, 102 Mass. App. Ct. 342, 343, 205 N.E.3d 1116 (2023).

Upon arrival at the hospital, the plaintiff became aware of a new hemorrhage wound on the patient's arm. The plaintiff questioned his partner about how the injury resulted, but the partner was not able to provide an explanation. Believing that the injury was a result of his partner's misconduct and neglect of the patient, the plaintiff used his personal cell phone to take photographs and one video recording of the patient's arm injury prior to taking the patient into the hospital.

The plaintiff reported the incident to his field supervisor that same day and showed **[**3]** her the photographs and video recording. She praised the plaintiff and requested that he forward the images to her. The plaintiff did so on December 4, 2019. This was the last that the plaintiff heard about the incident from his supervisor, despite numerous attempts to follow up on the status of the report.

Thirty days later, the plaintiff still had not heard anything about the report from his supervisor or otherwise. Despite this, he experienced a change in his job duties during this period, which he believed was a result of his reporting the incident. Whereas the plaintiff had previously worked in the field providing EMT care, **[*238]** his job duties now included sweeping, mopping, and sanitizing the station and paramedic trucks — duties usually reserved for more junior trainees. The plaintiff rarely, if ever, was asked to do these tasks prior to his reporting the incident to his supervisor.

On January 8, 2020, the plaintiff met with Fallon's vice-president, human resources director, and senior vice-president. These individuals notified the plaintiff that his possession of the images was in violation of company policy and instructed him to delete the photographs and video recording. The plaintiff, **[**4]** however, believed that he was required to file a report with OEMS if Fallon did not pursue an internal investigation. The plaintiff subsequently filed a report with OEMS on January 14.

On January 17, 2020, the plaintiff again met with Fallon's vice-president, at which time he deleted the images. Nonetheless, Fallon terminated the plaintiff, explaining in a letter that he was terminated for failing to "comply with company policy FP-247" by not deleting the images at the direction of his superiors.

The plaintiff filed a complaint in the Superior Court against Fallon and Fallon's vice-president for a whistleblower violation (count 1), wrongful termination in violation of public policy (count 2), and negligent infliction of emotional distress (count 3).[3] The complaint labeled the whistleblower count as falling under G. L. c. 149, § 185 (*b*) (3).

The defendants moved for judgment on the pleadings. Both sides briefed the whistleblower claim under G. L. c. 149, § 185 (*b*) (3), and accepted that the statute applied to Fallon. (In fact, it applies only to governmental entities, G. L. c. 149, § 185 [*a*] [2].) In ruling, the judge sua sponte raised the inapplicability of G. L. c. 149, § 185 (*b*) (3), to Fallon and dismissed on that basis. The judge also found that the termination did not violate public policy **[**5]** and that the tort claim was barred by the exclusivity provisions of the workers' compensation act, G. L. c. 152, § 26.

The plaintiff filed a prompt motion for relief from judgment under Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), arguing that the whistleblower claim falls under G. L. c. 149, § 187 (*b*), the statute prohibiting retaliation against whistleblowers in the medical context, and suggesting that the complaint could be amended to change the label on the whistleblower count, if necessary. The judge denied the motion, concluding that the plaintiff had not **[*239]** shown excusable neglect and that any amendment would be futile because G. L. c. 149, § 187, did not apply to the plaintiff either. This appeal followed.

2. *Standard of review*. "A motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c) is 'actually a motion to dismiss … [that] argues that the complaint fails to state a claim upon which relief can be granted.'" *Mullins* v. *Corcoran*, 488 Mass. 275, 281, 172 N.E.3d 759 (2021), quoting *Jarosz* v. *Palmer*, 436 Mass. 526, 529, 766 N.E.2d 482 (2002). "We review the allowance of a motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c) … de novo." *C.M.* v. *Commissioner of the Dep't of Children & Families*, 487 Mass. 639, 646, 169 N.E.3d 466 (2021), quoting *Marchese* v. *Boston Redev. Auth.*, 483 Mass. 149, 156, 130 N.E.3d 1222 (2019). "We draw our facts from

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[3] The plaintiff also proceeded against the vice-president for intentional interference with contractual relations. The plaintiff raises no issue concerning the dismissal of this count in his brief, and thus it is not before us.

the well pleaded allegations of the complaint and the admissions or failures of denial presented by the answer." *Ridgeley Mgt. Corp.* v. *Planning Bd. of Gosnold*, 82 Mass. App. Ct. 793, 804 (2012). To survive a motion to dismiss, the plaintiff must present factual allegations that rise above the level of speculation, and plausibly **[**6]** suggest an entitlement to relief. See *Cournoyer* v. *Department of State Police*, 93 Mass. App. Ct. 90, 91, 99 N.E.3d 802 (2018).

3. *Scope of the medical whistleblower statute*. General Laws c. 149, § 187, sets forth a statutory scheme that prohibits health care facilities from terminating or otherwise retaliating against health care providers who report certain forms of believed misconduct to supervisors or public authorities.[4] The parties agree **[*240]** that Fallon is a health care facility.[5] They disagree whether the plaintiff, an EMT, qualifies as a health care provider under the statutory definition.

"Our primary duty in interpreting a statute is 'to effectuate the intent of the Legislature in enacting it.'" *Commonwealth* v. *Sabin*, 104 Mass. App. Ct. 303, 305, 236 N.E.3d 1226 (2024), quoting *Commonwealth* v. *Sousa*, 88 Mass. App. Ct. 47, 49, 35 N.E.3d 440 (2015). "The language of the statute is the starting point for all questions of statutory interpretation." *Sabin, supra*, quoting *Bank of N.Y. Mellon* v. *Morin*, 96 Mass. App. Ct. 503, 507, 136 N.E.3d 396 (2019). "Statutory language should be given effect consistent with its plain meaning. Where … that language is clear and unambiguous, it is conclusive as to the intent of the Legislature." *Bank of N.Y. Mellon, supra*, quoting *Patriot Resorts Corp.* v. *Register of Deeds for the County of Berkshire, N. Dist.*, 71 Mass. App. Ct. 114, 117, 879 N.E.2d 716 (2008).

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[4] Specifically, G. L. c. 149, § 187 (*b*), provides the following:

> "A health care facility shall not refuse to hire, terminate a contractual agreement with or take any retaliatory action against a health care provider because the health care provider does any of the following:
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> "(1) discloses or threatens to disclose to a manager or to a public body an activity, policy or practice of the health care facility or of another health care facility with whom the health care provider's health care facility has a business relationship, that the health care provider reasonably believes is in violation of a law or rule or regulation promulgated pursuant to law or violation of professional standards of practice which the health care provider reasonably believes poses a risk to public health; **[**7]**
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> "(2) provides information to or testifies before any public body conducting an investigation, hearing or inquiry into any violation of a law, or rule or regulation promulgated pursuant to law or activity, policy or professional standards of practice of a health care provider, by the health care facility or by another health care facility with whom the health care provider's health care facility has a business relationship, which the health care provider reasonably believes poses a risk to public health;
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> "(3) objects to or refuses to participate in any activity, policy or practice of the health care facility or of another health care facility with whom the health care provider's health care facility has a business relationship which the health care provider reasonably believes is in violation of a law or rule or regulation promulgated pursuant to law or violation of professional standards of practice which the health care provider reasonably believes poses a risk to public health; or
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> "(4) participates in any committee or peer review process, files a report or a complaint, or an incident report discussing allegations of unsafe, dangerous or potentially dangerous care."

[5] The statutory definition of "health care facility" is

> "an individual, partnership, **[**8]** association, corporation or trust or any person or group of persons that employs health care providers, including any hospital, clinic, convalescent or nursing home, charitable home for the aged, community health agency, pharmacy or other provider of health care services licensed, or subject to licensing by, or operated by, the department of public health; any facility as defined in section 3 of chapter 111B; any private, county or municipal facility, department or unit which is licensed or subject to licensing by the department of mental health pursuant to section 19 of chapter 19, or by the department of developmental services pursuant to section 15 of chapter 19B; any facility as defined in section 1 of chapter 123; a state-operated veterans' home; or any facility as set forth in section 1 of chapter 19 or section 1 of chapter 19B."

G. L. c. 149, § 187 (*a*).

Under G. L. c. 149, § 187 (*a*), a "health care provider" is

> "an individual who is a licensed health **[**9]** care provider under **[*241]** the provisions of chapter 112 including, but not limited to, registered nurses, licensed practical nurses, physicians, physician assistants, chiropractors, dentists, occupational therapists, physical therapists, optometrists, pharmacists, podiatrists, psychologists and social workers or any other health care provider who performs or has performed health care related services for and under the control of a health care facility for care-related services."

The plaintiff here falls squarely within "any other health care provider who performs or has performed health care related services for and under the control of a health care facility for care-related services." G. L. c. 149, § 187 (*a*). As an EMT employed by Fallon, the plaintiff performed care-related services for and under the control of Fallon, a health care facility, including driving an ambulance and providing patient care in transport. During the incident in question, the plaintiff responded to a call at a rehabilitation hospital for a patient experiencing a medical emergency. The plaintiff was responsible for driving the ambulance as his partner provided medical care to the patient in the vehicle. In each of these tasks, the plaintiff **[**10]** interacted directly with the patient, who required immediate health care service. This falls within the patient care that G. L. c. 149, § 187, was designed to safeguard.

We are not persuaded by Fallon's argument that *Perez* v. *Bay State Ambulance & Hosp. Rental Serv., Inc.*, 413 Mass. 670, 602 N.E.2d 570 (1992), requires a different result. In *Perez*, the Supreme Judicial Court determined that the definition of "health care provider" in G. L. c. 231, § 60B, the medical malpractice tribunal statute, did not include EMTs. *Perez, supra* at 675-676. General Laws c. 231, § 60B, states,

> "*For the purposes of this section*, a provider of health care shall mean a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, social worker, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment" (emphasis added).

The Supreme Judicial Court held that, because EMTs are not specifically enumerated within the Legislature's list of "provid- **[*242]** er[s] of health care," G. L. c. 231, § 60B, did not apply. *Perez, supra*. This circumscribed definition does not bear on the meaning of the open-ended phrase "any other health care provider **[**11]** who performs or has performed health care related services for and under the control of a health care facility for care-related services" that appears in the medical whistleblower statute, G. L. c. 149, § 187 (*a*).

It is unsurprising that G. L. c. 149, § 187 (*a*), incorporates expansive phrasing not found in G. L. c. 231, § 60B, such as "including, but not limited to" and "or any other health care provider," given its difference in purpose. General Laws c. 231, § 60B, was enacted to establish medical tribunals to "guarantee the continued availability of medical malpractice insurance" by "discourag[ing] frivolous claims whose defense would tend to increase premium charges for medical malpractice insurance." *Lane* v. *Winchester Hosp.*, 101 Mass. App. Ct. 74, 77, 187 N.E.3d 1025 (2022), quoting *Brodie* v. *Gardner Pierce Nursing & Rest Home, Inc.*, 9 Mass. App. Ct. 639, 641, 403 N.E.2d 1184 (1980). In contrast, G. L. c. 149, § 187, was "designed to safeguard patient care by protecting the rights of health care providers who expose deficiencies in care that violate laws or regulations or professional standards that endanger public health." *Commodore* v. *Genesis Health Ventures, Inc.*, 63 Mass. App. Ct. 57, 66, 824 N.E.2d 453 (2005). The number of individuals who require protection for reporting misconduct to supervisors or public authorities exceeds those whose duties expose them to liability for medical malpractice. As such, there is nothing odd in the notion that the scope and coverage of "health care providers" protected under G. L. c. 149, § 187, is more expansive than those "health **[**12]** care providers" included in G. L. c. 231, § 60B.

To be sure, the complaint wrongly labeled the whistleblower count as a "violation of G.L. c.149 § 185(b)(3)." Massachusetts Rule of Civil Procedure 8 (a), 365 Mass. 749 (1974), however, "does not require a plaintiff to even allege the correct legal theory if the facts as alleged entitle him to any form of relief." *Windross* v. *Village Automotive Group, Inc.*, 71 Mass. App. Ct. 861, 867 n.4, 887 N.E.2d 303 (2008). Accord *Jones* v. *Boykan*, 464 Mass. 285, 288, 982 N.E.2d 1093 (2013); *Tetrault* v. *Mahoney, Hawkes & Goldings*, 425 Mass. 456, 463, 681 N.E.2d 1189 (1997).

Where the complaint made out a cognizable whistleblower claim under G. L. c. 149, § 187 (*b*), but cited the wrong statute, its dismissal for failure to state a claim was in error.

To be sure, the plaintiff did not invoke G. L. c. 149, § 187 (*b*), in opposing the defendants' motion for dismissal. Usually, an **[*243]** argument not raised in the Superior Court is waived on appeal. See *K & K Dev., Inc.* v. *Andrews*, 103 Mass. App. Ct. 338, 350 n.22, 219 N.E.3d 306 (2023). Here, however, the reason why the plaintiff did not raise that argument is that the defendants never challenged — and, indeed, accepted — that G. L. c. 149, § 185 (*b*) (3), applied to Fallon and the plaintiff. Although the judge was entitled to raise the inapplicability of that statute sua sponte, the plaintiff was entitled to notice of this possible, unbriefed ground for dismissal and to an opportunity to respond with the argument that the complaint also stated a claim under G. L. c. 149, § 187 (*b*). We cannot attribute waiver to the plaintiff's failure to anticipate and preemptively respond to the judge's sua sponte ground **[**13]** for dismissal. Accordingly, the whistleblower count should not have been dismissed.

4. *Termination in violation of a recognized public policy*. "As an exception to the general rule that an employer may terminate an at-will employee at any time with or without cause, we have recognized that an at-will employee has a cause of action for wrongful termination only if the termination violates a clearly established public policy." *Barbuto* v. *Advantage Sales & Mktg., LLC*, 477 Mass. 456, 471, 78 N.E.3d 37 (2017), quoting *King* v. *Driscoll*, 418 Mass. 576, 582 (1994), *S.C.*, 424 Mass. 1 (1996). "[T]he public policy exception to at-will employment has been recognized 'for *asserting a legally guaranteed right* (e.g., filing a worker's compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury).'" *Meehan* v. *Medical Info. Tech., Inc.*, 488 Mass. 730, 733, 177 N.E.3d 917 (2021), quoting *Smith-Pfeffer* v. *Superintendent of the Walter E. Fernald State Sch.*, 404 Mass. 145, 149-150, 533 N.E.2d 1368 (1989). The law recognizes a fourth category to the exception, for "performing important public deeds, even though the law does not absolutely require the performance of such a deed." *Meehan, supra*, quoting *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 810-811, 575 N.E.2d 1107 (1991).

The only argument made by the plaintiff in the Superior Court was that "M.G.L. c. 111, § 72G required Mr. Luu to create a detailed patient neglect report, and his termination, as a result of the contents of his report, is a direct violation of the statute." This section, **[**14]** however, did not impose an obligation on either the plaintiff or Fallon. General Laws c. 111, § 72G, imposes a duty **[*244]** on an expansive list of medical and nonmedical persons[6] (and creates a right for "any other person") to report abuse, mistreatment, neglect, or misappropriation committed against "an individual who receives health, homemaker or hospice services at home from an individual employed by a home health agency or a hospice program" or a person "who resides in a long term care facility." G. L. c. 111, §§ 72F, 72G, first & second pars. Here, the complaint does not allege that the patient was at home at the time of the injury and, indeed, alleges that the patient was being cared for by another EMT working for an ambulance service. Accordingly, this statute provided no duty for the plaintiff to report the injury and created no public policy against his termination.

We do not suggest that there is no other basis in public policy to forbid the termination of an EMT because he reported an injury to a patient to the government. (Indeed, as stated, G. L. c. 149, § 187 [*b*], appears to forbid just that.) Here, however, the defendants specifically argued that there was no basis in public policy to forbid the plaintiff's termination, and the plaintiff raised only G. L. c. 111, § 72G, as a basis for finding such a public policy. When given notice, an appellant may not raise on appeal grounds for opposing the motion to dismiss that were not raised in the Superior Court. See *Slive & Hanna, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 100 Mass.

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[6] The list contains a

> "physician, medical intern or resident, physician assistant, registered nurse, licensed practical nurse, nurse aide, orderly, home health aide, hospice worker, homemaker, administrator, responsible person, medical examiner, dentist, optometrist, optician, chiropractor, podiatrist, coroner, police officer, speech pathologist, audiologist, social worker, pharmacist, physical **[**15]** or occupational therapist or health officer, paid for caring for a patient or resident."

G. L. c. 111, § 72G, first par.

App. Ct. 432, 441 n.17, 178 N.E.3d 407 (2021). Accordingly, we have no cause to disturb the dismissal of this count.

5. *Exclusivity of the workers' compensation act*. "The [workers' compensation act] provides the exclusive remedy for claims brought by an injured employee against an employer." *Meehan* v. *Lazer Spot, Inc.*, 104 Mass. App. Ct. 690, 692, 243 N.E.3d 486 (2024), quoting *Molina* v. *State Garden, Inc.*, 88 Mass. App. Ct. 173, 178, 37 N.E.3d 39 (2015). "Under [the exclusivity provision], an injury is compensable where the plaintiff is an employee who suffers a 'personal injury' that arises 'out of and in the course of his employment.'" *Saab* **[*245]** v. *Massachusetts CVS Pharmacy, LLC*, 452 Mass. 564, 619-620 (2008), quoting *Green* v. *Wyman-Gordon Co.*, 422 Mass. 551, 558, 664 N.E.2d 808 (1996). "Claims for negligence, gross negligence, and even wilful misconduct by the employer, **[**16]** whatever the genesis, are all covered under the exclusive remedy provision of the act." *Estate of Moulton* v. *Puopolo*, 467 Mass. 478, 490, 5 N.E.3d 908 (2014).

The plaintiff argues that his claim for negligent infliction of emotional distress is not barred because "'serious and willful misconduct' by a supervisor or employer is an exception to the exclusivity provision of the Workers' Compensation Act and … Luu is entitled to a claim under Chapter 152 Section 28." General Laws c. 152, § 28, however, does not negate the exclusivity of workers' compensation, but merely increases the recovery obtained through workers' compensation.[7] See, e.g., *CNA Ins. Cos.* v. *Sliski*, 433 Mass. 491, 494-495, 744 N.E.2d 634 (2001) ("A worker who is injured by the 'serious and wilful misconduct' of an employer must forgo the recovery of tort damages that would likely be far more substantial and a common-law claim with a greater likelihood of success than his recovery or claim could be for injuries resulting from an employer's mere negligent conduct"); *Drumm's Case*, 74 Mass. App. Ct. 38, 41, 903 N.E.2d 1127 (2009) ("The 'serious and wilful misconduct' … lays the foundation for double compensation under § 28 …").

6. *Conclusion*. So much of the judgment as dismissed count 1 is reversed. The judgment is otherwise affirmed. The denial of the motion for relief from judgment is affirmed.[8]

So ordered.

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[7] General Laws c. 152, § 28, states, "If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled."

[8] The plaintiff raises no argument on appeal regarding the denial of the motion for relief from judgment relating to counts other than the whistleblower count. Because we are reversing the dismissal of count 1, we need not further explore whether the judge erred in denying relief from judgment regarding that count.