

. Affirmed
Chain, Ballance
· Concurring:
Riggsbee
Scott

NO. COA00-75

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2001

ELAINE GEORGALIS and
NICHOLAS GEORGALIS,

Plaintiffs-Appellants,

v.

N.C. Industrial Commission
T.A.-14045; 14046

EAST CAROLINA UNIVERSITY,
an institution of the
State of North Carolina,

Defendant-Appellee.

Appeal by plaintiffs from decision and order entered 17 June 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2001.

Elaine Georgalis and Nicholas Georgalis, plaintiffs-appellants, pro se.

Attorney General Michael F. Easley, by Assistant Attorney General Don Wright, for the State.

TYSON, Judge

Plaintiffs Elaine and Nicholas Georgalis ("plaintiffs") appeal a decision and order of the North Carolina Industrial Commission denying plaintiffs compensation for emotional distress suffered by Ms. Georgalis and resulting loss of consortium to Mr. Georgalis. We affirm the Commission's decision for the reasons below.

Issues

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CLERK COURT OF APPEALS
OF NORTH CAROLINA

Plaintiffs instituted this action on 3 October 1995 against defendant, East Carolina University ("ECU"), in its capacity as Ms. Georgalis' employer. Plaintiffs' appeal involves three issues: (1) whether ECU was negligent in its handling of a 1994 work reduction request by Ms. Georgalis; (2) whether ECU was negligent in its cancellation of Ms. Georgalis' health insurance provided by ECU; and (3) whether ECU was negligent in misinforming Ms. Georgalis of her eligibility for long-term disability benefits. Plaintiffs allege for each issue that ECU's actions were the proximate and foreseeable cause of severe emotional trauma suffered by Ms. Georgalis.

Facts

The Commission found as fact that Ms. Georgalis began working for ECU in November 1989 as a research technician. Ms. Georgalis' immediate supervisor was Dr. Paul Fletcher, who reported to Dr. Paul Phibbs, Chairman of the Department of Microbiology and Immunology at ECU's medical school.

In 1990, Ms. Georgalis was diagnosed as suffering from fibromyalgia, sleep problems, and a bulging cervical disc for which she was prescribed a course of physical therapy. Based on her medical condition, Ms. Georgalis sought to reduce her full-time work hours to thirty-two hours per week for a minimum of nine

months. Ms. Georgalis directed a letter to Dr. Fletcher requesting the reduced hours, and the letter was forwarded to Dr. Phibbs as the department chairman.

On 13 August 1990, Ms. Georgalis met with Dr. Phibbs regarding her request for reduced hours. The Commission found that during this meeting, Ms. Georgalis revealed that she was under the care of various physicians, including a psychiatrist who was treating her for depression. Dr. Phibbs informed Ms. Georgalis that he would require letters from her doctors before he would consider her request. Ms. Georgalis obtained a prescription pad note from her treating physician, Dr. Ross Shuping, requesting that she be given the reduced schedule.

Upon presenting the note to Dr. Phibbs' secretary, Bettie Baggett, Ms. Georgalis was informed that the note would be insufficient to support her request. Ms. Baggett arranged for Ms. Georgalis to meet with ECU's personnel director, Edgar Bass, who also informed Ms. Georgalis that Dr. Phibbs was the decision-maker on such requests. Mr. Bass informed Ms. Georgalis that Dr. Phibbs had the authority to require a doctor's explanation to support her request, and that if she did not meet his requirement of producing a letter, Dr. Phibbs could deny her request.

Ms. Georgalis eventually obtained the required letter from Dr.

Shuping, whereupon Dr. Phibbs granted her request for a thirty-two hour work week beginning September 1990. The Commission determined that at no time during the consideration of Ms. Georgalis' request did she provide Dr. Phibbs with any medical records, letters, or documentation from Dr. Ray Evans, her treating psychiatrist.

Ms. Georgalis continued to work a reduced schedule until 1 July 1991 when she returned full-time as a technician in Dr. Fletcher's laboratory. On 27 September 1993, Ms. Georgalis again sought to reduce her schedule. She made an oral request to ECU employee, Jim Midgette, for a twenty-five to thirty-hour work week. When Ms. Georgalis did not receive a response from Mr. Midgette by 9 February 1994, she went directly to Dr. Phibbs with a letter from Dr. Evans. The letter explained Ms. Georgalis' difficulty adjusting to new medication and requested that she be given the reduced schedule.

The Commission found that when Ms. Georgalis presented the letter to Dr. Phibbs, his response was that he would not approve Ms. Georgalis' request because she was hired to work full-time and that is what he expected her to do. Ms. Georgalis responded that, based on her prior 1990 dealings with Dr. Phibbs, she thought the letter from Dr. Evans would be sufficient to support her request. Dr. Phibbs responded that what she needed was his approval. Ms.

Georgalis testified she felt intimidated and hopeless, and she began to cry. Ms. Georgalis further stated she made a move to leave the room, but Dr. Phibbs instructed her to sit down.

During the course of this meeting, Dr. Phibbs discussed various issues not relevant to Ms. Georgalis' request for reduced hours, including why employees in Dr. Fletcher's lab were "always trying to stab [him] in the back," that Dr. Fletcher's lab was "irresponsible," and that Ms. Georgalis and her husband had not attended Dr. Phibbs' Christmas party.

Dr. Phibbs then called Brenda Lewis, his secretary, into the office and told Ms. Georgalis to repeat her request for reduced hours, the problems that were occurring in Dr. Fletcher's laboratory, and why Ms. Georgalis was upset. Ms. Georgalis responded that it was not possible for her to explain why she was upset, and that Ms. Lewis would not be able to understand.

Upon leaving Dr. Phibbs' office, Ms. Georgalis immediately sought assistance from Dr. Evans. The Commission determined that Ms. Georgalis was suffering from severe emotional distress caused, at least in part, by the meeting with Dr. Phibbs.

As a result, Ms. Georgalis was out of work from 9 February 1994 until 11 April 1994 when she returned to work twenty hours per week. ECU paid Ms. Georgalis' health insurance premiums pursuant

to its family medical leave plan which entitled her to such payments until 4 April 1994. Ms. Georgalis was also provided short-term disability benefits. However, when she returned as a part-time employee, Ms. Georgalis was no longer eligible to have ECU pay her health insurance premiums.

The Commission found that in March 1994, Elizabeth Whitley of ECU's human resources department advised Ms. Georgalis of her ineligibility to receive premium payments from ECU. In June 1994, Carolyn Stocks, also of ECU's human resources department, telephoned Ms. Georgalis to inform her that she owed health insurance premiums dating back to the time Ms. Georgalis' family medical leave coverage expired. Ms. Stocks asked Ms. Georgalis if she preferred to have the payments deducted from her salary or her short-term disability payments. Ms. Georgalis responded that the payments could be deducted from either source.

In November 1994, Ms. Whitley discovered ECU had erroneously been paying Ms. Georgalis' insurance premiums after the expiration of her family medical leave coverage on 4 April 1994. Ms. Whitley informed Ms. Georgalis of the oversight, and told her that it would be her responsibility to reimburse ECU for payments after April 1994. Ms. Georgalis responded that she would not reimburse ECU. On two separate occasions, Ms. Whitley and Ms. Stocks informed Ms.

Georgalis that her failure to reimburse ECU for the erroneous payments would result in retroactive cancellation of her insurance. Ms. Georgalis confirmed her intent not to reimburse ECU on both occasions. The Commission found that Ms. Georgalis was competent to make this decision.

In February 1995, Mr. Georgalis discovered his wife's health insurance coverage through ECU had been canceled effective 1 June 1994. Mr. Georgalis expressed his belief to ECU that Ms. Georgalis had not canceled her insurance. On 13 March 1995, Ms. Whitley contacted ECU's independent health plan administrator to request that Ms. Georgalis' insurance be reinstated retroactively to 1 June 1994. Ms. Whitley made a similar request by letter on 28 March 1995, but the request was denied by the plan administrator. ECU informed Mr. Georgalis of the denial on 5 April 1995, and further advised him that it would be plaintiffs' responsibility to pursue the denial further. Ms. Georgalis thereafter suffered an emotional breakdown and was hospitalized the following day due to severe emotional distress.

On 2 May 1995, ECU's Vice Chancellor, Richard Brown, contacted the executive director of ECU's health plan and explained plaintiffs' circumstances, including that Ms. Georgalis may not have been capable to make her own determination as to cancellation

of her coverage. As a result, Ms. Georgalis' insurance was reinstated retroactively to June 1994.

The Commission further found that in October 1995, Ms. Georgalis again excused herself from work as a result of emotional problems. Ms. Georgalis believed that since April 1994 when she transferred prior employment with local government to the state retirement system, she had accumulated five years of creditable service entitling her to long-term disability benefits. However, Ms. Georgalis received conflicting information from ECU on her eligibility for long-term disability benefits. Ms. Jenkins advised Ms. Georgalis by letter dated 13 November 1995 that Ms. Georgalis was not eligible for such benefits past March 1996 when her short-term disability expired, and that Ms. Georgalis would need to submit her resignation if she did not report to work 1 April 1996. Upon receiving the letter, Ms. Georgalis contacted the state retirement system to confirm that she was, in fact, eligible for long-term disability. The Commission found that at the time Ms. Jenkins erroneously informed Ms. Georgalis of her ineligibility, the paperwork in ECU's possession did not reflect any transfer of prior employment resulting in five years of creditable service.

Plaintiffs filed claims against ECU for negligent infliction of emotional distress on Ms. Georgalis, and the resulting loss of

consortium to Mr. Georgalis on 3 October 1995. A decision and order in favor of ECU was issued by the deputy commissioner on 16 April 1998. The full Commission affirmed the decision on 17 June 1999, finding that "[t]he damages sustained by Elaine Georgalis and Nicholas Georgalis were not caused by negligence on the part of defendant's named employees, nor was the emotional injury of Ms. Georgalis resulting from the actions of defendant's named employees foreseeable." Plaintiffs appeal.

Plaintiffs bring twenty-four assignments of error on appeal, alleging that the Commission erred in denying their claims to compensation based on ECU's actions in three instances: (1) the actions of Dr. Phibbs and inaction of Mr. Bass and Mr. Midgette in the consideration of Ms. Georgalis' work reduction request; (2) the actions of Ms. Jenkins, Ms. Whitley, and Ms. Stocks in the cancellation of and communication regarding Ms. Georgalis' insurance coverage, and (3) the erroneous information provided to Ms. Georgalis by ECU regarding her eligibility for long-term disability benefits.

Our standard of review of a decision and order of the Commission is well-established and is limited to a determination of "(1) whether the Commission's findings of fact are supported by any

competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, ___ N.C. App. ___, ___, 535 S.E.2d 602, 604 (2000) (citation omitted). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted). Moreover, this Court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Id.* (quotation omitted).

In order to state a claim for negligent infliction of emotional distress, a plaintiff must show, "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990); *see also, e.g., Simmons v. Chemol Corp.*, 137 N.C. App. 319, 325, 528 S.E.2d 368, 371 (2000). The plaintiff must have suffered severe distress, as opposed to "mere temporary fright, disappointment or regret." *Johnson* at 304, 395 S.E.2d at 97. Moreover, the evidence must

establish that the severe distress suffered was "a proximate and foreseeable result of the defendant's negligence." *Robblee v. Budd Services, Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, disc. review denied, 352 N.C. 676, ___ S.E.2d ___ (2000) (quoting *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993)).

I. ECU's denial of February 1994 work reduction request

The Commission found as fact that at all times during the 9 February 1994 meeting with Ms. Georgalis, Dr. Phibbs acted within the course and scope of his authority as chairman of the department. The Commission further determined that Dr. Phibbs should reasonably have recalled that in 1990 Ms. Georgalis was under the care of a psychiatrist for depression. However, the Commission found that on 14 February 1994, four years after their 1990 meeting, Dr. Phibbs had no basis of knowing that Ms. Georgalis was still suffering from depression or that the discussion regarding her reduced work hours would lead to her severe emotional trauma.

Our thorough review of the record reveals these findings to be supported by competent evidence. The details of the interaction between Ms. Georgalis and Dr. Phibbs in 1990 and 1994 were extensively explored through the testimony of various witnesses, and such testimony supports the Commission's findings of what transpired between the parties. Ms. Lewis testified that in 1994

when Dr. Phibbs called her into his office and asked Ms. Georgalis to explain what had happened, Ms. Georgalis was upset, but twice voluntarily stated "that it was nothing that Dr. Phibbs had done or said to her."

Both Dr. Phibbs and Ms. Baggett testified that during the April 1990 meeting with Ms. Georgalis there was no discussion regarding any psychiatric care or related issues Ms. Georgalis was experiencing. Dr. Phibbs testified that Ms. Georgalis mentioned she was seeing a "counselor" and may have said she was taking anti-depressants, but that the parties did not discuss those issues. Dr. Phibbs testified that Ms. Georgalis did not appear emotionally fragile in their 1990 meeting, but was "forcefully insisting that she didn't understand why she needed to have any kind of doctor's documentation" to support her request, and was "quite insistent."

Dr. Phibbs also testified that after their April 1990 meeting he had no dealings with Ms. Georgalis until their meeting in February 1994. Dr. Phibbs stated he had no communications or observed any behavior between April 1990 and February 1994 that would have caused him to be overly concerned about Ms. Georgalis, or to believe that she was experiencing stress and related problems. Testimony from Dr. Evans confirmed that prior to the meeting in February 1994, nothing was outwardly unusual about Ms. Georgalis' appearance or behavior that would lead those in everyday contact with her to believe she had any unusual susceptibility to

an adverse psychiatric reaction. Dr. Evans stated that a reasonable person dealing with Ms. Georgalis would have no basis to know that she suffered from psychological problems.

We hold such evidence competent to support the Commission's finding that although in 1994 Dr. Phibbs reasonably should have recalled that Ms. Georgalis had previously experienced problems with depression, Dr. Phibbs had no way of knowing in February 1994 that Ms. Georgalis was suffering from any peculiar emotional issues which made her unusually susceptible to severe emotional trauma. The resolution of any inconsistencies between Dr. Phibbs' testimony and that of other witnesses is within the sole province of the Commission. See, e.g., *Adams v. AVX Corp.* 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)) ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.").

We have reviewed the evidence regarding the actions of Mr. Bass and Mr. Midgette and find no grounds upon which plaintiffs can maintain that either of them should have foreseen that their inactions would cause Ms. Georgalis' mental breakdown. Ms. Baggett, who was present in the 1990 meeting between Ms. Georgalis and Mr. Bass, testified that Mr. Bass attempted to inform Ms. Georgalis about ECU's policies and procedures regarding work and

salary reduction for her own benefit, but that Ms. Georgalis was uncooperative and agitated.

II. ECU's cancellation of Ms. Georgalis' health insurance

The Commission found that at all times Ms. Stocks and Ms. Whitley acted reasonably in informing Ms. Georgalis of her health insurance coverage status, including canceling Ms. Georgalis' coverage after she informed both employees that she would not reimburse ECU for erroneous payments of her premiums after April 1994. The Commission further found no evidence of foreseeability on either employee's part concerning the effect their actions would have on Ms. Georgalis' emotional state.

The Commission's findings are supported by competent evidence. The record reveals that Ms. Whitley and Ms. Stocks adequately informed Ms. Georgalis of the status of her insurance coverage, and their testimony supports the findings of the Commission as to the communications between the parties. While plaintiffs dispute Ms. Whitley's testimony that she contacted Ms. Georgalis in November 1994 and discussed Ms. Georgalis' desire to cancel her insurance, the Commission is the appropriate body to resolve such issues of credibility. See, e.g., *Young v. Hickory Bus. Furn.*, 137 N.C. App. 51, 55, 527 S.E.2d 344, 348, reversed and remanded on other grounds, ___ N.C. ___, 538 S.E.2d 912 (2000).

If ECU should have further documented the process by which Ms. Georgalis' coverage was temporarily canceled, the record contains

competent evidence which supports the Commission's findings that any damages Ms. Georgalis suffered as a result were not foreseeable. Given the testimony of Dr. Evans, we agree with the Commission that neither employee should reasonably have foreseen Ms. Georgalis would experience severe emotional trauma. Both Ms. Whitley and Ms. Stocks testified that in their conversations with Ms. Georgalis, her demeanor was normal, not at all irrational or hysterical, and that it was "just plain, normal conversation."

Ms. Whitley stated that no one ever informed her not to discuss insurance matters with Ms. Georgalis due to any peculiar infirmity or stress-related problems Ms. Georgalis might experience as a result. Ms. Georgalis never indicated to Ms. Whitley that she was unable to understand such matters. Even if Ms. Whitley and Ms. Stocks knew through review of insurance claims that Ms. Georgalis was seeking therapy, such knowledge does not impute foreseeability that Ms. Georgalis would react with more than "mere temporary fright, disappointment or regret." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. Plaintiffs' claim is without merit. See *Bigger v. Vista Sales & Marketing, Inc.* 131 N.C. App. 101, 505 S.E.2d 891 (1998) (regardless of negligence of employer's insurer and agent in failing to advise employer regarding need to purchase workers' compensation insurance, claim for negligent infliction of emotional distress must fail where evidence does not support element of foreseeability).

III. ECU's communication regarding long-term disability

The Commission found that North Carolina's long-term disability plan is not administered by ECU, and that ECU acted reasonably in informing Ms. Georgalis that she was ineligible for long-term disability benefits based on the records in its possession. The Commission further determined that even if ECU's reliance on the records was not reasonable, "it was not reasonably foreseeable that these erroneous statements would cause emotional injury to Ms. Georgalis."

Our review of the testimony presented to the Commission reveals at least some competent evidence to support a finding that Ms. Jenkins' actions did not rise to the level of actionable negligence. The Commission was presented with a letter from the state's Deputy Director of the Retirement Systems Division stating that employers are not notified when a member of the state retirement plan transfers past creditable service from local to state government. Further, the letter confirmed that the state Disability Income Plan is administered by the State Retirement Systems Division of the Department of Treasury, and that "[e]mployers are not agents of the Retirement Systems Division and are not responsible for determining whether employees are eligible for extended short-term or long-term disability benefits nor are they responsible for determining employees' eligibility for retirement benefits." The letter further noted that, "[i]t would

appear that Ms. Georgalis was knowledgeable of this."

The Deputy Director noted that although employers are provided forms to assist in determining employees' eligibility for short-term disability, no such forms are provided for long-term benefits, "as the employers are not responsible for making this determination." Such information, in addition to the testimony of Ms. Jenkins, as well as Dr. Evans' deposition testimony that any misstatement regarding long-term disability did not add "in any significant way" to the problems Ms. Georgalis was suffering, is competent to support the Commission's finding that Ms. Jenkins was not actionably negligent.

The Commission's findings of fact were supported by competent evidence in the record, and are therefore conclusive on appeal. These findings in turn support the Commission's conclusion of law that ECU was not liable for Ms. Georgalis' reaction. Therefore, Mr. Georgalis' derivative claim for loss of consortium necessarily fails. *See, e.g., Mroska v. Feldman*, 90 N.C. App. 261, 264, 368 S.E.2d 39, 40 (1988) (loss of consortium derivative in nature).

Affirmed.

Judges GREENE and HORTON concur.

Report per Rule 30(e).