

2011 IL App (2d) 101150U
No. 2-10-1150
Order filed September 16, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THOMAS DAVIA)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-652
)	
STAR INCORPORATED f/k/a STAR)	
DISPLAYS, INC.,)	Honorable
)	Judith M. Brawka,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment in favor of defendant where plaintiff did not establish that his termination from employment was in retaliation for filing a workers' compensation claim against defendant.

¶ 1 Plaintiff, Thomas DaVia, appeals from an order of the circuit court of Kane County granting summary judgment in favor of defendant, Star Incorporated f/k/a Star Displays, Inc., on plaintiff's second amended complaint alleging retaliatory discharge. We affirm.

¶ 2 BACKGROUND

¶ 3 On June 9, 2006, plaintiff filed a complaint in the circuit court of Cook County against defendant and certain employees of defendant individually, who were later dismissed, alleging the tort of retaliatory discharge. Plaintiff alleged that he was injured while employed as a carpenter for defendant and that he was terminated from employment because he filed a workers' compensation claim against defendant. On March 1, 2007, plaintiff filed a second amended complaint alleging essentially the same cause of action. Specifically, plaintiff alleged that defendant belittled him when his injuries were discussed; defendant issued written warnings for trivial matters; defendant made the "conscious and intentional decision" to terminate him after his doctors took him off work due to his injuries and pending surgery by terminating his group insurance; and defendant withheld notifying plaintiff of his termination until he reported for work on June 24, 2004. On October 11, 2007, upon defendant's motion, the matter was transferred to the circuit court of Kane County.

¶ 4 On January 20, 2010, defendant filed a motion for summary judgment. The motion and the documents attached as exhibits showed the following facts. Plaintiff was an at-will employee of defendant. He was hired in April 2001 to supervise the installation and dismantling of trade show exhibits. Plaintiff suffered a herniated disc while lifting equipment at a trade show in New Orleans on March 15, 2002. As a result of that injury, defendant required surgeries and was off work for 21 months beginning in October 2002. According to the affidavit of Ken Van Spankeren, who processed Blue Cross Blue Shield health enrollment forms for the plan administrator for defendant, a full-time employee had to be regularly scheduled to work a minimum of 30 hours per week in order to be eligible for group health insurance benefits. According to Van Spankeren's affidavit, if an employee was not working the required 30 hours per week, the only way he could be provided benefits was if he applied for and was approved to receive benefits under COBRA. Van Spankeren's

records showed that plaintiff applied for COBRA coverage with a start date of November 27, 2002, and a projected end date of May 27, 2004. According to Van Spankeren's affidavit, plaintiff was approved for COBRA coverage beginning November 27, 2002.

¶ 5 Michelle Andersen, defendant's office manager, stated in an affidavit that she was obligated to notify Blue Cross Blue Shield that plaintiff was not working 30 hours per week. Further, according to her affidavit, after plaintiff stopped working in the fall of 2002, all of his job responsibilities were performed and absorbed by current employees, and defendant did not hire anyone to replace plaintiff. Deposition excerpts of other witnesses attached as exhibits mirrored Andersen's statement that plaintiff was not replaced and his duties were assumed by current employees. She averred that she never told plaintiff he was fired. According to Andersen, the only time she spoke with plaintiff about his returning to work was on June 24, 2004, when he asked if he could have his job back, and she said he was not needed because his duties were being handled by other employees. She stated in the affidavit that she never told plaintiff or any other employee not to file a workers' compensation claim, nor did she ever observe or know of management to be upset with anyone for filing a workers' compensation claim. According to Andersen, she knew of no employee who had been fired or demoted because of filing a workers' compensation claim. Andersen stated that plaintiff received two written warnings: on August 16, 2002, he was warned for failing to inform defendant he would be absent after he told defendant he would work; and on August 20, 2002, plaintiff was warned when he failed to pick up a check from a customer as directed at the conclusion of a trade show.

¶ 6 The August 16, 2002, and August 20, 2002, written warnings were included as exhibits. On August 16, 2002, plaintiff called defendant, letting defendant know he had a doctor appointment and

would be at work following the appointment. After his appointment, plaintiff called defendant and said he would not be coming into work that day, but he would come in the following Monday. Plaintiff then failed to show up at work on Monday and did not call. The August 20, 2002, warning related to an incident in which plaintiff failed to pick up a check from a client, as directed, and the client “skipped out on him.”

¶ 7 At his deposition, excerpts of which were attached as exhibits to the motion for summary judgment,¹ plaintiff testified that he could not identify any employee who defendant terminated for filing a workers’ compensation claim; he could not identify any employee who was treated improperly for filing a claim; no one, including anyone in a position of authority with defendant, ever let him know they were upset with plaintiff for filing a claim; and no one in a position of authority ever told him he could not file a claim. According to plaintiff’s deposition, he knew of no employee in the past 10 years who was injured on the job and then was involuntarily separated from defendant.

¶ 8 In response to defendant’s motion for summary judgment, plaintiff filed an affidavit in which he stated that he reported to work on June 24, 2002, when defendant fired him. According to plaintiff, he could not find another position supervising carpenters. Plaintiff stated in his affidavit that he settled his workers’ compensation claim because the insurance company did not want to continue to pay him benefits while he searched for work. He stated in his affidavit that he currently worked as a supervisor of other carpenters on a show-by-show basis, and that he had no physical limitations that would have prevented him from continuing to work for defendant as a supervisor.

¹The record shows that the trial court was tendered complete deposition transcripts of the various witnesses before it ruled on the motion for summary judgment. Those complete depositions are part of the record on appeal.

In the last paragraph of his affidavit, plaintiff stated: “There is no doubt in my mind that [defendant] terminated me for filing a workers’ compensation claim.”

¶ 9 Defendant’s reply consisted of argument that plaintiff had not presented evidence in the record to refute its legitimate reason for not allowing plaintiff to return to work.

¶ 10 The trial court ruled on defendant’s motion for summary judgment in a written order entered August 30, 2010. The trial court found that defendant’s reason for not allowing plaintiff to return to work was because, during plaintiff’s absence on medical leave, defendant discovered that it was able to have plaintiff’s duties absorbed by existing employees. The trial court found that this “inferentially decreased company costs by eliminating an unnecessary position.” The trial court held that cutting costs, increasing profits, and general cutbacks in employment are legitimate reasons for termination under Illinois law, and thus held that defendant’s basis for terminating plaintiff’s employment was “facially valid and legitimate.” The trial court shifted the burden to plaintiff to show that “[d]efendant’s explanation is not believable or that the evidence raises a genuine issue of fact as to whether [d]efendant was retaliating against him.” The trial court found that plaintiff failed to raise any genuine issue of material fact essentially for three reasons: (1) defendant’s evidence that plaintiff’s job duties were absorbed by existing employees was uncontradicted; (2) any dispute over the merit of the two disciplinary warnings was not material because defendant was not claiming that plaintiff was terminated for disciplinary reasons; and (3) defendant’s evidence that the termination of plaintiff’s group health insurance coverage was based on the number of hours worked rather than on plaintiff’s decision to file a workers’ compensation claim was un rebutted. Consequently, the trial court granted defendant’s motion for summary judgment. On September 27, 2010, plaintiff filed a

motion for reconsideration and requested leave to file a third amended complaint. On October 13, 2010, the trial court denied both motions. This timely appeal followed.

¶ 11

ANALYSIS

¶ 12 In this appeal, plaintiff attempts to raise seven genuine issues of material fact to defeat the grant of summary judgment in defendant's favor. Summary judgment is proper when, viewed in the light most favorable to the nonmovant, the pleadings, affidavits, depositions, admissions, and exhibits on file reveal that there is no issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 220 (2007). In ruling on a motion for summary judgment, the trial court construes the pleadings, affidavits, exhibits, and depositions strictly against the movant and liberally in favor of the opponent. *Siekierka*, 373 Ill. App. 3d at 220-221. This court's review of a summary judgment ruling is *de novo*. *Siekierka*, 373 Ill. App. 3d at 220.

¶ 13 Under section 4(h) of the Workers' Compensation Act (Act) (820 ILCS 305/4(h) West 2006)), it is unlawful for an employer to discharge an employee because the employee exercises his or her rights under the Act. *Siekierka*, 373 Ill. App. 3d at 221. "The retaliatory discharge tort is an exception to the general rule of at-will employment under which an employer may fire an employee for any reason or no reason at all." *Irizarry v. Illinois Central R.R. Co.*, 377 Ill. App. 3d 486, 488 (2007). To establish a claim for retaliatory discharge, a plaintiff must show (1) that he has been discharged in retaliation for his activities, and (2) that the discharge violates a clear mandate of public policy. *Irizarry*, 377 Ill. App. 3d at 488. Our supreme court in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-81 (1978), held that the sound public policy underlying the Act dictated the recognition of an employee's cause of action for retaliatory discharge. *Siekierka*, 373 Ill. App. 3d

at 221. However, “[d]espite the revolutionizing effect of *Kelsay*, the common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason remains the law in Illinois.” *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 159 (1992). Retaliatory discharge cases predicated on an employee’s filing a workers’ compensation claim are reviewed under a traditional tort analysis. *Siekierka*, 373 Ill. App. 3d at 221. The plaintiff has the burden to prove the following elements: (1) that he was an employee before the injury; (2) that he exercised a right granted by the Act; and (3) that he was discharged and the discharge was causally related to his filing a claim under the Act. *Siekierka*, 373 Ill. App. 3d at 221. The ultimate issue concerning causation is the employer’s motive in discharging the employee. *Siekierka*, 373 Ill. App. 3d at 221. The mere discharge of an employee who has filed a claim under the Act does not satisfy the requirement of causal relationship if the basis for the discharge is valid and nonpretextual. *Groark v. Thorleif Larsen & Son, Inc.*, 231 Ill. App. 3d 61, 65 (1992). A valid nonpretextual basis for discharge includes discharge of an employee for lack of work. *Groark*, 231 Ill. App. 3d at 65.

¶ 14 Here, it is undisputed that plaintiff was employed by defendant prior to his injury; that plaintiff exercised his rights under the Act; and that plaintiff was either discharged or not hired back to work at the end of his period of physical disability. The issue is whether plaintiff’s discharge was causally related to the exercise of his rights under the Act.

¶ 15 Plaintiff first argues that a jury should be allowed to hear that plaintiff was a supervisor of carpenters while in defendant’s employ, and, although plaintiff acted improperly in engaging in manual labor, which contributed to his injury, defendant did not give him a written reprimand. He does not elaborate on the relevance of these facts, and we are not able to grasp the relevance.

¶ 16 Plaintiff's second suggested issue of material fact is that he continued to work as a supervisor after his injury and defendant accommodated his absences due to doctor visits without reprimands. Again, plaintiff does not explain the relevance. It seems that defendant's tolerance of plaintiff's absences to attend doctor visits related to his injury is evidence in defendant's favor, not plaintiff's.

¶ 17 Third, plaintiff argues that a jury should hear evidence of the nature of the August 16, 2002, and August 20, 2002, written warnings, which plaintiff terms "silly." We infer plaintiff's argument to be that defendant used, or was planning to use, these warnings as a pretext to discharge him. It does not appear that either the infractions or defendant's reaction to them was silly. With respect to the August 16, 2002, incident, when plaintiff did not come into work on a Monday and did not call, plaintiff responds that Mondays were his days off. This misses the point that he did not return after his doctor visit and told his employer he would be in on that particular Monday. According to the written warning, it had been explained to plaintiff "numerous times" how important it was for defendant to know his schedule. With respect to the August 20, 2002, warning, defendant did not get paid by a customer because plaintiff failed to obey his supervisor's order to pick up the check from the client. In any event, we agree with the trial court that neither of these incidents presents a material issue of fact because neither incident led to plaintiff's discharge.

¶ 18 Fourth, plaintiff contends that a jury should be allowed to hear that "these" reprimands occurred the same day that plaintiff gave defendant a doctor's note restricting his lifting ability. This argument is difficult to understand. The reprimands occurred on two different days. Plaintiff does not make a coherent connection between them, the doctor's note, and his discharge.

¶ 19 Plaintiff's fifth issue of material fact is that a jury could draw the conclusion that defendant issued the reprimands (the August 16, 2002, warning contained a hint of future dismissal for another,

similar occurrence) because it was angry about plaintiff's workers' compensation claim. Plaintiff points to no evidence in the record to support this inference.

¶ 20 Plaintiff's sixth issue of material fact is that defendant's reason for discharging him—existing employees absorbed his duties—is “ridiculous.” Plaintiff argues that a jury could “easily see through this defense” if it could see the persons who took over his duties: “***Cori Jerrett, a young female, [who] traveled across the country, read blueprints and supervised carpenters building trade show exhibits ***”; “***Melody Holtz, bound to a wheelchair***.” Not only does plaintiff not support this argument with citations to the record, it borders on being scurrilous.

¶ 21 Plaintiff's seventh issue of material fact that is that defendant hired his replacement after the motion for summary judgment had been briefed and argued in the trial court. The record shows that defendant did not rehire plaintiff in 2004. According to the record, defendant hired someone in 2010. We do not see how an inference can be drawn that plaintiff's discharge was pretextual when defendant did not immediately hire someone else, but waited six years. Unavailability of work has been held to be a valid and nonpretextual basis to discharge an employee. *Groark*, 231 Ill. App. 3d at 64. It makes sense that work may not have been available in 2004 but available in 2010. Plaintiff presented no evidence to the contrary.

¶ 22 In sum, there is no evidence in the record that contradicts defendant's evidence that it terminated plaintiff because existing employees had absorbed his duties. Plaintiff tendered no evidence by way of counter-affidavits, only his subjective belief that he was discharged because he filed a workers' compensation claim. By the same token, all of the evidence in the record supports defendant's contention that plaintiff's discharge was not causally related to his exercise of his rights under the Act. Defendant never interfered with plaintiff's medical treatment; defendant continued

to pay benefits while plaintiff was temporarily totally disabled; no one in authority ever told plaintiff that he could not file a workers' compensation claim or told him they were upset with him for filing a claim; and defendant conclusively established that Blue Cross Blue Shield required employees to work 30 hours a week to be eligible for group coverage. Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 23 Affirmed.