2016 IL App (5th) 150261-U

NO. 5-15-0261

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

STEVE HAND,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Randolph County.
	)	
v.	)	No. 11-L-55
	)	
THE COUNTY OF RANDOLPH, ILLINOIS,	)	Honorable
	)	Richard A. Brown,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Schwarm and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted a summary judgment in favor of the defendant on the plaintiff's claim of retaliatory discharge where the plaintiff failed to establish a material issue of fact concerning whether his employment termination was in retaliation for filing a workers' compensation claim against the defendant.

¶ 2 The plaintiff, Steve Hand, worked as a maintenance worker for the defendant, Randolph County, Illinois, when he was injured in two work-related accidents. The accidents occurred on April 30, 2008, and November 18, 2010. He filed a claim under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). Randolph County terminated the plaintiff on May 2, 2011. On December 20, 2011, the

plaintiff filed a complaint against Randolph County, alleging that he was improperly terminated as a result of the exercise of his rights under the Act. Randolph County filed a motion for a summary judgment, arguing that the plaintiff could not establish that he was fired for exercising his rights under the Act. The circuit court agreed and granted Randolph County's motion for a summary judgment. The court concluded that the evidence established that the county terminated the plaintiff pursuant to a legitimate policy that it uniformly applied to all employees. The plaintiff appeals the circuit court's summary judgment. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The plaintiff worked as a maintenance worker for the county sheriff's department. After his workplace accidents, the plaintiff underwent a course of medical treatment that included visits with several doctors. He underwent surgery on February 23, 2011. On April 22, 2011, the plaintiff's treating physician released him to return to work with the following restrictions: no lifting greater than 10 pounds, no repetitive climbing, no squatting or kneeling, and no continuous standing or walking. On April 28, 2011, the sheriff sent the plaintiff a letter, informing him that his job duties as a maintenance worker were greater than his doctor's medical restrictions and that there were no light duty positions available for him.

¶ 5 Under a policy adopted by the county board, the county provides injured workers with a maximum of 12 weeks of unpaid leave, pursuant to the Family Medical Leave Act (29 U.S.C. § 2601 *et seq*. (2010)). With respect to workers who cannot return to work at the end of the 12-week period, the policy provides as follows:

"An employee who is not released by their health care provider to return to work or does not elect to return to work at the end of twelve (12) weeks of Family and Medical leave and who does not choose to resign will be placed on 'Inactive' status. An employee on 'Inactive' status is removed from the County's payroll, and will not acquire additional benefits, and will no longer be entitled to job restoration rights but is 'in good standing.' Inactive status will end at the earliest of the following:

1) The individual resigns from their position
2) The individual is released by their health care provider and/or reapplies for an open position
3) The individual begins to receive total or permanent disability
4) The individual has been on inactive status for the maximum of one year

If the individual is released by their health care provider and requests to return to work they may reapply for an open position for which they are qualified. Such employees who apply for an open position must meet the minimum qualifications for the position and will be given the same consideration for employment afforded other candidates with similar qualifications. An employee who is re-hired within one (1) year of being placed on 'Inactive' status will maintain all seniority rights to which they were entitled in their previous position."

¶ 6 On May 2, 2011, the sheriff sent the plaintiff a letter, informing him that he had exhausted his leave allowable under the Family Medical Leave Act and that he was being placed on inactive status as provided in the county's policy. Specifically, the sheriff

informed the plaintiff that "[p]ursuant to the County's policy, once an employee has exhausted the maximum amount of leave prescribed by the Family Medical Leave Act and has not secured a release from their health care provider allowing them to perform the essential functions of their job they are placed into Inactive Status." The sheriff informed the plaintiff that if he was released by his healthcare provider and wanted to return to work, he may apply for any open position for which he was qualified and he would be given the same consideration afforded other candidates with similar qualifications.

¶ 7 After being placed on inactive status, the plaintiff's union, International Union of Operating Engineers, Local 399, filed a grievance on the plaintiff's behalf. On June 2, 2011, the Randolph County Board of Commissioners denied the plaintiff's grievance. In denying the grievance, the county board noted that, at that time, the plaintiff's physicians had not stated whether he would ever be able to perform the essential functions of his job again and had not provided a definitive date for his return to work. The board stated, "In the meantime, the County needs to fill the position vacated by [the plaintiff's] absence." The county board further stated:

> "The County's decision to place [the plaintiff] on 'inactive status' and hire a permanent individual into the vacant maintenance position had nothing to do with the fact he has filed a workers' compensation claim. Rather, the County is merely exercising its right to hire an employee to work in the County's maintenance Department. The County cannot indefinitely wait to see if [the plaintiff] might be able to return to work someday."

¶ 8 Meanwhile, in the workers' compensation proceeding, on June 20, 2013, the parties deposed the plaintiff's treating physician, Dr. Tony Chien. Dr. Chien opined that the plaintiff's work restrictions were permanent and that the restrictions prohibited the plaintiff from performing the job duties of a maintenance worker. An independent medical expert retained by the employer offered opinions that contradicted Dr. Chien's opinions. However, on February 6, 2014, the plaintiff and the county agreed to settle the workers' compensation claim. The settlement included a lump sum payment of $100,000, representing compensation for attorney fees, medical expenses, and a permanent partial disability of "46% loss of use of the right foot and 35% loss of use of the body as a whole."

¶ 9 In the present case, the plaintiff filed his complaint, alleging a claim for retaliatory discharge on December 20, 2011. On July 30, 2014, the county filed the motion for summary judgment that is the subject matter of the present appeal. It argued that there was no genuine issue of material fact and that it was entitled to a summary judgment because the plaintiff could not produce any evidence from which a jury could find that he was terminated because he sought compensation benefits under the Act. The county argued that the evidence conclusively established that it terminated the plaintiff's employment pursuant to its policy, which was legitimate, neutral, and justified the termination.

¶ 10 In response, the plaintiff argued that the purpose of the policy was "to terminate employees who have been seriously injured at work." The plaintiff argued that, although the policy may appear neutral on its face, he investigated the county's motives for

implementing the policy, and the county was unable to produce a witness to articulate the business purpose of the policy. Specifically, the plaintiff emphasized the deposition testimony of Carol Best, who worked for the county and whose job duties included handling payroll, employee benefits, accounts payable, and human resources. The plaintiff cited the following colloquy that occurred during Best's discovery deposition as evidence that the county's policy did not serve a "business purpose":

> "Q. Is there any business justification or is there any business reason why Randolph County couldn't adopt a policy that said something like this: Hand, from time to time, we do have vacant positions for manual laborers, and when you have a doctor's release that allows you to go back to work, you can fill that position?
>
> A. We have that if the position is available, he's welcome to apply for it upon a full release from the doctor.
>
> Q. I understand that. But the policy that you've explained to me is that he can apply for the position, and if there is a better applicant available, that position won't be offered to him. That's what you told me, right?
>
> A. He is treated as every other applicant.
>
> Q. Is there any reason why the policy, any business justification that would prevent the County from changing its policy and saying something like this: Mr. Hand, when you get a full duty release, if we have a manual laborer position available to you, we will put you in that position?
>
> A. I don't think it's good business practice to say that we will put him in a position.

Q. I understand that you don't think it's good business practice. Can you tell me what the business justification is for that? That's your opinion. Is there anything other than your opinion that would cause you to reject my proposed change in the policy?

A. No."

¶ 11 Earlier in the deposition, Best explained that the policy "allows the County to fill a vacant position after 12 weeks if the County feels that that position needs to be filled and cannot wait on an indefinite medical release." She testified that the county applies the policy uniformly to every employee who exhausts his or her leave under the Family Medical Leave Act.

¶ 12 Citing Best's deposition testimony, the plaintiff argued that the county could not produce a witness who could establish a business justification for its policy. He argued that the policy "falls more harshly on those persons injured at work than any other employees, and it is not supported by a legitimate business purpose." The plaintiff concluded that "a jury should be given the case to decide whether as a result of the policy [he] was terminated in violation of Illinois public policy for exercising [his] rights under the Workers' Compensation Act."

¶ 13 On June 2, 2015, the circuit court granted Randolph County's motion for summary judgment, concluding that the plaintiff "was discharged in compliance with an existing absenteeism policy that applied to all employees." The court noted that the plaintiff had "not responded with any evidence which he would present at trial to rebut Defendant's claim that Plaintiff was discharged in compliance with the policy handbook for a business

purpose." The court held that the plaintiff's "assertion in his Complaint that he was discharged because he filed a worker's compensation claim, standing alone, is insufficient to create a genuine issue of material fact sufficient to survive a Motion for Summary Judgment."

¶ 14 The plaintiff now appeals the circuit court's summary judgment.

¶ 15 ANALYSIS

¶ 16 A summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file, when viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). It is a drastic means of disposing of a case, which courts employ only after an extraordinarily diligent review of the record to ensure that it does not preempt a party's right to present the factual basis of his claim. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306, 837 N.E.2d 99, 106 (2005). The party opposing a motion for summary judgment must present a factual basis that would arguably entitle him to a judgment. *Lyon Metal Products, L.L.C. v. Protection Mutual Insurance Co.*, 321 Ill. App. 3d 330, 338, 747 N.E.2d 495, 502 (2001). Our review of a circuit court's summary judgment is *de novo*. *West Bend Mutual Insurance Co. v. People*, 401 Ill. App. 3d 857, 864, 929 N.E.2d 606, 613 (2010).

¶ 17 In the present case, the plaintiff alleged a cause of action for retaliatory discharge. "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, 879 N.E.2d 1007, 1010 (2007). Retaliatory discharge cases predicated upon an employee's filing of a workers' compensation claim are reviewed using traditional tort analysis. *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 221, 868 N.E.2d 374, 380 (2007). The plaintiff has the burden of proving all of the elements of his cause of action. *Id.* "To recover damages for the tort of retaliatory discharge predicated upon the filing of a workers' compensation claim, an employee must prove: (1) that he was an employee before the injury; (2) that he exercised a right granted by the Workers' Compensation Act; and (3) that he was discharged and that the discharge was causally related to his filing a claim under the Workers' Compensation Act." *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 335-36, 704 N.E.2d 403, 406 (1998).

¶ 18 In the present case, it is undisputed that the plaintiff was employed by the county prior to his injury, that the plaintiff exercised his rights under the Act, and that he was discharged. The issue addressed in the summary judgment motion was whether there is a genuine issue of material fact concerning whether his discharge was causally related to the exercise of his rights under the Act.

¶ 19 In its motion for summary judgment, the county cited its policy as the basis for terminating the plaintiff's employment after his leave under the Family Medical Leave Act expired. It argued that the plaintiff failed to establish a genuine issue of material fact on the issue of causation because he failed to offer any evidence of an improper motive for the termination. The plaintiff argued that a jury could infer an improper motive

because the county did not produce a witness to explain the business reason for the policy.

¶ 20 With respect to the element of causation, the primary focus is the employer's motive in terminating the employee. *Siekierka*, 373 Ill. App. 3d at 221, 868 N.E.2d at 380. The element of causation is lacking "if the basis for discharge is valid and nonpretextual." *Slover v. Brown*, 140 Ill. App. 3d 618, 620, 488 N.E.2d 1103, 1105 (1986). Under Illinois law, an employer is not obligated to retain an at-will employee who is medically unable to return to his assigned position, and the law does not require the employer to reassign the employee to another position rather than terminate the employment. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 159, 601 N.E.2d 720, 728 (1992). Also, "an employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury." *Id*. at 160, 601 N.E.2d at 728. The employer may make employment decisions based on the employee's physical disabilities. *Id*. It is only the request for benefits under the Act that is "off limits as a ground of decision." *Id.*

¶ 21 In response to the motion for summary judgment, the plaintiff noted that the mere existence of a valid reason for the termination does not defeat a retaliatory discharge claim. *Siekierka*, 373 Ill. App. 3d at 222, 868 N.E.2d at 380. Instead, a jury must believe the reason. *Id*. "[D]espite an ostensibly neutral absenteeism policy, where the actual purpose and effect of the scheme penalize employees for filing workers' compensation claims, the employer's action may in fact be retaliatory." *Id*. at 222, 868 N.E.2d at 380-81.

¶ 22 However, the problem with the plaintiff's argument is that in order to defeat the county's summary judgment motion, he was obligated to present some evidence from which a jury could find that the county's termination of him was motivated by his seeking benefits under the Act. He did not present any evidence from which a jury could find in his favor on the issue of causation. We agree with the county that all of the pleadings, deposition testimony, and admissions on file support only one finding on the issue of causation, *i.e.*, that the sole cause for the plaintiff's termination was the county's neutral policy, which it applied to all employees without regard to the filing of a workers' compensation claim. The evidence on this issue was unrebutted. Summary judgment relief is appropriate when the plaintiff fails to present sufficient evidence to raise a genuine issue of material fact concerning whether the employer's stated valid reasons for discharge are not to be believed.

¶ 23 For example, in *Armstrong v. Freeman United Coal Mining Co.*, 112 Ill. App. 3d 1020, 1022, 446 N.E.2d 296, 298 (1983), the court affirmed the entry of summary judgment in favor of the employer on a retaliatory discharge claim where the uncontradicted evidence showed that the plaintiff's termination was part of a general cutback in employment by the defendant. Likewise, in *Groark v. Thorleif Larsen & Son, Inc.*, 231 Ill. App. 3d 61, 63, 596 N.E.2d 78, 79 (1992), the plaintiff filed a workers' compensation claim and was off work for five months. When his doctor authorized him to return to work, he was informed that his employment was terminated. *Id.* The plaintiff claimed that he was improperly dismissed for exercising his rights under the Act, but the employer proffered evidence that he was fired because of a lack of work. *Id*. at

64, 596 N.E.2d at 80. The court affirmed the dismissal of the plaintiff's complaint because the unrebutted evidence established that the plaintiff's termination was the result of the employer's "overall reduction in its workforce." *Id*. at 65-66, 596 N.E.2d at 81.

¶ 24 Similarly, in the present case, the defendant has responded to the plaintiff's claim by stating that its policy was the valid and nonpretextual reason for the plaintiff's termination. The record includes deposition testimony that the county applied this policy uniformly to all employees. The plaintiff did not present any facts, by affidavit, deposition, or admission, to contradict the valid basis for the employer's termination decision.

¶ 25 The plaintiff argues that there is no evidence in the record of the business justification for the county's policy that required his termination at the end of the 12-week leave under the Family Medical Leave Act. He concludes, therefore, that "a jury should be given the case to decide whether as a result of the policy [he] was terminated in violation of Illinois public policy for exercising [his] rights under the Workers' Compensation Act." However, as noted above, the focus on the causation issue is whether the employer had an improper motivation in terminating the plaintiff. Whether there is a business purpose that prevented the employer from utilizing an alternative policy that would not have resulted in the plaintiff's termination does not create a genuine issue of material fact with respect to the causation issue. See *La Porte v. Jostens, Inc.*, 213 Ill. App. 3d 1089, 1094, 572 N.E.2d 1209, 1212 (1991) ("the mere fact that plaintiff in this case may have been able to perform other jobs within defendant's plant is irrelevant to whether she was wrongfully discharged"). As noted above, under Illinois

law, an employer is not obligated to retain an at-will employee who is medically unable to return to his assigned position, and the employer is not required to reassign the employee to another position rather than terminate his employment. *Hartlein*, 151 Ill. 2d at 159, 601 N.E.2d at 728. The employer may retain the employee, but it is not obligated to do so. Therefore, the policy's failure to provide for the plaintiff's reassignment does not create a genuine issue of material fact on the issue of causation.

¶ 26 The evidence in the record includes the county board's denial of the plaintiff's grievance, in which the board stated that the plaintiff was medically unable to return to work and that the sheriff's department needed to place a permanent worker in the plaintiff's position. The county could not wait indefinitely to see if the plaintiff might eventually be able to return to work. The plaintiff has offered no evidence to contradict this valid reason for his termination, no evidence that the policy in question was applied differently to other employees, and no evidence that the policy was adopted for retaliatory purposes. Under these facts, the circuit court properly granted the county's motion for summary judgment.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the circuit court's summary judgment in favor of Randolph County.

¶ 29 Affirmed.