NO. 5-10-0087

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

AMY LASWELL DODD,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jefferson County.
	)	
v.	)	No. 04-L-53
	)	
WALGREEN COMPANY,	)	Honorable
	)	Robert W. Lewis,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

R U L E 2 3 O R D E R

Held: In a retaliatory-discharge action, the trial court erred in entering a judgment for the employer where the undisputed evidence proved that the plaintiff's termination was, as a matter of law, causally related to her filing a claim for workers' compensation benefits.

The plaintiff, Amy Laswell Dodd, filed an action in the circuit court of Jefferson County, against the defendant, Walgreen Company, alleging that she was discharged from her employment in retaliation for exercising her rights under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)). The defendant denied the allegation and asserted as an affirmative defense that the plaintiff was terminated because she violated the defendant's written attendance policy. After a bench trial, the circuit court entered a judgment in favor of the defendant. On appeal, the plaintiff contends that the circuit court erred in finding that she did not prove that she had been terminated in retaliation for exercising her rights under the Act. We reverse and remand with directions.

The crux of the appeal is whether the plaintiff established that her termination from

employment was causally related to her pursuit of workers' compensation benefits. A summary of the evidence pertinent to that issue follows.

The plaintiff was hired to work as a "split case picker" at the defendant's distribution center in Mount Vernon, Illinois. She began work on December 8, 2003. She was provided with an employee handbook that included the defendant's attendance policy. The expressed purpose of the attendance policy is to minimize excessive absenteeism. The policy recognizes both that unavoidable absences occur and that the distribution center depends on regular attendance for the success of its operations. The attendance policy is based on a no-fault point system. Under the no-fault policy, an employee is subject to termination if he or she accumulates 13 points within a 12-month period. Points are assessed for unpaid or unscheduled absences, including emergencies or other circumstances. The policy does not specifically address whether points would be assessed should an absence result from a work-related injury. According to the policy, an employee cannot be terminated for excessive absenteeism without a final review by the distribution center manager. Employees are advised to inform the human resources manager of any extenuating circumstances regarding an absence even though a point would have been assessed at the time of the absence.

The plaintiff testified that she missed three days of work during her first month due to a severe flu. She acknowledged that she was a probationary employee at that time and that she could have been terminated because of the absence. The plaintiff stated that she provided a doctor's note documenting her illness, and she requested a "last chance agreement." The human resources manager reviewed the matter, assessed two points on the plaintiff's attendance record, and permitted the plaintiff to return to employment after serving a one-day suspension. The plaintiff testified that in February 2004, she was assessed two points for an unpaid absence and that she was subsequently counseled because she had accumulated four points within a 12-month period.

The plaintiff testified that she suffered an injury while at work on March 22, 2004. She stated that she was watching a computer screen, advancing totes containing merchandise on a line, when an unexpected tote appeared on her computer screen. The plaintiff quickly turned her head to look for the tote. She heard a snap in her neck and right shoulder. She felt immediate pain. The plaintiff reported the incident to her supervisor and left work early. She reported for her shift the next day, but she was unable to work. She sought medical treatment and she was off work for 4 and 2/7 weeks. The plaintiff was given a medical release to return to work on May 6, 2004, but she did not report for work until May 8, 2004. The plaintiff testified that she did not report for work on May 6, 2004, because she had an appointment to consult with a specialist in St. Louis about her injury on that day. The plaintiff testified that she did not report for work on May 7, 2004, because she was sore from her drive to St. Louis.

The plaintiff testified that when she reported for work on May 8, 2004, she was suspended immediately because she had accumulated 13 points during a 12-month period due to absences. The plaintiff testified that she was informed that points for absences had been assessed because her workers' compensation claim had been denied.

The plaintiff acknowledged that she had received a copy of the defendant's attendance policy. She understood that the attendance policy was based on a point system. She was aware that if she accumulated 13 points due to absences within a 12-month period, she could be terminated. The plaintiff did not believe that any points should have been assessed during the period she was recovering from the injury she sustained at work. She thought that any injury incurred at work, regardless of how it occurred, would be considered a workers' compensation injury. The plaintiff testified that she told the human resources person, Nancy Hulfachor, that she had been absent because of an injury she sustained at work. Her pleas to Hulfachor were unsuccessful and she was terminated.

Nancy Hulfachor is employed by the defendant as a human resources generalist. She testified that she worked at the distribution center in Mount Vernon, Illinois, and that she was familiar with the defendant's attendance policy. Hulfachor stated that, under the attendance policy, absences during the 45-day introductory period are not permitted and that typically when an employee is absent from work during the orientation period, that employee comes under review for termination. Hulfachor also stated that, under the policy, an employee who accumulates 13 points in a 12-month period due to absences is subject to termination. Hulfachor testified that the distribution center manager reviews all terminations. Hulfachor stated that if an employee's absence could be the result of a work-related injury, points would not be assessed until the workers' compensation carrier determines whether the claim is compensable. If the carrier determines that the claim is compensable, points are not assessed for the absence. If the carrier determines that the claim is not compensable, then points are assessed. Hulfachor noted that if a situation arose wherein the carrier initially rejected the claim, but upon further review found it to be compensable, any points that had been assessed would be removed from the attendance record. Likewise, if a disputed case was tried and the arbitrator determined that the case was compensable, any assessed points would be removed. Hulfachor noted that the defendant's workers' compensation carrier is an outside contractor.

Hulfachor testified that the plaintiff missed three days during her orientation period and that she recommended termination. The distribution center manager overruled Hulfachor's recommendation, assessed two points against the plaintiff's attendance record, and permitted the plaintiff to return to work after a one-day suspension. Hulfachor testified that two points were assessed against the plaintiff's attendance record for an unpaid absence on February 27, 2004. Hulfachor noted that points were not initially assessed against the plaintiff's attendance record for the days she missed following her work injury in March

2004 but that points were assessed after the defendant was notified that its workers' compensation carrier had denied the plaintiff's claim for benefits. Hulfachor testified that she recommended termination where the plaintiff had been suspended in December 2003 for an abuse of the attendance policy, where the workers' compensation carrier had denied the plaintiff's claim for benefits, and where the plaintiff had accumulated 13 points in a 12-month period due to absences.

The plaintiff's attendance record was in evidence. It showed that the plaintiff had been suspended for a three-day absence during her probationary period and that the plaintiff accumulated 13 points due to absences within the first five months of her employment with the defendant. It also showed that the distribution center manager reviewed the plaintiff's attendance record and approved the recommended termination.

The lump-sum settlement petition and order was also admitted into evidence. The settlement contract contains standard language stating that disputes exist between the parties regarding whether the plaintiff incurred injuries to the degree alleged and whether those injuries are compensable. Under the terms of the settlement, the defendant agreed to pay and the plaintiff agree to accept $11,329.76 in full settlement of the claim, and that settlement sum represents a 5% loss of the use of the person as a whole, 4 and 2/7 weeks of temporary total disability, and certain unpaid medical bills.

After considering the evidence and the arguments of counsel, the trial court found that the plaintiff failed to meet her burden to prove that her discharge from employment was causally related to the exercise of her rights under the Workers' Compensation Act, and it entered a judgment for the defendant. The plaintiff appealed.

A cause of action for retaliatory discharge represents a very narrow exception to the general rule in Illinois that at-will employees may be discharged by the employer at any time for any reason. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 159, 601 N.E.2d 720, 728

(1992). The cause of action was first recognized by the Illinois Supreme Court in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The supreme court held that an employee who is terminated for pursuing workers' compensation benefits could bring an action for retaliatory discharge against the former employer. *Kelsay*, 74 Ill. 2d at 182-85, 384 N.E.2d at 356-59. The court reasoned that the public policy underlying the Act "would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act." *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357.

A valid claim of retaliatory discharge requires a showing that an employee was discharged in retaliation for her activities and that the discharge violated a clearly mandated public policy. *Hartlein*, 151 Ill. 2d at 160, 601 N.E.2d at 728. The element of causation is not met if the employer has a valid, nonpretextual basis for discharging an employee. *Hartlein*, 151 Ill. 2d at 160, 601 N.E.2d at 728. And so in *Hartlein*, the supreme court held that "Illinois law does not obligate an employer to retain an at-will employee who is medically unable to return to his assigned position," but it proceeded immediately thereafter to note that an employer may act on the basis of an employee's physical disability, but it may not ground the termination on its employee's request for benefits under the Act. *Hartlein*, 151 Ill. 2d at 159-60, 601 N.E.2d at 728.

In *Clark v. Owens-Brockway Glass Container, Inc.*, 297 Ill. App. 3d 694, 697 N.E.2d 743 (1998), the employer suspected that an employee, who was absent from her employment due to a work-related back injury, was malingering. The employer hired an investigator, who videotaped the employee mowing her lawn. As a result, the employee was terminated for alleged fraud in connection with her workers' compensation claim. The employee filed a retaliatory-discharge action, and the circuit court granted a summary judgment in favor of the employee on the issue of the employer's liability. Following a trial on damages, a jury

entered an award for the employee. On appeal, this court affirmed the summary judgment and stated as follows:

> "The undisputed fact is that Clark filed for and was collecting workers' compensation benefits prior to her discharge. The undisputed fact is that she was discharged because her employer believed that her claim for benefits was exaggerated. Her employer admits that her discharge was connected to her workers' compensation filing and her collection of benefits since Bailey, the industrial relations director, thought she was malingering and collecting benefits to which she was not entitled. He used this as a basis to claim she was guilty of fraudulent acts justifying the termination of her employment. Therefore, her discharge was, as a matter of law, 'causally related' to the filing of a claim under the Workers' Compensation Act. *** An employer may discharge an injured employee who has filed a workers' compensation claim as long as the reason for the discharge is wholly unrelated to the employee's claim for benefits under the Workers' Compensation Act. ***
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> *** While an employer may discharge an employee claiming benefits for a valid and nonpretextual reason, a dispute about the nature and extent of the injury does not constitute such a valid reason." *Clark*, 297 Ill. App. 3d at 698, 697 N.E.2d at 746.

More recently, in *Grabs v. Safeway, Inc.*, 395 Ill. App. 3d 286, 917 N.E.2d 122 (2009), two former employees filed a joint complaint and alleged that they were discharged in retaliation for filing claims pursuant to the Act. The employer contended that it terminated each plaintiff's employment pursuant to its neutrally applied attendance policy. The employer had a "no-fault" attendance policy that subjected an employee to termination for job abandonment if he failed to come to work or call in his absences for three consecutive days. Each plaintiff was off work due to a work-related injury and was claiming

benefits under the Act. Each plaintiff's treating physicians had advised him to remain off work. The employer obtained an independent medical evaluation (IME) of each employee. In each case, the physician performing the IME determined that the employee's injury was not work-related and that the employee could return to work without restrictions. As a result of the IME, the employer changed the attendance code in each employee's record and then proceeded to terminate employment based on the employees' violations of the attendance policy. The circuit court entered a summary judgment in favor of both employees. The court then certified to the appellate court in the First District the question of whether an employer may rely solely upon an IME in terminating an employee under its attendance policy.

On review, our colleagues in the First District determined, "[W]hen an employer is faced with conflicting medical opinions from the employee's doctor and the employer's IME, an employer may not rely solely on an IME in terminating an employee for failing to return to work or for failing to call in his absences." *Grabs*, 395 Ill. App. 3d at 288, 917 N.E.2d at 124. In the interlocutory appeal, the court declined to address the propriety of the circuit court's decision to enter a summary judgment in favor of the employees, but it noted as follows:

> "Consistent with our answer to the certified question, in order to recover for workers' compensation retaliatory discharge, plaintiffs were required to show that defendants relied on the IME opinions in discharging plaintiffs, such that the termination was causally related to their exercising a right or remedy granted to them by the Act. [Citation.] Consequently, if the change of plaintiffs' attendance coding was made based solely on the IME opinions, and defendants terminated plaintiffs for failing to return to work or for failing to call in their absences, entry of summary judgment for plaintiffs would be appropriate." *Grabs*, 395 Ill. App. 3d at 295, 917

N.E.2d at 129.

In the case at bar, the only contested issue was whether the plaintiff's discharge was causally related to the exercise of her rights under the Act, and the facts pertinent to that question are undisputed.

Hulfachor testified that, under the attendance policy, the defendant will not assess points for absences resulting from a work-related injury unless its workers' compensation insurance carrier denies the claim. If the claim is denied, the defendant will then assess points for the days absent following the alleged work-related injury. In the plaintiff's case, Hulfachor did not initially assess points for the days the plaintiff missed following her injury at work. Once Hulfachor was notified by the workers' compensation insurance carrier that the claim had been denied, she retroactively assessed points for the absences, determined that the plaintiff had accumulated 13 points, and recommended that the plaintiff be terminated. An action taken by an employer to discharge an employee that is based solely upon a difference of opinion regarding the employee's right to seek benefits is prohibited. *Grabs*, 395 Ill. App. 3d at 295, 917 N.E.2d at 129; *Clark*, 297 Ill. App. 3d at 698, 697 N.E.2d at 746. It follows that if, as in *Clark*, an employer may not rely solely upon its own judgment to determine whether an employee is capable of returning to work and if, as in *Grabs*, an employer may not rely solely upon a physician performing an IME to determine whether an employee is capable of returning to work, then an employer should not be permitted to terminate its employee based solely upon its workers' compensation carrier's determination that a claim is not compensable. In accordance with the reasoning of the aforementioned cases, we conclude that the discharge of an employee based solely upon a workers' compensation carrier's decision to deny the employee's claim is, as a matter of law, causally related to the employee's exercise of her right to seek benefits under the Act.

In this case, it is undisputed that the plaintiff was absent from work for more than

four weeks after the alleged work-related injury. It is undisputed that the attendance coding was changed and that several points were assessed for those absences based solely upon the workers' compensation carrier's denial of the plaintiff's claim for benefits. It is undisputed that if points had not been assessed for the absences incurred following the alleged work-related injury, the plaintiff would not have accumulated sufficient points to subject her to termination under the attendance policy. In this case, the plaintiff's claim is precisely what caused the defendant to discharge her. The undisputed facts show that the plaintiff's termination was, as a matter of law, causally related to her filing of a claim for benefits under the Act.

Further, in our view, the issues of whether the plaintiff's workers' compensation claim was ultimately settled or whether the Workers' Compensation Commission found it to be compensable or not have no bearing upon her retaliatory-discharge claim. It is her right to seek benefits under the Act that is protected. *Kelsay*, 74 Ill. 2d at 182, 384 N.E.2d at 357. If an employer is allowed to make retroactive termination decisions based upon whether an employee's claim is ultimately found to be compensable, the public policy of the Act would be frustrated and employees would surely be placed in the position of "choosing between their jobs and seeking their remedies under the Act." *Kelsay*, 74 Ill. 2d at 184, 384 N.E.2d at 358.

Accordingly, the judgment of the circuit court is reversed, and the cause remanded with directions to enter a judgment for the plaintiff and to determine the issue of damages.

Reversed; cause remanded with directions.