2019 IL App (1st) 182562-U

FIFTH DIVISION
Order filed: May 31, 2019

No. 1-18-2562

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WASEEM YAKO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 17 L 3747
	)	
FEJES FREIGHT EXPRESS, INC.,	)	Honorable
	)	Brigid M. McGrath,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's grant of summary judgment in favor of the defendant where the plaintiff failed to establish a genuine issue of material fact as to whether the defendant terminated his employment in retaliation for filing a workers' compensation claim.

¶ 2 The plaintiff, Waseem Yako, appeals from an order of the circuit court of Cook County entering summary judgment in favor of the defendant, Fejes Freight Express, Inc., on the plaintiff's claim that he was discharged in retaliation for exercising his rights under the Illinois

Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2016)). For the following reasons, we affirm.

¶ 3 The following factual and procedural history is derived from the pleadings and exhibits of record.

¶ 4 The defendant is a freight transportation company, working exclusively under a contract with FedEx to transport packages between certain FedEx locations. In 2016, the defendant operated out of three such locations in Illinois—Niles, Wheeling, and Grayslake. The defendant had a total of 11 employees, including Luke Fejes, the defendant's president, an office administrator, a mechanic, and eight drivers. The defendant's policy was to hire drivers specifically to operate out of one of the three locations, driving on assigned runs as designated by work volume.

¶ 5 In April of 2016, the defendant hired the plaintiff as a driver, operating out of the Niles location. The defendant assigned the plaintiff to the following four FedEx runs: Niles to Indianapolis; Niles to Champaign; Niles to Rock Island; and Niles to Chicago. At the time of the plaintiff's hiring, the defendant employed at least two other drivers—Eddie Bustamante and Marco Reyes—that operated out of Niles.

¶ 6 On October 26, 2016, the plaintiff suffered a work-related injury, and his physician instructed him to remain off of work. On November 1, 2016, the defendant reported the plaintiff's injury to its workers' compensation carrier, Protective Insurance. The defendant did not hire an additional driver to replace the plaintiff; rather, the defendant assigned the plaintiff's runs to Reyes.

¶ 7 Fejes testified in his deposition that, near the end of 2016, the defendant began experiencing financial trouble due to a decrease in revenue. In an affidavit, Fejes averred that at some point during the January 15, 2017 and January 28, 2017 payroll period, the defendant "laid off" Bustamante. Fejes further testified that, in February or March of 2017, the defendant lost three of the four FedEx runs that were assigned to the plaintiff due to FedEx restructuring their accounts. According to the defendant's 2016 profit and loss statement, it generated $1,374,717.36 in gross revenue for a net income of $1,273.49. The defendant's 2017 profit and loss statement shows that, as of July 24, 2017, it generated $786,475.20 in gross revenue for a net income of $49,166.

¶ 8 At some point, the plaintiff was cleared to return to work with restrictions. On February 21, 2017, Fejes sent the following text message to the plaintiff:

> "I finally was able to speak with the adjuster for your case. We don't have a position that you can come back to with a work restriction of 25 pounds so you have to stay on your current course until you have a full nonrestrictive status. So we'll just keep going the way things are until your [*sic*] able to come back 100%."

The plaintiff testified during his deposition that he understood Fejes to have been promising to keep a position open for him until he was able to return to work without restrictions.

¶ 9 On March 2, 2017, the plaintiff presented to Dr. Michael Kornblatt for an independent medical examination. Dr. Kornblatt told the plaintiff that he could return to work without restrictions on April 3, 2017. On March 28, 2017, the plaintiff filed an application for adjustment of claim pursuant to the Act, seeking payment for an epidural steroid injection to treat the work-

related injury he sustained on October 26, 2016. The plaintiff's initial application listed FedEx as his employer, not the defendant.

¶ 10 On March 31, 2017, Lisa Reardon, the claim adjuster for Protective Insurance who was assigned to the plaintiff's claim, exchanged emails with the plaintiff's counsel. The emails show that the plaintiff's counsel sought Reardon's help in returning the plaintiff to work and she agreed to speak with Fejes. A few hours later, Reardon learned that the plaintiff had filed an application pursuant to the Act and asked the plaintiff's counsel what issue prompted the filing of the claim. That same day, Reardon spoke with Fejes, who informed her that the defendant did not have a position available for the plaintiff. Reardon related this information to the plaintiff's counsel, explaining that the defendant had to downsize and terminate two positions. Fejes testified that the two positions that he was referring to belonged to Bustamante and the plaintiff.

¶ 11 On April 3, 2017, the plaintiff, on instructions from his counsel, arrived at the FedEx facility in Niles to report for work. A FedEx dispatcher called Fejes, informing him that the plaintiff was at the facility. Ultimately, the FedEx dispatcher told the plaintiff to go home. The plaintiff returned on the following two days and was sent home each time. Fejes testified that he spent the following days determining if he could find any work for the plaintiff. On April 8, 2017, Fejes decided to terminate the plaintiff's employment because the defendant did not have a position available for him.

¶ 12 On April 10, 2017, the plaintiff amended his application for adjustment of claim, naming the defendant as his employer. On April 12, 2017, Fejes sent the plaintiff a text message notifying him that the defendant did not have an available position for him. The message stated that the defendant had downsized and eliminated two positions since the plaintiff's injury. Fejes

concluded the message by stating, "If I'm able to add a position in the near future I will let you know." Fejes testified that, when he terminated the plaintiff, he did not know that the plaintiff had filed the application for adjustment of claim against the defendant.

¶ 13 The plaintiff testified that he believed the defendant terminated him for exercising his rights under the Act. According to the plaintiff, the defendant's statement that his business was decreasing was "not true." The plaintiff stated that he knew the defendant's business had not decreased because his attorney had conducted a "search." The plaintiff also testified that a driver from another company told him that the defendant's business was not suffering. The plaintiff further maintained that the defendant had hired people to do his job. When asked who the defendant had hired to take over the plaintiff's runs, the plaintiff stated that he did not know. The plaintiff admitted that Fejes never expressed anger toward him for having filed a workers' compensation claim against the defendant.

¶ 14 On April 13, 2017, the plaintiff filed a single-count complaint against the defendant, alleging that the defendant discharged him in retaliation for having exercised his rights pursuant to the Act. The plaintiff sought both compensatory and punitive damages against the defendant.

¶ 15 Thereafter, in May of 2017, Reyes resigned as a driver for the defendant and a new driver was hired to replace him. Fejes testified that he considered hiring the plaintiff for the open position but chose not do so because the plaintiff had initiated this litigation against the defendant.

¶ 16 On July 17, 2018, the defendant moved for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2016)), arguing that the plaintiff failed to raise a genuine issue of material fact as to whether he was terminated because he

exercised his rights under the Act. In support of its motion, the defendant attached the following exhibits: excerpts from the depositions of the plaintiff, Fejes, and Reardon; copies of the pleadings; its answers to the plaintiff's interrogatories; a November 1, 2016 letter sent by Providence Insurance acknowledging receipt of the plaintiff's claim under the Act; Fejes's affidavit averring that he fired Bustamante and attaching the accompanying payroll documents; a copy of an email correspondence between Reardon and the plaintiff's counsel; and a copy of the text message sent from Fejes to the plaintiff terminating his employment.

¶ 17 The plaintiff filed a response to the defendant's motion for summary judgment, arguing that several pieces of evidence support the inference that he was fired for exercising his rights under the Act. As such, he maintained that a genuine issue of material fact existed with respect to whether the defendant's proffered reason for his termination—lack of an available position—was pretextual and, therefore, summary judgment was inappropriate. In support of his argument, the plaintiff attached the entire deposition transcripts of the plaintiff's testimony and Fejes's testimony; copies of email correspondences between the plaintiff's counsel and Reardon; and the defendant's 2016 and 2017 profit and loss statements.

¶ 18 On November 14, 2018, the circuit court held a hearing on the defendant's motion for summary judgment. At the conclusion of the hearing, the circuit court entered summary judgment in favor of the defendants, finding that the plaintiff did not present sufficient evidence to raise a genuine issue of material fact as to whether the defendant's proffered reason for terminating the plaintiff was pretextual. The plaintiff now appeals.

¶ 19 On appeal, the plaintiff argues that the circuit court erred in granting the defendant's motion for summary judgment because there is a genuine issue of material fact as to whether the defendant terminated him for exercising his rights under the Act.

¶ 20 Before turning to the merits, we must first admonish the plaintiff because his brief does not conform to the Illinois Supreme Court Rules. Rule 341(h)(6) provides, in pertinent part, that an appellant's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal[.]" Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Here, the plaintiff failed to cite to the record for every factual statement presented, requiring this court to sift through the record in an effort to find the underlying factual support. Moreover, the plaintiff failed to provide this court with "the facts necessary to an understanding of the case" because he raised facts in his argument section that are not contained within his statement of facts. Our supreme court's rules "are not aspirational" and "are not suggestions," but rather, "[t]hey have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). However, it is within our discretion to consider an appellate brief notwithstanding an appellant's failure to comply with Rule 341(h)(6). *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 228 (2008). We do not find it necessary to strike the plaintiff's statement of facts because his error is not so egregious as to hinder our review of the issue raised on appeal; rather, we will simply disregard any improper or unsupported statements. *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 698 (2009).

¶ 21 Summary judgment is an appropriate means of disposing of a cause of action where the pleadings, depositions, admissions, together with the affidavits on file, viewed in a light most

favorable to the nonmoving party, demonstrate the absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2016); *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 20. The movant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing that there is an absence of evidence to support the nonmoving party's case. (Internal quotation marks omitted.) *Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 22. The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists. *Id.* We review a circuit court's order granting summary judgment *de novo*. *Id.*

¶ 22 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 (2007). Retaliatory discharge cases predicated upon an employee's filing of a workers' compensation claim are reviewed using traditional tort analysis and the plaintiff has the burden of proving all of the elements of his cause of action. *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 221 (2007). To sustain a cause of action for the tort of retaliatory discharge based 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 protected by the Act; and (3) that he was discharged and that the discharge was causally related to his filing a claim under the Act. *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 335-36 (1998). Here, the defendant does not contest the first two elements; thus, the only question before this

court is if there is a genuine issue of material fact as to whether the plaintiff's termination was causally related to the exercise of his rights under the Act.

¶ 23 The ultimate issue concerning the causation element is the employer's motive in discharging the employee. *Clemons*, 184 Ill. 2d at 336. In order to prove the causation element, a plaintiff must affirmatively show that his discharge was "primarily to retaliate against [him] for exercising the protected right and not for a lawful business reason." *Dixon Distributing Co. v. Hanover Insurance Co.*, 244 Ill. App. 3d 837, 845 (1993), aff'd, 161 Ill. 2d 433 (1994) (citing *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160 (1992)). As our supreme court has observed, the mere discharge of an employee who has filed a workers' compensation claim does not satisfy the requirement of causal relationship if the employer has a valid, nonpretextual basis for discharging the employee. *Hartlein*, 151 Ill. 2d at 160. Although the issue of an employer's motive or intent is a question of fact, not normally subject to summary judgment (*Miller v. J.M. Jones Co.*, 225 Ill. App. 3d 799, 804 (1992)), we have consistently affirmed the entry of summary judgment in cases where the plaintiff failed to provide any facts that would give rise to an inference that his termination was casually related to the filing of a claim under the Act (see, e.g., *Carter v. GC Electronics*, 233 Ill. App. 3d 237, 241 (1992)).

¶ 24 Here, the defendant presented evidence establishing that it terminated the plaintiff because there was no longer a position available for him as a driver. The record contains Fejes's undisputed testimony that the defendant hired its drivers to drive specific runs and that it lost the runs assigned to the plaintiff, which left the defendant with no position available for the plaintiff upon his return. Fejes's affidavit also states that the defendant terminated Bustamante, a driver with more seniority than the plaintiff, three months before discharging the plaintiff. Notably, the

record contains no evidence that Fejes had an issue with the plaintiff exercising his rights under the Act, nor has the plaintiff presented evidence that Fejes was aware of his April 10, 2017 application for an adjustment of claim when he discharged the plaintiff. Rather, Fejes expressly testified that he did not have any knowledge of the application prior to terminating the plaintiff.

¶ 25 The plaintiff nevertheless contends that he presented sufficient evidence to create a genuine issue of material fact, citing to *Hugo v. Tomaszewksi*, 155 Ill. App. 3d 906 (1987). In *Hugo*, an employee of 23 years sustained a work-related injury and filed a claim under the Act. *Id.* at 907. After receiving benefits for six months, the employee returned to work only to be discharged that same day. *Id.* at 907-08. The employer's stated reason for the discharge was a decline in business. *Id.* at 908. The circuit court granted the employer's motion for summary judgment. *Id.* at 909. On appeal, the employee argued that summary judgment was inappropriate because the following evidence created a genuine issue of material fact: the timing of the discharge, the employee was discharged even though there were less senior employees, and the employer hired someone to fill a position at the store without first offering the position to the plaintiff. *Id.* at 910. We held that, given these facts, summary judgment was inappropriate because "fair-minded people could draw different inferences from the facts presented ***." *Id.*

¶ 26 The plaintiff asserts that, just as in *Hugo*, the timing of his discharge, which occurred two days after he filed an application under the Act, when considered along with the other facts in evidence, is sufficient to preclude summary judgment. Specifically, the plaintiff highlights the following facts as support for his argument: Fejes's February 21, 2017 text message, which the plaintiff took as a promise to keep his position open until he fully recovered; the defendant's financial statements for 2016 and 2017, which show no reduction in the defendant's gross

revenue from 2016 to 2017; and the defendant's failure to hire the plaintiff in May of 2017 to replace a driver that quit.

¶ 27 We find *Hugo* distinguishable from the instant case and conclude that the uncontradicted evidence does not raise a genuine issue of material fact as to whether the plaintiff's discharge was casually related to his filing of a claim under the Act. Here, unlike in *Hugo*, the plaintiff was the driver with the least seniority when he was discharged. Moreover, the defendant terminated a more senior driver operating out of Niles before discharging the plaintiff. Neither the February 21, 2017 text message, nor the defendant's profit and loss statements, refutes the defendant's stated reason for discharging the plaintiff—lack of an available position. With regard to the defendant's refusal to offer the plaintiff a position when a driver from Niles quit, it is undisputed that the opening occurred after the plaintiff had initiated this lawsuit, which Fejes acknowledged was the reason that he did not offer the plaintiff the position when it became available.

¶ 28 On the record before us, the plaintiff has not presented sufficient evidence demonstrating a causal link between his discharge and his exercise of rights under the Act to preclude summary judgment. The fact that the plaintiff was terminated within days of filing a claim under the Act is not enough to show retaliatory discharge. *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 496 (1998). Moreover, the plaintiff's attempts to create genuine issues of material fact are based on assertions that are unsupported in the record and conclusory, self-serving deposition testimony. Where the uncontradicted facts would entitle the moving party to summary judgment, an opposing party cannot rely on his pleadings alone to raise issues of material fact (*Harris v. Bethlehem Steel Corp.*, 124 Ill. App. 3d 449, 453-54 (1984)), nor can he rest on mere general denials unsupported by any evidentiary facts (*Lavat v. Fruin Colnon Corp.*, 232 Ill. App. 3d

1013, 1023 (1992)). Such denials are insufficient to raise a triable issue. *Id.* at 1023 (citing *Purdy Co. of Illinois v. Transportation Insurance Co.*, 209 Ill. App. 3d 519, 529 (1991)). We conclude that to be the case here.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.