2019 IL App (5th) 170351-U

NO. 5-17-0351

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SUSAN DAWN O'NEAL, Special Representative of the Estate of John O'Neal, Plaintiff-Appellant, v. THE AMERICAN COAL COMPANY, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Saline County. No. 13-L-7 Honorable Todd D. Lambert, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Where genuine issues of material fact exist, the trial court's entry of summary judgment in favor of The American Coal Company was in error, and the trial court's order is reversed and the cause remanded.

¶ 2 Susan O'Neal appeals from the trial court's August 25, 2017, order granting The American Coal Company's motion for summary judgment. John O'Neal filed the underlying complaint seeking damages against his former employer, The American Coal Company (American Coal), for retaliatory discharge stemming from a previously-filed worker's compensation claim for injuries sustained on June 16, 2011. For the reasons

that follow in this order, we reverse the trial court's judgment and remand for further proceedings.

¶ 3 FACTS

¶ 4 John O'Neal was employed by American Coal from January 2011 until March 21, 2012. O'Neal worked at the American Coal mine located in Saline County, Illinois. On June 16, 2011, O'Neal was injured while on the job. He filed a worker's compensation claim against American Coal on January 26, 2012. During the time period O'Neal worked for American Coal, all employees were subject to a corporate absenteeism policy. American Coal's policy stated that an employee could be terminated after seven unexcused absences in any 12-month period. On March 10, 2012, O'Neal was informed by a corporate representative that he had violated the absenteeism policy. He argued that some of the absences should be treated as excused, and American Coal removed two of the unexcused absences. However, O'Neal still had more unexcused absences than American Coal's policy allowed. Instead of terminating O'Neal, American Coal offered him a "Last Chance Agreement." On March 14, 2012, O'Neal signed this agreement that contained the following statement: "You are further warned that any future related violations of the AmCoal attendance policy or standards of conduct will result in immediate termination of your employment."

¶ 5 After O'Neal signed the agreement with American Coal barring any additional unexcused absences, he missed work on March 20 and March 21, 2012. American Coal terminated O'Neal's employment by a written letter dated March 21, 2012, that stated

that he had failed to provide American Coal with information about the two absences. As a result, American Coal treated both dates as unexcused absences.

¶ 6 O'Neal filed a retaliatory discharge action against American Coal on February 20, 2013, alleging that American Coal terminated his employment because he filed a worker's compensation claim against the company and not because he violated the absenteeism policy and the "Last Chance Agreement." On June 29, 2013, O'Neal died; thereafter his wife was appointed as the personal representative for his estate; and the estate was substituted as the plaintiff for his claim. The estate filed its second amended complaint against American Coal in April 2014.

¶ 7 American Coal filed a motion for summary judgment. American Coal argued that O'Neal's termination of employment was not related to his previously-filed claim for a work-related injury, but was related to his violation of his last chance agreement involving unexcused absences from work.

¶ 8 American Coal attached an affidavit of Cindy Biggs, an employee of American Coal, in support of its motion. In this affidavit, Biggs stated that she was a manager in the human resources department for American Coal, and that she was familiar with the facts leading up to and including O'Neal's employment termination. Biggs confirmed that the American Coal absenteeism policy supported termination of employment if the employee had seven unexcused absences from work in any 12-month period; that O'Neal had more than seven unexcused absences by March 10, 2012; that American Coal offered O'Neal a last chance agreement instead of terminating his employment; that O'Neal had two unexcused absences shortly after he signed the last chance agreement; and that

American Coal notified O'Neal that his employment was terminated for violation of the last chance agreement.

¶ 9 On July 23, 2017, Biggs was deposed. She testified that she oversaw the recordation of employee absences and was responsible in 2011 and 2012 to track O'Neal's absences. Biggs explained O'Neal's absence and occurrence detail report, including all unexcused absences from March 11, 2011, to March 10, 2012. During that year, O'Neal had 11 documented occurrences that the company labeled as unexcused. An "occurrence" could be a single day or a number of days. After O'Neal objected to the unexcused categorization of some or all of the absences, American Coal deleted 2 of the 11 unexcused occurrences. Biggs testified that O'Neal had nine remaining calendar year occurrences that were treated as unexcused absences:

(1) 4-14-11;

(2) 6-4-11;

(3) 7-1-11;

(4) 7-24-11;

(5) 8-1-11;

(6) 11-22-11;

(7) 12-21-11 and 12-22-11;

(8) 2-13-12, 2-14-12, and 2-15-12; and

(9) 3-1-12 and 3-2-12.

Biggs stated that medical treatment for a work-related injury would be treated as an excused absence. If American Coal recorded an unexcused absence, the employee had

the ability to provide documentation that could change the classification of the absence. In work-related injury cases, American Coal required the employee to document that an absence was connected to that injury by providing a note from the physician or treatment facility. Biggs explained the steps an employee and the company would take in reporting and recording absences. When an employee was going to miss work, he would call into a dispatch system and provide a reason for the absence. If the employee's stated reason was "worker's compensation" or "work injury," the dispatcher would record that reason. The dispatcher's recorded entries would come to the attention of American Coal's worker's compensation manager. Biggs testified that this worker's compensation manager, Anita Day, would call to verify each of these types of absences. According to Biggs, Day would have also verified each absence on O'Neal's list before both the last chance agreement and the letter of termination were finalized. However, Biggs had no recollection of speaking to Day in O'Neal's case. Biggs also produced no documents detailing O'Neal's final two absences on March 20 and March 21, 2012, and otherwise did not specifically testify about the details leading to American Coal's conclusion that the absences were unexcused.

¶ 10 In response to American Coal's motion for summary judgment, the estate filed a response alleging that the "unexcused absences" on July 1, 2011, August 1, 2011, February 13, 2012, were dates when O'Neal sought medical treatment for his work-related injury. As Biggs had testified that medical treatment for a work-related injury would not constitute an unexcused absence, the estate argued that those three dates should not have been counted. The estate argued that if those three unexcused absences

had not been counted, O'Neal would have had only six unexcused absences, that he would not have been in violation of American Coal's absenteeism policy, and that the last chance agreement would not have been required. Furthermore, the estate claimed that American Coal failed to produce any supporting documentation that O'Neal's absences on March 20 and March 21, 2012, were unexcused at Biggs' deposition.

¶ 11 In support of the estate's response to American Coal's motion for summary judgment, Susan O'Neal provided a sworn affidavit. Susan stated that she attended all of her husband's work injury medical appointments. After each appointment, Susan stated that the provider confirmed that a notice of treatment would be faxed to American Coal. Susan also stated that she was never contacted by American Coal to confirm that her husband was seeking treatment on any of the alleged dates he missed work. Based upon a review of certain medical records attached to her affidavit, Susan stated that on July 1, 2011, O'Neal had an appointment with Dr. James O. Alexander (a treating physician selected by American Coal) and was seen at Deaconess Hospital. Dr. Alexander's record indicates that he called the "Mine" after that scheduled appointment. On August 1, 2012, O'Neal had an appointment with Dr. John D. Graham. After that appointment, Dr. Graham wrote a letter addressed to an apparent representative of the mine advising that O'Neal "can continue his current light duty work status." On February 13, 2012, O'Neal had another appointment with the company physician, Dr. Alexander.

¶ 12 On August 25, 2017, the trial court entered its order granting American Coal's motion for summary judgment. The court stated that it found no genuine issues of material fact. Specifically, the estate "has failed to present evidence that [O'Neal's]

discharge was in retaliation for exercising his rights under the Illinois Workers Compensation Act" and "failed to present evidence that his firing was not related to his absenteeism and his violation of the Last Chance Agreement."

¶ 13 The estate filed its timely notice of appeal on September 11, 2017.

¶ 14 LAW AND ANALYSIS

¶ 15 Section 2-1005(c) of the Code of Civil Procedure provides that a party is entitled to summary judgment as a matter of law if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c) (West 2016). If there are outstanding genuine issues of material fact, the trial court should deny a motion for summary judgment. *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). " 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.' " *Monson v. City of Danville*, 2018 IL 122486, ¶ 12, ___ N.E.3d ___ (quoting *Adames v. Sheahan*, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 753 (2009)); see also *Koziol*, 309 Ill. App. 3d at 476.

¶ 16 Summary judgment is considered a drastic remedy and should not be granted unless the movant's right to judgment is unquestionable. *Monson*, 2018 IL 122486, ¶ 12 (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43, 809 N.E.2d 1248, 1256 (2004)); *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000). The trial court must strictly construe all evidence in the record against the moving party and liberally in favor of the opponent. *Monson*, 2018

IL 122486, ¶ 12 (citing *Adams*, 211 Ill. 2d at 42); *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986); *Koziol*, 309 Ill. App. 3d at 476. Appellate courts review summary judgment orders on a *de novo* basis. *Monson*, 2018 IL 122486, ¶ 12 (citing *Barnett v. Zion Park District*, 171 Ill. 2d 378, 385, 665 N.E.2d 808, 811 (1996)); *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992).

¶ 17 Here, the estate claims that it presented a genuine issue of material fact about whether O'Neal would have been subject to the last chance agreement. In support, Susan's affidavit provided detailed information that she claims could establish that three of the dates American Coal claims were unexcused work absences should have been treated as excused work absences. Susan stated that she was present at the three physician appointments at issue, and after review of the attached provider medical records, she confirmed that the three appointments were related to O'Neal's work injury.

¶ 18 American Coal counters that the medical records upon which Susan relies in this affidavit were not certified, and thus constitute inadmissible hearsay evidence, and cannot raise a genuine issue of material fact.

¶ 19 We agree with American Coal's position that the medical records attached to Susan's affidavit were inadmissible because they were not certified as mandated by Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Rule 191(a) provides that affidavits filed in opposition to a motion for summary judgment:

> "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the *** defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall

> affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

Medical records can be admissible in evidence as evidence of the act or occurrence depicted if the records were "made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

¶ 20 As the medical records at issue had not been certified before Susan's affidavit was created, the trial court was correct to disregard Susan's specific testimony about those three medical appointments.

¶ 21 Although factually-specific statements connected to the medical records were inadmissible, other statements Susan made in her affidavit were admissible. Susan stated that she attended all medical appointments with her husband. This statement was confirmed in Susan's earlier deposition testimony. She also testified that her husband did not miss work after his return to work on light duty status unless he had a medical appointment. Susan also stated that all medical providers were instructed to fax a medical excuse note to American Coal.

¶ 22 In this case, American Coal is not suggesting that Susan falsified the records, but correctly discredits the admissibility of the records because the records upon which Susan relies do not appear to have been certified by records custodians for the medical providers in question. Thus, the medical records are currently inadmissible "as evidence of the act, transaction, occurrence, or event ***." *Id.*

¶ 23 The trial court's summary judgment order concluded that there was no genuine issue of material fact that American Coal terminated O'Neal's employment for a reason unrelated to his worker's compensation claim. We briefly review the elements that O'Neal was required to allege in his complaint for retaliatory discharge. In *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160, 601 N.E.2d 720, 728 (1992), the supreme court stated that a valid retaliatory discharge claim requires "that an employee has been (1) discharged; (2) in retaliation for the employee's activities; and (3) that the discharge violates a clear mandate of public policy." If the employer has a valid, nonpretextual basis for discharging an employee, the employee is not able to establish causation necessary for a retaliatory discharge claim. *Id.*

¶ 24 There is no question that O'Neal was discharged, and so the primary outstanding issue was whether American Coal's termination decision was retaliatory because he had filed his worker's compensation claim and had missed work because of the related medical appointments. Here, American Coal's stated nonpretextual basis for O'Neal's termination was his violation of the last chance agreement. As the last chance agreement resulted from O'Neal's nine unexcused absences, the designation of those absences as excused or unexcused was critical. Furthermore, if the "unexcused" absences were actually absences for medical care related to the work injury, those facts could be circumstantially important in establishing his claim for retaliatory discharge.

¶ 25 As stated earlier in this order, summary judgment should not be granted if "the pleadings, depositions, and admissions on file, together with the affidavits," demonstrate the existence of a genuine issue of material fact. 735 ILCS 5/2-1005(c) (West 2016).

American Coal argues that summary judgment was proper because Susan's affidavit did not counter Biggs' affidavit–an argument that ignores information contained in the pleadings and depositions on file. In this case, Susan's sworn deposition testimony provides factual details that counter Biggs' affidavit about O'Neal's medical appointments, absences from work, and contact from American Coal to investigate absences. A court's consideration of a motion for summary judgment cannot be so narrowly defined.

¶ 26 After a thorough review of the complete record and briefs on appeal as well as the motion for summary judgment and the affidavits in support and in opposition, we conclude that there were unresolved issues of material fact. We find that American Coal's absence documentation and Biggs' resulting conclusions that the absences at issue were unexcused are based upon a series of assumptions. Biggs testified that when an employee calls in to report his absence, he would inform the dispatcher that the absence was due to a work injury. Biggs then testified that the dispatcher would record that reason for the absence. If the employee referenced a work injury in reporting the absence and if the dispatcher actually reported that reason for the absence, American Coal's worker's compensation manager would then attempt to verify the reason for the absence. From Biggs' testimony, Day, the worker's compensation manager, would look for those worker's compensation absences on the dispatcher's records. While Biggs also testified that Day would have called to verify each absence on O'Neal's list both before he was provided the last chance agreement and before he was terminated, Biggs acknowledged that this was an assumption as she had no recollection of speaking to Day about O'Neal's

case for confirmation. Even if we were to assume that Day confirmed that each recorded absence was unexcused, Susan testified that she never received any contact from Day or any other American Coal representative to ask about her husband's absences. The record on appeal contains no files or records kept by Day in support of her "confirmation" that O'Neal's absences were unexcused. Furthermore, there is no sworn testimony from Day in the form of an affidavit or a deposition to support Biggs' assumptions.

¶ 27 "[E]ntry of summary judgment has two requisites: the absence of any issue as to material fact and the unmistakable conclusion of law that the moving party is entitled to the judgment he seeks." *Skipper Marine Electronics, Inc. v. United Parcel Service, Inc.*, 210 Ill. App. 3d 231, 235, 569 N.E.2d 55, 58-59 (1991). In this case, viewing all available evidence and resolving all inferences in favor of the estate, American Coal's right to judgment is not "clear beyond question" (*id.*). We conclude that the trial court's entry of summary judgment in favor of American Coal was incorrect.

¶ 28 CONCLUSION

¶ 29 For the reasons stated in this order, we reverse the judgment of the circuit court of Saline County and remand for further proceedings.

¶ 30 Reversed and remanded.