2018 IL App (1st) 180745-U

FOURTH DIVISION
December 27, 2018

No. 1-18-0745

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JULIO QUINONES,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 16 L 005217
CRAFTSMAN PLATING AND TINNING	)	
CORPORATION,	)	Honorable
	)	Brigid McGrath,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of defendant Craftsman Plating and Tinning Corporation where plaintiff failed to raise a question of material fact on his complaint for retaliatory discharge.

¶ 2 Plaintiff Julio Quinones was employed by defendant Craftsman Plating and Tinning Corporation as a maintenance worker. Plaintiff was injured on the job and exercised his rights under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq*. (West 2016)) to recover from his injury. When he returned to work, plaintiff was on limited duty for five months.

Shortly after being released to full duty, plaintiff was discharged by defendant's president, Brian Blacklidge. Plaintiff subsequently filed a retaliatory discharge action against defendant alleging that he was laid off for exercising his right to compensation under the Act. Defendant moved for summary judgment, asserting that plaintiff failed to establish a causal connection between his workers' compensation claim and subsequent lay off. Following briefing and arguments the trial court granted defendant's motion.

¶ 3 Plaintiff appeals, arguing that the trial court erred in granting summary judgment because he provided (1) sufficient evidence to support a genuine issue of material fact related to plaintiff's discharge, (2) evidence that his discharge was motivated by retaliatory intent, and (3) a rebuttal to defendant's nonretaliatory reason for discharging plaintiff to show a genuine issue of material fact.

¶ 4 Plaintiff was hired as a maintenance worker by defendant on February 25, 2015, after their existing maintenance worker, Patrick McGrath, had suffered a heart attack and was on medical leave. McGrath returned to work in March 2015, and both men were employed as maintenance workers.

¶ 5 On June 9, 2015, plaintiff injured his finger during the course of his employment. He initially sought treatment at Fullerton Medical Center in Chicago. Plaintiff was told to take the next day off work. Plaintiff returned to work on June 11, 2015, and continued to work until July 26, 2015. On July 27, 2015, plaintiff filed a workers' compensation claim and took medical leave for surgery on his hand and recovery. Plaintiff returned to work on November 9, 2015. At that time, plaintiff had a medical restriction preventing him from lifting over 10 pounds. Due to this restriction, plaintiff was unable to perform his regular work as a maintenance worker. Defendant accommodated plaintiff's medical restriction by creating a new job for him to paint the whole

facility at the same rate of pay as his maintenance position. Plaintiff continued in this role until April 2016. While plaintiff was on medical leave and restriction, McGrath was the sole maintenance worker for defendant.

¶ 6 On April 7, 2016, plaintiff's doctor released plaintiff's medical restriction and returned him to full duty. Plaintiff resumed his work as a maintenance worker. On or about April 18, 2016, Blacklidge notified plaintiff that he was being discharged.

¶ 7 On May 25, 2016, plaintiff filed his complaint for retaliatory discharge against defendant. In his complaint, plaintiff alleged that his termination "was intentional and was in retaliation for [plaintiff's] attempt to assert his rights to and remedies under the [Act] pursuant to the work related injuries he sustained while working for [defendant.]"

¶ 8 In August 2017, defendant filed its motion for summary judgment. Defendant argued that following the completion of discovery, plaintiff had failed to establish a *prima facie* case that his layoff was due to any retaliatory intent, nor has plaintiff rebutted defendant's nonretaliatory reason for his layoff, *i.e.*, lack of sufficient work to maintain two maintenance workers and plaintiff had less seniority than McGrath. Defendant attached an affidavit from Blacklidge to its motion.

¶ 9 In his affidavit, Blacklidge stated that he was the president for defendant. Defendant is a union shop and its employees are members of the Chemical and Production Workers Union Local No. 30, AFL-CIO (Union). Plaintiff was a member of the Union. Defendant's annual sales have been in decline from 2013 to 2017, and an attached exhibit showed a decrease in annual sales in each year, with a 4.8% decrease in 2016. Defendant did not have enough work to keep both maintenance workers busy, so plaintiff was laid off in April 2016. Plaintiff had the lowest seniority in the company at the time of his layoff in April 2016, and attached a copy of

defendant's seniority list. The other maintenance worker, McGrath, had 13 years seniority over plaintiff. Under the Union seniority rules, which were attached, the maintenance employee with less seniority must be terminated first.

¶ 10 Blacklidge further stated that since plaintiff's termination until the date of the affidavit in August 2017, defendant had not hired a second maintenance employee and McGrath remains the only maintenance employee. During plaintiff's medical leave and restricted duty, McGrath was able to handle all of the maintenance duties without assistance. Blacklidge stated that when plaintiff was hired in February 2015, defendant did not know if McGrath would return to work following his heart attack. When McGrath returned to work, both plaintiff and McGrath worked together for three months until plaintiff injured his hand.

¶ 11 Blacklidge denied that he or anyone else at the company had ever fired any employee based upon a filing of a workers' compensation claim. The last employees to be laid off were discharged during the recession in 2009, none of whom had filed a workers' compensation claim. He stated that another employee filed a workers' compensation claim in 2012 and was never laid off by defendant. He noted a second employee filed a workers' compensation claim in 2007 and was not laid off. That employee resigned in 2015 with his resignation letter attached to the affidavit.

¶ 12 In October 2017, plaintiff filed his response to defendant's motion for summary judgment. In his response, plaintiff asserted that his termination a week after returning to full duty "creates a presumption" that defendant's motive was retaliatory and precludes summary judgment. Plaintiff also contended that he could present evidence raising an issue of material fact that defendant's stated reason for termination, lack of work, was pretextual.

¶ 13 Plaintiff attached three depositions to his response: his own, Blacklidge, and Angel Febus, the Union representative. Plaintiff testified that Blacklidge did not give a reason when he discharged plaintiff. Plaintiff stated that he did not have the chance to ask the reason. He also testified that he tried to call the Union representative, but did not receive a call back from Febus. Plaintiff admitted that in the week he was working full duty prior to discharge, Blacklidge sent him home because he did not have work, though plaintiff maintained that there was work. He admitted that McGrath had seniority over him. Plaintiff testified that Blacklidge told him on more than one occasion that plaintiff was doing a "good job."

¶ 14 When asked at his deposition to explain any facts that would substantiate his claim for retaliatory discharge, plaintiff testified that everyone else got a "turkey check," *i.e.*, a holiday bonus, but he did not receive one. When he asked Blacklidge about the check, Blacklidge told plaintiff that he had only been working there a short time. Plaintiff also testified that Blacklidge made a comment to him that "some employees get here, and they don't take that much time off." Plaintiff also stated that Blacklidge would let him go home early when plaintiff believed there was work for two people. Plaintiff further testified that Blacklidge would ask plaintiff when he was coming back to full duty and seemed angry. Plaintiff described Blacklidge as "popping out of nowhere, like, hawking" him while he was painting and being rude. Plaintiff admitted that he did not contact the Union about any grievance prior to his termination. Plaintiff then testified that Blacklidge was a "different person" after lunch because he was "always drinking." Plaintiff did not talk to the Union about Blacklidge's drinking because it was none of his business. Plaintiff testified it was normal for Blacklidge to yell at employees in front of others, not just plaintiff. Plaintiff stated that he overheard Blacklidge belittle other employees. Plaintiff discussed this treatment with one employee named Jose, who worked on the dock. Both men vented to each

other about Blacklidge. As far as plaintiff knew, Jose had not been injured on the job or filed a workers' compensation claim.

¶ 15 Blacklidge testified at his deposition that Craftsman provides a finish on parts, such as silver plating and gold plating. The company has 27 employees. Blacklidge is the president, but he is not a stockholder. His brother and his children are the stockholders for the company. He had not hired any new employees after plaintiff was discharged, nor has anyone else been discharged. Blacklidge denied any recollection of plaintiff's testimony that Blacklidge criticized his workers' compensation claim. He stated that he would not discuss other injuries with plaintiff.

¶ 16 Blacklidge testified that Febus was the Union business agent, meaning he would negotiate the contract for the employees. Blacklidge discussed a letter provided as an exhibit prepared by Febus. The letter was prepared after Blacklidge contacted Febus to determine if plaintiff had gone to the Union after his discharge. When asked if the letter was something he asked Febus to write after plaintiff's complaint had been filed, Blacklidge answered, "Correct." Blacklidge stated that Febus would visit the company quarterly, talk to the employees, and generally discuss the business conditions. Blacklidge testified that plaintiff was laid off for lack of work and he was not contesting plaintiff's work injury.

¶ 17 Blacklidge testified that he told plaintiff that he could no longer keep plaintiff full time and did not have enough work for two maintenance workers. Because plaintiff was lowest in the department, Blacklidge had to let him go. Blacklidge testified that the lack of work had been going on for a year and a half to four years. He stated that plaintiff was hired because McGrath had a heart attack and they did not know what his capabilities were going to be when he came back, if he was going to return full time, or if he was going to retire. Blacklidge testified that he

did not have any complaints or performance problems with plaintiff's work. He denied belittling or criticizing plaintiff after his injury. He further testified that plaintiff did not get a "turkey check" because he had not been employed a full year and defendant based it off of the employment anniversary date. Blacklidge also denied consuming alcohol at the facility.

¶ 18 Febus testified at his deposition that he was employed by the Central States Joint Board as a business agent. Febus discussed the letter he drafted. It was dated October 17, 2016, and it was prepared after a conversation with the company, specifically with Blacklidge. Febus stated that Blacklidge did not ask him to write the letter, but the letter was sent to Blacklidge. Blacklidge had contacted Febus and asked if plaintiff had filed a grievance. Febus testified that plaintiff had not called or appeared in person to file a grievance. When asked how he knew plaintiff did not contact him, when plaintiff had testified that he attempted to contact him, Febus responded that he never had a conversation with plaintiff.

¶ 19 Febus testified that he normally visited defendant's facility once a month. He had observed a lack of work through his routine visits. He could not give a specific answer about lack of work because the work went up and down, sometimes on a daily basis. Febus did not have any personal knowledge about the lack of work leading to plaintiff's discharge. He did not reach out to plaintiff after plaintiff's discharge. Febus testified that "it is the responsibility of the employees to reach out to the organization, the union, to try to help them out with whatever situation they have. So normally, we do not reach out to them. Normally, they reach out to us." Febus testified that if anyone called him and left a name and phone number, then they would get a call back. After Blacklidge contacted him, Febus drafted the letter to clarify that plaintiff had not reached out to him. Febus testified that maintenance had "always been two guys." When asked if there was always enough work for two maintenance workers, Febus responded, "I know

there's work. Whether to maintain two people officially busy eight hours in a day, I cannot answer that."

¶ 20 Febus denied ever seeing Blacklidge drinking alcohol on the job. He also testified that no employees complained to him that Blacklidge was demeaning to employees after drinking alcohol. Febus testified that during his routine visits, employees would tell him when work was slow. He then would talk to Blacklidge about the employees' concerns, and Blacklidge would indicate if things were slow or if it picked up. Febus does not have any knowledge of defendant's work orders.

¶ 21 The letter, dated October 17, 2016, drafted by Febus and attached to the deposition, stated:

> "This is to inform or clarify a situation at Craftsman Plating. I know that an employee named Julio Quinones was laid-off by the Company and I was informed while visiting the shop. Mr. Quinones was laid-off due to lack of work and he was laid-off according to the Union contract.
>
> He has not contacted the Union to file a grievance or tried to reach out to his Business Representative."

¶ 22 Following briefing, the trial court conducted a hearing on defendant's motion for summary judgment. A transcript of the arguments was not provided in the record. On March 7, 2018, the trial court granted defendant's motion and entered its findings on the record with parties and counsel present. The court found there was no genuine issue of material fact because plaintiff was unable to show the requisite causal connection between his termination and his workers' compensation. The court rejected plaintiff's contention that the court consider the time period from when he was returned to full duty as a maintenance worker to his termination and

disregard the four months he was on medical leave as well as the five months he was accommodated as a painter by defendant. The court also found that plaintiff failed to raise a genuine issue of material fact rebutting defendant's nonretaliatory reason for discharge, the lack of work as a maintenance worker.

¶ 23 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on April 5, 2018. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 24 On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary judgment because he has presented sufficient evidence to establish a genuine issue of material fact regarding whether plaintiff's discharge was in retaliation for pursuing his workers' compensation claim. Defendant maintains that the trial court correctly granted summary judgment because plaintiff failed to establish a *prima facie* case of retaliation.

¶ 25 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no 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). "A genuine issue of material fact is said to exist when the evidence is sufficient to cause a reasonable jury to return a verdict for the party opposing the entry of summary judgment." *Schuster v. Occidental Fire & Casualty Co. of North America*, 2015 IL App (1st) 140718, ¶ 16. "Although a plaintiff is not required to prove his case at the summary judgment stage, in order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle the party to a judgment." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). We review cases

involving summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 26 "Witness testimony properly considered by a court in a summary judgment proceeding is testimony that meets the same standard as an affidavit and consists of a statement or statements of fact, not mere conclusions, opinions, or belief not based on personal knowledge of facts." *Schuster*, 2015 IL App (1st) 140718, ¶ 20. " 'The form of affidavits used in connection with motions for summary judgment is governed by Supreme Court Rule 191 ***.' " *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 21 (quoting *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992)). Supreme Court 191(a) provides in relevant part:

> "Affidavits in support of *** a motion for summary judgment under section 2-1005 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or 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).

¶ 27 An affidavit under Rule 191(a) "must not contain mere conclusions and must include the facts upon which the affiant relied." *US Bank*, 2014 IL App (1st) 140718, ¶ 22. " '[T]he affidavit is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony.' " *Id.* (quoting *Harris Bank Hinsdale*, 235 Ill. App. 3d at 1025). Evidence that would be inadmissible at trial may not be considered when reviewing a summary judgment

motion. *Id*. " 'If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)). " 'Facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.' " *US Bank*, 2014 IL App (1st) 140718, ¶ 31 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)).

¶ 28 "The general rule in Illinois is that an at-will employee may be discharged by the employer at any time and for any reason." *Grabs v. Safeway, Inc.*, 395 Ill. App. 3d 286, 291 (2009) (citing *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 17-18 (1998)). Under a limited exception to this general rule, the Illinois Supreme Court has allowed a plaintiff who was terminated for pursuing workers' compensation benefits to bring an action for retaliatory discharge against his or her former employer. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181-82 (1978). "Discharges are considered retaliatory when they violate a 'clear mandate of public policy,' and an employer 'may not present the employee with a choice between his job and his legal entitlement to compensation' under the Act." *Grabs*, 395 Ill. App. 3d at 291 (quoting *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160, 166 (1992)). Section 4(h) of the Act specifically provides: "[i]t shall be unlawful for any employer *** to discharge *** an employee because of the exercise of his or her rights or remedies granted to him or her by this Act." 820 ILCS 305/4(h) (West 2014).

¶ 29 Although not a workers' compensation case, "[t]o state a valid retaliatory discharge claim, an employee must show that he was dismissed in retaliation for his activities, and that the

dismissal was in contravention of a clearly mandated public policy." *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 505 (1991). Stated differently under the Act, "[t]o state a cause of action for retaliatory discharge, plaintiffs must show that: (1) they were employees of defendants before or at the time of the injury; (2) they exercised some right granted by the Act (820 ILCS 305/1 *et seq*. (West 2006)); and (3) their discharge was causally related to the exercise of their rights under the Act." *Grabs*, 395 Ill. App. 3d at 291; see also *Michael v. Precision Alliance Group, LLC*, 2014 IL 117376, ¶ 31. The first two elements are undisputed and not at issue here. Thus, the question before this court is whether a genuine issue of material fact exists as to whether plaintiff's discharge was causally related to his exercise of his workers' compensation rights.

¶ 30 The employee bears the burden of establishing causation. *Siekierka v. United Steel Deck, Inc.*, 373 Ill.App.3d 214, 221 (2007). "When deciding the element of causation, the ultimate issue is the employer's motive in discharging the employee." *Michael*, 2014 IL 117376, ¶ 31. "The element of causation is not met, however, if the employer has a valid, nonpretextual basis for discharging the employee." *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 39. "The mere discharge of an employee who has filed a workers' compensation claim 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). "Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is [a] 'lie, specifically a phony reason for some action.' " *Argyropoulos v. City of Alton*, 539 F.3d 724, 736 (7th Cir. 2008) (quoting *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 737 (7th Cir. 2006)). To show pretext, a plaintiff may provide " 'evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the employment action.' " *Carter v. Chicago State*

University, 778 F.3d 651, 659 (7th Cir. 2015) (quoting *Tank v. T-Mobile USA, Inc.*, 758 F.3d 800, 808 (7th Cir. 2014)). Generally, an employer's motive or intent in discharging an employee is a question of fact not subject to summary judgment. *Fuentes v. Lear Siegler, Inc.*, 174 Ill. App. 3d 864, 867 (1988).

¶ 31 Plaintiff asserts that the timing of his discharge supports the causal link between his exercise of his rights under the Act and his discharge. According to plaintiff, the temporal proximity between his seeking of medical treatment and his discharge creates a genuine issue of material fact to defeat summary judgment. However, a plaintiff must ordinarily present other evidence, beyond simply the timing, that the employer's explanation for the adverse action was pretext for retaliation. *Tibbs v. Administrative Office of the Illinois Courts,* 860 F.3d 502, 505 (7th Cir. 2017).

¶ 32 Plaintiff relies on *Hugo v. Tomaszewski*, 155 Ill. App. 3d 906, 910 (1987), to support his assertion that the timing of his discharge in relation to the exercise of his rights under the Act constitutes persuasive evidence of the impropriety of his discharge. In *Hugo*, the plaintiff was injured at work and sought relief under the Act. He was out on medical leave for approximately six months and when he returned to work, he had medical restrictions. At that time, his employer informed the plaintiff that he was being laid off. *Id*. at 907-08. The plaintiff filed a claim for retaliatory discharge. In a deposition, the employer testified that business was down, especially in the department where the plaintiff worked and he made the decision to lay off the plaintiff the morning the plaintiff was released to return to work. *Id*. at 908-09. The trial court granted the employer's motion for summary judgment. *Id*. at 909.

¶ 33 On appeal, the reviewing court recognized that a "*prima facie* case of retaliatory discharge may be established by showing a short time span between the exercise of the

employee's rights under the Worker's Compensation Act and the employer's action discharging the employee." *Id*. at 910. The court concluded that there was a question of material fact regarding the reason the employer discharged the plaintiff. The court observed that the employer hired a replacement employee after another employee left without contacting the plaintiff, but that it could also be reasonably found that the employer had no reason to discharge the plaintiff while he was on medical leave and not on the payroll, such basis to discharge the plaintiff for declining business did not arise until the plaintiff returned to work. *Id*. at 910-11.

¶ 34 In the present case, plaintiff argues that the circumstances are similar to *Hugo* because he was discharged 11 days after he was released to full duty. Plaintiff claims that the trial court failed to take into account that he "sought medical treatment and was released to work full duty just 11 days prior to his termination." However, in *Hugo*, the plaintiff was discharged when returning to work with medical restrictions, but in contrast, plaintiff here returned to work with medical restrictions five months before he was discharged. For this reason, we find plaintiff's reliance on *Hugo* to be misplaced.

¶ 35 We observe that plaintiff has not presented any evidence that his medical appointment on April 7, 2016, involved an aggravation of his injury such that medical treatment was needed. He contends that he exercised his rights under the Act when he filed his claim in July 2015, and when he went to the doctor on April 7, 2016. Nothing in the record explains what medical treatment plaintiff sought on April 7, 2016, beyond receiving a release to resume full duty. His complaint does not refer to any medical treatment sought on that date. The only references to April 7, 2016, in his response to defendant's summary judgment motion were two references to plaintiff receiving a note from his doctor returning him to full duty. Additionally, in his deposition, plaintiff testified that he received his doctor's note to return to full duty as a

maintenance worker on April 7, 2016. Plaintiff did not present any testimony that he sought treatment on that date such that his termination was in retaliation. Absent any support in the record, plaintiff's attempt to add April 7, 2016, as the basis for his retaliatory discharge claim does not support a causal link between plaintiff's termination and exercising his rights under the Act.

¶ 36 In essence, plaintiff wants this court to discount the five months he worked with restrictions prior to his termination. He cites the following proposition for support: "Plaintiff's right to receive benefits thereunder for as long as he was unable to work nonetheless deserves protection under the statute. As such, the passage of time from the date of filing a claim for adjustment under the Act to the date of discharge of an employee-claimant cannot be allowed to insulate an employer from liability for retaliatory discharge." *Netzel v. United Parcel Service*, 181 Ill. App. 3d 808, 813 (1989). This authority does not support plaintiff's argument because no one is contesting the period he was unable to work, which was from July 27, 2015 to November 16, 2015. Plaintiff has cited no authority to support his argument that this court should only consider the time frame from when he was released to full duty, rather than the five months he had returned to work and his restrictions were accommodated. To survive summary judgment on his claim of retaliation under the Act, defendant needed to provide evidence supporting a reasonable inference that he was fired because he took medical leave under the Act. *Tibbs*, 860 F.3d at 505. We note that the Seventh Circuit has repeatedly held that a span of several months between the action and a retaliatory act did not raise a suspicious intent. See *Carter*, 778 F.3d at 658 (finding a gap of 7 months not suspicious between medical leave and a failure to promote); *Naficy v. Illinois Department of Human Services*, 697 F.3d 504, 513 (7th Cir. 2012) (holding a nine-month gap between complaint and a reassignment to part-time did "little to raise

suspicion"); *Jajeh v. County of Cook*, 678 F.3d 560, 570 (7th Cir. 2012) (concluding that a five-month gap between complaint of discrimination and adverse employment action did not amount to suspicious timing); *Leonard v. Eastern Illinois University*, 606 F.3d 428, 432 (7th Cir. 2010) (holding a six-month lag between complaint and failure-to-promote "too long to infer a link between the two"); *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 687 (7th Cir. 2010) (finding the "more than half a year" separating complaints and dismissal "far too long to withstand summary judgment"); and *Argyropoulos*, 539 F.3d at 734 (finding a "seven-week interval" between a sexual harassment complaint and termination "without more" did not establish suspicious timing). Standing alone, we cannot say that a gap of nearly five months between plaintiff's return to work after his medical leave under the Act and his discharge established suspicious timing.

¶ 37 Moreover, defendant set forth a valid, nonpretextual basis for plaintiff's discharge, a lack of work to maintain two maintenance workers, and plaintiff failed to offer any competent evidence to rebut defendant's basis for discharge. The record supports this reason. McGrath, the senior maintenance worker, had a heart attack and was on medical leave when plaintiff was hired. Plaintiff and McGrath both worked as maintenance workers from March 2015 until plaintiff's workers' compensation leave in July 2015. While plaintiff was injured in June, the timesheets indicate that he continued to work until his surgery in late July. Plaintiff remained on leave until November, when he returned to work with limitations. He was unable to lift more than 10 pounds, and accordingly, he could not return to his work as a maintenance worker. Defendant accommodated plaintiff's limitations by having him paint the facility under the same pay as a maintenance worker. He continued painting from November until April 7, 2016, when his doctor lifted his medical restriction. Plaintiff resumed his work in maintenance, but was discharged on or about April 18, 2016. Throughout plaintiff's medical leave and reassignment to

painting, McGrath performed the maintenance work alone. Blacklidge stated in his affidavit that defendant has not hired a second maintenance worker since plaintiff was discharged. Defendant also provided an exhibit listing its annual sales which showed a decline beginning in 2013 with a decrease of 4.8% in 2016. Per the Union agreement, defendant was required to lay off the individual with the least seniority, and in maintenance, plaintiff had the least seniority. Thus, defendant has set forth a nonpretextual basis for plaintiff's termination with support in the record such that plaintiff must rebut this basis to show the causation necessary for his claim. See *Vulpitta*, 2016 IL App (1st) 152203, ¶ 39.

¶ 38 Plaintiff contends that defendant's stated nonpretextual basis of lack of work was not valid and unsupported by the deposition testimony of plaintiff and Febus, but has not provided any competent evidence to support his position. Plaintiff mischaracterizes Febus's testimony. While Febus testified that defendant "most of the time" employed two maintenance workers, he stated that he could not give "a specific answer" regarding the work available because the work went up and down, sometimes on a daily basis. When asked if there was always enough work for two maintenance workers during the last ten years, Febus responded, "I know there's work. Whether to maintain two people officially busy eight hours in a day, I cannot answer that." Febus testified that during his visits to defendant's facility, he had observed a lack of work. Febus did not have any personal knowledge about the lack of work leading to plaintiff's discharge.

¶ 39 Plaintiff's testimony, standing alone, is insufficient to rebut the evidence submitted by defendant regarding the lack of work to sustain two maintenance workers. Plaintiff testified without any supporting documents that there was enough work for both maintenance workers, but defendant has shown declining sales as well as the fact that the company has not hired a second maintenance worker since plaintiff was discharged. Plaintiff's opinion that there was

sufficient work for two maintenance workers is not competent evidence. "The trial court may not consider evidence that would be inadmissible at trial when assessing a motion for summary judgment." *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 21. "[T]he party opposing summary judgment must produce some competent, admissible evidence which, if proved, would warrant entry of judgment in her favor." *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 40.

¶ 40 Further, as discussed above, Febus's testimony supports defendant's basis for dismissal. While plaintiff testified that Blacklidge made rude comments to him including reference to his injury, plaintiff's own testimony stated that Blacklidge made rude comments to other employees and had not singled out plaintiff. These statements standing alone cannot rebut defendant's evidence of a valid, nonpretextual basis for plaintiff's discharge. Significantly, plaintiff failed to file a counteraffidavit in response to Blacklidge's affidavit which detailed the lack of work to support two maintenance workers and that defendant has employed only one maintenance worker since plaintiff's discharge as well as the decline in sales for the company. Without a counteraffidavit, we must accept these facts as true for purposes of summary judgment. See *US Bank*, 2014 IL App (1st) 140718, ¶ 31.

¶ 41 On the record before us, plaintiff has not demonstrated a causal link between his termination and his exercise of rights under the Act to preclude summary judgment. We do not find the passage of five months from his return to work with restrictions to his discharge to be suspicious absent any additional support. Plaintiff has failed to present any facts by affidavit or deposition to create a question of fact as to defendant's motive or intent in his discharge. His deposition testimony standing alone is not competent evidence to support his contention that there was enough work to support two full-time maintenance workers. Additionally, he failed to

present a counteraffidavit to rebut defendant's stated nonpretextual basis for his discharge. Since plaintiff has not raised a genuine issue of material fact, the trial court properly granted defendant's motion for summary judgment.

¶ 42 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 43 Affirmed.

¶ 44 JUSTICE GORDON, specially concurring:

¶ 45 I agree with the majority order but I must write separately because an employer's motive or intent in discharging an employee is a question of fact not normally subject to summary judgment. See *Hugo v. Tomaszewski*, 155 Ill. App. 3d 906, 909-10 (1987); *Palmateer v. International Harvester Co.*, 140 Ill. App. 3d 857, 860 (1986); *Fuentes v. Lear Siegler, Inc.*, 174 Ill. App. 3d 864, 867 (1988).

¶ 46 To establish a *prima facie* case of retaliatory discharge for filing a worker's compensation claim, a plaintiff must show that (1) he exercised his statutory right to file a worker's compensation claim; (2) he was discharged in retaliation for his claim activity; and (3) the defendant's conduct was motivated by plaintiff's filing or contemplated filing of the worker's compensation claim. *Gomez v. The Finishing Co., Inc.*, 369 Ill. App. 3d 711, 718 (2006). Although the majority sets out the general elements for retaliatory discharge in ¶ 29 of the majority order, I tailored the elements to a worker's compensation claim.

¶ 47 The plaintiff need not present direct evidence of a discriminatory motivation or pretext. A plaintiff fulfills his burden of proof if he can show that the employer's explanation is not believable or raises a genuine issue of fact as to whether the employer discriminated against the plaintiff for his filing of the worker's compensation claim. *Gomez*, 369 Ill. App. 3d at 719.

¶ 48 However, plaintiff has not presented any facts by affidavit, deposition, or admission which support an inference that plaintiff was discharged for exercising his right to seek worker's compensation benefits. See *Armstrong v. Freeman United Coal Mining Co.*, 112 Ill. App. 3d 1020, 1022 (1983); *Cunningham v. Addressograph Multigraph Corp.*, 87 Ill. App. 3d 396, 398-99 (1980).

¶ 49 What the evidence in this case shows is that plaintiff was hired to replace the one existing maintenance worker for defendant, who had suffered a heart attack and was on medical leave. When that worker returned to work, both men were employed as maintenance workers, where defendant normally employed only one maintenance worker. After plaintiff was injured, plaintiff was unable to perform his regular work as a maintenance worker. Defendant accommodated plaintiff's medical restriction by creating a new job for him to paint defendant's entire facility. Eleven months later, plaintiff was discharged by defendant, claiming they need only one maintenance worker. As the majority concludes, plaintiff has failed to establish a *prima facie* case that his discharge or layoff was due to any retaliation for filing a worker's compensation claim, nor has plaintiff rebutted defendant's nonretaliatory reason for his discharge. The evidence shows that other employees have filed worker's compensation claims and were not laid off or discharged. Plaintiff failed to raise a question of fact regarding defendant's motive for the discharge and that is the reason that summary judgment was appropriate here.