2013 IL App (5th) 1300032-U

NO. 5-13-0032

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WANETA COWAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Jackson County.
	)	
v.	)	No. 10-L-105
	)	
BIG LOTS STORES, INC.,	)	Honorable
	)	Christy Solverson,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Stewart and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of the defendant because the plaintiff failed to set forth sufficient facts to support her retaliatory discharge claim.

¶ 2 BACKGROUND

¶ 3 On October 19, 2010, the plaintiff filed her complaint for retaliatory discharge. The plaintiff alleged that in retaliation for reporting coworkers' criminal violations, the defendant improperly increased the physical demands of her employment position and ultimately terminated her employment. The pleadings, depositions, affidavits, and exhibits on file, when viewed in the light most favorable to the plaintiff, reveal the following.

¶ 4 The plaintiff was employed by the defendant from May 4, 1992, until February 1998, and then resumed employment on October 23, 1998, at the defendant's location in Carbondale. In 2004 and 2005, the plaintiff reported to her superiors what she believed were violations of store policy and criminal law. She notified the defendant that Denise Farris, the

store manager, improperly marked goods unsaleable and took the marketable merchandise home without paying for it and that other employees were taking leisurely lunch breaks in excess of one hour in length, thereby being paid while on personal time.

¶ 5 The plaintiff reported her coworkers' violations to the following: Bridget Liggett, the defendant's assistant manager; a hotline maintained by the defendant; Don Conoyer, the defendant's district manager in charge of operations; Steve McClard, the administrator responsible for assets protection; and officials in the defendant's human resources department, namely, Penny Davis, Josh Hammersmith, and Anthony Brock. After an investigation in July 2004, Farris was relocated to another store.

¶ 6 In the fall of 2004, the plaintiff, who had been working as an office coordinator, began reporting to Valarie DeRam, who had transferred to the Carbondale store after Farris's departure. The plaintiff's conditions of employment changed for the worse. DeRam required the plaintiff to perform tasks that were very difficult for her physically, including lifting furniture and removing top stock of heavy merchandise, despite the plaintiff's medical restrictions, which included 10-pound lifting limits and four-hour standing restrictions. The plaintiff was also given work assignments and time deadlines that were unreasonable; she was deprived of access to her cash register; and she was assigned job duties and break times that were outside her announced work restrictions. In 2005, the plaintiff complained to Brock and Conoyer that DeRam, along with Bridget Liggett and Ernestine Hewlett, were assigning her tasks that prevented her from performing her office work. On October 21, 2006, the plaintiff received an evaluation that she believed was unfair and on which she wrote that she believed she was being retaliated against. Previously, she had received favorable reviews from her superiors.

¶ 7 Because the defendant required her to perform heavy lifting, the plaintiff asserted that her back pain increased and worsened. The plaintiff continued to work at the defendant's

Carbondale location until October 2006, when she underwent surgery and began a leave of absence from work. On March 14, 2007, the plaintiff was notified that her leave of absence would expire and that her employment would terminate if she did not return to work with a medical release. Although by April 12, 2007, the plaintiff's pain had almost been completely resolved and she was released from medical care, she did not return to work with a medical release. Accordingly, the defendant, through Scott Rivolta, notified her that she had been terminated from employment.

¶ 8 The defendant had hired Rivolta in January 2006 as a regional associate relations manager, which made him responsible for handling human resources issues at the Carbondale location. Rivolta had no involvement with or knowledge of the plaintiff's reports regarding coworker misconduct. Rivolta terminated the plaintiff's employment because she failed to return to work when her medical leave was exhausted.

¶ 9 Dr. Brian McElheny, the plaintiff's primary physician since 1990, explained that the plaintiff's previous back condition was aggravated by the additional lifting, tugging, and pulling that she performed at work. Dr. McElheny opined that the defendant's failure to honor the plaintiff's medical restrictions aggravated her condition and potentially delayed her recovery.

¶ 10 The plaintiff testified that even though she was no longer under physical restrictions by a doctor, she would be unable to perform as a customer service specialist for the defendant because she was unable to lift a 50-pound piece of furniture, put it in a cart, and transfer it to a customer's car. The plaintiff testified, however, that she was capable of standing at a cash register during a regular shift. The plaintiff further stated that she could perform the office coordinator's position for the defendant because it did not require heavy lifting.

¶ 11 On May 22, 2012, the defendant filed a motion for summary judgment. 735 ILCS 5/2-1005 (West 2012). The defendant argued that the plaintiff could not demonstrate the

causation element of her retaliatory discharge claim because Rivolta had terminated the plaintiff with no knowledge of her reports of coworker misconduct. The defendant further argued that the plaintiff failed to return to work with a medical release, after her leave of absence expired, thereby justifying her termination.

¶ 12 On October 16, 2012, the circuit court entered its order granting the defendant's motion for summary judgment. The circuit court determined that the plaintiff was discharged for failing to return to work with a medical release at the expiration of her medical leave. The circuit court also found that the plaintiff could not perform the lifting requirements of her position and that the defendant was under no obligation to retain the plaintiff, who was medically unable to return to her assigned position. The circuit court further found that Rivolta, who terminated the plaintiff, had no knowledge of the plaintiff's whistleblowing activities in 2004. The circuit court found that no genuine issue of material fact precluded summary judgment in favor of the defendant. After the circuit court denied her motion for reconsideration, the plaintiff filed a timely notice of appeal.

¶ 13 DISCUSSION

¶ 14 "Summary judgment is intended to determine whether triable issues of fact exist and 'is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.' " *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 5 (quoting *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 333 (1996)); 735 ILCS 5/2-1005(c) (West 2010). " 'Since the entry of a summary judgment is not a matter committed to the discretion of the trial court, a reviewing court must independently examine the evidence presented in support of and in opposition to a motion for summary judgment [citation] and review the decision of the trial court *de novo* [citation].' " *Argueta*, 2011 IL App (1st) 102166, ¶ 5 (quoting *Groce v. South Chicago*

Community Hospital, 282 Ill. App. 3d 1004, 1006 (1996)). " 'The trial court's summary judgment may be affirmed on any basis appearing in the record whether or not the court relied on that basis or its reasoning was correct.' " *Id.* ¶ 5 (quoting *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992)).

¶ 15 Where, as in this case, the defendant moves for summary judgment, it may prevail:

> " '(1) by affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law (traditional test) [citation], or (2) by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action (*Celotex* test) [citations].
>
> *** Only if a defendant satisfies its initial burden of production does the burden shift to the plaintiff[ ] to present some factual basis that would arguably entitle [it] to a judgment under the applicable law. [Citation.] A party opposing summary judgment may rely solely upon the pleadings to create a question of material fact until the movant supplies facts that would clearly entitle it to judgment as a matter of law.' " *Id.* ¶ 6 (quoting *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89 (2000)).

¶ 16 "The retaliatory discharge cause of action is a very narrow exception to the doctrine of employment at-will." *Krum v. Chicago National League Ball Club, Inc.*, 365 Ill. App. 3d 785, 788 (2006). An at-will employee is " 'a noncontracted employee [who] serves at the employer's will, and the employer may discharge such an employee for any reason or no reason.' " *Id.* at 788-89 (quoting *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 32 (1994)). "Allowance of retaliatory discharge actions as an exception to the at-will employment rule is an outgrowth of recognition that 'a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies

carried out.' " *McGrath v. CCC Information Services, Inc.*, 314 Ill. App. 3d 431, 437 (2000) (quoting *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 129 (1981)).

¶ 17 "[T]he tort of retaliatory discharge is available *** under two situations: (1) where the discharge stems from exercising rights pursuant to the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2002)) or (2) where the discharge is for 'whistleblowing' activities, reporting illegal or improper conduct." *Irizarry v. Illinois Central R.R. Co.*, 377 Ill. App. 3d 486, 490 (2007). "To state a valid claim for retaliatory discharge, a plaintiff must establish that [s]he was (1) discharged, (2) in retaliation for h[er] activities, and (3) that the discharge violated a clear mandate of public policy." *Dixon Distributing Co. v. Hanover Insurance Co.*, 161 Ill. 2d 433, 443 (1994); see also *Irizarry*, 377 Ill. App. 3d at 491 (Illinois courts consistently have refused to expand the tort to encompass a private and individual grievance).

¶ 18 "[T]he requirement that the discharge be in retaliation for plaintiff's activities merely requires that plaintiff allege the causal relationship between the employee's activities and the discharge." *Dixon*, 161 Ill. 2d at 443. "Without this, the cause of action fails." *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1021 (2006). "The ultimate issue concerning the element of causation is the employer's motive in discharging the employee." *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 221-22 (2007). "The element of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee." *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160 (1992). "While in retaliatory discharge cases the issue of the employer's motive for terminating an employee should not readily be the subject of summary judgment [citations], summary relief has been granted where the plaintiff failed to present evidence sufficient to raise a genuine issue of material fact." *Carter v. GC Electronics*, 233 Ill. App. 3d 237, 241 (1992).

¶ 19 "To date, our supreme court has not expanded the tort of retaliatory discharge to

encompass any behavior other than actual termination of employment." *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 153 (1999). The Illinois Supreme Court has thus far declined to recognize a cause of action for retaliatory constructive discharge, retaliatory discrimination, or retaliatory demotion. *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 467-68 (1999); *Zimmerman*, 164 Ill. 2d at 38-40; *Hartlein*, 151 Ill. 2d at 161. Noting that previous courts intended retaliatory discharge to be narrowly applied, the *Zimmerman* court stated that recognizing retaliatory demotion would "replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination." *Zimmerman*, 164 Ill. 2d at 39. "We are thus constrained to interpret the elements of the retaliatory discharge cause of action narrowly." *Krum*, 365 Ill. App. 3d at 788-89.

¶ 20 Further, "Illinois law does not obligate an employer to retain an at-will employee who is medically unable to return to his assigned position [citation]; nor is an employer obligated to reassign such an employee to another position rather than terminate the employment [citation]." *Hartlein*, 151 Ill. 2d at 159-60. "Similarly, an employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury. (See *Slover v. Brown* (1986), 140 Ill. App. 3d 618, 621 (injured employee's lengthy inability to work was considered valid basis for discharge or for employer's failure to rehire).)" *Id.* at 160. "Simply put, 'Illinois allows employers to act on the basis of their employee's physical disabilities; it is only the request for benefits that state law puts off limits as a ground of decision.' *McEwen v. Delta Air Lines, Inc.* (7th Cir. 1990), 919 F.2d 58, 60." *Id.*

¶ 21 The defendant introduced evidence of a valid basis for terminating the plaintiff, namely, that she failed to timely return from her leave of absence with a medical release. Indeed, the parties do not dispute that the plaintiff was terminated for failing to return to work before the expiration of her medical leave, and the plaintiff has not set forth facts to

show that the defendant's valid basis for discharge was pretextual. Rivolta testified that when terminating the plaintiff, he had no knowledge that she previously had reported her coworkers' alleged violations. Thus, the plaintiff cannot establish a necessary causal link between her alleged protected activity and her discharge. See *Carter*, 233 Ill. App. 3d at 241 (where plaintiff filed retaliatory discharge complaint alleging that he was discharged in retaliation for questioning illegal transaction, court found summary judgment proper because discharging agent was not aware that the plaintiff had reservations or concerns about illegal transaction); see also *McCoppin v. State*, 53 Ill. Ct. Cl. 153, 158-59 (2001) (court held that the claimant's retaliatory discharge claim was not supported by evidence because the layoff decision was initiated by superior who had no knowledge of claimant's allegations against third-party employee). The plaintiff offers no evidence, other than her speculation, to support an inference that her alleged reports of coworker misconduct in 2004 and 2005 motivated the defendant to terminate her employment in 2007. " '[M]ere speculation, conjecture, or guess is insufficient to withstand summary judgment.' " *Atanus v. American Airlines, Inc.*, 403 Ill. App. 3d 549, 553 (2010) (quoting *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999)).

¶ 22 The plaintiff argues on appeal that the circuit court "ignored [her] claims that she was subjected to a systematic campaign designed to get her to quit after she engaged in the protected activity of reporting workplace criminal and ethical violations." The plaintiff cites evidence that after her reports, she began to receive unfavorable performance reviews, her hours were cut, and she was required to perform tasks beyond her medical restrictions, which had been accommodated for more than 10 years.

¶ 23 Again, "[t]he tort of retaliatory discharge does not encompass any behavior other than actual termination of employment." *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 742 (2000); *Welsh*, 306 Ill. App. 3d at 153 ("This court has rejected claims based on an

employer's retaliatory actions short of actual discharge."). The job responsibilities and work directives that the plaintiff seeks to challenge cannot form the basis for a retaliatory discharge claim against the defendant.

¶ 24 Citing *Siekierka*, 373 Ill. App. 3d at 221, the plaintiff argues that she has instead sufficiently set forth facts establishing causation by showing that the defendant's additional work directives set in motion a process that caused her health to deteriorate and made it impossible for her to return to work within the allotted time, thereby causing her termination.

¶ 25 In *Siekierka*, a former employee filed a complaint against his former employer, alleging that he had been wrongfully discharged in retaliation for filing a claim under the Workers' Compensation Act. *Id.* It was undisputed that the plaintiff was a good employee; that he exercised his rights under the Act; and that the defendant terminated his employment. *Id.* On appeal, the court addressed whether there was an issue of material fact as to whether there existed a causal connection between his termination and the filing of his workers' compensation claim. *Id.* at 222. The appellate court recognized the defendant's valid nonpretextual basis for terminating employment, *i.e.*, the plaintiff's failure to return from authorized leave. *Id.* However, the court noted evidence that supported an inference that the defendant's insurer set in motion a process that made it impossible for the plaintiff to return to work within the time granted to him by the defendant. *Id.* The defendant's insurer had refused to accommodate the surgery and forced him to seek the opinion of a physician who delayed the surgery so that the plaintiff was unable to undergo surgery and recover in time to return to work within the time allotted. *Id.* at 223. Thus, the appellate court concluded that there was a genuine issue of material fact as to whether there existed a causal nexus between the discharge and his exercise of rights under the Act. *Id.*

¶ 26 In light of the supreme court's directive to interpret the elements of the retaliatory discharge cause of action narrowly (*Fisher*, 188 Ill. 2d at 467-68; *Zimmerman*, 164 Ill. 2d at

38-40; *Hartlein*, 151 Ill. 2d at 161), we find *Siekierka* limited to its facts. Unlike *Siekierka*, the plaintiff here failed to set forth sufficient facts to support an inference that the defendant directed a process that made it impossible for her to return to work within the time it allotted to her. More specifically, the facts do not support an inference that the defendant, in subjecting the plaintiff to increased physical demands at work, engaged in a purposeful, retaliatory crusade to cause the plaintiff to require such extended medical treatment that it was impossible for her to return to work before the expiration of her medical leave. Instead, the defendant sets forth sufficient facts to support the inference that it had a valid, nonpretextual basis for discharging the plaintiff. Consequently, there is no material factual question as to defendant's motive for terminating plaintiff's employment. Absent a discharge in retaliation for plaintiff's notification of her coworkers' activities, the causation element of retaliatory discharge cannot be shown. The circuit court properly granted summary judgment in favor of the defendant.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we hereby affirm the circuit court's order granting summary judgment in favor of the defendant.

¶ 29 Affirmed.