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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000953-MR

ANDREW WALDRIDGE APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 05-CI-007193

ORR SAFETY CORPORATION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Andrew Waldridge ("Waldridge") appeals from a Jefferson Circuit Court order granting summary judgment in favor or his former employer, Orr Safety Corporation ("Orr"). We agree with the trial court that Orr did not retaliate against Waldridge for filing workers' compensation claims. Finding no error, we affirm the April 23, 2008 judgment.

Factual Background and Procedure

Orr hired Waldridge as a warehouse worker in 1990. In 2000, he was promoted to a warehouse leader position, primarily in shipping. He pulled, packed, loaded, stocked, and directed the daily tasks of about seven warehouse workers to make sure orders were pulled by a certain time each day. Although he coordinated the activities of other workers, Waldridge did not have the authority to hire, fire, discipline, evaluate, or approve timecards or payroll.

On June 18, 1998, Waldridge injured his back in a car accident which was not work-related. He was unable to work for four months as a result of the accident. Subsequently, he returned to his full work duties on October 5, 1998. On March 16, 1999, Waldridge injured his back in another non work related car accident. Following this second accident, Waldridge was unable to work until May 10, 1999.

On September 9, 1999, Waldridge injured his back at work while unloading a truck and subsequently filed a workers' compensation claim. Thereafter, he settled the claim with the award apportioned between the work injury and the two car accidents. Waldridge worked light duty, unable to lift more than fifteen pounds, until October 4, 1999 when his doctor completely restricted him from working.

On January 22, 2000, Waldridge underwent back surgery. He returned to light duty work on May 1, 2000, and was restricted to lifting no more

than twenty pounds. On November 8, 2000, his restrictions changed to allow him to lift fifty pounds with no repetitive bending, stooping, or lifting.

On November 21, 2000, Waldridge underwent a Functional Capacity Examination ("FCE"). As a result, he was restricted to lifting no more than thirty-five pounds, with no frequent fifteen pound lifting, no standing for more than four hours, and no standing for more than a total of five hours per day. Waldridge worked under these limitations until December 11, 2000, when he was once more restricted from working. Around January 11, 2001, Waldridge returned to light duty work, lifting no more than ten pounds and working no more than eight hours per day.

During the spring of 2001, Orr moved to new facilities and reorganized its warehouse management. The warehouse leader positions were replaced by two warehouse supervisor positions, one in shipping and one in receiving. These positions had the authority to hire, fire, discipline, evaluate, and approve time cards and payroll. The shipping position went to David Watkins ("Watkins"), who had been covering for Waldridge during his leave of absences. The receiving position went to Judy Petrowski ("Petrowski"), who had covered for Watkins in receiving while he covered for Waldridge in shipping. Waldridge was reclassified as a warehouse worker, but his pay and benefits remained the same. However, he missed a raise in 2001 or 2002 because he was not at work during evaluations.

Waldridge had a meeting with warehouse manager Chris Milby ("Milby") and human resources director Larry Clements ("Clements")[1]. Milby and Clements told Waldridge that he was reclassified as a warehouse worker because of his work-related injury. Further, Petrowski told him she had known about the reclassification for several months before any official action was taken.

On or about February 2, 2004, Waldridge sustained another back injury and filed a second workers' compensation claim. He was off work from February through June of 2004. When he returned to work, he was limited to working no more than eight hours per day and was restricted from lifting or carrying more than thirty-five pounds. Orr accommodated these restrictions, permitting Waldridge to change positions from standing, sitting, or walking as needed throughout the day.

Some time after his return, Orr decided that Waldridge should remain off work until his doctor determined his potential to return to his full work duties. Orr had laid off dozens of workers during the reorganization and had no light duty positions. Waldridge underwent another FCE on January 11, 2005, which led to more restrictions. His doctor also recommended that he find a new job or obtain vocational training.

On March 29, 2005, Orr terminated Waldridge's employment. Waldridge filed a complaint, alleging he had been terminated in retaliation for filing claims for workers' compensation benefits. Waldridge admitted that he was

[1] "Clements" is also spelled "Clemons" in the deposition log. For consistency, we will use "Clements" as the preferred spelling.

not able to perform his duties without accommodation by Orr, and further admitted that Orr was not required to provide him with light duty work. He claimed he did not know Clements' intentions for terminating him. The trial court granted Orr's motion for summary judgment on April 23, 2008. Waldridge now appeals to this Court.

Standard of Review

The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* at 480. The standard of review of an order for summary judgment is *de novo*, and it limited to questions of law. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Analysis

On appeal, Waldridge argues that the trial court erred in granting the summary judgment motion, dismissing Waldridge's claim again Orr for violations of Kentucky Revised Statute ("KRS") 342.197(1). This statute provides that "[n]o

employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter." To establish a *prima facie* case of retaliation, Waldridge must prove that (1) he engaged in a protected activity; (2) Orr knew he had done so; (3) Orr took adverse employment action against him; and (4) there was a causal connection between the protected activity and the adverse employment action. *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky. App. 2006).

Waldridge meets the first two of these criteria. He filed two workers' compensation claims and Orr knew he had done so. The issues that remain are whether Waldridge was demoted and ultimately terminated by Orr and if Waldridge presented significant evidence that demonstrated a causal connection between the protected activity and the adverse employment actions. Waldridge's filing of workers' compensation claims must have been a substantial and motivating factor, but for which he would not have been demoted or discharged. *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 188 (Ky. 1993).

First, we must determine whether the reclassification to warehouse worker may be considered an adverse employment action and, if it is such, whether Waldridge's act of filing a workers' compensation claim caused Orr to subject him to that adverse employment action. Second, we must determine whether Waldridge's act of filing the workers' compensation claims caused Orr to terminate his employment.

I. The reclassification to warehouse worker was not an adverse employment action.

Waldridge claims he was demoted immediately following the filing of his first workers' compensation claim and return from his leave of absence. He argues that the reclassification to warehouse worker amounted to an adverse employment action. "The sooner adverse action is taken after the protected activity, the stronger the implication that the protected activity caused the adverse action, particularly if no legitimate reason for the adverse action is evident." *Kentucky Department of Corrections v. McCullough*, 123 S.W.3d 130, 135 (Ky. 2004), *citing* Justin P. O'Brien, *Weighing Temporal Proximity in Title VII Retaliation Claims*, 43 B.C. L.Rev. 741, 749 (May 2002).

The record does not support Waldridge's argument that the adverse action occurred immediately following his return to work. Waldridge was off work for about seven months following his first injury. Waldridge filed a workers' compensation claim in September 1999. He then worked light duty for seven months before he took off another month. Waldridge returned to light duty again on January 11, 2001. He was not reclassified as a warehouse worker until the Spring of 2001 when Orr moved its facilities and reorganized management. Waldridge took two leaves of absence between filing his first claim and the time of his reclassification. Each time he returned to work, Orr accommodated his physical restrictions, even though they were not required to provide light duty work. Thus, the length of the delay coupled with Orr's accommodations negate

any temporal inference that Waldridge's workers' compensation claims were a substantial and motivating factor in its decision to reclassify him.

Adverse action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 2268 (1998). The reclassification to warehouse worker was not a significant change in employment status. The only different responsibility between warehouse worker and warehouse leader is directing the daily tasks of about seven employees. Waldridge never had the authority to hire or fire, and he was still expected to pull, pack, load, and stock with the warehouse workers. Furthermore, the reclassification did not involve the loss of salary or benefits, so Waldridge was not financially damaged by the reclassification.

Waldridge had been on leave of absence or light duty since 1998. Orr had a legitimate reason for not promoting him to a new position –Waldridge could not perform the duties of such a position due to his physical restrictions. There was no indication that Waldridge would be able to return to full duty work, and there was a possibility he would need additional future extended periods of time off due to his back injury. Although the reclassification to warehouse worker may have led to some loss of prestige, it does not rise to the level of adverse action under these circumstances.

II. Waldridge was not terminated for filing workers' compensation claims.

Next, we must determine whether Waldridge's act of filing workers' compensation claims caused Orr to terminate his employment. "Ordinarily an employer may discharge an at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 198 (Ky. 2001). Legal recourse is available only when the termination was based upon a legally impermissible reason, such as filing a workers' compensation claim. After reviewing the record, we conclude that Orr had a legitimate work reason for dismissing Waldridge, and that Waldridge failed to establish, beyond his own subjective belief, that his pursuit of wokers' compensation benefits was a substantial factor in his discharge.

Waldridge filed a second workers' compensation claim around February of 2004. He was off work for about four months before he returned with light duty restrictions. Some time after his return, Orr decided he should remain off work until his doctor could better determine his physical capabilities. Waldridge underwent an FCE on January 11, 2005 which resulted in additional restrictions and his doctor recommending a new job or vocational training. Thus, Waldridge would not be able to return to full duty work at Orr. Waldridge admitted that he did not know Clements' intentions for firing him, nor did he believe he could have continued to perform his work at Orr without special accommodation. Orr had no light duty positions. Waldridge acknowledged that Orr was not required to provide him with light duty work even though they had been accommodating him since his original non-work-related injury in 1998.

Therefore, it is clear that Waldridge was discharged because he could no longer perform the essential functions of his job.

Waldridge failed to show that the reclassification of his position amounted to an adverse employment action. Furthermore, Waldridge presented no evidence to rebut Orr's showing that it had a legitimate reason for terminating him, independent of his pursuit of workers' compensation benefits. Since Waldridge failed to show any genuine issue of material fact on these essential elements, the trial court properly dismissed his retaliation claim.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Mayer
Louisville, Kentucky

BRIEF FOR APPELLEE:

Todd B. Logsdon
Craig P. Siegenthaler
Louisville, Kentucky