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PAMELA BARBEE *v.* SYSCO
CONNECTICUT, LLC
(AC 36564)

Sheldon, Prescott and Pellegrino, Js.

Argued January 5—officially released April 28, 2015

(Appeal from Superior Court, judicial district of
Hartford, Hon. Richard M. Rittenband, judge trial
referee.)

Mark S. Loman, for the appellant (plaintiff).

Albert Zakarian, with whom, on the brief, was *Ashley L. Harrison*, for the appellee (defendant).

Opinion

PRESCOTT, J. This appeal arises out of an action by the plaintiff, Pamela Barbee, in which she asserts that her former employer, the defendant, Sysco Connecticut, LLC, wrongfully suspended her and then terminated her employment in violation of General Statutes § 31-290a¹ because she had filed for workers' compensation benefits. The sole issue is whether the trial court properly granted summary judgment in favor of the defendant on the ground that the plaintiff had failed to provide any evidence that causally connected her suspension and termination to the filing of her workers' compensation claim. We conclude that a genuine issue of material fact exists that should have precluded the granting of summary judgment as a matter of law, and, accordingly, we reverse the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. The defendant is a wholesale food distributor. The plaintiff was employed in various positions in the defendant's company beginning in August, 1995, until her termination from employment on October 3, 2011. For the last eight or nine years of her employment, she worked as a warehouse credit supervisor. In that position, she was responsible for processing products that were returned to the warehouse by the defendant's delivery drivers because the products were damaged or otherwise were rejected by the customer. The plaintiff was responsible for determining whether such returned products could be restocked and whether the customer should receive a credit to its account. If the returned product could be resold, the plaintiff would label the product for return to regular inventory. If products were no longer saleable, the plaintiff would discard them in the trash, put them on a food share board, give them to another employee, or keep them for herself.

On August 31, 2011, the plaintiff experienced pain and stiffness in her knees and legs while performing her work duties. She reported the incident to the defendant on September 12, 2011. That same day, she also filed a claim for workers' compensation benefits, and was sent by the defendant to a health care provider for a medical evaluation and treatment. The plaintiff was released to return to work starting on September 28, 2011. On that day, the plaintiff was suspended for removing a returned, nonsaleable product from the warehouse. The plaintiff's employment was terminated on October 3, 2011.

The defendant claimed that it terminated the plaintiff because of her unauthorized removal of damaged products from the defendant's warehouse, although, prior to that date, she had never been disciplined or reprimanded in any manner for removing damaged returned

products. The plaintiff believed that she had been suspended and subsequently terminated as a result of her having filed her claim for workers' compensation benefits on September 12, 2011. Removing damaged products from the warehouse was a common practice amongst the defendant's employees, including the plaintiff's supervisor, although shortly after the plaintiff's termination, the plaintiff's supervisor held a meeting with employees to warn them that that practice would not be permitted.

The plaintiff commenced the present action in December, 2011. The complaint contained two counts. The first alleged that the plaintiff was wrongfully suspended from work in retaliation for filing for workers' compensation benefits, and the second alleged that she was wrongfully terminated from employment in retaliation for filing for workers' compensation benefits. On September 30, 2013, the defendant filed a motion for summary judgment and an accompanying memorandum of law in support of the motion. In the motion, the defendant asserted that the plaintiff had no evidence to substantiate the allegations of her workers' compensation retaliation claims, and, therefore, that the court should grant the defendant's motion for summary judgment on both counts of the complaint. The plaintiff filed an opposition to the motion for summary judgment, and the defendant filed a reply memorandum.

Following a February 10, 2014 hearing on the motion for summary judgment, the court issued an order that same day, granting the motion and rendering judgment on the complaint in favor of the defendant. The entirety of the court's order is as follows: "The plaintiff may well have a claim for wrongful termination. By taking used products from her employer, she violated a policy, but it is an issue of fact as to whether she was authorized [to do so] and/or whether it was a common practice. The complaint alleges in paragraph 24, that she was terminated in retaliation for filing a workers' compensation claim. If taking used goods home was not a valid reason for termination, then is there a reasonable inference that she was terminated for some other reason? The plaintiff has failed to provide any factual basis for the termination being because of her filing the workers' comp[ensation] claim. Even though it may seem a reasonable inference, the plaintiff lacks any evidence to connect her termination with the filing of the workers' comp[ensation] claim." This appeal followed.

We first set forth the relevant standards that govern our review of a court's decision to grant a defendant's motion for summary judgment. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion

for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Citations omitted; internal quotation marks omitted.) *Himmelstein v. Windsor*, 116 Conn. App. 28, 42–43, 974 A.2d 820 (2009), *aff'd*, 304 Conn. 298, 39 A.3d 1065 (2012).

"It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§ 17-45 and 17-46, a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . .

"An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition On a motion by [the] defendant for summary judgment, the burden is on [the] defendant to negate each claim as framed by the complaint It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 625–27, 57 A.3d 391 (2012).

On appeal, the plaintiff claims that the court improperly granted the defendant's motion for summary judgment because a sufficient evidentiary foundation was before the court to show that a genuine issue of material fact existed as to whether the defendant's suspension and the subsequent termination of her employment

were in retaliation for the exercise of her right to seek workers' compensation benefits. We agree.

The burden of proof in actions alleging a violation of § 31-290a is well established. "The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination." (Internal quotation marks omitted.) *Callender v. Reflexite Corp.*, 143 Conn. App. 351, 363, 70 A.3d 1084, cert. denied, 310 Conn 905, 75 A.3d 32 (2013). "[T]o establish [a] prima facie case of discrimination, the plaintiff must first present sufficient evidence . . . that is, evidence sufficient to permit a rational trier of fact to find [1] that she engaged in protected [activity] . . . [2] that the employer was aware of this activity, [3] that the employer took adverse action against the plaintiff, and [4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action" (Internal quotation marks omitted.) *Id.*, 364.

"If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. . . . The plaintiff then must satisfy [the] burden of persuading the factfinder that [the plaintiff] was the victim of discrimination either directly by persuading the court [or jury] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*, 363.

In the present case, the defendant did not present any evidence in support of its motion for summary judgment tending to negate the plaintiff's allegations that she had engaged in a protected activity by filing a claim for workers' compensation benefits, that the defendant was aware of that protected activity, and that the defendant had taken adverse action against the plaintiff by suspending her and later terminating her employment. Rather, the defendant's arguments focused on the fact that it had presented evidence showing that the plaintiff was suspended and later terminated for stealing nonsaleable returned products from the defendant, and that the plaintiff had no contradictory evidence showing the existence of a retaliatory motive or that such an improper motive played a part in the adverse employment actions at issue.

In adjudicating the motion for summary judgment, however, the court was presented with contradictory evidence about whether it was common practice among the defendant's employees, including the plaintiff's direct supervisor, to take nonsaleable products from

the warehouse for their own use, despite the existence of a policy prohibiting such actions.² In its order granting summary judgment, the trial court acknowledged as much, stating that “it is an issue of fact as to whether [the plaintiff] was authorized [to take returned nonsaleable products] and or whether it was a common practice.” If the plaintiff was authorized to remove nonsaleable products from the warehouse or if she had been singled out by the defendant for selective enforcement of a policy that generally was not followed or enforced, then a reasonable inference could be drawn by a fact finder that the defendant’s proffered reason for terminating the plaintiff’s employment was pretextual in nature and that the plaintiff was fired for another reason.

In addition, there was undisputed evidence that the adverse employment actions against the plaintiff had begun on the very day that the plaintiff returned to work following her filing of a workers’ compensation claim. The temporal congruence between the plaintiff’s return to work after filing a worker’s compensation action and the defendant’s immediate actions against her for violating a workplace policy that, in practice, may not have been routinely enforced was additional evidence that the defendant’s proffered explanation for the adverse employment action may be unworthy of credence and masked a retaliatory purpose. See *Ayantola v. Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539, 976 A.2d 784 (2009) (indirect causal connection between protected activity and adverse action may be established by showing protected activity followed closely in time by adverse action). Thus, a genuine and triable issue of material fact clearly existed with respect to the defendant’s motives that should have precluded the granting of summary judgment.

The judgment is reversed and the case is remanded with direction to deny the defendant’s motion for summary judgment and for further proceedings according to law.

In this opinion the other judges concurred.

¹ General Statutes § 31-290a (a) provides: “No employer who is subject to the provisions of [the Worker’s Compensation Act] shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers’ compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of [the Worker’s Compensation Act].”

² The defendant argues on appeal that in proceedings before the workers’ compensation commissioner, the plaintiff admitted to having engaged in the very conduct for which the defendant claimed she was terminated, namely, she admitted to taking nonsaleable products without the permission of the defendant in violation of existing company rules and policies. Those factual admissions, however, do not resolve whether it was common practice for the defendant’s employees to violate the stated policy and whether the defendant has chosen to selectively enforce its policy in the present case as a form of retaliation against the plaintiff.