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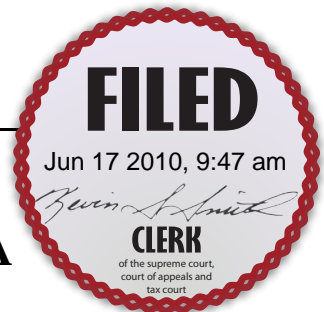
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**IN THE
COURT OF APPEALS OF INDIANA**



PAUL ROELL,

Appellant/Plaintiff,

VS.

No. 20A03-1001-CC-7

AMERICAN SENIOR COMMUNITIES
LLC d/b/a EAST LAKE NURSING AND
REHABILITATION CENTER and
HARRY SCRIBNER,¹

Appellees/Defendants.

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0811-CC-523

¹ Paul Roell does not raise any claims against Harry Scribner on appeal and Scribner did not file an appellate brief. However, pursuant to Indiana Appellate Rule 17(A), a party of record in the trial court is a party on appeal.

June 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Plaintiff Paul Roell appeals the trial court's entry of summary judgment in favor of Appellee/Defendant American Senior Communities LLC d/b/a East Lake Nursing and Rehabilitation Center ("East Lake"). Specifically, Roell contends that he was discharged by East Lake in retaliation for notifying East Lake that he intended to file a worker's compensation claim and that East Lake's stated reason for the discharge was pretextual. Concluding that Roell has failed to present sufficient evidence to create a genuine issue of material fact regarding whether East Lake's stated reason for discharging him was pretextual, we affirm the trial court.

FACTS AND PROCEDURAL HISTORY

East Lake operates a nursing home in Elkhart. At all relevant times prior to September 25, 2008, Roell was employed at East Lake as the maintenance supervisor. Harry Scribner was employed at East Lake as a maintenance assistant to Roell. Both Roell and Scribner were at-will employees.

On September 16, 2008, Roell brought a recording device to work and recorded portions of a conversation with Scribner without Scribner's knowledge or authorization. The conversation between Roell and Scribner was heated and confrontational. Later that day, Roell informed his immediate supervisor, East Lake Executive Director Chris Gill, that he was having "a problem" working with Scribner. Appellee's App. p. 27.

On September 18, 2008, Roell again recorded portions of a conversation with Scribner. As with the above-mentioned conversation, this conversation became confrontational and heated. Scribner asked Roell whether the conversation was being recorded, and Roell said it was not. Later that day, Roell again informed Gill that he was having difficulties working with Scribner. Roell informed Gill that he had recordings of confrontational conversations between him and Scribner. Gill instructed Roell to provide him with the recordings and explained to Roell that he would have to discuss the situation with his supervisor, Kim Hughes.

Rather than waiting to discuss the situation further with Gill, on September 19, 2008, Roell approached Hughes and presented her with the recordings of the heated conversations with Scribner. At Roell's request, Hughes listened to the recordings. After listening to the recordings, Hughes suggested that Roell be relieved of his duties for the day and allowed to leave. Later that day, Hughes played a portion of the recordings for Gill and recommended that Gill investigate the matter further and seek guidance from the human relations department about how to proceed.

On September 20, 2008, Gill memorialized his thoughts regarding the situation involving Roell and Scribner in a written memorandum. Gill's written memorandum stated as follows:

1. I do not like the thought that my maintenance director is carrying around a tape recorder, taping private conversations. I personally don't feel that I can trust him at this time. I'm also worried that by allowing him to continue working at [East Lake], after it becomes known that [Roell] was taping conversations, that it will either foster a paranoid workplace, and/or, encourage other staff to also tape their conversations. Can you imagine a workplace

where employees are taping each other's words? Or C.N.A.'s begin taping their conversations with residents and families?

2. I do not believe either [Scribner] or [Roell] behaved in a professional manner. Their anger toward each other has in just five work days created a negative impression of the maintenance staff. It also appears from the taped conversation that [Scribner] was disrespectful toward his supervisor; but I'm also not comfortable with thinking its [sic] all [Scribner]. It feels to me that [Roell] set [Scribner] up by how he initiated the conversation and by taping it, with the intent of sharing it with others.

3. I would personally prefer to see both of them terminated. In light of past concerns about [Roell's] work, the current negativity and the taping situation, I think it would be best to start over with a new maintenance department leader.

Appellee's App. pp. 49, 54.

Gill sent an email to Hughes containing his written memorandum on September 21, 2008. Later that day, Hughes forwarded Gill's written memorandum to Patricia Rowe, Vice President of Human Resources for East Lake. On September 22, 2008, Gill discussed the situation with Rowe. Rowe agreed that both Roell and Scribner should be terminated and instructed Gill to discharge both men. Scribner's employment was subsequently discharged. At the time of this conversation, nether Gill nor Rowe was aware that Roell planned to file a worker's compensation claim.

On September 25, 2008, Gill met with Roell in Gill's office at East Lake. During this meeting, Gill informed Roell that East Lake was "going to let him go" or "turn him loose." Appellee's App. pp. 36-37. Roell requested that Gill reconsider his discharge, and Gill stated that he would consider Roell's request and contact Roell within three business days.

The next morning, Gill attempted to contact Roell by telephone to inform him that his request had been denied and that his employment was indeed terminated. However, Gill was unable to speak with Roell that morning. At approximately 2:30 p.m., Roell delivered a note

to Gill's secretary which indicated that Roell intended to file a worker's compensation claim for treatment for stress and anxiety induced by his confrontational conversations with Scribner. At approximately 6:30 p.m., Gill was able to reach Roell by telephone. Gill informed Roell that his request that East Lake reconsider its prior decision to terminate him had been denied. Gill also informed Roell that he had received Roell's note regarding his intention to file a worker's compensation claim and stated that East Lake would process Roell's claim and pay any medical bills related to Roell's claim. Gill documented each step of his communications with Roell.

On November 14, 2008, Roell initiated a law suit against East Lake alleging that he was discharged in retaliation for his notifying East Lake of his intention to file a worker's compensation claim. East Lake filed a motion for summary judgment on July 28, 2009. Roell filed his response to East Lake's motion for summary judgment on September 11, 2009. East Lake filed its reply brief on September 24, 2009, and Roell filed a supplemental response brief on October 1, 2009. The trial court conducted a hearing on East Lake's motion for summary judgment on October 28, 2009. On December 28, 2009, the trial court issued an order granting East Lake's motion for summary judgment. Roell now appeals.

DISCUSSION AND DECISION²

Roell contends that the trial court erred by entering summary judgment in favor of East Lake. Our standard of review for a trial court's grant or denial of a motion for summary

² East Lake moved to strike Roell's Reply Brief because it raised a new issue that had not previously been raised before the trial court or on appeal in violation of Indiana Appellate Rule 46(C). Concluding that Roell's Reply Brief did contain new issues in violation of Appellate Rule 46(C), we now grant East Lake's Motion to Strike in an order issued simultaneously with this opinion.

judgment is well-settled. *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005), *trans. denied*. The purpose of summary judgment is to end litigation where no factual dispute exists and which may be determined as a matter of law. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1255 (Ind. Ct. App. 2002). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Purdy*, 835 N.E.2d at 212. The party moving for summary judgment has the burden of showing that it is entitled to summary judgment. *Powdertech*, 776 N.E.2d at 1256. Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Purdy*, 835 N.E.2d at 212. We do not reweigh the designated evidence; rather, all facts and reasonable inferences drawn therefrom are construed in favor of the nonmovant. *Id.* The party appealing the denial of a motion for summary judgment has the burden of persuading the court on appeal that the trial court's ruling was improper. *Powdertech*, 776 N.E.2d at 1256. A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. *Purdy*, 835 N.E.2d at 212.

In Indiana, if there is no definite or ascertainable term of employment, the employment is at-will and the employer may discharge the employee at any time with or without cause. *Id.* However, the Indiana Supreme Court created an exception to the employment-at-will doctrine for when an employee is discharged for filing a worker's compensation claim in *Frampton v. Cent. Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). *Powdertech*, 776 N.E.2d at 1256.

In *Frampton*, the Indiana Supreme Court observed that worker's compensation is for the benefit of the employee and that the Worker's Compensation Act ("the Act") should be liberally construed in favor of the employee so as not to negate its humane purposes. 260 Ind. at 251, 297 N.E.2d at 427. The Court continued:

The Act creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation-opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.

Id. at 251-52, 297 N.E.2d at 427. As such, the *Frampton* court held that when an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule is recognized, and a cause of action exists in the employee as a result of the retaliatory discharge. *Powdertech*, 776 N.E.2d at 1261 (citing *Frampton*, 260 Ind. at 253, 297 N.E.2d at 428).

In order to be successful on a claim for retaliatory discharge, a plaintiff must demonstrate that his or her discharge was *solely* in retaliation for the exercise of a statutory right. *Purdy*, 835 N.E.2d at 212 (emphasis added). The word "solely" means only that any and all reasons for the discharge must be unlawful in order to sustain the claim for retaliatory discharge.³ *Id.* Additionally, where retaliation is at issue, summary judgment is only

³ To the extent that Roell claims otherwise, we note that Roell has failed to present any authority in support of his position. Roell merely asserts that the trial court erroneously assumed that he could only defeat

appropriate when the evidence is such that no reasonable trier of fact could conclude that the discharge was caused by a prohibited retaliation. *Id.* Thus, to survive a motion for summary judgment in a *Frampton* case, an employee must show more than a filing of a worker's compensation claim and the discharge itself. *Id.* at 212-13. The employee must present evidence that directly or indirectly supplies the necessary inference of causation between the filing of a worker's compensation claim and the discharge. *Id.* at 213. For example, evidence of the proximity in time between the filing of the claim and the discharge, or evidence that the employer's asserted lawful reason for discharge is a pretext can provide the necessary inference of a causation needed to rebut a summary judgment motion. *Id.*

This Court has previously outlined the three steps of a retaliatory discharge claim. *Id.* First, the employee must prove, by a preponderance of the evidence, a prima facie case of discrimination. *Powdertech*, 776 N.E.2d at 1262. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for discharge. *Id.* Finally, if the employer carries that burden, the employee has the opportunity to prove, again by a preponderance of the evidence, that the reason offered by the employer is pretext. *Id.* This can be done by showing, for example, that the employer's proffered reason is factually baseless, is not the actual motivation for the discharge, or is insufficient to motivate the discharge. *Purdy*, 835 N.E.2d at 213.

With these factors in mind, we review Roell's claim of retaliatory discharge. Roell alleges that he was discharged from his employment at East Lake in retaliation for his notifying East Lake that he intended to file a worker's compensation claim. In challenging

East Lake's motion for summary judgment by satisfying the burden shifting method outlined in *Purdy*.

the trial court's order granting summary judgment in favor of East Lake, Roell asserts that he designated direct evidence of Gill's state of mind at the time of his discharge which would tend to show that he was discharged in retaliation for notifying East Lake of his intention to file a worker's compensation claim, that the trial court erred in ignoring the suspicious timing surrounding his discharge, and that the trial court erroneously concluded that he failed to demonstrate that East Lake's proffered reasons for his discharge were mere pretext. East Lake responds that there is no evidence, direct or indirect, that Roell was discharged in retaliation for notifying the company of his intention to file a worker's compensation claim. East Lake argues that the evidence establishes that the decision to discharge Roell was made before Roell notified East Lake that he intended to file a worker's compensation claim and that East Lake articulated legitimate, non-retaliatory reasons for the Roell's discharge.

Based upon the evidence designated in this case, we conclude that Roell has failed to identify any genuine issue of material fact that would render the trial court's award of summary judgment in favor of East Lake improper. The undisputed designated evidence establishes that East Lake officials made the decision to discharge Roell before any East Lake official was aware that Roell intended to file a worker's compensation claim. On September 16 and 18, 2008, Roell and Scriber engaged in at least two heated conversations, parts of which were recorded by Roell and later shared with East Lake management. On September 20, Gill prepared a written memorandum that was subsequently shared with other East Lake management officials.

In this written memorandum, Gill stated that he was concerned about allowing Roell

to continue working at East Lake after it became well known that he recorded private conversations with another employee because it could “foster a paranoid workplace, and/or, encourage other staff” to record their private conversations with fellow employees. Appellee’s App. p. 49. Gill stated that he did not believe that either Scribner or Roell behaved in a professional manner, and noted that “their anger toward each other has in just five days created a negative impression of the maintenance staff.” Appellee’s App. p. 49. Gill additionally stated that as a result of Scribner’s and Gill’s apparent inability to work together, he would prefer to discharge both Scribner and Roell. Upon reading Gill’s written memorandum, Rowe agreed that both Scribner and Roell should be discharged. At this time, no East Lake official had been notified that Roell intended to file a worker’s compensation claim. Thus, we conclude that the undisputed evidence establishes that East Lake management officials made the decision to discharge Roell before any East Lake official was aware that Roell intended to file a worker’s compensation claim.

This decision, however, was not carried out prior to Roell’s notifying East Lake that he intended to file a worker’s compensation claim, at least in part because Roell asked Gill on September 25, 2009, whether East Lake would reconsider the decision to discharge him. Gill attempted to reach Roell by telephone on the morning of September 26, 2009, to notify Roell that East Lake would not reconsider his discharge, but was unable to do so. Later that day, at approximately 2:30 p.m., Roell notified Gill’s secretary that he intended to file a worker’s compensation claim. Later still, at approximately 6:00 p.m., Gill was able to reach Roell, at which time Gill notified Roell that East Lake would not reconsider his discharge,

but that East Lake would cover all costs and fees associated with his worker's compensation claim.

In light of the facts above, we conclude that although Roell initially presented a prima facie case of discrimination, East Lake countered by satisfactorily articulating legitimate, nondiscriminatory reasons for Roell's discharge. *See Powdertech*, 776 N.E.2d at 1262. Especially in light of the fact that the undisputed evidence establishes that the decision to discharge Roell was made before he informed East Lake that he intended to file a worker's compensation claim, Roell has failed to prove that the reasons offered by East Lake were mere pretext. *See id.* Thus, even applying a liberal construction in favor of Roell, we conclude that Roell has failed to demonstrate that he was discharged solely in retaliation for notifying East Lake that he intended to file a worker's compensation claim. *See Purdy*, 835 N.E.2d at 212. In light of our conclusion that Roell has failed to establish that he was discharged "solely" in retaliation for filing a worker's compensation claim, *Purdy*, 835 N.E.2d at 212, we cannot say that the trial court erred in granting summary judgment in favor of East Lake.⁴

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.

⁴ Further, in light of precedent stating that we may affirm summary judgment on any basis supported by the record, *Purdy*, 835 N.E.2d at 212, and our conclusion that Roell has failed to demonstrate that he was discharged solely in retaliation for informing East Lake that he intended to file a worker's compensation claim, we need not consider Roell's claims regarding whether the trial court erred in ignoring allegedly direct evidence of Gill's state-of-mind regarding Roell's discharge and evidence of the close proximity in time between his notifying East Lake of his intention to file a worker's compensation claim and his termination. *See id.*