NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0685

ANTOINE DUFRENE

VERSUS

NORTHSHORE EMS, LLC

Judgment rendered: DEC 22 2021

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On Appeal from the
Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
No. 112436

The Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

HOLDRIDGE, J.

The plaintiff, Antoine Dufrene, appeals the trial court judgment that granted a motion for summary judgment in favor of the defendant, Northshore EMS, LLC, and dismissed his claims with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The defendant hired the plaintiff as an emergency medical technician (EMT) on August 21, 2013 as an at-will employee. On July 30, 2017, the plaintiff allegedly sustained injuries in an altercation involving a patient while on duty as an EMT.[1] Due to the altercation, the plaintiff reported the incident to the defendant on August 2, 2017 and told the defendant's Operations Manager, Eric Reed, that he wanted to submit a claim for works' compensation[2] under La. R.S. 23:1201, *et seq.*[3] Mr. Reed informed the plaintiff that he needed to prepare an incident report and get a drug screen that same day, August 2, 2017. On August 3, 2017, the plaintiff submitted the incident report to the defendant, which stated that his back pain was so severe from the incident on July 30, 2017, that he sought treatment in the emergency room at Lakeview Regional Medical Center on August 1, 2017.

On approximately August 22, 2017, the defendant learned that the plaintiff tested positive for barbiturates and butalbital from the drug screen administered on August 2, 2017 at the St. Tammany Parish Hospital emergency room. That same day, the defendant contacted the plaintiff and gave him an opportunity to provide a

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[1] The police report states that the date of the altercation was July 29, 2017; however, all other documents refer to July 30, 2017 as the date of the incident.

[2] The plaintiff's workers' compensation claim was dismissed by the Office of Workers' Compensation and this Court affirmed that decision in **Dufrene v. Louisiana Workers' Compensation Corporation**, 2019-1202 (La. App. 1 Cir. 5/11/20), 304 So.3d 93, 95, which held that the Office of Workers' Compensation correctly determined that the plaintiff failed to meet his burden of proving a compensable accident. See **Dufrene**, 304 So.3d at 101.

[3] On August 3, 2017, the Human Resources Manager for the defendant submitted a workers' compensation claim on behalf of the plaintiff. An employer's obligation to furnish medical treatment to an injured employee is governed by La. R.S. 23:1201, *et seq.*

written response as to why he tested positive for the drugs. In his written response, the plaintiff stated that his back pain was so severe from the incident on July 30, 2017 that he sought treatment at Lakeview Regional Medical Center on August 1, 2017. Prior to going to Lakeview Regional Medical Center, the plaintiff had an appointment with Dr. Harry Jasmin, his treating physician for his opioid addiction, wherein he was randomly drug tested. The plaintiff stated that the back pain worsened, so he took one of his wife's prescribed fioricet tablets the night before he provided a drug screen sample to the St. Tammany Parish Hospital emergency room on August 2, 2017.

After the defendant conducted an investigation, the defendant determined that the plaintiff's written response was insufficient to prevent his termination for violating its Drug-Free Workplace Policy, which was provided to the plaintiff when he was hired in 2013. The defendants' Drug-Free Workplace Policy stated the following:

> The [defendant] explicitly prohibits:
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> > The use, possession, solicitation for, or sale of narcotics or other illegal drugs, alcohol, or prescription medication without a prescription on Company or customer premises or while performing an assignment.
> >
> > Being impaired or under the influence of legal or illegal drugs or alcohol away from the Company or customer premises, if such impairment or influence adversely affects the employee's work performance, the safety of the employee or of others, or puts at risk the Company's reputation.
> >
> > ****
>
> The Company will conduct drug and/or alcohol testing under any of the following circumstances:
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> > ****
> >
> > POST-ACCIDENT TESTING: Any employee involved in an on-the-job accident or injury ... may be asked to submit to a drug ... test.
> >
> > ****
>
> If an employee is tested for drugs ... outside of the employment context and the results indicate a violation of this policy ... the employee may be subject to appropriate disciplinary action, up to and possibly including discharge from employment. In such a case, the employee will be given an opportunity to

explain the circumstances prior to any final employment action becoming effective.

On August 31, 2017, the defendant sent the plaintiff a letter of termination due to his violation of the defendant's Drug-Free Workplace Policy. The termination letter further stated that the defendant did not find the plaintiff's explanation to be sufficient grounds to waiver from the Drug-Free Workplace Policy. The defendant later learned that on August 1, 2017, the plaintiff tested positive for buprenorphine during the drug screen with Dr. Jasmin.[4]

On August 9, 2018, the plaintiff filed a petition for damages against the defendant alleging that he was terminated from his employment due to his filing a claim for workers' compensation. The plaintiff alleged that the termination was wrongful and in violation of La. R.S. 23:1361.[5] Thus, the plaintiff argued that he was entitled to damages. The plaintiff further alleged that the wrongful termination caused him "severe, embarrassment, humiliation and mental anguish, constituting intentional infliction of emotional distress additionally compensable under La. C.C.

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[4] Dr. Jasmin stated in his deposition that the plaintiff did not tell him that he had injured himself and was suffering with back pain during his August 1, 2017 appointment. Dr. Jasmin further stated that the plaintiff was undergoing opioid treatment with suboxone, which is buprenorphine. The plaintiff had been treated for his opioid addiction with suboxone for over five years.

[5] Louisiana Revised Statutes 23:1361 provides, in pertinent part:

> B. No person shall discharge an employee from employment because of said employee having asserted a claim for benefits under the provisions of this Chapter or under the law of any state or of the United States. Nothing in this Chapter shall prohibit an employer from discharging an employee who because of injury can no longer perform the duties of his employment.
> C. Any person who has been denied employment or discharged from employment in violation of the provisions of this Section shall be entitled to recover from the employer or prospective employer who has violated the provisions of this Section a civil penalty which shall be the equivalent of the amount the employee would have earned but for the discrimination based upon the starting salary of the position sought or the earnings of the employee at the time of the discharge, as the case may be, but not more than one year's earnings, together with reasonable attorney's fees and court costs.
> D. The rights and remedies granted by this Section shall not limit or in any way affect any rights and remedies that may be available under the provisions of any other state or federal law.

[a]rticle 2315." The defendant answered the plaintiffs' petition, generally denying all of the allegations. The defendant asserted several affirmative defenses and requested a trial by jury.

On July 23, 2020, the defendant filed a motion for summary judgment arguing that the plaintiff's claims should be dismissed with prejudice because he was not terminated in retaliation for filing a workers' compensation claim. The defendant stated that the plaintiff "was an at-will employee who was terminated for cause after testing positive for unprescribed drugs and for failing to comply with [the defendant's] Drug-Free Work-Place Policy." In opposition, the plaintiff argued that there were genuine issues of material fact as to whether the plaintiff violated the defendant's Drug-Free Workplace Policy and whether his termination of employment resulted in intentional infliction of emotional distress damages. Therefore, the plaintiff argued that the defendant's motion for summary judgment should be denied.

On October 6, 2020, the trial court held a hearing on the defendant's motion for summary judgment. After hearing arguments from the parties, the trial court made an oral ruling granting the defendant's motion for summary judgment and dismissing the plaintiff's claims with prejudice. A judgment in accordance with the trial court's ruling was signed on October 6, 2020. The plaintiff subsequently devolutively appealed the trial court's judgment.

STANDARD OF REVIEW

Appellate courts review the granting of summary judgment *de novo* using the same criteria governing the trial court's consideration of whether summary judgment is appropriate, *i.e.*, whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. See La. C.C.P. art. 966(A)(3);

Turner v. Rabalais, 2017-0741 (La. App. 1 Cir. 12/21/17), 240 So.3d 251, 255, writ denied, 2018-0123 (La. 3/9/18), 237 So.3d 1193.

The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. La. C.C.P. art. 966(A)(2). The purpose of a motion for summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **Hines v. Garrett,** 2004-0806 (La. 6/25/04), 876 So.2d 764, 769 *(per curiam)*. After an adequate opportunity for discovery, summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. La. C.C.P. art. 966(A)(4).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, after meeting its initial burden of showing that there are no genuine issues of material fact, the mover may point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, summary judgment shall be granted unless the adverse party can produce factual evidence sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. Any objection to a document shall be raised in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment. The court shall specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider. See La. C.C.P. art. 966(D)(2).

DISCUSSION

In his first assignment of error, the plaintiff argues that the trial court erred in granting the defendant's motion for summary judgment. In this case, the defendant is the mover and bears the initial burden of proof on the motion for summary judgment. See La. C.C.P. art. 966(D)(1). Accordingly, if the supporting documents presented by the defendant are sufficient to resolve all material issues of fact, only then would the burden shift to the plaintiff to present evidence showing that a material fact is still at issue. La. C.C.P. art. 966(D)(1); **Neighbors Federal Credit Union v. Anderson**, 2015-1020 (La. App. 1 Cir. 6/3/16), 196 So.3d 727, 734 (on a motion for summary judgment, it must first be determined that the documents presented by the moving party are sufficient to resolve all material issues of fact, and only if the documents are sufficient does the burden shift to the opposing party to present evidence showing that a material fact is still at issue).

The defendant supported its motion for summary judgment by submitting the plaintiff's written response into evidence, which evidenced that the plaintiff acknowledged that he took one of his wife's prescribed fioricet tablets for back pain on August 1, 2017. The defendant further supported its motion with the plaintiff's deposition, in which he acknowledged that he signed the defendant's Drug-Free Workplace Policy when he was hired in 2013, which warned him that if he violated

the policy his employment could be terminated. The plaintiff and his counsel acknowledged in his deposition that he did not believe that he was "retaliated against and terminated for making a workers' compensation claim[.]" The defendant also submitted into evidence the defendant's Drug-Free Workplace Policy, as well as the affidavits of Eric Reed, the Operations Manager for the defendant, and Krystal Schaff, the Office Manager and Human Resource Manager for the defendant. In both affidavits, the managers stated that the defendant required that its employees strictly comply with its Drug-Free Workplace Policy. The managers further stated that the plaintiff was not terminated by the defendant for filing a workers' compensation claim, but instead was terminated for testing positive for unprescribed drugs and violating the defendant's Drug-Free Workplace Policy.[6]

The defendant affirmatively proved that there were no genuine issues of material fact as to the reason for the plaintiff's termination of employment. After meeting its burden, the defendant pointed out the absence of factual support for an essential element to the plaintiff's claim. The burden then shifted to the plaintiff to prove the existence of genuine issues of material fact in order to defeat summary judgment, *i.e.* that the reason for his termination of employment was the filing of his workers' compensation claim. See **Chivleatto v. Sportsman's Cove, Inc.**, 2005-136 (La. App. 5 Cir. 6/28/05), 907 So.2d 815, 820. The evidence offered by the plaintiff in opposition to the motion for summary judgment did not establish that he could demonstrate a causal connection between his termination of employment and the filing of his workers' compensation claim. Although the plaintiff submitted into evidence a doctor's recommendation that the plaintiff needed an "MRI referral to a pain management doctor and a spine surgeon" to argue that his termination was due

[6] The defendant also submitted the plaintiffs' toxicology reports evidencing positive drug tests, the plaintiff's letter of termination, and the deposition of Dr. Jasmin as evidence in support of its motion for summary judgment.

to potentially needing surgery, this fact alone does not create a genuine issue of material fact to preclude the granting of summary judgment in favor of the defendant. Mere conclusory allegations, improbable inferences, and unsupported speculation will not support a finding of a genuine issue of material fact. **McLin v. Stafford**, 2019-0441 (La. App. 1 Cir. 12/27/19), 292 So.3d 566, 569. Thus, there does not remain any genuine dispute as to why the defendant terminated the plaintiff's employment, as both parties have acknowledged that the plaintiff's employment was terminated due to his violation of the defendant's Drug-Free Workplace Policy.

Accordingly, after a *de novo* review of the evidence, we find that the plaintiff failed to produce sufficient factual support demonstrating the existence of a genuine issue of material fact on the question of whether he was terminated from his employment due to him filing a workers' compensation claim. The evidence offered by the plaintiff in opposition to the motion for summary judgment did not establish that he could demonstrate a causal connection between his termination of employment and his workers' compensation claim with any reasonable probability. In fact, the plaintiff offered no evidence to rebut the defendant's claim that his employment was terminated due to the plaintiff's violation of the defendant's Drug-Free Workplace policy. Therefore, the trial court correctly granted summary judgment in favor of the defendant.

In his second assignment of error, the plaintiff argues that the trial court erred in finding an absence of a genuine issue of material fact as to the issue of whether the plaintiff's termination of employment resulted in intentional infliction of emotional distress. The plaintiff argues that "the action of [the defendant] in asserting ... illicit drug use on the part of the plaintiff ... as the basis of the termination of the plaintiff's employment ... rises to the level of extreme and

outrageous conduct sufficient to support [the] plaintiff's claim for intentional infliction of emotional distress."

The defendant counters that the plaintiff cannot establish that his termination of employment comes close to the level of "extreme and outrageous" standard required under Louisiana law. To recover damages for intentional infliction of emotional distress, a plaintiff must prove that: (1) the conduct of the defendant was extreme and outrageous; (2) the emotional distress suffered by the plaintiff was severe; and (3) the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **Barnett v. State Dept. of Health & Hospitals**, 2015-0633 (La. App. 1 Cir. 11/9/15), 2015 WL 6951294 (citing **White v. Monsanto Co.**, 585 So.2d 1205, 1209 (La. 1991)). Louisiana recognizes a cause of action for intentional infliction of emotional distress in a workplace setting. This state's jurisprudence has limited the cause of action to cases, which involve a pattern of deliberate, repeated harassment over a period of time. *Id.*

As pointed out by the defendant, the record reveals that the plaintiff has not shown that the defendant's actions were extreme or outrageous for terminating his employment and that the plaintiff did not suffer severe emotional distress because of this. The plaintiff has failed to provide evidence that the defendant engaged in a pattern of deliberate, repeated harassment over a period of time. Although the plaintiff may have been upset and insulted after reading his termination letter, the receipt of this correspondence regarding his employment does not rise to a cause of action for intentional infliction of emotional distress, as he was clearly aware that violating the defendant's Drug-Free Workplace Policy could result in his termination of employment. See **Stanton v. Tulane University of Louisiana**, 2000-0403 (La. App. 4 Cir. 1/10/01), 777 So.2d 1242, 1252, writ denied, 2001-0391 (La. 4/12/01),

789 So.2d 597. Thus, upon our *de novo* review, we find that the plaintiff's claim for intentional infliction of emotional distress was properly dismissed by the trial court as it was not of such an extreme and outrageous nature as is necessary to prove entitlement to damages. This assignment of error is without merit.

Accordingly, under the undisputed facts of this case, summary judgment was properly granted by the trial court, dismissing the plaintiff's claims with prejudice.

CONCLUSION

The trial court's October 6, 2020 judgment granting summary judgment in favor of Northshore EMS, LLC is affirmed. All costs of this appeal are assessed to the plaintiff, Antoine Dufrene.

AFFIRMED.