STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2037

James Zobel,
Appellant,

vs.

Carver County, et al.,
Respondents.

Filed July 1, 2013
Affirmed
Worke, Judge

Carver County District Court
File No. 10-CV-11-870

Andrew G. Birkeland, R. Daniel Rasmus, Rasmus Law Office, LLC, Minneapolis, Minnesota (for appellant)

William L. Davidson, Timothy P. Jung, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant, a discharged employee, challenges summary-judgment dismissal of his claim of wrongful discharge in retaliation for seeking workers' compensation benefits.

Because appellant failed to present evidence sufficient to establish that he was discharged for seeking workers' compensation benefits, we affirm.

FACTS

On May 25, 2005, respondent Carver County Community Development Agency (CDA), offered appellant James Zobel a position in maintenance. Appellant had a back injury from 1982 that had required surgery. At the time he accepted the position, he had a "sore" back from a recent move to a new apartment.

On Monday, June 13, 2005, appellant began work. He was assigned to scrape and paint, and to help move two toilets. Appellant stated in his deposition that he twice suggested to his supervisor that rather than scraping weatherbeaten panels, which was strenuous on his back, the panels should be replaced, but his supervisor rejected these suggestions.

The next day, between 7:30 a.m. and 8:00 a.m., appellant called CDA's call-in line and left a message that "[he] hurt [himself]. [He] wouldn't be in to work. And [he] needed to know what doctors they wanted [him] to go see." When asked at his deposition if his message to CDA stated that he hurt himself or that he hurt himself at work, appellant said, "I can't remember for sure." Appellant also informed CDA that he hurt his back.

According to appellant, within an hour, his supervisor came to his apartment and fired him. Appellant stated at his deposition that he did not know whether his supervisor had heard his message when he was fired; appellant did not depose his supervisor. Appellant saw a doctor on June 14 and was informed that he could not go back to work.

For unemployment compensation purposes, CDA reported that appellant "called in sick [the] next day claiming he hurt himself working. He never said anything prior." In answers to interrogatories, CDA stated that the reason for appellant's discharge was "deficient performance and attitude."

On July 3, 2006, appellant initiated a workers' compensation claim. A workers' compensation judge denied appellant's claim after finding that appellant did "not prove[] that he sustained [] a specific injury . . . on or about June 13, 2005." The judge found that Appellant had a pre-existing injury that had worsened over time, eventually resulting in a total disability. The judge's memorandum stated that "any injury which might have been sustained in June 2005 was no more than minor and temporary."

In 2011, appellant initiated an action in district court for retaliatory discharge, alleging that he was discharged for seeking workers' compensation benefits. The district court granted CDA's motion for summary judgment, concluding that appellant was collaterally estopped from raising a retaliatory-discharge claim because the issue of whether he was injured at work was already determined in the workers' compensation action, and, alternatively, that appellant failed to establish a prima facie case of retaliatory discharge. This appeal followed.

D E C I S I O N

A district court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. An appellate court reviews a

"district court's legal decisions on summary judgment under a de novo standard, and view[s] the evidence in the light most favorable to the party against whom judgment was granted." *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012) (quotations omitted). Summary judgment is appropriate when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

A cause of action for retaliatory discharge exists when an employee can show statutorily protected conduct by the employee, adverse employment action by the employer, and a causal connection between the two. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). If the employee establishes a prima facie case, the burden shifts to the employer to produce a legitimate reason for its conduct, after which the employee may demonstrate that the employer's given reason is pretextual. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2011) (adopting analysis for Minnesota whistleblower claims set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 1824-25 (1973)), *review denied* (Minn. May 15, 2001); s*ee Schmitz v. U. S. Steel Corp.*, ___ N.W.2d ___, ___ 2013 WL 1942991, at *10-11 (Minn. App. 2013) (noting that *McDonnell Douglas* burden-shifting framework can be used for retaliatory-discharge claims).

The district court found that appellant's claim did not survive the *McDonnell Douglas* test because even if the first two prongs were satisfied—that he sought workers' compensation benefits and was thereafter discharged—appellant failed to offer sufficient evidence to "show a causal connection between the two actions." We agree.

Appellant offered no link between his notifying CDA of his injury and CDA's decision to discharge him. He could not "remember for sure" whether he informed CDA when he left a message on the call-in line that he was injured at work and offered no evidence showing that his supervisor was aware of his injury at the time of his discharge. In addition, appellant did not depose his former supervisor to establish this link, and other employees who appellant did depose had no particular knowledge of the circumstances of appellant's discharge. Finally, even if appellant had established causation, CDA offered a legitimate reason for appellant's discharge—appellant's poor performance and attitude—and appellant offered no evidence to show that the articulated reasons for his discharge were pretextual.[1] Even viewing these facts in the light most favorable to appellant, he failed to establish a prima facie case of retaliatory discharge.

Because we affirm on this ground, we decline to address respondent's claim of collateral estoppel.

Affirmed.

[1] Appellant relies on a document submitted by CDA for unemployment compensation purposes as evidence of pretext, because it gave the following reason for his dismissal: "called in sick next day claiming he hurt himself working. He never said anything prior." This evidence is not sufficiently probative to withstand a motion for summary judgment. *See Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1337 (8th Cir. 1996) (affirming grant of summary judgment to employer when evidence of pretext was insufficient to infer intentional age-based discrimination); *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 546 (Minn. 2001) (applying summary judgment when a *McDonnell Douglas* "plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred").