IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1167

Filed: 2 July 2019

Wake County, No. 16 CVS 14254

BRANDON ATKINS, Plaintiff,

v.

TOWN OF WAKE FOREST, Defendant.

Appeal by Defendant from order entered 4 May 2018 by Judge George B. Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 April 2019.

Monteith Law, PLLC, by Charles E. Monteith, Jr., for the Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog, for the Defendant-Appellee.

DILLON, Judge.

Plaintiff Brandon Atkins was employed by the Town of Wake Forest (the "Town") as a police officer from February 2009 until his termination in January 2016. Plaintiff commenced this action against the Town for retaliatory workplace discrimination, claiming that the Town terminated his employment because he filed

a claim for workers' compensation benefits. Plaintiff appeals the trial court's order granting the Town summary judgment. We affirm Judge Collins' order.

I. Background

In 2014, the Town received a grant to purchase two motorcycles for the police force on the condition that the vehicles would be used consistently. Plaintiff applied for and received a motorcycle position.

During the summer of 2015, Lieutenant Coleman, one of Plaintiff's supervisors, began noticing that Plaintiff was not riding the motorcycle on a regular basis. On a particular day that summer, Plaintiff told another officer that he was not riding his motorcycle that day because it was "too hot." Towards the end of that summer, on 25 August 2015, Lt. Coleman sent Plaintiff an email directing Plaintiff to ride his motorcycle every day unless he presented a valid reason beforehand.

On 2 September 2015, Plaintiff experienced a medical emergency while patrolling on his motorcycle which led to an overnight stay in the hospital due to heat-related symptoms. Shortly thereafter, Plaintiff filed a workers' compensation claim arising from the medical emergency.

The evidence showed that, during his stay in the hospital, Plaintiff admitted to lying about the reason he was not riding his motorcycle: though he stated he was not riding because it was too hot outside, it was truly because he was experiencing stomach problems. Chief Leonard, chief of the Town police, had a strict no-lying

policy; every officer who had lied during his tenure had been fired. Chief Leonard spoke with the Town's human resources department about Plaintiff's admission that he had lied.

On 17 September 2015, the Town's insurance carrier hired a private investigator to conduct surveillance on Plaintiff while he was on leave, after becoming suspicious of Plaintiff's claimed injuries. Specifically, the Town believed that Plaintiff might be committing workers' compensation fraud. On 7 October 2015, Plaintiff returned to work in an administrative capacity, then transitioned to a telecommunications dispatch position a week later. However, based on Plaintiff's stated symptoms of fatigue and self-professed difficulties in performing his job duties, Plaintiff's doctor never returned Plaintiff to work at full duty.

During the first week of November 2015, with approval from his supervisors, Plaintiff went on vacation to Disney World in Florida. The Town's private investigator conducted surveillance during Plaintiff's time in Disney World and submitted a report to the Town, including a video of Plaintiff's conduct. The videotape demonstrated, in part, that Plaintiff spent up to twelve (12) hours per day at the parks, riding many rides. Based on the evidence gathered by the private investigator, the Town concluded that Plaintiff was committing workers' compensation fraud and decided that an investigation should be conducted by Internal Affairs within the department.

An Internal Affairs investigation was conducted. The investigator found that the Town's allegations of untruthfulness were supported by Plaintiff's conduct and that Plaintiff's activities at Disney World contradicted his own statements regarding his health and did not comply with restrictions implemented by Plaintiff's doctor. On or about 7 January 2016, based on the results of the internal investigation, Lt. Coleman and Chief Leonard terminated Plaintiff's employment with the Town police.

Following his termination, Plaintiff filed a grievance with the Town Manager, who reviewed and upheld Plaintiff's termination. Plaintiff then filed the present action in the trial court. The Town moved for summary judgment. The trial court found no genuine issues of material fact and granted summary judgment to the Town. Plaintiff timely appealed.

II. Analysis

Plaintiff asserts that the trial court erred in granting the Town's motion for summary judgment on the Plaintiff's claim of retaliatory discrimination.

We review a grant of summary judgment *de novo*, *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008), considering all evidence in the light most favorable to the nonmoving party and drawing all inferences in its favor, *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

A claim for retaliatory discrimination arises under the Retaliatory Employment Discrimination Act ("REDA"), which states that an employee may not

be punished for electing to exercise his or her lawful rights as an employee, including the filing of a workers' compensation claim:

> (a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:
>
> (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:
>
> a. Chapter 97 of the General Statutes [, which is known as the Workers' Compensation Act].

N.C. Gen. Stat. §95-241 (2017). In order to successfully state a prima facie cause of action under the REDA, a plaintiff must show: "(1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a)." *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004).

Claims under the REDA invoke a burden-shifting framework, requiring each party to prove and disprove, in turn, whether discrimination occurred. The employee must first establish a prima facie case of retaliatory discrimination. *See Whiting v. Wolfson Casing Corp.*, 173 N.C. App. 218, 221, 618 S.E.2d 750, 753 (2005). "If [the employee] presents a prima facie case of retaliatory discrimination, then the burden shifts to the [employer] to show that he 'would have taken the same unfavorable

action in the absence of the protected activity of the employee.' " *Wiley*, 164 N.C. App. at 186, 594 S.E.2d at 811 (quoting N.C. Gen. Stat. §95-241(b) (2018)). Once the employer provides a nondiscriminatory reason for its action, the burden of proof shifts back to the employee to demonstrate that the "apparently valid reason was actually a pretext for discrimination." *Fatta v. M&M Properties Mgmt., Inc.*, 221 N.C. App. 369, 372, 727 S.E.2d 595, 599 (2012). "Although evidence of retaliation in a case [] may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Swain v. Elfland*, 145 N.C. App. 383, 387, 550 S.E.2d 530, 534 (2001).

Plaintiff contends that the trial court erred in granting the Town summary judgment because the evidence showed a genuine issue of material fact with respect to whether his termination was causally connected to his filing a workers' compensation claim. There is no dispute, here, that Plaintiff "exercised his right" to file a workers' compensation claim and subsequently "suffered an adverse employment action," termination of his employment with the Town. *Wiley,* 164 N.C. App. at 186, 594 S.E.2d at 811. Therefore, the first two elements of Plaintiff's prima facie case under the REDA are satisfied, and the issue of whether Plaintiff's termination was causally connected to his pending workers' compensation claim is all that remains. *See McDowell v. Cent. Station Original Interiors, Inc.*, 211 N.C. App. 159, 162, 712 S.E.2d 251, 254 (2011).

To prove the last element, Plaintiff "must show that [his] discharge was caused by [his] good faith institution of [] workers' compensation proceedings . . . ." *Abels v. Renfro Corp.,* 108 N.C. App. 135, 143, 423 S.E.2d 479, 483 (1992), *aff'd in part, rev'd in part,* 335 N.C. 209, 436 S.E.2d 822 (1993). "[T]o satisfy the causation element, a plaintiff may present evidence of [1] close temporal proximity between the protected activity and the adverse employment action, or [2] a pattern of conduct." *Webb v. K.R. Drenth Trucking, Inc.*, 780 F. Supp. 2d 409, 413 (W.D.N.C. 2011) (applying N.C. Gen. Stat. § 95-241) (internal quotation omitted);[1] *see also Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 510, 593 S.E.2d 808, 812 (2004).

Plaintiff failed to present evidence of a close temporal proximity between his filing for benefits and his termination. About four months elapsed between these events in this case, and we have held that a plaintiff failed to establish a close temporal relationship between the filing of a claim and suspension from employment where the events were separated by two and a half months. *Shaffner v. Westinghouse Elec. Corp.*, 101 N.C. App. 213, 216, 398 S.E.2d 657, 659 (1990) (finding no close temporal relationship between compensation claim in April and termination of employment in June of the same year, approximately two and a half months later).

Assuming, for argument's sake, that the evidence in the light most favorable to Plaintiff sufficiently showed a pattern of conduct suggesting that the Town

[1] "Although we are not bound by federal case law, we may find their analysis and holdings persuasive." *Ellison v. Alexander,* 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010).

terminated him because he filed a workers' compensation claim, we conclude that Plaintiff has presented little more than mere speculation rebutting the Town's nondiscriminatory purpose.

The Town has shown a legitimate, nondiscriminatory reason for firing Plaintiff. The Town presented evidence that, though the circumstances leading to Plaintiff's termination did involve Plaintiff's injury and pending workers' compensation claim, Plaintiff was terminated due to concerns about his honesty. *See Johnson v. Trustees of Durham Tech.,* 139 N.C. App. 676, 682, 535 S.E.2d 357, 361 (2000) ("The [REDA] does not prohibit all discharges of employees who are involved in a workers' compensation claim, it only prohibits those discharges made *because* the employee exercises his compensation rights." (emphasis in original)). It is undisputed that Plaintiff lied to one of his coworkers when he first said that he was not riding his motorcycle because it was too hot outside, when, truly, he was feeling sick to his stomach. Chief Leonard had a strong policy disfavoring dishonesty amongst his police force, under which he had fired each and every officer who had lied on duty. Questions of honesty and integrity are legitimate grounds for termination of police officers, as the nature of the job necessitates public trust and confidence, an internal need for trust between officers in the field, and a reputation for trustworthiness when called to testify at trial. Following the institution of Plaintiff's workers' compensation claim, the Town attempted to provide alternative

work for Plaintiff but developed suspicions that Plaintiff was being untruthful regarding the extent of his injuries. And, after conducting its own investigations, interviewing Plaintiff, and reviewing a report compiled by its private investigator, the Town concluded that Plaintiff was untrustworthy and was, therefore, justified in terminating Plaintiff's employment for that reason.

At this point, the burden of proof shifted back to Plaintiff to show that the Town's justification, that it believed Plaintiff was dishonest, is merely pretext. Our law states that "[t]o raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a prima facie showing by pointing out specific, non-speculative facts which discredit the defendant's non-retaliatory motive." *Wells v. N.C. Dep't of Corr.,* 152 N.C. App. 307, 318, 567 S.E.2d 803, 811 (2002). There must be some evidence that, not only casts doubt on the defendant's nondiscriminatory reasoning, but also independently leads the factfinder to believe the plaintiff's story of intentional discrimination by the defendant. *See Enoch v. Alamance Cty. Dep't of Soc. Servs.*, 164 N.C. App. 233, 242, 595 S.E.2d 744, 752 (2004) (citing *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000) (explaining the burden-shifting framework at hand in circumstances of discrimination).

In his brief on appeal, Plaintiff points to discrepancies in the facts leading up to his termination to support the causal connection between his termination and his workers' compensation claim but never advances any arguments as to what facts

make the Town's justifications truly pretext. For instance, Plaintiff and the Town each spend considerable time debating when and to whom Plaintiff claimed it was "too hot" to ride his motorcycle, as well as when and to whom Plaintiff admitted to lying about this reason. However, we find these distinctions immaterial; the undisputed facts are that Plaintiff initially lied to his co-workers with respect to why he was not riding his motorcycle and later, at some point, admitted to lying.

Plaintiff also presented uncontradicted evidence that his supervisors all approved that he take time off and travel to Disney World despite Plaintiff's condition. Though Plaintiff had approval to travel, the Town then sent its private investigator to follow Plaintiff around the theme park, record his activities, and compile a report. The resulting report was considered by the Town's internal investigator before recommending Plaintiff's termination.

Plaintiff contends that there are genuine issues of material fact with respect to the factual basis supporting the report of his activities in Disney World. Specifically, Plaintiff challenges the Town's assertion that his conduct at the park conflicted with Plaintiff's self-attested injuries and his doctor's recommendations. However, the evidence shows that, whether the conduct contained in the report was a fair representation of his activity at the park, the Town, in good faith, relied on the report as part of its reasoning for terminating Plaintiff due to concerns with dishonesty. To the extent that the information in the report is not totally accurate,

we cannot say that it is anything more than speculation that approval of Plaintiff's travel plans could be construed as an effort to generate false evidence that supports an account of dishonesty as pretext. *See Wells,* 152 N.C. App. at 318, 567 S.E.2d at 811; *see also Shoaf v. Kimberly-Clark Corp.*, 294 F. Supp. 2d 746, 759 (M.D.N.C. 2003) (employing a burden-shifting framework and stating that, "[e]ven in discrimination cases where motive and intent are critical to the analysis, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation" (internal quotation omitted)).

It is clear that the evidence, taken in the light most favorable to the Town, is that the Town truly suspected Plaintiff lied to a co-worker during active duty and was committing workers' compensation fraud. But this Court, and the trial court below, is to review the evidence in the light most favorable to the nonmoving party. *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. And "[i]n a case such as this, the motivation of the employer in the dismissal of the employee is the primary issue to be decided by the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 218, 436 S.E.2d 822, 827 (1993). Even still, we agree with Judge Collins that the evidence in the light most favorable to the Plaintiff does not allow a reasonable inference that Plaintiff's supervisors engaged in a pattern of conduct to get rid of Plaintiff following his workers' compensation claim. That is, Plaintiff presented no evidence that rises above speculation that the Town's

motive in terminating Plaintiff was due to the mere fact that he filed a claim for workers' compensation benefits. Rather, the only reasonable inference is that the Town terminated Plaintiff for what the Town believed to be acts of dishonesty and misrepresentation, which are justifiable motives and fatal to a REDA claim.

III. Conclusion

We conclude that the trial court did not err in granting Defendant summary judgment for the Town, as there were no material issues of fact as to whether the Town's nondiscriminatory reasoning for terminating Plaintiff's employment was merely a pretext. Therefore, we affirm Judge Collins' order.

AFFIRMED.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).