IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-121

Filed 19 September 2023

Davie County, No. 21CVS381

JUSTIN SLOAN, Plaintiff,

v.

TOWN OF MOCKSVILLE, NORTH CAROLINA, PATRICK REAGAN in his official and individual capacities, and MATT SETTLEMYER in his official and individual capacities, Defendants.

Appeal by plaintiff from order entered 12 October 2022 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 22 August 2023.

Hensel Law, PLLC, by Wilson F. Fong, for plaintiff-appellant.

Cranfill Sumner& Hartzog, LLP, by Steven A. Bader and Patrick H. Flanagan, for defendants-appellees.

FLOOD, Judge.

Justin Sloan ("Sloan") appeals from the 12 October 2022 Order granting the Motion for Summary Judgment filed by the Town of Mocksville, North Carolina; Patrick Reagan; and Matt Settlemyer (collectively the "Town"). After careful review, we affirm the trial court's Order.

I. Factual and Procedural Background

Sloan was employed as a police officer by the Town of Mocksville Police Department (the "Department") from 30 May 2017 until his termination on 27 August 2020. Sloan filed a Complaint in Davie County Superior Court on 11 August 2021 alleging the Town violated the North Carolina Retaliatory Employment Discrimination Act ("REDA") by terminating him. The relevant facts are as follows.

On 19 June 2020, Sloan attempted to call out sick from his shift because he was experiencing an upset stomach and a fever of 100.3 degrees Fahrenheit. According to Sloan, Sgt. Brian Nichols "pressured" Sloan to come into work that day because they could not find anyone to cover his shift. Sloan worked his shifts on 20, 21, 24, and 25 June 2020. On 27 June 2020, Sloan tested positive for Covid-19.

While in quarantine, Sloan learned Department Chief Patrick Reagan ("Chief Reagan") and Town Manager Matt Settlemyer ("Settlemyer") were denying to the public and the Department that Sloan had tested positive for Covid-19. On 3 July 2020, an anonymous Facebook page with the pseudonym "Joshua Morris William" posted a photograph of a Department-wide, 28 June 2020 email Chief Reagan sent warning employees against discussing any other employee's medical status. The post alleged the Town did not want anyone to know Department employees had tested positive for Covid-19 and stated, "the truth will come out." On 7 July 2020, the same Facebook page included a second post, showing the letter Sloan received from Rowan County Public Health, informing Sloan of his positive Covid-19 test.

On 9 July 2020, Sloan filed an anonymous Occupational Safety Hazard Administration Complaint ("OSHANC Complaint") with the North Carolina Department of Labor ("NCDOL"), alleging the Department forced him to work while sick during a pandemic and failed to contact trace or alert people of a possible exposure to Covid-19. NCDOL provided the Town notice of the anonymous OSHANC Complaint on 15 July 2020. NCDOL described the nature of the complaint as follows:

> 1. On June 19, 2020, an employee attempted to call out sick with symptoms consistent with COVID-19 but was pressured into working by the police chain of command due to staff shortages. The employee became progressively more sick [sic], but was still not allowed to call out and worked four more shifts through June 24, 2020. The employee eventually tested positive for COVID-19 after going to the hospital. By requiring a sick employee to work, the employer potentially exposed other employees and first responders to the COVID-19 virus.
>
> 2. Once management became aware of the employee's positive COVID-19 test, no contract [sic] tracing was conducted by the employer to identify potentially exposed co-workers and notify them of that exposure to allow for testing and monitoring of their own health.

Subsequently, Chief Reagan initiated an internal investigation to determine what information had been personally shared by a Department employee with the anonymous Facebook page, and what information was obtained without permission. This investigation was independent of NCDOL's investigation into Sloan's OSHANC Complaint. On 16 July 2020, Sgt. Larry Leonard ("Sgt. Leonard") interviewed Sloan

as part of the internal investigation to determine how Sloan's medical information and the email from Chief Reagan came to be posted to the anonymous Facebook page.

On 17 July 2020, Officer Charles Davidson ("Officer Davidson"') was also interviewed by Sgt. Leonard as part of the same investigation. Both Officer Davidson and Sloan were told by Sgt. Leonard, and signed a form agreeing, not to discuss the investigation with anyone until the interviews were completed. The form—"Rights and Responsibilities of Employees in Administrative Interviews"—read in pertinent part:

> This investigation and interview is confidential. In order to ensure that the integrity of the investigation is preserved and that all department rules and regulations are understood and followed, you shall not discuss the allegations or investigation, nor allow anyone else to gain access to that information without the expressed authorization of the Chief of Police, his designee, or the assigned internal affairs investigator. If you are the accused employee, you may disclose to others that you are the subject of an investigation. You may also discuss the matter with your supervisor or your attorney without prior approval.

After Sloan was first interviewed by Sgt. Leonard, he "contacted all of the individuals" he had identified in his interview and discussed the investigation with them. Specifically, Sloan discussed the investigation with State Trooper Andrew Doss ("Trooper Doss"). Officer Davidson also spoke with Trooper Doss and disclosed details about the investigation. Sgt. Leonard learned of the disclosure when he was approached by Sgt. Howell, Trooper Doss's supervisor, who told Sgt. Leonard "one of

his troopers had concerns about the investigation and [the trooper's] involvement." When Sgt. Leonard asked Sloan whether he discussed the investigation with anyone, Sloan admitted to discussing it with Trooper Doss. Sgt. Leonard did not ask Officer Davidson whether he discussed the interview with Trooper Doss.

On 27 August 2020, Sloan was terminated by the Town for insubordination based on Sloan's disclosure of information related to the investigation, which Sloan had agreed to keep confidential. Officer Davidson was not fired for his disclosures. On the same day, Sloan submitted a "Retaliatory Employment Discrimination Complaint Form" with NCDOL, alleging he was terminated for filing the OSHANC Complaint. On 1 June 2021, NCDOL issued Sloan a "right-to-sue-letter" concluding, "there [was] reasonable cause to believe that the allegations of [Sloan's] complaint are true and that the [Town] may have violated REDA." Sloan subsequently filed a Complaint against the Town with the Davie County Superior Court.

On 18 October 2021, the Town filed an Answer and asserted it had a legitimate nondiscriminatory reason for terminating Sloan because Sloan's disclosure of the investigation amounted to insubordination in violation of Section 5.60 of the Town of Mocksville's Personnel Policy (the "Policy"). On 22 September 2022, the Town filed a Motion for Summary Judgment. On 12 October 2022, Judge Klass granted the Town's Motion for Summary Judgment. Sloan filed timely notice of appeal on 9 November 2022.

II. Jurisdiction

This Court has jurisdiction to hear this appeal from a final order from a superior court pursuant to N.C. Gen. Stat. 7A-27(b) (2021).

III. Analysis

The sole issue before this Court is whether the trial court erred in granting the Town's Motion for Summary Judgment.

"Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. R. Civ. P. 56(c). "As a general principle, summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue." *Johnson v. Trs. of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361 (2000). When considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *See id.* at 683, 535 S.E.2d at 362. A motion for summary judgment should be denied "when there is more than a scintilla [of evidence] to support plaintiff's prima facie case. Where the question of granting [summary judgment] is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1998).

A. *Prima Facie* REDA Claim

Under REDA, an employer is prohibited from taking "any retaliatory action against an employee because the employee" filed a complaint with respect to the Occupational Safety and Health Act of North Carolina ("OSHANC"). N.C. Gen. Stat. § 95-241(a)(1)b. (2021); *see also* N.C. Gen. Stat. § 95-126(a) (2021). "The statute does not prohibit all discharges of employees who are involved in [an OSHANC complaint], it only prohibits those discharges made *because* the employee [filed a complaint]." *Johnson*, 139 N.C. App. at 682, 535 S.E.2d at 361 (emphasis in original). "In order to state a claim under 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). Once the plaintiff shows a *prima facie* case of retaliation pursuant to REDA, the burden shifts to the employer to show the unfavored action would have been taken regardless of whether the employee exercised his rights under N.C. Gen. Stat. § 95-241(a). *See id.* at 186, 594 S.E.2d at 811; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677–78 (1973).

In assessing whether the facts here establish a *prima facie* case, it is undisputed Sloan exercised his rights under N.C. Gen. Stat. § 95-241(a) by filing the OSHANC Complaint and subsequently suffered an adverse employment action, *i.e.*,

his termination from the Department. *See Wiley*, 164 N.C. App. at 186, 594 S.E.2d at 811 (concluding an adverse action includes discharge from employment). The question before us, therefore, is whether there is a "scintilla" of evidence that the alleged retaliatory action was taken *because* Sloan filed the OSHANC Complaint. *See Edwards*, 128 N.C. App. at 573, 495 S.E.2d at 923; *see also Johnson*, 139 N.C. App. at 682, 535 S.E.2d at 361.

To show the adverse employment action was taken because a plaintiff engaged in a protected activity, "a plaintiff may present evidence of close temporal proximity between the protected activity and the adverse employment action . . . ." *Fatta v. M&M Props. Mgmt., Inc.*, 221 N.C. App. 369, 372–73, 727 S.E.2d 595, 599 (2012) (citation omitted). "[M]erely a closeness in time between the filing of a discrimination charge and an employer's firing an employee is sufficient to make a *prima facie* case of causality." *Id.* at 373, 727 S.E.2d at 599. "[A]n employer [however] cannot take action because of a factor of which it is unaware, [and] the employer's knowledge that the plaintiff engaged in a protected activity[, therefore,] is absolutely necessary to establish the third element of the prima facie case." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 563, 657 (4th Cir. 1998); *see also Abels v. Renfro Corp.*, 335 N.C. 209, 218, 436 S.E.2d 822, 827 (noting North Carolina courts may "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in [employment] discrimination cases." (citation omitted)). "Although evidence of retaliation in a case such as this one may often be completely

circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Wiley*, 164 N.C. at 187, 594 S.E.2d at 811.

Here, there is sufficient evidence to make an inference that the Town was aware Sloan filed the OSHANC Complaint. Even though the OSHANC Complaint was anonymous, NCDOL provided the Town with notice that a complaint had been filed by an employee who attempted to call out of work sick on 19 June 2020, was denied leave and forced to work due to staff shortages, became progressively sicker, worked four more shifts through 24 June 2020, and eventually tested positive for Covid-19. The undisputed facts show Sloan attempted to call out sick on 19 June 2020; was denied leave based on staff shortages; worked his shifts on 20, 21, 24, and 25 June 2020; and ultimately tested positive for Covid-19 on 27 June 2020.

The Town argues Sloan cannot show they had actual knowledge Sloan filed the OSHANC Complaint because "anyone who viewed the Facebook postings could have learned the supposed details needed to lodge the [OSHANC C]omplaint." While this may be true, whether the Town had actual knowledge of Sloan's filing of the complaint is nevertheless a genuine issue of material fact for the trial court, not this Court, to decide. *See Edwards*, 128 N.C. App. at 573, 495 S.E.2d at 923. We therefore conclude the trier of fact could infer beyond mere speculation that the Town knew Sloan was the employee who filed the OSHANC Complaint. *See Wiley*, 164 N.C. at 187, 594 S.E.2d at 811.

As for temporal proximity, Sloan filed the anonymous OSHANC Complaint on 9 July 2020, and the Town was informed of the OSHANC Complaint on 15 July 2020. On 19 August 2020, NCDOL closed Sloan's OSHANC Complaint. On 27 August 2020, Sloan was terminated from the Department, just six weeks after the Town became aware of the OSHANC Complaint.

Accordingly, Sloan has successfully shown his *prima facie* case of retaliatory discrimination sufficient to survive summary judgment because, viewing the evidence in the light most favorable to Sloan, there is a genuine dispute as to whether the Town knew Sloan filed the OSHANC Complaint, and there is a close proximity between the filing of the Complaint and Sloan's termination. *See Wiley*, 164 N.C. App. at 186, 594 S.E.2d at 811; *see also Johnson,* 139 N.C. App. at 681, 535 S.E.2d at 361.

B. The Town's Legitimate Nondiscriminatory Reason

"Once a plaintiff establishes a *prima facie* case of discrimination, the employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons." *Fatta*, 221 N.C. App. at 373, 727 S.E.2d at 599 (internal quotations and citation omitted). An employer has not violated REDA if they can prove "by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee." N.C. Gen. Stat. § 95-241(b) (2021). If the employer can produce such evidence, the burden shifts back to the plaintiff to show the "proffered reason was

mere pretext for retaliation by showing both that the reason was false and that discrimination was the real reason for the challenged conduct." *Fatta*, 221 N.C. App. at 374, 727 S.E.2d at 600 (internal quotations and citations omitted).

1. Legitimate Nondiscriminatory Reason

The Town argues Sloan was not terminated because he filed the OSHANC Complaint, but because he disclosed confidential information about the Department's investigation. To support this argument, the Town submitted an affidavit signed by Settlemyer, which stated Sloan was terminated for insubordination pursuant to section 5.60 of the Policy. Section 5.60 of the Policy states, in pertinent part, "[e]mployees shall not be insubordinate. Insubordination is disrespect toward a supervisor, open defiance, or the refusal to obey any lawful order or directive of a supervisor in a timely and satisfactory manner." According to the Town, Sloan violated this section when he disclosed information about the investigation after receiving a "directive of a supervisor" to keep the information confidential. Settlemyer and Chief Reagan both stated in affidavits that Sloan did not show a lack of remorse for disclosing information about the investigation or show any concern.

Based on the foregoing, the Town has demonstrated a legitimate nondiscriminatory ground for terminating Sloan. *See Fatta*, 221 N.C. App. at 373, 727 S.E.2d at 599.

2. Pretext

First, Sloan argues the Town's legitimate reason for terminating him was

pretext for discrimination because the Rights and Responsibilities of Employees in Administrative Interviews form permitted him to discuss the investigation because he was the target of said investigation. This argument is without merit.

The form Sloan signed states, in relevant part,

> This investigation is *confidential*. In order to ensure that the integrity of the investigation is preserved . . . you *shall not* discuss the allegation or investigation, nor allow anyone else to gain access to that information . . . . If you are the accused employee, you may disclose to others that you are the subject of an investigation.

(emphasis added). The Record evidence, however, indicates Sloan discussed the investigation with "all of the individuals" whom he had identified in his initial interview with Sgt. Leonard. Sloan stated in an affidavit that he specifically admitted to Sgt. Leonard to discussing the investigation with Trooper Doss. Trooper Doss communicated his concerns about the investigation and his involvement to Sgt. Howell. Sloan's discussion of the investigation with Trooper Doss went further than merely disclosing that he was the target of the investigation because Sloan also disclosed to Trooper Doss that Doss's name came up in the investigation.

Next, Sloan argues the reason the Town terminated him was pretext for discrimination because the Town did not fire Officer Davidson, who also disclosed information regarding the investigation. This argument is also without merit.

A showing of pretext must be supported by more than inferences, unsupported speculation, and conclusory allegations. *See Fatta*, 221 N.C. App. at 375, 727 S.E.2d

at 601 (concluding the plaintiff's reliance on "weak inferences and unsupported speculation" was insufficient to show the defendant's reason was pretext for discrimination).

Like Sloan, Officer Davidson also spoke to Trooper Doss about the investigation, but unlike Sloan, was not disciplined. The Town argues, however, there is no evidence showing the Town knew Officer Davidson spoke with Trooper Doss. The evidence shows Sgt. Leonard was approached by Sgt. Howell, who communicated to Sgt. Leonard that one of his troopers had concerns about the investigation. Sgt. Leonard then asked Sloan whether he had discussed the investigation with anyone. Sloan admitted he had discussed the investigation with Trooper Doss. No evidence was presented showing the Town knew Officer Davidson discussed the investigation, or ever asked him whether such a discussion had occurred.

Sloan argues the Town must have known Officer Davidson also spoke about the investigation because the affidavits "prove . . . there were three individuals present when they spoke about the investigation: Sloan, [Officer] Davidson, and [Trooper] Doss." Settlemyer and Chief Reagan's affidavits both state Sgt. Leonard only asked Sloan whether he had discussed the investigation, which he admitted he had. In Sloan's affidavit, he stated he and Officer Davidson both discussed the investigation with Trooper Doss, but this alone does not impute knowledge to the Town nor does it show, beyond mere speculation, they spoke to Trooper Doss at the

same time. Moreover, Officer Davidson represented in his affidavit that, "*I* later spoke about the investigation and my questioning to [Trooper Doss]." (emphasis added). Officer Davidson did not suggest he and Sloan spoke to Trooper Doss together.

Based on the Record evidence, there is no indication the Town knew, at the time Sloan was terminated, that Sloan and Officer Davidson both spoke to Trooper Doss at the same time; any inference to the contrary is mere speculation. *See Fatta*, 221 N.C. App. at 375, 727 S.E.2d at 601. Sloan has presented no evidence, circumstantial or direct, the Town knew Officer Davidson spoke to Trooper Doss. *See Swain v. Elfland*, 145 N.C. App. 383, 387, 550 S.E.2d 530, 534 (2001 (affirming summary judgment when plaintiff "presented nothing more than mere conjecture to support his allegations of retaliation.").

We therefore hold Sloan failed to carry his ultimate burden of showing the Town's legitimate reason for terminating him was pretext for retaliation. *See Fatta*, 221 N.C. App. at 375, 727 S.E.2d at 601.

IV. Conclusion

For the aforementioned reasons, we hold Sloan has shown a *prima facie* case of retaliatory discrimination, but failed to meet his burden to show the Town's proffered legitimate reason for terminating him was pretext for retaliation. We therefore affirm the trial court's grant of summary judgment in favor of the Town.

AFFIRMED.

Chief Judge STROUD and Judge STADING concur.

Report per Rule 30(e).