

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

NORMAN LACEY,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-02-026
- vs -	:	<u>OPINION</u>
	:	9/26/2011
CTL AEROSPACE, INC.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-03-1373

John H. Forg, P.O. Box 72, West Chester, Ohio 45071-0072, for plaintiff-appellant

Frost Brown Todd LLC, Thomas B. Allen, 9277 Centre Point Drive, Suite 300, West Chester, Ohio 45069, for defendant-appellee

POWELL, P.J.

{¶1} A former employee of a corporation alleged in a lawsuit that he was fired in retaliation for filing a workers' compensation claim. The corporation said the employee was dismissed as part of a workforce reduction. In a trial to the bench, the Butler County Common Pleas Court ruled for the corporation. The judgment is affirmed on appeal because the employee failed to show the layoff was in retaliation for filing a workers' compensation claim.

{¶2} Norman Lacey began working for CTL Aerospace, Inc. in 2007. During his tenure, Lacey was given raises and progressively more responsibility on the production line. He suffered a workplace injury in August 2009 and was fired in September 2009. Lacey filed a civil case, alleging CTL violated R.C. 4123.90 by firing him in retaliation for his workers' compensation claim. His case was tried to the bench.

{¶3} Evidence was presented at trial that CTL was losing a major business account and layoff rumors began circulating at the plant. Lacey's supervisor, Richard Hoffman, testified that he and other supervisors were asked to rate their employees for an anticipated reduction in force. He said he gave the rating report to the plant manager on August 1.

{¶4} Lacey testified that he injured his shoulder on the job on August 24, but finished his shift. He sought medical attention the next day, and a workers' compensation claim was filed. Lacey reported for work the same day. At the conclusion of his shift, Lacey said Hoffman took him aside and told him the plant manager was upset about the worker's compensation claim, and he was warned not to get hurt again.

{¶5} Hoffman and the plant manager both claimed they were aware of the injury, but not aware of the workers' compensation claim. Hoffman acknowledged the plant manager was upset about Lacey's injury, but denied the concerns had anything to do with the workers' compensation claim. Hoffman said the comments made to Lacey related to the impact of an injury on Lacey's overtime and concerns about avoiding future injury. Lacey argued the comments they made indicated to him that Hoffman and the plant manager were aware of the workers' compensation claim.

{¶6} Lacey testified that he asked Hoffman about possible layoffs during the same conversation about his injury. Lacey said Hoffman reassured him he would not be laid off and showed him a document on the computer in which Hoffman had given Lacey an employee rating of "5," the highest rating on a lowest to highest rating scale of 1 to 5.

{¶7} Hoffman testified that he actually assigned Lacey a rating of "2" when he turned in the report before Lacey's injury. Hoffman acknowledged he temporarily changed Lacey's rating from a "2" to a "5" to show Lacey the "5" rating so he would not worry about the layoffs and would not "back off of his work performance." Hoffman said he didn't want Lacey to "go behind my back and talk bad about the company. I didn't want him to scare all the employees off."

{¶8} Hoffman explained that Lacey's "2" rating was not based on the amount of work produced because the amount of work he produced was "good." Hoffman indicated Lacey didn't seem to get along with a lot of other employees. Hoffman said he'd been overlooking Lacey's "behavior patterns," but he was beginning to think that Lacey was using him and taking advantage of him.

{¶9} CTL also presented evidence that during his tenure, Lacey was disciplined twice for production mistakes, with one of those mistakes reportedly costing \$7,200 in scrapped parts. Lacey also received a warning about tardiness and absences. Lacey disputed the tardiness warning, arguing that when he was working overtime, he was permitted to come and go when he wanted.

{¶10} CTL witnesses also indicated CTL was investigating allegations that Lacey obtained employee pay information and was improperly sharing it with other workers. Lacey admitted to sharing the information with others, but insisted that another employee obtained the information from the supervisor's desk and told him about it.

{¶11} Lacey maintained that CTL asked him to train another employee on the equipment he operated, but did so only after his injury. CTL responded that the employee was training on the equipment before Lacey was injured and for the purpose of reducing the necessity for overtime. This individual reportedly took over Lacey's work when Lacey was fired.

{¶12} Hoffman testified that he didn't intend for Lacey to be part of the reduction in force. "But again," Hoffman said, "when you're looking at all your employees, and you have a few that have attendance problems, you have some that have performance problems, you have some that cause you trouble in other ways, that's how you make the assessment."

{¶13} At the conclusion of the trial, the trial court stated from the bench that it did not find "all the testimony of the defendants [CTL] in this particular case particularly credible." However, the trial court ruled that Lacey had not sustained his burden of proof that the termination was due to filing a worker's compensation claim. "And that," the trial court said, "really has to do with the relatively minor nature of the case—of the claim itself more so than perhaps any other factor." The trial court said it could not believe that in this case CTL would subject itself to the legal ramifications involved if it was proven that it retaliated when the claim involved no lost time and no direct results to their insurance rates. The trial court's entry was a one-paragraph judgment finding for CTL.

{¶14} Lacey filed this appeal, raising a single assignment of error as follows:

{¶15} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN HOLDING THAT CTL AEROSPACE, INC. WAS ENTITLED TO AN INFERENCE THAT IT ACTED PROPERLY BASED SOLELY ON THE 'RELATIVELY MINOR' NATURE OF LACEY'S WORKERS' COMPENSATION CLAIM."

{¶16} Lacey argues the trial court, by its comments from the bench, indicated he had to overcome an inference that a minor worker's compensation claim would not be the basis of employer retaliation, and the trial court's inference created an equal protection issue when a "trivial" worker's compensation claim was treated differently than a more substantial claim. Finally, Lacey argues that since the trial court questioned the credibility of CTL witnesses, the remaining evidence established that CTL retaliated against him for filing the workers' compensation claim.

{¶17} R.C. 4123.90 says, in pertinent part, that no employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a workers' compensation claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

{¶18} The scope of the statute is narrow, and R.C. 4123.90 does not prevent an employer from taking an adverse employment action against an employee who is unable to perform his or her duties or for just and lawful reasons; the statute protects only against adverse employment actions in direct response to the filing or pursuit of a workers' compensation claim. *Ferguson v. SanMar Corp.*, Butler App. No. CA2008-11-283, 2009-Ohio-4132, ¶12; *Sidenstricker v. Miller Pavement Maintenance, Inc.*, Franklin App. Nos. 00AP-1146, 00AP-1460, 2001-Ohio-4111, ¶55.

{¶19} To establish a prima facie case of retaliation the employee must show: (1) he engaged in a protected activity, (2) he was the subject of an adverse employment action, and (3) a causal link existed between the protected activity and the adverse employment action. *Ferguson* at ¶17; *Sidenstricker* at ¶58; see, also, *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶13.

{¶20} To establish a causal link, the employee must produce evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse employment action. *Ferguson* at ¶19. Evidence that may be offered in support of an inference of retaliatory motive may include a showing that the exercise of the protected conduct was closely followed by the adverse employment action, although timing alone is insufficient to show a causal link. *Dover v. Carmeuse Natural Chemicals*, Perry App. No. 10-CA-8, 2010-Ohio-5657, ¶47, fn. 1; see *Pflanz v. Cincinnati*, 149 Ohio App.3d 743, 2002-Ohio-5492, ¶68.

{¶21} Other evidence may include, but is not limited to: punitive actions taken, such as bad performance reports, changes in salary level, hostile attitudes, evidence that the employer treated the employee differently from other employees, a request that the employee not file a workers' compensation claim, and evidence that the employee was on the work schedule past the date of termination. *Ferguson* at ¶19.

{¶22} If the plaintiff establishes his prima facie case, then the burden of production shifts to the employer to articulate a legitimate, nonretaliatory reason for its action; if the employer succeeds in doing so, the burden shifts back to the employee to show that the employer's proffered reason is a mere pretext. *Sidenstricker*, 2001-Ohio-4111 at ¶59; *Ferguson* at ¶21.

{¶23} Pretext may be shown when the employee shows the employer's proffered reason had no basis in fact, did not actually motivate the adverse employment action, or was insufficient to motivate the adverse employment action. *Wysong v. Jo-Ann Stores, Inc.*, Montgomery App. No. 21412, 2006-Ohio-4644, ¶13.

{¶24} As we previously noted, the trial court issued a one paragraph entry finding for CTL. Neither party asked the trial court for findings of fact and conclusions of law. We must consider this assignment of error within those constraints. See Civ.R. 52; *O'Brien v. O'Brien*, Butler App. No. CA2009-11-289, 2010-Ohio-3258, ¶9.

{¶25} Lacey focuses his assigned error on the trial court's statements from the bench, arguing that the trial court essentially created an inference that CTL acted legally because it was not credible that it would act improperly when his workers' compensation claim was relatively minor.

{¶26} Without benefit of findings and conclusions, we find that Lacey unduly accentuates the comments from the trial court. We have reviewed the record and do not agree with Lacey's assertions that the trial court imposed any sort of inference related to a

"minor" workers' compensation claim.

{¶27} Lacey also argues that this "inference" violated his right to equal protection under the law. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. As a general rule, a person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual. *Hill v. Croft*, Franklin App. No. 05AP-424, 2005-Ohio-6885, ¶16; see *In re Kister*, Athens App. No. 10CA19, 2011-Ohio-2678, ¶72.

{¶28} As we previously noted, we do not agree the trial court was creating an inference that an employee with a minor workers' compensation claim had a greater burden to prove employer retaliation. Lacey fails to sustain his assertion that he was denied the equal protection of the laws by the trial court, and has not presented a cognizable equal protection claim.

{¶29} We are mindful that the trial court indicated it did not consider all the testimony of the CTL witnesses "particularly credible," but we do not know which witness or which specific testimony the trial court may have discounted, without the findings of fact and conclusions of law. Lacey did not appear to refute that the loss of the business account had a significant impact on CTL, which necessitated two reductions in force—one in late August and the other in late September. Evidence indicated that 13 employees were affected by the "RIFs," and the layoffs would apply "throughout the shop."

{¶30} CTL presented evidence that employees who did not file workers' compensation claims were laid off and some retained employees had previously filed claims. In addition, CTL supervisors indicated there were workplace issues concerning Lacey that were unrelated to his worker's compensation claim. Lacey provided his explanation or

perspective for those workplace concerns, but did not appear to refute that issues existed.

{¶31} We have reviewed all of the arguments set forth by Lacey in this appeal. The record shows that Lacey was not required to overcome any sort of inference with regard to the "minor" nature of his claim. Lacey did not sustain his burden to show that CTL's proffered reason for the firing was a mere pretext, and he did not establish that CTL retaliated against him for filing the workers' compensation claim. Lacey's single assignment of error is overruled.

{¶32} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.