Opinion issued July 28, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00716-CV

KENNETH MONTGOMERY, Appellant

V.

VALERUS COMPRESSION SERVICES, LP, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Case No. 51020

MEMORANDUM OPINION

Kenneth Montgomery sued his employer Valerus Compression Services, L.P., alleging wrongful termination in retaliation for his filing of a workers' compensation claim. The trial court granted Valerus's traditional and no-evidence

motion for summary judgment. Montgomery contends that the trial court erred in granting summary judgment because he presented sufficient evidence on all the elements of retaliation to satisfy a prima facie case, a fact issue exists on the causation element, and his damage claims are not barred as a matter of law.

We affirm.

Background

On March 29, 2007, Montgomery injured his neck and shoulder on his left side after a fall in the course of his employment as an assembler in a Valerus manufacturing facility. Valerus documented the accident and its carrier paid Montgomery worker's compensation benefits for his injury.

Montgomery saw a doctor three days after the accident who released him to return to work that day with restrictions that he not lift, push, pull, reach, climb stairs or ladders. The physician ordered him to keep his shoulder elevated and apply regular cool compresses. Montgomery saw a second doctor the following day who released him to work with the additional restrictions that he avoid grasping and wrist extension. These restrictions conflicted with the job description for an assembler which included that the employee must be able to lift 50 pounds periodically and lift 25-35 pounds regularly. Occasionally, an employee must also be able to bend, squat, climb, twist and reach.

Montgomery sporadically returned to work on light duty between April 4, 2007 and April 19, 2007. In his affidavit, Montgomery testified that his light duty included wiring skids and tightening bolts one-handed. When Montgomery complained to his supervisor that the work hurt his shoulder, his supervisor cursed at him and told him to go home because "We can't use you if you can't do what I want." Montgomery states that Valerus frequently sent him home early after he complained.

On April 19, 2007, Montgomery's doctor issued a report stating that the injury prevented Montgomery from returning to work. The report did not specify restrictions or a projected date to return. An August 2007 medical evaluation by the insurance carrier's physician found that Montgomery had reached his maximum level of medical improvement with a 10% whole person impairment rating. The physician's report stated that Montgomery could not perform his previous heavy labor job, but that he had full use of his right arm and could be retrained for a clerical or otherwise less physical job.

Montgomery never returned to work after April 19, 2007. In addition to his workers' compensation benefits, he received long-term disability benefits through his insurance coverage with Valerus and applied for social security disability benefits.

Jim Nicholson, the newly appointed vice president of human resources for Valerus, began reviewing the status of employees on extended leave in April 2008. Nicholson testified in his affidavit that his review took several months and included eight injured employees, four with workers' compensation claims and four without workers' compensation claims. According to his affidavit, Valerus placed Montgomery on medical leave after his physician reported on April 19 that he was physically unable to work. Nicholson made the decision to terminate all eight employees as a result of his review and fired Montgomery on April 15, 2008, almost a year after his doctor reported that his injury prevented him from working. The termination report listed the termination as "for cause," and stated that Montgomery was "on leave of absence and unable to return back to work." In his affidavit, Montgomery testified that Valerus never notified him of his termination or of the opportunity to reapply with the company. He testified that a human resources employee told him that she forgot to mail the paperwork.

Montgomery sued Valerus for retaliation alleging that Valerus discriminated against him and fired him as a result of his workers' compensation claim. Valerus filed a traditional and no-evidence motion for summary judgment and asserted that Montgomery could not show a causal link between his workers' compensation claim and his termination, prove that Valerus's non-discriminatory reason for his termination was false, or demonstrate Valerus's retaliatory motive. It also argued

that even if Montgomery could satisfy these requirements for a retaliation claim, he could not recover lost wages for the time he has been unable to work or punitive damages without evidence of malice on Valerus's part.

As summary judgment evidence, Valerus relied on a job description for an assembler, the August 2007 evaluation stating he had a permanent impairment rating at 10%, and several reports from Montgomery's doctors detailing his injury and restrictions. Nicholson testified in his affidavit that he made his decision to terminate Montgomery based on the doctors' reports, Valerus's leave of absence policy, and Montgomery's extended absence from work for more than three months. He concluded that the medical records indicated that Montgomery was unlikely to return to work in the foreseeable future. Nicholson testified that Montgomery was not fired because of his workers' compensation claim.

Valerus provided two versions of the employee handbook as summary judgment evidence. Both state Valerus's policy to evaluate extended leave at any time or at least every six months.[1] The handbooks state that Valerus provides qualifying employees with 12 weeks of leave. After 12 weeks, the employee may be terminated.

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[1] Valerus hired Montgomery in January 26, 2006, at which time he signed an acknowledgment that he read the employee handbook and understood that he was an at-will employee. The record contains two different versions of the handbook. One copy is dated April 10, 2006. The second version is undated, but Nicholson attached the version to show he followed Valerus's leave of absence policy in firing Montgomery in 2008.

Montgomery responded to Valerus's summary judgment motion and asserted that he satisfied the requirements to show a prima facie case of workers' compensation retaliation and that he raised a fact issue that Valerus's stated reason for the termination was pretextual. As summary judgment evidence, Montgomery relied on his deposition and affidavit testimony in which he stated he could have continued to perform assembly work with the accommodation of a helper because he rarely had to lift heavy objects. He also testified to verbal harassment by his supervisors.

The trial court granted Valerus's motion for summary judgment. Montgomery timely filed this appeal.

Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The motion must state the specific grounds relied upon for summary judgment. *See* TEX. R. CIV. P. 166a(c), (i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). When reviewing a summary judgment motion, we must (1) take as true all evidence favorable to the nonmovant, and (2) indulge every

reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request under the traditional summary judgment standard. *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004). When a party has filed both a traditional and no-evidence summary judgment motion and the order does not specify which motion was granted, we typically first review the propriety of the summary judgment under the no-evidence standard. *See* TEX. R. CIV. P. 166a(i); *see Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the no-evidence summary judgment was properly granted, we need not reach arguments under the traditional motion for summary judgment. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 600 (Tex. 2006).

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each

of the elements specified in the motion. *Mack Trucks*, 206 S.W.3d at 582; *Hahn*, 321 S.W.3d at 524.

In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Workers' Compensation Retaliation

In his sole issue on appeal, Montgomery contends the trial court erred in granting Valerus's traditional and no-evidence summary judgment motion. He asserts that summary judgment was improper because he presented sufficient evidence on all the elements of retaliation to satisfy his prima facie case, a fact issue exists on causation despite Valerus's non-discriminatory reason for its actions, and Valerus did not negate his damage claims as a matter of law.

A. Retaliation & Burden Shifting

Labor Code section 451.001 states that an employer may not discharge, or in any other manner discriminate, against an employee because that employee has

filed a workers' compensation claim in good faith. *See* TEX. LAB. CODE ANN. § 451.001 (West 2010); *Terry v. S. Floral Co.*, 927 S.W.2d 254, 256–57 (Tex. App.—Houston [1st Dist.] 1996, no writ). The purpose of the statute is to protect a person entitled to workers' compensation benefits from retaliation for exercising their statutory rights. *See Terry*, 927 S.W.2d at 256. An employee who shows a violation of section 451.001 may recover "reasonable damages incurred by the employee as a result of the violation." TEX. LAB. CODE ANN. § 451.002 (West 2010).

"An employee asserting a violation of section 451.001 has the initial burden of demonstrating a causal link between the discharge and the filing of the claim for workers' compensation benefits." *Terry*, 927 S.W.2d at 257. The employee does not need to show that the workers' compensation claim was the sole reason for the employer's conduct, only that but for the filing of the claim, "the employer's action would not have occurred when it did had the report not been made." *Cont'l Coffee Prod. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996) (applying standard of proof for causation in whistleblower actions to anti-retaliation claims under workers' compensation); *Turner v. Precision Surgical, L.L.C.*, 274 S.W.3d 245, 252 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Terry*, 927 S.W.2d at 257. An employee may prove the causal link by direct or circumstantial evidence. *Jenkins*

v. Guardian Indus. Corp., 16 S.W.3d 431, 441 (Tex. App.—Waco 2000, pet. denied). Circumstantial evidence of the causal link includes:

> (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude towards the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the discharge was false.

Cont'l Coffee Prod., 937 S.W.2d at 451; *Benners v. Blanks Color Imaging, Inc.*, 133 S.W.3d 364, 369 (Tex. App.—Dallas 2004, no pet.).

Once the employee establishes the causal link, the burden shifts to the employer to rebut the alleged discrimination by showing a legitimate, non-discriminatory reason for its actions. *Terry*, 927 S.W.2d at 257. If the employer demonstrates a legitimate, non-discriminatory reason, then the burden shifts back to the employee "to produce controverting evidence of a retaliatory motive." *Id.* (citing *Tex. Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994)). Summary judgment is proper if the employee fails to produce controverting evidence. *Id.* (affirming summary judgment for employer because employee failed to produce evidence of retaliatory motive to rebut employer's neutral reason for firing her); *Benners*, 133 S.W.3d at 369, 372 (holding summary judgment proper because employee failed to raise a fact issue on retaliatory motive); *Castor v. Laredo Cmty. Coll.*, 963 S.W.2d 783, 785–86 (Tex. App.—San Antonio 1998, no

pet.) (holding employee failed to raise fact issue on retaliatory motive despite indulging all inferences in his favor).

B. Uniform Absentee Policy

Montgomery maintains that he raised a fact issue on causation sufficient to show a causal link and to negate Valerus's alleged non-discriminatory reason for his termination. "If an employee's termination is required by the uniform enforcement of a reasonable absentee policy, then it cannot be the case that termination would not have occurred when it did but for the employee's assertion of a compensation claim . . . ." *Cont'l Coffee Prod.*, 937 S.W.2d at 451. In other words, summary judgment is proper if the employee's absence exceeded the employer's leave of absence policy and the employer enforced the policy uniformly. *See id.*; *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 132 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding summary judgment proper because employee did not controvert employer's summary judgment evidence by showing employer applied absence policy differently to similarly situated employees); *Hardy v. AAA Cooper Transp., Inc.*, No. 01-02-00872-CV, 2003 WL 22451367, at *3 (Tex. App.—Houston [1st Dist.] Sept. 11, 2003, no pet.) (same); *Page v. Fort Bend Indep. Sch. Dist.*, No. 01-02-00675-CV, 2002 WL 31771439, at *2–3 (Tex. App.—Houston [1st Dist.] Dec. 12, 2002, no pet.) (holding summary judgment proper because there was no evidence that absence

policy was not uniformly applied despite employees allegations that employer expressed negative attitude towards her impairment by refusing to honor light-duty restrictions and rudeness of fellow employees).

Montgomery had the burden to show that Valerus would not have terminated him but for his filing a workers' compensation claim. *See Cont'l Coffee Prod.*, 937 S.W.2d at 450; *Terry*, 927 S.W.2d at 257. The absence policy in Valerus's employee handbook provides, "If, for any reason, a leave of absence continues beyond a three (3) month period, the individual's employment status may be terminated unless such termination would be a violation of any applicable federal, state or local law."[2] Montgomery failed to demonstrate that Valerus did not uniformly apply its leave of absence policy. He did not identify a single Valerus employee on extended leave of absence who had not filed a worker's compensation claim but had been retained by Valerus. Montgomery relies on his affidavit testimony that a "similarly situated employee would be an uninjured Assembler. A similarly situated employee would not be given work that was inconsistent with his physical limitations or that would slow or hamper his

[2] The quoted language is from Valerus's 2006 version of the handbook but is substantially the same as the later version. Additional language appears in the later, undated version relied on by Nicholson in his affidavit including "Employees for whom the Company has information that they are not likely to return to work in the future may be terminated unless prohibited under applicable federal, state or local law." The differences between the versions of the handbook are immaterial to our analysis.

recovery." Montgomery also relies on his deposition testimony in which he identified two employees, one unnamed and one referred to only as "Mike," as on a leave of absence for non-work related injuries. But the record does not indicate what happened to these employees, if they were terminated, how long they had been on leave without termination, or how Valerus treated Montgomery differently. Montgomery's references in his affidavit and deposition do not identify similarly situated employees to demonstrate that Valerus did not uniformly apply its absence policy. *See Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386, 388–89 (Tex. 2005) (holding employee's controverting evidence no more than a scintilla because similarly situated employee too different from plaintiff employee because terminated two years after plaintiff, never received salary while on leave like plaintiff did, and never returned to work); *Benners*, 133 S.W.3d at 372 (stating employee failed to controvert employers non-discriminatory reason because failed to produce evidence that other employees were treated differently in job assignments and overtime); *Larsen*, 296 S.W.3d at 132 (holding summary judgment proper where employee presented no evidence of similarly situated employees treated differently from plaintiff).

Further, the record supports Valerus's contention that it uniformly applied its absence policy. Nicholson testified in his affidavit that his review resulted in the firing of eight employees on leave, but that four of those employees had filed

workers' compensation claims and four had not. He then went on to list 12 employees who had filed workers' compensation claims and then returned to work. Montgomery does not refute this evidence nor does he identify any other employees to demonstrate Valerus's alleged unequal treatment of them under its policy. Based on this record, Montgomery did not raise a fact issue on whether Valerus applied its absence policy in a discriminatory manner. *See Hardy*, 2003 WL 22451367, at *3 (holding employee did not controvert employer's non-discriminatory reason because no evidence of any other employees absent for more than a year and not terminated). *Cf. Cont'l Coffee Prod.*, 937 S.W.2d at 451–52 (holding employer did not uniformly apply absence policy stating that employer may fire employee if she has not reported to work in three days because employee presented some evidence that she reported to employer within three days of termination).

Montgomery contends that he raised a fact issue that the employment policy was not the sole reason for his termination. He relies on evidence of Valerus's alleged failure to follow its policies, its treatment of other injured workers, the use of inappropriate jobs to force him to leave work, and a negative attitude and discriminatory conduct towards him before he was fired. Montgomery asserts that Valerus did not uniformly apply its leave of absence policy because it failed to notify him of the need to return to work, of his termination, or that he could

reapply after his termination.[3] Further, Valerus did not request periodic reports on his condition. Valerus does not refute that it informed Montgomery of his termination for the first time when he contacted human resources to ask why his benefits had been terminated. Nothing in the record, however, indicates that Valerus's policy created a duty to inform Montgomery of the need to return to work or of the opportunity to reapply after termination beyond the notice supplied in the handbook. Moreover, Montgomery did not explain how a post-termination failure to advise him of his termination evidences an intent to discriminate in the termination itself. Valerus's policy did not recognize any further obligation to request reports on Montgomery's condition nor did Montgomery present evidence demonstrating his condition had improved. Nicholson in his affidavit testified that his termination decision was based on statements by Montgomery's doctor refusing to return him to work and by his 10% permanent impairment.

Montgomery's allegations of negative attitude and discrimination in his work assignments by his employer before his termination are not alone sufficient to raise a fact issue on the motive of Nicholson's termination decision. The

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[3] Montgomery also asserts that Valerus failed to follow policy because Nicholson fired him outside of the chain of supervision. Montgomery does not identify any policy by Valerus that would prevent the vice president of human resources from terminating employees on extended leave. Conversely, Montgomery contends in his reply brief that Nicholson acted as the "cat's paw," or merely as a conduit for the discriminatory motives of other Valerus employees. Montgomery, however, supplied no evidence to demonstrate Nicholson acted as an instrument of another's discriminatory intent.

employee in *Page v. Fort Bend Independent School District* alleged that her employer "'expressed a negative attitude' towards her impaired condition," did not honor her doctor's light-duty restrictions, refused to accept faxes regarding her medical condition, and that her employer's representatives were "rude" and "intolerant" towards her. *Page*, 2002 WL 31771439, at *2. This court stated that her "contentions are based solely on her subjective beliefs and do not raise an issue of material fact as to whether her termination was retaliatory discharge." *Id.* (citing *Cont'l Coffee Prod.*, 937 S.W.2d at 452). Therefore, summary judgment was proper because the employee presented no evidence that her employer failed to uniformly apply the absence policy. *Id.* at 3.

Montgomery raises almost identical contentions that Valerus's employees were hostile towards his disability and that Valerus refused to comply with his light-duty restrictions. As in *Page*, Montgomery's subjective beliefs that his employer was hostile and had a negative attitude are not sufficient to raise a fact issue on Valerus's application of its absence policy. *See Cont'l Coffee Prod.*, 937 S.W.2d at 452; *Page*, 2002 WL 31771439, at *3. Further, the specific comments here were directed at Montgomery's inability to perform the work assigned, not his workers' compensation claim. Montgomery's allegation of discrimination with regard to his work assignments similarly fails without evidence of Valerus's

different treatment of similarly situated employees. *See Hardy*, 2003 WL 22451367, at *3.

We hold Montgomery did not raise a fact issue on whether Valerus failed to uniformly apply its absence policy. Therefore, the trial court properly granted summary judgment on his retaliation claim. Because we find summary judgment to be proper on one ground raised by Valerus in its summary judgment motion, we need not address Montgomery's remaining arguments regarding damages. *See Beverick*, 186 S.W.3d at 148.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.