In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00298-CV

KYLE TAWIL, Appellant

V.

COOK CHILDREN'S HEALTHCARE SYSTEM, Appellee

On Appeal from the 236th District Court
Tarrant County, Texas
Trial Court No. 236-291175-17

Before Kerr, Birdwell, and Bassel, JJ.
Opinion by Justice Bassel

OPINION

I. Introduction

After Appellant Kyle Tawil's employment as a rehabilitation technician with Appellee Cook Children's Healthcare System ended, Tawil sued, claiming that Cook Children's terminated his employment in retaliation for filing a workers' compensation claim. Cook Children's responded with a combined traditional and no-evidence motion for summary judgment. The trial court granted the motion. Tawil appealed.

Cook Children's presented a legitimate reason why it terminated Tawil's employment—he repeatedly violated a hospital policy that required him to notify his supervisor if he would not be reporting to work. The summary-judgment record does not raise a fact issue to support Tawil's claim that Cook Children's claimed reason to terminate his employment was a pretext and that it fired him in retaliation for having filed a workers' compensation claim. We affirm.

II. Procedural and Factual Background

A. Tawil's suit, Cook Children's summary-judgment grounds, the trial court's ruling, and Tawil's issues on appeal

Tawil sued Cook Children's raising the single claim that he was discharged because he filed a workers' compensation claim due to an on-the-job injury. He pleaded that Cook Children's actions violated section 451.001 of the Texas Labor Code.

Cook Children's answered and later filed a combined no-evidence and traditional motion for summary judgment. The motion's no-evidence grounds turned on whether Cook Children's claimed reason for separating Tawil from his employment was pretextual:

- "Defendant is entitled to no-evidence summary judgment because there is no evidence in the record to establish Tawil's [prima facie] case of worker[s'] compensation retaliation because there is no evidence of any of the . . . factors [that establish his employer's stated reason for termination was pretextual]."
- "Further, there is no evidence that Defendant's legitimate, non-retaliatory reasons for termination are pretextual."

Cook Children's based its traditional summary judgment on similar grounds, asserting that it had a legitimate reason to separate Tawil's employment:

> Defendant is also entitled to traditional summary judgment because the facts in the record establish that there is no causal link between Tawil's worker[s'] compensation claim and his termination because the facts negate the . . . factors [reviewed to determine whether the employer's stated reason for termination was a pretext] and because [Cook Children's] terminated Plaintiff for legitimate, non-retaliatory reasons, which were not pretext[,] and [that] no genuine issue of material fact exists with respect to the reasons for [Cook Children's] decision.

The trial court granted Cook Children's motion "in all respects" and dismissed all of Tawil's claims with prejudice.

Tawil challenges the trial court's granting of summary judgment in three issues, contending that (1) he was not terminated "pursuant to a well-established, uniformly applied termination policy," (2) circumstantial evidence establishes the existence of factors showing his termination was a pretext, and (3) the policy that Cook Children's relied on to terminate him "was not in effect during a pending workers' compensation case."

B. Tawil's employment, injury, medical treatment, and relationship with his supervisors

In August 2016, Tawil began his employment with Cook Children's as a rehabilitation technician at Cook Children's Rehab-South Forth Worth Clinic. The controversy at issue began with an injury he suffered in mid-November of that year and ended when he was separated from employment a few weeks later on December 6.

Tawil injured himself moving several heavy items at the clinic. His shoulder was sore for several days afterwards. On November 11, he felt a pop in his shoulder that caused him severe pain.

After experiencing the pop, Tawil's supervisor instructed him to contact the occupational health department of Cook Children's and to fill out an employee report of his injury. He made contact with occupational health, filled out the required form, and was instructed to see a doctor, which he did. After examining Tawil, the physician prepared a work-status report and placed him on work restrictions that

limited his physical activities but that allowed him to return to work. The report did not impose any medication restrictions. Tawil received a prescription for a limited amount of narcotic pain medication, which was apparently refilled once.

The physician examined Tawil again three days after the initial examination. The physician prepared another work-status report that allowed him to return to work with restrictions on his activities. After the second examination, the physician did not believe that Tawil required narcotic pain medication while working. Another work-status report prepared by the physician approximately two weeks later, a few days before Tawil's separation from employment, placed restrictions on Tawil's work activities but again cleared him to return to work and expressed the physician's belief that Tawil did not need to take narcotic pain medication at work.

A few days after the initial examination of Tawil's injury, Cook Children's made a "bona fide offer of employment" to Tawil, which offered a temporary modified-duty position to accommodate the restrictions established by his physician. His supervisor stated that she planned to accommodate the restrictions by assigning Tawil limited work activities. After the last documented visit to his physician, Cook Children's made another bona fide offer of employment to Tawil that accommodated the restrictions contained in the later work-status report. Tawil rejected both offers.

Tawil testified that he continued to take the prescribed narcotic pain medication with the exception of the one day that he returned to work approximately a week after his injury. That day, Tawil left work early because he was in pain. Tawil

stated that he did not want to drive and was unable to work while taking the medication. Taking the medication was one of the reasons why Tawil stated he could not work under the restrictions established by his physician.

The written policies of Cook Children's state that an employee may not report

> to work or perform[] other job duties while under the influence of other drugs, including prescription or over-the-counter drugs, when there is any possibility that such use may adversely affect the employee's ability to safely perform his/her job, or may adversely affect his/her safety or that of patients or other employees.

And Tawil's supervisor also testified that he would not be allowed to work in her department while under the influence of narcotic pain medication.

Tawil described what he viewed as the negative attitude of his supervisors toward him because of his claim that he could not work without taking narcotic pain medications. In his deposition, he described the attitude of his main supervisor as being "snappy and stern" during the partial day that he worked after his injury. In addition, she ignored him and was "rude and ugly" in an unspecified way in text messages. He also responded to a question asking who else acted unprofessionally or inappropriately by saying that the clinic lead who oversaw rehabilitation technicians acted in that fashion on the day that he worked. But he did not give any details describing how her behavior was unprofessional or inappropriate.

Tawil also characterized the attitude of a person with whom he dealt in the occupational health department as aggressive and rude. In Tawil's view, this person wanted him to sign the initial bona fide offer of employment that accommodated the

restrictions placed on his job duties by his physician. His complaint focused on her alleged attitude about his refusal to accept the offer of employment and the pain medication that he was prescribed. He stated, "[S]he said that they have a no-narcotics policy and [that] she would not take no for an answer and said that I had to come back or I would be fired." In an affidavit that Tawil filed in support of his response to Cook Children's motion for summary judgment, he stated that the occupational health department representative "kept threatening me that she didn't want me to lose my job and she didn't want me to get fired for simply being out on workers' compensation." The affidavit also described a phone call during which his supervisor and the occupational health department representative were "very stern" in telling him that he was not protected by FMLA and that he was going to lose his job if he did not come back to work.

C. Communications between Cook Children's and Tawil about his employment, Cook Children's employment policies, Tawil's separation from employment, and Cook Children's enforcement of its attendance policies

From the beginning of his employment, Tawil understood that if he was going to be absent from work, he was required to notify his supervisor. Further, Tawil acknowledged that when he began working for Cook Children's, he signed an acknowledgement that he would fully abide by Cook Children's handbook of policies and procedures. The summary-judgment record contains a new-hire acknowledgement electronically signed by Tawil.

Cook Children's maintains an attendance policy with two provisions relevant to this controversy. First is a policy that provides as follows, "No Call – When an employee fails to come in for a scheduled shift and fails to notify [his] supervisor by the start of [his] shift, [he] will be considered a no call for the shift. This will count as three occurrences." Second is a policy that provides, "Job Abandonment – Failure to report to work for two consecutive days without personally notifying supervisor." We will refer to both policies collectively herein as the "No Call-No Show Policy."

Tawil's supervisor testified that a few days after his injury, she reminded Tawil that he still needed to follow Cook Children's attendance policy:

> I sent Tawil a text message on November 17, reminding him that he was still required to follow [Cook Children's] attendance policy[,] which included calling in each day prior to the start of the shift to advise whether he would be reporting to work or not. . . . I also verbally counseled him on multiple occasions of the need to follow the attendance policy by calling in prior to the start of his shift if he would be absent.

The text message referred to in the quoted paragraph stated, "Kyle, you still need to follow the PTO / Attendance policy, and notify us of any schedule changes an hour prior to your expected shift[.]" Tawil acknowledged that the supervisor "told [him] on November 17th [that he] needed to follow the attendance policy."

At some point after the injury, Tawil's supervisor spoke with Tawil by phone and reminded him of the need to follow Cook Children's attendance policy.

A few days after sending Tawil the text message on November 17, his supervisor sent Tawil a letter dated November 23, which reiterated the need for him

to comply with the No Call-No Show Policy and how he had failed to comply in the days after his supervisor's November 17 reminder:

> In accordance [with] the attendance policy of Cook Children's Medical Center, each employee is required to notify [his] supervisor if [he is] unable to report to work as scheduled. As of this date, I have not received any notification from you since our last conversation on 11/17/16. Since that time, you were scheduled to work and failed to call or show up on the following dates:
>
> Friday 11/18/16
> Monday 11/21/16
> Tuesday 11/22/16
> Wednesday 11/23/16
>
> The attendance policy states the following: Job Abandonment – Failure to report to work for two consecutive days without personally notifying supervisor will result in administrative review.
>
> Upon receipt of this notice, you have 5 days to notify me of your intent to return to work. If you fail to reply, your silence and failure to comply with the attendance policy will be accepted as your intent to resign your position[,] and your termination will be processed.
>
> Please contact me at my work number. Please note that my work number has changed. The new number is: . . . .

Tawil did not challenge the letter's claim that he had failed to call his supervisor on the listed dates. Also, he did not work on November 24, 25, or 28, and he did not call and could not recall texting his supervisor before the scheduled start of his shift on those dates.

Tawil followed the same pattern after his physician examined him on November 29 and again cleared him to return to work with limited activity and no medication restrictions. Tawil stated that he could not recall and did not have records

showing that he made any call to Cook Children's for the period between November 29 and December 6. The testimony of Cook Children's Employee Relations Director confirmed that "Tawil had not had any contact or communication with [Cook Children's] between November 29 to December 6 and was not following the call[-]in procedures by notifying his supervisor each day prior to the start of the scheduled shift that he would not be reporting to work."

On December 6, Cook Children's wrote Tawil notifying him that it considered his actions to be a voluntary resignation of his employment:

> You have not reported to work since November 15, 2016, nor have you provided medical documentation excusing you from work. You are required to report each day that you are going to be absent to your Supervisor. In accordance with the attendance policy[,] two days of no call and no show to work is considered job abandonment. As a result[,] we have accepted your continued silence as such and will accept this as your voluntary resignation of employment.

The decision to separate Tawil's employment was not made by his supervisor but by Cook Children's Employee Relations Director. The Employee Relations Director acknowledged that she had spoken to the supervisor. But Tawil's supervisor testified that the decision to separate Tawil's employment was "HR's" and that her involvement was only to report his attendance and call-in history. In Tawil's supervisor's words, "It was not my decision. I did not ask somebody to do that, no."

Because he had filed a workers' compensation claim, Tawil disputed that the No Call-No Show Policy applied to him. During his deposition, he could not recall "what policy says that when you are under a doctor's orders you don't have to follow

the generalized call-in procedures." He also claimed that he was initially told by the representative in occupational health that because his physician "had [him] off of work, . . . all I was required to do was keep in touch with occupational health." That conversation predated the various communications that he received from his supervisor reminding him of the need to comply with the attendance policy.

Cook Children's Employee Relations Director also stated that the attendance policy applied to all employees, "regardless [of] the reason for the absence." Tawil's response to the motion for summary judgment countered this assertion with testimony from Cook Children's employees in which they could not cite a policy provision that specifically stated the No Call-No Show Policy applied to an employee who had filed a workers' compensation claim.

Tawil also contended that Cook Children's policies demonstrated that the No Call-No Show Policy did not apply to him after he filed his workers' compensation claim. The policy that he relied on states:

> ATTENDANCE
>
> If an employee requires time off because of a current, on-going, verified work-related injury or illness, the period will not be considered an occasion of absence. Once a workers' compensation claim is closed, CCHCS policy HR 110 - Attendance will be applicable.

Tawil's summary-judgment response cited a provision in the attendance policy containing the No Call-No Show Policy that provides:

> Each department will establish guidelines for its employees to notify the department when they are unable to report to work as scheduled and

> how they are to schedule time off. Employees are expected to hold to those guidelines to allow for alternate staffing.
>
> This does not include lost time due to on-the-job injuries, bereavement leave, or emergency hospitalization. Illness or injuries [that] are classified as Family and Medical Leave (FMLA) time will not be considered an unscheduled absence (refer to CCHCS policy HR 140 – Family and Medical Leave for required medical documentation).

In his deposition, Tawil stated that he did not stop communicating with his supervisor because the No Call-No Show Policy did not apply to him but instead because of the attitude of his supervisors:

> Q. Why did you stop calling and texting [your supervisor] each morning as you had done several times during your absence?
>
> A. Because that is when they started threatening me, telling me that I had to come to work or they were going to fire me, and going against doctor's orders.

Tawil also asserted that Cook Children's had failed to follow its policies because he did not receive any warnings or any type of discipline short of termination. In his words, "[N]obody notified me of anything." He amplified this claim in his summary-judgment response, where he noted that the No Call-No Show Policy does not mandate termination and that other Cook Children's policies provided for a graduated response to policy infractions.

Cook Children's responded to the contention that Tawil's termination was premature by noting that the No Call-No Show Policy provided that the failure to call in constitutes job abandonment; that its December 6 letter notified Tawil that his actions were construed as job abandonment; and that "when an employee has failed

to respond to warning letters and is not in contact with [Cook Children's] at all, no administrative review is performed because there is no opportunity to schedule and coordinate the review with the employee." Cook Children's explanation for the lack of an administrative review continued, "Due to the fact that Tawil was not in contact with [Cook Children's], he was not entitled to go through an Administrative Review of his separation[,] and Tawil never requested to have an administrative review or otherwise appeal that decision." Tawil did not contend that he had communicated with Cook Children's after the December 6 letter; he was not able to recall any communication that he had with Cook Children's after November 28, other than his receipt of the letter that separated his employment.

Further, Cook Children's attendance policy notified employees that discipline could begin at any step. Specifically, it stated, "Although many behaviors may be dealt with in a progressive manner, the disciplinary process can begin at any step, including termination."

Tawil alleged that no other employee of Cook Children's with an open workers' compensation claim had been terminated for violation of the No Call-No Show Policy. But Cook Children's Employee Relations Director testified that employees without workers' compensation claims were terminated for the failure to follow the attendance policy and that those employees did not receive an administrative review before Cook Children's accepted their resignation:

> I also have knowledge of [Cook Children's] uniform application of its Attendance Policies. During Tawil's employment, 10 employees other than Tawil . . . were terminated by [Cook Children's] due to job abandonment because they failed to follow [Cook Children's] call[-]in procedures under the Attendance Policies. None of those employees were injured on the job or made worker[s'] compensation claims. These employees also did not go through the administrative review process prior to [Cook Children's] acceptance of their resignation because they were not in contact with [Cook Children's]. Accordingly, Tawil was treated the same as other employees who were not injured and did not make worker[s'] compensation claims.

Tawil could not identify another employee who had failed to follow the attendance policy for more than a week of consecutive days and who had kept his job.

III. Standard of Review

We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

Usually, when a party moves for summary judgment under both rules 166a(c) and 166a(i), we will first review the trial court's judgment under the standards of rule 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). But we need not follow this regime when dealing with a hybrid motion for summary judgment. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013) ("Though these burdens vary for traditional and no-evidence motions, the summary[-]judgment motion here was a hybrid motion[,] and both parties brought forth summary[-]judgment evidence; therefore, the differing burdens are immaterial and the ultimate issue is whether a fact issue exists.") (citing *Buck v. Palmer*, 381 S.W.3d 525, 527 & n.2 (Tex. 2012)); *Reynolds v. Murphy*, 188 S.W.3d 252, 258 (Tex. App.—Fort Worth 2006, pet. denied) (op. on reh'g) (reviewing the

propriety of traditional summary judgment first despite fact that both no-evidence and traditional summary-judgment motions were filed).

In a traditional summary-judgment case, the issue on appeal is whether the movant met the summary-judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008); *Provident Life & Accident Ins. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We also consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort*, 289 S.W.3d at 848. We must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all the evidence presented. *See Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006); *City of Keller v. Wilson*, 168 S.W.3d 802, 822–24 (Tex. 2005).

A defendant that conclusively negates at least one essential element of a plaintiff's cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to

the plaintiff to come forward with competent controverting evidence that raises a fact issue. *Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999). If less than a scintilla of probative evidence exists in the plaintiff's favor, a fact issue is not raised, and summary judgment is proper. *Neely*, 418 S.W.3d at 59.

IV. Applicable Law

A. The statutory prohibition against retaliation for filing a workers' compensation claim

"A person may not discharge or in any other manner discriminate against an employee because the employee has[] filed a workers' compensation claim in good faith . . . ." Tex. Lab. Code Ann. § 451.001(1). The prohibition against retaliation is "an exception to the traditional doctrine of 'employment at will' found in Texas law." *Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309, 312 (Tex. 2015) (quoting *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 453 (Tex. 1996)). An employee discharged in retaliation for a workers' compensation claim may recover reasonable damages and "is entitled to reinstatement in the former position of employment." Tex. Lab. Code Ann. § 451.002(a), (b).

B. The shifting burdens that apply to a retaliatory-discharge claim

To recover for a retaliatory discharge, the employee has an overall burden of proof to "show that the employer's prohibited action 'would not have occurred when it did' absent the employee's protected conduct." *Melendez*, 477 S.W.3d at 312 (quoting *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 637 (Tex. 1995)); *see also*

Haggar Clothing Co. v. Hernandez, 164 S.W.3d 386, 388 (Tex. 2005) ("To prove a 'retaliatory discharge' claim, the employee must show that the employer's action would not have occurred when it did had the employee's protected conduct—filing a workers' compensation claim—not occurred."). This burden may be met with either direct or circumstantial evidence. *Melendez*, 477 S.W.3d at 312.

A burden-shifting analysis applies to workers' compensation-retaliation claims. *Parker v. Valerus Compression Servs., LP*, 365 S.W.3d 61, 66 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). The employee bears "the initial burden of demonstrating a causal link between the discharge and the filing of the claim for workers' compensation benefits." *Id.* In the summary-judgment context, "once a prima facie claim is established, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for its actions, after which the burden shifts back to the employee to produce controverting evidence of a retaliatory motive in order to survive a motion for summary judgment." *Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d 467, 479 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (quoting *Parker*, 365 S.W.3d at 67) (internal quotation marks omitted).[1] Only the burden of

[1]The burden-shifting process used to analyze summary-judgment procedures in various types of discrimination cases has its origins in the United States Supreme Court's opinion in *McDonnell Douglas*:

> Under the *McDonnell Douglas* burden[-]shifting analysis, "[t]he burden of going forward then shifts to the employer to 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 477 (Tex. 2001) (quoting *McDonnell*

production shifts to the employer in this process; the burden of persuasion always remains with the employee. *Datar*, 518 S.W.3d at 479.

When an employee relies on circumstantial evidence to establish the causal link between the filing of a workers' compensation claim and a termination, courts look to the factors enumerated by the supreme court in *Continental Coffee*:

> Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision on termination; (2) expression of a negative attitude toward 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.

937 S.W.2d at 451; *see Cardenas v. Bilfinger TEPSCO, Inc.*, 527 S.W.3d 391, 399 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Continental Coffee* factors as types of evidence an employee may rely on to establish the necessary causal link between the filing of a claim and the termination). But an employee's subjective belief that the

---

> *Douglas [Corp. v. Green]*, 411 U.S. [792,] 802, 93 S. Ct. [1817,] 1824 [(1973)]). The offer of a legitimate reason eliminates any presumption of discrimination created by the plaintiff's prima facie showing, and the burden then shifts back to the plaintiff to show that the employer's stated reason was a pretext for discrimination. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 805–07, 93 S. Ct. at 1826–27, and *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–56, 101 S. Ct. 1089, 1094–95 . . . (1981)). "Although the burden of production shifts between the parties, the burden of persuasion 'remains continuously with the plaintiff.'" *Chandler*, 376 S.W.3d at 814 (quoting *Greathouse v. Alvin Indep. Sch. Dist.*, 17 S.W.3d 419, 423 (Tex. App.—Houston [1st Dist.] 2000, no pet.)).

Datar, 518 S.W.3d at 478.

employer acted in retaliation for the filing of a claim has no probative force because such beliefs are "no more than conclusions." *Willis v. Nucor Corp.*, 282 S.W.3d 536, 544 (Tex. App.—Waco 2008, no pet.).

Where the *Continental Coffee* factors enter the process in the burden-shifting regimen is not always clear from the opinions applying them. Some cases mention the factors early in the burden-shifting analysis and look for the causal link in the employee's prima facie case. For example,

> [t]he plaintiff has the burden of making a prima facie showing that he, in good faith, filed a workers' compensation claim and that there is a causal link between his filing of the claim and his discharge or other act of discrimination by the employer. To establish a causal connection between his firing and his filing of a workers' compensation claim, an employee must demonstrate that, but for the filing of the claim, the employer's action would not have occurred when it did.

Cardenas, 527 S.W.3d at 399 (citations and internal quotation marks omitted); *see also McClendon v. Deep E. Tex. Prop. Mgmt., LLC*, No. 12-12-00331-CV, 2014 WL 1308618, at *3 (Tex. App.—Tyler Mar. 31, 2014, no pet.) (mem. op.); *Parker*, 365 S.W.3d at 67; *Dallas Cty. v. Holmes*, 62 S.W.3d 326, 329 (Tex. App.—Dallas 2001, no pet.).

Other cases hold off on an analysis of the *Continental Coffee* factors until the third step in the burden-shifting analysis—the point of analyzing whether the employer's claimed legitimate reason for termination is a pretext. The Waco Court of Appeals specifically described the juncture in the summary-judgment process where the *Continental Coffee* factors come into play as being after the employer states a non-discriminatory reason for the termination:

> But, when an employer moves for summary judgment asserting that the employee's termination was unrelated to his compensation claim, the employee has not been called on to produce evidence of the employer's motive. *Only after the employer's summary[-]judgment evidence establishes a legitimate, non-discriminatory reason for the termination[] is the employee required to come forward with summary[-]judgment evidence of a retaliatory motive, i.e., the causal link*. The ultimate question will be whether the evidence of a causal link is so strong as to justify a finding that the employer had a retaliatory motive.

Jones v. NRG Tex., LLC, No. 10-16-00260-CV, 2017 WL 1540690, at *2 (Tex. App.—Waco Apr. 26, 2017, no pet.) (mem. op.) (emphasis added) (citations omitted); *see also Avila v. United Parcel Serv., Inc.*, No. 03-18-00233-CV, 2018 WL 4100854, at *10 (Tex. App.—Austin Aug. 28, 2018, pet. filed) (mem. op.) ("The causal link required at the prima facie stage does not rise to the level of a 'but for' standard.").

Contrary to the approach of the parties before us, we view the *Continental Coffee* factors as fitting more efficiently in the stage of the analysis challenging the employer's claimed reason for termination as a pretext. Thus, we impose only a slight burden on the employee to establish a prima facie case in the first step of the burden-shifting process. Two opinions hold that the employee meets that prima facie burden with proof that the protected activity was followed shortly by an adverse employment action. *Avila*, 2018 WL 4100854, at *10 ("Temporal proximity alone can, in some instances, establish the prima facie causation element."); *Parker*, 365 S.W.3d at 67 ("Little or no lapse in time between the plaintiff's compensation claim and the employer's adverse employment action is also circumstantial evidence of a retaliatory motive."). But the temporal proximity needed to establish the employee's prima facie

case does not meet the causal link standard necessary to establish that the reason for termination offered by an employer is a pretext. *Avila*, 2018 WL 4100854, at *10–11.

As set forth above, the existence of a prima facie case triggers only the second step in the process—the requirement that the employer produce a legitimate, non-discriminatory reason for its actions. *Datar*, 518 S.W.3d at 479. In response to this showing, the employee may bring forward his circumstantial evidence that the proffered reason is actually a pretext. *See id.*

The employer may make one showing that pretermits further controversy. Proof that termination occurred because it was required by the uniform enforcement of a reasonable absence-control policy meets the employer's burden and puts an end to the employee's claim. *See Melendez*, 477 S.W.3d at 312; *Haggar Clothing*, 164 S.W.3d at 388. In such a case, "[w]hile courts generally examine the [*Continental Coffee* factors] listed above to determine if a fact issue exists on the causal link, the focus is narrower in workers' compensation retaliation claims arising from enforcement of leave policies." *Parker*, 365 S.W.3d at 68. Uniform enforcement of such a policy "does not constitute a retaliatory discharge." *Melendez*, 477 S.W.3d at 312 (quoting *Cont'l Coffee*, 937 S.W.2d at 451). Uniform enforcement also renders "circumstantial evidence that could otherwise support a causal link . . . 'immaterial.'" *Id.* (citing *Haggar Clothing*, 164 S.W.3d at 388). Thus, "[s]ummary judgment on a workers' compensation retaliation claim is proper if the employee's absence from work exceeded the employer's leave policy and the employer enforced the policy uniformly." *Parker*, 365 S.W.3d at 68.

But courts question whether an employer may rely on the protection of a mandatory absence-control policy if the policy gives the employer discretion in its enforcement, especially when it is not uniformly enforced. *Tex. Dep't of Family & Protective Servs. v. Parra*, 503 S.W.3d 646, 666–67 (Tex. App.—El Paso 2016, pet. denied).

Nevertheless, the failure to establish that an employee was terminated pursuant to a uniform absence-control policy does not "compel[] the conclusion that an injured employee was terminated in retaliation for the filing of a claim." *Phillips v. SACHEM, Inc.*, No. 03-13-00346-CV, 2014 WL 7464035, at *6 (Tex. App.—Austin Dec. 31, 2014, no pet.) (mem. op.) In other words, the inability to establish that the employer terminated the employee as the result of an unambiguous, mandatory absence-control policy does not translate into an automatic finding of retaliation. *Melendez*, 477 S.W.3d at 312 ("Barring unusual circumstances, when an employer terminates an employee consistent with the employer's uniform enforcement of its leave policy, even when an alternative interpretation of the policy would not require termination, that uniform enforcement is no evidence that an employee's termination 'would not have occurred when it did but for the employee's assertion of a compensation claim or other conduct protected by section 451.001.'" (quoting *Cont'l Coffee*, 937 S.W.2d at 451)). A court must still conduct an analysis of the *Continental Coffee* factors to then determine whether the purported reason for termination was a pretext. *See, e.g.*, *Datar*, 518 S.W.3d at 480–81 (explaining that the failure to follow progressive discipline policy or

even an erroneous decision by employer does not free employee from proving stated reason for termination was pretext).

At the step of applying the *Continental Coffee* factors, the burden reverts "to the employee 'to produce controverting evidence of a retaliatory motive' in order to survive a motion for summary judgment." *Parker*, 365 S.W.3d at 67. Generally, the employee must show "that the employer's asserted reason for the discharge or other adverse employment action was pretextual or 'challenge the employer's summary[-] judgment evidence as failing to prove as a matter of law that the reason given was a legitimate, nondiscriminatory reason.'" *Id.* at 67–68 (citing and quoting *Benners v. Blanks Color Imaging, Inc.*, 133 S.W.3d 364, 369 (Tex. App.—Dallas 2004, no pet.)); *see also Datar*, 518 S.W.3d at 479 ("[O]nce a prima facie claim is established, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for its actions, after which the burden shifts back to the employee to produce controverting evidence of a retaliatory motive in order to survive a motion for summary judgment." (citing and quoting *Parker*, 365 S.W.3d at 67) (internal quotation marks omitted)).

To avoid summary judgment, the employee need not produce evidence on all the *Continental Coffee* factors but must produce evidence to sustain the majority of them. *Armendariz v. Redcats USA, L.P.*, 390 S.W.3d 463, 469 (Tex. App.—El Paso 2012, no pet.).

Each of the *Continental Coffee* factors has its own parameters:

- With respect to knowledge of the compensation claim by those making the decision on termination, "the fact that the person making the termination decision has knowledge of the worker[s'] compensation claim, standing alone, is not evidence sufficient to establish a causal connection." *Love v. Geo Grp., Inc.*, No. 04-12-00231-CV, 2013 WL 1223870, at *3 (Tex. App.—San Antonio Mar. 27, 2013, no pet.) (mem. op.); *see also Adams v. Oncor Elec. Delivery Co.*, 385 S.W.3d 678, 683 (Tex. App.—Dallas 2012, no pet.) (same); *Willis*, 282 S.W.3d at 546 (same).

- With respect to negative comments made about the injured employee's condition:

> [Those comments] may provide some evidence of discriminatory intent if they are: (1) related to the protected class of persons of which the plaintiff is a member; (2) proximate in time to the termination; (3) made by individuals with authority over the employment decision; and (4) related to the employment decision at issue. *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 683 (5th Cir. 2001); *Wal–Mart Stores, Inc. v. Bertrand*, 37 S.W.3d 1, 10 (Tex. App.—Tyler 2000, pet. denied). Mere stray remarks, however, are typically insufficient to show discrimination. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 25 (Tex. 2000).

Willis, 282 S.W.3d at 547; *see also AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 593 (Tex. 2008) (same); *Jones*, 2017 WL 1540690, at *3 (holding that no probative evidence existed of negative attitude because employee did "not provide any evidence that [those] who made the decision to fire

him[] made negative comments concerning the injury or the claim"); *Love*, 2013 WL 1223870, at *4 ("To be probative of retaliation, negative remarks must be made by an individual with authority over the employment decision at issue."). Further, "[d]iscriminatory animus by a person other than the decision-maker may be imputed to an employer *if evidence indicates that the person in question possessed leverage or exerted influence over the decision-maker.*" *AutoZone*, 272 S.W.3d at 593 (emphasis added).

- With respect to a failure to adhere to employment policies, that failure does not necessarily suggest a pretextual motive. For example, failing to strictly follow a progressive disciplinary policy does not establish that the stated reason for termination was pretextual:

> The issue at the pretext stage is not whether the employer made an erroneous decision; it is whether the decision, even if incorrect, was the real reason for the employment determination. *Crutcher [v. Dallas ISD]*, 410 S.W.3d [487,] 497 [(Tex. App.—Dallas 2013, no pet.)] (citing *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002)). "The employer 'is entitled to be unreasonable so long as it does not act with discriminatory animus.'" *Id.* (quoting *Sandstad*, 309 F.3d at 899). An employee who intends to show that the offered explanation is so unreasonable it must be pretextual bears the burden of proffering evidence creating a fact issue regarding reasonableness. *Id.*

Datar, 518 S.W.3d at 481. Or as a variation on this theme, "arguing about the accuracy of the employer's assessment is a distraction because the question is not whether the employer's reasons for a decision are

'right but whether the employer's description of its reasons is *honest*.'" *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 656 (Tex. App.—Dallas 2012, no pet.) (emphasis in original) (quoting *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997)).

- With respect to the treatment of similarly situated employees, to establish that another similarly situated employee received dissimilar treatment, the complaining employee must establish that his circumstances match those of the employee being compared. "Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct." *Parker*, 365 S.W.3d at 69 (quoting *Ysleta ISD v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005)); *see also Jones*, 2017 WL 1540690, at *4 (same); *Love*, 2013 WL 1223870, at *4 ("To prove discriminatory treatment in comparison to similarly situated employees, [the employee is] required to demonstrate that the circumstances of the other employees were nearly identical to his circumstances.").
- With respect to the temporal proximity of the workers' compensation claim and the termination, temporal proximity may be sufficient to establish an employee's prima facie case in the first step of the burden-shifting analysis, but temporal proximity alone is not sufficient to raise a

material fact issue on the issue of whether the stated reason for termination was a pretext. *Avila*, 2018 WL 4100854, at *11 (citing *Willis*, 282 S.W.3d at 546).

V. Analysis

Though Cook Children's filed both a no-evidence and a traditional motion for summary judgment, we will not segregate our review to address the unique burdens associated with each type of motion. Cook Children's motion was a hybrid that combined both no-evidence and traditional grounds. As we noted when reciting the standard of review, in reviewing a hybrid motion in which both parties brought forth summary-judgment evidence, the differing burdens are immaterial, and the ultimate issue is whether fact issues exist. *See Neely*, 418 S.W.3d at 59. Thus, our approach will be to review the full summary-judgment record to determine whether fact issues exist.

A. Tawil established a prima facie case that required Cook Children's to present a legitimate reason for his termination.

We agree that Tawil presented a prima facie case. As we have noted, that prima facie link may be established by closeness in time between the filing of a compensation claim and termination. *See Avila*, 2018 WL 4100854, at *10. ("Temporal proximity alone can, in some instances, establish the prima facie causation element."). Here, there was less than a month between Tawil's injury and his termination. But a prima facie case does not establish the level of causation necessary to permit the employee to recover; it only shifts the burden of production to the

employer to present a legitimate reason for his termination. *See id.* Thus, the burden of production shifted to Cook Children's to present a legitimate reason for his termination.

B. Cook Children's presented a legitimate reason for Tawil's termination.

Cook Children's presented a legitimate, non-discriminatory reason for Tawil's termination—his refusal to abide by the No Call-No Show Policy. We do not read either Tawil's response to Cook Children's motion for summary judgment or his brief as contending that Cook Children's claimed reason for his termination was not facially legitimate. Instead, the issue is joined as to whether the facially valid reason was a pretext.

C. We agree with Tawil that Cook Children's cannot rely on the enforcement of a mandatory absence-control policy as the basis for his termination.

In his first issue, Tawil argues that the policies of Cook Children's and his termination showed that Cook Children's was exercising a measure of discretion in its decision to terminate him. He relies on two arguments. First, various hospital policies vest it with discretion regarding whether it will immediately terminate the employee or begin with a lesser sanction. Second, the No Call-No Show Policy provides that the employee has abandoned his employment after two infractions. Here, Cook Children's relied on four infractions.

Courts have refused to hold that a termination has occurred pursuant to a mandatory policy if the employer had discretion in how it applied the policy or did

not apply it uniformly. *See Parra*, 503 S.W.3d at 666 ("The Supreme Court has made clear that a termination pursuant to the uniform enforcement of an absence[-]control policy makes circumstantial evidence that could otherwise support a causal link immaterial[] but only if the termination 'was required' by the uniform enforcement of such a policy." (citing *Melendez*, 477 S.W.3d at 312; *Haggar Clothing*, 164 S.W.3d at 388)); *Echostar Satellite LLC v. Aguilar*, 394 S.W.3d 276, 287 (Tex. App.—El Paso 2012, pet. denied) (holding that sufficient evidence demonstrated that employer did not terminate plaintiff in strict compliance with its absence-control policy's unambiguous terms, and thus plaintiff's termination was not required by the policy's uniform enforcement).

We agree that Cook Children's policies vested it with a level of discretion and that it did not terminate Tawil at its earliest possible opportunity. Thus, we will not hold that Tawil was terminated in accordance with a mandatory attendance policy. Again, this holding does not invalidate the trial court's summary-judgment ruling in favor of Cook Children's. Instead, we now turn to the application of the *Continental Coffee* factors to determine whether Tawil presented sufficient circumstantial evidence to raise a fact question on whether Cook Children's proffered reason for his termination was a pretext. Thus, we sustain Tawil's first issue but only to the extent that it is not sufficient, in and of itself, to sustain the trial court's granting of summary judgment.

D. After applying the *Continental Coffee* factors, we conclude that the trial court properly granted summary judgment dismissing Tawil's retaliation claim.

We will examine in turn the five *Continental Coffee* factors and whether they circumstantially create a causal link between Tawil's workers' compensation claim and his termination, i.e., whether the reason Cook Children's offered for the termination was a pretext and whether the real reason for his termination was retaliation for the filing of his compensation claim. Those factors include (1) knowledge of the compensation claim by those making the termination decision, (2) expression of a negative attitude toward 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*, 937 S.W.2d at 451. We conclude that the summary-judgment record does not create a fact question that Cook Children's offered reason for Tawil's termination was a pretext.

1. The summary-judgment record is unclear whether the person responsible for terminating Tawil knew of his compensation claim, but mere knowledge of the claim is not sufficient to establish that Cook Children's stated reason for this termination was a pretext.

Cook Children's Employee Relations Director testified that she made the decision to separate Tawil's employment. Tawil highlights that his supervisor had discussed his attendance with the Employee Relations Director. The Employee Relations Director testified that she could not remember the specifics of the

conversation but that they related to Tawil not reporting to work, the number of days that he had missed, and Cook Children's policies. The portions of the testimony cited by Tawil do not establish the full extent of the Employee Relations Director's knowledge of his compensation claim. But even if the Employee Relations Director had knowledge of the claim, that knowledge, standing alone, is not sufficient to establish a causal connection between the filing of the compensation claim and termination. *See Love*, 2013 WL 1223870, at *3.

2. The summary-judgment record contains no cognizable evidence of a negative attitude expressed towards Tawil's workers' compensation claim.

Tawil's brief claims that his supervisor's positive attitude toward him changed after his injury. As noted above, he characterized the attitude of his supervisor as "snappy and stern" after the injury. Without any detail or examples, he characterized her text messages as "rude and ugly." Again, without specifics, he characterized the clinic lead as acting unprofessionally and inappropriately.

As to specifics, Tawil claimed that he was told that he would be fired if he did not come to work against the orders of his doctor. He attributed to both his supervisor and the representative of occupational health the pressure for him to return to work even though he claimed that he could not do so without taking narcotic pain medication. The occupational health representative allegedly told him that she "didn't want [him] to lose [his] job and [that] she didn't want [him] to get fired for simply being out on worker[s'] compensation."

We attribute no evidentiary weight to Tawil's generalized characterizations of his supervisors' attitudes or text messages. These characterizations are "merely [the kind of] conclusory allegations, improbable inferences[,] and unsupported speculation" that cannot support a finding of retaliatory intent even in a summary-judgment context. *Fenley v. Mrs. Baird's Bakeries, Inc.*, 59 S.W.3d 314, 320 (Tex. App.—Texarkana 2001, pet. denied); *see also Chhim v. Univ. of Houston*, 76 S.W.3d 210, 218–19 (Tex. App.—Texarkana 2002, pet. denied) ("[Employee's] assertions amount to nothing more than conclusory allegations and unsupported speculation. The nonmovant must come forward with more than mere conclusory allegations, improbable inferences, and unsupported speculation to survive summary judgment.").

Moreover, as noted above, to be probative, the negative remarks must be made both by individuals with authority over the employment decision and must relate to the employment decision at issue. *Willis*, 282 S.W.3d at 547. Stray remarks are not sufficient. *Id.* Tawil's description of what he was told is artful but not probative. In his words, the occupational health representative was telling him that she did not want him to lose his job. He obviously attributes those words to an animus toward his contention that he could not work, but an equally valid inference is that she was referring to the fact that his physician had repeatedly cleared him to work under restrictions that Cook Children's had accommodated and without pain medication. *See Jinkins v. Jinkins*, 522 S.W.3d 771, 783–84 (Tex. App.—Houston [1st Dist.] 2017, no pet.) ("[E]vidence that raises more than one equally probable inference does not

raise a fact issue to defeat summary judgment."); *Aranda v. Willie Ltd. P'ship*, No. 03-15-00670-CV, 2016 WL 3136884, at *2 (Tex. App.—Austin June 1, 2016, no pet.) (mem. op.) (collecting cases demonstrating that when summary-judgment evidence raised equally plausible inferences, it did not raise a fact issue, and summary judgment was properly granted). Urging Tawil to conform to the instructions of his doctor might well be something that he found uncongenial, but in the context of the information that had been provided to Cook Children's, we do not view it as an expression of a negative attitude toward Tawil for having filed a workers' compensation claim.

Finally, we note again that the supervisor and the representative of occupational health were not the ones who made the decision to separate Tawil's employment. Tawil apparently never spoke to and offers no evidence that the Employee Relations Director manifested a negative attitude toward his injury or his workers' compensation claim. Usually, for a negative attitude to be probative of a pretextual motive, that attitude must come from the person making the employment decision. *Love*, 2013 WL 1223870, at *4. If he wished to establish a link between the purportedly negative attitude of his supervisor and the representative of occupational health and the decision to separate Tawil's employment, Tawil had to present proof that these persons "possessed leverage or exerted influence" over the decision-maker—in this case, the Employee Relations Director. *See AutoZone*, 272 S.W.3d at 593. Again, Tawil notes that his supervisor and the Employee Relations Director

spoke, but the description of those conversations and the statements of the Employee Relations Director do not point to any leverage or influence exerted on the Employee Relations Director by the supervisor. Tawil's evidence fails to demonstrate a negative attitude that circumstantially establishes that the reason Cook Children's offered for his termination was a pretext attempting to hide a motive to retaliate for the filing of a workers' compensation claim.

3. Tawil's argument that Cook Children's did not terminate him at its earliest possible opportunity does not demonstrate a lack of adherence to hospital policies that is evidence of a pretext.

Tawil's argument is counterintuitive—Cook Children's offered him a measure of grace by terminating him after four violations of the No Call-No Show Policy. This was not a strict adherence to the policy's provision that job abandonment occurs after two violations. But we do not accept the argument that application of a policy in a fashion that benefits the employee may be used as evidence of a pretext. We have agreed with Tawil that the failure to terminate an employee in strict adherence with a mandatory termination policy may deprive the employer of the safe harbor found in *Haggar* and *Kingsaire*, but that principle does not translate into one in which every act of discretion, even one that benefits the employee, may be turned against the employer. *See Love*, 2013 WL 1223870, at *4 ("However, the delay in placing Love in the TAP program benefitted Love by providing him additional time in an alternative position. Such evidence is simply not probative of retaliation, and does not establish a

causal connection between the filing of Love's worker[s'] compensation claim and his termination.").

4. The summary-judgment record contains no proof that an employee similarly situated to Tawil was treated differently than Tawil.

Tawil's brief cites only the testimony of the Employee Relations Director to establish that he was the only employee "out on a workers' compensation claim" who was separated from employment for violation of the No Call-No Show Policy. In our view, this is only half an answer for the point that he is trying to make. He offers no evidence that another employee who was out on a compensation claim violated the No Call-No Show Policy and was not separated from employment. Indeed, he admitted in his deposition that he had no knowledge of any employees who violated that policy and were able to keep their jobs or who violated the No Call-No Show Policy in any regard.

Cook Children's provided a list of ten former employees who had been terminated for "job abandonment" because they had violated the call-in procedures. The evidence established that none of these employees had been injured on the job or had made a workers' compensation claim. In essence, "Tawil was treated the same as other employees who were not injured and did not make worker[s'] compensation claims."

The summary-judgment record contains no evidence that an employee whose circumstances are comparable to Tawil's in all material aspects—including similar

standards, supervisors, and conduct—was treated differently than Tawil. *See Parker*, 365 S.W.3d at 69.

5. Tawil's claim that Cook Children's failed to strictly adhere to its attendance policy is not evidence that its stated reason for his termination was a pretext.

Tawil asserts that Cook Children's stated reason for his termination was a pretext because its policies can be read to exclude those with open workers' compensation claims from the attendance policy's application. We agree that the policies are not models of clarity. But the question is not whether Cook Children's made a mistake in applying the policy but whether the stated reason for Tawil's termination was a pretext. And if Tawil contends that the offered explanation was so unreasonable that it must be a pretext, he must offer evidence creating a fact question of that unreasonableness. *See Datar*, 518 S.W.3d at 481.

Tawil's physician cleared him to work; his supervisor needed to know whether he was coming to work; she told him repeatedly that he had to comply with the No Call-No Show Policy; and compliance with the policy was not arduous, but he simply refused to comply. This set of circumstances does not hint that Cook Children's acts were so unreasonable as to suggest a pretext lurked in its decision to separate Tawil's employment.

And Tawil's focus on the vague verbiage of policies and a lack of conversance with each policy provision by Cook Children's employees does not change our view. Tawil highlights three points:

- Cook Children's attendance policy provides that each department will establish guidelines for its employees to notify the department when they are unable to report and "how they are to schedule time off," but "this does not include lost time due to on-the-job injuries."
- Hospital employees testified that they could not identify specific provisions of the attendance policy that made it applicable to those with open workers' compensation claims though the Employee Relations Director testified that the policy did not exempt anyone.
- Another policy provision stated that the attendance policy does not apply "[i]f an employee requires time off because of a current, on-going, verified work-related injury."

We agree that the policies do not appear to envision a situation in which an employee is released by his doctor to return to work but claims that he cannot do so. But we also cannot agree that the policies absolve an employee who has been released to work from following the No Call-No Show Policy if he does not want to follow the doctor's release to return to work. In that situation, the department where the employee works still needs to know if alternate staffing arrangements need to be made, which is the very purpose of the No Call-No Show Policy.

If Tawil had any question about the application of the policy, the repeated reminders that he received of his need to conform to the policy should have answered

that question. He refused to comply with the policy not because he questioned its application to him but instead because he believed that he was being mistreated. And to the main point, it is not a legitimate circumstantial inference that Cook Children's was using the attendance policy as a subterfuge to set up Tawil for firing when it warned him repeatedly of what he had to do to avoid that result.

The argument that the attendance policy's application to him was a subterfuge is further undermined by how simply he could have avoided the rule's impact. If Cook Children's had contorted the rule in a way to make Tawil's compliance difficult, then that behavior might have some circumstantial evidentiary value to establish that the rule was being used as a pretext for termination. Instead, the record shows that compliance by Tawil was not difficult and that he could have satisfied the rule's application to him by simply calling his supervisor to tell her that he would not be coming to work. Whatever his excuse or motive, he refused to do so. Here, Cook Children's behavior is not of a type that raises a circumstantial inference that Cook Children's applied the attendance rule to Tawil for any other reason than ensuring it was adequately and efficiently staffed. No matter the fact that the attendance policy may have not been written to precisely deal with Tawil's status, Cook Children's did not use that policy so unreasonably that it prompts an inference that it was using the

attendance policy as a pretext to fire Tawil because he had filed a workers' compensation claim.[2]

Earlier, we noted that to avoid summary judgment, Tawil did not have to produce evidence on all the *Continental Coffee* factors but had to produce evidence to sustain the majority of them. *See Armendariz*, 390 S.W.3d at 469. We have examined each of the *Continental Coffee* factors, the summary-judgment record, and Tawil's arguments, and we conclude that he has failed to produce evidence to sustain any of the *Continental Coffee* factors and certainly not the majority of them. Therefore, the trial court did not err by concluding that Tawil had failed to raise any fact question on the issue that Cook Children's proffered reason to separate Tawil's employment was a pretext. We overrule Tawil's second issue.

VI. Conclusion

The first core issue in this appeal is whether Cook Children's presented a legitimate reason for Tawil's termination. It did. The second core issue is whether the summary-judgment record contains evidence that implicates the *Continental Coffee* factors to such a degree that a fact question arises regarding whether the legitimate reason presented by Cook Children's was a pretext. It does not. Accordingly, we

[2]Tawil's brief raises a third issue that rehashes almost verbatim the argument made under the fifth element of the *Continental Coffee* factors. On the basis of our discussion examining that element, we overrule his third issue. *See* Tex. R. App. P. 47.1.

affirm the trial court's granting of Cook Children's no-evidence and traditional motion for summary judgment and its dismissal of Tawil's claims.

/s/ Dabney Bassel

Dabney Bassel
Justice

Delivered: May 30, 2019