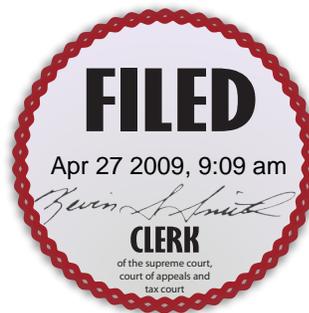


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM GILHAM,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 40A05-0810-CV-603
)	
NORTH VERNON BEVERAGE CO., INC.,)	
)	
Appellee-Defendant.)	
)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0505-PL-117

April 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

William “Toby” Gilham was injured during the course of his employment at North Vernon Beverage Company (“Beverage”). Less than a month after filing a worker’s compensation claim, Gilham was discharged from employment. Gilham then filed a retaliatory discharge suit against Beverage, who responded that Gilham was discharged for violating its alcohol policy. The trial court granted summary judgment in favor of Beverage. Gilham now appeals, arguing that he presented sufficient evidence that Beverage’s stated reason for termination was pretextual to survive a motion for summary judgment. Concluding that Gilham did designate sufficient evidence of retaliatory intent, we reverse the trial court’s grant of summary judgment and remand for further proceedings.

Facts and Procedural History

In 1992, Gilham began working for Beverage in North Vernon, Indiana, and he worked there as both a delivery person and assistant warehouse manager. On February 3, 2005, Gilham injured his left wrist while unloading one of the company’s delivery trucks. Gilham learned after a trip to St. Vincent Jennings Hospital a few days later that his wrist was broken. On February 9, 2005, Mike Flora, the general manager at Beverage, prepared an “Indiana Worker’s Compensation First Report of Employee Injury, Illness” regarding Gilham’s wrist injury and submitted it to the company’s insurance carrier. Gilham later began a course of physical therapy for his injury.¹

¹ We pause at this point to note different deficiencies in the Statement of Facts contained within the Appellant’s Brief and the Appellee’s Brief. Specifically, the Appellant’s Brief at several points enumerates facts that are not contained in the record on appeal and were not designated to the trial court in the summary judgment proceedings. For example, Gilham asserts in his brief that he was referred to

On March 4, 2005, Flora terminated Gilham's employment with Beverage. Flora informed Gilham that he was being discharged for drinking alcoholic beverages during working hours in violation of the company's alcohol policy. Gilham then filed suit in Jennings County Circuit Court against Beverage, alleging retaliatory discharge. Beverage filed a motion for summary judgment, arguing that there was no genuine issue of material fact as to whether it fired Gilham in retaliation for filing a worker's compensation claim. In support of its motion, Beverage designated several affidavits and portions of deposition testimony to show that Gilham, who admitted to drinking at work, was fired for violating the alcohol policy and that the alcohol policy was uniformly and neutrally enforced. In opposition to the summary judgment motion, Gilham then designated several affidavits and portions of deposition testimony reflecting that many of Beverage's employees were regularly drinking at work, that the supervisors knew about and in some cases participated in the drinking activity, and that no one had previously been fired for violating the alcohol policy. Gilham also noted evidence designated by Beverage showing that, soon before he was fired by Flora, Flora remarked to him that the physical therapy was a waste and that Gilham was costing the company a lot of money. Appellant's App. p. 64.

physical therapy and began treatment on March 3, 2005, but does not provide a citation to evidence designated to the trial court contained in the record on appeal. Appellant's Br. p. 3. We may only consider evidence that was designated to the trial court and provided to us in the record. Ind. Trial Rule 56; *Hughes v. King*, 808 N.E.2d 146, 147-48 (Ind. Ct. App. 2004) (dismissing appeal for failure to provide our Court with the evidence designated to the trial court at summary judgment). As for the Appellee's Brief, we remind counsel that the statement of facts should be given in narrative form in the light most favorable to the judgment and should not be argumentative. Ind. Appellate Rule 46(A)(6); *Nicholson v. State*, 768 N.E.2d 1043, 1045 n.2 (Ind. Ct. App. 2002).

The trial court granted Beverage's motion for summary judgment, finding that Gilham had failed to introduce evidence that his firing was pretextual. Gilham then filed a motion to correct errors, which was denied. Gilham now appeals.

Discussion and Decision

Gilham contends that the trial court erred by granting summary judgment in favor of Beverage with regard to Gilham's claim of retaliatory discharge. Specifically, Gilham argues that summary judgment was improper because the evidence designated to the trial court reveals a genuine issue of material fact as to whether Beverage's stated reason for his discharge, that is, Gilham's violation of its alcohol policy, was pretextual.

Where a motion to correct error is grounded upon a claim that the trial court erred by granting summary judgment, on appeal we review the grant of summary judgment. *Hamilton v. Prewett*, 860 N.E.2d 1234, 1240 (Ind. Ct. App. 2007), *trans. denied*. The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. *Bushong v. Williamson*, 790 N.E.2d 467, 474 (Ind. 2003). Our standard of review is the same as that of the trial court, *de novo*, and summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Atterholt v. Herbst*, 902 N.E.2d 220, 222 (Ind. 2009); *Williams v. Riverside Cmty. Corr. Corp.*, 846 N.E.2d 738, 743 (Ind. Ct. App. 2006), *trans. denied*. We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. *Id.* On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity. *Id.* A party

appealing from an order granting summary judgment has the burden of persuading the appellate tribunal that the decision was erroneous. *Id.*

In Indiana, employment is generally at-will, and the employer may discharge the employee at any time with or without cause. *Coutee v. Lafayette Neighborhood Hous. Servs., Inc.*, 792 N.E.2d 907, 911 (Ind. Ct. App. 2003), *reh'g denied, trans. denied.* There are three exceptions to the employment-at-will doctrine, one of which is a public policy exception established by our Supreme Court in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). *Coutee*, 792 N.E.2d at 911 (listing all three exceptions). The Court held in *Frampton* that when an employee is discharged solely for exercising a statutorily conferred right, such as the right to file a claim for worker's compensation, an exception to the general rule of at-will employment is recognized. *See Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005), *trans. denied.* The *Frampton* Court established that an action for retaliatory discharge exists when an employee is discharged for filing a worker's compensation claim. *See id.* One of the purposes of the exception established by *Frampton* is to prevent the employer from terminating an employee in a way which sends a message to other employees that they will lose their jobs if they exercise their right to worker's compensation benefits. *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1261 (Ind. Ct. App. 2002).

In order to be successful on a retaliatory discharge claim, a plaintiff must demonstrate that his or her discharge was solely in retaliation for the exercise of a statutory right. *See Smith v. Elec. Sys. Div. of Bristol Corp.*, 557 N.E.2d 711, 712 (Ind. Ct. App. 1990); *see also Frampton*, 297 N.E.2d at 428. We have further explained that

use of the word “solely” by the *Frampton* Court means only that any and all reasons for the discharge must be unlawful in order to sustain the retaliatory discharge claim. See *Markley Enters., Inc. v. Grover*, 716 N.E.2d 559, 566 (Ind. Ct. App. 1999); *Dale v. J.G. Bowers, Inc.*, 709 N.E.2d 366, 369 (Ind. Ct. App. 1999). The mere fact that an employer has designated evidence showing that it articulated a lawful reason for the termination which appears “at first blush” to be independent of the employee’s worker’s compensation claim does not necessarily establish that the employer lacked retaliatory intent when it terminated the employee. *Markley Enters., Inc.*, 716 N.E.2d at 565-66.

The issue of retaliation is a question for the trier of fact. *Powdertech, Inc.*, 776 N.E.2d at 1261. Where retaliation is at issue, summary judgment is only appropriate when the evidence is such that no reasonable trier of fact could conclude that the discharge was caused by a prohibited retaliation. *Id.* at 1262. Thus, to survive a motion for summary judgment, an employee must show more than just the filing of a worker’s compensation claim and the discharge itself. *Id.* The employee must present evidence that directly or indirectly supplies the necessary inference of causation between the filing of the worker’s compensation claim and the termination. *Id.* For example, evidence of the proximity in time between the filing of the claim and the termination can provide the necessary inference of causation needed to rebut a summary judgment motion. *Purdy*, 835 N.E.2d at 213. However, “timing evidence is rarely sufficient in and of itself to create a jury issue on causation.” *Hudson v. Wal-Mart Stores, Inc.*, 412 F.3d 781, 787 (7th Cir. 2005). To demonstrate the necessary inference of causation, an employee can also provide evidence that the employer’s asserted lawful reason for discharge is a

pretext. *Purdy*, 835 N.E.2d at 213. The employee can prove pretext by showing that the employer's stated reason for the termination has no basis in fact, is insufficient to warrant the termination, or is not the actual motivation for the discharge. *Id.*

A plaintiff ostensibly fired for violation of a rule attempting to demonstrate that the employer's stated reason is pretextual can present evidence that other employees, who did not file worker's compensation claims, were not fired even though they engaged in conduct substantially identical to that which the employer claims motivated the plaintiff's termination. *See Powdertech, Inc.*, 776 N.E.2d at 1260 (discussing pretext evidence in the context of an Americans with Disabilities Act claim but later applying the analysis to plaintiff's *Frampton* claim of retaliatory discharge for filing a worker's compensation claim). Stray remarks made to the plaintiff may also be evidence of retaliatory intent if they are made by the decisionmaker or those who influence the decisionmaker and are made close in time to the termination. *See Purdy*, 835 N.E.2d at 218 (applying the Seventh Circuit's stray remark discrimination analysis to remarks made to plaintiff before his termination).

This Court has outlined the three steps of a retaliatory discharge claim. *Id.* at 213. First, the employee must prove, by a preponderance of the evidence, a prima facie case of discrimination. *Id.* The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the discharge. *Id.* Finally, if the employer carries that burden, the employee can prove, by a preponderance of the evidence, that the reason offered by the employer is pretextual. *Id.*

We now turn to Gilham's retaliatory discharge claim. Gilham alleged that he was discharged from employment with Beverage in retaliation for filing a worker's compensation claim after he broke his wrist.² Beverage responded that Gilham was terminated for violating Beverage's alcohol policy. Beverage argues that summary judgment was appropriate because the evidence was undisputed that Gilham, while employed by Beverage, drank alcohol during the working day despite its alcohol policy prohibiting such conduct. But Beverage's articulation of a lawful reason for termination does not entitle it to judgment as a matter of law as it claims. *Markley Enters., Inc.*, 716 N.E.2d at 565-66. Rather, the articulation of a lawful reason shifted the burden to Gilham to establish that Beverage's explanation for his termination is a pretext.

In support of his argument that his firing was retaliatory, Gilham designated evidence to the trial court that he argues demonstrates the necessary inference of causation between the filing of his worker's compensation claim and his termination. Gilham designated both proximity in time evidence and pretext evidence to the trial court to support his allegation that Beverage fired him in retaliation for filing a worker's compensation claim.

As for the proximity in time evidence, Beverage prepared and submitted the "Indiana Worker's Compensation First Report of Employee Injury, Illness" form regarding Gilham's injury on February 9, 2005. Appellant's App. p. 42. Less than a month later, on March 4, 2005, soon after Gilham began a course of physical therapy for

² We note that the parties have failed to include in the record on appeal a copy of the plaintiff's complaint and the defendant's answer. We remind the parties that documents designated to the trial court in a summary judgment proceeding should be included in the record on appeal of a trial court's decision on a motion for summary judgment. *Ace Foster Care & Pediatric Home Nursing Agency Corp. v. Ind. Family & Soc. Servs. Admin.*, 865 N.E.2d 677, 681 n.2 (Ind. Ct. App. 2007).

his wrist injury, Beverage terminated his employment. A close temporal connection supports an inference of retaliatory intent, and we have previously found that a six-month period between filing and termination was not fatal to a retaliatory discharge claim. *Markley Enters., Inc*, 716 N.E.2d at 565.

As for the pretext evidence, Gilham argues that there is sufficient designated evidence from which a reasonable fact-finder could conclude that Beverage's stated reason for his termination was not the actual, retaliatory reason. Specifically, Gilham first argues that there is a genuine issue of material fact as to whether Beverage even had an alcohol policy in place at the time he was terminated. Gilham further argues that even if there were such a policy in place, the designated evidence showing that the policy was not uniformly and neutrally enforced creates a genuine issue of material fact as to retaliatory intent. Finally, Gilham argues that evidence of remarks made to him by Flora, the general manager at Beverage, shortly before he was fired demonstrate a genuine issue of material fact as to retaliatory intent.

First, Gilham argues that Beverage failed to designate any evidence showing that it had an alcohol policy at the time Gilham was terminated. In his deposition, Gilham stated that he had never seen the alcohol policy before and had never received a copy of it at work. Appellant's App. p. 100. Roger Ritchison, an employee of Beverage until 2002, swore in his affidavit that he had never been told of a policy prohibiting drinking alcohol while at work. *Id.* at 134. In support of his argument, Gilham cites also to the affidavit of Steve Pein, Beverage's office manager, who stated that the alcohol policy was distributed to all the company's employees and was posted for the past two years in the

company meeting room. *Id.* at 48-49. Gilham notes that the affidavit is dated January 31, 2008, and Gilham was fired more than two years before the date of the affidavit. Gilham argues that this evidence demonstrates that no alcohol policy existed at the time he was fired. However, Flora swore in his affidavit that the alcohol policy was in effect at the time of Gilham's termination and for some time beforehand. *Id.* at 38. Gilham's statement that he never saw the policy, Ritchison's statement regarding the time before Gilham was terminated, and Pein's statement regarding when the policy was posted in the meeting room do not controvert Flora's statement that the policy was in effect at the time of Gilham's termination.

Assuming that the evidence designated to the trial court demonstrates that the alcohol policy was in effect at the time of his discharge, Gilham argues that the designated evidence nevertheless reflects a genuine issue as to retaliatory intent because the alcohol policy was never enforced against his co-workers, who also engaged in drinking activity while at work. According to Gilham, only he, after filing a worker's compensation claim, was fired for drinking while on the job.

Beverage did designate evidence that the alcohol policy was uniformly and neutrally enforced. Beverage designated to the trial court a copy of the "Drug-Free Workplace and Substance Abuse Policy," which stated in part that "[i]f alcohol or other substance use is detected while on the job, you may be terminated." Appellant's App. p. 40. Flora testified in his deposition that Don Miller, the owner of the company, had advised him that if anyone was drinking on the job, that person should be fired. *Id.* at 77. Pein stated that he knew of no incidents in which an employee consumed alcohol while

on the job except for those incidents involving Gilham. In his affidavit, Flora stated that Gilham had been given repeated verbal warnings about drinking beer while at work. *Id.* at 38. In his affidavit, Gary Stamper, the Beverage graphics manager, stated that Gilham had admitted to him that he was aware of the alcohol policy. *Id.* at 53.

But the evidence that Gilham designated to the trial court paints a vastly different picture of drinking activity at Beverage. In his deposition, Gilham testified that he and his co-workers regularly consumed alcoholic beverages while working and that Flora was familiar with their practice. *Id.* at 103. Gilham testified that, several weeks before he was terminated, he saw Steve Masters consume beer at a cookout at work during the afternoon work hours while Flora was present. *Id.* at 105. Gilham testified that Mark Creech, Colin Vaughn, and Kevin Vaughn all drank beer frequently while on the job and that Flora knew about the drinking. *Id.* at 108. Gilham also testified that he was not aware of any employees ever being fired for drinking on the job and that he had never been warned that he could be fired for drinking on the job. *Id.* at 112. Gilham designated the affidavits of several individuals who were formerly employed by Beverage. David Harding swore that employees at Beverage were permitted to drink beer anytime in the warehouse and that Flora himself provided beer at company meetings and would drink beer during working hours, sometimes in his company vehicle. *Id.* at 126. Bobby Joe Stearns swore that drivers at Beverage routinely drank while they were working, that Flora drank beer during the workday and provided beer at company meetings, that Flora would allow underage employees to take beer with them to college, that Flora would advise drivers when they were selected to undergo a drug and alcohol screening in time

to keep their system clear before the test, and that he was unaware of any employee being fired for drinking during the workday. *Id.* at 128-29. Gilham also designated the affidavits of two employees of Miller's Tavern who observed employees of Beverage, including Flora, drinking beer during lunch. *Id.* at 130, 133. Taking this evidence as true for summary judgment purposes, it could reasonably appear that Beverage did not uniformly enforce its alcohol policy but instead enforced it only against Gilham, who had recently filed a worker's compensation claim. Thus, a fact-finder could reasonably infer retaliatory intent because other Beverage employees, who did not file worker's compensation claims, were not fired even though they engaged in conduct substantially identical to that which Beverage claims motivated Gilham's termination. *See Powdertech, Inc.*, 776 N.E.2d at 1260.

Moreover, Gilham also introduced evidence that Flora made remarks to him before his firing from which a reasonable fact-finder could infer retaliatory intent. Specifically, Gilham testified that Flora told him that the physical therapy was "a waste of time" and that Gilham was "costing the company a lot of money." Appellant's App. p. 64. Remarks may be evidence of retaliatory intent if they are sufficiently connected to the employment decision, that is, if the remarks are made by the decisionmaker or those who influence the decisionmaker and must be made close in time to the adverse employment decision. *Purdy*, 835 N.E.2d at 218. Stray remarks, or isolated comments, are insufficient to establish retaliatory intent. Here, Flora is the general manager at Beverage, and he testified in his deposition that he consulted with Miller, the company's owner, regarding whether to fire Gilham, Appellant's App. p. 77, and that "[w]ith the

warning, and we caught him again, I needed to be a man of my word. And that is the only reason he was terminated.” *Id.* at 80. A fact-finder could reasonably infer from this evidence that Flora, the general manager, was the decisionmaker or someone who influences the decisionmaker. As for the time between the remarks and the termination, Gilham argues that Flora told him only a few hours before he was terminated that the therapy was a waste of time and costing the company a lot of money.³ *Id.* at 64, 111. Flora’s remarks, made by a decisionmaker or someone who influences a decisionmaker and made close in time to the adverse employment decision, support a finding that Beverage fired Gilham in retaliation for filing a worker’s compensation claim. *See Volovsek v. Wis. Dep’t of Agric., Trade and Consumer Prot.*, 344 F.3d 680, 690 (7th Cir. 2003) (finding that supervisors’ comments about keeping women “barefoot and pregnant” overheard by employee the day she was passed over for promotion precluded summary judgment in Title VII discrimination case).

In sum, the facts designated to the trial court, when viewed in the light most favorable to Gilham, the nonmoving party, permit the inference that Beverage’s stated reason for discharging him was a pretext. These facts are sufficient to raise a genuine

³ At one point in his deposition, Gilham testified that Flora dissuaded him from seeking medical treatment because the therapy was a waste of time and Gilham was costing the company a lot of money. Appellant’s App. p. 64. At another point in his deposition, Gilham testified that the morning of the day he was fired he and Flora conversed regarding Gilham’s therapy. *Id.* at 111. Gilham was then fired around lunchtime. *Id.* In his brief, Gilham alleges that the testimony at both places in his deposition refers to the same conversation. Beverage does not challenge this. We are unable to discern for ourselves from the pages Gilham cites that these statements refer to the same conversation. But given our duty on review to construe all facts and the reasonable inferences drawn therefrom in favor of the nonmoving party and the lack of a challenge from Beverage, we accept Gilham’s contention. What is certain is that if Flora did make these remarks to Gilham, the remarks must have been made at some point between Gilham’s injury on February 3, 2005, and his firing on March 4, 2005.

issue of material fact as to whether Beverage's true motive for Gilham's discharge was impermissible retaliation, an issue which should be decided by the trier of fact.

Finally, Beverage argues that Gilham's claim fails because it designated evidence that Flora told Gilham that he "would not be against re-employing him" if he sought the help of a substance abuse professional and completed a substance abuse program. Appellant's App. p. 80. Even if this evidence were true, a jury could nevertheless infer that Flora extended this offer with the knowledge that Gilham, now unemployed, would be unable to pay for the requested treatment. As a result, this evidence does not negate the genuine issue of material fact as to retaliatory intent. The trial court erred in entering summary judgment for Beverage. We reverse and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

RILEY, J., and DARDEN, J., concur.