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# IN THE
# COURT OF APPEALS OF INDIANA

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| DONALD "JEFF" SCOTT, | ) | |
| | ) | |
| Appellant-Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 27A02-0703-CV-199 |
| | ) | |
| CHRONICLE TRIBUNE, | ) | |
| | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE GRANT SUPERIOR COURT I
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0501-CT-60

**November 20, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Plaintiff, Donald Scott (Scott), appeals the trial court's entry of summary judgment in favor of Appellee-Defendant, Chronicle Tribune (Chronicle).

We affirm.

## ISSUE

Scott raises three issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court erred in granting Chronicle's Motion for Summary Judgment, thereby determining Scott's discharge from Chronicle was not retaliatory in nature.

## FACTS AND PROCEDURAL HISTORY

Scott was hired by Chronicle on October 29, 1984, as a press operator. Between 1985 and 1996, Scott suffered from a series of work related injuries. He filed worker's compensation claims for some, but not all, of his resulting injuries. However, in January 2003, he suffered an injury to his back, and did file a worker's compensation claim. Scott was off work approximately four months as a result of his injury. On May 22, 2003, he was cleared to return to work without restrictions.

In February 2003, Chronicle decided that due to losing a commercial printing job in September 2002, it needed to restructure its business operations and reduce its workforce. Specifically, Chronicle determined it needed to reduce its press operator workforce by two. On July 18, 2003, Chronicle held a meeting with Scott's department and informed the employees that as a part of the ongoing restructuring two press operators would be discharged. That same day, Scott was informed his employment would be terminated.

In deciding which two employees to terminate, Chronicle first looked at its employees' seniority. One press operator had less than one-year seniority, so he was terminated. However, all the remaining press operators had at least twelve years of service, so Chronicle decided to look at additional criteria in deciding who else to terminate. Chronicle chose to use the remaining press operators' performance reviews as a basis for termination. In his most recent performance review, Scott received a rating of two on a scale of one to five. Scott's performance rating was the lowest of all remaining press operators; all the other press operators earned a three or better on their reviews. Thus, Scott was the second press operator terminated.

In total, approximately forty of Chronicle's two hundred employees were terminated due to the loss of the commercial printing business and subsequent restructuring. At least thirty of the forty employees whose employment was terminated had never filed a worker's compensation claim during their tenure with Chronicle. Additionally, at least ten Chronicle employees who had filed worker's compensation claims retained their employment with Chronicle. In Scott's department several other employees were terminated, among whom some had, and others had not, filed worker's compensation claims. After the terminations, a press operator, who was not terminated, voluntarily resigned and the position was offered to a former employee who, like Scott, had previously filed and been compensated for worker's compensation claims.

On January 25, 2005, Scott filed a complaint for damages alleging retaliatory discharge. On August 7, 2006, Chronicle filed a Motion for Summary Judgment, together with its Brief in Support of Motion for Summary Judgment. On November 3, 2006, a

hearing was held on Chronicle's Motion for Summary Judgment after which the trial court took the matter under advisement. On November 9, 2006, the trial court entered its Order granting Chronicle's Motion for Summary Judgment.

Scott now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

Scott contends the trial court improperly granted summary judgment in favor of Chronicle. Specifically, Scott claims that summary judgment was improper because the reason for his termination is unclear and inconsistent with other employees, specifically the other terminated press operator, and therefore constitutes a genuine issue of material fact to be determined by a finder of fact.[1]

### I. *Standard of Review*

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *Nat'l Mut. Ins. Co. v. Curtis*, 867 N.E.2d 631, 634 (Ind. Ct. App. 2007). Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's

[1] Scott argues the fact finder in this case should be a jury. However, Scott never filed the proper demand for a jury trial pursuant to Indiana Trial Rule 38. Thus, Scott has waived his opportunity to have this issue heard by a jury, leaving the trial court to act as the fact finder.

ruling was improper. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *See Ayres v. Indian Heights Volunteer Fire Dep't, Inc.*, 493 N.E.2d 1229, 1234 (Ind. 1986).

We note in the present case that the trial court did not enter findings of fact and conclusions of law. Special findings are not required in summary judgment proceedings and are not binding on appeal. *Nat'l Mut. Ins. Co.*, 867 N.E.2d at 634. However, such findings offer this court valuable insight into the trial court's rationale for its judgment and facilitate appellate review. *Id.*

## II. *Retaliatory Discharge*

Scott contends his discharge was retaliatory. Generally, Indiana follows the employment-at-will doctrine, which permits both the employer and the employee to terminate the employment at any time for "good reason, bad reason, or no reason at all." *Meyers v. Meyers*, 861 N.E.2d 704, 706 (Ind. 2007) (quoting *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006)). On rare occasions narrow exceptions have been found. *Meyers*, 861 N.E.2d at 706. Retaliation theories were first recognized in Indiana in *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), where our supreme court held: "[U]nder ordinary circumstances, an employee at[-]will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily conferred right[,] an exception to the general rule must be recognized." *M.C. Welding and Machining Co. v. Kotwa*, 845 N.E.2d 188, 192 (Ind. Ct. App. 2006) (quoting *Frampton*, 297 N.E.2d at 428).

Specifically, *Frampton* concerned retaliation for filing a claim pursuant to the Indiana Workmen's Compensation Act. The *Frampton* court concluded, "an employee who alleges he or she was discharged in retaliation for filing a claim pursuant to the Indiana Workmen's Compensation Act . . . or the Indiana Workmen's Occupational Diseases Act . . . has stated a claim upon which relief can be granted." *Frampton*, 297 N.E.2d at 428. One of the reasons for the *Frampton* rule is to prevent the employer from terminating the employment of one employee in a manner that sends a message to other employees that they will lose their job if they exercise a similar, statutory right. *Powedertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1261 (Ind. Ct. App. 2002).

To succeed on a claim for retaliatory discharge, a plaintiff must demonstrate that his or her discharge was solely in retaliation for the exercise of a statutory right. *Prudy v. Wright Tree Service, Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005), *trans. denied*. We have previously explained that the word "solely" means only that any and all reasons for the discharge must be unlawful to sustain the claim for retaliatory discharge. *Id.* Accordingly, the employee must present evidence that directly or indirectly supplies the necessary inference of causation between the filing of a claim and the termination, such as proximity in time or evidence that the employer's asserted lawful reason for discharge is a pretext. *Powdertech*, 776 N.E.2d at 1262. An employee can prove pretext by showing: (1) the employer's stated reason for discharge has no basis in fact; (2) although based on fact, the stated reason was not the actual reason for his discharge; or (3) the stated reason was insufficient to warrant the discharge. *Id.*

III. *Proximity in Time*

Scott first alleges proximity in time exists between when he returned to work following his worker's compensation injury and his termination. Scott was injured in January 2003. He was released back to work without restrictions in May 2003. Then, two months later in July 2003, he was terminated. Scott argues that because the trial court focused on Chronicle's need to reduce its workforce, the trial court agrees proximity in time exists between Scott filing his claim and his termination. Conversely, Chronicle argues that no negative inference can be drawn between the date Scott returned to work and his termination; rather, Chronicle proposes the relevant date for timing purposes is the date Scott filed his worker's compensation claim and the day he was terminated.

Chronicle directs our attention to *Frampton*, 297 N.E.2d at 428 and *Markley Enter., Inc. v. Grover*, 716 N.E.2d 559, 565 (Ind. Ct. App. 1999), for support of its contention that Indiana courts have decided worker's compensation issues involving temporal proximity are based on the date an employee files a claim for worker's compensation, rather than the date an employee returns to work, with relation to the employee's termination. In *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 213 (Ind. Ct. App. 2005), *trans. denied*, we stated:

> [T]o survive a motion for summary judgment in a *Frampton* case, an employee must show more than a filing of a worker's compensation claim and the discharge itself. The employee must present evidence that directly or indirectly supplies the necessary inference of causation between the filing of a worker's compensation claim and the termination. For example, evidence of the proximity in time between the filing of the claim and the termination, or evidence that the employer's asserted lawful reason for discharge is a pretext can provide the necessary inference of causation needed to rebut a summary judgment motion.

(Internal citations omitted). Thus, the relevant date for timing purposes is the date an employee files his or her worker's compensation claim and the date he or she is terminated.

In the instant case, Scott filed his most recent worker's compensation claim in January 2003, returned to work without restrictions in May 2003, and was terminated in July 2003. We have previously reasoned, "[a]lthough a closer temporal connection between the two events often supports an inference of retaliatory intent, a six month lapse has also sufficed when the other evidence before the court calls into doubt the employer's reasons for discharge." *Markley*, 716 N.E.2d 559, 565 (Ind. Ct. App. 1999) (citing *Pepkowski v. Life of Indiana Ins. Co.*, 535 N.E.2d 114, 1168 (Ind. 1989)). Therefore, because proximity in time alone is not necessarily evidence of a retaliatory discharge, we find it necessary to delve further into the parties' designated evidence for an articulated reason that establishes, as a matter of law, Chronicle's retaliatory intent when it discharged Scott.

IV. *Pretext*

Our review of the record reveals satisfactory evidence that Scott's discharge was not retaliatory. Scott's employment was terminated based on Chronicle losing a commercial printing job in September 2002, four months before he filed his most recent worker's compensation claim. Chronicle's stated reason for terminating Scott was his last performance review; after discharging one press operator based on seniority, the remaining press operators had comparable seniority. Chronicle decided to use the remaining press operators' performance reviews to select the second press operator to terminate. Scott received a *two* on a scale of *one to five* on his most recent performance review; no other press operator received less than a three.

Additionally, the evidence establishes that of the forty people terminated in Chronicle's restructuring at least thirty of the forty employees had *never* filed a worker's

compensation claim during their tenure. Moreover, at least ten employees who were not terminated had filed worker's compensation claims. Lastly, the record indicates that after the terminations, a press operator, who was not terminated, voluntarily resigned and Chronicle offered the position to a former press operator who had previously filed a worker's compensation claim. Thus, we find Scott has failed to show that he was discharged "solely" for filing the worker's compensation claim. Chronicle has not only alleged an independent reason for terminating Scott's employment, *i.e.*, his poor performance review, but Chronicle's terminations due to loosing a commercial printing job and the need to restructure their business operations was not merely a pretextual cover for the retaliatory discharge of Scott. The designated evidence, when viewed in the light most favorable to Scott, does not permit an inference that Chronicle's stated reason for discharging Scott was merely a pretext.

## CONCLUSION

Based on the foregoing, we conclude the trial court did not err in granting Chronicle's Motion for Summary Judgment, thereby determining as a matter of law Scott's discharge from Chronicle was not retaliatory in nature.

Affirmed.

BAKER, C.J., and SHARPNACK, J., concur.