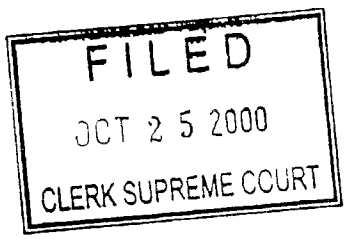
IN THE COURT OF APPEALS OF IOWA

No. 0-433 / 99-1741
Filed October 25, 2000

DAVID McMAHON,
Plaintiff-Appellant,

vs.

MID-AMERICA CONSTRUCTION COMPANY OF IOWA, n/k/a KNUTSON CONSTRUCTION SERVICES MIDWEST, INC. and WILLIAM J. MUNDT,
Defendants-Appellees.



Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

Plaintiff appeals the district court's ruling granting summary judgment to the defendants in his wrongful discharge case. **AFFIRMED.**

Thomas D. Wolle and Chris J. Scheldrup of Moyer & Bergman, P.L.C., Cedar Rapids, for appellant.

Donald G. Thompson and Ellen Ramsey-Kacina of Bradley & Riley, P.C., Cedar Rapids, for appellees.

Heard by Vogel, P.J., and Miller and Hecht, JJ.

HECHT, J.

David McMahon appeals the district court's ruling granting summary judgment to the defendants in his wrongful discharge case. He contends the court erred in holding there is no cause of action for refusing to rehire an employee in retaliation for filing a workers' compensation claim. We affirm the decision of the district court.

I. Factual Background and Proceedings. McMahon worked for Mid-America Construction Company n/k/a Knutson Construction Services Midwest ("Mid-America") from 1990 until 1996. He worked primarily as an ironworker connecting steel and welding. On March 24, 1995, while working for Mid-America on a building project, he fell approximately twenty-four feet to the ground, fracturing his third lumbar vertebra and his sternum. Due to his injuries, he was off work until July 10, 1995. At that time, he returned to work for Mid-America and worked on a project as the foreman in charge of rebar and structural steel. He transferred to another project for Mid-America in the early fall of 1996.

On August 16, 1996, McMahon filed a claim for workers' compensation benefits based on his March 1995 injuries. He testified after filing the claim, he felt as if the superintendents who were in charge of supervising Mid-America's various projects mistreated him. He felt as if they no longer included him in decisions in the same way they had before he filed the claim. When he returned to work following his injury, McMahon had several medical restrictions, including the amount of weight he could lift on the job. He claims one superintendent

commented he "always got all the handicapped" on his jobs. McMahon testified he felt harassed on the job site because his co-employees often asked him if he needed help lifting certain items and he felt as if they were treating him differently because of his restrictions. McMahon testified Mid-America accommodated his physical restrictions and found work for him to do taking into account his injury.

In December of 1996, the project McMahon worked on ran short of work for welders. As a result, the superintendent in charge of the project, William Mundt, laid off some of the steelworkers. On December 6, 1996, McMahon heard about the layoffs and went to Mundt to volunteer to take a layoff. During his deposition testimony, McMahon testified about the reason he wanted some time off.

> Well, there was nothing to do, and it was right before deer season, and they said they were laying people off, and I thought, with my attitude right now, I could sure use two weeks, and I could go deer hunting all week, so I suggested I take two weeks, and they said perfect. . . .

Mundt told McMahon it would be two or three weeks before they got the steel to the worksite to continue the job. Mundt also prepared a "Personnel Action Form" on December 9, 1996, which stated, "Since we were short of work Dave asked if he could take a voluntary lay-off until we got more work to do. I said that would not be a problem."

All of Mid-America's superintendents who testified stated the company maintained an informal unwritten policy when an employee was laid off, it was the employee's responsibility to contact the various project superintendents to see if work was available when they wished to return to work. McMahon had

voluntarily taken a layoff twice during his time at Mid-America and both times was rehired after he called a superintendent inquiring about work. McMahon contacted two supervisors, Ronald Kron and Jim Mott, regarding work five or six weeks after he accepted the December 1996 layoff. McMahon testified both Kron and Mott told him they did not have work for welders at their job sites at that time. The record indicates McMahon did not talk to any other superintendents about returning to work, but he did speak to other employees of Mid-America. He testified the employees told him "they heard through the grapevine" Mid-America was not going to hire him back because he filed a claim for workers' compensation benefits.

McMahon filed the present lawsuit on January 30, 1998, alleging Mid-America and Mundt wrongfully terminated him and failed to rehire him in retaliation for filing a workers' compensation claim. Mid-America filed a motion for summary judgment on August 4, 1999. The district court granted the motion on September 30, 1999, holding wrongful failure to rehire an employee for filing a workers' compensation claim is not actionable in the State of Iowa and dismissing all of McMahon's claims.

II. Standard of Review. Summary judgment rulings are reviewed for errors at law. *Gerst v. Marshall,* 549 N.W.2d 810, 811 (Iowa 1996). We examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law. *Weinzetl v. Ruan Single Source Transp. Co.,* 587 N.W.2d 809, 810 (Iowa App. 1998). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c). We review the record in a light most favorable to the non-moving party. *Wright v. American Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999). When the facts are not in dispute, we will decide whether the district court correctly applied the law to the undisputed facts before us. *Iowa Tel. Ass'n v. City of Hawarden,* 589 N.W.2d 245, 250 (Iowa 1999).

III. Public Policy Exception. McMahon concedes Iowa has not recognized a cause of action for wrongful failure to rehire an employee in retaliation for seeking workers' compensation benefits. He argues we should recognize the claim based on the public policy recognized in *Springer v. Weeks & Leo, Co.*, 429 N.W.2d 558 (Iowa 1988).

McMahon was an at-will employee. In the absence of a valid employment contract, an employer may terminate an employee at any time, for any *lawful* reason; in other words, a reason that is not contrary to public policy. *Lockhart v. Cedar Rapids Community Sch. Dist.,* 577 N.W.2d 845, 846 (Iowa 1998) (emphasis in original). Iowa has recognized two narrow exceptions to this general rule: (1) where the discharge clearly violates a "well-recognized and defined public policy of the state" and (2) where a unilateral contract is created by an employer's handbook or policy manual. *Phipps v. IASD Health Servs. Corp.,* 558 N.W.2d 198, 202 (Iowa 1997). The public policy exception is based on the theory employers should not be allowed to fire employees for reasons that violate

public policy. *Borschel v. City of Perry,* 512 N.W.2d 565, 567 (Iowa 1994). Recently, our supreme court warned against broad application of the public policy exception stating, "we must proceed cautiously when asked to declare public policy to support an exception to the at-will doctrine, and only utilize those policies that are well-recognized and clearly defined." *Fitzgerald v. Salsbury Chem., Inc.,* 613 N.W.2d 275, 283 (Iowa 2000) (quoting *Burnham v. Karl & Gelb, P.C.,* 745 A.2d 178, 182 (Conn. 2000) (holding public policy exception is narrow and courts should not lightly intervene to impair the exercise of managerial discretion.))

In *Springer*, our supreme court held one of the "well-recognized and defined public policies" in employment relationships is violated when an employer discharges an employee for exercising his or her rights under the workers' compensation statute. *Springer,* 429 N.W.2d at 559-60. In deciding that case, the court relied on the public policy expressed in Iowa Code section 85.18, which provides, "No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by [the workers' compensation] chapter except as herein provided." Iowa Code § 85.18 (1997). In recognizing a claim for retaliatory discharge for seeking workers' compensation benefits, the court noted the "untenable result" of making an employee choose between continued employment and the receipt of workers' compensation benefits. *Springer,* 429 N.W.2d at 561; *see also Below v. Skarr,* 569 N.W.2d 510, 512 (Iowa 1997).

McMahon does not argue retaliatory discharge, nor could he. He volunteered to take the layoff when he heard the company was short on work because he wanted to go deer hunting and thought he needed some time off. No representative of the company asked him to take the layoff nor did they force him to do so. McMahon contends, however, the same public policy that protects an employee's interest in not being terminated in retaliation for seeking workers' compensation benefits should protect the interest of one who, after a voluntary layoff, seeks to be rehired after making a workers' compensation claim. We conclude, however, we need not reach the question of whether an employer's refusal to rehire in retaliation for pursuing workers' compensation benefits is actionable in Iowa. Even if such a cause of action could be stated in Iowa, summary judgment was the appropriate disposition on this record.

Under the *Springer* analysis, McMahon would have the burden to produce substantial evidence his protected conduct of seeking workers' compensation benefits was a determining factor in Mid-America's refusal to rehire him. *See Weinzetl,* 587 N.W.2d at 811. In other words, as plaintiff, McMahon would be required to produce sufficient evidence to generate a fact question on the issue of whether there was a causal connection between his protected conduct and the employer's refusal to rehire him. *Teachout v. Forest City Community Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998). A factor is determinative if it is the reason that "tips the scales decisively one way or the other," even if it is not the predominant reason behind the employer's decision. *Id.* at 302 (quoting *Smith v. Smithway Motor Xpress Inc.,* 464 N.W.2d 682, 686 (Iowa 1990)).

McMahon asserts several statements and portions of testimony in his resistance to Mid-America's motion for summary judgment. When considering his resistance, we look for guidance in rule 237(e) of the Iowa Rules of Civil Procedure, which provides in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

Iowa R. Civ. P. 237(e). McMahon attempted to prove Mid-America's failure to rehire him was in retaliation for his filing of a workers' compensation claim by asserting an employee of Mid-America (Alan Christiansen) told him one of the company's superintendents (Lyle Seydel) said the president of the company (Robert Marsh) said Mid-America would not rehire McMahon because he filed a workers' compensation claim. It is at once apparent this evidence contains several layers of hearsay. Although a statement by Mid-America's president could arguably be admissible as an admission of the company pursuant to Iowa Rule of Evidence 801(d)(2)(C) or (D) if presented in a proper form, it was multiple-level hearsay when presented as Christiansen's account of Seydel's report of the company president's statement. McMahon offers no argument or authority suggesting the hearsay is admissible under an exception to the hearsay rule. Inadmissible evidence does not meet the standard of Iowa Rule of Civil Procedure 237(e). *Willis v. City of Des Moines,* 357 N.W.2d 567, 573 (Iowa

1984). McMahon cannot rely on this hearsay evidence to support his claim. Furthermore, the summary judgment record includes the testimony of Christiansen, Seydel, and Marsh who expressly denied making the statements McMahon attempts to attribute to them.

McMahon argues other evidence presented rises to the level of substantial evidence of Mid-America's retaliatory purpose in failing to rehire him. He testified he could "sense" a difference in the way he was treated after filing his workers' compensation claim. In general, he claims he was made to feel less like he was a member of the team. As further evidence of the employer's intent to retaliate against him, McMahon points to: (1) post-injury inquiries from unidentified co-employees as to whether he needed assistance in performing his work; and (2) his supervisor's complaint about having all of the injured workers assigned to his crew. The summary judgment record does not suggest the inquiries about his need for assistance in the performance of his work after a serious injury were in any way inappropriate. There is no factual basis in the record upon which to conclude the inquiries were motivated by retaliatory animus. Nor is there evidence in the record tending to prove the supervisor who made the complaint about disabled workers on his crew played any part in the decision not to rehire McMahon. McMahon has the burden of supporting his claims with substantial evidence. Evidence is substantial for purposes of sustaining a finding of fact when reasonable minds would accept it as adequate to reach a conclusion. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). The party resisting summary judgment "may not rest upon the mere allegations or denials

in the pleadings." Iowa R. Civ. P. 237(e). The resistance must set forth specific facts that constitute competent evidence showing a *prima facie* claim. *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989). McMahon must assert more than mere generalities in order to carrying his burden of substantial evidence. *See id.* In short, a reasonable fact-finder could not view these matters as evidence McMahon's protected activity was a determining factor in Mid-America's decision not to rehire him.

McMahon points out other construction workers with similar skills to his own were hired or rehired during the time he was looking to return to Mid-America. All of these workers, except one, however, requested an opportunity to return to work by contacting the superintendent who rehired them. Mid-America admits it affirmatively called one worker who was on layoff during the relevant time period and invited him to return to work. That employee's superintendent testified he made the call because the employee in question possessed skills other than welding that were needed on the job site. A reasonable fact-finder could not find this isolated deviation from the company policy to be substantial evidence tending to prove McMahon's protected activity was a determining factor in Mid-America's decision not rehire him after the voluntary layoff.

Because we have concluded McMahon has not produced substantial evidence his protected activity was a determining factor in Mid-America's decision not to rehire him, we need not address his contention the record contains substantial evidence tending to prove the company's stated reasons for not rehiring him are based upon pretext.

IV. Conclusion. We do not decide whether a claim for wrongful failure to rehire an employee for filing a claim for workers' compensation benefits is cognizable in Iowa because, even if such a claim were actionable, McMahon has not presented substantial evidence tending to prove his protected activity was a determining factor in Mid-America's decision not to rehire him. We affirm the district court's grant of summary judgment in favor of Mid-America and the dismissal of McMahon's claims.

AFFIRMED.