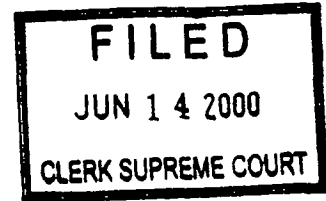


IN THE COURT OF APPEALS OF IOWA

No. 0-185 / 99-1252
Filed June 14, 2000



DANA L. ADMIRE,
Plaintiff-Appellant,

vs.

CHEROKEE COUNTY, A Municipal
Corporation,
Defendant-Appellee.

Appeal from the Iowa District Court for Cherokee County, John P. Duffy,
Judge.

Plaintiff appeals following the grant of summary judgment dismissing his wrongful termination action against Cherokee County. He contends the facts before the court were sufficient to generate genuine issues of material fact on his claims that he was terminated in retaliation for his filing both a workers' compensation claim and an unemployment insurance claim. **AFFIRMED.**

Willis J. Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellant.

John H. Cook, Jr., of Herrick, Ary, Cook, Cook, Cook & Cook, Cherokee,
for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Plaintiff Dana Admire appeals the grant of summary judgment in favor of defendant **Cherokee County**, contending there is a genuine issue of material fact concerning whether Cherokee County terminated his employment in retaliation for filing a workers' compensation claim and an unemployment benefits claim. We agree with the trial court that there is no genuine issue of material fact, and Cherokee County is entitled to judgment as a matter of law. We therefore affirm.

I. Scope and Standard of Review

A summary judgment ruling is reviewed for errors of law. *Teachout v. Forest City Community School Dist.*, 584 N.W.2d 296, 298 (Iowa 1998). Summary judgment should be granted where the moving party shows there is no genuine issue of material fact and he or she is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Teachout*, 584 N.W.2d at 298. In assessing whether the movant has met this standard, we view the record in the light most favorable to the nonmoving party, *Teachout*, 584 N.W.2d at 298, and consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Iowa R. Civ. P. 237(c).

II. Factual and Procedural Background

Viewing the facts in a light most favorable to Admire, the record fairly reveals certain facts. Admire was employed by the Cherokee County Secondary Roads Department as a heavy equipment operator. His job duties required him to be able to climb ladders, steep slopes, walk, stand, bend, sit and kneel and lift and carry up to one hundred pounds. On October 11, 1993, Admire sustained an injury in the course of and in the scope of his employment. As a result of this

result of this injury, he filed for and received workers' compensation benefits, and was unable to return to his previous work capacity with Cherokee County for the next ~~twenty-three~~ months. On June 12, 1995, Admire's treating physician wrote a letter advising that Admire could return to his job for sedentary work only, and could not engage in any prolonged standing, walking or carrying. A ten pound weight limit was placed on his carrying activities. Admire asked Cherokee County whether he could return to work, but was informed there was no work for him within his prescribed limitations.

Admire filed for unemployment compensation, and the County contested his claim. Hearing on the unemployment compensation application was held September 12, 1995. One day later, the Iowa Department of Employment Services found Admire eligible for unemployment insurance benefits. On the same day, the Cherokee County Engineer sent a letter to Admire, advising him they had received the June 12, 1995, letter from Admire's treating physician, and that Cherokee County had no work for him within the restrictions placed upon Admire's physical activities. The letter further advised Admire his employment with Cherokee County would be terminated on September 25, 1995, if he did not obtain a full release from his physician. Having received no response from Admire by September 25, Cherokee County terminated Admire's employment.

Admire filed this petition at law on September 18, 1997. In it, Admire alleged as a direct consequence of his filing a workers' compensation claim, Cherokee County wrongfully retaliated against him by terminating his employment. The petition further alleged Admire suffered lost earnings and emotional distress as a direct result of the wrongful termination.

On June 29, 1999, the district court sustained the County's motion for summary judgment, finding there was no evidence in the record that the existence of a compensable injury and receipt of workers' compensation benefits was even a factor in the County's decision to terminate his employment, "much less a determinative one." *Admire* appeals.

III. Merits

A. The Law

The parties agree *Admire* is an employee at will. Even an employee at will, however, may not be terminated for a reason contrary to public policy. *Teachout*, 584 N.W.2d at 299. When an employee is terminated for a reason that violates a well-established public policy, the employee has a remedy for damages. *Id.* To recover damages under these circumstances, a plaintiff must establish (1) engagement in a protected activity, (2) an adverse employment action, and (3) a causal connection between the two. *Id.*

There is no dispute *Admire* engaged in protected activities, filing a workers' compensation claim and an unemployment compensation claim. See *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (holding "retaliatory discharge of an employee who files a claim for partial unemployment benefits" is in violation of a defined public policy of the state); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558 (Iowa 1988) (recognizing a cause of action for retaliatory discharge due to filing of a workers' compensation claim). Further, it is undisputed *Admire* suffered an adverse employment decision—his termination. The controversy in this case is whether *Admire* presented any evidence that created a genuine issue of material fact concerning whether there was a causal

relation between Admire's protected activity and the County's decision to terminate his employment.

The causation standard in a common-law retaliatory discharge case is high. *Teachout*, 584 N.W.2d at 301. "The employee's engagement in protected conduct must be the *determinative* factor in the employer's decision to take adverse action against the employee." *Id.* (emphasis in original). 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)).

Proof that the adverse employment action occurred after protected employee conduct, without more, is insufficient to generate a fact question on the determining factor issue. *Phipps v. IASD Health Services Corp.*, 558 N.W.2d 198, 203 (Iowa 1997). Further, it is not a violation of Iowa public policy to terminate the employment of an employee for absenteeism due to work-related injuries. See *Weinzetl v. Ruan Single Source Transp. Co.*, 587 N.W.2d 809, 812-13 (Iowa App. 1998).

B. Application of the Facts to the Law

Admire contends he presented sufficient evidence to create a genuine issue of material fact concerning whether his receipt of workers' compensation and unemployment benefits was a determinative factor in the County's decision to terminate his employment. Admire points to evidence the County initiated steps toward termination the same day the decision granting him unemployment compensation was rendered; reasons offered at different times by the County for

his termination, reasons he claims are irreconcilable; and evidence the County was acutely aware of his injured status and his receipt of benefits.

Admire's petition only pled his employment was terminated in retaliation for filing a workers' compensation claim. It made no claim his employment was terminated in retaliation for filing an unemployment compensation claim or receiving unemployment benefits. He did not amend his petition to add such a claim. He therefore cannot, on appeal, rely on such a claim to support his assertion that summary judgment should not have been granted. See, e.g., *Yockey v. State*, 540 N.W.2d 418, 422 (Iowa 1995) (holding plaintiff cannot make out a jury case on appeal by showing wrongful discharge based on a theory not alleged in district court). Further, the trial court's ruling did not address a retaliatory discharge claim based upon Admire's filing an unemployment compensation claim or receiving unemployment benefits, and Admire did not file a rule 179(b) motion asking the trial court to expand its ruling. See *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999) ("A rule 179(b) motion is necessary to preserve error when a trial court fails to resolve an issue, claim, defense, or other theory properly submitted to it for adjudication.").

We also note the County Engineer's letter which led to Admire's termination is dated the same day the Iowa Department of Employment Services rendered its decision awarding Admire unemployment benefits, September 13, 1995. It thus appears highly unlikely the County was aware benefits had been awarded when its letter was written and sent, and there is no evidence the County was aware of the award. With no evidence the County was aware of the

award there can be no fact issue concerning whether the *award* of benefits was a determining factor in Admire's termination.

During the course of the workers' compensation proceedings, interrogatories were propounded to the County by the Second Injury Fund of Iowa. In one interrogatory, the County was asked why Admire's employment had been terminated, and the County answered the termination was due to "[b]udget restrictions and shortages of work. . . ." In an affidavit submitted in support of the County's motion for summary judgment in this case, the County, through the County Engineer, stated the reason for Admire's termination was "the County's need for securing suitable secondary road operators...." Admire contends these reasons offered by the County are irreconcilable, therefore indicating neither was in fact the reason Admire was terminated.

When divorced from context the statements might be seen as asserting somewhat different reasons for Admire's termination. However, when viewed in the context of undisputed facts concerning Admire's injury, limitations and inability to perform his job, the statements are not only reconcilable but very consistent. Admire worked for the County's secondary roads department in a position that involved operating heavy equipment and performing heavy physical labor. The "[b]udget restrictions" language in the first statement can reasonably only be referring to the County's inability to afford keeping on the payroll indefinitely an employee who could not perform the work the County had available for the employee and needed performed. Admire's medically prescribed limitations resulted in "shortages of work" he could perform within those limitations and led to "the County's need for securing suitable secondary

road operators" who could do the job he could no longer do. The two statements do not present a genuine issue of material fact concerning the reason for Admire's termination.

Finally, Admire contends the County's awareness of his injury and receipt of workers' compensation benefits is sufficient evidence of causation to survive a summary judgment motion. Admire's argument is little different, if at all different, than the argument that an adverse employment action occurring after protected employee conduct is sufficient proof to generate a fact question and survive a summary judgment motion. The Iowa Supreme Court has, as noted above, rejected this argument. *Phipps*, 558 N.W.2d at 203. Further, the *Phipps* holding is premised upon an assumption the employer is aware of the injury and subsequent receipt of benefits. Evidence of the employer's knowledge of the injury and receipt of benefits is necessary, but not sufficient, to generate a fact question to survive a motion for summary judgment in a retaliatory discharge action based on claiming or receiving workers' compensation benefits.

We agree with the trial court that the only *facts* Admire presented in resistance to Cherokee County's motion for summary judgment were his termination after engagement in a protected activity. Therefore, the trial court did not err in granting the County's motion for summary judgment.

AFFIRMED.