IN THE COURT OF APPEALS OF IOWA

No. 2-293 / 91-1266

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CLERK SUPREME COURT

DAVID E. CHYMA,

Appellant,

vs.

TRACKERS, INC.,

Appellee.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Judge.

The plaintiff appeals a judgment of the district court dismissing his claims of retaliatory discharge and unpaid commissions. **AFFIRMED.**

M. Leanne Tyler, Davenport, for appellant.

Bryan L. Sylvester of Goebel & Koury, Davenport, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Plaintiff David Chyma began his employment with defendant Trackers, Inc. on November 23, 1987. Chyma was an experienced debt collector. He was hired to handle all of the bank collection files from People's Bank in Waterloo, Iowa. Initially Chyma received a salary plus commissions. Beginning in January 1988 he was paid strictly on commissions. The bank collection files were the largest accounts at Trackers. Thus, Chyma received the largest commissions among the employees there. He was named "Collector of the Month" on a number of occasions. He also received bonuses totaling over $10,000 in his first eighteen months on the job.

The evidence shows several things happened to change this rosy employment picture. The other employees complained Chyma had received the most lucrative collection files. The employer then terminated the bonus program and began to distribute the bank collection files to other employees. At about the same time Chyma's attitude changed so he was no longer as aggressive in making collections. He admitted he started spending only about four or five hours per day working on his assigned files. The president of Trackers, Phillip Berg, talked to Chyma twice in the fall of 1989 concerning his attitude.

In November 1989 Trackers was investigated by the Department of Labor concerning overtime pay. The investigation was based on a complaint filed by a former

employee, Thomas Henderson. The investigation revealed Trackers had not followed the standard wage and hour guidelines in paying its employees. Trackers was required to pay its employees a total of $7,553 for unpaid overtime. Chyma received $5,219 of this amount.

On January 4, 1990, Berg delivered to Chyma a check for $5,219, the amount of back overtime for which he had not been paid. At this meeting Chyma told Berg he wanted to work on only a part-time basis and only on the accounts he had previously set up on an installment plan. Berg then told Chyma he was fired.

Chyma filed the present action in March 1990 based on claims of retaliatory discharge and unpaid commissions. The district court found there was insufficient evidence Chyma had been discharged in retaliation for the investigation. The court found Chyma had been discharged because of his work performance. The court also found there was no provision in Chyma's employment contract for the payment of commissions after he was terminated and it was not the general practice of the business to pay commissions after an employee quit or was discharged. The court then dismissed the action. Chyma appealed.

I. Scope of Review.

This case was tried at law, and, on appeal our review is limited to correction of legal error. See Hulme v. Barrett, 480 N.W.2d 40, 41 (Iowa 1992). Under this standard of review, we give the district court's factual

findings the weight of a special verdict; they are binding on us if supported by substantial evidence in the record. Id. Evidence is substantial if a reasonable person would accept the proof as adequate to reach a conclusion. Id.

When a trial court, in a law action tried to the court, denies recovery because of a party's failure to carry his burden of proof on an issue, we will not interfere on appeal unless we find the party carried his burden as a matter of law. Crookham v. Structural Contractors, Ltd., 466 N.W.2d 277, 278 (Iowa App. 1990). Where this happens, on appeal the evidence in the party's favor must be so overwhelming that only one reasonable inference could be drawn. K. Carr v. Hovick, 451 N.W.2d 815, 817 (Iowa 1990). On review, we examine the evidence in the light most favorable to the judgment. Id.

II. **Retaliatory Discharge.**

A. The general rule is an employee at-will can ordinarily be fired at anytime by an employer. Niblo v. Parr Manufacturing, Inc., 445 N.W.2d 351, 352 (Iowa 1989). However, under proper circumstances an employee may bring a common-law claim for wrongful discharge from employment when such employment is terminated for reasons contrary to public policy. Id.

To prove a prima facie case of retaliatory discharge, a plaintiff must prove (1) involvement in statutorily protected activity; (2) adverse employment action; and (3) a causal connection between the two. Hulme v. Barrett, 480

N.W.2d 40, 42 (Iowa 1992). The employee's assertion of his statutorily protected rights must be the determinative factor behind the firing. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686 (Iowa 1990). A "determinative factor" need not be the main reason behind the decision; it need only be the reason which tips the scales decisively one way or the other. Id.

B. Chyma first contends the district court applied an erroneous burden of proof in evaluating his claim of retaliatory discharge. He believes the court required him to prove the employer's predominant purpose in firing him was retaliation.

The district court stated:

> In any event, it appears to this Court that in order for the plaintiff to recover based on the issue of wrongful termination, there must be evidence in the record establishing by a preponderance that the actions taken by the defendant were as a result of either the wage and hour dispute and/or the consulting of an attorney, and the Court finds that this preponderance has not been met.

(Emphasis added.)

Chyma's claim is based on a misquote of the underlined word as "predominance". Because the court did not actually use the word "predominance," but correctly stated Chyma was required to prove his claims by a preponderance of the evidence, we determine the court applied the correct burden of proof.

C. Chyma also contends the evidence in his favor is so overwhelming the court should have ruled in his favor as a

matter of law. He points to the fact he was fired at the same meeting he received his check for unpaid overtime. The Department of Labor did not reveal to Trackers the identity of the person who had complained about the failure to pay for overtime. Chyma benefited the most from the investigation, and thus he claims the employer could have believed he had been the person who complained to the department.

We conclude the district court's finding Chyma was terminated because of his job performance is supported by substantial evidence. The evidence shows Chyma became disenchanted with his job after he was no longer assigned only large accounts. As the supreme court has noted, the protection afforded by antiretaliatory legislation does not immunize a plaintiff from discharge for past or present inadequacies, unsatisfactory performance, or insubordination. Hulme, 480 N.W.2d at 43. We affirm the decision of the district court on the issue of retaliatory discharge.

III. Unpaid Commissions.

A. Chyma contends under Iowa Code section 91A.4 he is entitled to commissions which accrued after his termination. He relies upon the case Williams v. Davenport Communications Limited Partnership, 438 N.W.2d 855, 857 (Iowa App. 1989), in which a plaintiff was awarded commissions which accrued after she quit her job. However, in Williams a previous small claims action had established

the plaintiff was entitled to payment for the commissions in question. Id. Thus, the issue before us was not addressed in Williams.

The present case is more similar to Crookham v. Structural Contractors, Ltd., 466 N.W.2d 277 (Iowa App. 1990). Crookham claimed he was entitled to severance pay. Id. at 278. His claims were denied because he could not show an agreement or a set policy to pay severance payments. Id.

In the present case the district court found Chyma's employment contract did not provide for the payment of commissions after termination. The court also found there was no practice in the collection agency business to pay commissions after an employee was separated from his or her employment. These findings are supported by substantial evidence. We conclude Chyma has failed to show he is entitled to commissions which accrued after he was discharged.

B. Chyma has also alleged the district court erred in finding he did not show ascertainable damages under his claim for earned commissions after discharge pursuant to section 91A.4. Because of our conclusion above, we need not address this issue.

We have considered all issues which were raised in this appeal, and we affirm the district court. Costs on appeal are assessed to the appellant.

AFFIRMED.