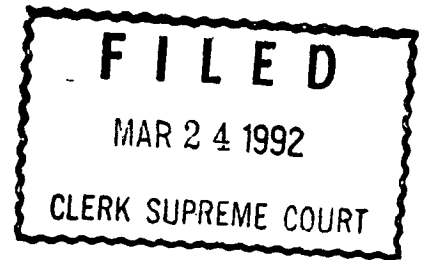


IN THE COURT OF APPEALS OF IOWA

No. 1-617 / 91-450



MARK STEVEN GROMMET,

Appellee,

vs.

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MIDLAND TRANSPORTATION CO.,

Appellant.

Appeal from the Iowa District Court for Marshall County, Timothy J. Finn, Judge.

The defendant appeals from a ruling by the district court awarding the plaintiff compensatory and punitive damages in his action for retaliatory discharge. **AFFIRMED**

Theodore R. Hoglan of Fairall, Fairall, Kaplan, Hoglan, Condon & Klaessy, Marshalltown, for appellant.

George S. Eichhorn of Eighorn, Elverson & Vasey, Des Moines, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

In August 1988 the plaintiff, Mark Grommet, filed an application for employment with the defendant, Midland Transportation Company (Midland) in Marshalltown, Iowa. In completing the application, Grommet indicated that he had not been discharged for poor performance by any of his last three employers. At the end of the month, Grommet was hired by Midland as a loading dock worker.

On the evening of September 6, 1988, Grommet was injured while working. Midland was informed of the injury, and a First Report of Injury was completed the following morning. The written report was given to the president of Midland, Gerald Mattox, within twenty-four hours of the injury. Apparently, Mattox held the document for five days after receiving it before submitting it to Midland's workers' compensation insurer.

A company doctor diagnosed Grommet with cervical strain and gave him a prescription for medication. The injury prevented Grommet from working until September 14, when he was given a release to return to work. Within a week of Grommet's injury and before Grommet returned to work, Mattox and Ed Klosterman, the terminal manager, had a meeting concerning Grommet. They decided to terminate his employment with Midland at that meeting. When Grommet returned on September 15, he was told by Terry Keller, his supervisor, that he had been replaced.

Grommet returned to Midland to seek payment for his medical prescription. He claims a secretary, Cindy Klosterman, was rude to him telling him he had not worked long enough to receive workers' compensation benefits and that her husband, Ed Klosterman, "had to pay for the prescriptions out of his pocket." Grommet also claims the secretary threw the envelope containing the money at him.

At the end of September, Grommet began to receive benefits from Midland's workers' compensation insurer, and Midland's insurer also paid for Grommet's medical expenses, including his prescription.

Grommet filed a petition against Midland alleging retaliatory discharge and demanding both compensatory and punitive damages. He claims he was terminated because he made a valid claim for workers' compensation benefits. Midland answered, asserting Grommet was terminated for other reasons. Midland contended Grommet was terminated because he was found to have misrepresented his employment history on the Midland employment application, he was not doing a good job, and his probationary period had not yet expired.

Midland filed a pretrial motion for summary judgment, asserting Grommet's claim should be denied as a matter of law. The district court overruled the motion. At trial, Midland requested a directed verdict on Grommet's claim and objected to the jury instructions on emotional distress and punitive damages on the basis they were unsupported by the

evidence. The district court overruled the motions and objections.

The case was submitted to a jury which found for Grommet, awarding him \$7,421.29 in compensatory damages and \$5,000 in punitive damages. The trial court entered judgment in Grommet's favor, and Midland filed motions for new trial and for judgment notwithstanding the verdict. The district court denied the motions, and Midland has appealed.

Our scope of review in this law action is for the correction of errors at law. Iowa R. App. P. 4. This appeal presents three questions for our review. The first is whether Grommet's claim generated a genuine issue of material fact, and therefore, warranted submission to a jury. The second is whether Grommet's claim is supported by substantial evidence. The third question is whether the reasoning behind the trial court's denial of Midland's new trial motion is clearly untenable. Our answers to these questions demonstrate the trial court committed no error nor abused its discretion. Accordingly, we affirm the trial court's judgment.

I. Summary Judgment Motion. Summary judgment is appropriate only when no genuine issue of material fact exists and any conflicts pertain only to the legal consequences flowing from the undisputed facts. Farm Bureau Mutual Insurance Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the

nonexistence of a material fact, id., and the evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that can be reasonably deduced from the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds could differ on how the issue should be resolved. Id.

The nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e).

On our review, we find Grommet's claim generated a genuine issue of material fact. That is, was Grommet discharged in retaliation for pursuing his rights under the workers' compensation laws. Therefore, we find no error in the trial court's denial of Midland's motion for summary judgment.

II. Motions for Directed Verdict and Judgment Notwithstanding the Verdict. Midland next argues the trial court erred in denying its motions for directed verdict and

for judgment notwithstanding the verdict. We view the evidence in accordance with the same principles required for review by the trial court. Slocum v. Hammond, 346 N.W.2d 485, 493 (Iowa 1984). A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party, Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2), and the movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of the claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984). The same rule applies to a motion for judgment notwithstanding the verdict. See Valadez v. City of Des Moines, 324 N.W.2d 475, 477 (Iowa 1982); Iowa R. Civ. P. 243(b). Furthermore, the motion for judgment notwithstanding the verdict must stand on grounds raised in the directed verdict motion. Id. The trial court is vested with considerable discretion in determining whether

evidence is sufficient. Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 687 (Iowa App. 1989).

On the record before us, we find substantial evidence supporting each element of Grommet's claim. We believe Grommet's evidence was sufficient to present a jury issue as to whether his discharge was due to his filing of a workers' compensation claim against Midland. We also believe Grommet presented sufficient evidence to support submission of the emotional distress and punitive damages issues to the jury. As such, we hold the trial court committed no error in overruling Midland's motions for directed verdict and judgment notwithstanding the verdict.

A. Retaliatory Discharge Claim. In Springer v. Weeks & Leo Co., the Iowa Supreme Court stated

discharging an employee merely for pursuing the statutory right to compensation for work-related injuries offends against a clearly articulated public policy of this state. This type of conduct by an employer, if established, will support a claim for tortious interference with the contractual relationship.

429 N.W.2d 558, 559 (Iowa 1988). Such retaliation may not be "allowed to weigh at all in the employer's decision to discharge" an employee. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686 (Iowa 1990)(retaliation need not be the determining or even the predominant motivation).

Jury Instruction number 9, which was submitted to the jury in this case, provides:

Plaintiff must prove all of the following propositions:

1. That Mark Grommet was an employee of Midland Transportation Co.

2. That Midland Transportation Co. discharged Mark Grommet from employment.
 3. That Midland Transportation Co. discharged Mark Grommet because he was pursuing his rights under the Iowa Worker's Compensation Laws.
 4. That the discharge was a proximate cause of damage to Mark Grommet.
 5. The nature and extent of the damage.
- If the Plaintiff has failed to prove any of these propositions, the Plaintiff is not entitled to damages. If the Plaintiff has proved all these propositions, then you will consider the defense of discharge for cause as defined in Instruction No. [10].

Jury Instruction number 10 provides:

The Defendant claims it had good cause for discharging the Plaintiff because he was still working under his 90-day probationary period allowing the Defendant to discharge for any cause; the Plaintiff's work performance was not satisfactory; and the Plaintiff failed to list a prior employer on his job application and the Defendant through its efforts contacted this employer and did not receive a good work recommendation for the Plaintiff. If the Defendant has proved good cause for the discharge, the Plaintiff cannot recover damages. If the Defendant has failed to prove good cause for the discharge, then you shall decide if the Plaintiff is entitled to recover damages under the other instructions.

The evidence in this case, viewed in its light most favorable to Grommet, establishes the report of Grommet's work-related injury caused the company president and the terminal manager to hold a meeting where it was decided that Grommet's employment with Midland should be terminated. The decision to fire Grommet was made less than a week after he reported his injury and filed for workers' compensation benefits. Mattox made the decision to fire Grommet and in doing so relied heavily on

Klosterman's recommendation. Mattox stated Klosterman had told him Grommet "did not seem to be working out."

However, Midland was unable to offer a coherent or credible explanation for Grommet's discharge. The evidence shows Grommet was not discharged for poor performance. Mattox specifically testified Grommet was not discharged for poor performance. Additionally, Klosterman's testimony established the company's practice was to warn probationary employees before terminating them for poor performance, yet there is no evidence to suggest Grommet was ever warned his performance was unsatisfactory.

Midland's answers to interrogatories stated Klosterman observed Grommet's poor performance, but Klosterman testified at trial that he did not observe any poor performance by Grommet. Neither did Klosterman remember anyone informing him that Grommet's performance was poor. Klosterman testified that he did not remember recommending that Grommet be terminated.

The record does not suggest Grommet was discharged for failing to properly complete his employment application either. Gerald Mattox testified that Grommet was not fired for any failure to properly complete his employment application. The Midland employment application only instructs the applicant to list his or her last three employers. The record shows that Swift, the former employer contacted by Klosterman, was not one of Grommet's last three employers. Therefore, Grommet had no reason to

supply Midland with an account of the circumstances under which he left Swift.

Mattox testified Grommet was fired from Midland because he had performed poorly in the past with Swift. However, this information regarding Grommet's employment history was not known to Midland until Klosterman called Swift--after Grommet's injury. Klosterman's father-in-law had apparently told Klosterman that Grommet had worked at and been discharged from Swift.

Midland argues the temporal proximity of Grommet's discharge and his filing for benefits is merely coincidental. Midland asserts the large number of employees and the volume of workers' compensation filings at Midland make it unlikely that Grommet was singled out for retaliation. Despite these contentions, the record suggests Grommet's case did receive an inordinate amount of the terminal manager's attention. In fact, the record shows Grommet's injury and claim for benefits were of sufficient interest to Klosterman that he discussed the case with his wife and his father-in-law. It was during this conversation that Klosterman's father-in-law told him he thought Grommet had been discharged for poor performance by Swift. It is also worth repeating that Klosterman's wife, Cindy, was the secretary who was rude to Grommet when he came to pick up his workers' compensation benefits. She had thrown Grommet's reimbursement money at him stating he was not entitled to benefits and the money would have to

come out of her husband's pockets. Despite Klosterman's title as terminal manager, he has had no education, training, or background in personnel management. Klosterman also testified that he had no "education or background in the legalities of hiring and firing people." Prior to his promotion to the position of terminal manager, Klosterman had been a truck driver. It was Klosterman who recommended Grommet be discharged.

In summary, the evidence shows Grommet suffered a work-related injury approximately one week after he began employment with Midland. Less than a week after reporting this injury and filing for workers' compensation benefits Grommet was fired. When faced with the allegation that Grommet was fired for filing a workers' compensation claim, Midland defends by asserting Grommet was fired from Midland because he performed poorly in the distant past while working for an entirely different employer. However, Grommet's employment history was not even investigated until after he had reported his injury. We find this record contains sufficient evidence to engender a jury question on whether Grommet's discharge was motivated by his filing of a worker's compensation claim after working for the company for such a short period of time.

B. Emotional Distress Damages. Midland contends the trial court erred in instructing the jury on Grommet's claim for emotional distress damages. Midland asserts the instructions were without evidentiary support. Grommet

testified the loss of income caused him financial troubles. These financial troubles required him to sell his furnishings, rent his house, and move in with his parents. We find the record contains evidence sufficient to engender a jury question on whether Grommet suffered emotional distress as a result of his wrongful discharge. We affirm.

C. Punitive Damages. Midland also argues Grommet's claim for punitive damages should not have been submitted to the jury. Under Iowa Code chapter 668A, punitive damages may be awarded when the defendant's conduct is found to have constituted "willful and wanton disregard for the rights" of the plaintiff. Iowa Code § 668A.1(a) (1991). We find substantial evidence in the record to support submission of the instruction and affirm.

III. Motion for New Trial. Finally, Midland contends the verdict failed to effectuate substantial justice because it was not supported by the evidence. In reviewing the appropriateness of the trial court's refusal to grant a new trial, we look for an abuse of discretion. Witte v. Vogt, 443 N.W.2d 715, 716 (Iowa 1989). In ruling on motions for new trial, the court has broad though not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). To show an abuse of that discretion, one must generally demonstrate the court exercised its discretion "on grounds or for reasons clearly untenable or

to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976)(quoting Weeks v. Burnor, 132 Vt. 603, 606, 326 A.2d 138, 140 (1974)). We are unable to make such a finding on the record before us. We affirm.

The costs of this appeal are taxed to Midland.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. Plaintiff was a very short-term, at-will, probationary employee. There were misstatements on his employment application. Plaintiff claimed to be injured in his employment. He was fired.

I cannot agree with the majority that the discharge of this probationary employee near the time of an injury compensable under workers' compensation statutes is substantial evidence to support a claim for retaliatory discharge. It falls short of the evidence in cases where retaliatory discharge was found to exist. See Springer v. Weeks and Leo Co., 429 N.W.2d 558 (Iowa 1988) (evidence was to return to work employee had to sign a statement incident was not work related); Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990) (decision to fire made by company insurance director against advice of personnel director and insurance director conceded cost of paying workers' compensation benefits entered into decision to fire).