IN THE COURT OF APPEALS OF IOWA

No. 0-581 / 10-0181
Filed November 24, 2010

DAVID F. SMITH,
Plaintiff-Appellant,

vs.

CRESTON MUNICIPAL UTILITIES/
WATER DEPARTMENT,
Defendant-Appellee.

Appeal from the Iowa District Court for Union County, David L. Christensen, Judge.

David Smith appeals from the district court's grant of summary judgment to his former employer on his claims of disability discrimination and retaliatory discharge. **AFFIRMED.**

James L. Sayre of James L. Sayre, P.C., Clive, for appellant.

Patrick D. Smith of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

Plaintiff David Smith appeals the district court's grant of summary judgment to defendant Creston Municipal Utilities (CMU) on his claims of disability discrimination under the Iowa Civil Rights Act, *see* Iowa Code § 216.6(1)(a) (2009), and retaliatory discharge in violation of public policy. We agree Smith failed to put forth a genuine issue of material fact that his work restrictions amounted to a disability or that he was terminated for retaliatory reasons. We therefore affirm the judgment below.

I. Background Facts and Proceedings

Because this is an appeal from a grant of summary judgment, we set forth the facts in the light most favorable to Smith as the nonmoving party. *Stevens v. Iowa Newspapers, Inc*., 728 N.W.2d 823, 827 (Iowa 2007). Smith began his employment at CMU in the distribution department on December 17, 2001. Smith performed service work including checking, reading, and replacing water meters, locating and stopping water main leaks, and raking and reseeding yards after digs. This work would be done in all types of weather: rain, ice, or snow. When a water main broke, Smith or another member of the distribution department would be called to locate the main, dig to the source of the leak using either a shovel or jackhammer, and stop the leak using a clamp. Because a water emergency could occur at any time, each employee of the distribution department was on call at all times and could be summoned to a call without assistance from another employee. Smith had to carry water pipes and pumps at work sites, if necessary. In addition, Smith would have to remove manhole covers, some weighing almost 100 pounds, and descend into the manhole to

make repairs and to check the meters. Smith also did general office cleaning and lawn care at the water treatment plant. Overall, Smith admits his work tasks involved "physically demanding work with [his] hands and arms," including lifting of heavy objects and having to exert considerable force when loosening or tightening nuts on pumps and hydrants.

In February 2007, after having experienced pain and stiffness in his wrists for several years, Smith was diagnosed with traumatic degenerative arthritis. His doctor, Arnie Grundberg, recommended surgery on both wrists. After the left wrist surgery in March 2007, Dr. Grundberg placed strict weight restrictions on each wrist, presumably to help in Smith's healing and recovery. Smith could still do limited tasks at CMU, including providing assistance to other employees and changing and reading meters. In November 2007, surgery on the right wrist was performed, and Smith returned to work on January 22, 2008. Upon his return, Smith presented Steve Green, general manager of CMU, with Dr. Grundberg's instructions regarding the weight that could be subjected to each wrist. At that point, Smith could not push, pull, or lift more than forty pounds with the left hand or more than five pounds with the right. Green determined that these specific weight restrictions limited Smith's ability to do his job, and thus told Smith that no work was available for him at CMU.

For the next four months, Smith brought in Dr. Grundberg's instructions which gradually relaxed the weight restrictions on the right hand. By May 13, 2008, the right-hand restriction amounted to no pushing, pulling, lifting over thirty pounds, while the left-hand restriction remained at forty pounds. Nonetheless,

despite Smith's willingness to resume work at CMU, Green stated that no work was available due to the restrictions.

By then, Smith had exhausted his sick leave and vacation time. He applied for unemployment benefits on March 30, 2008. Although CMU contested the application on the ground Smith was still employed, Smith was granted those benefits on April 24, 2008 on the basis of "temporary layoff."

On May 19, 2008, Smith was called to a meeting with Green where he was given a letter terminating his employment at CMU. The letter outlined Smith's job duties and explained how Dr. Grundberg's physical restrictions were preventing him from completing these job duties. The letter indicated that Smith had the option to appeal the decision to the Water Works Board of Trustees, which Smith ultimately declined. The letter concluded:

> David, if the City has any jobs open where you could work with your restrictions and/or you apply for jobs at other places, I would have no problem giving you a positive reference as you have always been a good worker for the City.

Smith attempted to grieve his termination through his union. Green denied the grievance, stating:

> There clearly is proper cause for the termination of your position because of the fact that due to your medical restrictions you are unable to complete many of the tasks that are required for your job.

After lodging a civil rights complaint and receiving a right to sue letter from the Iowa Civil Rights Commission, Smith filed suit against CMU on October 7, 2008. The petition alleged disability discrimination under the Iowa Civil Rights Act (ICRA), *see* Iowa Code § 216.6(1)(a), retaliatory discharge in violation of

public policy, and violations of the Family Medical Leave Act (FMLA) under 29 U.S.C. § 2615(a).

Following discovery, CMU moved for summary judgment on all claims, contending Smith lacked evidence that "his restrictions substantially limited a major life activity or that CMU perceived that his restrictions limited a major life activity" and therefore Smith could not prove he was disabled under the ICRA. CMU also maintained that there was no proof of a causal connection between Smith's unemployment claim and his termination. Finally, CMU argued that Smith was not an "eligible employee" under the FMLA.

After a hearing, the district court granted summary judgment to CMU on all claims. First, the court held Smith had not produced any evidence to support his claim that he was disabled. The court reasoned:

> Working is considered a major life activity; however, the Plaintiff has produced no evidence to show that he is restricted in the ability to perform a class of jobs or a broad range of jobs. In fact, he testified that at the time of his termination he believed he could perform 90 to 95 percent of the tasks of a distribution employee.

The court also found no evidence that CMU "regarded" Smith as disabled. Rather, it found the termination letter "demonstrates that the Defendant considered the individual circumstances and concluded that the Plaintiff could not remain employed in his position with his particular restrictions."

Additionally, the court found Smith failed to provide evidence of a causal connection between his filing for unemployment benefits and his termination. Lastly, the court concluded that Smith was not an "eligible employee" under the FMLA because CMU had less than fifty employees within seventy-five miles of Smith's worksite.

Smith appeals the dismissal of the disability discrimination and retaliatory discharge claims.

II. Standard of Review

We review the district court's grant of summary judgment for correction of errors at law. *Bank of the West v. Kline*, 782 N.W.2d 453, 456 (Iowa 2010). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Iowa R. Civ. P. 1.981(3).

III. Disability Discrimination Claim

The ICRA prohibits an employer from discriminating against a qualified individual due to his or her disability. Iowa Code § 216.6(1). The federal Americans with Disabilities Act (ADA) and its regulations guide our interpretation of the ICRA's provisions on disability discrimination. *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 918 (Iowa 1997). To recover for disability discrimination, it is Smith's burden to establish:

1) he has a disability;
2) he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and
3) he has suffered adverse employment action from which an inference of unlawful discrimination arises.

Casey's Gen. Stores, Inc. v. Blackford, 661 N.W.2d 515, 519 (Iowa 2003). A person with a disability is defined as "any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment." Iowa Admin. Code r. 161-8.26(1). Major life activities include "caring for one's self,

performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id*. 161-8.26(3).

Here the only major life activity affected by the weight restrictions was Smith's ability to work. But to be *substantially limited* in his ability to work, Smith had to be "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" *Bearshield*, 570 N.W.2d at 920 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). We agree with the district court that Smith failed to offer proof on this point. Indeed, he conceded as follows in his deposition testimony:

> Q. We already talked about working. You didn't believe [your physical restrictions] substantially limited your ability to work? A. No.
>
> Q. Did your physical restrictions as of May 19th, 2008 substantially limit your ability to perform manual tasks. A. No.

Furthermore, after being let go at CMU, Smith obtained a full-time job working at a pest control and lawn care company, where he does lawn mowing, spraying for pests, and spraying yards for weeds.

Hence, we view this case as a situation where "[t]he number and type of jobs from which [Smith] was disqualified because of his impairment was fairly limited." *Vincent v. Four M Paper Corp.*, 589 N.W.2d 55, 62 (Iowa 1999).

Smith argues, alternatively, that he had a "perceived disability." The definition of disability includes someone who is "regarded as" having an impairment that substantially limits one or more life activities. Iowa Admin. Code r. 161-8.26(1). The supreme court has held that so long as the employer's decision rests on an individualized assessment of the employee's physical

condition rather than "myths, fears or stereotypes," it does not constitute discrimination based on perceived disability. *Vincent*, 589 N.W.2d at 63; *Howell v. Merritt Co*., 585 N.W.2d 278, 281 (Iowa 1998).

Smith claims Green's termination letter of May 19, 2008, is evidence that his employer based its decision on a "perceived disability." We disagree. The letter contains a careful discussion of Green's weight restrictions and how those restrictions affect his ability to perform his various job duties. It is an individualized assessment. Smith argues the letter's references to his "physical restrictions" are evidence in and of themselves that CMU viewed him as disabled. We cannot reach that conclusion. It is undisputed that Smith's physician imposed physical restrictions; that is beside the point. The issue, rather, is whether those restrictions amounted to a disability.

Smith also points to the following statement in Green's June 5, 2008 letter responding to the grievance: "We do not have a position that we could assign you to accommodate your disabilities." We do not view this letter, written by a non-lawyer, as substantial evidence that Smith actually met the legal definition of person with a "disability." Notably, Smith, also a non-lawyer, testified in his deposition, "I don't have any disabilities." Neither statement, in our view, deserves much weight. Since disability is a term of art, with a specific legal definition, the relevant question for our purposes is whether Smith met the parameters of that legal definition. Read in its entirety, Green's June 5 letter is simply a reiteration of the points made in his earlier May 27 letter. As Green put it on June 5,

> David, even if there was a proper cause provision in the contract, there clearly is proper cause for the termination of your position because of the fact that due to your medical restrictions you are unable to complete many of the tasks that are required for your job.

As the supreme court explains, "In considering the perceived disability doctrine, we have restricted its use to those cases in which the adverse employment decision 'rested on myths, fears, or stereotypes.' The type of conduct which the ICRA was intended to remedy." *Vincent*, 589 N.W.2d at 62 (quoting *Howell*, 585 N.W.2d at 281). There is no evidence that CMU's decision rested on such myths, fears, or stereotypes.

Because Smith failed to establish a genuine issue of material fact that he had a disability, there is no need to discuss the remaining prongs of the disability discrimination test. Therefore, we affirm the district court's grant of summary judgment to CMU on this count.

IV. Retaliatory Discharge Claim

An employee may not be terminated for a reason contrary to public policy. *Teachout v. Forest Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998). In determining whether an employee's termination was retaliatory and against public policy, Iowa applies a three-part test that the employee must meet: "(1) engagement in a protected activity, (2) adverse employment action, and (3) a causal connection between the two." *Id*. The protected activity must "advance a well-recognized and defined public policy of the state." *Id*. at 300. The supreme court has previously held that filing for unemployment benefits is a protected activity, and that an employee may not be discharged in retaliation for applying for benefits. *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994).

Smith proved, of course, that he was terminated from his employment with CMU approximately two months after he applied for benefits. However, the shortfall in Smith's proof relates to the final prong of the test: the requirement of a causal connection between his application for unemployment benefits and his termination from CMU. The employee must show the protected activity was the "determinative factor in the employer's decision to terminate." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 767 (Iowa 2009) (citing *Teachout*, 584 N.W.2d at 301). A determinative factor is one which "tips the scales decisively one way or the other even if it is not the predominant reason behind the employer's decision." *Teachout*, 584 N.W.2d at 302. Smith produced no such evidence. As he stated in his deposition:

> Q. Why do you believe that you were terminated? A. First thing, because I filed for unemployment
> Q. And what makes you think that? A. Just me. Just how I feel.
> . . . .
> Q. Is there anything that Mr. Green has said that makes you believe he didn't want to pay your unemployment? A. No, no.
> Q. Anything he's done or said that makes you think your termination is connection to the filing of unemployment? A. No.
> Q. It's a personal belief that you have? A. Yeah.

The timing between Smith's application for unemployment benefits and his termination is insufficient to establish a causal connection. *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 750-51 (Iowa 2006) (noting "'more than a temporal connection between the protected activity and adverse employment action is required to present a genuine factual issue on retaliation'") (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999)).

Smith argues that CMU did not prepare a job description for him until April 28, 2008. This, in his view, suggests a belated effort to build a case for a termination. Yet, when Smith was deposed, he admitted the activities listed in the job description are in fact duties required for the job that he performed prior to his 2007 surgeries. Thus, the job description was an accurate rendition of the duties Smith needed to be able to perform.

Additionally, Smith asks us to infer retaliation from the fact that CMU failed to hire him on two subsequent occasions, despite Green's statement in the termination letter that "if the City has any jobs open where you could work with your restrictions and/or you apply for jobs at other places, I would have no problem giving you a positive reference as you have always been a good worker for the City." Although we disagree with the district court's finding that Green was not aware of Smith's subsequent job applications, we agree the record does not support an inference of retaliation. Smith applied for the first job in December 2008 after it had already been filled. Smith was not interviewed for the second position because there was a more qualified candidate who had "a strong possibility of state licensing, with some college education and a certification in welding." There is no evidence that CMU declined to hire Smith for any reason other than the presence of a more qualified candidate.

Finally, Smith argues in one sentence of his appellate brief that "[a] finder of fact could easily find that [he] was terminated for exercising his FMLA rights, for applying for and receiving unemployment compensation, or for both." Thus, Smith suggests his public policy claim really has two components—retaliation for seeking unemployment benefits, and retaliation for exercising FMLA rights. Yet

Smith's petition indicated his public policy claim was limited to the unemployment benefits issue; the district court's ruling assumed that was the case; and Smith did not appeal the district court's grant of summary judgment on his separate FMLA claim. Regardless, a single fleeting sentence in a brief is insufficient to preserve an argument for our review. *See* Iowa R. App. P. 6.903(2)(*g*)(3). Even if we did find the argument preserved, we would conclude that the FMLA preempts any state-law claim based on retaliation for exercising FMLA rights. *See Lucht v. Encompass Corp.*, 491 F.Supp. 856, 866 (S.D. Iowa 2007) (so holding). And, there is no evidence in the record of a causal connection between Smith's attempted exercise of FMLA rights and his discharge anyway.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.