IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

HOLLY CARLSON,

Plaintiff,

No. 4:06cv00542-JAJ

vs.

ACH FOOD COMPANIES, INC. d/b/a TONE'S SPICES.

ORDER

Defendant.

This matter comes before the court pursuant to defendant's October 22, 2007, motion for summary judgment (docket number 10). Plaintiff resisted defendant's motion on November 29, 2007 (docket number 14). Defendant filed its reply brief on December 11, 2007 (docket number 17).

Plaintiff, a longtime employee of Tone's, claims that she sustained a work-related injury that prohibited her from doing her usual job after January of 2003. After refusing on multiple occasions the defendant's offer of light duty employment, plaintiff took a job with another employer on February 3, 2004. Her employment at Tone's was terminated shortly after Tone's found out about the other job. In this case, she claims that she was fired for filing a workers' compensation claim. Tone's claims that her employment was terminated for accepting other employment. The question here is whether plaintiff can generate a genuine issue of material fact regarding the reason for the termination of her employment. Because no genuine issue of material fact remains for trial, summary judgment in favor of the defendant is appropriate.

I. SUMMARY OF THE ARGUMENTS

On October 11, 2006, the plaintiff, Holly Carlson ("Carlson") sued the defendant, ACH Food Companies, Inc. d/b/a Tone's Spices ("Tone's") in the Iowa District Court in and for Polk County, alleging that Carlson's termination from Tone's violated the public policy of the State of Iowa in that Carlson was terminated in retaliation for seeking workers' compensation benefits. Tone's removed Carlson's lawsuit to this court on November 3, 2006. Tone's now moves for summary judgment, arguing that the undisputed material facts demonstrate that Carlson's employment was terminated because she accepted another job while refusing to return to work at Tone's, and not because she pursued a workers' compensation claim. Tone's further argues that Carlson's claim is preempted by Section 301 of the Labor Management Relations Act, and that the public policy exception to the employment-at-will doctrine does not apply to Carlson as she was not an at-will employee.

Carlson resists Tone's motion for summary judgment, arguing that the facts, when taken in a light most favorable to her, establish the elements of a public policy discharge. Carlson further argues that she did not return to work at Tone's because she was never released by her treating physician to do so. Carlson claims that her wrongful discharge claim is not preempted by the Labor Management Relations Act because her wrongful discharge claim is not dependent on an interpretation of the Collective Bargaining Agreement in place. Finally, Carlson argues that the public policy exception is applicable to more than at-will employees.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as

a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id.

III. FACTS TAKEN IN LIGHT MOST FAVORABLE TO PLAINTIFF

Carlson began working at Tone's in 1992 as a "Line Operator." Carlson was eventually promoted to the position of "Line Technician." Carlson was in the position of "Line Technician" during all times relevant in this matter. Throughout her employment at Tone's, Carlson was an hourly employee, covered by a Collective Bargaining Agreement. In January 2003, Carlson left work after experiencing chest pains. Carlson initially sought and received short-term disability benefits, believing that her condition was not work-related. Carlson returned to work briefly, but continued experiencing pain and

was unable to perform her duties. Carlson's doctor advised her to stop working at Tone's. Her last day of work was April 3, 2003.

In May 2003, following a series of medical tests that ruled out other causes, Carlson claimed that her condition, costochronritis (a tear of the sternum muscle), might be work-related. Between May 9th and 14th, 2003, Carlson contacted a workers' compensation attorney, notified Tone's of her injury, and informed Tone's workers' compensation carrier of her physician's diagnosis.

In late May and early June 2003, Carlson's treating physician referred her to another physician to explore breast reduction surgery, which her treating physician felt would aid and improve her ability to have her sternum heal and prevent further future injury. Before the breast reduction surgery could take place, however, Carlson's treating physician felt she needed to have her sternum heal more completely and continue physical therapy.

Tone's has a light duty work program for employees unable to fulfill the physical requirements of their usual positions. Carlson was aware of Tone's light duty program. Further, Zenith, Tone's workers' compensation insurance carrier, offered Carlson light duty work at Tone's and invited her to return to work in the light duty program on several occasions. Carlson never returned to work at Tone's, in any capacity, because she was not released by her treating physician to do so. Carlson's treating physician advised Carlson to change careers.

In mid-July 2003, Carlson contacted William Nelson, Tone's Labor Relations and Security Manager, to discuss the fact that she was receiving no workers' compensation pay, nor any other compensation while she recuperated from her injury. Nelson and Carlson discussed "light duty" work at Tone's, but both acknowledged that Carlson could not perform "light duty" work absent a medical release to do so.

Throughout August and September 2003, Tone's workers' compensation insurance

carrier continued to classify Carlson's injury as not work-related. On November 24, 2003, Carlson underwent an Independent Medical Examination by Dr. Donna Bahls. Carlson underwent breast reduction surgery on December 11, 2003. On December 12, 2003, Tone's workers' compensation insurance carrier accepted Carlson's injury as being work-related.

While Carlson was off work, Tone's learned that she was working for her treating physician. Carlson's employment there began on February 16, 2004. Tone's made no inquiry as to Carlson's job duties with her treating physician. Carlson's primary job duties were to answer the phone and determine the priority of the call, greet arriving patients, arrange follow-up appointments, operate small office equipment, file papers into the proper files, monitor insurance paperwork, and occasional data entry.

On May 3, 2004, William Nelson wrote to Carlson, informing her that her employment at Tone's had been terminated because she had accepted other employment while refusing consistent offers of light duty work from Tone's. Carlson responded on May 6, 2004, contesting the basis of the letter and stating that she had not returned to work at Tone's because she had never received a release from her physician to perform light duty work.

Throughout her employment at Tone's, Carlson estimates that she sustained a half-dozen injuries covered by workers' compensation. Except for the injury at issue in this lawsuit, Carlson was always allowed to return to work at Tone's following her workers' compensation claims without incident.

Following her termination, Carlson filed a grievance under the Collective Bargaining Agreement, claiming that the contract required Tone's to keep her employed even if she accepted employment elsewhere while declining light duty at Tone's. Carlson's grievance was rejected.

IV. CONCLUSIONS OF LAW

A. Public Policy Discharge - Workers' Compensation Retaliation

Tone's argues that summary judgment should enter on Carlson's workers' compensation retaliation claim because the undisputed facts establish that Carlson was terminated solely because she accepted employment elsewhere while consistently refusing to perform light duty work at Tone's. Tone's claims that there is no evidence that Carlson's termination was related to her claim for workers' compensation benefits, especially in light of the fact that Tone's repeatedly requested that Carlson return to light duty after she sought workers' compensation benefits. Tone's further notes that Carlson had pursued approximately a half dozen workers' compensation claims throughout her employment at Tone's and had always been allowed to continue working.

Carlson argues that summary judgment is inappropriate, as she was never released to return to work at Tone's, even in a light duty capacity, as of the date of her termination. Carlson was released to work within a light duty and work hardening program on July 26, 2004, less than fifteen months after her last date of work for a work-related injury. Her termination, Carlson argues, contravened Tone's Collective Bargaining Agreement, which placed no limitation on how long an employee could be off of work as long as they are under a doctor's care. Tone's policy and past practice had allowed employees with both work and non work-related injuries to have their jobs held open for as long as eighteen months. Carlson also argues that Tone's custom and practice of providing notice in advance of termination was not followed in her case. These facts, Carlson argues, provide the court the necessary inference that her workers' compensation claim was the reason for her discharge. Carlson states that she refused Tone's offer of light duty because she would be assessed negative "points" under the attendance system when she missed work for therapy appointments because Tone's workers' compensation insurance carrier was not treating her injury as work-related. Finally, Carlson offers her personal observations as

to Tone's reluctance in accommodating employees with work-related injuries, and notes that while Tone's made no such inquiry, her job duties at the office of her treating physician were markedly different that her job duties at Tone's.

To prevail on a claim of discharge in violation of public policy, a plaintiff must prove: (1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge. Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 281 (Iowa 2000). More recent cases from the Iowa Supreme Court recognized a fourth element, i.e., an absence of other justification for the termination. Id. at 282 n.2. See also Lloyd v. Drake Univ., 686 N.W.2d 225, 228 (Iowa 2004) (citing Davis v. Horton, 661 N.W.2d 533, 535 (Iowa 2003)). Seeking workers' compensation benefits for work-related injuries is such a protected activity. Fitzgerald, 613 N.W.2d at 281 (citing Springer v. Weeks & Leo Co., 429 N.W.2d 558, 560 (Iowa 1998)). See also Iowa Code §85.15 (protecting workers' compensation rights). Tone's does not dispute that the first two elements are met, i.e., Carlson engaged in a protected activity and was discharged. As such, the issue is whether Carlson has demonstrated that a genuine issue of material fact exists with respect to the causation and absence of justification elements. Fitzgerald, 613 N.W.2d at 282 ("[T]o withstand summary judgment, a plaintiff must . . . offer adequate evidence from which a lack of justification for termination can be inferred.").

"The protected conduct must be the determinative factor in the decision to terminate the employee." <u>Id.</u> at 289 (citing <u>Teachout v. Forest City Comm. Sch. Dist.</u>, 584 N.W.2d 296, 301-02 (Iowa 1998). "The causation standard is high," and requires the court to determine if a "reasonable fact finder would conclude" that Carlson's workers' compensation claims were the "determinative factor in the decision to discharge [her]." <u>Id.</u> (citing <u>Teachout</u>, 584 N.W.2d at 300). "In other words, the protection afforded by anti-retaliatory legislation does not immunize the complainant from discharge for past or present inadequacies, unsatisfactory performance, or insubordination." <u>City of Hampton v. Iowa Civil Rights Comm'n</u>, 554 N.W.2d 532, 535-36 (Iowa 1996) (citing <u>Hulme v.</u>

Barrett, 480 N.W.2d 40, 43 (Iowa 1992)).

"If the employer does offer 'other justifications' for allegedly retaliatory conduct, however, in order for the plaintiff to defeat summary judgment on the retaliation claim, the plaintiff must generate genuine issues of material fact that the 'other justifications' are not the true reasons for the employer's actions, but are, instead, pretexts for retaliatory action or insufficient, standing alone, to justify the adverse action in question, so that the plaintiff's protected activity was the 'final straw' in favor of the adverse action." Raymond v. U.S.A. Healthcare Center - Fort Dodge, L.L.C., 468 F. Supp. 2d 1047, 1059 (N.D. Iowa 2004). Moreover, the mere temporal relationship between the protected conduct and the discharge alone is not sufficient evidence of causation. Phipps v. IASD Health Servs. Corp., 558 N.W.2d 198, 203 (Iowa 1997). To carry the burden of establishing pretext, Carlson must show that Tone's justification for her termination was unworthy of credence. Smith v. Allen Health Sys., Inc., 302 F.3d 827, 833-34 (8th Cir. 2002). "One method of proving pretext is showing that the employer's proffered explanation had no basis in fact." Id. at 834. However, merely asserting a dispute as to the "legitimacy" of the proffered reasons is not enough to raise a genuine fact issue. Id.

This court has recognized that an employee can demonstrate that an employer's proffered reasons for allegedly retaliatory action are pretexts for retaliatory action by showing, for example, that the employer varied from its normal policy or practice to address the employee's situation, or by showing that the employer routinely treated similarly situated employees who were not in the protected class more leniently, or by demonstrating that the employee was discharged pursuant to an inconsistent policy.

<u>Raymond</u>, 468 F. Supp. 2d at 1061. "An employee can prove pretext by showing the employer meted out more lenient treatment to similarly situated employees who were not in the protected class, or as here, who did not engage in protected activity." <u>Smith</u>, 302 F.3d at 835. However, the plaintiff must prove that the compared employees were

similarly situated in all relevant respects. <u>Id.</u>

While causation generally presents a question of fact, the court finds that Carlson has not generated a genuine issue of material fact as to a causal connection between her termination and her pursuit of workers' compensation benefits. Carlson first claimed that her injury was work-related in May 2003. She never returned to work at Tone's and was terminated on May 3, 2004. The temporal connection does not support Carlson's case. Carlson has not produced evidence from which a reasonable fact finder could conclude that Carlson's filing of a workers' compensation claim was the determinative factor in Tone's decision to terminate her employment. Throughout her employment at Tone's, Carlson had filed approximately a half dozen workers' compensation claims, one of which went through litigation, and was always allowed to return to her job. Carlson accepted other employment in February 2004, before and after which she declined repeated offers from Tone's to return to work in its light duty program. In terms of evidence supporting her wrongful termination claim, Carlson testified:

- Q: What evidence do you have that you were terminated because of a workers' compensation claim?
- The company sent me a letter I was terminated. A:

Alternatively, Carlson has not established a genuine issue of material fact that the reason proffered by Tone's in support of her termination is pretext for workers' compensation retaliation. William Nelson testified:

- Q: In other words, it appeared to you when you wrote the letter that she'd accepted [termination] employment and, therefore, wasn't interested in returning so she had effectively quit?
- A: Yes.
- Was there any other basis for her termination, other Q: than what's listed in this letter -
- No. A:
- - to your knowledge? Q:
- A: No.

Carlson's argument that Tone's termination violated the contract in that her position should have remained open for at least eighteen months also does not demonstrate pretext, considering Nelson's testimony that an employee could still lose her job during this period if she quit her job, which was consistent with the position Tone's took in Carlson's See Def. App. p. 23. Further, Nelson's testimony as to his termination letter. understanding that Dr. Bahls had released Carlson to return to light-duty work in November 2003, which constituted a medical release per Tone's contract or policy or custom stands unrefuted. See Def. App. p. 24-25, 26. The fact that Tone's did not inquire as to her job duties is not persuasive, especially in light of Carlson's testimony that she had no knowledge whether light duty under the Collective Bargaining Agreement involved working on the factory floor. Finally, accepting that it was Tone's policy or custom to provide employees on leave for a work-related injury notice in advance of their termination, Carlson offers no evidence whether that policy applied to employees who had accepted employment elsewhere while on leave for a work-related injury. As set forth above, merely disputing the legitimacy of the proffered reason will not establish pretext.

Finally, Carlson does not demonstrate that she was treated differently than similarly situated employees who had not filed workers' compensation claims. General allegations that Tone's was reluctant to accommodate her work-related injury in 1998 does not suffice. There is no evidence that Carlson was treated differently than similarly situated employees who had been off of work for over a year and accepted employment elsewhere, but had not filed workers' compensation claims. Defendant's motion for summary judgment is granted.²

¹As a copy of the Collective Bargaining Agreement was not made part of the summary judgment record in this matter, the court cannot say that Nelson's "understanding" was at odds with the contract language, thereby demonstrating pretext.

²As the court finds that Carlson was unable to demonstrate a genuine issue of material fact (continued...)

Upon the foregoing,

IT IS ORDERED that defendant's motion for summary judgment (docket number 10) is granted. This matter is dismissed with prejudice. The Clerk of Court shall enter judgment accordingly.

DATED this 10th day of March, 2008.

SOUTHERN DISTRICT OF IOWA

²(...continued)

regarding the causation and lack of justification elements of her public policy discharge claim, it will not address defendant's arguments that Carlson's claim was preempted by the Labor Management Relations Act and that the public policy exception to the employment at-will doctrine does not apply to Carlson as she was not an at-will employee.