IN THE SUPREME COURT OF THE STATE OF NEVADA

KELLY DIXON,
Appellant,
vs.
PEPSI BOTTLING GROUP, INC., AND BOTTLING GROUP, LLC, A DELAWARE CORPORATION,
Respondents.

No. 43351

FILED

DEC 14 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment in favor of the respondents in a wrongful termination action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This appeal involves a claim that an employer directly or constructively discharged an at-will employee in violation of Nevada public policy. Years into the litigation, the district court granted summary judgment in favor of the employer on the ground that Dixon had failed as a matter of law to establish a case of retaliatory discharge. Although we conclude that the district court erred in treating the employee's claim as one for retaliatory tortious discharge, we conclude that the employee's constructive discharge claim fails as a matter of law. Accordingly, we affirm the entry of summary judgment below.

FACTS AND PROCEDURAL HISTORY

Appellant Kelly Dixon commenced employment as a warehouse worker with respondent Pepsi Bottling Group, Inc. (Pepsi), in 1996. The facility where he worked operated 24 hours daily, utilizing three shifts. Dixon worked the day shift from 1997 until February 1999,

when a manager transferred him to the swing shift. Dixon subsequently injured his lower back while restacking a pallet of 54-pound soda syrup containers. Dixon filed a workers' compensation claim later that day.

Pepsi, which is self-insured for Nevada workers' compensation coverage, referred Dixon to its managed care provider, Southwest Medical Associates, where he saw Dr. Mark Turner. Dr. Turner diagnosed Dixon with lower back strain and temporarily prohibited Dixon from working. Two days later, at a follow-up appointment, Dr. Ronald Kong, another Southwest Medical Associates physician, authorized Dixon to return to work with lifting and driving restrictions. The parties do not dispute that Pepsi provided Dixon transitional duties consistent with these restrictions.

Thirty days post-accident, Dr. Kong continued the lifting restrictions but allowed Dixon to push or pull less than 12 pounds and "drive" occasionally. Five days later, an unnamed co-worker contacted Dr. Kong and asked if Dixon could "drive more than occasionally." In response, upon reviewing his reports, Dr. Kong changed the driving restrictions from "occasionally" to "without restriction," but still maintained Dixon on transitional duty due to continued lifting and bending restrictions. Based on this change, Dixon's supervisor assigned Dixon to drive a forklift, a function which requires repeated turning and twisting.[1] Dixon reluctantly agreed, fearing that Pepsi would terminate him if he refused.

While operating the forklift in reverse, Dixon further injured his back. Dixon later claimed that his inability to adequately turn his

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[1]Dr. Kong's report does not distinguish between driving a forklift and an ordinary motor vehicle.

body and safely navigate while driving caused the second back injury. No written report was submitted and Dixon continued working in a restricted capacity.

Dixon was seen by an orthopedic specialist, Dr. Donald Mackay, several days after the second incident. This appointment had been scheduled before Dr. Kong changed Dixon's driving restrictions. Dr. Mackay ordered Magnetic Resonance Imaging, which revealed varying degrees of disc degeneration at all lumbar intervertebral levels,[2] with herniated discs from the second lumbar level through the first sacral level. Without revealing whether Dixon's condition was impacted by the second injury, Dr. Mackay continued Dr. Kong's most recent work restrictions.

Dixon subsequently participated in a rehabilitation program with Dr. Edson Parker, a pain specialist. Dr. Parker ordered that Dixon be assigned less strenuous job duties than those performed before the original industrial accident. Ostensibly aware of differing work requirements among the three shifts, Dr. Parker recommended that Pepsi transfer Dixon to the day shift. Dr. Parker also imposed a lifting restriction of no more than five pounds and restricted Dixon's "driving" to no more than four hours a day.[3] Ultimately, four of five physician

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[2]A long-term developmental condition.

[3]As with Dr. Kong's reporting, Dr. Parker's recommendations do not delineate between forklift operation and ordinary driving of motor vehicles.

evaluators concluded that Dixon's injuries precluded return to his previous position as a warehouseman.[4]

Under company policy, Pepsi offers no permanent light-duty positions and only provides transitional duties to industrially-injured employees for a maximum of 90 days. Accordingly, Pepsi informed Dixon that it had no positions available that were consistent with his work restrictions and placed him on temporary total disability leave.

Dixon filed suit against Pepsi in June 2001. In a briefly worded statement of charges, Dixon alleged that he was injured in the course and scope of his employment, that he filed a workers' compensation claim, that Pepsi knowingly and intentionally forced him to drive a forklift before being medically cleared to do so, that Pepsi conspired with his physicians to effect this purpose, that he aggravated his initial injury while attempting to maneuver the forklift, that Pepsi refused to return him to work at the completion of his medical treatment, and that the actions alleged amounted to a "tortious discharge" in violation of Nevada public policy. After two years of litigation, the district court granted Pepsi summary judgment, stating that Dixon had failed to present competent evidence raising a genuine issue of material fact as to whether he was

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[4]Over the subsequent year, three different physicians agreed that Dixon had reached maximum medical improvement, requiring permanent work restrictions on lifting, no more than 25 to 30 pounds, and repeated bending. Two of the doctors recommended a 10 percent whole person permanent impairment. After Dixon contested this recommendation as understating the extent of his disablement, another physician reviewed Dixon's medical history and treatment program, and concluded that Dixon would "not be able to return to his work as a warehouse loader because of the frequent requirements of bending, stooping, or lifting."

tortiously terminated in retaliation for filing a workers' compensation claim. Dixon appeals.

DISCUSSION

This court reviews orders granting summary judgment de novo.[5] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[6]

Retaliatory discharge for filing a workers' compensation claim

The district court, in granting summary judgment, exclusively treated Dixon's claim as one for retaliatory discharge for filing a workers' compensation claim, under our decision in Hansen v. Harrah's.[7] We note, however, that Dixon claimed below and argues on appeal, that he was either directly or constructively discharged. We also note that his retaliatory discharge claim was never specifically supported, and that his primary argument has always been that he was constructively discharged in violation of public policy. Because the district court did not reach the

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[5]Nicholas v. Public Employees' Ret. Board, 116 Nev. 40, 43, 992 P.2d 262, 264 (2000).

[6]Wood v. Safeway, Inc., 121 Nev. 724, ___, 121 P.3d 1026, 1031 (2005).

[7]100 Nev. 60, 675 P.2d 394 (1984). Absent a contract of continuing employment, employees in Nevada are presumed to be employed "at-will," and thus subject to termination for any reason, or for no reason. See Dillard Department Stores v. Beckwith, 115 Nev. 372, 376, 989 P.2d 882, 884 (1999). In Hansen, we adopted a "narrow exception to the at-will employment rule[,] recognizing that retaliatory discharge by an employer stemming from the filing of a work[ers'] compensation claim by an injured employee is actionable in tort." 100 Nev. at 64, 675 P.2d at 397.

latter issue in granting summary judgment, we conclude that the district court erred in restricting its grant of summary judgment to the former. That said, given the nominal support for his claim of direct retaliatory discharge, we conclude that the district court correctly rejected that claim.[8] Going further, as discussed below, we have reviewed Dixon's claim of constructive discharge and conclude that the summary judgment should have been granted upon that claim as well. Accordingly, we affirm the summary judgment entered below.

Constructive discharge

Relying on our recent decision in Dillard Department Stores v. Beckwith,[9] Dixon argues that Pepsi constructively discharged him in violation of the public policy of this state which favors economic security for employees injured while in the course of their employment. In Dillard, we reiterated the elements of tortious constructive discharge:

> "[A] tortious constructive discharge is shown to exist upon proof that: (1) the employee's resignation was induced by action and conditions that are violative of public policy; (2) a reasonable person in the employee's position at the time of

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[8]In affirming the district court on this issue, we reject Dixon's implied arguments that, under Star v. Rabello, 97 Nev. 124, 625 P.2d 90 (1981), and Maduike v. Agency Rent-A-Car, 114 Nev. 1, 953 P.2d 24 (1998), can be read by analogy to expand the elements of a retaliatory discharge claim made under Hansen. Wrongful termination under Hansen involves intentional misconduct, begging the question of how an employer can "recklessly" fire someone. That said, reckless conduct can form the basis of a wrongful constructive discharge if the recklessness creates "intolerable" working conditions. See discussion infra.

[9]115 Nev. 372, 989 P.2d 882 (1999).

> resignation would have also resigned because of the aggravated and intolerable employment actions and conditions; (3) the employer had actual or constructive knowledge of the intolerable actions and conditions and their impact on the employee; and (4) the situation could have been remedied."[10]

The facts in Dillard were particularly egregious. The employer in Dillard attempted to force its employee back to work before she was medically ready to do so.[11] The employee refused.[12] Upon her return to work, she was demoted at a greatly reduced salary in retribution for taking time off "for workman's [sic] comp."[13] Under the circumstances, the employee was forced to resign and seek other employment.[14] Applying the above elements, we affirmed a tortious constructive discharge judgment in favor of the employee.[15] In short, the employer in Dillard violated public policy by requesting that the industrially injured employee return to work before she was medically able and then demoting her for refusing to return to work against doctor's orders.[16] This action forced her resignation for her own economic survival.

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[10]Id. at 377, 989 P.2d at 885 (quoting Martin v. Sears, Roebuck and Co., 111 Nev. 923, 926, 899 P.2d 551, 553 (1995)).

[11]Id. at 375, 989 P.2d at 884.

[12]Id.

[13]Id.

[14]Id. at 375-76, 989 P.2d at 884.

[15]Id. at 378, 989 P.2d at 886.

[16]Id. at 377-78, 989 P.2d at 885-86.

Dixon claims that Pepsi likewise constructively discharged him in violation of public policy, as follows. First, that Pepsi conspired to induce Dr. Kong to change Dixon's work instructions to allow Dixon to drive a forklift before he was medically capable of doing so.[17] Second, that Pepsi recklessly or intentionally caused an aggravation of his injuries when it required him to drive the forklift pursuant to that inducement. Third, that the inducement to change his driving restrictions occurred when he was scheduled to see Dr. Mackay, a spine specialist, due to concerns that his condition might be more serious than originally contemplated. In this, he notes that the diagnostic testing confirmed the validity of these concerns. Fourth, that Pepsi's unreasonable refusal to change his shifts to accommodate him caused him to seek rehabilitation and alternate employment after his condition stabilized. Fifth, that Pepsi violated this state's "clear public policy favoring economic security for employees injured while in the course of their employment."[18] Although the district court did not explicitly resolve this aspect of the claim, summary judgment was still appropriate.

As an initial matter, the record contains no evidence indicating that Pepsi unreasonably relied on Dr. Kong's medical release or that Pepsi colluded with the doctor or forced Dixon to drive the forklift for retaliatory purposes. Certainly, Dr. Kong later contended that he was not aware that Dixon would be required to drive a forklift. While a

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[17]As noted, after reviewing Dixon's treatment history, Dr. Kong updated his medical report to change Dixon's driving restriction from "occasionally" to "without restriction."

[18]Hansen, 100 Nev. at 63, 675 P.2d at 396.

miscommunication may have occurred between Dr. Kong and Pepsi, Pepsi's action in asking Dr. Kong whether Dixon could drive does not satisfy the elements of a constructive discharge under Dillard. In short, none of the proofs offered by Dixon establish that Pepsi (intentionally, recklessly or otherwise) forced his resignation through aggravated and intolerable employment actions and conditions or that the situation could have been remedied.[19] Certainly, Pepsi was entitled to conclude, based on the doctors' reports, that Dixon's condition made him physically unfit for service in his former job. Quite importantly, there was no evidence that the forklift incident had any permanent impact on Dixon's documented degenerative disc disease. And, unlike the employee in Dillard, there was no evidence that Dixon was denied the opportunity, in violation of NRS 616C.530(1), to return to his pre-injury position following a release to such duty by his physician. Rather, the evidence showed that he was never released by a physician to return to his pre-injury position as a warehouseman. Moreover, as stated in Dillard, NRS 616C.530 does not create a private cause of action and does not preclude Pepsi's employment practice of only offering temporary transitional work positions for partially disabled employees.[20] Here, as noted, Dixon received a substantial partial disability award under the Nevada Industrial Insurance Act. Accordingly

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[19]See Wood, 121 Nev. at ___, 121 P.3d at 1031 (stating that summary judgment is appropriate when there is no genuine issue of material fact and that factual disputes are "genuine" in circumstances "when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party").

[20]Dillard, 115 Nev. at 378, 989 P.2d at 885.

we reject Dixon's claim that the summary judgment entered below be reversed based upon the notion that he was constructively discharged under Dillard, and we

ORDER the judgment of the district court AFFIRMED.[21]

_____, C.J.
Rose

_____, J.
Becker

_____, J.
Maupin

_____, J.
Gibbons

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Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

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[21]We have considered Dixon's other arguments and conclude that they lack merit.

cc: Hon. Mark R. Denton, District Judge
Carolyn Worrell, Settlement Judge
Law Office of Daniel Marks
Littler Mendelson/Las Vegas
Clark County Clerk