

Rel: May 7, 2021

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Laura Register

v.

Outdoor Aluminum, Inc.

**Appeal from Geneva Circuit Court
(CV-18-900062)**

BOLIN, Justice.

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Laura Register appeals from a summary judgment entered in favor of Outdoor Aluminum, Inc., as to her claim alleging retaliatory discharge in violation of § 25-5-11.1, Ala. Code 1975. We reverse and remand.

Facts and Procedural History

Register was employed by Outdoor Aluminum as a laborer. As an employee of Outdoor Aluminum, Register signed a form that provided:

"As an employee of Outdoor Aluminum, you are entitled to compensation for any injury you receive while on the job. If you are injured, proper procedure must be followed to receive this compensation.

"1. In the event of an injury, you must notify your supervisor within 24 hours.

"2. You must receive treatment from an approved doctor. Our company doctor is Dr. Kraft. With an alternate company doctor as Dr. Cosper.

"3. You must submit to a drug test at the time of initial treatment/examination.

"Failure to abide by the above procedures could result in loss of job and compensation benefits."

Paul Rose, Outdoor Aluminum's production manager, developed a "Notice of Disciplinary Action Form." The form outlined a three-step warning process concerning disciplinary actions against employees. The

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first warning results in employee counseling, the second warning results in a three-day suspension, and the third warning results in termination of employment. One of the grounds for disciplinary action listed in the form is absenteeism.

The record reflects the following facts. On October 20, 2016, Register, as part of her employment, laid out metal material, drilled or punched holes in the material, and deburred¹ and cut the material. Register punched holes in the metal material with a hydraulic-press machine. The hydraulic press became misaligned and was not punching through the metal. When Register attempted to fix the press, the press exploded, causing a two-inch long and half-inch thick piece of metal to strike Register on the head above her right eye and temple. Register reported the incident to her supervisor, Roger Wise. She told Wise she needed to go to the hospital. Another employee drove Register to the hospital where she was treated in the emergency room.

¹According to testimony in the record, deburring removes imperfections from machined metal.

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As a result of the incident, Register's neck and head were injured and she had headaches, blurred vision, dizziness, balance problems, and pain. Register sought workers' compensation benefits and medical treatment from Outdoor Aluminum. Dr. Christopher Cospers, one of the doctors approved by Outdoor Aluminum, treated Register.

Sandy Redding was assigned as Register's nurse case manager to facilitate Register's treatment. A nurse case manager schedules certain appointments and may go to appointments with the patient. The case manager ensures that the doctor's orders regarding treatment, such as attending physical therapy, are carried out.

Dr. Cospers treated Register as Outdoor Aluminum's authorized physician. As part of his treatment, Dr. Cospers referred Register to other physicians for certain procedures and treatment. Dr. Cospers released Register to work light duty in March 2017, but Register's symptoms worsened after returning to work. Register returned to Dr. Cospers, who restricted her from working in early April 2017. Dr. Cospers referred Register to Dr. Jeremiah Maddox for treatment of her continued neck pain and headaches. Dr. Maddox concluded that Register was not a candidate

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for surgery in relation to her neck injury and scheduled her for a functional-capacity evaluation ("FCE") on June 20, 2017. Dr. Maddox also referred Register to other treatment providers for epidural injections and physical therapy. Dr. Joshua Meyers, who administered the epidural injections, restricted Register from work until she could be given a neurological examination.

On June 6, 2017, Rose, Outdoor Aluminum's production manager, contacted Redding, Register's nurse case manager, concerning Register's work status. Redding responded that she had attended Register's appointment with Dr. Maddox on June 5, 2017, and that Dr. Maddox had ordered Register to remain off duty until Register received the results of the FCE. Redding stated that, once Dr. Maddox received the FCE results, Redding was to make a follow-up appointment for Register with Dr. Maddox so that he could go over the results with her. Redding stated that she would be at the appointment with Register and would notify Rose of the outcome immediately afterwards. Rose sent an e-mail to Redding, asking: "Just when will this happen? This is dragging out way past its time." Before Redding responded, Rose sent a second e-mail stating:

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"I guess I want to know what's taking so long to get through all of this? The last time I spoke with anyone, the appointment yesterday was going to be to release her. We seem to be just going from one place to another TRYING to find a place that will say she's disabled. She has no trouble going to yard sales and such.^[2] It seems light duty is easier than that."

Redding responded that she understood Rose's frustration. She also sent Rose the work-status report that Dr. Maddox had given Register at the appointment on June 5, 2017. On June 20, 2017, Register underwent the FCE as ordered by Dr. Maddox. On June 26, 2017, Redding e-mailed Rose and told him that the FCE had been completed and that it normally took 10 days to receive an FCE report. She also stated that she would let Rose know when the report was in and when Register had her follow-up appointment with Dr. Maddox.

On July 18, 2017, Register had a follow-up appointment with Dr. Cospers concerning her neurological symptoms. Dr. Cospers referred Register to Dr. Meyers again for pain management, and Dr. Cospers wrote an excuse restricting Register from returning to work until July 27, 2017.

²The record reflects that Rose had gathered this information by viewing postings on Register's social-media accounts.

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On July 20, 2017, at 3:44 p.m., Rose e-mailed Redding asking if there had been any update on Register's condition since her FCE on June 20, 2017. That same day, at 4:36 p.m., Redding forwarded Register's FCE report to Rose, noting that, based on the report, Dr. Maddox had released her to full duty with zero impairment. Sometime after that and before July 21, 2017, at 8:55 a.m., Rose had a telephone conversation with Redding. In an e-mail to Outdoor Aluminum staff dated July 21, 2017, at 8:55 a.m., Rose wrote:

"Here is the final report on Laura Register. I called Ms. Redding and she told me that according to the report, [Register] should have been back to work already. She has assured me that Worker's Comp payments have been stopped.

"After I read all this, I will compose a letter and mail to [Register] and tell her that we have considered her to have cancelled her insurance.

"Does that meet with everyone's approval?"

On July 21, 2017, Rose sent Register a letter terminating her employment. The letter provided as follows:

" I received the attached report yesterday via email from Ms. Sandy Redding, with Carlisle and Associates.

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"In the report, dated 6/25/2017, item 7 on page 2 indicates that you were recommended to be released within physician discretion. On page 12 of the same report it was found that you have a recommended impairment of 0% of your whole person. That page is dated 6/27/17 and Dr. Maddox certified that it was medically correct on 6/28/17.

"With the knowledge of this report, I can conclude that you should have reported back to work on 6/29/17. Instead, you have had no contact with either your supervisor, myself or Outdoor Aluminum, Inc., and you have never reported back to work in the approximately 3 weeks since this report.

"Regrettably, it is obvious to me that you no longer wish to be employed here, and with that in mind, as of today 7/21/17, you have been terminated, due to lack of attendance.

"Your health insurance has been canceled as of this date also.

"In the next few days you will receive information from either Outdoor Aluminum or BCBS on how you can continue your health insurance coverage should you so desire."

At the time Rose sent that letter, Register had neither received a copy of her FCE report nor met with Dr. Maddox regarding the FCE results as Redding had indicated was necessary. It is undisputed that Register had been restricted from returning to work until July 27, 2017, by Dr. Cospers.

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On June 27, 2018, Register sued Outdoor Aluminum seeking workers' compensation benefits and damages for retaliatory discharge. The parties engaged in discovery.

On May 22, 2020, Outdoor Aluminum filed a motion for a summary judgment regarding Register's retaliatory-discharge claim, arguing that Register cannot show that her workers' compensation claim was the sole motivating factor behind the termination of her employment. Specifically, Outdoor Aluminum argued that Rose had been unaware that Dr. Cospers had restricted Register from work until July 27, 2017. Without Rose's knowledge of the work restriction, Outdoor Aluminum argued, Register's alleged absenteeism was a valid basis for her discharge and her workers' compensation claim could not be construed as the sole reason for the termination of Register's employment. Outdoor Aluminum asserted that Redding had not told Rose of and had not sent Rose any information regarding Dr. Cospers' work restriction. Outdoor Aluminum also argued that it did not terminate Register's employment until nine months after she had sought workers' compensation benefits and that, therefore, there is no proximity between Register's seeking benefits and Outdoor

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Aluminum's terminating her employment. Outdoor Aluminum argued that there was no evidence indicating that it had a negative attitude toward Register "regarding her injured condition." Although Outdoor Aluminum had a policy regarding attendance, Rose testified that it was Outdoor Aluminum's policy to retain discretion to skip steps in its policy if needed. Outdoor Aluminum also asserted that there was no evidence indicating that other employees had been discharged for filing a workers' compensation claim. Lastly, Outdoor Aluminum argued that it had a legitimate nonretaliatory reason for terminating Register because she had not returned to work after being released by Dr. Maddox.

On June 15, 2020, Register filed a response to the summary-judgment motion, arguing that summary judgment was inappropriate because, she said: (1) Outdoor Aluminum had failed to follow its own policies and procedures when it discharged Register; (2) Outdoor Aluminum's negative attitude toward Register and her maintaining her workers' compensation claim was evident in the e-mail exchange between Rose and Redding; (3) Outdoor Aluminum discharged Register for lack of attendance despite the fact she was being held out of work by an

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authorized treating physician on the date of her discharge; and (4) Outdoor Aluminum had failed to conduct even the most cursory of investigations with regard to the return-to-work order issued by its own treating physician before discharging Register and, instead, had taken "the first perceived opportunity it could find to terminate Register for a 'legitimate reason' because it felt her workers' compensation claim was 'dragging out way past its time' and she appeared to be 'TRYING to find a place that will say she's disabled.'" Register presented testimony indicating that Redding denied telling Rose that Register should have been back to work after Rose had received the results of the FCE. Redding also testified that it was not within her purview to advise Rose and that she had referred Rose to the workers' compensation claims adjuster. Register presented evidence indicating that Outdoor Aluminum had received medical bills and treatment notes from Dr. Cosper, that an employee of Outdoor Aluminum had sent e-mails to the claims adjuster, and that an employee of Outdoor Aluminum had forwarded Dr. Cosper's office notes from July 18, 2017, to the claims adjuster.

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On June 17, 2020, the trial court held a hearing on the summary-judgment motion. On July 2, 2020, the trial court entered an order granting Outdoor Aluminum's summary-judgment motion as to Register's retaliatory-discharge claim. On August 4, 2020, Register filed a motion requesting that the summary judgment as to the retaliatory-discharge claim be certified as final pursuant to Rule 54(b), Ala. R. Civ. P., and, that same day, the trial court certified the summary judgment on Register's retaliatory-discharge claim as final. Register timely appealed.

Standard of Review

"This Court reviews a summary judgment de novo, 'apply[ing] the same standard of review as the trial court.' Slay v. Keller Indus., Inc., 823 So. 2d 623, 624 (Ala. 2001). 'In order to enter a summary judgment, the trial court must determine: 1) that there is no genuine issue of material fact, and 2) that the moving party is entitled to a judgment as a matter of law.' Williams v. Ditto, 601 So. 2d 482, 484 (Ala. 1992). This Court must view the evidence in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party. Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2001)."

Gustin v. Vulcan Termite & Pest Control, Inc., [Ms. 1190255, Oct. 30, 2020] ___ So. 3d ___, ___ (Ala. 2020).

Discussion

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"As a general rule in Alabama, an employment contract for an indefinite period is terminable at will by either party, with or without cause or justification. Hoffman–LaRoche, Inc. v. Campbell, 512 So. 2d 725 (Ala.1987). The Legislature carved out an exception to that general rule, however, with regard to a discharge of an employee in the aftermath of the filing of a workers' compensation claim. Section 25-5-11.1 provides:

"'No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter....' "

Flint Constr. Co. v. Hall, 904 So. 2d 236, 246 (Ala. 2004)(emphasis added).

This Court, in Alabama Power Co. v. Aldridge, 854 So. 2d 554, 563 (Ala. 2002), explained:

"In order for an employee to establish a prima facie case of retaliatory discharge the employee must show: 1) an employment relationship, 2) an on-the-job injury, 3) knowledge on the part of the employer of the on-the-job injury, and 4) subsequent termination of employment based solely upon the employee's on-the-job injury and the filing of a workers' compensation claim."

"Because direct evidence demonstrating that an employer has discharged an employee solely because the employee has filed a workers' compensation claim is not often easily obtained, an employee may

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establish by circumstantial evidence that the actual reason for the discharge was the employee's filing of a workers' compensation claim." Hatch v. NTW, Inc., 35 So. 3d 623, 628 (Ala. Civ. App. 2009) (citing Aldridge, 854 So. 2d at 564-55).

In Aldridge, this Court clarified the proof necessary for establishing a prima facie case of retaliatory discharge and that a plaintiff must prove a causal connection between the workers' compensation claim and the subsequent discharge. The Aldridge Court noted that our prior caselaw had not addressed in detail the evidence a plaintiff must present to show that he or she was discharged solely because of his or her workers' compensation claim. The Court acknowledged that proximity in time between the filing of the workers' compensation claim and the termination of employment may be a typical beginning point, but is not the sole means of showing a causal connection, and held that such temporal proximity alone is insufficient. 854 So. 2d at 565. The Aldridge Court also cited Chhim v. University of Houston, 76 S.W.3d 210, 218 (Tex. App. 2002). In Chhim, the Texas court set out examples of circumstantial evidence that

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may be sufficient to establish a causal link between termination of employment and the filing of a workers' compensation claim, including:

"1) knowledge of the compensation claim by those making the decision on termination, 2) expression of a negative attitude toward the employee's injured condition, 3) failure to adhere to established company policy, 4) discriminatory treatment in comparison to similarly situated employees, 5) sudden changes in an employee's work performance evaluations following a workers' compensation claim, and 6) evidence that the stated reason for the discharge was false."

Chhim, 76 S.W.3d at 218.

In Foster v. North American Bus Industries, Inc., 236 So. 3d 70 (Ala. 2017), the plaintiff suffered a head injury when she was drilling a hole in a steel plate. After her accident, the plaintiff was terminated from her employment, and she commenced a retaliatory-discharge action. The trial court entered a summary judgment in favor of her employer. This Court reversed the summary judgment, concluding that the plaintiff had presented a prima facie case of retaliatory discharge by demonstrating, among other things, that there was a relatively close proximity between the date on which the plaintiff had filed a claim for workers' compensation benefits and the date of her discharge. She was injured on July 10, 2012,

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and filed her claim for benefits on that date; she was discharged on July 30, 2012. Additionally, there was no dispute that those who had made the decision to terminate the plaintiff's employment, two employees in particular, had known about the plaintiff's workers' compensation claim. The plaintiff also presented evidence, albeit disputed, indicating that a supervisor had expressed a negative attitude about the plaintiff's injured condition. There was also a conflict in the evidence as to whether the employer had adhered to its attendance policy in terminating the plaintiff's employment. The Court addressed the employer's stated reason for terminating the plaintiff's employment and whether that reason was a pretext for terminating the plaintiff's employment. The Court concluded that there were numerous issues of fact precluding summary judgment and that the jury should resolve whether the plaintiff had complied with the employer's attendance policy; whether the employer had a previous practice of deviating from the requirements of its attendance policy; whether the employer had been aware that the plaintiff's absences were related to her work injury; and whether negative comments made by the plaintiff's supervisor, suggesting that the plaintiff

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might have to find another job because of her injury, indicated the motive behind the plaintiff's termination. Foster, 236 So. 3d at 77.

In the present case, it is undisputed that Register was employed by Outdoor Aluminum, that she was injured while she was performing her job, and that Outdoor Aluminum was aware of her injury. Viewing the evidence in a light most favorable to Register, the nonmovant, as this Court must do, Gustin, ___ So. 3d at ___, it is clear that she has presented substantial evidence indicating that Outdoor Aluminum terminated her employment solely for maintaining her workers' compensation claim. Register complied with Outdoor Aluminum's requirement that she seek treatment for her workplace injury from one of their approved doctors, Dr. Cosper. It was Dr. Cosper who excused Register from work until July 27, 2017. As part of Dr. Cosper's treatment, Register was referred to other physicians for specific treatment and therapy. Outdoor Aluminum was clearly aware that Dr. Cosper was Register's treating physician, because Outdoor Aluminum had required Register to use Dr. Cosper for treatment of her on-the-job injury. Register presented evidence indicating that an employee of Outdoor Aluminum had forwarded Dr.

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Cosper's office notes to the workers' compensation claims adjuster and that the same employee had been sent Rose's e-mail regarding Register's discharge.

When Dr. Maddox, to whom Register was referred to by Dr. Cosper, ordered an FCE, Rose expressed a negative attitude toward Register's workers' compensation claim, suggesting that Register was searching for a physician who would conclude that she was disabled. Rose also expressed a negative attitude toward Register's maintaining her workers' compensation claim by stating that Register had no problem going to yard sales and that light-duty work would be easier than attending such sales. Rose's statements, which he made before the FCE occurred, indicate either that he did not believe that Register's injuries were serious or that he believed that she was exaggerating her injuries to stay out of work.

The evidence indicates that Outdoor Aluminum did not comply with its own disciplinary policy when it terminated Register's employment. Outdoor Aluminum had a disciplinary-action form that set out its policy. Although Rose's deposition testimony provides that complying with the disciplinary process set out on the form was discretionary and that

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Outdoor Aluminum reserved the right to skip steps in its disciplinary process, nothing on the form indicates that Outdoor Aluminum reserved such discretion. Cf. Hale v. Hyundai Motor Mfg. Alabama, LLC, 86 So. 3d 1015, 1028 (Ala. Civ. App. 2012)(indicating that company had an express policy in its handbook regarding serious violations of its attendance policy but that, in certain circumstances, such as situations involving falsification of employment records like bereavement-leave requests, the company would forgo its policy). In its brief to this Court, Outdoor Aluminum makes several arguments regarding the informality of the process set out on the disciplinary-action form and that Register's interpretation of the form, taken to its logical conclusion, is unworkable, "lacks any basis in Alabama law, fundamental business operations, or even common sense." Outdoor Aluminum's brief, p. 20. However, Outdoor Aluminum authored the form, and whether the process set out on the disciplinary-action form applies in this case is an issue for a jury to decide.

The e-mails between Rose and Redding indicate that Rose was, at the very least, aware that Register should meet with Dr. Maddox in a follow-up appointment so that he could discuss the results of the FCE with

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Register. Register did not receive a copy of the FCE report, much less have the results of the FCE explained to her by Dr. Maddox, before her employment was terminated. Additionally, Redding testified that she did not tell Rose that Register should have been back at work. Instead, Redding testified that advising Rose on termination was not within her job purview and that she had referred Rose to the claims adjuster. That testimony, coupled with Rose's e-mail exchange with Redding, create a question of fact for a jury regarding whether Register's discharge was in retaliation for having pursued a workers' compensation claim.

We recognize that Outdoor Aluminum claims to have terminated Register's employment based on her alleged absenteeism. However, Register has presented substantial evidence that there are genuine issues of material fact that should be resolved by a jury, including (1) whether Outdoor Aluminum reserved the right to skip steps in its disciplinary process and whether Register understood whether it had the discretion to do so; (2) whether the e-mail exchange between Rose and Redding shows a negative attitude toward Register's workers' compensation claim and whether Redding advised Rose that Register should have already returned

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to work before she was discharged; (3) whether Outdoor Aluminum was aware, or should have been aware, of Dr. Cospers's restriction on Register's returning to work; (4) and whether Rose was looking for a reason to discharge Register for maintaining her workers' compensation claim. In regard to issue (4), Outdoor Aluminum's express reason for discharging Register was absenteeism, even though Outdoor Aluminum's approved treating physician determined that Register should not return to work until July 27, 2017. A jury should determine whether absenteeism was a pretextual reason for the discharge.

Based on the foregoing, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur.

Sellers, J., concurs in the result.

Parker, C.J., dissents.

Mitchell, J., recuses himself.