IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-98

No. COA21-253

Filed 15 February 2022

Buncombe County, No. 19 CV 02220

KIRT ABERNATHY, Plaintiff,

v.

MISSION HEALTH SYSTEM, INC., Defendant.

Appeal by plaintiff from judgment entered 21 December 2020 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 30 November 2021.

John C. Hunter for plaintiff-appellant.

Constangy, Brooks, Smith & Prophete, LLP, by Jonathan W. Yarbrough and Jill C. Stricklin, for defendant-appellee.

DIETZ, Judge.

¶ 1 Plaintiff Kirt Abernathy brought a retaliatory discharge claim after he was fired from his job as an energy program manager in the Mission Health System network. Abernathy contends that he was fired for raising concerns about safety standards and practices at the network's hospitals.

¶ 2 The trial court entered summary judgment against Abernathy, and he timely

appealed to this Court. As explained below, we affirm the trial court's judgment. Taking the evidence in the light most favorable to Abernathy, he has not shown that he filed any claim or complaint, or initiated any inquiry, investigation, inspection, proceeding or other action concerning the alleged safety issues. Thus, he failed to forecast evidence concerning an essential element of his Retaliatory Employment Discrimination Act (REDA) claim and the trial court properly entered summary judgment against him.

¶ 3 Additionally, Abernathy's REDA claim must be brought against his employer. Undisputed evidence demonstrates that Abernathy's employer was Mission Hospital, Inc. The named defendant in this action, Mission Health System, Inc., asserted in its answer and at summary judgment that Abernathy named the wrong corporate entity. Abernathy did not move to amend the complaint. Accordingly, the trial court properly entered summary judgment on this basis as well. We therefore affirm the trial court's judgment.

Facts and Procedural History

¶ 4 The trial court resolved this case on Defendant Mission Health System, Inc.'s motion for summary judgment, and we therefore describe the factual background of this case in the light most favorable to Plaintiff Kirt Abernathy, as the non-moving party.

¶ 5 Abernathy began working for Mission Hospital, Inc. as an Operations Manager

on 28 December 2015. He was later promoted to the role of Energy Program Manager. He oversaw the operations of various physical plant systems, including electrical energy programs and working with local contractors to develop cost-efficient energy programs. This included the transition to LED lighting.

¶ 6 In July and September 2018, two small fires broke out at hospital facilities in the Mission Health System network. These fires resulted from improper LED light installation. After the fires, Abernathy participated in several meetings to address and resolve the problematic lights. At some point in this process, officials within Mission Health System's network asked Abernathy to provide a presentation that included detailed instructions about the installation and retrofitting process for the LED lighting that could be shared with staff members in the Mission Health System network.

¶ 7 Abernathy responded to the request by offering to provide limited information but explaining that he believed the requested presentation was inappropriate. Abernathy's reason for declining to prepare the requested information was his concern that the staff members who would review the materials were not qualified to perform the expected tasks under applicable occupational safety standards. Abernathy repeatedly communicated these concerns and other, related safety concerns to his direct supervisor, Michael Mace, and to another supervisor within the Mission Health System network.

¶ 8 On 3 December 2018, Abernathy received a written warning for refusing to complete the requested assignment. The corrective action notice directed Abernathy to provide the requested presentation to his supervisor by the end of the day on 5 December 2018, attend counseling, and enroll in employee communication and performance classes. Abernathy failed to complete any of these requested tasks. On 6 December 2018, Abernathy emailed the human resources department and explained that he believed the corrective action notices and related disciplinary actions were "retaliation for my expressing concerns about being required to take actions that are unsafe and not in compliance with applicable North Carolina safety and building codes and standards."

¶ 9 Abernathy was again instructed to submit the requested presentation by 14 December 2018 and told that his failure to do so could result in further disciplinary action including termination.

¶ 10 Abernathy submitted a presentation before the deadline, but it failed to contain the information that his supervisor and others requested. On 17 December 2018, Abernathy emailed his supervisor, the human resources director, and another company official a copy of an online whistleblower complaint form that he claimed to have filed with the U.S. Department of Labor. In that online form, Abernathy checked boxes indicating that he had suffered adverse employment action because he "[c]omplained to management about unlawful conditions, conduct or practice," and

"[r]efused to perform unsafe task." In a box asking the complainant to explain the reason that the employer took adverse action, Abernathy wrote that "Director stated I was to instruct and select unqualified employees to conduct electrical work for installation of LED fixtures at each hospital facility. My refusal to follow these instructions resulted in a Corrective Action notice including termination."

¶ 11 Abernathy was fired on 17 January 2019. He filed a REDA complaint with the North Carolina Department of Labor that same day. The Department later issued a right-to-sue letter.

¶ 12 Abernathy then brought a one-page, *pro se* complaint against Defendant Mission Health System, Inc. that, generously construed, asserted a retaliatory discharge claim under REDA and a retaliation complaint under federal law.

¶ 13 Mission Health System filed an answer and motion to dismiss and the trial court issued an order dismissing the federal claim with prejudice and allowing Abernathy 30 days to file an amended complaint.

¶ 14 On 6 September 2019, Abernathy, now represented by counsel, filed an amended complaint asserting a retaliatory discharge claim under REDA. Mission Health System answered the amended complaint, and the parties proceeded to discovery.

¶ 15 On 30 July 2020, Mission Health System moved for summary judgment. The trial court heard the motion on 16 December 2020 and entered summary judgment

in favor of Mission Health System on 21 December 2020. Abernathy timely appealed.

Analysis

¶ 16 We review the trial court's entry of summary judgment *de novo*, examining whether the evidence forecast by the parties shows there is "no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). In our review, we examine "the presented evidence in a light most favorable to the nonmoving party." *Id.*

I. Claim under the Retaliatory Employment Discrimination Act

¶ 17 We begin by examining Abernathy's argument that there are genuine issues of material fact concerning his claim under the Retaliatory Employment Discrimination Act (REDA). REDA provides that no person "shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do" one of a series of actions described by the statute. N.C. Gen. Stat. § 95-241(a). Among the actions covered by REDA is filing "a claim or complaint" or initiating "any inquiry, investigation, inspection, proceeding or other action" with respect to issues governed by the Occupational Safety and Health Act of North Carolina (OSHANC). *Id.*

¶ 18 To prevail on a REDA claim, a plaintiff must show: "(1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse

employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a)." *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004).

¶ 19 Courts analyze this three-part test using a burden-shifting framework. The employee must first establish a prima facie case of retaliatory discrimination. *See Whitings v. Wolfson Casing Corp.,* 173 N.C. App. 218, 221, 618 S.E.2d 750, 752–53 (2005). If the employee presents a prima facie case of retaliatory discrimination, then the burden shifts to the employer to show that he would have taken the same unfavorable action in the absence of the protected activity of the employee. *Wiley*, 164 N.C. App. at 186, 594 S.E.2d at 811. Once the employer provides a nondiscriminatory reason for its action, the burden of proof shifts back to the employee to demonstrate that the apparently valid reason was actually a pretext for discrimination. *Fatta v. M&M Properties Mgmt., Inc.*, 221 N.C. App. 369, 372, 727 S.E.2d 595, 599 (2012).

¶ 20 We begin with the first prong of the test, examining whether Abernathy "exercised his rights" under REDA by filing or threatening to file a claim or complaint, or initiating or threatening to initiate an inquiry, investigation, inspection, proceeding or other action concerning issues governed by OSHANC. In *Pierce v. Atlantic Group, Inc.*, this Court examined the types of activities that fall within this category. 219 N.C. App 19, 28, 724 S.E.2d 568, 574 (2012). Citing federal decisions interpreting REDA, we observed that "REDA does not limit protected activities to the

sole act of filing a formal claim under OSHANC. At the other end of the spectrum, however, courts have held that merely talking to an internal supervisor about potential safety concerns is not a 'protected activity' under REDA." *Id.*

¶ 21 After examining the federal cases, *Pierce* ultimately held that the employee's activity in that case did not satisfy this first prong of REDA's test. *Id.* The court explained that the employee in *Pierce* "spoke only to his supervisors" about his safety concerns and later called an outside ethics hotline, but only to report retaliatory treatment, "not to report a concern regarding occupational health and safety in the context of his employment." *Id.* We held that these facts were not "sufficient to constitute the initiation of an inquiry pursuant to N.C. Gen. Stat. § 95-241(a)." *Id.*

¶ 22 Abernathy attempts to distinguish *Pierce* by asserting that he did "far more than merely talking to an internal supervisor about potential safety concerns." He contends that he "repeatedly informed his direct supervisor, Mace, on at least five different occasions over an 11-month period" about his safety concerns. The record supports this contention. The record also indicates that he expressed his concerns to another supervisor at the hospital. But, under *Pierce*, informing supervisors of safety concerns is not the initiation of an inquiry, investigation, inspection, proceeding or other action, regardless of how many times the employee raised the issue with those supervisors. *Id.*

¶ 23 Abernathy also contends that he "brought his safety and retaliation concerns"

to Mission Hospital's human resources department, "up to and including the Director of Human Resources, Susan Parille." But, as Abernathy acknowledges, his correspondence with human resources concerned his allegations of *retaliation* for raising safety concerns with his supervisors. Specifically, Abernathy's correspondence with human resources concerned disciplinary action taken against him. He explained that "I believe that this is retaliation for my expressing concerns about being required to take actions that are unsafe and not in compliance with applicable North Carolina safety and building codes and standards." Under *Pierce*, to report "the retaliatory treatment he had been receiving—not to report a concern regarding occupational health and safety in the context of his employment" does not amount to initiation of any inquiry, investigation, inspection, proceeding or other action under REDA. *Id.*

¶ 24 Similarly, Abernathy contends that he "filed a formal complaint with the United States Department of Labor" stating his safety concerns. But again, that was a complaint for retaliatory treatment. In it, Abernathy indicated by checking boxes on an online form that he suffered "Termination/Layoff" and "Harassment/Intimidation" because he "[c]omplained to management about unlawful conditions, conduct or practices" and "[r]efused to perform unsafe or illegal task." In the box asking the complainant what reasons the employer had for the adverse employment action, Abernathy explained: "Director stated I was to instruct and select

unqualified employees to conduct electrical work for installation of LED fixtures at each hospital facility. My refusal to follow these instructions resulted in a Corrective Action notice including termination." In the next box on the online form, Abernathy listed three additional reasons why he believed he had been disciplined, including his refusal to sign a change order, an email "that was interpreted as misconduct that was direct but not offensive" and "refusal to comply" with instructions concerning an "LED fixture issue."

¶ 25 Like the call to the ethics hotline in *Pierce*, this online complaint reported retaliatory treatment. Nowhere in the form did Abernathy file a complaint concerning OSHANC safety issues or initiate an inquiry, investigation, inspection, proceeding or other action concerning OSHANC safety standards. Instead, he reported claims of retaliation based on adverse employment action after he raised safety concerns to supervisors internally at the company.

¶ 26 In short, taking the evidence in the light most favorable to Abernathy, we cannot distinguish the facts in this case from the factual allegations in *Pierce*. Accepting all of Abernathy's evidence at true, Abernathy raised OSHANC safety concerns repeatedly to supervisors at the hospital, and then reported retaliatory treatment to the hospital's human resources department and to the U.S. Department of Labor after the hospital took disciplinary action against him for repeatedly raising those concerns to his supervisors. Under *Pierce*, these facts are insufficient to satisfy

the first prong of the three-part REDA test. Accordingly, the trial court properly determined that Defendant Mission Health System, Inc. was entitled to summary judgment as a matter of law on Abernathy's REDA claim.

II. Failure to show employee-employer relationship

¶ 27 In addition, there was an alternative ground on which the trial court properly determined that Mission Health System, Inc. was entitled to summary judgment: that it could not be liable under REDA because it was not Abernathy's employer. REDA imposes liability for "retaliatory action against an *employee*." N.C. Gen. Stat. § 95-241(a) (emphasis added). In its answer to the complaint and its summary judgment argument, Mission Health System, Inc. asserted that Abernathy's employer was Mission Hospital, Inc., a separate company within the overall hospital network.

¶ 28 There is undisputed evidence from Abernathy's employment records and the affidavit of his direct supervisor that supports this argument. Abernathy's paystubs and W-2s indicated that his employer was Mission Hospital, Inc.; Abernathy's direct supervisor, Michael Mace, was a Mission Hospital, Inc. employee; the personnel who signed his disciplinary warnings were Mission Hospital, Inc. employees; and the human resources officials involved in the decision to terminate Abernathy's employment were Mission Hospital, Inc. employees.

¶ 29 Abernathy acknowledges this evidence but cites cases in the workers'

compensation context that address how to determine "an employer-employee relationship." *Sutton v. Ward*, 92 N.C. App. 215, 217, 374 S.E.2d 277, 279 (1988). Abernathy argues that these cases show Mission Health System, Inc. is his actual employer. But the cases Abernathy cites do not support his position, and instead support the trial court's ruling.

¶ 30 In *Sutton v. Ward*, for example, this Court emphasized that the "right to control the worker determines who is the employer" and that the right to control was evidenced by factors such as "authority to terminate" for unsatisfactory performance; employing the worker's "immediate supervisors"; controlling and directing work activities; and responsibility for records of work hours and wages. *Id.* As noted above, there is undisputed evidence that Mission Hospital, Inc. was responsible for all of these factors.

¶ 31 Abernathy responds by pointing to various evidence that he contends creates a genuine issue of material fact with respect to the identity of his employer, such as his understanding that, when he was promoted to his most recent position, his duties expanded to "a system corporate role." Similarly, he points to the employment policy under which he was disciplined and ultimately terminated, which applies to all "Mission Health System, Inc. staff members"—although, to be fair, the policy also states it is "applicable to" Mission Hospital, Inc. Finally, Abernathy points to a filing by Mission Health System, Inc. with the Department of Labor which states that

Abernathy "worked for the Hospital" and, in the introductory section several paragraphs earlier, defined the term "Hospital" to mean Mission Health System, Inc. But that same document then states that "Mission Health System, Inc. operates a number of health care facilities throughout western North Carolina, including the Hospital where [Abernathy] worked."

¶ 32 None of this evidence indicates that Mission Health System, Inc., as opposed to Mission Hospital, Inc., had the right to control Abernathy's employment. Even accepting that Abernathy's role had expanded to a "system corporate role"—meaning performing services for Mission Hospital System and all its corporate entities—and even assuming that he was disciplined under employment policies applying to the entire system network, the undisputed evidence is that employees of Mission Hospital, Inc. supervised Abernathy and had the authority to discipline or terminate him, and that Mission Hospital, Inc. paid him for his work as reflected on his payroll stubs and W-2s.

¶ 33 Because REDA imposes liability for "retaliatory action against an employee" and because the undisputed evidence before the trial court at summary judgment showed that Abernathy was not an employee of Mission Health System, Inc., the trial court properly entered summary judgment for this alternative reason as well.

Conclusion

¶ 34 We affirm the trial court's order granting summary judgment in favor of

Defendant Mission Health System, Inc.

AFFIRMED.

Judges MURPHY and WOOD concur.

Report per Rule 30(e).