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KERRY L. TEETOR, APPELLANT, V. DAWSON PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND ROBERT A. HEINZ, APPELLEES.

808 N.W.2d 86

Filed January 17, 2012. No. A-11-170.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
4. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
5. **Termination of Employment: Summary Judgment: Discrimination: Presumptions: Proof.** When considering the propriety of a grant of summary judgment in a wrongful termination of at-will employment case, Nebraska employs the burden-shifting analysis for considering claims of employment discrimination that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973): First, the plaintiff has the burden of proving a prima facie case of discrimination. Second, if the plaintiff succeeds in proving that prima facie case, the burden of production shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Third, assuming the employer establishes an

articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision.

6. **Employer and Employee: Time: Proof.** Proximity in time between an employee's actions allegedly being retaliated against and discharge is a typical beginning point for proof of a causal connection, and a plaintiff supports an assertion of retaliatory motive by demonstrating such proximity along with evidence of satisfactory work performance and evaluations.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellant.

Gail S. Perry and Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Kerry L. Teetor appeals an order of the district court for Dawson County, Nebraska, granting summary judgment in favor of the Dawson Public Power District (the District) and Robert A. Heinz (collectively Appellees) in this action for wrongful termination of employment. On appeal, Teetor has assigned numerous errors challenging the court's grant of summary judgment and its finding that there was no genuine issue of material fact concerning Teetor's employment status and concerning there being sufficient grounds for terminating his employment. We find no merit, and we affirm.

II. BACKGROUND

Teetor was employed by the District from April 1978 to May 2008. Teetor was the operations manager for the District. At all relevant times, Heinz was the general manager of the District. Heinz conducted regular evaluations of Teetor's performance, and Teetor generally received all positive performance reviews from Heinz.

In April 2008, the District's employees expressed interest in forming a labor union. The District conducted a meeting with

the employees on April 10. During that meeting, the employees expressed to the District's management that Teetor's management style was "threaten[ing]" and having a negative effect on morale. The District informed the employees that the proper procedure if they were unhappy with Teetor's management was to follow the District's grievance procedure. Subsequently, a number of grievances were filed, involving approximately 20 employees.

On April 10, 2008, the same day as the District's meeting with employees about their desire to form a labor union, a storm moved into the District's service territory and began to cause power outages. The District's repair employees were called in to respond to the outages. One of the employees indicated that he had consumed two beers. At the time, the District had a policy that employees could not return to work after consuming alcohol. Heinz advised the employee that he could work, but Teetor advised him not to drive. Apparently, the employee actually did drive; Heinz was ultimately disciplined for allowing the employee to return to work after consuming alcohol.

In late April 2008, Heinz met with Teetor and advised him that employees had filed grievances about his management. During that meeting, Teetor indicated that "everybody was nothing but a bunch of bitches and whiners and that they — everybody just wanted to get rid of him." Teetor also informed Heinz that he was going to "take action" concerning Heinz' allowing the employee to work after consuming alcohol.

Heinz testified that he initially did not intend to terminate Teetor's employment and that, instead, he attempted to find alternative solutions that would be acceptable to the employees of the District. In late April 2008, Heinz met with Teetor and offered, as a potential solution, that Teetor needed to apologize to the employees for his prior intimidating and threatening behavior and assure them that it would not happen again. Teetor's response was that "none of it was true" and that "[e]veryone was out to get him." Heinz testified that he never heard any apology or assurance that Teetor would not retaliate against the employees for filing grievances against him.

On April 29, 2008, the District's personnel committee met. At that meeting, the committee discussed both the many grievances filed against Teetor and Heinz' investigation of the grievances. The committee concluded that the grievances filed by the employees were valid and highlighted a pattern of abusive behavior by Teetor. Heinz then determined that termination of Teetor's employment was necessary because of Teetor's unwillingness to attempt to repair the situation by apologizing and assuring the employees that he would not retaliate.

Also in late April 2008, and prior to his termination of employment, Teetor began the process of filing a workers' compensation claim based on mental anxiety. On May 1, Teetor filed a grievance with the District concerning Heinz' decision to allow an employee to return to work after consuming alcohol. On May 2, Heinz met with Teetor and advised him that his employment was terminated.

Teetor filed an unsuccessful claim with the Nebraska Employment Opportunity Commission; he served notice of claims pursuant to Nebraska's Political Subdivisions Tort Claims Act, and his tort claims were ultimately denied. Teetor then filed an action in the district court alleging multiple causes of action for wrongful termination and interference with a business relationship. The action was removed to federal court, where Teetor's causes of action were dismissed based on violation of federal law and the matter was remanded to the district court. Appellees moved for summary judgment.

On February 2, 2011, the district court entered a memorandum and order concerning the motion for summary judgment. The district court provided over 20 pages of analysis of Teetor's claims. The court recognized that Teetor's wrongful termination claims included assertions that he was terminated from employment in contravention of public policy for filing a grievance about his superior's authorization of an employee's working after consuming alcohol, in retaliation for filing a workers' compensation claim, in exchange for the District employees' not forming a labor union, in contravention of an employee manual, and in bad faith. The court analyzed each claim under the summary judgment standard and concluded Teetor had failed to adduce sufficient evidence to establish

that he was anything other than an at-will employee and that termination of his employment was in contravention of public policy or law. The court granted summary judgment in favor of Appellees, and this appeal followed.

III. ASSIGNMENTS OF ERROR

Teetor has assigned numerous errors on appeal. At their core, his assertions all challenge the district court's grant of summary judgment.

IV. ANALYSIS

In his amended complaint, Teetor asserted 10 causes of action to support his claim that his employment was wrongfully terminated. Two of the causes of action were based on his assertion that his employment was terminated in retaliation for his filing a grievance against Heinz related to Heinz' decision to allow an employee to work after consuming alcohol. One of the causes of action was based on his assertion that his employment was terminated in retaliation for his filing a workers' compensation claim. One of the causes of action was based on his assertion that his employment was terminated in exchange for the District employees' not forming a labor union. One of the causes of action was based on his assertion that his employment was terminated in contravention of the terms of an employee manual. One of the causes of action was based on his assertion that his employment was terminated in contravention of a requirement of good faith and fair dealing. Three of the causes of action were based on assertions of interference with a business relationship. One of the causes of action was based on his assertion that termination of his employment was in violation of federal law. We find no merit to his claims on appeal that the district court erred in granting summary judgment on these claims.

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Howsden v. Roper's Real Estate*

Co., 282 Neb. 666, 805 N.W.2d 640 (2011). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence. *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

[3,4] Teetor has not asserted or adduced any evidence to suggest that he was hired on anything other than an at-will basis. The general rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). Under the public policy exception, however, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id.*

[5] In *Riesen v. Irwin Indus. Tool Co., supra*, the Nebraska Supreme Court, in considering the propriety of a grant of summary judgment in a wrongful termination of at-will employment case, employed the burden-shifting analysis for considering claims of employment discrimination that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The district court in the present case employed the same reasoning. In *Riesen v. Irwin Indus. Tool Co.*, the Nebraska Supreme Court noted that the following procedure is utilized under the three-tiered allocation of proof standard: First, the plaintiff has the burden of proving a prima facie case of discrimination. Second, if the plaintiff succeeds in proving that prima facie case, the burden of production shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and drops from the case. Third, assuming the employer establishes an articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision.

1. GRIEVANCE

Teetor first asserted that his employment was terminated in retaliation for his filing a grievance against Heinz related to Heinz' decision to allow an employee to work after consuming alcohol. Although Teetor demonstrated a proximity in time between the grievance and the discharge, the district court concluded that he failed to demonstrate any additional evidence which would support a finding that the termination was in retaliation for the grievance. We agree.

Teetor asserted that termination of his employment in retaliation for his filing a grievance was in contravention of public policy. Specifically, he argued that Neb. Rev. Stat. § 60-4,163 (Reissue 2010) prohibits operation of a motor vehicle after consuming alcohol and that the District's policy actually prohibits returning to employment after consumption of alcohol. Teetor asserts that his grievance against Heinz for allowing the employee to return to work provided a retaliatory motive for termination of Teetor's employment.

[6] In *Riesen v. Irwin Indus. Tool Co., supra*, the Nebraska Supreme Court noted that proximity in time between an employee's actions allegedly being retaliated against and discharge is a typical beginning point for proof of a causal connection and that a plaintiff supports an assertion of retaliatory motive by demonstrating such proximity along with evidence of satisfactory work performance and evaluations. In the present case, Teetor established that his termination from employment was close in time to his filing of a grievance against Heinz and that he had a history of satisfactory work performance and evaluations.

The district court acknowledged that Teetor had adduced sufficient evidence to make his prima facie case of retaliatory discharge. In addition, the court acknowledged that it is the public policy of the State of Nebraska to promote safe roads and that the statutory and the District's prohibitions noted above would be part of such a policy. The district court then found that Appellees met their burden of production with respect to providing a justification for the discharge by providing evidence of Teetor's demoralizing management style,

allegations of his bullying and harassment of employees, and complaints about his ineffectiveness as a leader.

To defeat summary judgment concerning Teetor's claims that he was improperly discharged in retaliation for filing a grievance against Heinz, Teetor then needed to present evidence establishing a genuine issue of material fact regarding whether Appellees' proffered explanation for firing him was merely pretextual. The district court found that Teetor did not, and we agree.

Teetor adduced no evidence to establish that Appellees' reasons for terminating his employment were merely pretextual. Indeed, Teetor himself testified that he received a telephone call from Heinz on April 29, 2009, and that his interpretation of the telephone call was that he "was going to be fired" on May 2, and that "[s]o, on May 1st, I decided that I'm going to be fired, so I might as well file a grievance" against Heinz. Thus, although there was temporal proximity, Teetor's own testimony demonstrates that there was no genuine issue of material fact suggesting that he was fired in retaliation for filing a grievance against Heinz or that Appellees' proffered reasons for the termination were pretextual. We affirm the summary judgment on these claims.

2. Workers' Compensation

Teetor next asserted that his employment was terminated in retaliation for his filing a workers' compensation claim. Termination of employment in retaliation for filing a workers' compensation claim is contrary to public policy and supports a wrongful termination action. See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003). Like Teetor's claims asserting that the termination was in retaliation for his filing a grievance against Heinz, this claim relied primarily on the temporal proximity between Teetor's filing of a workers' compensation claim and the termination of his employment. Like it did concerning the assertions based on Teetor's grievance against Heinz, the district court found that Teetor had satisfied his burden to establish a prima facie case because of the temporal proximity and his history of satisfactory performance and evaluations and that Appellees satisfied

their burden of production by establishing that Teetor was terminated from employment because of his management style and employee complaints.

Again, the issue concerning summary judgment is whether Teetor satisfied his burden of establishing pretext. We agree with the district court that he did not. Teetor has not pointed us to any evidence in the record suggesting any causal connection between his filing of a workers' compensation claim and Appellees' decision to terminate his employment. The only evidence adduced by Teetor was that his firing was close in time to his filing of a workers' compensation claim, but the evidence establishes without contradiction that the investigation into his management behaviors and employee complaints had already begun and was nearing an end when he filed his workers' compensation claim and that his claim was actually based on emotional conditions that arose as a result of that investigation. There was no evidence to establish a genuine issue of fact on this point, and we affirm the summary judgment granted on this claim.

3. Union Activity

Teetor next asserted that his employment was terminated as a means of discouraging union activity and that his termination was done to encourage employees to vote against forming a union. As with the above claims, the only evidence adduced in support of Teetor's claim is that the termination was close in time to the employee vote rejecting the creation of a union. As with the above claims, Teetor adduced no evidence to establish any factual question that his employment was terminated in exchange for the employees' voting against forming a union. Teetor adduced no evidence to suggest anyone associated with Appellees made any suggestion to any of the employees that Teetor would be fired in exchange for their voting against creation of a union. We affirm the summary judgment granted on this claim.

4. Employee Manual

Next, Teetor asserted that Appellees failed to follow procedures set forth in an employee manual including a progressive

discipline provision. The district court found that there was no genuine issue of material fact that the employee manual reserved the right of Appellees to terminate employment at any time. We agree.

Teetor acknowledged in his testimony that the employee manual provided that "[w]hile not required to do so, the District may, in its sole discretion, follow progressive discipline to correct problems," and that the employee manual provided that "[t]he District retain[ed], in its sole discretion, the right to modify or bypass any steps . . . including the right to immediately terminate an employee if management decide[d] such action [was] appropriate." The employee manual also specifically provided that the progressive discipline rules were "not intended to form any contract between the District and its employees as to the procedures to be followed concerning any rule violation." There is no evidence in the record creating any genuine issue of fact concerning whether the employee manual somehow altered Teetor's employment status or obligated Appellees to impose progressive discipline prior to termination. We affirm the summary judgment granted on this claim.

5. Good Faith and Fair Dealing

Teetor next asserted that termination of his employment was in contravention of implied covenants of good faith and fair dealing contained in the employment agreement created by the employee manual. As discussed above, the employee manual specifically did not create an employment contract that altered Teetor's at-will employment status, and there is no evidence that any portion of the manual created a covenant of good faith and fair dealing. Such a covenant is not implied in Nebraska relating to the termination of at-will employees. See *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989). We affirm the summary judgment granted on this claim.

6. Interference With Business Relationship

Teetor next asserted that termination of his employment constituted an impermissible interference with the valid business relationship between Teetor and the District. The district court

properly characterized Teetor's assertions concerning alleged interference with a business relationship as being based upon assertions of tortious conduct.

Neb. Rev. Stat. § 13-902 (Reissue 2007) provides that no political subdivision shall be liable for torts of its officers, agents, or employees and that no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent the political subdivision has waived its immunity in the Political Subdivisions Tort Claims Act.

Neb. Rev. Stat. § 13-910(7) (Reissue 2007) specifically provides that no waiver of immunity exists with regard to allegations of interference with contract rights. In the present case, Teetor brought his suit against the District and against Heinz in his official capacity only and has not created any genuine issue of material fact concerning the ability to bring suit against Appellees for alleged interference with contractual rights. We affirm the summary judgment granted on this claim.

7. Federal Law

Finally, Teetor asserted that termination of his employment was in contravention of federal law. Specifically, Teetor alleged a violation of the Employee Retirement Income Security Act of 1974. This action was removed to federal court, and the federal court found the claim of such a violation to be without factual or legal basis and dismissed it. The district court agreed with the federal court and granted summary judgment in district court on this claim as well. Teetor has not challenged this grant of summary judgment on appeal.

V. CONCLUSION

We find no merit to Teetor's assertions of error on appeal. The most that can be said about Teetor's claims in the district court is that he demonstrated that his termination of employment was close in time to his filing of a grievance, his filing of a workers' compensation claim, and an employee vote concerning formation of a union. He failed, however, to establish any genuine issue of material fact to suggest that the legitimate grounds for termination of his at-will employment asserted by

Appellees were pretextual or that his at-will employment status was altered by any provisions of the employee manual. As such, we affirm the grant of summary judgment.

AFFIRMED.

TURBINES LTD., APPELLEE, V. TRANSUPPORT, INCORPORATED, APPELLANT.

808 N.W.2d 643

Filed January 24, 2012. No. A-11-042.

1. **Motions for New Trial: Appeal and Error.** Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
2. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
3. **Actions: Rescission: Equity: Appeal and Error.** An action for rescission sounds in equity, and it is subject to de novo review upon appeal.
4. **Attorney and Client.** No person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court.
5. **Attorney and Client: Corporations.** A corporation cannot appear in its own person. It must appear by a member of the bar.
6. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
7. **Motions to Vacate: Default Judgments.** A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.
8. **Motions for New Trial: Statutes.** A motion for new trial is a statutory remedy, and it can be granted by the court only upon the grounds specified by statute.
9. **Actions: Equity: Contracts: Rescission.** An action to rescind a written instrument is an equity action.
10. **Contracts: Rescission.** Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement.
11. **Breach of Contract: Rescission.** Rescission is a proper remedy when the breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement.
12. **Contracts.** Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the