MEMORANDUM DECISION

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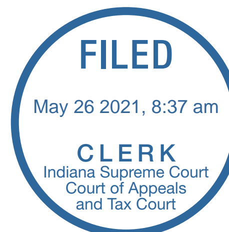

ATTORNEYS FOR APPELLANT

Christopher C. Myers
Ilene M. Smith
Christopher C. Myers & Associates
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Cathleen M. Shrader
Anthony M. Stites
Rachel K. Steinhofer
Barrett McNagny LLP
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

Norman Schroder,
Appellant-Plaintiff,

v.

Bills Bistro, LLC d/b/a Hamilton Public House,
Appellee-Defendant.

May 26, 2021

Court of Appeals Case No. 20A-CT-2188

Appeal from the Allen Superior Court

The Honorable Jennifer L. DeGroote, Judge

Trial Court Cause No. 02D03-1905-CT-252

Kirsch, Judge.

[1] Norman Schroder ("Schroder") appeals the trial court's grant of summary judgment in favor of Bills Bistro, LLC d/b/a Hamilton Public House ("HPH").

Schroder raises one issue, which we restate as whether the trial court erred in granting summary judgment in favor of HPH on Schroder's complaint for retaliatory discharge, improper wage deduction, and failure to pay wages due.

[2] We affirm.

Facts and Procedural History

[3] Schroder began working at HPH on February 12, 2018. *Appellant's App. Vol. 2* at 55, 167. HPH hired Schroder as a bartender where he was typically scheduled to work from 10:00 a.m. through 4:00 p.m. and earned $5.00 an hour, plus tips. *Id.* at 48, 56-58, 112, 167; *Appellee's App. Vol. 2* at 2-16. Schroder also performed miscellaneous tasks as needed. *Appellant's App. Vol. 2* at 57. In late March of 2018, one of HPH's managers quit, and there were discussions about Schroder occasionally taking over some management functions as a "keyholder" for HPH.[1] *Id.* at 49, 58-59, 61, 112, 116, 120. Schroder wrote a proposal to Pete Giokaris ("Giokaris"), a consultant for HPH and other restaurants operated by Bills Bistro, in which Schroder sought a pay increase to $12.00 per hour while continuing to perform tipped work of bartending and serving one-third of the tables. *Id.* at 59-60, 82-84, 112. Schroder said that Jen Walters ("Walters"), HPH's General Manager, agreed to increase his hourly rate of pay to $10.00 per hour as a keyholder with certain

[1] Being a "keyholder" meant that Schroder had a set of keys to the restaurant. *Appellant's App. Vol. 2* at 112.

managerial responsibilities and simultaneously allowed him to perform tipped work. *Id.* at 61.

[4] In his role as a keyholder, Schroder had a set of keys to the restaurant and was responsible for opening the restaurant, opening the garage doors, setting up the outside patio, preparing the bar's cash drawer, and – if there was not a manager at the restaurant – dealing with salespeople and dissatisfied customers. *Id.* at 61. His scheduled hours as a keyholder were from 9:00 a.m. or 9:30 a.m. until 4:00 p.m., which were similar to his bartending schedule, and Schroder still acted as the daytime bartender. *Id.* at 49, 61-62, 112-13. Schroder was to clock in as management at the beginning of his shift each day, but when another manager reported to assume managerial duties, Schroder needed to clock out as a manager and clock back in as a bartender. *Id.* at 49, 112-13, 116, 119-20.[2] Schroder's understanding of his dual role was that Walters said he could remain clocked in at the $10.00 per hour rate for the entirety of his shift while also performing tipped work, but he also acknowledged that he discussed clocking out as a manager once a manager arrived and clocking back in as a bartender. *Id.* at 61-62, 64, 167-68. At some point, Assistant General Manager Sonya Slagle ("Slagle"), noticed that Schroder was not always clocking out as a manager and clocking back in as a bartender when Slagle or Walters arrived,

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[2] On the HPH point-of-entry system, Schroder could select the hourly pay rate for which his time would be calculated when he clocked in and out; if he selected the bartender option, he would be paid $5.00 per hour as a bartender, and if he selected the keyholder option, he would be paid $10.00 per hour. *Appellant's App. Vol. 2* at 48-50, 63.

and she "told [Schroder] he needed to enter his time properly" and "personally adjusted his time card on several instances to reflect when his duties moved from managing to bartender." *Id.* at 49-50.

[5] Schroder's paychecks showed that he first worked part of his shifts as a keyholder during the pay period ending on April 15, 2018 and was issued a paycheck on April 25, 2018,where he clocked in 1.97 hours as a keyholder at the $10.00 per hour keyholder rate and 27.57 hours as a bartender at the $5.00 per hour bartender rate. *Id.* at 64-65; *Appellee's App. Vol. 2* at 9. Schroder also worked some shifts where he was clocking in only as a bartender, where he was correctly paid at the $5.00 per hour rate. *Appellant's App. Vol. 2* at 68. His paychecks showed that after his April 25, 2018 paycheck when he began his hybrid status, he steadily clocked in more hours on his subsequent paychecks in April and May of 2018. *Appellee's App. Vol. 2* at 6-9. On his paycheck dated May 2, 2018, he clocked in 13.18 hours as a bartender at the $5.00 per hour bartender rate and 14.77 hours as a keyholder at the $10.00 per hour keyholder rate. *Id.* at 8. On his paycheck dated May 9, 2018 he clocked in 6.2 hours as a bartender at the $5.00 per hour bartender rate and 24.92 hours as a keyholder at the $10.00 per hour keyholder rate. *Id.* at 7. On his paycheck dated May 16, 2019, he clocked in all 35.5 hours as a keyholder at the $10.00 per hour keyholder rate and zero hours as a bartender at the $5.00 per hour rate. *Id.* at 6. During this time, Schroder's tips remained consistent and generally comparable to what he earned before he assumed his status as a bartender and a keyholder/manager. *Id.* at 5-16.

[6] On May 22, 2018, Schroder slipped and fell while putting together a carryout order. *Appellant's App. Vol. 2* at 70-71. Sometime after the fall that day, Schroder and some other employees viewed footage of his fall as recorded by the security camera. *Id.* at 70, 80. Slagle came into the office as Schroder was using his phone to record the playback, and he was making sound effects and laughing about the fall with other HPH employees. *Id.* at 50. When Slagle saw the video of Schroder's fall, she asked him if he was okay and if he needed to be seen by a doctor. *Id.* Schroder told Slagle that he did not need to see a doctor and worked the rest of his shift, which ended at 4:00 p.m. *Id.*

[7] On May 22, 2018, Schroder also spoke with Giokaris about an adjustment to his May 23, 2018 paycheck, which reflected the pay period ending on May 13, 2018. *Id.* at 78. The May 23, 2018 check reflected that 21.93 of Schroder's hours at the keyholder rate were deducted and 54.48 hours were added at the bartender rate, which resulted in a paycheck to Schroder of $15.14.[3] *Id.* at 50, 113; *Appellee's App. Vol. 2* at 5. Giokaris told Schroder the adjustment was made to his pay because Schroder was not supposed to be earning management-level rates for his entire shift and was incorrectly clocking in at the manager rate for hours during prior shifts when he was to perform only bartending duties. *Appellant's App. Vol. 2* at 66-68, 78, 113. Schroder was upset and insisted to Giokaris that Walters "had agreed he would be paid $10 per hour for his entire

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[3] Schroder's cash tips for that pay period were $148.58. *Appellee's App. Vol. 2* at 5.

shift and also perform and collect tips for bartending and serving," but Giokaris "told [Schroder] he was wrong" and reminded him that Schroder's arrangement was to clock out as a manager and clock back in as a bartender once another manager arrived so that Schroder would be making $10.00 per hour for the first hour of his shift.[4] *Id.* at 67, 112-13. There were no employees at HPH or other Bills Bistro restaurants that had a payment arrangement like the one Schroder believed he had, and Giokaris had never seen any "documentation" to substantiate Schroder's understanding of his compensation. *Id.* at 113. Schroder texted Walters that day informing her that he "had a long talk" with Giokaris about HPH seeing "fit to garnish" his wages and that he needed to talk with her the next day since Walters had offered him "10 per hour plus 1/3 of the tables" as his payment arrangement. *Id.* at 78, 191.

[8] Schroder returned to HPH later that evening for trivia night, but the following day, May 23, 2018, Schroder told Slagle that he needed to be seen by a doctor, and she told him to go RediMed for a medical evaluation. *Id.* at 50-51, 72. Schroder's medical treatment was approved and paid for through worker's compensation. *Id.* at 72, 75, 101, 117. While Schroder was in the RediMed waiting room, he texted Slagle that he did not think he could go back to work, and Slagle told him she had his shift covered for that day and to bring his

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[4] Schroder's subsequent paycheck dated May 30, 2018 showed that he was clocked in for 20.25 hours as a bartender at the $5.00 per hour bartender rate and for 6.83 hours as a keyholder at the $10.00 per hour keyholder rate. *Appellee's App. Vol. 2* at 4. Similarly, Schroder's paycheck dated June 6, 2018 showed that he was clocked in for 10.3 hours as a bartender at the $5.00 per hour bartender rate and for 3.02 hours as a keyholder at the $10.00 per hour keyholder rate. *Id.* at 3.

paperwork in from the doctor's office. *Id.* at 79. Schroder said that the doctor did not release him to return to work despite the contemporaneous medical documentation indicating that he had suffered a cervical strain[5] from the fall and could work with some restrictions, and Slagle told him to take a week off to recover. *Id.* at 50-51, 72-73, 76, 79; *Appellee's Conf. App. Vol. 2* at 18. Schroder said that Slagle told him "I hope you feel better. I'm sorry that you hurt yourself," and he believed it was "really genuine." *Appellant's App. Vol. 2* at 50-51, 76.

[9] On May 29, 2018, Schroder went for another doctor's appointment regarding his fall, and the medical documents provided to him indicated that his diagnosis was "[c]ervicalgia and right shoulder pain secondary to fall" but that he could work with some restrictions. *Id.* at 73; *Appellee's Conf. App. Vol. 2* at 20. After his follow-up appointment, Schroder returned to work on May 30, 2018, arriving an hour before his shift was scheduled to start. *Appellant's App. Vol. 2* at 72, 76. At the time, Walters was the only other person in HPH, and Schroder went to the office to tell Walters that he was still in a lot of pain and did not think he could work his shift. *Id.* at 69, 116, 119, 121. Schroder also wanted to discuss his paycheck, and Walters told Schroder that Giokaris had already discussed the matter with Schroder and that the issue about his pay had been settled. *Id.* at 69, 116, 118, 121. Schroder continued to ask about his paycheck,

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[5] Schroder described himself as suffering from a separated shoulder during his deposition, but he acknowledged that it was after he left HPH that he obtained such a diagnosis. *Appellant's App. Vol. 2* at 69-70, 72-73, 74.

and Walters asked Schroder if he was refusing to work his scheduled shift. *Id.* at 69. Walters told Schroder that there was no proof that he was to receive one-third of the tips and $10.00 per hour, and she asked Schroder if he was refusing to work, so he asked if she was refusing to pay him. *Id.* at 169-70. Schroder was angry and stood in the doorway, blocking Walters from leaving the office. Walters told Schroder she was "in fear for her life," which Schroder thought was "absurd," and told him she was calling the police if he did not leave; at that point, Schroder left. *Id.* at 69, 116, 119, 121, 169-70. Schroder believed that he was calm the entire time and never raised his voice when he spoke with Walters. *Id.* at 78, 169.

[10] Walters did not tell Schroder that he was fired after their exchange on May 30, but Schroder believed he had been fired. *Id.* at 69-70, 78, 169-70. After his May 30 discussion with Walters, Schroder sent a text message to Giokaris, stating that Walters "said I was not fired but still called the police." *Id.* at 78, 113, 193. Giokaris responded to Schroder: "Can't call tonight, I have the kids out and about. I have job fair tomorrow from 9-4 again. Ill [sic] try and reach out during a break." *Id.* at 193. Schroder felt that after his discussion with Walters and text exchange with Giokaris, he did not know whether he was scheduled to work because he never returned to HPH and considered himself medically unable to work, despite the medical documentation to the contrary. *Id.* at 70, *Appellee's Conf. App. Vol. 2* at 17-25. Schroder said he "never talked to anybody at [HPH] after [Walters] called the police on me. I left. I would not go back there. I'll never go back there." *Id.* at 79.

[11] Schroder went to another follow-up doctor's appointment on June 5, 2018 regarding his fall, and the medical documents provided to him indicated that his diagnosis was "[r]ight shoulder strain, neck and back pain secondary to fall" but that he was able to return to work with some restrictions. *Appellee's Conf. App. Vol. 2* at 24. When Schroder failed to report for his scheduled shifts, HPH management concluded Schroder had abandoned his job and stopped adding him to the HPH schedule. *Appellant's App. Vol. 2* at 51, 113, 117, 121. Slagle texted Schroder asking if he would return his copy of the keys to HPH, and Schroder responded that his attorney had the keys.[6] *Id.* at 51, 79.

[12] On May 1, 2019, Schroder filed a complaint against HPH, seeking back pay of $1,585.00 plus liquidated damages of double the amount of back pay and reasonable attorney's fees and costs pursuant to Indiana Code chapters 22-2-5 ("the Wage Payment Statutes") and 22-2-9 ("the Wage Claim Statutes"). *Appellant's App. Vol. 2* at 4, 30-35. He alleged that he was terminated in retaliation for reporting the injury he suffered on the job as a worker's compensation injury and sought compensatory and punitive damages. *Id.* at 31. HPH filed its answer to Schroder's complaint along with a counterclaim against Schroder on July 9, 2019, seeking payments from Schroder for the cost to change the restaurant's locks. *Id.* at 4-5, 36-38, 39-40. Schroder responded to the counterclaim, stating that the keys had been in the possession of his counsel

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[6] HPH incurred the cost of changing the locks at HPH. *Appellant's App. Vol. 2* at 51, 113.

and contending that the counterclaim was frivolous and in bad faith and asserted that the counterclaim should be dismissed pursuant to Indiana Trial 12(B)(6). *Id.* at 5, 41-42.

[13] On May 15, 2020, HPH filed its motion for summary judgment along with its designation of evidence and a brief in support of its motion for summary judgment. *Id.* at 6, 43-44, 45-134, 135-161. On July 15, 2020, Schroder filed his response to HPH's motion for summary judgment along with his designation of evidence and a brief in response. *Id.* at 7, 162-63, 164-93, 194-221. On July 27, 2020, HPH filed its reply brief to Schroder's response to its summary judgment motion. *Id.* at 7, 212-220. Following a September 29, 2020 telephonic hearing on the summary judgment motion, the trial court issued an order on October 29, 2020 that granted HPH's motion for summary judgment. *Id.* at 9, 11-29. The trial court's order determined that Schroder could not prevail on his retaliation claim because he could not show HPH retaliated against him by firing him and could not show the required causation, elements that the designated evidence negated. *Id.* at 20-24. As to Schroder's wage-related claims, the trial court determined that his wages had not been improperly deducted because the alleged deduction was not for wages that he earned but an adjustment reflecting wages previously paid, and there was no evidence that HPH withheld wages from Schroder. *Id.* at 24-27. The trial court also determined that even assuming HPH had withheld wages properly owed to Schroder, there was no evidence of bad faith to support an award of liquidated damages for that claim. *Id.* at 26-27. Schroder now appeals.

Discussion and Decision

[14] Schroder argues that the trial court erred in granting summary judgment to HPH. We review a summary judgment ruling de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of the non-moving parties, summary judgment is appropriate if the designated evidence shows no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Our review of a summary judgment ruling is limited to those materials designated to the trial court. Ind. Trial Rule 56(H); *Thornton v. Pietrzak*, 120 N.E.3d 1139, 1142 (Ind. Ct. App. 2019), *trans. denied*. A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences. *Hughley*, 15 N.E.3d at 1103. The initial burden is on the movant to demonstrate the absence of any genuine issue of fact; if the movant meets that burden, the burden shifts to the non-movant to present contrary evidence that demonstrates an issue for the trier of fact. *Id.*

[15] A trial court's grant of summary judgment is clothed with a presumption of validity, and the party who lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous. *Henderson v. Reid Hosp. and Healthcare Servs.*, 17 N.E.3d 311, 315 (Ind. Ct. App. 2014), *trans. denied*. We will affirm upon any theory or basis supported by the designated materials. *Id.* When a trial court grants summary judgment, we carefully

scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. *Id.*

I. Retaliatory Discharge

[16] Schroder first argues that the trial court erred in granting summary judgment to HPH on his retaliatory discharge claim because he maintains that there are disputed issues of material fact about this claim. In cases involving retaliatory discharge, our court has explained as follows:

> "In general, an employment contract of indefinite duration is presumptively terminable at the will of either party." *Stillson v. St. Joseph Cnty. Health Dep't*, 22 N.E.3d 671, 679 (Ind. Ct. App. 2014) (citing *Pepkowski v. Life of Ind. Ins. Co.*, 535 N.E.2d 1164, 1168 (Ind. 1989)), *trans denied*. However, it is well settled in Indiana that an action for retaliatory discharge exists when an employee is discharged for exercising a statutorily conferred right, such as filing a worker's compensation claim. *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005), *trans. denied*. In *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 251-53, 297 N.E.2d 425, 427-28 (1973), our supreme court held that an employee-at-will who was discharged for filing a worker's compensation claim could file an action for retaliatory discharge against her employer because the Worker's Compensation Act was designed for the benefit of employees, and as such, its humane purpose would be undermined if employees were subject to reprisal without remedy solely for exercising that statutory right.
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> This Court has outlined and consistently followed a three-step approach to a retaliatory discharge *Frampton* claim under Indiana law. First, the employee must prove, by a preponderance of the evidence, a prima facie case of discrimination. *Powdertech, Inc. v.*

> *Joganic*, 776 N.E.2d 1251, 1262 (Ind. Ct. App. 2002). Specifically, the employee must present evidence that directly or indirectly implies the necessary inference of causation between the filing of a worker's compensation claim and the termination. *Id.* Second, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge. *Id.* If the employer carries its burden, the employee then has the opportunity to prove that the reason cited by the employer is a pretext. *Id.* He may establish pretext by showing that the reasons are (1) factually baseless; (2) not the actual motivation for his discharge; or (3) insufficient to motivate the discharge. *Id.* The question of whether a retaliatory motive exists for discharging an employee is a question for the trier of fact. *Id.* at 1261-62.

Best Formed Plastics, LLC v. Shoun, 51 N.E.3d 345, 351 (Ind. Ct. App. 2016), *trans. denied*. Here, the trial court concluded that Schroder had failed to show a prima facie case of discrimination because he was unable to show that he was terminated or present evidence demonstrating the necessary inference of causation. *Appellant's App. Vol. 2* at 20-21.

[17] Schroder contends that the trial court "bought into" HPH's argument and impermissibly weighed the evidence in favor of HPH to conclude that he was not terminated in violation of the summary judgment standard. *Appellant's Amended Br.* at 10. He correctly observes that retaliatory intent is ordinarily a question of fact where summary judgment is appropriate only where the evidence is such that no reasonable fact-finder could conclude that the discharge was caused by a prohibited retaliation. *See Best Formed Plastics*, 51 N.E.3d at 351; *see also Markley Enters., Inc. v. Grover*, 716 N.E.2d 559, 565 (Ind.

Ct. App. 1999). Schroder argues that a reasonable jury could determine that he "believed he was terminated" because he "was asked to leave, the police were going to be called, that nobody from [HPH] called or messaged him back when he inquired about returning to work, and nobody from [HPH] contacted Schroder to indicate whether he was scheduled for work." *Appellant's Amended Br.* at 10-11. He maintains that the trial court's order – which observed that Schroder was affirmatively told on May 30, 2018, that he was not fired – overlooks that he was constructively discharged because a reasonable person would not work where "their pay was taken, the police were called, they were asked to leave under threat of arrest, and never contacted by management again" *Id.* at 12.

[18] First, the designated evidence is without dispute that Schroder was explicitly told that he was not fired. *Appellant's App. Vol. 2* at 69-70, 78-79, 113, 193. Walters specifically told Schroder he was not fired and never asked him to return his copy of the restaurant's keys or told him not to return to HPH. *Id.* at 193. Schroder acknowledges that no one at HPH ever told him he was fired, and Walters told Schroder that Giokaris had settled Schroder's pay issue and that Walters said he was not terminated but nevertheless called the police. *Appellant's App. Vol. 2* at 78, 113, 193. Indeed, Schroder himself acknowledged as much in his May 30, 2018 text message to Giokaris after the incident earlier in the day with Walters: in inquiring about his employment status with HPH he stated that Walters "said *I was not fired* but still called the police." *Id.* at 193 (emphasis added). Outside of texting Giokaris, the designated evidence does

not show that Schroder attempted to contact HPH. *Id.* at 79. The trial court was correct to conclude that there was no genuine issue of material fact as to whether Schroder was expressly discharged.

[19] Nevertheless, Schroder believed that he was fired despite Walters's statement to the contrary and that the inferences to be drawn from the circumstances of May 30, 2018 show that he was constructively discharged. The trial court reasoned that Walters's act of calling the police and Giokaris's failure to respond to Schroder's inquiry about his employment status did not necessarily raise an inference that, even absent an explicit firing, Schroder was constructively discharged. *Id.* at 21-22.

[20] Schroder is correct that Indiana law recognizes that a claim for retaliatory discharge may be premised on constructive discharge. *See Baker v. Tremco*, 917 N.E.2d 650, 655 ("[A] constructive retaliatory discharge falls within the ambit of the narrowly drawn public policy exception to the employment at will doctrine.") "A constructive discharge occurs when an employer purposefully creates working conditions [that] are so intolerable that an employee has no other option but to resign." *Cripe, Inc. v. Clark*, 834 N.E.2d 731, 735 (Ind. Ct. App. 2005). Determining whether an employee was constructively discharged generally entails objectively considering whether working conditions are such that the employee had no choice but to resign. *See Tony v. Elkhart Cnty.*, 918 N.E.2d 363, 369 (Ind. Ct. App. 2009) (citing and applying federal decisions for standards in evaluating constructive discharge). We have also observed, that "the objective 'reasonable person' test for constructive discharge is not

applicable if an employer 'is proved to be deliberately taking advantage of a known idiosyncratic vulnerability of the employee (like Winston's fear of rats in Orwell's *Nineteen Eighty-Four*) by altering the employee's working conditions in order to make the employee's life at work intolerable. . . ." *Id*. at 369 (quoting *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998)).

[21] Schroder cites *Tony v. Elkhart Cnty.*, (*Tony I*) 851 N.E.2d 1032 (Ind. Ct. App. 2006), in support of his position that the designated evidence created a genuine issue of material fact that he was subject to constructive retaliatory discharge. In that case, an employee serving as a highway maintenance worker was involved in two work-related accidents in which he sustained injuries that required surgery, physical therapy, and placement on work restrictions by his physicians. *Id.* at 1034. The employee was subjected to a hostile working environment in which he was ridiculed by the employer's management for his injuries and compensation claims, and the management ignored the employee's restrictions and directed him to perform tasks that exceeded the employee's limitations and placed him in further risk of injury. *Id.* The employment relationship ended, and the employee subsequently filed a complaint against the employer for constructive discharge in retaliation for the employee's workers compensation claims. *Id.* The complaint was dismissed by the trial court. *Id.* at 1035.

[22] On appeal from the dismissal of his complaint, this court held that an employer's acts of creating working conditions so intolerable as to force an employee to resign in response to the exercise of the employee's statutory right

to file a worker's compensation claim also "creates a deleterious effect on the exercise of this important statutory right and would impede the employee's ability to exercise his right in an unfettered fashion without being subject to reprisal." *Id.* at 1040. In concluding that the complaint should not have been dismissed pursuant to Indiana Trial Rule 12(b)(6), we noted that the employee alleged he had been "constructively discharged" in his complaint and alleged that after he was involved in two work-related accidents, filed worker's compensation claims, and was placed on work restrictions, his employer was hostile toward him, ridiculed him by calling him a "faker" and implied that he was "malingering," ignored his work restrictions, and instructed him to perform job tasks that placed him at risk of further injury. *Id.* at 1041.

[23] In contrast to *Tony I*, in which this court concluded that the employee could state a claim for retaliatory discharge under *Frampton* based on a constructive discharge, the designated evidence, here, does not show a disputed issue of fact as to whether Schroder was constructively discharged in retaliation for seeking worker's compensation benefits. There was no evidence that the conditions had become "so intolerable that Schroder was forced to resign" as Schroder was given a week off of work to recover following his injury and remained on the schedule even after the May 30 incident. *Appellant's App. Vol. 2* at 50-51. Viewing the designated evidence most favorably to Schroder, the May 30 incident, even if uncomfortable or untenable for Schroder still ended in Walters' specifically telling Schroder – an at-will employee – that he was not fired. The two were alone in the restaurant, and Walters was frightened by Schroder. The

demand that Schroder leave the premises, which would end his confrontation with Walters, was coupled with the statement to Schroder that he was not fired.[7] While not controlling, we find instructive an unreported[8] Delaware opinion involving an appeal from a final decision of an unemployment board that addressed a similar factual scenario when determining whether an employee quit or was fired. *Moncrief v. Celtic Crossing*, No. CV K14A-07-001 WLW, 2015 WL 868500 (Del. Super. Ct. Feb. 6, 2015). In *Moncrief*, a cook at a restaurant and the restaurant's owner disputed whether the cook's paycheck – which included a week of unpaid vacation because the cook had already used his one week of paid vacation earlier in the year – should have instead been paid for his use of a second week of vacation on the disputed paycheck. 2015 WL at *1. During the exchange, the owner did not feel comfortable and asked the cook to leave the premises or she would call the police. *Id.* After the cook left, he assumed he was terminated, corresponded only to pick up his final

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[7] As to Schroder's contention that the adjustment to his paycheck that occurred on the same day of his fall suggested retaliation and was relevant to showing that he was constructively discharged, while not controlling, the Seventh Circuit has explained that a dispute about wages is not generally considered to be an intolerable working condition. *See Chambers v. Am. Trans Air, Inc.*, 17 F.3d 998, 1005 (7th Cir. 1994) (observing that the failure to authorize back pay was not an intolerable working condition), *cert. denied.* 513 U.S. 1001 (1994).

[8] Indiana Appellate Rule 65(D), which addresses the precedential value of memorandum decisions, provides that "[u]nless later designated for publication in the official reporter, a memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case." We have stated that "Appellate Rule 65(D) concerns memorandum decisions from this Court and does not contemplate not-for-publication decisions from other courts." *Selective Ins. Co. of S.C. v. Erie Ins. Exch.*, 14 N.E.3d 105, 113 (Ind. Ct. App. 2014), *trans. granted, opinion vacated sub nom. Selective Ins. Co. of S.C. v. Erie Ins. Exch., Welch & Wilson Props., LLC*, 21 N.E.3d 838 (Ind. 2014), *vacated sub nom. Selective Ins. Co. of S.C. v. Erie Ins. Exch.*, 24 N.E.3d 958 (Ind. 2015)

paycheck, did not return to the restaurant to work his scheduled shift, and did not contact anyone at the restaurant. *Id.* In rejecting the cook's contention that he was constructively discharged, the court explained:

> Neither Appellant nor [owner] testified that Appellant was told he was fired, nor that he was not to report to work for his scheduled shifts, nor that was he told to never come back again. [Owner's] request for the Appellant to leave the premises addressed Appellant's visible and growing upset due to not receiving the pay expected, which made [owner] feel uncomfortable because she was alone with him. The Court does not hold that the Appellant was fired because he was told to leave the premises during an argument.

Id. at *3.

[24] As previously mentioned, Schroder was specifically told he was not fired, and, like the cook in *Moncrief*, Schroder could not reasonably conclude that he had no other alternative under the circumstances but to quit. The trial court was correct to conclude that there was no genuine issue of material fact that Schroder was constructively discharged. Therefore, because HPH designated evidence negating the element that Schroder was terminated, whether expressly or constructively, the trial court did not err in concluding that Schroder was not terminated.

[25] As to causation, Schroder argues that "the timing and circumstantial evidence points to the obvious conclusion that Schroder's work-related injury, his treatment for his work-related injuries, and the payment for that treatment by

Worker's Compensation insurance shows rather conclusively that he was fired in retaliation for getting hurt on the job and utilizing Worker's Compensation benefits (payment of medical care)." *Appellant's Amended Br.* at 11. Schroder maintains that HPH management "showed animosity" toward him, which he argues "include[ed] threats by police, taking away his pay, and not returning his calls/messages about returning to work." *Id.* at 11-12.

[26] Evidence of the proximity in time between the filing of the claim and the termination, or evidence that the employer's asserted lawful reason for discharge is a pretext can provide the necessary inference of causation needed to rebut a summary judgment motion. *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 213 (Ind. Ct. App. 2005). However, to survive a motion for summary judgment in a case of retaliatory discharge, an employee must show more than a filing of a worker's compensation claim and the discharge itself. *Id.* While not controlling, the Seventh Circuit has also observed that timing evidence is rarely sufficient in and of itself to create a jury issue on causation. *Hudson v. Wal-Mart Stores, Inc.*, 412 F.3d 781, 787 (7th Cir. 2005) (applying Indiana law in a claim involving retaliatory discharge under *Frampton*).

[27] Contrary to Schroder's assertions that his pay was taken, that he was discharged by HPH, and that the police were eventually called in retaliation for his seeking worker's compensation, the designated evidence shows that Schroder received his preprinted May 23, 2018 paycheck on May 22, 2018 – the date that he fell – for the pay period that had ended May 13, 2018 and that he did not seek any medical treatment for his fall until the day after he had fallen while at work. *Id.*

at 78, 88; *Appellee' s Conf. App. Vol. 2* at 18. In fact, when Schroder fell on May 22, 2018, HPH management promptly prepared the "First Report of Employee Injury" for worker's compensation purposes, covered the cost of his medical treatment through its worker's compensation carrier, asked Schroder about his condition in a way that Schroder thought was "really genuine," and told him to seek treatment. *Appellant's App. Vol. 2.* at 50-52, 72, 76, 101.

[28] Schroder also specifically told Slagle after he had fallen that he did not need to go to the doctor, worked the rest of his shift, went home, and returned to the restaurant later that evening for trivia night. *Id.* at 50. The sole documents regarding the treatment Schroder had received for his May 22, 2018 fall indicated that Schroder was able to work with some restrictions related to lifting.[9] *Id.* at 50-51; *Appellee's Conf. App. Vol. 2* at 18-25. The designated evidence also showed that Walters said nothing about his injury during their May 30 conversation, which Schroder himself characterized as "literally a four second" exchange. *Id.* at 76. Schroder also said that after his May 30 interaction with Walters: "I never talked to anybody at [HPH] after [Walters] called the police on me. *I left. I would not go back there. I'll never go back there.*" *Id.* at 79 (emphasis added). In addition, no one from HPH made any statements to Schroder that he thought were discriminatory because he was

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[9] As previously mentioned, Schroder's description of himself as suffering from a separated shoulder was not diagnosed until after he left HPH. *Appellant's App. Vol. 2* at 69-70, 72-73, 74.

injured and obtaining worker's compensation for his injury.[10] *Id.* at 52, 76, 113. Schroder also admitted that no one at HPH treated him differently or less preferentially than any other employee as a result of his seeking treatment for his workplace injury and that no one said anything to him about his injury other than what he perceived as genuine concern for his wellbeing. *Appellant's App. Vol. 2* at 76-77. There is no evidence that HPH took any retaliatory actions toward Schroder that were motivated by Schroder's fall and subsequent treatment, all of which happened after HPH adjusted Schroder's paycheck to ensure he was being paid only for the work he had actually done.

[29] Other than the fact that Schroder happened to fall on the day he received his paycheck for the pay period ending May 13, 2018, there is no evidence or inference to be drawn supporting the conclusion that retaliating against Schroder for using worker's compensation was the reason Walters wanted to put an end to Schroder's questioning her about his wages or why Giokaris failed to call Schroder during a break from a job fair. The designated evidence shows that Schroder himself simply stopped appearing for work and does not show causation as to his retaliatory discharge claim. *See Purdy*, 835 N.E.2d at 215-16 (concluding, in a retaliatory discharge case, that the employer's reason for discharging an employee was not pretextual where the "cause of [the employee's] discharge was not discrimination, but rather his medical inability,

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[10] In the last five years, Bill's Bistro has had six employees who made claims against the company's worker's compensation policy; none of the workers was fired, and no one other than Schroder ever claimed to suffer retaliation as a result of seeking worker's compensation benefits. *Appellant's App. Vol. 2* at 113, 117.

at the conclusion of his FMLA leave period, to return to work.") The trial court did not err in concluding that there was no genuine issue of material fact as to causation.

II. Improper Wage Deduction

[30] Schroder argues that the trial court "weighed the evidence" and engaged in "a shocking example" of violating the "appropriate standard of review" in granting summary judgment to HPH. *Appellant's Amended Br.* at 12. He contends that there is a genuine issue of material of fact as to whether he was paid at a higher than allowable rate because he disputed that he overpaid himself. The trial court concluded that "the 'overpayment' was the result of Schroder mis-entering his rate of pay by clocking in as a manager/keyholder when he was working only in the capacity as a bartender. Schroder created the issue and it was not because of the mistake of HPH." *Appellant's App. Vol. 2* at 24. It further reasoned that Schroder had not actually earned the wages that he claims were improperly deduced and that the amount deducted from his May 22, 2018 paycheck was to adjust his compensation to accurately reflect the services he had rendered rather than an improper wage deduction. *Id.* at 24-25.

[31] While Schroder disputes that he overpaid himself, his own deposition testimony conflicts with his later affidavit regarding his compensation arrangement. For example, Schroder stated as follows regarding his compensation arrangement at his deposition: (1) Walters "offered me $10.00 an hour plus a third of the tips and we shook hands and we agreed on it"; (2) "[Giokaris and I] discussed that I would get paid the $10.00 an hour plus a third of the wages [sic] the whole

time, not the first hour I was at work like he told – that's what [Giokaris] told me"; (3) "I spoke to [Giokaris] and then he said that when [Walters] shook my hand, it was for $10.00 an hour plus a third of the tips tor the whole time that I was working." *Appellant's App. Vol. 2* at 60, 66, 67. In comparison, Schroder's subsequent affidavit states:

> 4. . . . [A]fter negotiating my salary, [Walters] offered me the position of manager/keyholder, to be compensated at the rate of $ 10.00 per hour, plus 1/3 of the tips collected while I was performing managerial duties, and she and I shook hands as I accepted the offer.
>
> 5. It was explained to me, at that time, that I would be scheduled as needed to bartend for some shifts, as a manager for other shifts, and that if I was scheduled to work as a manager *I would remain at the manager's rate for my entire shift unless instructed otherwise.*

Id. at 167-68 (emphasis added).

[32] Here, any conflict as to Schroder's compensation arrangement arises from the inconsistences in his deposition testimony and later affidavit. *See Crawfordsville Square, LLC. v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 938 (Ind. Ct. App. 2009) (applying the "sham affidavit rule" which has as its "overriding purpose [] to prevent a party from generating its own genuine issue of material fact by providing self-serving contradictory statements without explanation."), *trans. denied*. Schroder also does not dispute that no other employee of HPH had ever had a compensation arrangement such as his. *Id.* at 113. Moreover, his paychecks over the period when he first began working in his dual capacity

show that over that four-week period, Schroder eventually had ceased to clock in as a bartender at all and clocked in *only* as a manager/keyholder. *Appellee's App. Vol. 2* at 6-9.

[33] Like the trial court, we agree that Schroder's claim that his wages were improperly deducted is not within the scope of the applicable statute. In pertinent part, Indiana Code section 22-2-6-4 provides:

> (a) If an employer has overpaid an employee, the employer may deduct from the wages of the employee the amount of the overpayment. A deduction by an employer for reimbursement of an overpayment of wages previously made to an employee is not a fine under IC 22-2-8-1 or an assignment of wages under section 2 of this chapter. An employer must give an employee two (2) weeks notice before the employer may deduct, under this section, any overpayment of wages from the employee's wages.
>
> (b) An employer may not deduct from an employee's wages an amount in dispute under IC 22-2-9-3.

Ind. Code § 22-2-6-4(a)-(b). Where, as here, the interpretation of a statute is at issue, such statutory interpretation presents a pure question of law for which disposition on summary judgment is particularly appropriate. *Miller v. Town Bd. of Sellersburg*, 88 N.E.3d 217, 218 (Ind. Ct. App. 2017) (citing *Pike Twp. Educ. Found., Inc. v. Rubenstein*, 831 N.E.2d 1239, 1241 (Ind. Ct. App. 2005)).

[34] Wages are not defined in this particular statute, and when a statutory term is undefined, we interpret the term using its "plain, or ordinary and usual, sense." Ind. Code § 1-1-4-1(1). In pertinent part, Merriam Webster's defines "wage" as

"a payment usually of money for labor or services usually according to contract and on an hourly, daily, or piecework basis – often used in plural." https://www.merriam-webster.com/dictionary/wage. *See also Wage*, Black's Law Dictionary (11th ed. 2019) (defining "wage" as "[p]ayment for labor or services, based on time worked or quantity produced; specif., compensation of an employee based on time worked or output of production." The general-purpose dictionary and legal dictionary definitions are also consistent with the definition of "wages" under the Wage Claim Statutes, which govern employee wage claims in cases of involuntary terminations, and provides that the term "means all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount." Ind. Code § 22-2-9-1(b). Implicit in each of these definitions is the idea that payments of wages are for services rendered. *See Design Indus., Inc. v. Cassano*, 776 N.E.2d 398, 402 (Ind. Ct. App. 2002) (reviewing definitions of wage in the legal dictionary and Indiana Code section 22-2-9-1(b) and noting that "implicit in all the definitions is the concept that the payments are earned for services rendered.")

[35] Here, the designated evidence showed that the check issued for the pay period ending May 13, 2018 for $15.14 reflected an adjustment that HPH applied to properly reflect the hourly rate Schroder received for his services rendered to HPH. *Appellant's App. Vol. 2* at 113. The amounts that were subject to adjustment were not from wages that Schroder had properly *earned*; indeed,

there is no dispute that he was not to be paid $10.00 per hour for the entirety of his shift. The designated evidence showed that Schroder was to clock back in as a bartender at the $5.00 per hour rate once a manager arrived, and that his role as a manager was limited to the beginning of his shift. *Id.* at 49-50, 112-13. In addition, his paychecks over the period when he first began working in his dual capacity show that over that four-week period, Schroder eventually had ceased to clock in as a bartender at all and clocked in *only* as a manager/keyholder in violation of his payment arrangement. *Appellee's App. Vol. 2* at 6-9.

[36] Thus, the amounts paid to Schroder before the adjustment on the May 23, 2018 paycheck were effectively treated as an advance that were equalized on that paycheck and reflected that Schroder had *already* been paid for the work he had done by clocking in at $10.00 per hour when he should not have been. Compare Schroder's circumstances with those in *E & L Rental Equipment, Inc. v. Bresland*, where we affirmed the trial court's judgment in favor of the employee in a wage deduction dispute because the employer had unlawfully deducted wages from the employee's paycheck to pay for property the employee had damaged. 782 N.E.2d 1068, 1069 (Ind. Ct. App. 2003). In that case, the employer deducted from the employee's paycheck wages that were *owed* to the employee. *Id.* at 1071. Here, HPH did not deduct wages *owed* to Schroder because his paycheck reflected a correction for his own previous mis-entries of his time that had already been paid, and HPH did not owe wages to Schroder. Because HPH was not making a deduction from wages it owed to Schroder, the

trial court properly concluded that there was no violation of the statute because it was not properly applicable to the situation and did not err in granting summary judgment to HPH.

III. Wage Payment Claim

[37] Schroder also argues that summary judgment should not have been entered for HPH under the Wage Payment Statutes because he contends there were questions of fact respecting his wage computation, disputes as to whether he was fired because he received worker's compensation benefits, and whether the trial court violated the standard of review.[11]

[38] As discussed above regarding Schroder's arguments that there is a genuine issue of material fact as to the amount of his compensation for purposes of his wage deduction claim, Schroder's arguments under the Wage Payment Statutes are equally unavailing in the context of his wage payment claim as there was no dispute that he was not entitled to $10.00 per hour plus tips for the entirety of his shift. *See Crawfordsville Square, LLC*, 906 N.E.2d at 938. Here, the trial court

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[11] Because we have determined that Schroder was not fired or otherwise involuntarily terminated from his employment with HPH, we need not address his contentions that he is entitled to relief under the Wage Claim Statutes, which apply in the case of an employee's involuntary termination. *See Walczak v. Lab. Works-Ft. Wayne LLC*, 983 N.E.2d 1146, 1154 (Ind. 2013) (discussing and applying relevant state and federal law decisions explaining that the Wage Claim Statutes apply to situations where an employee is fired); *see also St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 705 (Ind. 2002) (stating that the Wage Payment Statutes "reference[] current employees and those who have voluntarily left employment, either permanently or temporarily" (citing Ind. Code § 22-2-5-1(b)). However, even if we were to address Schroder's claim under the Wage Claim Statutes, our conclusion would be the same as it is under the Wage Payment Statutes because there is no genuine issue of material fact with respect to HPH's payment of wages to Schroder.

correctly focused on the fact that pursuant to Indiana Code section 22-2-5-1 Schroder had been paid "the amount due the employee" and reasoned:

> Schroder sometimes worked as a bartender and sometimes worked as a manager/keyholder. His rate of pay was based on the type of work he performed. Schroder was required to use both designations throughout the week when clocking his time based upon his duties. Schroder's own conduct of clocking in under different jobs based on the work he did after this agreement was reached supports this conclusion. With each passing week he tested the boundaries by increasing the hours he reported as manager even though he clearly was not working in that capacity until he eventually eliminated clocking in as a bartender completely. It was when this occurred that HPH took the actions in adjusting his pay to reflect services he actually performed while on the job.

Appellant's App. Vol. 2 at 26-27. The trial court considered and examined all the designated evidence, and we discern no error or violation of the standard of review in the trial court's conclusion that there was no genuine issue of material fact as to Schroder's wage payment claim.[12]

[39] Finally, Schroder argues that the trial court was incorrect in concluding that there was no evidence that HPH was not acting in good faith for purposes of liquidated damages under Indiana Code section 22-2-5-2. Good faith is not

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[12] We also note, as HPH observes, that Schroder does not address the discrepancy between his pay record and his damages claim, in which he alleges he is owed four weeks of pay, at forty hours per week, all at $10.00 per hour. *Appellant's App. Vol. 2* at 31, 35, 65, 67, 129.

defined in the statute but generally refers to: "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *Good Faith*, Black's Law Dictionary (11th ed. 2019). The absence of good faith is bad faith. *Young v. Williamson*, 497 N.E.2d 612, 617 (Ind. Ct. App. 1986), *trans. denied*. Bad faith entails "evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will." *Ag One Co-op v. Scott*, 914 N.E.2d 860, 864 (Ind. Ct. App. 2009).

[40] Here, the designated evidence showed that the trial court was correct in determining that there was no evidence that HPH acted in bad faith when it adjusted Schroder's hours to reflect the work he was actually performing. HPH management met and collectively discussed the issue of Schroder's not clocking in as a bartender and Schroder's claim that he was to be paid at a manager rate the entire time he was working, an arrangement no other employee had and one for which Schroder had no documentary support.[13] *Appellant's App. Vol.* 2 at 49-50, 112-13. As discussed above, Schroder has not shown a triable issue of

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[13] Schroder contended below that Walters was acting in bad faith because he maintained she agreed to pay him management wages even when he was doing tipped work, she reviewed the payroll, and she adjusted the timecards. *Appellant's App. Vol. 2* at 208-09. However, such a claim overlooks the undisputed evidence of the substantial role other members of HPH management, such as Slagle and Giokaris, played in addressing Schroder's failure to record his time accurately and the decision to adjust his check to reflect accurately the amount he had earned. Viewing the inferences as to the lack of good faith in favor of Schroder, the other decision makers' legitimate business purpose for treating Schroder like all other employees for purposes of his compensation does not show a lack of good faith.

fact with respect to his pay rates, and his paychecks provided contemporaneous documentation that he was not entitled to $10.00 per hour for the entirety of his shifts. *Appellee's App. Vol. 2* at 6-9. The designated evidence simply does not show that the adjustment to Schroder's paycheck was done with "dishonest purpose, moral obliquity, furtive design, or ill will." *Ag One Co-op*, 914 N.E.2d at 864. Therefore, even if Schroder had shown that there was a genuine issue of material fact that HPH had not paid him "the amount due," the absence of evidence as to bad faith provides no basis for an award of liquidated damages.

[41] Because the trial court did not violate the standard of review, and Schroder has not carried his burden of showing that the trial court's grant of summary judgment in favor of HPH was erroneous, *see Henderson*, 17 N.E.3d at 315, we affirm the trial court.

[42] Affirmed.

Altice, J., and Weissmann, J., concur.