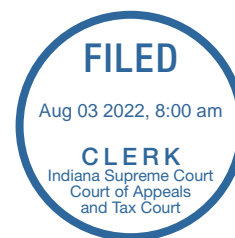


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Mark Tucker,
Appellant-Plaintiff,

v.

Estate of Troy Shirar,
Appellee-Defendant.

August 3, 2022

Court of Appeals Case No.
21A-PL-2539

Appeal from the
Montgomery Circuit Court

The Honorable
Harry A. Siamas, Judge

Trial Court Case No.
54C01-1506-PL-473

Shepard, Senior Judge.

- [1] Mark Tucker appeals the trial court's judgment in favor of the Estate of Troy Shirar following a bench trial on Tucker's claim for constructive retaliatory discharge. Finding that Tucker failed in his burden to produce evidence showing the necessary inference of causation between the exercise of his

statutory right to worker's compensation benefits and the conclusion of his employment with Shirar Trucking, we affirm.

Facts and Procedural History

[2] Tucker was a driver for Shirar Trucking in Crawfordsville. On January 28, 2014, Tucker went to work and found his boss, Troy Shirar (Shirar), working on the truck that he was to drive to Chicago. In his haste to get on the road once the truck was repaired, Tucker walked into the truck's side mirror and hit his head, knocking him to the ground. After getting up, Tucker drove his car to buy cigarettes before leaving in the truck. On his way to Chicago, Tucker called Shirar and informed him his head was hurting. Shirar urged him to finish the drive and rest for the night. Continuing to experience pain, Tucker called his daughter who instructed him to go to the hospital. Instead, Tucker drove the truck back to Shirar Trucking, then drove to his home in Illinois and went to the hospital the following day. Tucker had difficulty contacting Shirar for the company's worker's compensation insurance information for his treatment, but he eventually obtained the information. Tucker never returned to Shirar Trucking.

[3] Tucker subsequently filed an action against Shirar Trucking for wrongful termination.¹ Following a bench trial, the court entered judgment in favor of the trucking company. Tucker now appeals.

Issue

[4] Tucker presents one issue for our review, which we restate as: whether the court's judgment in favor of Shirar Trucking on Tucker's claim for wrongful discharge is clearly erroneous.

Discussion and Decision

[5] Tucker contends that he was wrongfully constructively discharged. Indiana follows the doctrine of employment-at-will under which employment may be terminated by either party at any time without reason. *Baker v. Tremco Inc.*, 917 N.E.2d 650 (Ind. 2009). The parties agree that Tucker did not have a contract for his employment with Shirar and thus was an at-will employee.

[6] Our Supreme Court has recognized only three exceptions to the doctrine of employment-at-will, one of which is where an employee is terminated for exercising a clear statutory right or obeying a legal duty. *Id.* Tucker claims this exception applies to his circumstances, alleging he was discharged in retaliation for exercising his statutory right to file a worker's comp claim. This Court has

¹ Troy Shirar died during the pendency of this proceeding, and his estate was substituted as defendant after his death.

consistently followed a three-step approach to a retaliatory discharge claim: (1) the employee must prove by a preponderance a prima facie case of discrimination by presenting evidence that implies causation between the filing of a worker's compensation claim and the termination; (2) the burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge; and (3) the employee then has the opportunity to prove that the reason cited by the employer is a pretext by showing that the reasons are factually baseless, not the actual motivation for the discharge, or insufficient to motivate the discharge. *Best Formed Plastics, LLC v. Shoun*, 51 N.E.3d 345 (Ind. Ct. App. 2016), *trans. denied*. The question of whether a retaliatory motive exists for discharging an employee is a question for the trier of fact. *Id.*

[7] Indiana law also recognizes that the doctrine of constructive discharge can be raised in the context of a retaliatory discharge claim. *Baker*, 917 N.E.2d 650. In *Cripe, Inc. v. Clark*, we stated that “[a] constructive discharge occurs when an employer purposefully creates working conditions, which are so intolerable that an employee has no other option but to resign.” 834 N.E.2d 731, 735 (Ind. Ct. App. 2005). More particularly, we explained:

Before the employment situation will be deemed intolerable, however, the adverse working conditions must be unusually “aggravated” or amount to a “continuous pattern” of negative treatment. The essence of the test is whether, under the totality of the circumstances, the working conditions are so unusually adverse that a reasonable employee in plaintiff’s position “would have felt compelled to resign.” Put another way, the standard by which a constructive discharge is generally determined is an objective one: “whether a reasonable person faced with the

allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.”

Id. (internal citations omitted).

[8] The trial court here entered sua sponte findings of fact and conclusions. In such cases, the court’s findings control only as to those issues specifically referenced therein, and the findings and judgment will be set aside only if they are clearly erroneous, meaning that there are no facts or inferences supporting them. *Coles v. McDaniel*, 117 N.E.3d 573 (Ind. Ct. App. 2018). Further, a judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* In conducting our review, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. We will neither reweigh the evidence nor assess witness credibility. *Id.* As to the issues on which there are no findings, we apply a general judgment standard. *Bock v. Bock*, 116 N.E.3d 1124 (Ind. Ct. App. 2018).

[9] At trial, Tucker testified that he considered himself terminated on January 28, the day of his injury, because Shirar would not thereafter answer his phone or return Tucker’s calls. *See* Tr. Vol. II, pp. 18, 19. Tucker eventually did get the worker’s compensation insurance information, and he acknowledged that Shirar never told him not to come back to work. *See id.* at 18. Tucker explained the nature of his employment with Shirar Trucking as, “I would show up on Monday morning, more than likely I already had a job assignment, so when I showed up I had work [sic] to leave Monday morning with the truck

and bring it home Saturday, late Friday night or Saturday, whatever day I ended up getting home.” *Id.* at 14. Defense counsel asked Tucker whether, after January 28, he “ever tried to drive there and go see [Shirar] and say, hey, I’m here for work,” to which Tucker replied, “No.” *Id.* at 19.

[10] In addition, at trial the transcript of Tucker’s worker’s compensation hearing was admitted into evidence as Exhibit 1. *See id.* at 3. At the hearing, Shirar testified that the truck and its load were at the trucking company when he arrived on January 29, so his brother drove the truck and delivered the load. Counsel asked Shirar if he called Tucker, and he responded, “No. I was sure he’d quit.” Exhibits Volume, p. 45.

[11] Tucker’s constructive discharge claim rests on his assumption that, based on Shirar’s alleged avoidance of his calls, he was terminated. In support of his claim, he cites *Tony v. Elkhart County*, 918 N.E.2d 363 (Ind. Ct. App. 2009) in which the employee, Tony, was injured on the job and filed a worker’s comp claim for the injury. Thereafter he was ridiculed by his supervisor who called him names such as “trouble boy” and “disabled” and who told Tony’s co-workers he was a “faker.” *Id.* at 365. Tony underwent several surgeries as a result of the injury and returned to work with restrictions. However, his employer ignored the restrictions and directed him to perform tasks that exceeded the restrictions. On appeal, we reversed the trial court’s grant of summary judgment in favor of Tony’s employer on Tony’s claim of constructive retaliatory discharge. In doing so, we stated that although it was “debatable whether Tony’s claims of rude or boorish behavior by his superiors”

would, by themselves, be sufficient to constitute a constructive discharge, it was clear that evidence his superiors knowingly, or at the very least with deliberate indifference, ordered him on more than one occasion to perform job duties that violated express medical restrictions imposed by his doctors, thereby causing him severe pain, constituted a constructive discharge. *Id.* at 370.

[12] Unlike in *Tony*, there is no evidence in this case indicating that Shirar had a hostile attitude toward Tucker, exposed Tucker to repeated ridicule or taunting, or repeatedly assigned Tucker to job duties that violated his medical restrictions and/or put him at risk of further physical harm. Even accepting as true that Shirar initially avoided Tucker's calls and was irritated when Tucker asked for the worker's compensation carrier information, Tucker was not exposed to an environment or conditions similar to those as occurred in *Tony*. Further, Tucker acknowledged that he was never told he was fired or not to come back to work. Instead, he assumed he was terminated when he left the loaded truck at Shirar Trucking some time during the night of January 28. He neither returned to Shirar Trucking for more work assignments nor inquired in another manner about further work at Shirar Trucking. Moreover, it appears reasonable for Shirar to be upset and believe that Tucker had quit when he left the loaded truck in the middle of the night without informing Shirar of the circumstances.

Conclusion

[13] We cannot say that our review of the record leaves us with a firm conviction that a mistake has been made, because the court's findings support its

judgment. The evidence is insufficient to show that Shirar purposefully created working conditions so intolerable that Tucker had no choice but to resign and thus does not show the necessary causation between Tucker's exercise of his statutory right to worker's compensation benefits and the cessation of his employment with Shirar Trucking.

May, J., and Najam, Sr. J., concur.