

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MARK WILSON,	:	APPEAL NO. C-100351
	:	TRIAL NO. A0810974
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
TIME WARNER, INC.,	:	
	:	
Defendants-Appellees.	:	
	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant, Mark Wilson, filed suit against defendant-appellee, Time Warner, Inc. (“TWC”), alleging employment retaliation in response to his active pursuit of a workers’ compensation claim.² The trial court granted summary judgment in favor of TWC, and Wilson now appeals that decision. For the following reasons, we affirm the judgment of the trial court.

Wilson joined TWC in 1996, and for most of his time with the company, he worked as a customer service technician (“CST”) in a Cincinnati district office. Ordinarily, CSTs are dispatched to customers’ homes to service TWC’s phone, cable, and Internet products. But after he injured his knee on the job in 1998, TWC allowed

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See R.C. 4123.90.

Wilson to assist customers over the phone from the district office. The company also did not contest Wilson's workers' compensation claim for this injury.

Wilson performed this so-called "walk-through" function for eight years until TWC began dispatching him again to customers' homes in March 2006. But within a month, Wilson reinjured his knee, and TWC reassigned him to "walk-through" duties. This time, however, when Wilson filed for workers' compensation, TWC opposed his claim, as well as his later filings for a tendonitis allowance and permanent partial disability. Wilson was actively pursuing his claim as late as May 2, 2008, when a hearing was held on the disability issue.

Meanwhile, in 2006 and 2007, Wilson received solid performance reviews and merit increases in his salary. But by early 2008, TWC had decided to centralize the "walk-through" function at one location and, therefore, to eliminate the task from several district offices, including Wilson's. TWC gave Wilson three options: (1) return to ordinary CST duties, (2) apply for a new position with TWC, or (3) apply to the appropriate workers' compensation program.

Unable to return to the field, Wilson pursued other opportunities with the company; however, he received no job offers. By May 31, 2008, Wilson's duties were eliminated, and he was placed on a leave of absence. Wilson then decided to forego workers' compensation and sought unemployment benefits instead.

Three months later, TWC launched a new software program known as "Whole House Check." Early glitches prompted TWC to assign certain CSTs to desk jobs to provide technical support to CSTs running the program in the field. Those providing support were required to assist in the field if necessary. TWC did not tell Wilson about this opportunity, and Wilson claims that a less-qualified individual was assigned to this task.

In his sole assignment of error, Wilson argues that the trial court erred by granting summary judgment in favor of TWC.

We review decisions granting summary judgment de novo.³ Under Civ.R. 56, summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.⁴

Wilson's claim arises under R.C. 4123.90 which prohibits employers from taking punitive action against "any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer." In such a case, the plaintiff first must establish a prima facie case for retaliation by demonstrating that (1) he or she was injured on the job, (2) he or she instituted or pursued a claim for workers' compensation, and (3) there was a causal connection between his or her workers' compensation claim and any adverse employment action.⁵ If a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for the adverse employment action.⁶ If the defendant provides such a reason, the plaintiff then must prove that this reason was a pretext for unlawful retaliation.⁷

³ *Mitchell v. Blue Ash*, 181 Ohio App.3d 804, 2009-Ohio-1887, 910 N.E.2d 1118, at ¶6.

⁴ Id.

⁵ *King v. Jewish Home*, 178 Ohio App.3d 387, 2008-Ohio-4724, 898 N.E.2d 56, at ¶7.

⁶ Id.

⁷ Id.

In this case, Wilson does not argue that the elimination of his “walk-through” duties was retaliatory. He concedes that “TWC had a right to centralize the walk-through function elsewhere.”⁸ Instead, he argues that the company placed him on a leave of absence and did not allow him to work in a different position because he had actively pursued his 2006 workers’ compensation claim.

Even if we assume that TWC’s conduct was actionable under R.C. 4123.90, we agree with the trial court that TWC was entitled to summary judgment because Wilson produced insufficient evidence (1) to infer a causal connection between his workers’ compensation claim and TWC’s conduct, and (2) to show that TWC’s proffered reasons for its actions were pretextual.

To establish a causal connection, Wilson was not required to present a “smoking gun,” but he needed to present sufficient evidence—either direct or indirect—to create an inference that any decision not to allow him to work in a different position with the company was retaliatory.⁹ We have held that the factors relevant in determining whether retaliation has occurred include the following: (1) punitive action, such as bad performance reports after the claim was filed, (2) the length of time between the claim and the punitive action, (3) changes in salary level, (4) emerging hostile attitudes, and (5) whether legitimate reasons existed for the adverse action.¹⁰

Wilson, however, cites only the costs incurred by TWC to oppose his workers’ compensation claim and the temporal proximity between his disability hearing on May 2, 2008, and the elimination of his job duties by the end of that month. Even so,

⁸ Appellant’s Brief at 10.

⁹ *Young v. Stelter & Brinck, Ltd.*, 174 Ohio App.3d 221, 2007-Ohio-6510, 881 N.E.2d 874, at ¶123.

¹⁰ *Boyd v. Winton Hills Med. & Health, Inc.* (1999), 133 Ohio App.3d 150, 154, 727 N.E.2d 137.

without some other indicia of retaliatory motive, we hold that this evidence was insufficient for a reasonable person to infer a causal connection between Wilson’s pursuit of his workers’ compensation claim and any TWC decision not to employ him in a different position with the company after eliminating his job duties.¹¹

Moreover, Wilson has not provided sufficient evidence to show that TWC’s reasons for not placing him in a different position were a pretext for retaliation. To create a question of fact regarding pretext, Wilson had to produce evidence that these reasons (1) had no basis in fact, (2) did not actually motivate his discharge, or (3) were insufficient to motivate his discharge.¹²

TWC provided lawful reasons for not placing Wilson in a different position. And Wilson argues only that TWC rejected all his job applications and assigned “Whole House Check” support duties to an allegedly less-qualified CST. Even on summary judgment, this evidence did not sufficiently show that TWC’s stated reasons were a pretext. Accordingly, we overrule the assignment of error.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HENDON and FISCHER, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 25, 2011

per order of the Court _____.
Presiding Judge

¹¹ See *Young*, supra, at ¶24.

¹² *King*, supra, at ¶9.