

STATE OF SOUTH CAROLINA )

COUNTY OF CHESTERFIELD )

Antonio Hough, )

Plaintiff, )

v. )

Town of Pageland, )

Defendant. )

IN THE COURT OF COMMON PLEAS  
FOURTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-13-667

**ORDER GRANTING DEFENDANT'S  
SUMMARY JUDGMENT MOTION**

(Ending case)

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SC Court of Appeals

This matter comes before the Court pursuant to Defendant's Motion for Summary Judgment as to all of Plaintiff's claims. A hearing was held on this motion on November 5, 2013, at which time the Court took arguments and reviewed exhibits and affidavits submitted by the parties.<sup>1</sup> Present and participating at the hearing were Sarah C. Campbell, Esq., representing the Plaintiff; and Charles F. Thompson, Jr., Esq., on behalf of the Defendant.

Plaintiff has alleged two causes of action: (1) retaliation for filing a workers' compensation claim; and (2) breach of employment contract based on provisions within the Town of Pageland's employee handbook. At the hearing, the Plaintiff abandoned his claim for breach of contract. Thus, the only remaining claim for determination is for wrongful discharge in retaliation for filing a workers' compensation claim. For the reasons set forth below, the Court grants Defendant's Motion for Summary Judgment and dismisses this matter.

The uncontested facts are as follows. Antonio Hough ("Hough") was an entry level public works employee for the Town of Pageland ("Town"). His job duties required manual labor including heavy work, the necessity of pulling 100 to 150 pounds, as well as prolonged sitting, standing, and walking. In August 2009, Hough alleged that he injured his knee while on

<sup>1</sup> A hearing on this motion was previously held in September 2013 before the Honorable Paul M. Burch, however, before issuing a decision, Judge Burch, a resident of Pageland, recused himself from this matter.

the job by stepping in a hole. He was out of work for several weeks and eventually put on light duty. His light duty work was not a regular job position, it was temporarily created for him by the Town. Hough was absent for substantial periods of time throughout 2010 and, when he was working, he performed the light duty work. According to Hough, his knee never allowed him to resume his regular job. During the first week of January 2011, Hough had surgery on his knee. He never returned to work. On or about August 18, 2011, Hough's orthopedist initially wrote that Hough could return to work. Hough informed the Town of this but, at the same time, reported that he actually could not return to work at that time because a different doctor put him out of work due to diabetes.

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Shortly after issuing the August 18, 2011 return-to-work authorization, Hough's orthopedist rescinded it. The week following the rescission, the orthopedist opined that Hough had a permanent disability to the knee, gave him an impairment rating, and rated him as permanently unable to lift more than 25 pounds or do any climbing. Hough received workers compensation benefits for his injury.

The Town's leave of absence policy provides that employees may have up to six months of leave for medical reasons. If unable to return to work after exceeding this leave, the employee terminated. Because Hough had exceeded this leave by August 18, 2011 and still was unable to return to work, the Town terminated his employment. The Town has uniformly applied this policy, and at least two other employees have been terminated under the policy in the past.

Hough testified in his deposition in this case, on February 26, 2013, that he never was able to resume his regular duties and was still unable to return to work because he continued to suffer pain in his knee.

## WORKERS' COMPENSATION RETALIATION

S.C. Code Ann. § 41-1-80 prohibits an employer from discharging or demoting an employee because of a workers' compensation claim. However, section 41-1-80 does not prohibit an employer from terminating an employee medically unable to perform his job, even if the disability was caused by an injury compensable under South Carolina's workers' compensation law. Such a termination can occur at any time. The only thing an employer may not do is treat the employee differently from other injured employees because the injury is compensable under South Carolina workers' compensation laws.

It is uncontested that Hough was out of work due to his injury from January 2011 through August 2011 and has never been able to return to his regular job. It is also uncontested that the Town has a policy of allowing only six months of leave for any medical leave of absence. Finally, it is uncontested that Hough was unable to return to work at the end of his allowed leave, and, in fact, is permanently unable to resume his job.

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Section 41-1-80 does not require an employer to give any particular amount of time for an employee to recover from an on-the-job injury. So long as workers' compensation injuries are not treated differently from other injuries, the employee is not entitled to any particular amount of time off. See, e.g., *Horn v. Davis Elec.*, 416 S.E.2d 634, 636 (S.C. 1992) ("41-1-80 [has] no provision for according an employee a reasonable period of time within which to demonstrate that he can meet established work standards."); *Johnson v. J.P. Stevens*, 417 S.E.2d 527 (S.C. 1992) (termination of employee absent for nine days after job-related injury did not violate section 41-1-80 where employer's policy was uniformly applied); *Hinton v. Designer Ensembles*, 540 S.E. 2d 94 (S.C. 2000) ("It was inappropriate for the Court of Appeals to second

guess the imposition of Designer's absentee policy."); *White v. Malphus*, 2008 WL 4221723 (D. S.C. 2008) (no violation of section 41-1-80 when plaintiff was not able to resume his duties. Availability and prior provision of temporary light duty does not make termination retaliatory.); *Morgan v. Mattress Gallery, LLC*, No. 2:05-CV-2035-DCN, 2006 WL 1878983, at \*3 (D.S.C. July 6, 2006) ("Under *Hines*, even if plaintiff has been fired as a result of his workers compensation claim, his cause of action would be fatally deficient because it is undisputed that plaintiff was unable to perform his duties as a delivery helper at the time his employment terminated.").

Therefore, because section 41-1-80 does not provide an employee guaranteed leave beyond what the employer normally allows, it was not retaliatory to terminate Hough when he exceeded his allowed leave and was still unable to come back to work.

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Plaintiff contends that his inability to return to work is an affirmative defense which the Defendant failed to plead. A review of the Defendant's Amended Answer filed on January 26, 2012 shows that it includes, as an affirmative defense, that "Defendants actions were based on legitimate non-discriminatory reasons, specifically plaintiff exceeding allowable leave for a non-work related injury." This is the grounds on which the Defendant requests summary judgment and the Court finds that the defense was adequately pled.<sup>2</sup>

Hough presented an affidavit from one of Hough's co-workers in which the co-worker stated that he heard Hough's supervisor use racial slurs<sup>3</sup> when referring to Hough and that the supervisor openly opined that Hough had faked his injury and would be fired if he filed a claim. According to the affidavit, the statements were made over two years before Hough's termination.

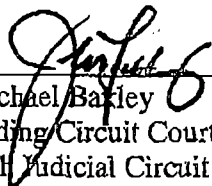
<sup>2</sup> After the November 5 hearing in this matter, Defendant moved to amend its pleadings to more specifically assert an affirmative defense on this issue. No hearing on this motion was ever scheduled and no decision made, it is now moot as a result of this Order.

<sup>3</sup> The Court notes that the alleged slurs in reference to Hough are not relevant to the matter, are highly inflammatory, and likely inadmissible pursuant to Rule 403. They are not repeated here.

The Court finds that the affidavit does not raise a material issue of fact. First, the statement is likely inadmissible for several reasons. Plaintiff argues that the statement may be considered as an admission by a party opponent. It is true that admissions by an agent might be considered if they were authorized by the principle or were within the scope of the speaker's agency or employment with the party-opponent. See SCRE 801(d)(2). The affidavit, however, does not indicate the scope of the supervisor's employment or his authority nor was any evidence of such authority brought to the Court's attention. See, e.g., *Todd v. S. Carolina Farm Bureau Mut. Ins. Co.*, 321 S.E.2d 602, 614 (S.C. Ct. App. 1984) *decision quashed on other grounds*, 336 S.E.2d 472 (S.C. 1985) (witness "neither heard the admission nor could identify whether an authorized agent of the Farm Bureau companies made the admission."); *Clark v. Flow Measurement, Inc.*, 948 F. Supp. 519, 524 (D.S.C. 1996) (statement may not be considered without showing of "a matter within the scope of the agency or employment, made during the existence of the relationship."). Second, and as an independent reason, there is no evidence that the supervisor was involved in the decision to terminate Hough's employment. The parties have had ample time to engage in discovery on this issue and no evidence was presented to the Court that the supervisor had any role in Hough's termination two years after the alleged statements. Finally, even if the Court were to consider the affidavit as evidence of some animus toward Hough's workers' compensation claim, that evidence has no bearing on the question of whether Hough was able to resume his regular duties or whether he had exceeded his leave. By Hough's own admission, and as confirmed by his physicians, Hough has never been able to resume his regular work. An employer is not required to grant any leave beyond what is normally provided to employees disabled by an injury compensable under South Carolina's workers' compensation

laws. Therefore, Hough's termination did not violate the anti-retaliation provision of section 41-1-80.

**THEREFORE, IT IS HEREBY ORDERED** the Defendant's Motion for Summary Judgment is **GRANTED**, and this case is dismissed in its entirety, with prejudice.

  
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J. Michael Barkley  
Presiding Circuit Court Judge  
Fourth Judicial Circuit

December 13, 2013

Hartsville, South Carolina