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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-000453

Antonio Hough. ..... . Appellant,

v.

Town of Pageland. ..... Respondent.

RESPONDENT'S BRIEF

November 11, 2014

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STATEMENT OF ISSUES ON APPEAL

The issues on appeal are: (1) whether or not the circuit court properly ruled that the Town correctly pled that Hough was terminated for exceeding allowable medical leave following a workers compensation injury and (2) whether the court failed to consider an affidavit submitted by Hough in opposition to the Town's motion for summary judgment.

STATEMENT OF THE CASE

This case is about a former Town employee who has admitted that he is medically unable to ever come back to work for the Town but wants the Town to pay him for failing to put him back to work.

The case concerns only a claim by Hough that he was terminated in retaliation for filing a workers compensation claim. The claim was based on an injury Hough suffered while working for the Town of Pageland. Hough was on medical leave for an extended period of time. Eventually, he was terminated after he exceeded allowable medical leave and was still unable to return to his job. Hough admitted in testimony that he never recovered sufficiently to return to his job. Following discovery, the Town submitted a motion for summary judgment on the grounds that there was no duty to give an employee any time to recover from a workers' compensation injury and Hough had admittedly exceeded his allowed medical leave. The Honorable Judge Paul Burch initially heard the motion in September 2013, however, he recused himself from the case after hearing the motion. The motion was reheard before on November 5, 2013 before the Honorable J. Michael Baxley who granted summary judgment.

STATEMENT OF THE FACTS

Hough was an entry level public works employee for the Town of Pageland. His job duties included significant manual labor including "heavy work," the necessity of pulling 100 to 150 pounds and prolonged sitting, standing, and walking. *(R. 29) (Aff. Long).* In August 2009, Hough injured his knee while on the job by stepping in a hole. *(Id.).* He was out of work for several weeks and eventually put on light duty. His light duty work was not a regular job position but was instead, "make work," and temporary. *(Id.).* Hough remained on light duty throughout 2010 (when he worked at all). *(R. 78-81) (Hough Testimony pp. 11-14).* According to Hough, his knee never allowed him to resume his regular job. *(R. 77) (Hough Testimony p. 10).* 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. *(R. 57, 84-85) (pp. 17-18) (Dr. Kirol Note).* Hough informed the Town of this but also informed the Town that, despite Dr. Kirol's note, he could not return to work at that time because his regular doctor put him out of work due to Hough's diabetes. *(R. 58, 85) (pp. 17-20) (Carolina Physicians' Note).*

The Town's leave of absence policy provides that employees may have up to six months of leave for medical reasons. If they are unable to return to work after exceeding this leave, they are administratively terminated. *(R. 29) (Aff. Long).* Because Hough had exceeded this six months of leave by August 18, and still was unable to return to work, the Town administratively 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 several years. *(Id.).*

Hough, in fact, was never able to return to work. Despite the Orthopedist's August 18 determination, Hough testified that he was unable to return to work because his knee was still painful. *(R. 89-90) (pp. 22-23).* Shortly after issuing the August 18 return-to-work authorization, Hough's orthopedist rescinded it *(R. 59) (8/24/11 Note of Dr. Kirol)* and gave Hough a permanent disability due to the knee, gave him an impairment rating, and rated him as permanently unable to lift more than 25 pounds or do any climbing. *(R. 60) (9/1/2011 Note of Dr. Kirol).* Hough agreed in his testimony that he never was able to resume his regular duties and still cannot do so at this time. *(R. 77-78, 89-90) (pp. 10-11, 22-23).*

ARGUMENT

A. Hough admitted that he was medically unable to return to his job. He was terminated for exceeding allowable leave time and this defense was properly pled and further clarified by subsequent pleadings.

S.C. Code § 41-1-80 provides that an employer may not terminate the employment of an employee because that employee has initiated a workers compensation claim. Section 41-1-80 does not prohibit an employer from terminating an employee who is medically unable to perform his job. This is true even if the disability was caused by an injury covered by South Carolina's workers' compensation law. The employer is not required to wait any period of time before terminating such an employee. However, an employer cannot treat an employee suffering from a workers compensation injury differently from employees suffering from non-occupational injuries.

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.

It is clear that 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 Westlaw 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 leave longer than what is provided to any employee, it was not retaliation to terminate an employee like Hough when he exceeds his leave and cannot come back to work.

In this appeal, Hough contends that his inability to return to work is an affirmative defense which the Defendant failed to plead. However, as Judge Baxley noted, the Defendant's Amended Answer filed on January 26, 2012 specifically states, 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 exactly why Hough was terminated and the grounds on which Judge Baxley granted summary judgment. Apparently, Hough thinks the affirmative defense needed to add the words "and he exceeded his leave because he was unable to return to work." Such particularity is not required.

The requirement of pleading affirmative defenses is set forth in S.C. Rule Civ. P. 8(c). As the notes to that Rule set forth, the purpose of the Rule is "to avoid surprise." Hough cannot claim to have been surprised that the Town was asserting that he (Hough) was terminated for exceeding allowable leave because he was unable to return to work. The Town's pleading on this point makes this clear. In any event, Plaintiff was well aware, even before filing suit, that his physician gave him an impairment rating incompatible with his return to work. Plaintiff testified he believed himself unable to return to work. The Defendants presented this defense in its discovery responses in January 2013. Those responses state: "Plaintiff was terminated for being unable to return to work after exceeding the amount of leave provided under the Town's policies." *(R. 137) (Answers to Plaintiff's First Interrogatories) (emphasis added).* The Town's March 2013 summary judgment filing of March 2013 thoroughly, and repeatedly, explains that Hough exceeded his leave and was unable to resume his duties because of his medical condition. Therefore, Plaintiff was well aware of the defense and can claim no prejudice from the way the Town pled its defense.

Numerous courts have held that a complete failure to present an affirmative defense in an Answer can be cured by subsequent identification of the defense to avoid surprise. In *Plyler v. Burns*, 647 S.E.2d 188, 194-95 (S.C. 2007) the court thoroughly examined this point and recognized that a complete failure to assert an affirmative defense in an "initial pleading" is cured by timely raising the defense to the court such that no unfair surprise results. *citing Brinkley v. Harbour Recreation Club,* 180 F.3d 598, 612 (4th Cir.1999), *abrogated on other grounds by Desert Palace Inc. v. Costa,* 539 U.S. 90 (2003) *and Floyd v. Ohio Gen. Ins. Co.,* 701 F.Supp. 1177, 1187 (D.S.C.1988). *See also Gardner v. Newsome Chevrolet-Buick, Inc.,* 404 S.E.2d 200 (S.C. 1991) (providing that where there are no South Carolina cases directly on point, the Court may look to the construction placed on the corresponding federal rules of civil procedure).

The *Brinkley* court, cited by the *Plyler* court, summarized the caselaw well.

> Although it is indisputably the general rule that a party's failure to raise an affirmative defense in the appropriate pleading results in waiver, *see* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (1990), there is ample authority in this Circuit for the proposition that absent unfair surprise or prejudice to the plaintiff, a defendant's affirmative defense is not waived when it is first raised in a pre-trial dispositive motion, *see Peterson v. Airline Pilots Ass'n,* 759 F.2d 1161, 1164 (4th Cir.1985) (holding that waiver is not automatic, but requires a showing of prejudice or unfair surprise); *see also American Recovery Corp. v. Computerized Thermal Imaging, Inc.,* 96 F.3d 88, 96 (4th Cir.1996) (evaluating prejudice to plaintiff when considering timeliness of affirmative defense of arbitration); *Nasim v. Warden,* 42 F.3d 1472, 1475–76 (4th Cir.) (noting that, in limited circumstances, affirmative defense of statute of limitations need not be raised in answer if demonstrated conclusively on the face of the complaint), *vacated on other grounds,* 64 F.3d 951 (4th Cir.1995) (en banc); *Polsby v. Chase,* 970 F.2d 1360, 1364 (4th Cir.1992) (noting that affirmative defenses may be pleaded in pre-trial motions and that the district court did not abuse its discretion by permitting defendant to raise an affirmative defense after the answer); *vacated and remanded on other grounds,* 507 U.S. 1048, 113 S.Ct. 1940, 123 L.Ed.2d 646 (1993). This view is in accord with the vast majority of our sister circuits. *See, e.g., Blaney v. United States,* 34 F.3d 509, 512 (7th Cir.1994) (stating that an unpleaded untimeliness defense could be raised in motion to dismiss); *Camarillo v. McCarthy,* 998 F.2d 638, 639 (9th Cir.1993) (holding that an affirmative

> defense may be raised at summary judgment absent prejudice to opposing party); *Moore, Owen, Thomas & Co. v. Coffey,* 992 F.2d 1439, 1445 (6th Cir.1993) (asserting that an affirmative defense may be raised in response to summary judgment motion); *Kleinknecht v. Gettysburg College,* 989 F.2d 1360, 1374 (3d Cir.1993) (noting that an affirmative defense may be raised at summary judgment absent prejudice); *Ball Corp. v. Xidex Corp.,* 967 F.2d 1440, 1443–44 (10th Cir.1992) (raising affirmative defense in summary judgment motion preserved defense for trial three months later). *But see Harris v. Secretary, U.S. Dep't of Veterans Affairs,* 126 F.3d 339, 342 (D.C.Cir.1997) (disagreeing with the majority approach and holding that the approach alters the structure dictated by Rules 8(c) and 15(a) by relieving parties of the need to request amendment and by promoting strategic behavior); *Ashe v. Corley,* 992 F.2d 540, 545 n. 7 (5th Cir.1993) (disposing of several affirmative defenses not raised in the answer without evaluating prejudice to the plaintiff).

Brinkley v. Harbour Recreation Club, 180 F.3d 598, 612-13 (4th Cir. 1999).

All of the above cases concern a complete failure to plead an affirmative defense. The Town did assert the defense. Hough is only arguing about the wording.

For the foregoing reasons, the Town did adequately plead its defenses. Even if the Town's Answer was not worded as particularly as Hough would like, Hough was fully aware he could not resume his duties. The Town's discovery responses and the Town's summary judgment filing made it crystal clear that the Town took the position that Hough was medically unable to resume his duties.

B. The trial court did not improperly refuse to consider any affidavits

Hough asserts that the court improperly refused to consider the affidavit of Bobby Joe Rollins submitted in opposition to the Town's motion for summary judgment. This argument is rather confusing because Judge Rollins carefully considered the affidavit in his order granting the motion. That order states:

> 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[1] when referring to Hough and

[1] The court notes that the alleged slurs in reference to Hough are not relevant to the matter and are highly inflammatory and prejudicial.

> 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. The court finds that the affidavit does not raise a material issue of fact. First, the statement is inadmissible. 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. 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, contrary to Hough's arguments, the court did consider the affidavit and found it to be insufficient to raise any issue of fact. First, the court noted that Hough failed to present evidence that the supervisor was speaking within the scope of his authority. It was Hough's burden to do so. Second, the court noted that Hough failed to show any causation between the alleged comments two years before his termination to the termination. Hough did not, and could not, assert that the supervisor was involved in Hough's termination or even that he still worked for the Town. Finally, and most importantly, even if the supervisor wanted to fire Hough because of his workers compensation claim, and was involved in the decision, that

animus would be irrelevant. It would be irrelevant because Hough admitted he could not come back to work even if he wanted to. Hough wants to be compensated for a damage that never could have occurred to him. The law simply does not permit this. A terminated employee simply cannot hold his hand out for money on the basis of wrongful termination and yet admit he is physically unable to come back to work. Employees cannot "speak out of both sides of [their] mouths with equal vigor and credibility before the court." *Reigel v. Kaiser Foundation Health Plan of N.C.*, 859 F.Supp. 963 (D. N.C. 1994). . In *August v. Offices Unlimited,* 981 F.2d 576 (1st Cir. 1992), a claimant also represented that she was unable to return to work because of her disability. The court rightfully held that this declaration meant that the claimant was therefore barred from seeking damages or a return to work. *See also, McMemar v. The Disney Stores, Inc.,* 1995 West Law 390051 (E.D. Pa. 1995) (claimant represented that he was totally and permanently disabled and therefore could not seek damages or a return to work) (*citing August v. Offices Unlimited*, 981 F.2d 576 (1st Cir. 1992); *Garcia-Paz v. Swift Textiles*, 873 F.Supp. 547 (B. Kan. 1995); *Kennedy v. Applause, Inc.,* 1994 West Law 740765 (C.D. Cal. Dec. 6, 1994); *Riegel v. Kaiser Foundation*, 859 F.Supp 963 (E. N.C. 1994). As should this court, these courts focused on the uncontroverted fact that the plaintiff clearly stated he was unable to work. Those representations bound those plaintiffs and should bind Hough.

CONCLUSION

For the foregoing reasons, the Respondents request that the court affirm the circuit court.

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PROOF OF SERVICE

I certify that Final Brief was served this day upon counsel for the Respondent, M.W. Cockrell 159 Main St. Chesterfield, South Carolina 29709 and filed with the South Carolina Court of Appeals.

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CERTIFICATE OF COUNSEL

I certify that the Respondent's final brief complies with S.C. R. App. P. 211(b)

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