IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

ROBERT BARNHART,

Plaintiff,

v. CASE NO. 4:11cv450-RH/WCS

THE LAMAR COMPANY, L.L.C.,

Defendant.

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ORDER GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT

The plaintiff Robert Barnhart asserts that he was fired by his former employer, the defendant The Lamar Company, L.L.C., for complaining about the company's practice of illegally poisoning trees that interfered with its billboards. Mr. Barnhart asserts a claim under the Florida Whistleblower's Act, Florida Statutes §§ 448.101-448.105. Each side has moved for summary judgment. This order grants summary judgment for Lamar.

I

Lamar is an outdoor advertising company. Mr. Barnhart went to work for Lamar in Tallahassee in November 2005. His duties included maintaining billboards. This sometimes required climbing ladders, lifting and handling heavy rolls of vinyl, and trimming or removing trees. The job included substantial physical labor.

Mr. Barnhart says he was instructed by his supervisor Chris Oaks to poison trees that interfered with the company's billboards. Mr. Oaks confirms this and says he was acting on the instructions of Lamar's southeast regional manager Chip LaBorde. Whether Mr. LaBorde or other Lamar officials in fact directed or approved the practice may be disputed, but for purposes of this order I assume they did, because on Lamar's summary-judgment motion, disputes in the evidence must be resolved—and all reasonable inferences must be drawn—in Mr. Barnhart's favor. Mr. Barnhart poisoned trees over a substantial period and voiced no objection.

On June 7, 2011, Mr. Barnhart injured his back while performing duties having nothing to do with the poisoning. He tried to return to work on June 8 but was unable to do his job. He began using sick leave, vacation time, and, when that ran out, leave under the Family and Medical Leave Act. Lamar offered no

resistance; it did not question the fact or seriousness of Mr. Barnhart's injury, his resulting inability to do the job, or his entitlement to sick leave, vacation time, and FMLA leave. FMLA leave was available through August 2, 2011.

On July 15, 2011, Mr. Barnhart sent two emails to his supervisor Mr. Oaks within 10 minutes of one another. The first said Mr. Barnhart's doctor had "taken [him] off work." ECF No. 37-1 at 52. The second said:

> I am concerned about Lamar's business practices as it relate[s] to trees. I think it is important to be in full compliance with local, state, and federal laws regarding the removal or killing of trees. When I come back to work I would like to discuss how we can effectively do our work and stay in compliance with all regulations.

ECF No. 31-5 at 13.

Mr. Barnhart asserts that Lamar immediately hatched and carried out a plan to fire him. The evidence of that is thin. But one thing is certain: Mr. Barnhart never went back to work for Lamar. Instead, he pursued a worker's-compensation claim asserting that he was unable to work at all, and he accepted benefits under Lamar's long-term disability plan. Benefits were available under that plan only to a person unable to perform the duties of the person's job at Lamar.

Mr. Barnhart has not applied for any other job with any employer. And he testified, both in the worker's-compensation proceeding and in his deposition in this case, that since the June 7, 2011 injury, he has been unable to perform the duties of his former position at Lamar.

II

The Florida Whistleblower's Act prohibits an employer from taking action against an employee because the employee has "[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." Fla. Stat. § 448.102(3). Mr. Barnhart says, and this order assumes, that his email came within the Act's protection.

A claim under the Act is properly analyzed under the familiar burden-shifting framework set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Rice-Lamar v. City of Ft. Lauderdale*, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003); *see also Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000). At the first step of that framework, an employee must present a prima facie case. Part of a prima facie case of retaliation is a showing that protected conduct was a *cause* of a challenged adverse action—that the protected conduct and adverse action were not "wholly unrelated." If a plaintiff presents a prima facie case, the burden shifts to the employer to proffer a legitimate nonretaliatory explanation for the adverse action. The plaintiff must overcome a legitimate nonretaliatory explanation by showing that it was not the true reason for the action and that instead the true reason was retaliation. Finally, even if retaliation was a motivating factor for the adverse action, the employer can prevail by showing that it would have made the same decision anyway, even in the absence of the protected

activity. *See, e.g.*, *Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001); *Pulliam v. Tallapoosa Cnty.*, 185 F.3d 1182, 1184 (11th Cir. 1999) (citation omitted).

Mr. Barnhart's claim fails at three points—causation, legitimate nonretaliatory explanation, and same decision—all on related grounds.

The record establishes without dispute that Lamar never permanently assigns an employee to light duty. When a person like Mr. Barnhart becomes unable to do the job, the person is replaced—or, as Mr. Barnhart phrases it, fired or terminated—just as Mr. Barnhart was. It happens every time. Nothing in federal or state law requires an employer to create a new position for an employee under these circumstances. Nor does anything in federal or state law require an employer to move such an employee to a different position, even if one exists or comes open. Lamar's consistent policy is a legitimate nonretaliatory explanation for Mr. Barnhart's termination; it shows that Mr. Barnhart's complaint of illegal activity did not cause the termination; and it shows that Lamar would have made the same decision anyway, even in the absence of the complaint of illegal activity.

To be sure, the Florida Whistleblower's Act prohibits an employer from denying a whistleblowing employee the same opportunities made available to other employees. But Mr. Barnhart has proffered no evidence that Lamar afforded any

other injured employee an opportunity it did not provide Mr. Barnhart. Lamar is entitled to summary judgment.

In reaching this decision, I have not overlooked Mr. Barnhart's assertion in his summary-judgment papers and at oral argument that, in fact, he was fully able to do the job despite his injury. It is a curious assertion, contrary to his position in the worker's-compensation proceeding, contrary to his acceptance of long-term disability benefits, contrary to his decision not to seek other employment, and contrary to his own sworn testimony. His explanation is that he did not know he could do the job and learned it only when he obtained through discovery in this lawsuit a worker's-compensation form signed by his neurosurgeon clearing him to return to work without restrictions. This is perhaps sufficient to avoid any estoppel and to overcome the settled principle that a party cannot—without an adequate explanation—avoid summary judgment by disavowing the party's own deposition testimony. *See, e.g.*, *Lane v. Celotex Corp.*, 782 F.2d 1526, 1532 (11th Cir. 1986); *Van T. Junkins & Assocs., Inc. v. U.S. Indus. Inc.*, 736 F.2d 656, 657 (11th Cir. 1984).

But this still does not save Mr. Barnhart's claim. Mr. Barnhart never told Lamar he was able to return to work. Mr. Barnhart says Lamar must have known he could return to work because worker's-compensation forms like the neurosurgeon's are routinely provided to an employer. But there is no evidence

that *this* form was in fact provided to Lamar. Nor would one expect anyone at Lamar to pick out this form from among all the worker's-compensation papers and to conclude—contrary to Mr. Barnhart's own statements and belief—that Mr. Barnhart could in fact go back to work.

The undisputed facts are these: Mr. Barnhart injured his back; Mr. Barnhart told Lamar he could not do his job; Mr. Barnhart took leave with Lamar's unqualified support; Mr. Barnhart submitted and continued to pursue a worker's-compensation claim saying he could not work; Mr. Barnhart accepted long-term disability benefits; Mr. Barnhart never told Lamar he could go back to his old job without restrictions; and Lamar's consistent practice was not to provide permanent light duty for an injured employee but instead always to replace—to terminate—an employee who became unable to do the job. In short, the record shows without genuine dispute Lamar would have terminated Mr. Barnhart even if he had never complained about the tree-poisoning practice.

The Florida Whistleblower's Act protects an employee from retaliatory action. But the Act does not immunize an employee from adverse actions that an employer would take anyway for reasons unrelated to the employee's whistleblowing. Illegally poisoning trees is reprehensible, as is asking an employee to participate in the practice. Remedies for illegally poisoning trees are available. But this lawsuit is not one of them.

III

For these reasons,

IT IS ORDERED:

1. Lamar's summary-judgment motion, ECF No. 31, is GRANTED.

2. Mr. Barnhart's summary-judgment motion, ECF No. 32, is DENIED.

3. All other motions are denied as moot.

4. The clerk must close the file.

SO ORDERED on July 30, 2012.

s/Robert L. Hinkle
United States District Judge