IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

DAVID LLANES,
Plaintiff,

CASE NO.: 09-25165 CA 31

vs.

CENTRAL TRANSPORT, INC.,
a foreign corporation,
Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the court upon defendant Central Transport Inc.'s Motion for Summary Judgment. The court has convened two hearings on this motion and has considered the pleadings, the arguments of counsel, all relevant affidavits, deposition testimony and exhibits. For reasons set forth further below, the court finds that no genuine issues of material fact remain, and defendant is entitled to judgment as a matter of law.

Plaintiff worked as a driver for defendant when he injured his wrist in a fall on the job on July 1, 2008. Thereafter, he filed a worker's compensation claim. Eventually he had surgery and was given a 5% disability of the body as a whole. On October 21, 2008, plaintiff's physician cleared him to return to work. It is common knowledge, however, that earlier that same month, a worldwide financial crisis unfolded and stock markets around the world crashed, with the Dow Jones Industrial Average dropping over 18% in value in the course of a single week. All U.S. industries and businesses were hard hit and began laying off employees, and most continue to suffer today, nearly two years later.

Plaintiff alleges in this lawsuit that he tried to return to work on October 30, 2008, but was terminated in retaliation for filing his worker's compensation claim. Defendant points out, however, that it began laying off drivers in the first quarter of 2008, eventually reducing its force of drivers by 25% by the end of the first quarter of 2009. Independent evidence and deposition testimony corroborates defendant's claim that it terminated one quarter of its drivers in this time

period.

In order to establish a claim under Section 440.205 for unlawful retaliation, the employee must establish (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal connection between the protected expression and the adverse action. Once a plaintiff establishes a prima facie case by proving only that the protected activity and the negative employment action are not completely unrelated, the burden then shifts to the employer to proffer a legitimate reason for the adverse employment action. If the employer does so, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the "legitimate reason" was merely a pretext for the prohibited, retaliatory conduct. *Russell v. KSL Hotel Corp.*, 887 So.2d 372, 381-380 (Fla. 3d DCA 2004).

Section 440.205 "only prohibits the retaliatory discharge of an employee 'by reason of' the filing of a worker's compensation claim. The statute cannot be interpreted to prohibit the discharge of an employee for any reason once the employee has filed or pursued a worker's compensation claim. Employers still retain their traditional right to terminate employees for legitimate business reasons." *Edwards v. Niles Sales & Service, Inc.*, 439 F. Supp. 2d 1202, 1228 (S.D. FL 2006).

Plaintiff herein has established the initial *prima facie* case, and it is thus defendant's burden to proffer that the layoff occurred for a non-discriminatory reason. As the defense has argued, this burden is a light one. It is a burden of producing a non-discriminatory reason, it is not a burden of persuasion. *City of Hollywood v. Hogan*, 986 So.2d 634, 643 (Fla. 4th DCA 2008).

In the instant case, defendant has demonstrated through the unrefuted sworn testimony of Kyle Blain, its corporate representative, that when plaintiff sought to return to work, there was no position available for him due to the economic downturn. There is no duty imposed on an employer in Florida to find or create a different position to accommodate an employee returning from leave for an injury or illness in a circumstance where that employee's job has been terminated due to an economic downturn, and plaintiff provides no authority for such a premise. No positions were available, and therefore plaintiff was not rehired. Defendant was so hard hit by the economic downturn that it terminated one quarter of its drivers and did not rehire a single

driver until August 3, 2009, nearly ten months after plaintiff's attempted return to work.

Plaintiff's affidavit in opposition to defendant's motion for summary judgment asserts that several unnamed other drivers, hired later than he, remained on the job despite his own layoff, suggesting an improper retaliatory motive on the part of defendant. But this vague allegation of unnamed other persons remaining on the job is contradicted by plaintiff's prior sworn deposition testimony, in which he testified that he had *not the slightest idea* whether any drivers hired later than he had received better treatment (i.e., were not laid off). Plaintiff's affidavit does not explain why there is a discrepancy with his deposition testimony on this important issue. A party may not file an affidavit flatly contradicting his own prior testimony in order to defeat summary judgment. *See, e.g., Futch v. Wal-Mart Stores, Inc.*, 988 So.2d 687 (Fla. 1st DCA 2008) (noting that court may strike or disregard contradictory affidavit offered on issue of summary judgment unless credible explanation for discrepancy is provided by affiant).

During perhaps the worst worldwide economic crisis in human history, defendant reduced its workforce from 124 to 101 employees. Plaintiff had the misfortune to be returning to work in the midst of this very serious economic downturn, and found no job to return to. Defendant laid off some twenty-three employees, and did not hire a single new employee until ten months after plaintiff sought to return to work. No genuine issues of material fact remain herein. Plaintiff has failed to meet his burden of showing any evidence that defendant's proffered reason for not rehiring him was pretextual. Accordingly, defendant is entitled to summary judgment as a matter of law.

It is therefore **ORDERED** and **ADJUDGED** that the motion for summary judgment is **GRANTED**. The court reserved jurisdiction to address the issues of court costs and attorney's fees.

DONE and **ORDERED** at Miami-Dade County, Florida this JUN 10 2010 day of _____, 2010.

JOHN SCHLESINGER
CIRCUIT JUDGE

John Schlesinger
Circuit Court Judge

Copies furnished to:
Eddy O. Marban, Esq.
Lawrence J. McGuinness, Esq.