Affirmed and Opinion Filed June 21, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00367-CV

MELVIN WATKINS, Appellant
V.
ROLLING FRITO-LAY SALES, LP, FRITO LAY, INC., AND PEPSICO, INC., Appellees

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause No. 416-03859-2014

MEMORANDUM OPINION

Before Justices Evans, Stoddart, and Boatright
Opinion by Justice Stoddart

Melvin Watkins appeals from a take-nothing judgment following a directed verdict on his wrongful termination claim against Rolling Frito-Lay Sales, LP, Frito Lay, Inc., (collectively Frito-Lay) and PepsiCo, Inc. Watkins sued appellees under the narrow exception to the employment-at-will doctrine recognized in *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). In three issues, Watkins argues the trial court erred by granting directed verdicts on his *Sabine Pilot* claim, his request for punitive damages, and his "joint enterprise" claim against PepsiCo. We affirm.

BACKGROUND

Watkins was employed by Frito-Lay in July of 2012. He was terminated on July 30, 2014 for failing to report to work for three consecutive days without authority or proper

notification.

Watkins was a route sales representative (RSR). RSRs work out of secured storage facilities or "bins," where products assigned to each RSR are delivered and stored until the RSR delivers the products to the stores they service. RSRs are responsible for maintaining a physical inventory of the products in their bin. The physical inventory is compared with the electronic or book inventory and any variance must be accounted for. Watkins worked at the storage facility in Rice, Texas.

Watkins testified that in November of 2012, his direct supervisor, Brad Greene, asked Watkins and another RSR, Aaron Bennett, to "short" the delivery manifest by indicating fewer cases of products were delivered than were actually received. Watkins refused. In January of 2014, according to Watkins, Greene directed Bennett to short deliveries of crackers in order to cover stale products in his inventory and to instruct Watkins to do so as well. As directed, Bennett told Watkins to short the delivery, but by that time, Watkins had already acknowledged the full delivery of crackers. Watkins alleged in his live pleading these two requests to short the deliveries were requests to commit theft under section 31.03(a) of the penal code. TEX. PENAL CODE ANN. § 31.03(a).

Watkins contends that after he refused to short his deliveries, Greene began harassing him. Watkins testified there were several burglaries at the Rice facility between July of 2013 and February of 2014. Over $1,100 of Watkin's inventory was stolen in one burglary. Fingerprints found in Watkin's bin after this burglary were later identified as Bennett's.

The events leading to Watkins's ultimate discharge began in June of 2014. Watkins was scheduled to work on June 7 and 8, 2014. On Sunday morning, June 8, 2014, the manager of a Walmart serviced by Watkins contacted Greene to complain that shelves were not properly stocked and organized. Greene was on his way to the Walmart when Watkins responded to his texts about the complaint. Unknown to Greene, Watkins had not serviced the store as he was

scheduled to do that morning. Instead, Watkins went to his son's baseball tournament in Round Rock and, contrary to Greene's instruction a week earlier, sent a part-time worker to service the store. On his way back from the baseball tournament, Watkins called the confidential employee hotline to complain that Greene had been harassing him since 2013. Watkins drove his Frito-Lay truck to the store on Sunday evening and restocked the shelves.

After the June 8 incident, Greene pulled time and GPS records for Watkins and his truck and determined that Watkins used the truck at Walmart for over four hours the evening of June 8, 2014. Watkins did not report the time on his timecard for June 8, 2014. Rather, he reported the time as time worked on Monday, June 9, 2014. Greene also reviewed surveillance video at Walmart and found that on May 25, 2014, Watkins had his minor children helping him service the store. The RSR handbook states that work outside the normal workday requires management approval, but whether or not approved, employees must report the time worked. The handbook also provides that failure to accurately record work time and allowing non-employees to work in stores are violations of company policy. Greene attempted to contact Watkins, but Watkins was not scheduled to work until June 13, 2014.

Watkins called the hotline again on June 11, 2014 to report that in April, Greene instructed Watkins and Bennett to short deliveries from Irving Bakery. Watkins believed this would have been a theft.

John McLaughlin, the zone sales leader, contacted Watkins about his calls to the hotline. Watkins wrote to McLaughlin on June 12, 2014 detailing his complaints about Greene, including the request to short the delivery of crackers in January. After giving more background on his complaints about Greene, Watkins stated he was being suspended tomorrow for not working Sunday morning, June 8, his assigned work day. He explained that in practice, RSRs could work the stores on Saturday nights for Sunday morning. Then they would put the time worked on Saturday down as their time entry for Sunday morning. Greene always allowed this practice, but

told Watkins two weeks earlier that Watkins had to ask for permission before doing so. Watkins said other RSRs were not required to ask for permission. Watkins stated he did not ask Greene for permission to go to his son's baseball tournament. Instead, Watkins stocked the store Saturday night as was his practice and asked a part-time employee to stock the store on Sunday morning while Watkins traveled to the tournament.

Watkins was suspended with pay on June 13, 2014 pending an investigation into a potential performance violation.

The RSR employee handbook states that employment is at will and may be terminated at any time with or without cause and with or without prior notice. As a general guideline, the handbook contains a four-step discipline procedure. Step-1 is a written reminder to address unsatisfactory job performance or conduct issues. Step-2 is a written warning to address continuing performance or conduct issues. Step-3 is a final warning and the final step before termination. Failure to correct the performance or conduct will result in termination. Step-4 is termination. Employees may appeal any discipline to higher management and ultimately to independent arbitration.

Watkins met with McLaughlin and Greene on July 4, 2014, and was presented with a "Last Chance Agreement" to sign in order to return to work. The agreement placed Watkins at a step-3 discipline level and listed several performance requirements Watkins was required to follow, such as inventory and administrative responsibilities, route procedures, approval for changing work days, timely submission of accurate timecards and mileage, and not permitting non-employees to work his route. The agreement provided that any proven performance violations over the next nine months would constitute just cause for discharge. Watkins was also given the right to appeal the agreement or any future discipline. Watkins refused to sign the agreement without talking to a lawyer, but was not permitted to take a copy with him.

McLaughlin contacted Watkins on July 8, 2014 and gave him three days to sign the

agreement and return to work. Otherwise, McLaughlin would have no choice but to terminate Watkins's employment. On July 10, 2014, Watkins sent a letter to McLaughlin, Kellee Terwilliger from human resources, and Frito-Lay corporate officers explaining that he refused to sign the agreement and return to the same hostile work environment. He complained that he received only a part of his pay while suspended and was not allowed to have a copy of the agreement to review with a lawyer. Watkins concluded, "I am not quitting my job. I like my job and wish to continue working for the company. However, that said, I do not believe that things would be different in the management of the Rice facility."

McLaughlin responded on July 11, 2014 that there was a mistake with his pay during the suspension and that his pay would be corrected. McLaughlin also attached a copy of the agreement presented to Watkins on July 4, 2014. The terms of the agreement were the same, but the title was changed to "Agreement for Continued Employment." McLaughlin stated that Terwilliger would contact Watkins to discuss moving forward after she reviewed his letter with headquarters.

On July 21, 2014, Watkins met with Terwilliger and Bill Howard, the Frito-Lay law department manager. Watkins was told the company's investigation found no evidence to support his allegations about Greene and the direction to short manifests. Watkins confirmed he was still employed at the time and had received his pay while suspended. They discussed several options where Watkins could return to work, possibly at another facility, but under the terms of the agreement, or Watkins could be given a brief period of time to find other employment. Watkins rejected a transfer to another facility because he would have to move his family or to a lower-paying position that did not require him to move. Watkins stated he would not return to work unless his discipline record was cleared and he was not subject to the agreement.

The next day, Terwilliger wrote to Watkins giving him two options: (1) he could return to work at the Rice facility under the terms of the agreement, or (2) in exchange for his executing

a settlement agreement releasing the company from all claims, he would be allowed to resign and receive his current salary and benefits for a period of nine weeks.

Watkins rejected these options in a letter dated July 23, 2014, and questioned the adequacy of the investigation into his complaints. Terwilliger replied that the investigation was done properly and found no support for his broad allegations of fraud. However, the options remained open and he was scheduled to return to work at the Rice facility on July 27, 2014. She stated Watkins would not by paid after July 27 unless he returned to work. Watkins rejected the offers as "unfair" on July 26, 2014. He proposed a payment of four years' salary as severance or "you will have no choice but to terminate me. I do not quit this job." Howard rejected the offer of four years' salary and informed Watkins that he could report to work on July 27 as scheduled. If he did not report for three days, he would be terminated under the no-show policy.

Watkins did not report for work on July 27, 2014 or thereafter. On July 30, 2014, his employment was terminated for failing to report to work on three consecutive workdays without authorization or proper notification.

At the close of Watkins's evidence, Frito-Lay and PepsiCo moved for a directed verdict. The trial court granted the motions and rendered a take-nothing judgment. Watkins's motion for new trial was denied by a written order.

STANDARD OF REVIEW

We review a trial court's decision to grant or deny a motion for a directed verdict under the legal sufficiency standard of review. *Helping Hands Home Care, Inc. v. Home Health of Tarrant Cty., Inc.*, 393 S.W.3d 492, 515 (Tex. App.—Dallas 2013, pet. denied); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) (test for legal sufficiency is same for directed verdict, JNOV, and appellate no-evidence review). A directed verdict is warranted when the evidence is such that no other verdict can be reached and the moving party is entitled to judgment as a matter of law. *See Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d

636, 645 (Tex. App.—Dallas 2015, no pet.); *Halmos v. Bombardier Aerospace Corp.*, 314 S.W.3d 606, 619 (Tex. App.—Dallas 2010, no pet.). We will sustain a no-evidence issue when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the only evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *See City of Keller*, 168 S.W.3d at 810; *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). We credit evidence favoring the non-movant if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 827; *see also Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007) (stating courts must keep in mind that some contrary evidence cannot be ignored); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003).

DISCUSSION

In Texas, absent a specific agreement to the contrary, employment is considered to be at will. That is, "employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998). In *Sabine Pilot*, the supreme court recognized a "very narrow [public policy] exception to the employment-at-will doctrine." *Sabine Pilot*, 687 S.W.2d at 735. The exception covers only the discharge of an employee "for the sole reason that the employee refused to perform an illegal act." *Id.* The plaintiff must prove by a preponderance of the evidence that his discharge was *for no reason other* than his refusal to perform an illegal act. *Id.* This is a "very strict standard of causation." *Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 633 (Tex. 1995). "An employer who discharges an employee both for refusing to perform an illegal act *and* for a legitimate reason or reasons cannot be liable for wrongful discharge." *Id.* We focus on the sole-cause requirement of the *Sabine Pilot* doctrine and do not consider whether the acts

would have constituted theft as alleged by Watkins.

One of the elements Watkins was required to prove is that he was terminated solely for his refusal to commit a crime. *Sabine Pilot*, 687 S.W.2d at 735. Frito-Lay contends that the evidence shows conclusively that Watkins was fired for another reason, namely his refusal to return to work for three consecutive days beginning July 27, 2014 without authorization or proper notification. Because this reason is undisputed and conclusive, Frito-Lay argues Watkins cannot prove he was fired solely because he refused to perform an illegal act.

Watkins contends that Frito-Lay's reason for firing him was merely an excuse. He asserts the investigation of his complaints in June of 2014 was inadequate because Greene was later fired after a different investigation found Greene failed to follow company policy in certifying inventories. Green's violation of company policy is not, however, the illegal act alleged in support of Watkins's claim. He also argues Frito-Lay did not follow its own procedures for his discipline and later termination. However, as an at-will employee, Watkins was subject to termination at any time with or without cause. Therefore, even if Frito-Lay did not follow the discipline guidelines, that fact does not raise a rational inference that Watkins was fired solely for refusing to commit an illegal act.

There is indisputable evidence that Watkins refused to sign the agreement and return to work on July 27, 2014. He refused to sign the agreement because he felt it was unfair. Regardless of the agreement's fairness, signing it would not be an illegal act. Watkins's refusal to sign the agreement and return to work was the reason for his termination, not his refusal to commit the theft he alleged in his pleading. This is an independent reason for Watkins's termination.

Even assuming there was some evidence that Watkins's refusal to short his delivery manifest was a reason for his termination, there is no evidence it was the *sole reason* he was fired. The evidence shows conclusively that Watkins, without authorization, did not report to

work when scheduled for three days. Because this is a legitimate reason for his termination, there is no evidence he was terminated solely for refusing to commit the allegedly illegal acts. Thus, the evidence conclusively negates an essential element of Watkins's *Sabine Pilot* claim and the trial court correctly granted the directed verdict.

Watkins argues on appeal that he was constructively discharged before he was told to return to work on July 27, 2014. He asserts he was constructively discharged either on July 4, 2014 when defendants demanded he sign the agreement, or on July 10, 2014 when he refused to sign the agreement.

Constructive discharge is not an independent cause of action. *Microsoft Corp. v. Mercieca*, 502 S.W.3d 291, 312 (Tex. App.—Houston [14th Dist.] 2016, pet. filed). It is a doctrine that permits an employee who resigns, rather than being terminated, to satisfy the discharge requirement of a discriminatory discharge claim. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 805 (Tex. 2010) ("A constructive discharge qualifies as an adverse personnel action under the TCHRA . . . ."); *Passons v. Univ. of Tex. at Austin*, 969 S.W.2d 560, 562 (Tex. App.—Austin 1998, no pet.) ("Constructive discharge serves as a legal substitute for the discharge element of a prima facie case of discrimination."). Some courts have concluded that an employee who resigns as a result of a constructive discharge may bring a claim under the *Sabine Pilot* exception.[1]

The evidence in this case, however, does not support the constructive discharge argument. Watkins testified at trial that he was still employed after he refused to sign the agreement and that he was paid during his suspension. He also stated in his July 10, 2014 letter

[1] *See Nguyen v. Technical & Scientific Application, Inc.*, 981 S.W.2d 900, 901–02 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *see also Marx v. Elec. Data Sys. Corp.*, 418 S.W.3d 626, 631–32 (Tex. App.—Amarillo 2009, no pet.) (following *Nguyen*); *but see Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 664 (Tex. 2012) ("A plaintiff may not bring a *Sabine Pilot* claim immediately after being asked to perform an illegal activity, but must first refuse and be fired.") and *Nezat v. Tucker Energy Services, Inc.*, 437 S.W.3d 541, 546 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (presuming without deciding that the conclusion in *Nguyen* is correct). We express no opinion on the question because it is not necessary to the disposition of this appeal.

that he was not quitting his job. He reiterated this to Howard on July 26, 2014, saying, "[Y]ou will have no choice but to terminate me. I do not quit this job." In short, there is no evidence that Watkins resigned. He steadfastly maintained that he was fired, not that he felt compelled to resign. *See Williams*, 313 S.W.3d at 805 (constructive discharge requires proof employer made working conditions so intolerable that a reasonable person would feel compelled to resign). Thus, Watkins's own testimony and written statements are inconsistent with the constructive discharge argument and are the types of evidence no rational jury could disregard. *See City of Keller*, 168 S.W.3d at 827. Therefore, there is no evidence that Watkins was constructively discharged before his termination on July 30, 2014.

Because the trial court properly granted a directed verdict on Watkins's *Sabine Pilot* claim, we overrule his first issue. We need not address his issues regarding punitive damages and the alleged joint liability of PepsiCo. *See* TEX. R. APP. P. 47.1.

CONCLUSION

Because there is no evidence of an essential element of Watkins's cause of action, the trial court did not err by granting a directed verdict. Accordingly, we affirm the trial court's judgment.

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/Craig Stoddart/
CRAIG STODDART
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MELVIN WATKINS, Appellant

No. 05-16-00367-CV V.

ROLLING FRITO-LAY SALES, LP, FRITO LAY, INC., AND PEPSICO, INC., Appellees

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Trial Court Cause No. 416-03859-2014.
Opinion delivered by Justice Stoddart.
Justices Evans and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees ROLLING FRITO-LAY SALES, LP, FRITO LAY, INC. AND PEPSICO, INC. recover their costs of this appeal from appellant MELVIN WATKINS.

Judgment entered this 21st day of June, 2017.