

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE12015899 DIVISION 12 JUDGE Keathan Frink

Max Nelson

Plaintiff(s) / Petitioner(s)

v.

Zimmerman Advertising LLC

Defendant(s) / Respondent(s)

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FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

THIS CAUSE came before the Court on August 12, 2019, upon the Motion for Summary Judgment (the "Motion") filed by Defendant, Zimmerman Advertising, LLC ("Zimmerman"), and having reviewed the Motion, the Response in Opposition thereto filed by Plaintiff, Max Nelson ("Nelson"), as well as the Court's file, having heard argument of counsel and being otherwise duly advised in the premises, the Court finds as follows:

As to Count I of the Amended Complaint for retaliation under the Florida Private Sector Whistleblower Act ("FWA"), Fla. Stat § 448.001, *et seq.*:

To establish a prima facie case of retaliation, the plaintiff must show that: (1) he engaged in statutorily protected activity; (2) he experienced an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. If the plaintiff makes out a prima facie case, the burden then shifts to the defendant to articulate a legitimate reason for the adverse action. If the defendant does so, the plaintiff must then show that the defendant's proffered reason for the adverse action is pretextual.

Hurlbert v. St. Mary's Health Care Sys., Inc., 439 F.3d 1286, 1297 (11th Cir. 2006). Florida courts apply federal Title VII case law to FWA claims. *Rustowicz v. N. Broward Hosp. Dist.*, 174 So. 3d 414, 419 (Fla. 4th DCA 2015). Even assuming, without deciding, that Nelson could establish a prima facie case of retaliation, it is undisputed that he cannot otherwise establish

his claim. Zimmerman has come forward with summary judgment evidence demonstrating a legitimate reason for the adverse action. Specifically, the record evidence reveals that Nelson's performance was poor in that (i) he was substantially late with an important client project that he had promised could be completed by June 2010 and which was still not complete in April 2011 and (ii) he substantially failed to meet his revenue goal of between \$700,000 and \$5,000,000, with a gross revenue of less than \$37,000 and a net revenue of negative \$4,869.48. The defendant's burden is a burden of production, not persuasion, and it involves no credibility assessment. *City of Miami v. Hervis*, 65 So.3d 1110, 1117 (Fla. 3d DCA 2011).

The Court finds that these record facts demonstrate a legitimate business reason for the adverse employment action. See *Silvera v. Orange Cty. School Board*, 244 F.3d 1253, 1260 (11th Cir. 2001) (in determining whether the employer had a legitimate, non-discriminatory reason for its treatment of a plaintiff, neither the plaintiff nor the court may recast the reason given by an employer for taking, or failing to take, a particular job action). *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999) (an employer may terminate an employee for a good or a bad reason without violating the law); *Alford v. Florida*, 390 F. Supp. 2d 1236, 1254 (S.D. Fla. 2005) (“[i]t is not a court’s role to second guess the wisdom of an employer’s decisions as long as the decisions are not [illegally] motivated”).

Because Zimmerman has presented sufficient evidence establishing a legitimate business reason for the adverse employment action, the burden shifts to Nelson to come forward with summary judgment evidence to prove that the legitimate business reason was a mere pretext for unlawful retaliation. In order to meet his burden of proving pretext, Nelson is required to prove, not only that the reasons articulated by Zimmerman were false, but also that retaliation was the real reason for Zimmerman's actions. *Hervis*, 65 So.3d at 1117.

Nelson has not met the first part of his burden because he has admitted that his

performance was inadequate. See Plaintiffs Response to Defendant's Statement of Undisputed Facts, ¶ 18 ("Plaintiff does not dispute the fact that '[i]n April 2011, with the Party City deliverables still incomplete, Carmen Marston, Vice President of Human Resources, again met with Nelson to address with him multiple performance inadequacies"), ¶ 22 ("Plaintiff does not dispute the fact that 'Nelson did not meet, and never even came close to meeting, either of the revenue goals as set forth in his "Strategic Intelligence Opportunity Assessment"").

Since Zimmerman offered a legitimate reason for termination, Nelson must provide sufficient evidence to allow a reasonable fact-finder to conclude that the proffered reasons were not actually the motivation for his discharge. See *Alford*, 390 F. Supp. 2d. at 1255. Here, Nelson has failed to come forward with any sufficient evidence as to the second part of his burden - - that retaliation was the real reason for his termination. Accordingly, the Court finds that there is no genuine issue of material fact as to Nelson's claim for retaliation (Count I of the Amended Complaint) and that Zimmerman is entitled to summary judgment in its favor and against Nelson on that claim as a matter of law.

As to Count II of the Amended Complaint for breach of contract, Zimmerman came forward with summary judgment evidence demonstrating that the net revenue attributable to Nelson under his compensation arrangement was negative \$4,869.48. With negative net revenue, Nelson would not be entitled to any commission under his compensation arrangement (which provided for 5% commission on net revenue). Nelson failed to come forward with any admissible evidence refuting Zimmerman's summary judgment evidence on this point. Thus, there is no genuine issue of material fact as to Nelson's claim for breach of contract (Count II of the Amended Complaint), and Zimmerman is entitled to summary judgment in its favor and against Nelson on that claim as a matter of law.

Accordingly, it is hereby **ORDERED and ADJUDGED** that the Motion is **GRANTED**. Summary Judgment is hereby entered for Zimmerman, whose address is 6600 N. Andrews

Avenue, Fort Lauderdale, FL 33309, and against Nelson, whose last known address is 621 SW 11th Street, Fort Lauderdale, Florida 33315, on Nelson's Amended Complaint and all claims asserted by Nelson therein. Nelson shall take nothing by this Action, and Zimmerman shall go forth hence without day. The Court reserves jurisdiction to hear any timely filed motions for attorneys' fees and/or costs.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 09-03-2019.


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Hon. Keathan Frink

CIRCUIT JUDGE

Electronically Signed by Keathan Frink

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