NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1383

LORENZO SEPTS

VERSUS

CONTROL VALVE SPECIALIST, INC.

Judgment Rendered: March 23, 2012

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 581,821

Honorable Timothy E. Kelley, Judge Presiding

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KUHN, J. CONCURS

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

Plaintiff appeals the trial court's summary judgment dismissing his lawsuit in which he asserted federal and state law claims of racial harassment and discrimination in the workplace. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Lorenzo Septs, an African-American male, was hired by Control Valve Specialist, Inc. ("Control Valve") as a driver/helper in April 2008. On October 30, 2008, his employment with Control Valve was terminated.

On August 26, 2009, Septs filed the instant lawsuit naming Control Valve as defendant and averring that throughout his employment and continuing through the date of his termination, he was subjected to race-based harassment and discrimination. In December 2010, Control Valve filed a motion for summary judgment, seeking dismissal of Septs's claims.

Following a hearing on the motion, the trial court signed a judgment dated May 3, 2011, granting the motion for summary judgment and dismissing Septs's suit with prejudice. From this judgment, Septs appeals, contending that the trial court erred in: (1) concluding that an "affidavit" from a former employee was not proper summary judgment evidence; and (2) granting summary judgment and concluding that Septs was required to offer "corroborating" evidence of his claims, despite the fact that Septs had presented his own sworn testimony and other evidence offered in opposition to the motion which circumstantially supported his claims.

ASSIGNMENT OF ERROR NUMBER ONE

In this assignment of error, Septs contends that the trial court improperly excluded a written statement, which Septs contends is an "affidavit." In opposition to Control Valve's motion for summary judgment,

Septs filed into the record, among other things, the written statement of Chris Meisner, a former employee of Control Valve. At the hearing on the motion, counsel for Control Valve objected to the written statement on the basis that it was not in proper affidavit form as it was not a sworn statement. The trial court ruled that the written statement was not an affidavit and, thus, was not admissible. Therefore, the trial court did not consider the statement in ruling on the motion.[1]

Louisiana Code of Civil Procedure article 966(B) lists the only documents and evidence that a court may properly consider in determining a motion for summary judgment, i.e., pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Berard v. L-3 Communications Vertex Aerospace, LLC, 2009-1202 (La. App. 1st Cir. 2/12/10), 35 So. 3d 334, 349, writ denied, 2010-0715 (La. 6/4/10), 38 So. 3d 302. With regard to the particular requirements that an affidavit must satisfy, LSA-C.C.P. art. 967(A) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

But with regard to the form of an affidavit, there is no legal requirement that an affidavit must be made in any particular form. See generally State v. Duhon, 95-2724, 95-2726 (La. 5/21/96), 674 So. 2d 944, 946. Clearly, however, an affidavit's definitive characteristic is the fact that the writing is made **under oath**. Duhon, 674 So. 2d at 946; see also Berard,

[1]Notably, in the document, Meisner stated that the "N" word was used freely at Control Valve and outlined specific instances of the use of that word. Also, Meisner stated that after Septs had been fired, Meisner heard Todd Johnson, the manager, state, "I will never hire a N----- again." After ruling that the statement was inadmissible, the trial court stated that a proper affidavit or deposition from Meisner would have "easily" defeated the motion.

35 So. 3d at 350 (unsworn employee statements are not competent evidence for purposes of summary judgment), and Charlot v. Alabama Great Southern Railroad Company, 98-0895 (La. App. 4th Cir. 6/24/98), 716 So. 2d 906, 908-909, writ denied, 98-2007 (La. 10/30/98), 728 So. 2d 387 (proper form of an affidavit requires that it be under oath). Generally, to constitute a valid oath, there must be, in the presence of a person authorized to administer it, an unequivocal act by which the affiant consciously takes on himself the obligation of an oath. The oath may be oral or written. See State v. Snyder, 304 So. 2d 334, 337(La. 1974), and Neely v. State, Department of Public Safety, Drivers License Division, (La. App. 2nd Cir. 1975), 308 So. 2d 880, 882-883. Thus, a document which is not an affidavit or sworn to in any way, or which is not certified or attached to an affidavit, is not of sufficient evidentiary quality on summary judgment to be given weight in determining whether or not there remain genuine issues of material fact. St. Romain v. State, through the Department of Wildlife and Fisheries, 2003-0291 (La. App. 1st Cir. 11/12/03), 863 So. 2d 577, 585, writ denied, 2004-0096 (La. 3/26/04), 871 So. 2d 348.

In the instant case, Meisner's written statement consists of seven typed pages, and it is dated November 21, 2008. In the statement, Meisner specifically states that "[a]ll of the following statements represent my knowledge and memory of various circumstances," and he then details various events that occurred during his employment with Control Valve. On November 26, 2008, five days after the date of the written statement, Meisner and a notary public signed the statement on the last page.

However, while Meisner's signature was apparently witnessed by the notary, noticeably absent from the document is any subscription or recitation by the notary that Meisner's statement was a sworn statement before the

notary or given under oath. Thus, we cannot conclude that the trial court erred in finding that Meisner's written statement was not an affidavit, i.e., a sworn statement, and, thus, could not be properly considered in opposition to Control Valve's motion for summary judgment. See MacFadden v. Ochsner Clinic Foundation, 08-91 (La. App. 5th Cir. 10/28/08), 998 So. 2d 161, 164 (notary's signature on a separate page, which did not identify or incorporate the documents the notary professed to notarize, could not convert documents into sworn affidavits). Accordingly, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In this assignment of error, Septs contends that the trial court erred in granting Control Valve's motion for summary judgment and dismissing his suit on the basis that Septs had not produced "corroborating evidence."[2] Septs contends that his testimony that his supervisor made repeated derogatory comments about his race, which was directly contradicted by the testimony of his supervisor, created a "genuine issue of material fact to be later resolved by the trier of fact."

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The summary judgment procedure is expressly favored in the law

[2]Contrary to Septs's contention, the trial court did not specifically state in its oral reasons for judgment that Septs was required to produce "corroborating evidence" to defeat summary judgment. Rather, the trial court found that the only evidence tending to support Septs's claim was his own "self-serving" affidavit. We note, however, that in opposition to the motion for summary judgment, Septs presented both his own affidavit and excerpts of his deposition testimony, in addition to other testimonial and documentary evidence.

and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. LSA-C.C.P. art. 966(A)(2).

A motion for summary judgment is rarely appropriate for a determination based on subjective facts, such as intent, motive, malice, knowledge, or good faith. Baldwin v. Board of Supervisors for University of Louisiana System, 2006-0961 (La. App. 1st Cir. 5/4/07), 961 So. 2d 418, 422. Further, issues that require the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. Baldwin, 961 So. 2d at 422.

On appeal, summary judgments are reviewed *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 243-244, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146.

With regard to Septs's discrimination claim, we note that generally, an employer is at liberty to dismiss an employee at any time for any reason without incurring liability for the discharge.[3] LSA-C.C. art. 2747; Quebedeaux v. Dow Chemical Company, 2001-2297 (La. 6/21/02), 820 So. 2d 542, 545. However, that right is tempered by numerous federal and state

[3]We note, as stated above, Septs asserted claims of both racial discrimination and racial harassment under state and federal law. To prevail in a hostile work environment claim based on racial harassment, the plaintiff must prove five elements: (1) he belongs to a protected group; (2) he was subjected to harassment; (3) the harassment was motivated by discriminatory animus (race); (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action. Hicks v. Central Louisiana Electric Company, Inc., 97-1232 (La. App. 1st Cir. 5/15/98), 712 So. 2d 656, 658-659; Chaney v. Home Depot, USA, Inc., 2005-1484 (La. App. 4th Cir. 8/16/06), 940 So. 2d 18, 22, writ denied, 2006-2286 (La. 11/22/06), 942 So. 2d 559. Because genuine issues of material fact remain in this matter, as more fully discussed in reference to Septs's racial discrimination claim, we find that summary judgment dismissing Septs's racial harassment claims was also inappropriate.

laws which proscribe certain reasons for dismissal of an at-will employee, such as race, sex, or religious beliefs. Fletcher v. Wendelta, Inc., 43,866 (La. App. 2nd Cir. 1/14/09), 999 So. 2d 1223, 1229, writ denied, 2009-0387 (La. 4/13/09), 5 So. 3d 164. In Louisiana, LSA-R.S. 23:332(A)(1) prohibits intentional discharge of an employee because of the employee's race, color, religion, sex, or national origin. Also, in Title VII federal law claims, 42 U.S.C. § 2000e-2(a)(1) provides that it shall be an unlawful employment practice for an employer to discharge any individual because of the individual's race, color, religion, sex, or national origin. Because LSA-R.S. 23:332(A) mirrors federal law, Louisiana courts routinely look to federal jurisprudence for guidance in determining whether a claim of racial discrimination has been asserted. St. Romain, 863 So. 2d at 586; Chaney v. Home Depot, USA, Inc., 205-1484 (La. App. 4th Cir. 8/16/06), 940 So. 2d 18, 22, writ denied, 2006-2286 (La. 11/22/06), 942 So. 2d 559.

The plaintiff claiming discrimination has the initial burden of proof and must establish a *prima facie* case of discrimination under the burden-shifting framework established in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). Baldwin, 961 So. 2d at 422. To establish a *prima facie* case of discrimination, a plaintiff must establish: (1) that he was a member of a protected class; (2) that he was qualified for the position; (3) that he suffered an adverse employment action; and (4) that he was replaced by someone outside of the protected class or, in the case of disparate treatment, that similarly situated employees outside the protected class were treated more favorably. McDonnell Douglas, 93 S. Ct. at 1824; Okoye v. University of Texas Houston Health Science Center, 245 F.3d 507, 512-513 (5th Cir. 2001).

Upon establishing a *prima facie* case, the burden then shifts to the defendant to set forth a legitimate non-discriminatory explanation for the adverse employment decision. McDonnell Douglas, 93 S. Ct. at 1824. The burden is one of production and not persuasion. It cannot, therefore, involve a credibility assessment. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105 (2000). If the defendant is able to articulate a legitimate non-discriminatory reason, the plaintiff must offer sufficient evidence to create a genuine issue of material fact that the defendant's proffered reason is pretextual, or, in a "mixed-motive" case, sufficient evidence to create a genuine issue of material fact that defendant's reason, while true, is only one of the reasons for its conduct, and the plaintiff's race is another "motivating factor" for the defendant's conduct. See Reeves, 120 S. Ct. at 2106; see also Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 1795, 104 L. Ed. 2d 268 (1989); Mbarika v. Board of Supervisors of Louisiana State University, 2007-1136 (La. App. 1st Cir. 6/6/08), 992 So. 2d 551, 562, writ denied, 2008-1490 (La. 10/3/08), 992 So. 2d 1019.

In support of its motion for summary judgment, Control Valve averred that Septs could not establish a *prima facie* case of discrimination or, alternatively, even if Septs could establish a *prima facie* case of racial discrimination, he could not produce sufficient evidence to overcome Control Valve's legitimate, non-discriminatory reason for terminating Septs's employment. Control Valve further asserted that its "good faith assessment" of Septs's performance was entitled to "great deference" by the court and that "[d]iffering views" concerning its business decisions do not establish pretext.

In opposition to the motion for summary judgment, Septs offered evidence to show that he is an African-American, that he met all the requirements for the position when he was hired, that he was removed from his position with Control Valve, and that he was replaced by white males. Thus, Septs established a *prima facie* case as required by McDonnell Douglas. See Baldwin, 961 So. 2d at 423.

To counter Septs's evidentiary showing, Control Valve offered what it considered legitimate and non-discriminatory reasons for the termination. Specifically, Control Valve pointed to the incident that occurred the day before Septs's termination, wherein Septs had told co-worker Meisner that their supervisor had called Meisner a "ding bat" and a "waste of company money." Control Valve contended that this incident created conflict in the workplace. Additionally, Control Valve contended that Septs's work performance began to decline after he was denied a raise and that Septs began to take extended lunch breaks, used his cell phone excessively at work, and was "perceived" to be placing bets on football games at work. Thus, Control Valve came forth with seemingly legitimate and non-discriminatory reasons for Septs's removal. As such, Septs was required to show that genuine issues of material fact remained as to whether the reasons offered by Control Valve for the removal were a pretext for racial discrimination or as to whether Control Valve's reason, while true, was only one of the reasons for its conduct and whether Septs's race was another motivating factor for the termination. See Baldwin, 961 So. 2d at 424; Mbarika, 992 So. 2d at 562. Based on the record evidence before us, we find that Septs successfully met this burden, given that disputed facts remain, which are susceptible to different interpretations as to the intent and

motivation in Control Valve's decision to terminate Septs's employment. See Baldwin, 961 So. 2d at 424.

The evidence properly before the trial court in determining whether summary judgment was appropriate establishes the following. Control Valve, a company specializing in control valve repair, had a contract with and performed work for ExxonMobil. Ronald Williams, who was employed by ExxonMobil and was a "customer" of Control Valve, inquired as to whether Control Valve may have a job available for Septs, who was Williams's brother-in-law. Todd Johnson, the manager at Control Valve's Baton Rouge shop hired Septs as a driver/helper and technician trainee, and Septs was the only African American employed by Control Valve. Johnson was Septs's boss, but Septs received job assignments and duties from Kevin Sonnier, the shop foreman.

According to Septs, he was subjected to hearing racial slurs and comments on many occasions during the six-to-seven-month period that he was employed at Control Valve, and the "N" word was "openly used" in the shop. These racial slurs included the following comments by Sonnier: "once you go black, you can't go back," "[b]lack men want white women, and white women want black men," and "that snake scared the s--- out of that n-----," referring to a prank played on Septs with a rubber snake. Septs further testified that the comment regarding the rubber snake was made by Sonnier in the presence of Johnson, yet, importantly, Johnson did not say anything in an effort to correct or reprimand Sonnier. According to Septs, on one occasion when Sonnier used the "N" word to refer to some people at a night club, Septs told Sonnier to "watch his mouth." However, Sonnier did not quit using the "N" word, but instead "just blew it off."

Septs testified that Johnson told him that Meisner was a "ding bat" and a "waste of company money," and Septs acknowledged that he had told Meisner what Johnson had said about him. However, Septs further testified that considering the work environment with the race-based comments, racial slurs, and pranks, he believed that his race played a factor in the decision to terminate his employment.

On the other hand, Johnson and Sonnier denied that they had ever used or heard racial slurs or comments used in the workplace. Another employee, Justin Wells, similarly testified that he had never heard the "N" word used at work. Notably, however, while denying the use of the "N" word in the workplace, Wells acknowledged that the word "honky" was used in the workplace.

Regarding the reasoning in firing Septs, in addition to the comments Septs made to Meisner,[4] Johnson testified that while Septs's job performance was satisfactory at first, his job performance began to decline after Septs asked for, and was denied, a raise a few months after he began working for Control Valve. According to Johnson, these job performance problems included taking long lunch breaks and extensive cell phone use. However, Johnson acknowledged that he had never given Septs a job assignment that Septs did not perform, that Septs had never violated company policy, and that Septs had never been "written up" for taking long lunches. Similarly, Sonnier also acknowledged that Septs had never refused to perform a job assignment, that Sonnier had never recommended that Septs be written up for long lunches or excessive phone use, and that Johnson had

[4]Johnson denied that he had ever called Meisner a "ding bat" or "waste of company money," and instead suggested that Septs had said those things to Meisner because Septs believed that if Meisner were no longer employed by Control Valve, there would be more money to give Septs a raise.

never indicated to Sonnier that Johnson was considering giving Septs a written reprimand.[5]

Considering the foregoing and the record as a whole, we can reach no other conclusion but that genuine issues of material fact remain as to the motives of Control Valve in terminating Septs's employment and as to whether the stated reasons for his removal were a pretext for racial discrimination or whether Septs's race was another motivating factor. See Baldwin, 961 So. 2d at 424-425. Specifically, we note, as stated by the United States Fifth Circuit Court of Appeals in holding that a supervisor's routine use of racial slurs constituted direct evidence that racial animus was a motivating factor in a contested disciplinary decision, the term "n-----" is a universally recognized opprobrium, stigmatizing African Americans because of their race. Brown v. East Mississippi Electric Power Association, 989 F.2d 858, 861 (5th Cir. 1993). The serious factual disputes regarding the regular use of such racial slurs in the workplace at Control Valve give rise to credibility issues and questions as to whether Septs's race was a motivating factor in his removal and, thus, require reversal of the trial court's conclusion that summary judgment was warranted herein. (Nonetheless, on the record as developed thus far, we are unable to say either party is entitled to judgment in its favor as a matter of law). Accordingly, the summary judgment must be reversed.

CONCLUSION

For the above and foregoing reasons, the trial court's May 3, 2011 judgment, granting Control Valve's motion for summary judgment and

[5]Additionally, there is evidence of record that another white employee, who had been hired as a machinist and who was ultimately terminated for failure to perform the job correctly, received four warnings prior to being fired, whereas Septs was fired without having received any warnings.

dismissing Septs's suit with prejudice, is reversed. This matter is remanded for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against Control Valve, Specialist, Inc.

REVERSED AND REMANDED.