CAUSE NO. 2009-76279

JAMES BALDERAZ,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
V.	§	
	§	HARRIS COUNTY, T E X A S
ACE AMERICAN INSURANCE COMPANY; BROADSPIRE SERVICES, INC.; ANN ADAMS, AND BJ SERVICES COMPANY, U.S.A.,	§	
	§	
	§	
Defendants.	§	129TH JUDICIAL DISTRICT

DEFENDANT BJ SERVICES COMPANY, U.S.A'S MOTION FOR SUMMARY JUDGMENT

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DEFENDANT BJ SERVICES COMPANY, U.S.A.'S MOTION FOR SUMMARY JUDGMENT

Defendant BJ Services Company, U.S.A. ("BJ Services" or "the Company") files its motion for summary judgment, showing in support as follows:

I. INTRODUCTION AND SUMMARY

James Balderaz ("Balderaz") worked as an Equipment Operator in BJ Services' Victoria District.[1] Between his date of hire in October 2006, and December 2007, Balderaz took three separate medical leaves of absence, for: (i) an injured thumb; (ii) a ruptured appendix; and (iii) self-reported alcohol and cocaine abuse.[2] In December 2007, Balderaz began a fourth medical leave of absence from BJ Services that resulted from an alleged on-the-job injury to his shoulder.

In early and mid-2009, while Balderaz was still on his fourth medical leave of absence, a dramatic downturn in the oil and gas industry caused massive lay-offs in many companies throughout the oilfield services industry.[3] BJ Services' Victoria District was affected too.

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[1] Balderaz Dep., Ex. A at 16-17, 25-26, 75. This motion is based on Balderaz's deposition (Ex. A), Steve Webb's affidavit and three attachments thereto (Ex. B and B-1 through B-3), and Sophia Leslie's affidavit and one attachment thereto (Ex. C and C-1).

[2] Balderaz Dep., Ex. A at 47-50, 60-63, 65-75.

[3] *See* Webb Affidavit, Ex. B at ¶¶ 13-14 and the article in the Houston Chronicle, Ex. B-2; http://www.chron.com/disp/story.mpl/side/6333029.html (noting massive lay-offs in 2009 throughout the oilfield

Specifically, because of this dramatic downturn in business, between February 2009 and June 2009, the BJ Services Victoria District laid off sixteen employees in an ongoing reduction in force ("RIF"), including seven Equipment Operators.[4]

On June 25, 2009, Balderaz was given a full duty medical release to return to work after his fourth medical leave of absence.[5] At the time, however, there were no open positions for Equipment Operators in the Victoria District.[6] Accordingly, on or about July 17, 2009, the Victoria District Manager, Steve Webb ("Webb") met with Balderaz and told him that it was good to have him back, but the Company did not have any work for him, so he was being laid off.[7] Balderaz admits that he has no proof that BJ Services actually did have work available to him when it laid him off.[8] In fact, Balderaz understood and agreed with his termination. As he testified:

> Q: Do you have any beef with the fact that the company terminated your employment?
>
> Mr. Finkelstein: Objection, form.
>
> A: No.[9]

Nearly two years after his termination, in March 2011, Balderaz sued BJ Services, claiming that the Company: (a) terminated his employment in retaliation for his workers'

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services industry, including at Schlumberger, Baker Hughes, and Halliburton, all of which are competitors with BJ Services).

4 Webb Affidavit, Ex. B at ¶ 14 and Ex. B-3.

5 Balderaz Dep., Ex. A at 129-130; Webb Affidavit, Ex. B at ¶ 14.

6 Webb Affidavit, Ex. B at ¶ 15.

7 Balderaz Dep., Ex. A at 134-37, 181; Webb Affidavit, Ex. B at ¶ 18.

8 Balderaz Dep., Ex. A at 181.

9 Balderaz Dep., Ex. A at 144.

compensation claim, in violation of Section 451.001 of the Texas Labor Code; and (b) tortiously interfered with his workers' compensation claim.[10] Both claims fail as a matter of law.

Balderaz's workers' compensation retaliation claim fails because, among other reasons, he has no proof that BJ Services' articulated legitimate reason for his discharge – a RIF – is a pretext for workers' compensation retaliation. "A RIF is a legitimate, nondiscriminatory reason for terminating an employee." *Cox v. NextiraOne*, 169 S.W.3d 778, 781 (Tex. App.–Dallas 2005, no pet.) (citations omitted).[11] In *Cox*, for example, the court affirmed summary judgment against the plaintiff's workers' compensation retaliation claim because the plaintiff produced no evidence that the employer's articulated legitimate reason for her termination – a RIF – was a pretext for workers' compensation retaliation. *Id*. at 782. The same analysis and result as in *Cox* follows here. Balderaz conceded as much in his deposition. As he testified:

> Q: Now, you're aware that BJ Services claims that there was a reduction in force and they terminated you as part of the reduction in force, correct?
>
> A: Yes.
>
> Q: Do you have any proof that that's false?
>
> Mr. Finkelstein: Objection, form.
>
> A: No. I don't have any proof.[12]

Balderaz's tortious interference claim fails for at least two reasons. First, he admittedly had no contract with the workers' compensation insurer with which BJ Services could have interfered.[13] Second, in any event, BJ Services was legally justified in providing the insurer information about Balderaz's alleged on the job injury.[14]

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[10] Balderaz's First Amended Original Petition & Jury Demand at ¶¶ 9.1 through 10.4.

[11] For the Court's convenience, a copy of *Cox* is attached as Exhibit D.

[12] Balderaz Dep., Ex. A at 145-46.

[13] Balderaz Dep., Ex. A at 149; Webb Affidavit, Ex. B at ¶ 27.

[14] Balderaz Dep., Ex. A at 149-50.

II. UNDISPUTED BACKGROUND FACTS

A. BJ Services Hires Balderaz In October 2006, And Over The Next 33 Months, Balderaz Is On Leaves Of Absence 23 Months

BJ Services hired Balderaz on October 5, 2006, to be an Equipment Operator III in its Victoria, Texas District.[15] The District Manager, Webb, hired Balderaz.[16] Balderaz was paid $13.50 per hour.[17] Over the following 33 months of his employment, Balderaz was off work for approximately 23 months on four different medical leaves of absence.[18]

B. Balderaz's First Leave of Absence From BJ Services, Because Of An Off-The-Job Injury

On November 1, 2006, Balderaz took a medical leave, resulting from an off-the-job injury, when he injured his thumb while "trick or treating" on Halloween.[19] Balderaz returned to work on December 18, 2006, with a full duty release from a doctor with the Victoria Orthopedic & Sports Medicine Clinic.[20]

C. Balderaz's Second Leave of Absence From BJ Services, Because Of A Ruptured Appendix

On January 16, 2007, Balderaz took a second medical leave, resulting from a ruptured appendix that required him to undergo an emergency appendectomy.[21] Balderaz returned to work on March 26, 2007, with a full duty release from Dr. Matthew Janzow of Victoria Surgical Associates.[22]

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[15] Balderaz Dep., Ex. A at 16-17, 25-26, 75; Webb Affidavit, Ex. B at ¶ 3.

[16] Balderaz Dep., Ex. A at 24-26; Webb Affidavit, Ex. B at ¶ 3.

[17] Balderaz Dep., Ex. A at 19.

[18] Balderaz Dep., Ex. A at 165-66.

[19] Balderaz Dep., Ex. A at 47-49.

[20] Balderaz Dep., Ex. A at 50, 54.

[21] Balderaz Dep., Ex. A at 60-61.

[22] Balderaz Dep., Ex. A at 63.

D. Balderaz's Third Leave of Absence From BJ Services, Because Of Self-Reported Alcohol And Cocaine Abuse

On July 17, 2007, Balderaz took a third medical leave, resulting from his self-reported substance abuse problem.[23] Balderaz had been abusing alcohol and cocaine.[24] Balderaz received treatment from United Behavioral Health, and returned to work on August 20, 2007.[25] Balderaz testified that BJ Services "helped [him] big-time" with his substance abuse problem.[26] When he returned to work from his substance abuse treatment, Balderaz testified that Webb told him "[i]ts good to have you back."[27]

E. Balderaz's Fourth Leave of Absence From BJ Services, Because Of An Alleged On-The-Job Injury – During Which Time He Rejected BJ Services Offer To Return Him To Work In A Light Duty Position

On December 17, 2007, Balderaz was given medical restrictions stating that he was to work on light duty.[28] The restrictions were issued as a result of an alleged right shoulder injury he suffered on the job on November 10, 2007, when a pipe supposedly struck his right shoulder.[29] No light duty work was available, so Balderaz began a fourth medical leave on or about December 20, 2007.[30]

Two BJ Services witnesses claimed that Balderaz was not hurt at work as he described on November 10, 2007, and gave statements to BJ Services' workers' compensation insurer, Ace American Insurance Company, to that effect.[31] Therefore, on February 5, 2008, Ace American

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[23] Balderaz Dep., Ex. A at 65.

[24] Balderaz Dep., Ex. A at 67.

[25] Balderaz Dep., Ex. A at 67, 75.

[26] Balderaz Dep., Ex. A at 69.

[27] Balderaz Dep., Ex. A at 74.

[28] Balderaz Dep., Ex. A at 79-80; Webb Affidavit, Ex. B at ¶ 8.

[29] Balderaz Dep., Ex. A at 79; Webb Affidavit, Ex. B at ¶ 8.

[30] Balderaz Dep., Ex. A at 80; Webb Affidavit, Ex. B at ¶ 8.

[31] Balderaz Dep., Ex. A at 85-87.

Insurance Company denied Balderaz's workers' compensation claim based on this injury, asserting that he did not suffer any injury on the job.[32] On February 21, 2008, Balderaz was released to return to work on "light duty," but no light duty work was available, so he did not return to work.[33]

On June 13, 2008, a hearing officer named Virginia Rodriguez-Gomez, with the Texas Department of Insurance, Division of Workers' Compensation, ruled that Balderaz's alleged injury was compensable and that Ace American Insurance Company had to pay workers' compensation benefits to Balderaz from December 21, 2007 forward.[34]

On October 20, 2008, Webb sent a letter to Balderaz offering to return him to work in a light duty position with the same hourly pay as his prior job.[35] Through his lawyer, Balderaz rejected the offer.[36]

On or about December 12, 2008, ING Employee Benefits approved a claim for long-term disability benefits from Balderaz.[37] So, in addition to his workers' compensation benefits, Balderaz received monthly long-term disability benefits from ING of $140.40 per month between December 17, 2008 and September 30, 2009, for a total receipt of $1,404.00 of long-term disability benefits.[38]

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[32] Balderaz Dep., Ex. A at 94-96, 109; Webb Affidavit, Ex. B at ¶ 9.

[33] Balderaz Dep., Ex. A at 97-98; Webb Affidavit, Ex. B at¶ 9.

[34] Balderaz Dep., Ex. A at 102, 112; Webb Affidavit, Ex. B at ¶ 10.

[35] Balderaz Dep., Ex. A at 113; Webb Affidavit, Ex. B at ¶ 11, and Ex. B-1.

[36] Balderaz Dep., Ex. A at 120-21; Webb Affidavit, Ex. B at ¶ 11.

[37] Balderaz Dep., Ex. A at 122.

[38] Balderaz Dep., Ex. A at 122.

F. Balderaz's Termination In A RIF That Also Caused The Terminations Of More Than 1,400 BJ Services Employees, Including Many Employees In The Victoria District

In January 2009, oilfield service companies directly competitive to BJ Services, such as Schlumberger, Baker Hughes, and Halliburton, implemented large-scale RIFs.[39] These RIFs throughout the oilfield services industry were part of a large, and well publicized, downturn in the industry related to falling oil prices and the global recession in 2009. *See* http://www.chron.com/disp/story.mpl/side/6333029.html (noting massive lay-offs in 2009 throughout the oilfield services industry, including at Schlumberger, Baker Hughes, and Halliburton, all of which are competitors with BJ Services).[40]

Beginning in February 2009, the BJ Services Victoria District began laying employees off because of a dramatic downturn in business. Specifically:

- In February 2009, four Victoria District employees were let go in the RIF, including two Equipment Operators, Richard McKinney and Karl Parks.[41]
- In April 2009, four Victoria District employees were let go in the RIF, including two more Equipment Operators, Scott Jana and Reymundo Ramos.[42]
- In June 2009, eight employees in Victoria were let go in the RIF, including three Equipment Operators, Jeffrey Franklin, Robert Garcia, and Miguel Hernandez.[43]

Balderaz was not included in any of these lay-offs because – due to his medical leave of absence – he was excluded from the pool of employees subject to the RIF.[44]

On June 25, 2009, Balderaz was given a full duty medical release.[45] At the time, however, there were no open positions for Equipment Operators in the Victoria District.[46] In

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[39] Balderaz Dep., Ex. A at 122-23; Webb Affidavit, Ex. B at ¶ 13.

[40] *See also* Webb Affidavit, Ex. B at ¶ 13, and Ex. B-2; Leslie Affidavit, Ex. C. In August 2009, Baker Hughes acquired BJ Services, and the transaction closed in 2010. Webb Affidavit, Ex. B at ¶ 25.

[41] Webb Affidavit, Ex. B at ¶ 15, and Ex. B-3.

[42] Webb Affidavit, Ex. B at ¶ 15, and Ex. B-3.

[43] Webb Affidavit, Ex. B at ¶ 15, and Ex. B-3.

[44] Webb Affidavit, Ex. B at ¶ 16, and Ex. B-3.

fact, as set forth above, such employees were being let go in a company-wide RIF that began in February 2009.[47]

On or about July 17, 2009, Webb met with Balderaz at the Victoria District and told him that it was good to have him back, but the Company did not have any work for him, so he was being laid off.[48] Balderaz's "Personnel Change Notice" form accurately lists him as being let go in a "RIF" and being eligible for rehire.[49] Webb alone made the decision to lay Balderaz off as part of the RIF.[50] Balderaz admits that he has no proof that BJ Services actually did have work available to him when it laid him off.[51]

In Victoria, none of the other employees terminated in the RIF in 2009 had filed workers' compensation claims.[52] One employee who had filed a workers' compensation claim in 2007, named Pablo Ruiz, was not terminated in the RIF.[53] Ruiz is an Equipment Operator in the Victoria District, who was not included in the RIF, and who remains employed by BJ Services to this day.[54]

The RIF did not just affect Victoria.[55] Rather, its impact was global.[56] In total, BJ Services laid off approximately 1,464 employees between February 1, 2009 and February 1,

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45 Balderaz Dep., Ex. A at 129-130; Webb Affidavit, Ex. B at ¶ 14.

46 Webb Affidavit, Ex. B at ¶ 15.

47 Webb Affidavit, Ex. B at ¶¶ 15, 17.

48 Balderaz Dep., Ex. A at 134-37, 181; Webb Affidavit, Ex. B at ¶ 18.

49 Webb Affidavit, Ex. B at ¶ 18, and Ex. B-3.

50 Webb Affidavit, Ex. B at ¶ 19.

51 Balderaz Dep., Ex. A at 181.

52 Webb Affidavit, Ex. B at¶ 22.

53 Webb Affidavit, Ex. B at ¶ 22.

54 Balderaz Dep., Ex. A at 64; Webb Affidavit, Ex. B at ¶ 22.

55 Webb Affidavit, Ex. B at ¶ 23; Leslie Affidavit, Ex. C.

56 Webb Affidavit, Ex. B at ¶ 23; Leslie Affidavit, Ex. C.

2010.[57] BJ Services did not hire a single employee in 2009 in the Victoria District.[58] To the contrary, as explained above, it laid off a significant number of employees during that time period.[59] BJ Services did not hire a new employee into the Victoria District until mid-2010.[60]

Balderaz received unemployment benefits from approximately July 2009 until approximately January 2011.[61] In February 2011, Balderaz began working for MODA Flying Fox Transport, where he is earning approximately $1,000.00 per week, or $52,000.00 per year.[62]

G. Balderaz's Claims Against BJ Services, Brought Nearly Two Years After His Termination

In 2009, Balderaz sued Ace American Insurance Company, Broadspire Services, Inc., and Ann Adams (an insurance adjuster) for violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and violations of the Deceptive Trade Practices Act.[63]

On March 11, 2011, nearly two years after his termination, Balderaz joined BJ Services in the suit, claiming that the Company: (a) terminated his employment in retaliation for his workers' compensation claim, in violation of Section 451.001 of the Texas Labor Code; and (b) tortiously interfered with his workers' compensation claim.[64] As set forth below, both of Balderaz's claims against BJ Services fail as a matter of law.

III. MOTION FOR SUMMARY JUDGMENT STANDARDS

BJ Services seeks both a traditional and a no-evidence summary judgment. The movant for a traditional summary judgment has the burden to show that no genuine issue of material fact

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[57] Leslie Affidavit, Ex. C, and Ex. C-1.

[58] Webb Affidavit, Ex. B at ¶ 26; Balderaz Dep., Ex. A at 146.

[59] Webb Affidavit, Ex. B at ¶ 15, and Ex. B-3.

[60] Webb Affidavit, Ex. B at ¶ 26.

[61] Balderaz Dep., Ex. A at 99-100.

[62] Balderaz Dep., Ex. A at 17-19.

[63] Balderaz Dep., Ex. A at 142.

[64] Balderaz's First Amended Original Petition & Jury Demand at ¶¶ 9.1 through 10.4.

exists and thus he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Once the movant shows he is entitled to judgment as a matter of law, the burden shifts to the non-movant to present evidence raising a fact issue to defeat the motion for summary judgment. *Haight v. Savoy Apartments*, 814 S.W.2d 849, 851 (Tex. App.–Houston [1st Dist.] 1991, writ denied).

In a no-evidence summary judgment, the movant represents that no evidence exists as to one or more essential elements of the non-movant's claims, upon which the non-movant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70–71 (Tex. App.–Austin 1998, no pet.). On review, we ascertain whether the non-movant produced more than a scintilla of probative evidence to raise a genuine issue of material fact. *Id*. More than a scintilla of evidence exists if the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). If the evidence does no more than create a mere surmise or suspicion of fact, less than a scintilla of evidence exists. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711–12 (Tex. 1997). Although the non-moving party is not required to marshal its proof, it must present evidence that raises a genuine fact issue on each of the challenged elements. TEX. R. CIV. P. 166a(i). The fact that a movant attaches evidence to a motion for summary judgment on both traditional and no-evidence grounds does not foreclose it from asserting that there is, in fact, no evidence with regard to a particular element. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004). Rather, any attached evidence should be examined to determine whether it creates a fact question. *Id*.

IV. ARGUMENT AND ANALYSIS

A. Balderaz's Workers' Compensation Retaliation Claim Fails

1. Law

Chapter 451 of the Texas Labor Code provides: "A person may not discharge or in any other manner discriminate against an employee because the employee has: filed a workers' compensation claim in good faith," or otherwise participated in a workers' compensation claim or suit in specified ways. TEX. LAB. CODE ANN. § 451.001 (Vernon 2006). Section 451.001 is a statutory exception to the Texas common-law doctrine of employment-at-will. *Lozoya v. Air Systems Components, Inc.*, 81 S.W.3d 344, 347 (Tex. App.–El Paso 2002, no pet.); *Jenkins v. Guardian Industries Corp*., 16 S.W.3d 431, 435 (Tex. App.–Waco 2000, pet. denied). The purpose of this statute is to protect persons entitled to benefits under the Workers' Compensation Act and to prevent them from being discharged for filing claims to collect those benefits. *Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997); *Lozoya*, 81 S.W.3d at 347. Thus, the section has both remedial and deterrence objectives. *Lozoya*, 81 S.W.3d at 347.

In workers' compensation retaliation claims, an employee can recover damages for retaliatory discharge under this provision only if he proves that without his filing a workers' compensation claim, the discharge would not have occurred when it did. *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex.1996); *Lozoya*, 81 S.W.3d at 347. This causal link may be established by direct or circumstantial evidence. *Lozoya*, 81 S.W.3d at 347. Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes: (1) knowledge of the compensation claim by those making the decision to terminate; (2) a negative attitude toward the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment of the injured employee in comparison to similarly situated employees; and (5) providing incentives to refrain from

reporting on-the-job injuries. *Lozoya*, 81 S.W.3d at 347–48; *Wyler Industrial Works, Inc. v. Garcia*, 999 S.W.2d 494, 501 (Tex. App.–El Paso 1999, no pet.). Further, proof that the stated reasons for the discharge are false is sufficient to establish that the employee was terminated in violation of Section 451.001. *Lozoya*, 81 S.W.3d at 348, *citing Continental Coffee*, 937 S.W.2d at 452. Once the link is established, it is the employer's burden to rebut the alleged discrimination by showing there was a legitimate reason behind the discharge. *Lozoya*, 81 S.W.3d at 348; *Terry v. Southern Floral Co*., 927 S.W.2d 254, 257 (Tex. App.–Houston [1st Dist.] 1996, no pet.). The employee then has the burden to either produce evidence raising a fact issue on whether the employer's stated reason was a pretext for retaliatory action, or challenge the employer's summary judgment evidence as failing to prove as a matter of law that the stated reason was legitimate and nondiscriminatory. *See Benners v. Blanks Color Imaging, Inc*., 133 S.W.3d 364, 369 (Tex. App.–Dallas 2004, no pet.).

2. Analysis

As explained below, Balderaz's workers' compensation retaliation claim fails for two separate and independent reasons: (a) there is no proof of a causal link between his workers' compensation claim and his termination; and (b) even assuming for the sake of argument that Balderaz could establish a causal link, his case still fails because he has no proof that BJ Services' articulated legitimate reason for his discharge – a RIF – is a pretext for workers' compensation retaliation.

a. <u>Balderaz Cannot Establish A Causal Link Between His Workers' Compensation Claim, And His Termination Eighteen Months Later</u>

Balderaz cannot establish a causal link. It is true that Webb knew of Balderaz's injured condition. However, as several courts have held in summary judgment cases, employer knowledge alone does not establish a causal connection between a workers' compensation claim

and discharge. *See Garcia v. Allen*, 28 S.W.3d 587, 601 (Tex. App.–Corpus Christi 2000, pet denied). Rather, it simply places the plaintiff within the protected class and "must be considered along with the remaining evidence." *Garcia*, 28 S.W.3d at 601 (citation omitted); *see also Lone Star Steel Co. v. Hatten,* 104 S.W.3d 323, 327-28 (Tex. App.–Texarkana 2003, no pet.).

There is no proof that Webb had a negative attitude towards Balderaz's injured condition. It is true that Balderaz claims that Webb twice said that injured workers should claim their on-the-job injuries on their own insurance, but he conceded that he does not know if Webb had a negative attitude towards his injured condition.[65] While Balderaz claims that other employees at BJ Services demonstrated a negative attitude towards his injured condition, that evidence is not probative, because those other employees played no role in the decision to lay Balderaz off as part of the RIF.[66] The most telling evidence on this point is that Webb offered to reemploy Balderaz in October 2008, after his on-the-job injury and workers' compensation claim, at the same hourly pay, and Balderaz rejected the offer.[67]

Balderaz cannot rely on the fact that BJ Services insurer contested his claim, or that it did so based on its employee-witnesses' testimony to establish proof of a negative attitude towards his injured condition because the mere "exercise of an employer's statutory right to challenge an employee's claim of benefits is not evidence of a negative attitude." *Lozoya*, 81 S.W.3d at 348-49. While Balderaz apparently alleges that BJ Services gave bonuses to project supervisors whose projects are completed without an on-the-job injury, he fails to present proof that, under Texas law, such bonuses amount to incentives to refrain from reporting on-the-job injuries.[68]

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[65] Balderaz Dep., Ex. A at 33, 40.

[66] Balderaz Dep., Ex. A at 152-58.

[67] Balderaz Dep., Ex. A at 120-22; Webb Affidavit, Ex. B at ¶ 11, and Ex. B-1.

[68] Balderaz Dep., Ex. A at

Balderaz flatly conceded that he had no proof that BJ Services failed to adhere to established company policies.[69] As he testified:

> Q: Do you have any proof that the company failed to adhere to established company policies in the way it treated you?
>
> A: No.[70]

Balderaz also point-blank conceded that he had no proof of discriminatory treatment in comparison to similarly situated employees.[71] As he admits:

> Q: Do you have any proof of discriminatory treatment of you, compared to similarly situated employees who didn't file workers' comp claims?
>
> Mr. Finkelstein: Objection, form.
>
> A: Do I have any proof, you said?
>
> Q: Any proof of discriminatory treatment of you, compared to other noninjured employees?
>
> Mr. Finkelstein: Same objection.
>
> A: No.[72]

Furthermore, the only other employee in Victoria that Webb knew of with a workers' compensation claim, Pablo Ruiz, was not included in the RIF.[73] And, more than 18 months passed between Balderaz's alleged on the job injury and his termination.

Balderaz's testimony, and the undisputed facts, conclusively confirm that there is no causal nexus between Balderaz's workers' compensation claim and his termination. *See Burch v. City of Nacogdoches*, 174 F.3d 615, 623 (5th Cir. 1999) (twenty month gap between claim and termination supported district court's entry of summary judgment against workers' compensation

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[69] Balderaz Dep., Ex. A at 158.

[70] Balderaz Dep., Ex. A at 158.

[71] Balderaz Dep., Ex. A at 158-59.

[72] Balderaz Dep., Ex. A at 158.

[73] Balderaz Dep., Ex. A at 64; Webb Affidavit, Ex. B at ¶ 22.

retaliation claim); *Burfield v. Brown, Moure & Flint, Inc.*, 51 F.3d 583, 590 (5th Cir. 1995) (holding that fifteen to sixteen months between the workers' compensation claim and discharge "militates against a finding of retaliation.").

In short, Balderaz's workers' compensation retaliation claim fails because he cannot establish a causal nexus. *See Green v. Lowe's Home Ctrs., Inc.,* 199 S.W.3d 514, 523 (Tex. App. –Houston [1st Dist.] 2006, pet. denied) (affirming summary judgment because plaintiff failed to establish a causal link between his workers' compensation claim and termination)*; Dallas Area Rapid Transit v. Johnson*, 50 S.W.3d 738, 741 (Tex. App.–Dallas 2001, no pet.) (reversing and rendering a verdict that had been entered in a Section 451.001 case for the plaintiff because the evidence did not establish a causal connection even though the plaintiff presented evidence that the employer did not follow its own policies in regard to its treatment of the plaintiff); *Urquidi v. Phelps Dodge Refining Corp.*, 973 S.W.2d 400 (Tex. App.–El Paso, 1998, no writ) (same); *McIntyre v. Lockheed Corp.*, 970 S.W.2d 695 (Tex. App.–Fort Worth 1998, no writ) (same); *Burfield*, 51 F.3d at 590 (finding no causal connection as a matter of law even though the plaintiff's manager told him "Hell no" when he asked if he should file a workers' compensation claim, and another manager later told him that "[t]hanks to you our [workers' compensation] insurance rates are about to double."); *Parham v. Carrier Corp.*, 9 F.3d 383, 389 (5th Cir. 1993) (reversing a jury verdict in the plaintiff's favor and finding as a matter of law that there was no causal connection); *Pope v. MCI Telecommunications Corp.*, 937 F.3d 258, 265 (5th Cir. 1991) (finding as a matter of law that there was no causal connection).

b. Balderaz Has No Proof That BJ Services' Articulated Reason For His Termination – A RIF – Is A Pretext For Workers' Compensation Retaliation

Even assuming solely for the sake of argument that Balderaz could establish a causal link, his case still fails because there is no evidence that BJ Services' articulated legitimate

reason for his discharge is a pretext for retaliation. BJ Services' legitimate reason for Balderaz's discharge is that he was laid off in a RIF.[74] "A RIF is a legitimate, nondiscriminatory reason for terminating an employee." *Cox v. NextiraOne*, 169 S.W.3d 778, 781 (Tex. App.–Dallas 2005, no pet.) (citing *Benners*, 133 S.W.3d at 370; *Anderson v. Taylor Publ'g Co*., 13 S.W.3d 56, 59 (Tex. App.–Dallas 2000, pet. denied)).

That a RIF occurred is indisputable.[75] That there was no position available for Balderaz upon his release to return to work in late June 2009 is also beyond dispute.[76] Indeed, as set forth above, seven of Balderaz's brethren Equipment Operators in Victoria had already been terminated in the RIF between February 2009 and June 2009.[77] Thus, that Balderaz was included in the RIF upon his medical release to return to work in late June 2009 is not surprising. Balderaz was not included in the RIF before his termination because – due to his medical leave of absence – he was excluded from the pool of employees subject to the RIF.[78] Accordingly, if anything, Balderaz received better treatment than he otherwise would have because of his workers' compensation related leave of absence.

There is substantial case law supporting BJ Services' position. For example, in *Cox v. NextiraOne*, 169 S.W.3d 778, NextiraOne attributed Cox's discharge to the company's ongoing RIF. *Id*. at 781. NextiraOne presented summary judgment evidence of a company-wide RIF that began in 2000 and continued at least through 2002. *Id*. According to NextiraOne's evidence, on March 1, 2001, NextiraOne had 5482 employees. *Id*. at 781. In 2001, the company laid off 813 of those employees, and in 2002, it laid off 1186 more. *Id*. at 781. Over this two-year period,

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[74] Balderaz Dep., Ex. A at 134-37; Webb Affidavit, Ex. B at ¶¶ 17-18, and Ex. B-3.

[75] Webb Affidavit, Ex. B at ¶¶ 13-18; Leslie Affidavit, Ex. C at Ex. B-3.

[76] Balderaz Dep., Ex. A at 181; Webb Affidavit, Ex. B at ¶ 17.

[77] Webb Affidavit, Ex. B at ¶ 15, and Ex. B-1.

[78] Webb Affidavit, Ex. B at ¶ 16.

thus, NextiraOne's RIF claimed approximately 36% of its workforce. *Id*. at 781. During the specific six-week period when Cox was terminated, NextiraOne laid off 335 employees, including 23 employees in her job classification. *Id*. at 781. Cox's summary judgment response did not challenge any of these numbers, nor did she challenge the legitimate economic basis for the company's RIF. *Id*. at 782.

Cox challenged the specific reasons NextiraOne proffered for including her within the more than 2000 employees laid off during this time period. *Id*. Cox testified that she had never received a bad performance evaluation and asserted that she carried more responsibility than any other employee in her job classification. *Id*. She offered appreciative e-mails from a client. *Id*. She quoted positive letters of recommendation from superiors, including one from the supervisor who selected her for the RIF. *Id*. And she purported to identify mistakes in the statistics relied upon by NextiraOne to rank her performance lower than that of her colleagues. *Id*. In essence, Cox argued she was a good employee and that she had not been made aware of any concerns expressed by her supervisor until long after her termination. *Id*. In affirming summary judgment against Cox's workers' compensation retaliation claim, the Dallas Court of Appeals stated:

> We view all this evidence in the light most favorable to Cox. *See Gen. Mills*, 12 S.W.3d at 833. However, it is not sufficient for Cox to show that she was a good employee. Indeed, Corathers never testified that Cox was not a good employee: he testified only that he ranked her third among the DSMs he considered laying off. What Cox must offer to avoid summary judgment is more than a scintilla of evidence that the true reason she was fired was her filing the workers' compensation claim. *See Benners*, 133 S.W.3d at 369. Cox has offered no evidence that Corathers or any other supervisor ever expressed animosity toward her because of her compensation claim. She has offered no evidence showing that compensation claimants were targeted for the RIF or that the RIF was not applied neutrally. Indeed, we find no evidence beyond Cox's own personal belief that she was included in the RIF because she filed a workers' compensation claim. Cox's subjective belief regarding the reason for her discharge is a mere conclusion and is not competent summary judgment evidence. *See Lee*, 129 S.W.3d at 197 (citing *Tex.*

> *Division–Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313–14 (Tex. 1994) (per curiam)).
>
> The circumstances of NextiraOne's RIF support our conclusion. The RIF lasted at least three years. During this period, more than a third of the company's employees lost their jobs. Cox kept her position until at least the third significant wave of layoffs, more than two years after she filed her claim. These facts belie Cox's claims of retaliation. Certainly if this employer had been anxious to dismiss Cox, it could have done so using the excuse of the RIF long before. We conclude there is not a scintilla of evidence that NextiraOne's proffered reason for Cox's termination was a pretext and that she was actually discharged because she filed a workers' compensation claim. Accordingly, we conclude the trial court properly granted summary judgment on this ground, and we decide Cox's first issue against her.

Id.

Other workers' compensation retaliation plaintiffs who were terminated in RIFs have also lost on summary judgment. *See Benners*, 133 S.W.3d at 370-71 (affirming summary judgment because the plaintiff failed to produce evidence that the employer's proffered reason for terminating his employment, that a reduction in force was necessary due to its poor financial performance, was false); *Armstrong v. Norris Cylinder Co.*, 922 S.W.2d 210 (Tex. App.–Texarkana 1996, writ dism's w.o.j.)[79] (affirming summary judgment against workers' compensation retaliation claim even though eighteen of the twenty-two persons affected by the layoffs had previously filed workers' compensation claims). The *Armstrong* case – where eighteen of the twenty-two workers laid off had previously filed workers' compensation claims – is clearly a far stronger case than this one, yet the appeals court still affirmed the trial court's grant of summary judgment for the employer. As such, it is crystal clear that summary judgment should be entered against Balderaz's workers' compensation retaliation case.

Balderaz's deposition testimony confirms that summary judgment should be entered against his workers' compensation retaliation claim. As he testified:

[79] For the Court's convenience, a copy of *Armstrong* is attached as Exhibit E.

Q: Do you have any beef with the fact that the company terminated your employment?

Mr. Finkelstein: Objection, form.

A: No.[80]

* * *

Q: Do you have any evidence that BJ Services fired you because of your workers' comp claim?

Mr. Finkelstein: Objection, form.

A: No.[81]

* * *

Q: Now, you're aware that BJ Services claims that there was a reduction in force and they terminated you as part of the reduction in force, correct?

A: Yes.

Q: Do you have any proof that that's false?

Mr. Finkelstein: Objection, form.

A: No. I don't have any proof.[82]

B. Balderaz's Tortious Interference Claim Fails

1. Law

Balderaz claims BJ Services tortiously interfered with his alleged contract with Ace American Insurance Company. To prevail on a tortious-interference claim, Balderaz must prove: (1) contracts existed which were subject to BJ Services' interference; (2) BJ Services willfully and intentionally committed acts of interference; (3) BJ Services' acts proximately caused damages; and (4) actual damages or loss occurred. *Browning–Ferris, Inc. v. Reyna*, 865 S.W.2d

[80] Balderaz Dep., Ex. A at 144.

[81] Balderaz Dep., Ex. A at 144.

[82] Balderaz Dep., Ex. A at 145-46.

925, 926 (Tex. 1993); *Rodarte v. Investeco Group, LLC*, 299 S.W.3d 400, 411 (Tex. App.–Houston [14th Dist.] 2009, no pet.).

2. Analysis

First, Balderaz's tortious interference claim fails on the first element – he admittedly had no contract with Ace American Insurance Company.[83] A similar case is *Holloway v. Compass Sec*., No. 05-03-00563-CV, 2004 WL 837868 (Tex. App.–Dallas, Apr. 20, 2004) (unpublished). There, a widow sued her husband's former employer for destroying evidence she contended was necessary to prove a workers' compensation claim involving the death of her husband. In affirming the trial court's dismissal of her claim, the Dallas Court of Appeals stated, "regardless of this characterization or the arguments she asserts with respect to third-party beneficiary rights, this lawsuit involves nothing more than the alleged destruction of evidence." It then held that "[b]ecause spoliation is not a recognized cause of action, the trial judge did not err in denying Holloway's motion for default judgment and in dismissing Holloway's claim." *Id*. at *1. The bottom line is that Balderaz had no contract with Ace American Insurance Company that could be subject to tortious interference, so this claim must fail.

Second, in any event, the defense of justification bars Balderaz's tortious interference claim. The justification defense can be based on the exercise of either (1) one's own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken. *Id*.; *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). If a trial court finds as a matter of law that the defendant had a legal right to interfere with a contract, the defendant has conclusively established the justification defense, and the motive is irrelevant. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 80 (Tex. 2000); *Tex. Beef*

[83] Balderaz Dep., Ex. A at 149; Webb Affidavit, Ex. B at ¶ 27.

Cattle, 921 S.W.2d at 211. Alternatively, if the defendant cannot prove justification as a matter of law, it can still establish the defense if the trial court determines that the defendant interfered while exercising a colorable right, and the jury finds that, although mistaken, the defendant exercised that colorable right in good faith. *Prudential*, 29 S.W.3d at 80; *Tex. Beef Cattle*, 921 S.W.2d at 211.

Here, there is no proof that BJ Services did anything improper to delay or deny Balderaz's workers' compensation claim. Balderaz himself testified that he has no proof that BJ Services lied to Ace American Insurance Company, so that the insurer would deny his claim.[84] While it is true that BJ Services employees provided evidence that Ace American Insurance Company used to initially refute his claim, that is part of the workers' compensation claims administrative process. In other words, BJ Services had a legal right to provide evidence to Ace American Insurance Company, that Ace American Insurance Company then could use to initially refute Balderaz's workers' compensation claim.[85] *See Lozoya*, 81 S.W.3d at 348-49. Thus, even if Balderaz could make out all the elements of tortious interference, the justification defense bars his claim. *Prudential*, 29 S.W.3d at 80 (citing *Calvillo v. Gonzalez*, 922 S.W.2d 928, 929 (Tex. 1996)).

V. CONCLUSION

For the foregoing reasons, Defendant BJ Services respectfully prays that the Court grant its motion for summary judgment, order that Plaintiff Balderaz take nothing by way of his claims against it, and for all other relief to which it is justly entitled.

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[84] Balderaz Dep., Ex. A at 149-50.

[85] Balderaz Dep., Ex. A at 150.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel of record, as listed below, via the ProDoc efiling service or via certified mail, return receipt requested, on this the 8th day of August 2011.

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INDEX OF EXHIBITS

The following exhibits are incorporated into the preceding motion as if set out verbatim.

DESCRIPTION	EXHIBIT
Plaintiff James Balderaz's Deposition	A
Steve Webb's Affidavit and Exhibits Thereto	B and B-1 through B-3
Sophia Leslie's Affidavit and Exhibit Thereto	C and C-1
Cox v. NextiraOne, 169 S.W.3d 778, 781 (Tex. App.–Dallas 2005, no pet.)	D
Armstrong v. Norris Cylinder Co., 922 S.W.2d 210 (Tex. App.– Texarkana 1996, writ dism's w.o.j.)	E