UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BRUCE LORING, Plaintiff, vs. ADVANCED FOODS, INC. *dba* HEARTLAND BEEF PROCESSING, Defendant.	No. C02-4067-PAZ **MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

On December 19, 2003, the defendant Advanced Foods, Inc. *dba* Heartland Beef Processing ("Heartland") filed a motion for summary judgment, statement of material facts, supporting brief, appendix, and request for oral argument. (Doc. No. 31) On January 30, 2004, the plaintiff Bruce Loring ("Loring") filed a resistance to the motion (Doc. No. 37), brief in support of the resistance (Doc. No. 38), response to the defendant's statement of material facts (Doc. No. 36), appendix (Doc. No. 39), statement of material facts, and request for argument (Doc. No. 40). On February 19, 2004, Heartland filed a reply brief. (Doc. No. 44).

The parties' requests for oral argument were granted, and on April 8, 2004, the court heard telephonic arguments from the attorneys for the parties. James A. Clarity, III appeared on behalf of Loring, and Jeffrey A. Silver appeared on behalf of Heartland.

The court has considered the submissions and arguments of the parties carefully, and turns now to discussion of the issues raised by the defendant in its motion.

I. INTRODUCTION

Loring was employed at Heartland from March 25, 1996, until about November 6, 2001, when his employment was terminated. Loring filed this action on August 1, 2002, claiming he was discharged from his employment (1) in violation of the Family Medical Leave Act (the "FMLA"), 29 U.S.C. § 2601, *et seq.*; (2) in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"); and (3) in retaliation for his attempts to assert his rights under the FMLA and the ADA, and for filing workers' compensations claims, in violation of Iowa public policy. Loring asks for compensatory damages, liquidated damages, interest, costs, attorney fees and expenses, and reinstatement. (*See* Complaint, Doc. No. 1.) Heartland denies Loring's claims, and affirmatively asserts that Loring failed to obtain a Right to Sue Letter from the United States Equal Employment Opportunity Commission ("EEOC"). (Doc. No. 15)

II. FACTUAL BACKGROUND

On March 25, 1996, Loring was hired by Heartland as a laborer. On May 28, 1996, Loring dislocated his shoulder, resulting in a workers' compensation claim that was paid in accordance with Iowa law. On September 1, 1998, Loring experienced muscle spasms and back pain, resulting in another workers' compensation claim that was paid in accordance with Iowa law. On January 6, 1999, Loring had a band saw accident, and lost his left ring finger, his left small finger, and part of his left long finger (this finger had been partially amputated in an incident occurring when he was two years old). As a result of these injuries, he received additional workers' compensation benefits, including a lump sum settlement.

On March 18, 1999, Loring was released by his doctor to return to full-time work, but he was restricted from prolonged exposure to cold. He returned to work on March 22,

1999. On November 24, 1999, his restrictions were changed so he was prohibited from working in temperatures below 40 degrees Fahrenheit or lifting over 10 pounds. On March 10, 1999, Loring's surgeon determined that Loring had a 44% hand impairment and 40% upper extremity impairment.

On March 1, 2001, Loring injured his right shoulder, but the problem resolved by April 17, 2001. The injury resulted in a workers' compensation claim that was paid in accordance with Iowa law. On October 12, 2001, Loring gave Heartland a "Statement of Industrial Injury/Illness," in which he stated, "I have been opening frozen beef, chicken, marinated products and operating the flatsteak machine for almost 1 year[,]" and "my hand has been hurt from the cold, handling frozen product, and from too many hours." He also stated, "My left hand is almost always numb and when it isn't the pain in the nerves on my palm is almost intolerable[,]" and "my left wrist and arm [are] very sore and tired." On October 24, 2001, Loring's doctor issued a permanent work restriction prohibiting Loring from working in an environment less than 50 degrees Fahrenheit, and limiting him to eight hours a day and five days a week.

On November 5, 2001, Paul Beerman, the plant manager, and Jan Feldotto, the office manager, met with Loring and advised him that Heartland was terminating his employment. On November 6, 2001, Loring received a letter from Heartland confirming that his employment was terminated.

III. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment, and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. Fed. R. Civ. P. 56(a) & (b). Rule 56 further states that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*.

Fed. R. Civ. P. 56(c) (emphasis added). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn from the facts." *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa 1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). A genuine issue of material fact is one with a real basis in the record. *Lockhart*, 963 F. Supp. at 814 n.3 (citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [its] motion and identify[ ] those portions of the record which show lack of a genuine issue.'" *Lockhart*, 963 F. Supp. at 814 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). Once the moving party has met its initial burden under Rule 56 of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in [Rule 56],[1] must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e); *Lockhart*, 963 F. Supp. at 814 (citing *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356). "Mere allegations not supported with specific facts are insufficient to establish a material issue of fact and will not withstand a summary judgment motion. Only admissible evidence may be used to defeat such a motion, and

[1] *E.g.*, by "affidavits . . . supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Fed. R. Civ. P. 56(e).

affidavits must be based on personal knowledge." *Henthorn v. Capitol Communications*, 359 F.3d. 1021, 1026 (8th Cir. 2004) (internal citations omitted).

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the United States Supreme Court has explained the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart*, 963 F. Supp. at 815 (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). Furthermore, the Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue for trial exists, rather than "weigh the evidence and determine the truth of the matter." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Celotex*, 477 U.S. at 323-24, 106 S. Ct. at 2552-53; and *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56).

Thus, if Heartland shows no genuine issue exists for trial, and if Loring cannot advance sufficient evidence to refute that showing, then Heartland is entitled to judgment as a matter of law, and the court must grant summary judgment in Heartland's favor. If, on the other hand, the court "can conclude that a reasonable trier of fact could return a verdict for [Loring], then summary judgment should not be granted." *Lockhart*, 963 F. Supp. at 815 (citing *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)

Special care must be given to summary judgment motions in employment discrimination cases. As the Honorable Mark W. Bennett explained in *Bauer v. Metz Baking Co.*, 59 F. Supp. 2d 896 (N.D. Iowa 1999):

> Because this is an employment discrimination case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991);

> *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 782, 102 L. Ed. 2d 774 (1989)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1204 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) ("summary judgments should only be used sparingly in employment discrimination cases," citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364).

Bauer, 59 F. Supp. 2d at 900-01.

Thus, summary judgment rarely is appropriate in employment discrimination cases, and should be granted only in "'those rare instances where there is no dispute of fact and where there exists only one conclusion.'" *Bauer*, 59 F. Supp. 2d at 901 (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244)). Judge Bennett further explained:

> To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford[*,

> 37 F.3d at 1341]); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

Id.

Keeping these standards in mind, the court now will address the defendant's motion for summary judgment.

IV. LEGAL ANALYSIS

A. Failure to Obtain Right-to-Sue Letter

Heartland argues it is entitled to summary judgment on Loring's ADA claim because he did not obtain a "right-to-sue" letter from the EEOC before bringing this action. There is no dispute that Loring has not obtained a right-to-sue letter from the EEOC. At the hearing on the motion, Loring's counsel conceded that he could not pursue the ADA claim without a right-to-sue letter.

Under the ADA, a claimant may bring suit in federal court only if he has filed a timely complaint with the EEOC and obtained a right-to-sue letter. See 42 U.S.C. § 2000e-5(e) and (f); 42 U.S.C. § 12117(a). A complaint is timely filed with the EEOC if it is filed within 300 days of the allegedly discriminatory act. *See, e.g.*, *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir. 1999) (citing 42 U.S.C. § 2000e-5(e), as incorporated into the ADA by reference in 42 U.S.C. § 12117(a), for the proposition that an ADA claim must be filed with the EEOC within 300 days of the discriminatory act). The claimant then must initiate litigation on an ADA claim within ninety days from the date he receives a "right to sue" letter from the EEOC. *See* 42 U.S.C. § 2000e-5(f)(1) (providing filing deadlines for Title VII claims); 42 U.S.C. § 12117(a) (specifically

adopting Title VII filing deadlines for ADA claims). "These timing requirements are prerequisites to a civil suit." *Croy v. Cobe Labs., Inc.*, 345 F.3d 1199, 1202 (10th Cir. 2003). The receipt of a right-to-sue letter is non-jurisdictional, and may be cured by the receipt of a right-to-sue letter during the course of the litigation. *See Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346, 1351 (9th Cir. 1984).

In his brief, Loring does not dispute these principles, but asks for a stay to give him time to try to obtain a right-to-sue letter from the EEOC or the Iowa Civil Rights Commission. (*Id.*) A stay is not appropriate in this case. Nothing has prohibited Loring from attempting to obtain a right-to-sue letter during the course of this lawsuit, and he has been aware of this defense for more than a year, when Heartland filed its amended answer on March 12, 2003. (Doc. No. 15)[2] As stated above, the filing of a timely right-to-sue letter is not jurisdictional, so Loring could have cured the defect in his claim at any time during the course of this action without a stay. Obviously, this did not occur because it was too late for Loring to file a claim with the EEOC. The alleged discriminatory act in this case occurred on November 5, 2001, when Heartland terminated Loring's employment. Any ADA claim was required to have been filed with the EEOC or the Iowa Civil Rights commission within 300 days from that date, or by September 1, 2002. At this point, a stay would be meaningless.

Heartland's motion for summary judgement therefore is **granted** on this claim, and Loring's ADA claim is dismissed.

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[2]In its amended answer, Heartland asserted the following affirmative defense: "Plaintiff has failed to obtain a Right to Sue Letter from the United States Equal Employment Opportunity Commission." (Doc. No. 15, ¶ 32)

B. Loring's Family Medical Leave Act Claim

Loring claims Heartland violated the FMLA when it terminated his employment. Heartland responds that Loring never requested FMLA leave and was not eligible for FLMA leave. (Brief, Doc. No. 31, pp. 22-26) Loring concedes he never formally requested FMLA leave, but alleges he was never given an opportunity to do so before his employment was terminated. (Doc. No. 38, p. 7)

The FMLA was enacted by Congress to provide a degree of job security to employees who are prevented from working for a temporary period by a serious health condition. As the Eighth Circuit Court of Appeals noted in *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002):

> The rights Congress created under the FMLA are fundamentally different than those granted under the ADA. One of Congress's purposes in enacting the ADA involved eliminating the discrimination qualified individuals with disabilities face in their day to day lives. 42 U.S.C. § 12101. In contrast, the FMLA was created, in part, because of "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). While the ADA's protection is almost perpetual, lasting as long as the employee continues to meet the statutory criteria, the FMLA grants eligible employees 12 weeks of leave to deal with a specified family situation or medical condition. 29 U.S.C. § 2612.

Spangler, 278 F.3d at 851. Loring is attempting to turn an ADA claim into an FMLA claim, and in the process is faced with the classic dilemma of trying to fit a square peg into a round hole.

The FMLA defines "eligible employee" as "an employee who has been employed -- (i) for at least 12 months by the employer *with respect to whom leave is requested under section 2612 of this title*; and (ii) for at least 1,250 hours of service with such employer

during the previous 12-month period." 29 U.S.C. § 2611(2)(A) (emphasis added). To invoke the protection of the FMLA, "an employee must provide notice and a qualifying reason for requesting the leave." *Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998). "The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed." 29 C.F.R. §§ 825.302(c), 825.303(b) ("An employee need not mention the FMLA by name in order to invoke its protections; the employee need only make the employer aware that leave is required for a purpose covered by the FMLA."); *see Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999) (under FMLA, employer's duties are triggered when employee provides enough information to put employer on notice that employee may be in need of FMLA); *see also Rhoads v. FDIC*, 257 F.3d 373, 383 (4th Cir. 2001); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 762 (5th Cir. 1995) ("These are workers, not lawyers."); *George v. Associated Stationers*, 932 F. Supp. 1012, 1016 (N.D. Ohio 1996).

In other words, "[a]n employee does not have to expressly assert his right to take leave as a right under the FMLA." *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 450 (6th Cir. 1999); *see* 29 C.F.R. §§ 825.302(c), 825.303(b). "[A]n employee gives his employer sufficient notice that he is requesting leave for an FMLA-qualifying condition when he gives the employer enough information for the employer to reasonably conclude that an event described in [the FMLA] has occurred." *Hammon*, 165 F.3d at 451.

If the need for the leave is foreseeable at least thirty days in advance, the employee must provide that much notice so the employer can minimize the disruptive effect of an unscheduled leave on his business. 29 U.S.C. § 2612(e)(2)(B); 29 C.F.R. § 825.302(a). But if, though the need is foreseeable, "30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable."

29 C.F.R. § 825.302(a). Similarly, when the need for the leave is not foreseeable at least thirty days in advance, notice must be given "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a) ("It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave."). *See Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950, 951 (7th Cir. 2004); *see also Thorson v. Gemini, Inc*, 205 F.3d 370, 381 (8th Cir. 2002); *but see*, *Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1046 n.6 (8th Cir. 1999) (employee's notice obligations under FMLA were not met where employee's written medical excuses "were only given after the fact in response to disciplinary proceedings, not 'as soon as practicable' after the missed work.")

Loring has presented no evidence that he gave thirty days' notice, or "such notice as [was] practicable," to Heartland about any foreseeable absences, and therefore he has not satisfied the notice requirements of 29 U.S.C. § 2612(e)(2). He also has presented no evidence that he gave Heartland notice of his unforeseen absences "as soon as practicable," and therefore he has not satisfied the notice requirements of 29 C.F.R. § 825.303(a). Loring argues the notice requirements were satisfied by Heartland's knowledge that he had serious medical conditions and was under medical care, but this attempts to shift the burden of notice to Heartland, and satisfies neither the requirement of notice of "the anticipated timing and duration of the leave," 29 C.F.R. § 825.302(c), nor the requirement of notice "as soon as practicable if dates . . . were initially unknown." 29 C.F.R. § 825.302(a). *See Bailey v. Amsted Industries Inc.*, 172 F.3d at 1046.

Two weeks before Loring was discharged, his doctor issued a permanent work restriction prohibiting him from working in an environment that was less than 50 degrees Fahrenheit, and limiting him to working no more than eight hours a day and five days a week. Heartland claims it discharged Loring because it had no available jobs that met

these restrictions. When notified of his termination, Loring did not mention the FMLA, nor did he ask for leave under the FMLA to allow him to recover more fully, to seek physical therapy, or otherwise to render himself able to work under the conditions that existed at Heartland.

In an affidavit filed in resistance to Heartland's motion for summary judgment, Loring states, "I believe leave under the FMLA would have helped me recover, but it was never offered or discussed." (Affidavit of Bruce Loring, ¶ 29) Later in his affidavit, he states, "I have a serious health condition, which, I believe, is covered by FMLA. The defendant ignored this." (*Id.*, ¶ 37) Other than these unsupported opinions, there are no facts in the record to support an FMLA claim by Loring against Heartland. Prior to his termination, Loring had not made a request for a temporary period of leave under the FMLA, nor did he make such a request at the time he was terminated. In fact, Loring's first mention of the FMLA was in the Complaint filed in this court on August 1, 2002, almost a year after Loring's employment was terminated.

Heartland's motion for summary judgement therefore is **granted** on this claim, and Loring's FMLA claim is dismissed.

C. Loring's Retaliatory Discharge Claim

Loring claims Heartland fired him in retaliation for his assertion of his rights under the ADA and the FMLA, and for filing workers' compensations claims, in violation of Iowa public policy. At the outset, the court notes any claim that Heartland retaliated against Loring because he asserted rights under the ADA or the FMLA is completely inconsistent with the record because Loring never asserted any such rights before his termination. This leaves only Loring's claim that he was terminated because of his numerous workers' compensation claims.

A claim of retaliatory discharge under Iowa law requires a prima facie showing that (1) the employee engaged in a protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse action. *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998). In *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001), the court explained:

> The Supreme Court of Iowa has recognized that when an employee is terminated in retaliation for asserting his right to workers' compensation benefits, a public policy is violated. *Below v. Skarr*, 569 N.W.2d 510, 511 (Iowa 1997); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 559-60 (Iowa 1988). Webner was obligated to prove to the jury that his protected conduct of seeking workers' compensation benefits was a determining factor in Titan's decision to terminate his employment. *See McMahon v. Mid-Am. Const. Co.*, No. 99-1741, 2000 WL 1587952, at *3 (Iowa Ct. App. Oct. 25, 2000). "A factor is determinative if it is the reason that tips the scales decisively one way or the other, even if it is not the predominant reason behind the employer's decision." *Teachout*, 584 N.W.2d at 302.

Webner, 267 F.3d at 835.

In *Barrera v. Con Agra, Inc.*, 244 F.3d 663 (8th Cir. 2001), the Eighth Circuit Court of Appeals summarized the law in Iowa in this area, as follows:

> In Iowa, an employer's ability to discharge an employee is limited when the discharge clearly violates the "well-recognized and defined public policy of the state." *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 559 (Iowa 1988) (*Springer I*); *see also Springer v. Weeks & Leo Co.*, 475 N.W.2d 630, 631-33 (Iowa 1991) (*Springer II*). Discharge in retaliation for filing a worker's compensation claim clearly violates Iowa's public policy. *Springer I*, 429 N.W.2d at 559. To prevail on a retaliatory discharge claim, Barrera must establish (1) that he engaged in a protected activity; (2) that he suffered an adverse employment action; and (3) that there

> existed a causal connection between the protected activity and his termination. *Teachout v. Forest City Community School District*, 584 N.W.2d 296, 299 (Iowa 1998). "The causation standard in a common-law retaliatory discharge case is high," however, and "[t]he employee's engagement in protected conduct must be the determinative factor in the employer's decision to take adverse action against the employee." *Id*. at 301 (emphasis in original).
>
> We agree with the district court's conclusion that Barrera failed to produce evidence sufficient to raise a genuine issue of material fact regarding causation. As the court noted, other than the timing of the discharge, Barrera produced "almost no evidence" that his termination was in any way related to his worker's compensation claim. Under Iowa law, the fact that Barrera was fired after filing a worker's compensation claim is not alone sufficient to prove causation. *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992) (citation omitted). Iowa law demands, rather, that Barrera produce evidence demonstrating that his worker's compensation claim was the determinative factor in Swift's decision to terminate his employment. Barrera's version of the facts, however, suggests nothing more than rude and callous behavior on Swift's part. Although we proceed with caution on summary judgment motions in the employment context, *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998), we conclude that the grant of summary judgment on Barrera's first claim was proper.

Barrera, 244 F.3d at 665-66.

Loring has offered no admissible evidence to support a claim that he was fired in retaliation for filing his workers' compensation claims other than the fact that he filed a number of claims, and then he was fired. This evidence is not sufficient to support his claim. *See id.* ("Under Iowa law, the fact that [the plaintiff] was fired after filing a worker's compensation claim is not alone sufficient to prove causation. . . . Iowa law

demands, rather, that [the plaintiff] produce evidence demonstrating that his worker's compensation claim was the determinative factor in [the employer's] decision to terminate his employment." (Internal citations omitted)).

Heartland has offered evidence that it terminated Loring's employment because he could not perform any of the jobs available at the company in light of his work restrictions. Loring has offered no admissible evidence to the contrary. Instead, he has offered an affidavit from his wife in which she states, "I have heard from other employees that Jan Feldatto has said that Bruce was fired because of 'the suit.' I assume this means the pending worker's compensation claim." (Affidavit of Susan Loring, ¶ 29) This is not evidence that would be admissible at trial (*see* Fed. R. Evid. 802, 801(c)), and therefore it cannot be considered in response to Heartland's motion for summary judgment. *See Henthorn v. Capitol Comm.*, 359 F.3d. at 1021.

Heartland's motion for summary judgement therefore is **granted** on this claim, and Loring's claim for retaliatory discharge is dismissed.

IV. CONCLUSION

Based upon the foregoing analysis, the defendant's motion for summary judgment (Doc. No. 17) is **granted**, and the plaintiff's case is dismissed.

IT IS SO ORDERED.

DATED this 9th day of April, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT