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MAR 23 2018

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY DAVIS IV, Plaintiff-Appellant, v. CON-WAY FREIGHT, INC.; CON-WAY, INC.; CON-WAY WESTERN EXPRESS, Defendants-Appellees.	No. 15-35864 D.C. No. 3:14-cv-01389-HZ MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Argued and Submitted March 9, 2018
Portland, Oregon

Before: N.R. SMITH, CHRISTEN, and HURWITZ, Circuit Judges.

Plaintiff-Appellant Johnny Davis appeals a district court order granting summary judgment for Defendant-Appellee Con-Way Freight, Inc. and its associated entities. We have jurisdiction under 28 U.S.C. § 1291, and we review

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

de novo. *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 773 (9th Cir. 2018). We affirm.

1. The district court properly entered summary judgment on Davis's disability discrimination claim. "We apply the familiar burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), to claims under Oregon disability law." *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 943 (9th Cir. 2015). We conclude that Davis did not make out a prima facie case of disability discrimination. To establish a prima facie case, Davis needed to introduce evidence that he "suffered an adverse employment action because of his disability." *Id.* at 944. We agree with the district court that Davis fell short of that mark.

Even viewing the evidence in the light most favorable to Davis, there are no facts showing, or permitting a reasonable inference, that the decisionmakers behind Davis's firing were aware he was disabled. Although Davis suggests Kathryn Withrow had to approve his medical leave requests in 2012, he points to no evidence—as opposed to unsworn argument—that he made any such request. Similarly, there is no evidence that Withrow was aware Davis's "emotional

breakdown" was due to cancer-related stress.[1] Finally, Davis's reliance on a reference to oncology in a document Withrow included in a packet for Davis's Employee Termination Review Board hearing is misplaced. Even assuming Withrow saw the document and understood it to mean Davis had cancer, he did not raise a material issue about whether she obtained the document until after Davis had been suspended and fired. Absent evidence that the decisionmakers knew he was disabled, Davis did not show that he suffered adverse employment actions because of his disability.

2. The district court also properly entered summary judgment on Davis's wrongful discharge claim. As pleaded, Davis's wrongful discharge claim advances the theory that Con-Way fired him because it did not want to bear the expense of his healthcare. Such a claim is preempted by § 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a). *See Campbell v. Aerospace Corp.*, 123 F.3d 1308, 1313 (9th Cir. 1997) ("[W]e have held that where the plaintiff's claim or theory alleged that the employer terminated the employee to avoid paying benefits or sought to prevent the discharged employee from obtaining benefits, ERISA preempted the claim.").

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[1] The uncertain provenance of the Marc Kamm letter does not suggest that Withrow or Kevin Huner knew of Davis's cancer.

Davis now advances something akin to a retaliation theory, claiming he was fired for "rais[ing] complaints about how he had to pay thousands of dollars out of pocket for his cancer medications, how he was financially struggling because of the high costs of his treatments, and how he was under tons of stress because of his health and cost of cancer treatments." A wrongful discharge claim in Oregon requires a "causal connection" between a protected activity and an allegedly wrongful discharge. *Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012) (internal quotation marks omitted). Here, Davis asserts protected activities that are inextricably linked with his cancer, but, as discussed, there is no evidence that the decisionmakers behind his firing were aware of his cancer. Consequently, to the extent Davis disavows his benefits-avoidance theory, his retaliation theory lacks factual support.

AFFIRMED.