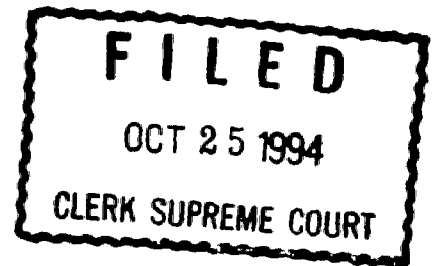


IN THE COURT OF APPEALS OF IOWA

No. 4-250 / 93-1157



STACY MONTGOMERY,

Appellant/Cross-Appellee,

vs.

PELLA CORPORATION, a/k/a ROLSCREEN COMPANY,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Marion County,
Richard Morr, Judge.

Appeal from former employee's action claiming
retaliatory discharge and fraud. REVERSED ON CROSS APPEAL.

Philip F. Miller, Des Moines, for appellant.

Mark F. Thomas and Mary Kiener of Greife & Sidney, Des
Moines, for appellee.

Heard by Donielson, C.J., Huitink, J., and Schlegel,
S.J.*

*Senior judge from the Iowa Court of Appeals serving
by order of the Iowa Supreme Court.

DONIELSON, C.J.

Stacy Montgomery was employed as part of a temporary employment program at Pella Corporation a/k/a Rolscreen Company ("Rolscreen"). Employees in this program were employed on an "on call" status and could be called to work when Rolscreen needed to increase its production in response to customer demand. Montgomery had been employed in this capacity since 1987.

Montgomery began suffering carpal tunnel problems with her right wrist in early 1989 and last worked for Rolscreen on March 10, 1989. She underwent carpal tunnel surgery in May 1989 and received workers' compensation benefits as a result of this injury.

In July of 1989 Rolscreen sent its temporary employees, including Montgomery, a letter informing them they would be contacted in early August about their availability to work in late August. In response Montgomery wrote Rolscreen a letter dated July 25, 1989. She did not address her availability for temporary work in August, but instead, expressed her desire to obtain full-time employment with Rolscreen. She asked she be kept in mind if full-time positions became available.

Rolscreen personnel specialist Arlin Harvey responded to Montgomery's inquiry in a letter dated August 1, 1989. The text of the letter is as follows:

Dear Stacy:

Thanks for your letter of July 25, where you

asked about full time employment opportunities. I really have no idea of what will be available in the future, however, we will make sure you receive equal consideration.

Sincerely,
ROLSCREEN COMPANY

Arlin Harvey
Personnel Specialist

Rolscreen contacted Montgomery in October 1989 to inquire as to her availability for work. Montgomery responded she did not yet have a release from her doctor and would call Rolscreen when she could return to work.

Montgomery wrote Rolscreen in a letter dated November 16, 1989. In her letter she informed the company she had obtained a release from her doctor to return to work. Her letter stated she wanted to keep herself on the temporary program and requested she be called back to work after the first of the year.

According to testimony given by Montgomery in depositions and before the Iowa Industrial Commissioner, she called Rolscreen at the end of 1989 to inquire about returning to work. She spoke with personnel specialist Arlin Harvey and learned the company had taken the position she had quit her employment with Rolscreen. After learning this Montgomery resumed her former employment in a nursing home. Due to its importance to the disposition of the cross-appeal, we set forth the relevant portions of Montgomery's testimony:

Q. Then after that incident, when was the next time that you had any conversation with Rolscreen or

any correspondence with Rolscreen about possibly returning back to work?

- A. I know I had called them after I was released, and--I remember, because that's when they said I quit.
- Q. Do you remember who you talked to then?
- A. No.
- Q. Do you remember anything that was said at all during that conversation?
- A. Well, at first--I can't remember the lady's name, but she was stalling me at first, and then she said I needed to talk to Arlin Harvey. Then Arlin is the one that got on there and said that for some reason they've got me down that I quit, and I told him that I never quit.
- Q. Did he tell you anything about possibly coming back to work then?
- A. I don't remember.
- Q. Do you know if that was before you started working at the nursing home?
- A. Yes, it was.
- Q. Did he say you were fired at that point in time, or did he say that you had quit?
- A. He didn't say fired. He said I had quit.

[Montgomery deposition of June 5, 1992]

- Q. And just tell us a little bit about what led up to your working at the Pleasant Park Nursing Home in 1990. We'll go back and talk a little bit later about how you alternated working at the nursing home and Rolscreen before you had your carpel tunnel. But right now I want you just to focus on from the time Dr. Bergman said you could go back to work, released you.
- A. Well, I went back to the nursing home because Rolscreen wouldn't hire me back.
-
- Q. What did you tell them at that time?
- A. At first they kept stalling me and said that Harlan [sic] Harvey needed to talk to me. And then he got on there and that's when he told me I had quit.
- Q. Who was that? Mr. Harvey?
- A. Yes.
- Q. What did you say to him when he said you'd quit?
- A. I just told him I didn't know how they got that because I never said I quit.
- Q. Had you ever given them any indication you had quit?
- A. No. I liked that job a lot.
- Q. What else did he tell you as far as working for them?
- A. He didn't think I would be able to handle that

kind of work anymore.

....

Q. And I think in August of 1990 there's a personnel record that says that a Mr. Joe Michels contacted you in August of 1990 and advised you that you were taken off the temporary program because, "We were concerned that Rolscreen may not have a temporary job that would fit your physical condition"?

A. Yes.

Q. In reading these depositions, do you find there are many other woman [sic] working there who have the same condition you do?

A. Yes.

Q. And does that also indicate that you were disappointed because they couldn't find other positions--they could find other positions for full-time personnel with the same problem?

A. Yes.

Q. And you told them that on August 15, 1990; is that correct?

A. Yes.

[Montgomery testimony before Iowa Industrial Commissioner on June 9, 1992]

Q. First tell me how you found out you quit.

A. I called to see about coming back to work and they got Arlin Harvey on there, and that's when he told me I quit.

Q. Do you recall when that was in terms of a month, year?

A. It was the end of '89.

Q. You talked to Arlin Harvey the end of 1989 and found out that they considered you quit from the Temporary Program?

A. Right.

.....

Q. So after you had found out that Rolscreen wasn't going to call you back on the Temporary Program, you went back to the nursing home and asked them if you could have your old job back, is that correct?

....

A. I mean, you know, I assumed -- they said I quit. They wasn't going to hire me back, and, yes, I went to the nursing home.

[Montgomery deposition of December 18, 1992]

Joe Michels, a personnel specialist with Rolscreen, contacted Montgomery on August 15, 1990, and informed her

she had been taken off the temporary program. He informed her this action was taken because the company was concerned it would not have a temporary job which would accommodate her physical condition and it did not wish to jeopardize her physical well being.

Through discovery proceedings related to her workers' compensation claim, Montgomery learned in approximately March 1991 of the existence in her Rolscreen personnel file of a document captioned "Separation Notice." This document indicated it was completed January 2, 1990, and it stated the reason for Montgomery's leaving her employment with Rolscreen was the fact that she was "not suitable for factory employment."

Montgomery filed suit against Rolscreen on August 20, 1992. Her petition set forth three causes of action. Division I of her petition set forth the alternative claims of wrongful discharge in retaliation for her filing of a workers' compensation claim and wrongful discharge due to a disability. Division II of the petition set forth a claim of fraud predicated on Rolscreen's representations in its August 1, 1989 letter.

Rolscreen filed a motion for partial summary judgment on November 25, 1992. In its motion it claimed it was entitled to summary judgment on Montgomery's claim of disability discrimination because she had failed to file a complaint with the Iowa Civil Rights Commission as required by chapter 601A (now 216) of the Iowa Code. The trial

court granted the motion, and Montgomery does not challenge this ruling on appeal.

Rolscreen filed an additional motion for summary judgment on January 27, 1993, in which it claimed Montgomery's claim for retaliatory discharge was barred by the statute of limitations and the circumstances underlying her fraud claim did not constitute fraud as a matter of law. The motion was denied by the trial court.

Rolscreen subsequently filed a motion for adjudication of law pursuant to Iowa Rule of Civil Procedure 105. It contended Montgomery's claims were barred by the exclusivity provisions of Iowa's Workers' Compensation Act and she should be estopped by her testimony in the workers' compensation proceedings from offering evidence of her ability to return to work for Rolscreen. In ruling on this motion the trial court concluded Montgomery's sole and exclusive remedy was in the workers' compensation statutes. The court found, as a matter of law, "an employee who cannot work due to their work related injuries cannot be said to have been wrongfully terminated when that employee has not been returned to the job they could no longer perform." The motion was sustained, and Montgomery's case was dismissed in its entirety.

Montgomery appeals the trial court's ruling on the motion for adjudication of law, and Rolscreen appeals from the denial of its motion for summary judgment. Our scope of review is for the correction of errors at law. Iowa R.

App. P. 4.

I. Statute of Limitations.

Rolscreen plead the affirmative defense of the statute of limitations and properly raised it in its motion for summary judgment. See, e.g., Harden v. State, 434 N.W.2d 881, 883 (Iowa 1989), cert. denied, 493 U.S. 869 (1989). Rolscreen contends the trial court erred in not finding Division I of Montgomery's petition (the claim of retaliatory discharge) was barred by the statute of limitations. We agree and reverse the trial court's denial of summary judgment.

The Iowa Supreme Court has recognized a common-law tort action for retaliatory discharge based on the filing of a workers' compensation claim. French v. Foods, Inc., 495 N.W.2d 768, 771 (Iowa 1993); Conaway v. Webster City Prods. Co., 431 N.W.2d 795, 796 (Iowa 1988). "Generally, when characterized as a tort cause of action, a wrongful discharge suit will be governed by the tort statute of limitations." 82 Am. Jur. 2d Wrongful Discharge § 196 (1992).

Rolscreen had the burden of establishing the application of the statute of limitations defense, and Montgomery had the burden of proving any exceptions to the ordinary limitations period. See Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 350 (Iowa 1987). The general rule is a cause of action accrues when the aggrieved party has a right to institute and maintain a suit. Sandbulte v. Farm

Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984).

Montgomery claims the statute of limitations did not begin to run in this case until she found the "Separation Notice" in her personnel file and discovered the "overt act of termination by the employer." Under the discovery rule the statute of limitations begins to run when the injured person discovers or in the exercise of reasonable care should have discovered the allegedly wrongful act. Franzen v. Deere and Co., 377 N.W.2d 660, 662 (Iowa 1985).

It is sufficient that the facts would support a cause of action. It is not necessary that the person know they are actionable. Knowledge of the facts and knowledge they are actionable are distinct and unrelated issues for purposes of the discovery rule.

Id.

Montgomery's testimony reveals she was aware at the end of 1989 and was informed again on August 15, 1990, her employment with Rolscreen was terminated and she would not be returning there to work. She also knew her employer had reservations about her ability to handle the work and was purportedly concerned a return to work would jeopardize her physical well being. Whether the termination of her employment is characterized as a quit or a dismissal by her employer is irrelevant to the fact Montgomery was aware her employment with Rolscreen was terminated and would not resume. She was aware of sufficient factual information to establish the elements of an action for retaliatory discharge. Neither the discovery rule nor the doctrine of

fraudulent concealment are applicable in this case to toll the statute of limitations.

Montgomery does not challenge Rolscreen's contention that a two-year statute of limitations applies to actions for wrongful discharge. Her cause of action for wrongful discharge accrued over two years before the filing of her suit on August 20, 1992, and was barred by the statute of limitations. The trial court's denial of summary judgment on this issue is reversed.

II. Fraud.

Rolscreen also appeals from the trial court's denial of its motion for summary judgment with respect to Montgomery's fraud claim. Summary judgment is appropriate only when there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. Id. The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986).

A nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e).

The elements for a cause of action based on fraud consist of: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage. Garren v. First Realty, Ltd., 481 N.W.2d 335, 338 (Iowa 1992). As a general rule intentional torts such as fraud are poor candidates for summary judgment because of the subjective nature of motive and intent. Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 338 (Iowa 1991). However, the rule is not absolute as there is no genuine issue of fact where there is no evidence in support of a claim of fraud. See id.

Montgomery's fraud claim was based on representations made in Rolscreen's letter of August 1, 1989.¹ The letter was issued in response to Montgomery's request she be considered if full-time job opportunities became available. It asserts Rolscreen was unaware at that time of what full-time jobs would open up but assures Montgomery she would receive equal consideration if they did arise. A

1. Montgomery filed a motion for leave to amend on April 14, 1993, to enlarge her fraud claim to include an allegation that Rolscreen fraudulently misrepresented to her she had quit her employment and knowingly concealed from her it had terminated her employment. Rolscreen resisted this motion, and a review of the trial court record reveals no order was entered granting it. As a result, our review of Montgomery's fraud claim and its sufficiency to withstand summary judgment is limited to the allegations set forth in her original petition.

general statement regarding the prospect of an employer creating additional jobs in the future is not a sufficient statement upon which liability for fraud can be predicated. See, e.g., Stowman v. Carlson Cos., Inc., 430 N.W.2d 490, 493 (Minn. App. 1988) (employee handbook statement regarding creation of thousands of exciting and rewarding career opportunities did not constitute basis for claim of fraudulent inducement).

We have carefully reviewed Montgomery's resistance to the motion for summary judgment and find no genuine issue of material fact exists as to her fraud claim. She failed to set forth any evidence pertaining to her reliance or resulting injury in conjunction with reliance on Rolscreen's August 1 letter. As a matter of law Montgomery failed to establish a claim of fraud, and we reverse the trial court's denial of summary judgment on this issue.

Our resolution of Rolscreen's cross-appeal disposes of this case in its entirety and obviates the need for us to address the issues raised in Montgomery's appeal. In reversing the trial court's ruling on Rolscreen's motion for summary judgment, we express no opinion as to the underlying merits of Montgomery's claim of wrongful discharge or the propriety of the trial court's ruling on Rolscreen's motion for adjudication of law.

Costs assessed to appellant/cross-appellee.

REVERSED ON CROSS APPEAL.