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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-220 / 89-937

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JAMES FRANK,

Appellee/Cross-Appellant,

vs.

WAL-MART STORES, INC., LEE STUCKY, AND LOWELL MILBRANDT,

Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Polk County, Robert O. Frederick, Judge.

Wal-Mart appeals a district court ruling on a breach of contract; Frank cross-appeals claiming the district court erred by granting summary judgment on two of his claims. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark McCormick and Donald G. Henry of Belin Harris Helmick Tesdell Lamson McCormick, P.C., Des Moines, for appellants.

Lois Cox and Paul Papak, Attorneys, and Peter Parry, Student Legal Intern, Clinical Law Program, Iowa City, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ., but decided en banc.

SCHLEGEL, J.

Wal-Mart challenges a jury verdict granting plaintiff damages for breach of an employment contract. The plaintiff cross-appeals, challenging the trial court's failure to submit several of his theories to the jury.

Plaintiff James Frank was employed by Wal-Mart Stores, Inc. in Mt. Pleasant, Iowa, in 1984. He was given an employee handbook which contained various personnel policies, including a fraternization policy. In compliance with this policy, Frank sought his supervisor's permission to date coemployee Darlene Brawley in August 1985. Darlene was separated from her husband, Marty Brawley, who was another Wal-Mart employee. Supervisors Lee Stucky and Lowell Milbrandt had several meetings with Frank and Darlene concerning their dating situation. Some of these meetings were precipitated by complaints by Marty. Frank and Darlene were advised not to date until Darlene filed for divorce, and then told not to date until her divorce was final.

Frank and Ms. Brawley complied with the instructions not to see each other. However, Darlene was unhappy with this situation and quit her employment with Wal-Mart. Her last day of work was October 16, 1985. During an exit interview on October 23, Darlene informed Milbrandt that she and Frank were in the process of moving in together. Stucky and Milbrandt discharged Frank the next day, October 24, for violating the company's fraternization

policy. Frank had a difficult time finding other employment.

Frank sued Wal-Mart, Stucky, and Milbrandt. Before trial the district court granted the defendants' motion for summary judgment on Frank's claims of wrongful discharge and intentional infliction of emotional distress. The court entered a directed verdict against Frank on his claim of breach of an implied covenant of good faith and fair dealing. Frank's claim based on breach of employment contract was submitted to the jury, and the jury returned a verdict for Frank in the amount of $65,000.

Wal-Mart appealed. It claims the court should have entered a directed verdict against Frank on his breach of contract claim. Wal-Mart contends that Frank was an employee at will and that the employee handbook did not create a contract. It states there were no express and specific terms in the handbook permitting discharge only for good cause.

Wal-Mart argues that the court erred in not giving its two requested instructions concerning employment at will. It feels it was entitled to have its theory of the case submitted to the jury.

Wal-Mart also contends the court erred in instructing the jury on the law of contracts as it concerned the employee handbook. The court instructed the jury that the handbook permitted discharge only for good cause, and the jury needed only to find if Wal-Mart was bound by the

handbook. Wal-Mart asserts that the jury should have determined the terms of the alleged contract.

Finally, Wal-Mart claims the court should not have allowed Frank to recover emotional distress damages on his contract claim. It believes emotional distress damages should not be recoverable for breach of an employment contract because breach of such a contract is not particularly likely to cause serious emotional distress.

Frank filed a cross-appeal. He contends the court should not have granted Wal-Mart's motion for summary judgment on his wrongful discharge claim. He states that even if he was an at-will employee, Wal-Mart violated a public policy interest in privacy by discharging him for being romantically involved with Darlene. He argues that an employer should not be able to regulate the personal lives of its employees.

Frank also contends the court should not have granted summary judgment on his claim of intentional infliction of emotional distress. He asserts there was a question of material fact concerning whether Wal-Mart's acts of grilling him about his private life and then abruptly terminating him constituted outrageous conduct.

Frank finally argues that the court should have submitted his claim for breach of an implied covenant of good faith and fair dealing to the jury. He states that Wal-Mart breached this covenant by discharging him after he tried to comply with the fraternization policy.

I. **Breach of Contract Claim.** The first claim by Wal-Mart is whether a directed verdict should have been granted on the plaintiff's breach of contract claim. A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). The movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, at 757. If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984).

The key question is whether a binding employment contract can be found from the evidence presented at trial so that a reasonable jury could find for the plaintiff on this issue. The common law doctrine of employment at will is firmly rooted in Iowa law. Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989). There are only two exceptions to the employment-at-will doctrine. The first creates liability in tort when the discharge is in clear violation of a well-recognized and defined public policy of the state. Id. The second exception arises where a contract created by an employer's handbook or

policy manual guarantees an employee that discharge will occur only for cause or under certain conditions. Id. In this portion of our opinion we deal with Wal-Mart's contention that the second of these two exceptions should not have been submitted to the jury.

In answer to Wal-Mart's claims, Frank contends the handbook created a unilateral contract of continued employment. The precise intentions of the parties to an employment agreement are often left unexpressed and contractual obligations may be enforced based upon the reasonable expectations of the parties. Cannon v. National By-Products, Inc., 422 N.W.2d 638, 640 (Iowa 1988). Ordinarily whether a particular writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence. Id. The question of whether the written personnel policies became part of plaintiff's contract is to be determined on the basis of plaintiff's reasonable expectations. Id. Even if it was not defendant's intention that these policies confer contractual rights, a contract may be found to exist if this was the plaintiff's understanding and defendant had reason to suppose that plaintiff understood it in that light. Id.

The statement in Cannon, which allows the jury to determine reasonableness from the plaintiff's point of view, was explained further in McBride v. City of Sioux City, 444 N.W.2d 85, 91 (Iowa 1989), and Fogel. An

employee manual may constitute a unilateral contract only if the traditional requirements of contract formation have first been met. Fogel, at 456.

> Thus, an employee handbook may create a unilateral contract if (1) the handbook is sufficiently definite in its terms to create an offer; (2) the handbook has been communicated to and accepted by the employee so as to create an acceptance; and (3) the employee has continued working, so as to provide consideration. (emphasis in original).

Id.

The Wal-Mart handbook was sufficiently definite to constitute an offer. The pertinent portions of the handbook are as follows:

> This handbook outlines those policies and procedures. You are expected to know and follow them, and understand the conditions of employment.
>
> New Wal-Mart associates are hired for a probationary period of ninety days.
>
> Throughout these ninety days, your attitude, job performance and personal appearance is carefully observed. These characteristics, of course, must be positive and your performance satisfactory. If not, and it is determined by management that the working relationship should be severed, it may be done totally at Wal-Mart's discretion. On the other hand, an associate may decide during the probationary period to leave Wal-Mart. In such a case the termination is without prejudice. That is, no reason need be given by the associate, and Wal-Mart will consider the separation amicable and for personal reasons.
>
> It is the hope and intention of this Company, that the employment relationship begun with you today will be one of long-term duration . . . It should be clearly understood that the continued employment of any associate of the Company will depend upon the successful performance of all work assigned to the associate, and the general following of the guidelines of this booklet. . . .

In effect, the terms in the handbook told an employee that

for ninety days he will be on probation. During that ninety-day period Wal-Mart can terminate the employee for any reason. After the ninety-day period an employee will be terminated only for the listed causes of (1) failure to do his job, and (2) failure to follow the policies in the handbook. There was clearly a definite offer of continued employment. There is no question Frank accepted the offer because he was given the handbook and asked to sign an acknowledgment that he read and understood the handbook. In addition, the consideration exists because Frank was a successful employee up to the time of his termination.

The basic elements of a contract have been shown in this case, and therefore the contractual status of the employee handbook is strictly a fact question determinable by Frank's reasonable expectations. Cannon, at 640. Aside from the language in the handbook itself, Frank's supervisors testified that it was the admitted practice and policy of Wal-Mart not to fire an employee without good reason. They also testified that Frank might have been expected to know this policy. In addition, Frank was fired for a specific violation of the company policy. The trial court was entirely correct to submit the breach of contract issue to the jury.

Frank also bases his breach of contract claim on the existence of an implied contract. In Iowa, a contract will be implied where there has been a mutual manifestation of assent by acts and deeds (rather than words) to the same

terms of an agreement. McBride, at 90. The actions of Wal-Mart in this case were entirely consistent with the existence of a contract of employment. They were aware of several complaints regarding the alleged dating activities of Mr. Frank. However, management made sure that Frank and Darlene Brawley knew of the specific policy against dating, knew of the procedures when employees wished to date, and were aware they would be fired if found in violation of this policy. Frank was not fired at the first suggestion that he was dating a coemployee. Instead, he was called in several times and the policy was explained to him in great detail. A contract could certainly be implied on the basis of Wal-Mart's actions. Those actions were consistent with a policy not to fire successful employees without good reason. We hold that sufficient evidence existed for the trial judge to submit the issue of a breach of contract under an implied contract theory.

II. **Jury Instructions.** Wal-Mart contends the trial court should have instructed the jury on its theory of employment at will. The theories of both parties to a lawsuit, as far as they are supported by the pleadings and substantial evidence, must be submitted to the jury, and it is prejudicial error to fail to do so. Doser v. Interstate Power Co., 173 N.W.2d 556, 559 (Iowa 1970). We held earlier in this opinion that there was sufficient evidence to submit the breach of contract issue to the jury. However, we do not find the evidence so overwhelmingly in

favor of the existence of a contract, that the theory of employment at will should not have been submitted to the jury. The evidence might support a verdict in favor of employment at will just as it could support the existence of a valid contract. The court should have submitted the employment-at-will theory to the jury and, therefore, we must reverse for a new trial.

Wal-Mart also challenges the submission of instructions number five and number nine. It contends those instructions improperly took the issue of whether Wal-Mart could discharge Frank away from the jury. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). However, the trial court's ruling regarding this decision will not be disturbed absent an abuse of the trial court's discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986). We will not find an abuse of discretion unless "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The burden of proving abuse of discretion lies with the defendant. Id. We hold there was not an abuse of discretion by the trial judge in submitting instructions five and nine.

III. **Emotional Distress Damages.** Wal-Mart also contends the trial court erred in submitting the issue of

emotional distress to the jury. Normally damages for emotional distress are not allowed in a breach of contract action. Bossuyt v. Osage Farmers National Bank, 360 N.W.2d 769, 777 (Iowa 1985). There are two exceptional situations where such damages are recoverable. Id. The first is where the disturbance accompanies a bodily injury. Id. In the second, the contract or breach is of such a kind that serious emotional disturbance was a particularly likely result. Id. Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. Id. Where the character of the contract is of such a nature that a natural and probable consequence of the breach will be to inflict mental pain or anguish on the person to whom performance is due, the parties may be presumed to have contracted with respect to mental anguish as an element of damages. Meyer v Nottger, 241 N.W.2d 911, 920 (Iowa 1976).

The Iowa Supreme Court recently discussed mental distress as an incidental damage caused by the tort of wrongful discharge. In Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (1989), the court discussed the difference between allowing mental distress in negligence cases as opposed to those involving intentional acts. The court held:

> . . . [T]he question of whether damages for emotional distress are recoverable in a given tort

> depends on the theory of recovery in each type of action. In cases grounded on negligence where there is no duty to exercise ordinary care to avoid causing emotional harm, recovery is generally denied for the infliction of mental distress without accompanying physical injury.
>
> We allowed a limited exception to this rule in Mentzer and Cowan, where the telegraph company negligently failed to deliver messages concerning deaths.
>
> We have been lenient in allowing incidental damages for mental distress in tort cases when the theory of recovery includes intentional acts or those arising out of illegal conduct.

Niblo, at 354-55.

The Mentzer v. Western Union Telegraph Co., 93 Iowa 752, 62 N.W. 1 (1895), case cited in Niblo was based on contract. Niblo was based on both tort and contract. This case is based on contract, but as in Mentzer, the breach was not due to an intentional act of one party. Damages for mental anguish were allowed in Mentzer due to the public policy considerations that accompany the duty of common carriers. Niblo, at 355. Recovery in Niblo was also based on public policy grounds. A wrongful or retaliatory discharge in violation of public policy is an intentional wrong committed by the employer against an employee who chooses to exercise some substantial right. Id. There is no such public policy at stake in this case.

Under any of the theories allowing recovery of damages for mental anguish, the plaintiff's claim must fail. The contract is not the type that a natural and probable consequence of the breach will be to inflict mental

anguish. The facts in this case do not even begin to approach the probability of mental anguish that can arise from the breach of a contract for funeral services. This was a typical commercial contract of employment. There is no public policy against firing someone for believing he or she violated a company policy. There is only an action for breach of contract against the employer. The trial court erred in submitting the issue of mental damages to the jury.

IV. Summary Judgment On Frank's Claims. In Iowa, summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). The burden of showing the nonexistence of a material fact is upon the moving party. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa 1984). Summary judgment is not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. Id. Every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. Id.

The trial court awarded summary judgment to Wal-Mart on plaintiff's claims of wrongful discharge and intentional infliction of emotional distress. There is an established public policy exception to the doctrine of employment at will. See Springer v. Week & Leo Co., 429 N.W.2d 558 (Iowa

1988). This cause of action was referred to as "tortious interference with the contract of hire." Id. at 560. Frank claims the reason for his termination violated public policy, therefore allowing him to make a claim for wrongful discharge. The reason for his discharge was his alleged fraternization with a coemployee or, as Frank contends, Wal-Mart's invasion of his privacy.

Frank is correct that a common law cause of action exists for invasion of privacy. See Anderson v. Low Rent Housing Comm'n of Muscatine, 304 N.W.2d 239, 248 (Iowa 1981). An invasion of privacy may be based upon (among others), an "unreasonable intrusion upon the seclusion of another." Frank contends the invasion into his private life should be prohibited as a violation of public policy. There is no Iowa statute setting out an express policy prohibiting termination for coemployee fraternization or for invasion of privacy. Courts should not declare conduct violative of public policy unless it is clearly so. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 196 (Iowa 1985).

The right of privacy may be lost by express or implied waiver by the complaining party. Anderson, at 248. For implied waiver to exist, the intention of the party alleged to have waived his or her rights must be clear from the party's conduct. Id. It is apparent that Frank would have waived his right to a common law action of invasion of privacy. He knew about the policy of prohibiting

fraternization and signed an acknowledgment that he understood that policy. It is unlikely that the Supreme Court of Iowa would allow a plaintiff to waive a harm that arose to a level violating public policy. In any event, Wal-Mart had legitimate reasons for barring relationships at work and expressed those reasons to its employees. See Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 856-59 (1988). We hold that there is no public policy preventing the regulation of relationships at the work place. The trial court was correct in granting summary judgment on this issue.

Frank also contends summary judgment should not have been granted on his claim of intentional infliction of emotional distress. The elements of this tort are: (1) outrageous conduct by the defendant; (2) the defendant's intentional causing, or reckless disregard of the probability of causing, extreme emotional distress; (3) plaintiff has suffered severe or extreme emotional distress; and (4) actual proximate causation of the emotional distress by the defendant's outrageous conduct. Northrup, at 197. In order to recover, each element of the tort must be satisfied. We have said that the outrageous conduct in this context is so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Id. at 198. It is for the court to determine

in the first instance, as a matter of law, whether the conduct complained about may reasonably be regarded as outrageous. Id.

Defendant's conduct in this case, at most, consists of only the negligence of discharging Frank upon the belief that he violated the policy. A private employer may be considered somewhat "interfering" when regulating relationships and terminating based on such a policy; however, such conduct does not go beyond all possible bounds of decency. We affirm the trial court's granting of summary judgment on this issue.

V. **Claim of Implied Covenant of Good Faith.** Finally, as an alternative to his other theories of recovery, Frank urges this court to recognize a cause of action for breach of an implied covenant of good faith and fair dealing. Applied in the employment context, an employee proving a prima facie case of unjust termination could shift to the employer the burden of proving good faith as a defense. Fogel, at 456. The classic case invoking such a duty of good faith would be the discharge of a thirty-year employee six months before a pension vests, or the dismissal of an employee for spurning the affections of a coworker. Id. The majority of jurisdictions that have addressed the covenant have unequivocally rejected it. Id. We need not decide whether this doctrine should be recognized in Iowa. The facts in this case do not compel its consideration. Id. Frank was terminated due to the belief he had violated

a company policy. There was clear evidence of negligence by Wal-Mart, but as the trial court found, insufficient evidence of a failure to deal in good faith. We affirm the trial court on this issue.

We reverse and remand for a new trial with instructions to the trial court to take action consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

All judges concur except Donielson and Sackett, JJ., who dissent.

DONIELSON, P.J. (dissenting)

I dissent. I would not find the policies in the Wal-Mart handbook created an employment contract. Sufficient evidence did not exist for submission of this claim to the jury.

Sackett, J., joins this dissent.