IN THE COURT OF APPEALS OF IOWA

No. 5-478 / 94-1452

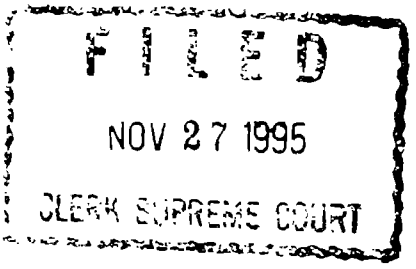
DONALD DELISI,

Plaintiff-Appellant,

vs.

IOWA BANKERS ASSOCIATION,

Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Donald Delisi appeals the district court's order granting defendant's motion for summary judgment in this fraudulent misrepresentation action. **AFFIRMED.**

Garry D. Woodward, Des Moines, for appellant.

Patricia A. Shoff and Sharon K. Malheiro of Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., Cady, J., and McCartney, S.J.*

* Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, J.

Donald Delisi appeals the district court's grant of a motion for summary judgment on his claim of fraudulent misrepresentation. We affirm the district court's decision.

Delisi began working for the Iowa Banker's Association (IBA) in September 1990 as an at-will employee in the printing shop. At the time of Delisi's employment, IBA had a prohibitive policy on sexual harassment which could result in termination of employment. Delisi personally received a copy of this policy in his IBA employee handbook, and the policy was posted on IBA's bulletin board.

IBA learned members of Delisi's department, including Delisi and his supervisor, had posted sexually explicit cartoons in the work area and used sexually explicit and vulgar language. After an investigation by IBA, Delisi admitted to drawing cartoons as well as using sexually explicit language. IBA held a workshop session on their sexual harassment policy, and warned its employees conduct in violation of the sexual harassment policy would result in a termination of employment.

IBA later hired a female employee, Shanel Alshouse, to work in the printing shop. During her employment, Delisi continued to engage in conduct which violated the sexual harassment policy, including drawing and circulating sexually explicit cartoons and business cards as well as using profane and abusive language directed

towards Alshouse. Alshouse quit her employment with IBA and filed a sexual harassment complaint with the Equal Employment Opportunity Commission.

IBA investigated Alshouse's complaint and discovered Delisi and his supervisor continued their sexually harassing conduct, despite the earlier warnings. In December 1991, IBA terminated Delisi and his supervisor's employment because they had violated the company's sexual harassment policy.

Delisi brought an action against IBA contending it fraudulently represented to him he could engage sexually harassing conduct without suffering any danger to his employment, since the hostile work environment had existed prior to his employment and his supervisors encouraged the behavior with laughter and by their silent consent. He further argued IBA, aware of the hostile environment in the printing shop, hired Delisi and his supervisor to act as "fall guys" or "scapegoats" in the event a sexual harassment complaint was brought against the IBA, enabling the association to avoid or limit its liability by terminating their employment. He also contends IBA fraudulently failed to disclose information to him concerning Alshouse's prior sexual harassment claim against her former employer.

IBA filed a motion for summary judgment. It argued Delisi could not prove a claim for fraudulent misrepresentation since the employee handbook expressly prohibited sexual harassment in the workplace, and he continued his harassment after the association told him it violated the sexual harassment policy. The district court

granted the motion for summary judgment, noting IBA had never represented sexually harassing behavior was acceptable to Delisi.

I. Standard of Review

We review the district court's grant of summary judgment for corrections of errors at law. Iowa R. App. 4; *Hernandez v. Farmers Ins. Co.*, 460 N.W.2d 842, 843 (Iowa 1990). Our task is to determine whether genuine issues of material fact existed and whether the district court correctly applied the law. *Hagen v. Texaco Refining & Marketing, Inc.*, 526 N.W.2d 531, 534 (Iowa 1995). The record is viewed in the light most favorable to the party opposing summary judgment. *Met-Coil Systems Corp. v. Columbia Casualty Co.*, 524 N.W.2d 650, 654 (Iowa 1994). If reasonable minds could draw different inferences and conclusions from the undisputed facts, summary judgment is improper. *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984).

A party must raise more than mere conclusions or conclusory allegations in resisting a summary judgment motion. *Schulte v. Mauer*, 219 N.W.2d 496, 500 (Iowa 1974). A "genuine" issue of fact requires a showing "a reasonable jury could return a verdict for the nonmoving party." *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988) *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed.2d 202, 211-12 (1986).

II. Supporting Affidavits

Delisi first argues the district court erred by considering certain affidavits and attachments to the motion for summary judgment which contained inadmissible evidence. He contends the affidavit of Jeanie McDonald was improperly considered by the court because it did not specifically indicate her statements were based upon personal knowledge. He further argues the other attachments should not have been considered since they would have been inadmissible as evidence at trial.

The record for the purpose of summary judgment adjudication includes the pleadings, depositions, affidavits, and any exhibits.[1] *Schaefer v. Cerro Gordo County Abstract Co.*, 525 N.W.2d 844, 846 (Iowa 1994). Affidavits must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Iowa R. Civ. P. 237.

In his resistance to the motion for summary judgment, Delisi conceded the affidavit of Jeanie McDonald could be properly admitted and failed to challenge her lack of personal knowledge. Generally, issues not presented to the trial court may

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[1] IBA moved to supplement the appellate appendix with additional affidavits and exhibits attached to a reply brief to the motion for summary judgment and to tax costs of the supplemental appendix to Delisi. We deny the motion to supplement the appendix since the affidavits and attachments were never filed with the court and are not a part of the appellate record. *See* Iowa R. App. P. 15(a) (trial briefs shall not be included in the appendix); Iowa R. Civ. P. 82(d) & (e) We also deny the motion to tax costs of the supplemental appendix to Delisi

not be raised for the first time on appeal. *Conner v. State*, 362 N.W.2d 449, 457 (Iowa 1985). Moreover, we will assume as fact an unstated finding necessary to support the trial court's judgment if no motion under rule 179(b) was made or when the issue was not raised. *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983).

Delisi cannot now challenge McDonald's affidavit based upon the lack of personal knowledge. Furthermore, a fair reading of the affidavit reveals McDonald was personally familiar with the stated facts. *See Wilson v. Boy Scouts of America*, 784 F. Supp. 1422, 1424, (E.D. Mo. 1991) *aff'd* 989 F.2d 953 (8th Cir. 1993). We, like the district court, can properly consider McDonald's testimony that the IBA sexual harassment policy was posted on the bulletin board and published in the employee handbook.

Delisi also failed to contest the affidavit of JoAnn Bailey Boldt which stated in the summer of 1991, during her employment in IBA's human resources division, she received complaints concerning the print shop. She also stated in August of 1991, she conducted a workshop session addressing sexual harassment issues and IBA's sexual harassment policy with IBA's support staff. We similarly consider this affidavit.

In his resistance to summary judgment, Delisi presented his own affidavit which stated IBA's sexual harassment policy as set forth in the handbook "requires there be verbal or physical conduct of a sexual nature and one of the following conditions exists: . . . (3) creating an intimidating, hostile or offensive work

environment." Delisi himself admits in his affidavit he was aware of IBA's sexual harassment policy, which was communicated to him through IBA's handbook.

We find these three affidavits provide sufficient information to show IBA's entitlement to summary judgment for both fraudulent misrepresentation and fraudulent nondisclosure. Since these affidavits sufficiently illustrate no genuine issue of material fact exists for Delisi's claims and IBA is entitled to judgment as a matter of law, we need not address the admissibility of the other attachments to IBA's motion for summary judgment.

III. Fraudulent Misrepresentation

Delisi claims the district court erred in concluding "IBA never represented to Plaintiff that his conduct was correct. . . . [and] Plaintiff's claim of fraudulent misrepresentation is without merit." He claims a genuine issue of material fact existed as to whether IBA through its laughter and failure to verbally tell Delisi to stop his sexually explicit jokes and cartoons, falsely represented to Delisi his conduct was condoned by the association and would not result in and loss of employment.

A party resisting a substantiated motion for summary judgment may not rest on its pleadings alone, but "must set forth specific facts which constitute competent evidence showing a prima facie claim." *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989).

> Involved here is the basic purpose of summary judgment procedure. Every trial court has on its docket some pleaded claims and defenses which are actually without substance and exist only on paper.

> To obviate the labor and expense of trial to expose those empty vessels, summary judgment procedure was conceived. By proper motion, a party can compel his adversary to come forth with specific facts which constitute competent evidence showing a prima facie claim or defense. Paper cases and defenses can thus be weeded out to make way for litigation which does have something to it.
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> The language of our rule on summary judgments is very strong. Rule 237(e) Rules of Civil Procedure. . . . When the motion itself is substantiated, the opposing party cannot simply rely upon his pleadings, for the pleadings are the very instruments that the procedure is designed to pierce: "an adverse party may not rest upon the mere allegations or denials of his pleading". Neither can the opposing party assert only generalities in resistance: "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." (Emphasis added.)

Gruener v. City of Cedar Falls, 189 N.W.2d 577, 580 (Iowa 1971); *accord Iowa Civil Rights Comm'n v. Massey-Ferguson*, Inc., 207 N.W.2d 5, 8 (Iowa 1973).

IBA has proven the absence of a genuine issue at trial through its supporting affidavits. The evidence presented indicates Delisi was aware of the sexual harassment policy and the possibility of termination, the policy was communicated to him through the company handbook, postings, and a special workshop session. We find IBA has substantiated its defense that no fraudulent representations were made concerning the sexual harassment policy to Delisi.

In order to resist the substantiated motion for summary judgment, Delisi must show a prima facie case a material misrepresentation was knowingly made by IBA with the intent to induce Delisi to act or refrain from acting, and Delisi justifiably relied on the representation to his detriment. *See Hoefer v. Wisc. Education Ass'n*

Ins. Trust, 470 N.W.2d 336, 340 (Iowa 1991). The underlying misrepresentation may emanate from words as well as conduct, and even silence may amount to fraud in some instances. *See Keiffer v. Linton*, 396 S.E.2d 13, 15 (Ga. App. 1990).

Delisi claims workers laughed at the jokes and did not tell him to stop his behavior. We find no reasonable jury could find these actions rose to the level of a representation to Delisi he would not lose his job if he continued to conduct himself in violation of the sexual harassment policy. We also find no reasonable jury could find this "representation" was made knowingly by IBA with the intent to induce Delisi to continue his behavior. As such, no "genuine" issue of material fact exists concerning the fraudulent misrepresentation claim.

Delisi presented no facts from which a reasonable inference could be drawn that IBA represented to him that his conduct was acceptable. IBA's handbook, postings, and workshops concerning their sexual harassment policy gave a clear message to Delisi this type of behavior was not acceptable to the association. The laughter of IBA employees does not show a fraudulent representation was made to Delisi which would contradict and supersede the sexually harassment policy communicated to Delisi on several occasions. Delisi's contentions are merely paper claims, unsubstantiated by any evidence in the record.

Furthermore, Delisi's claims of a conspiracy by IBA to hire himself as a "fall guy" for potential sexual harassment claims are mere conclusory allegations unsupported by any evidence. We agree with the district court that no genuine issue

remains for trial and IBA is entitled to summary judgment as a matter of law with regards to the fraudulent misrepresentation.

IV. Fraudulent Nondisclosure

Delisi further claimed the district court erred in granting summary judgment to IBA concerning the fraudulent nondisclosure claim. He contends the district court erred when it held IBA was entitled to summary judgment based on the conclusion the association had no duty to inform Delisi of a lawsuit filed by a co-worker against the co-worker's previous employer.

Fraudulent misrepresentation may arise from the failure to disclose material facts. *Anderson v. Boeke*, 491 N.W.2d 182, 188 (Iowa App. 1992). In order to prevail in his claim for fraudulent nondisclosure, however, Delisi must prove IBA failed to disclose material facts related to a material matter known by association, and IBA had a legal duty to communicate the information to Delisi and his co-workers. *Irons v. Community State Bank*, 461 N.W.2d 849, 852 (Iowa 1990).

Delisi, in his resistance to summary judgment offered no factual or legal proof circumstances existed to give rise to a duty to disclose. Instead, he merely argued IBA should have warned Delisi and his co-workers "the person hired, in following a preexisting patter, was likely to file charges of sexual harassment against Plaintiff." Delisi gave no rationale for why IBA had a duty to warn its employees of a co-worker's previous claims of sexual harassment at her previous employment, but merely offered legal-conclusions unsubstantiated by the record. *See* Iowa R. Civ. P.

237(c); *Byker v. Rice*, 360 N.W.2d 572, 574 (Iowa App. 1984) (party resisting summary judgment cannot, in his or her resistance, rely solely upon legal conclusions to show there is a genuine issue of material fact).

We reject the notion an employer has a duty to warn an employee that another employee has previously filed a sexual harassment claim. The Iowa Civil Rights Act and the federal Civil Rights Act prohibit an employer from retaliating against any person for lawfully filing a civil rights complaint. *See* Iowa Code § 216.11(2) (1993); 42 U.S.C. 2000(e)(3)(a). The duty Delisi asks us to impose would contradict this legislation. Moreover, we are unable to find such a duty from any other source or legal principle.

We find the claims of fraudulent misrepresentation and nondisclosure are not supported by the facts, or any reasonable inferences from the facts. The trial court properly avoided the labor and expense of trial by granting summary judgment in IBA's favor. We affirm the trial court.

AFFIRMED.