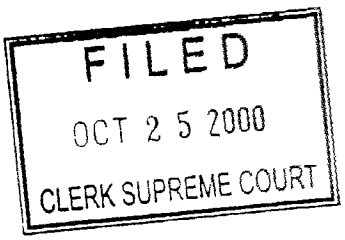
IN THE COURT OF APPEALS OF IOWA

No.0-528 / 99-1366
Filed October 25, 2000

SAMIR SHAMS,
Plaintiff-Appellant,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,
Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, James W. Brown, Judge.

Plaintiff appeals from the summary judgment entered in favor of defendant on plaintiff's action for wrongful termination. Plaintiff contends the court erred by failing to address in its ruling the portion of his claim based on disability discrimination. **AFFIRMED.**

Kenneth J. Weiland Jr. of Weiland Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Gordon E. Allen, Deputy Attorney General, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Plaintiff-appellant, Samir Shams, appeals a district court order granting summary judgment to his employer, defendant-appellee, Iowa Department of Revenue and Finance. Shams sued claiming defendant violated the Iowa Civil Rights Act, Iowa Code ch. 216 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, by discriminating against him on the basis of his nationality and disability. Shams contends the district court improperly granted summary judgment without considering his disability claim. We affirm.

We review a summary judgment ruling for correction of errors of law. *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* The moving party has the burden to show the nonexistence of a material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). We will review the record before the district court to determine whether an issue of material fact exists, and if not, whether the district court properly applied the law. *Shriver*, 567 N.W.2d at 400. The record includes the pleadings, motion for summary judgment, resistance, affidavits, and exhibits. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993). The facts are reviewed in the light most favorable to the nonmoving party. *Shriver*, 567 N.W.2d at 400. A factual dispute precludes summary judgment only when the dispute is over facts that would affect the outcome of the suit. *Id.*

The nonmoving party may not simply rest on its pleading and allegations once a motion for summary judgment is filed. *Estate of Oswald v. Dubuque County*, 511 N.W.2d 637, 639 (Iowa App. 1993).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleading, but the 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 the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

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

Shams failed to submit a resistance to defendant's motion for summary judgment. A failure to file a resistance to a motion for summary judgment, as provided by Iowa Rule of Civil Procedure 237(e), is fatal only if the movant has sustained its burden of proof. *In re Eickman's Estate*, 291 N.W.2d 308, 312 (Iowa 1980); *Ferris v. Anderson*, 255 N.W.2d 135, 137 (Iowa 1997); *American Telephone & Telegraph Co. v. Dubuque Communications Corp.*, 231 N.W.2d 12, 14-15 (Iowa 1975). Opposing affidavits are not required, but the party who does not file affidavits in response takes the risk of standing on the record established by the moving party. *Eickman's Estate*, 291 N.W.2d at 312; *Mead v. Lane*, 203 N.W.2d 305, 306 (Iowa 1972); *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 154 (Iowa 1976); *American Telephone & Telegraph Co.*, 231 N.W.2d at 14. Our review is thus limited to whether the movants carried their burden of proof. *Eickman's Estate*, 291 N.W.2d at 312.

On December 11, 1996 Shams requested leave under the Family Medical Leave Act (FMLA) to visit his mother in Egypt who he claimed was seriously ill. *See* 29 U.S.C. § 2612(a)(1)(d) (1996). On December 27, 1996 Shams met with

his supervisor and they both signed a request required by the Act for Shams to receive a leave. Shams requested leave from December 31, 1996 through March 4, 1997. The Act also required Shams to provide medical certification as to his mother's condition from a physician as soon as practicable. See 29 C.R.F. 825, 305(b). Shams was provided a Certification of Health Care Provider form to be filled out by his mother's doctor. In addition to the form he was given a self-addressed, stamped envelope for the form to be returned to defendant. Also on December 27, 1996 Shams was sent a letter explaining the Certification of Health Care Provider form needed to be filled out by Shams' mother's doctor and returned.

On February 20, 1997 a first class registered letter went to Shams telling him he was to have returned the Certification of Health Care Provider form by January 15, 1997, and he had not done so, and it must be returned before March 4, 1997 when he was to return to work. He was further told without the form his absence would be classified as an unauthorized leave without pay.

Shams did not return to work on March 4th. On March 7, 1997 another letter was sent to Shams' last known address telling him he had been absent from work without approval for three consecutive days, and if he did not report within two days he would be considered to have voluntarily terminated his employment. On March 11, 1997 Shams left a voicemail message at defendant office saying he had injured his back and was unable to travel. Additionally, on March 11, 1997 defendant received a cable from Shams dated February 26, 1997, stating he had hurt his back and was under medical care in Egypt.

On March 20, 1997 Shams was terminated for absence without approval for three consecutive workdays. On May 2, 1997 defendant's human resources department explained to Shams he had not qualified for FMLA because he failed to complete the Certification of Health Care Provider as required by the FMLA.

Shams filed a complaint with the Iowa Civil Rights Commission, which found defendant provided a legitimate, nondiscriminatory explanation for terminating Shams. Shams then filed a petition against defendant in district court making claims under the Iowa Civil Rights Act, Iowa Code ch. 216 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Shams specifically alleged defendant unlawfully discriminated against him on the basis of nationality and disability.

Defendant filed a motion for summary judgment alleging they had set forth a nondiscriminatory reason of Shams' voluntary termination. Defendant advanced Shams was terminated because he failed to provide defendant with the medical information necessary to establish his FMLA leave to care for his mother and he failed to return to work after three days of consecutive absence after his leave expired.

Shams made only an oral resistance to the motion. The resistance was not reported and the only information available as to the resistance is found in the district court's ruling. The district court dismissed his petition in ruling on the motion for summary judgment. In doing so the district court found there was nothing in the record to show Shams' termination was the result of his nationality, religion or any disability. The court found he violated the FMLA and the

reasonable conditions for continued employment with defendant and this resulted in his termination.

Shams contends the district court erred in dismissing the petition because it only ruled upon the national origin claim in the petition and never made a determination as to whether he was disabled or whether defendant knew about his alleged disability before discharging him. The defendant contends Shams failed to establish a prima facie case of discriminatory treatment. We agree.

To establish a prima facie case of discrimination for an existing employee/employer relationship, the plaintiff must show by a preponderance of the evidence that: (1) he belongs to a protected group; (2) he was qualified to retain the job; (3) he was terminated; and (4) it is more likely than not the termination was based on an impermissible consideration, in our case national origin and/or disability. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 231 (Iowa 1995).

Shams has failed to set forth a prima facie case of discrimination. He did not show there was any question of material fact as to whether his termination was based upon his national origin or his alleged back injury. Shams was voluntarily terminated because he failed to return to work and did not return the necessary forms required for leave under the FMLA. The defendant successfully established a nondiscriminatory reason for termination of Shams' employment. Shams failed to rebut defendant's nondiscriminatory reason for his termination. In viewing the evidence in the light most favorable to Shams, a reasonable jury could not infer defendant terminated Shams based upon his national origin or alleged disability. There existed no genuine issue of material fact and therefore,

as a matter of law, summary judgment was appropriate. We affirm the district court ruling granting defendant summary judgment.

AFFIRMED.