IN THE COURT OF APPEALS OF IOWA

No. 6-668 / 05-1225
Filed December 13, 2006

CYNTHIA TOFFLEMIRE,
Plaintiff-Appellant,

vs.

STATE OF IOWA, BYRON ORTON, and GAIL SHERIDAN-LUCHT, In Her Individual and Official Capacities,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Plaintiff appeals from the district court's summary judgment ruling dismissing her claims for intentional interference with contractual relations, wrongful termination, and defamation. **AFFIRMED.**

Matthew W. Cunningham of Cunningham Law Offices, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Julie A. Burger, Assistant Attorney General, for appellees.

Heard by Sackett, C.J., and Huitink and Zimmer, JJ.

ZIMMER, J.

Plaintiff Cynthia Tofflemire, an attorney formerly employed by Iowa Workforce Development (IWD), appeals from the district court's ruling that granted the summary judgment motion of defendants State of Iowa, Byron Orton, and Gail Sheridan-Lucht, and dismissed Tofflemire's claims for intentional interference with contractual relations, wrongful termination, and defamation. We affirm the district court.

I. Background Facts and Proceedings.

Prior to hearing on the defendants' summary judgment motion, Tofflemire's license to practice law was suspended by the supreme court. *See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Tofflemire*, 689 N.W.2d 83, 95 (Iowa 2004). At the defendants' request, the district court took judicial notice of the findings in the disciplinary proceeding. The undisputed facts, as shown by those findings and the remaining record, are as follows.[1]

Tofflemire was employed by IWD as an Attorney II. She also performed, with IWD's consent, indigent criminal defense contract work for the State Public Defender (SPD). In June 2000 Byron Orton, Commissioner of Labor and Tofflemire's supervisor, became concerned that Tofflemire's work for the SPD

[1] Tofflemire's license was suspended, in part, because the supreme court determined her misuse of IWD's sick leave policy—a key issue in this case—was "egregious enough to constitute illegal conduct involving moral turpitude." *Id.* at 92. While Tofflemire denied the accuracy of the supreme court's findings, she neither contested the district court's ability to take judicial notice of them nor set forth any disputed facts to refute their accuracy. Although Tofflemire refers us to the allegations in her petition, a party resisting summary judgment may not simply rely on the pleadings, but must "set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). Moreover, as we will subsequently discuss, to the extent Tofflemire objected to the preclusive effect of the prior findings, that objection was without merit. Accordingly, for the purposes of this appeal, we accept the findings in *Tofflemire* as undisputed facts.

was negatively impacting her performance at IWD. In December 2000 the Iowa Department of Revenue and Finance informed Orton that during 2000 Tofflemire had earned $97,438 for her indigent defense contract work for the SPD, over $38,000 more than the annual salary for her full-time position with IWD.

Orton began an investigation, enlisting the help of Thomas Becker, director of the SPD office. Orton compared Tofflemire's IWD payment records—hours submitted to justify her forty-hour-per-week work requirement and amount of sick leave taken—with the billing records Tofflemire had submitted to the SPD. The records revealed that between January 1 and September 15, 2000, Tofflemire had taken sick leave while claiming to do contract work for the SPD on twenty-six occasions, and had billed substantial hours of work to the SPD on days she claimed she had also worked an eight-or-ten-hour day for IWD. On some of these days, the amount of hours she claimed to have worked for IWD and the SPD exceeded twenty-four hours. Tofflemire had also performed 6.7 hours of work for the SPD on a day she had taken funeral leave from IWD.

On January 9, 2001, Orton met with Tofflemire to discuss his findings. Tofflemire asserted the above-noted inconsistencies were due to billing errors. Orton suspended Tofflemire with pay pending completion of the investigation. He again met with Tofflemire on January 12, 2001. During that meeting, Tofflemire asserted the hours billed to the SPD the day she took funeral leave from IWD had been completed after she returned from a family funeral in South

Dakota.[2] Orton was not satisfied with Tofflemire's explanations and terminated her employment that same day.

> The termination letter stated Tofflemire was being discharged because
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> you abused sick leave . . . by performing indigent legal defense work for which you received payment from the State of Iowa while utilizing paid sick leave, and because you gave less than honest and forthright answers during the course of our investigation.

It further stated Tofflemire's actions were in violation of departmental rules regarding abuse of sick leave, deliberate falsification of records related to work activities, and lying during an investigation. A short time later, Becker terminated Tofflemire's contract with the SPD because of his concerns that she had submitted inaccurate billing itemizations and fee claims.

In January 2003 Tofflemire filed a petition against the State, IWD, and Orton, as well as fellow IWD employee Sheridan-Lucht in both her individual and official capacities. Tofflemire alleged (1) her employment had been wrongfully terminated in violation of public policy for refusal to commit perjury, (2) the defendants intentionally interfered with and caused the termination of her SPD contract, and (3) Sheridan-Lucht, acting in her official capacity, had made disparaging and derogatory statements about Tofflemire's professional life that constituted defamation per se and per quod.[3] Tofflemire did not file a claim with the State Appeal Board until February 7, 2003.

The defendants moved to dismiss Tofflemire's tort claims on several grounds. The district court rejected the defendants' assertion that the court

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[2] Tofflemire later admitted that she did not attend a funeral that day.

[3] An additional claim, alleging a violation of Iowa Code section 22.7(11) (2003), was dismissed by the district court and is not at issue on appeal.

lacked subject matter jurisdiction due to Tofflemire's failure to exhaust her administrative remedies prior to filing suit. It did, however, dismiss IWD as a defendant, and the intentional interference and defamation claims against the State. It declined to dismiss either the wrongful termination claim or the intentional interference and defamation claims to the extent they stated a claim against Orton and Sheridan-Lucht for acts outside the scope of their employment.

The defendants moved for summary judgment, seeking dismissal of the remaining claims. The motion came before the district court in June 2005. By the time of hearing, Tofflemire's State Appeal Board claim had been denied. The supreme court had also suspended her license to practice law, finding her misuse of sick leave was "egregious enough to constitute illegal conduct involving moral turpitude." *Tofflemire,* 689 N.W.2d at 92.

Although the district court declined to revisit the question of subject matter jurisdiction, it did grant the summary judgment motion and dismiss the remaining claims. The court dismissed the intentional interference with contractual relations claim after determining the record contained no facts to support a conclusion Orton was acting outside the scope of his employment when he committed the alleged interference. The court dismissed the wrongful termination claim on the basis the disciplinary opinion established Tofflemire's abuse of sick leave, and thus provided a lawful ground for termination of her employment. Finally, although the court determined there was a question of fact as to whether Orton and Sheridan-Lucht were acting within the scope of the their employment when they made the allegedly defamatory statements, it dismissed the defamation

claims because it determined Orton and Sheridan-Lucht were entitled to a qualified privilege for the alleged statements and had established a substantial truth defense.

Tofflemire appeals. She asserts the record contains disputed issues of material fact sufficient to send the intentional interference claim to the jury, the findings of the disciplinary opinion were not entitled to preclusive effect, and Orton and Sheridan-Lucht did not demonstrate either entitlement to qualified privilege or the existence of a substantial truth defense. The defendants reassert their contention that the district court lacked subject matter jurisdiction.

II. Scope and Standards of Review.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996). We may uphold the ruling on any ground raised before the district court, even if that ground was not a basis for the court's decision. *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

Where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Iowa R. Civ. P. 1.981(3); *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996). The court reviews pleadings, depositions, interrogatory answers, admissions, and affidavits in the light most favorable to the party opposing the motion for summary judgment. *Bearshield v. John Morrell & Co*., 570 N.W.2d 915, 917 (Iowa 1997); *City of West Branch*, 546 N.W.2d at 600. However, a party resisting summary judgment may not simply rely upon the pleadings, but 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. 1.981(5).

III. Discussion.

We begin by considering the preclusive effect of the supreme court's fact findings in the disciplinary opinion. In order for the defendants to successively invoke issue preclusion in this matter,

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Fischer v. City of Sioux City, 654 N.W.2d 544, 546-47 (Iowa 2002).

Tofflemire's claim that these elements have not been shown is premised on her categorization of the "issue" in each matter: an alleged ethical violation in the disciplinary proceeding and the alleged wrongful termination of her employment in the present tort action. She contends, not incorrectly, that the question of whether her employment was terminated in violation of public policy for refusal to commit perjury was not raised and litigated in, material and relevant to the disposition of, or necessary and essential to the resulting judgment in the disciplinary proceeding. This analysis is flawed, however, because it looks to the *claims* in the two proceedings instead of the underlying factual *issue* common to both—whether Tofflemire abused IWD's sick leave policy.

When the issue is properly cast, there can be no doubt this common, identical issue was raised and litigated in, material and relevant to the disposition of, and necessary and essential to the resulting judgment in the disciplinary proceeding. The elements of issue preclusion have been met. Tofflemire

nevertheless contends additional considerations prevent application of the doctrine in this particular case. For example, she asserts she did not have adequate discovery opportunities in the disciplinary proceeding, because any attempt to obtain evidence of her wrongful termination would have been denied.

A new determination of an issue may be warranted "by differences in the quality or extensiveness of the procedures followed in the two courts . . . ." Restatement (Second) of Judgments § 28, at 273 (1982). We are not persuaded such an exception should be made in this case, however. Significantly, despite the purported presence of additional procedural opportunities in the tort action, Tofflemire did not present any facts to support her allegation that she was terminated for refusing to commit perjury. We have considered the exceptions to issue preclusion urged by Tofflemire, *see id*. at 273-74, and find none of them applicable to this matter. We accordingly conclude Tofflemire is precluded from relitigating the issue of whether she abused IWD's sick leave policy. This determination, when viewed in light of the remaining summary judgment record, is fatal to Tofflemire's wrongful termination claim.

To establish wrongful discharge Tofflemire must show (1) she engaged in a protected activity, (2) she was discharged from her employment, and (3) a causal connection between the two. *Teachout v. Forest City Cmty. Sch. Dist*., 584 N.W.2d 296, 299 (Iowa 1998). Her participation in the protected activity must be "a determining factor" in the termination decision; mere proof of protected conduct followed by termination is insufficient. *Weinzetl v. Ruan Single Source Transp. Co*., 587 N.W.2d 809, 811 (Iowa Ct. App. 1998).

Here, while Tofflemire alleged she was discharged for refusing to commit perjury, she presented no facts that would support a determination this alleged refusal occurred, much less a finding that such a refusal was a determining factor in her termination.[4] Rather, the record demonstrates that Tofflemire was lawfully discharged for an abuse of IWD's sick leave policy. The district court did not err in dismissing Tofflemire's wrongful termination claim.

We accordingly turn to Tofflemire's claims of intentional interference with contractual relations and defamation. Orton and Sheridan-Lucht have immunity from such claims to the extent they are based on acts within the scope of their office or employment. *See* Iowa Code §§ 669.2(3)(b), .14(4), .23. Significantly, Tofflemire's defamation claims are based solely upon statements Sheridan-Lucht allegedly made while "acting in her official capacity." Thus, her petition does not state a cognizable defamation claim against either individual defendant.

Moreover, even if we assume, as alleged by Tofflemire, that Sheridan-Lucht did discuss Tofflemire's work and work practices with Becker, we must disagree with the district court's determination that the summary judgment record contained a disputed issue of material fact on the question of whether she was acting within the scope of her official capacity when the allegedly defamatory statements were made. The district court did not specify where such facts could

[4] On appeal, Tofflemire asserts her termination was in violation of public policy because it was somehow connected with her right to seek unemployment benefits. Not only is this connection absent from the summary judgment record, termination on this ground was never pled as a basis of her wrongful termination claim. *See Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995) (requiring an issue to be presented to and passed upon by the district court before it may be raised and adjudicated on appeal).

be found, and no such facts were provided by Tofflemire in resistance to the summary judgment motion.

Our review of the summary judgment record reveals no facts from which it can be reasonably inferred that Sheridan-Lucht was acting outside of the scope of her employment when the allegedly defamatory statements were made. The same must be said about Tofflemire's claim for intentional interference with contractual relations, which is based solely upon alleged communications between Orton, Sheridan-Lucht, and Becker. The only evidence on the issue indicates the communications occurred within the context of Orton's investigation, an investigation Tofflemire concedes he had a right to conduct.

Tofflemire urges us to find a disputed issue of material fact by relying on the allegations in her petition and speculating as to the possible motives of Orton and Sheridan-Lucht. However, as we have previously noted, as the party resisting summary judgment Tofflemire cannot simply rely on the pleadings or other unsupported allegations and denials, but must set forth specific facts showing there is a genuine issue for trial. Iowa R. Civ. P. 1.981(5). Here, Tofflemire has failed to set forth any facts in support of her contention that Orton or Sheridan-Lucht were acting outside of their official capacity when the statements allegedly occurred. Accordingly, the claims were properly dismissed.

In light of the foregoing conclusions, we find it unnecessary to address the remaining contentions in this matter, including the defendants' assertion that the district court lacked subject matter jurisdiction and Tofflemire's assertion that Orton and Sheridan-Lucht were not entitled to a qualified privilege and did not establish a substantial truth defense. Because Tofflemire did not present a

disputed issue of material of fact sufficient to send her claims to the jury, and the defendants were entitled to summary judgment as a matter of law, we uphold the dismissal of Tofflemire's petition.

AFFIRMED.