IN THE COURT OF APPEALS OF IOWA

No. 0-803 / 10-0464
Filed March 7, 2011

JOSEPH P. TEKIPPE,
Plaintiff-Appellant,

vs.

STATE OF IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Allamakee County, John Bauercamper, Judge.

A former state employee appeals a summary judgment ruling in favor of the State on his wrongful discharge claims. **REVERSED AND REMANDED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, L.L.P., Charles City, for appellant.

Thomas J. Miller, Attorney General, and Tyler M. Smith, Assistant Attorney General, for appellee State.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

Joseph Tekippe, a former employee of a state prison, appeals a summary judgment ruling in favor of the State on his wrongful discharge claims.

I. Background Facts and Proceedings

Tekippe worked as an officer at the Luster Heights work camp. One of his immediate supervisors was Major Harry Wood. Tekippe suspected that Wood was stealing cigarettes from the commissary. He conveyed his suspicions to union officials and others.

An employee of another prison facility was charged with investigating the theft allegation. He reported that the manner in which commissary inventory and receipts were maintained made it impossible to establish a theft. A state audit, conducted at the request of the director of the Department of Corrections, similarly found that "the current inventory balance cannot be calculated and the accuracy of the balance cannot be determined." The auditor recommended that Luster Heights employees "develop procedures to assist in monitoring commissary inventory balances by documenting all commissary purchases and deductions."

Major Wood left his employment at Luster Heights in early 2002. Tekippe left his employment at Luster Heights two years later claiming he was constructively discharged.

Tekippe sued the State, alleging he was wrongfully terminated in violation of public policy and in violation of Iowa's whistleblower statute. *See* Iowa Code § 70A.28(2) (2007). The State moved for summary judgment on both counts. The district court granted the motion after adopting the State's statement of

material facts. The court concluded (1) "[t]he undisputed evidence fails to show any recognized public policy in the State of Iowa for which a violation may be shown" and (2) "the plaintiff did not communicate any protected information to a party covered by the whistleblower statute at any relevant time."

On appeal, Tekippe contends the district court erred in adopting the State's statement of material facts and in rejecting his claims as a matter of law. The State responds that we may affirm the district court based on the absence of a causal connection between the claimed theft disclosure and Tekippe's separation from his employment.

II. Adoption of State's Statement of Facts

As a preliminary matter, Tekippe contends the district court's adoption of the State's statement of material facts contravenes the principles governing summary judgment. *See generally* Iowa Rs. Civ. P. 1.981(3) (authorizing summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"), 1.981(8) (stating "there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried"). Tekippe is correct that, in determining whether summary judgment is appropriate, the court is to look at the facts in a light most favorable to the nonmoving party. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). "The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Id.* at 717–18.

These principles were not followed. However, reversal is not mandated if there exists no dispute of material fact that would preclude resolution of the issues as a matter of law. *See Fees v. Mut. Fire & Auto Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992) ("An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law.").

As noted, Tekippe pled two counts.[1] In the first, he alleged he was constructively discharged "because he reported that illegal activity of a co-worker whom administration did not want punished." He asserted his claimed constructive discharge was "in violation of the public policy of this State." In his second count, Tekippe alleged he "was discharged from his position as a public employee for disclosing information to other public officials or law enforcement agencies of the violation of the law or rule of a supervisor," in contravention of Iowa Code section 70A.28(5)(a).

With respect to the first count, Tekippe concedes that "[t]here is likely no factual dispute related to the issue of whether a public policy exists to protect reports of misuse or theft of State funds." *See Lloyd v. Drake Univ.*, 686 N.W.2d 225, 229 (Iowa 2004) ("[W]hether a public policy exists against discharge presents a question of law for the court to resolve."); *see also Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 282 (Iowa 2000) (same). Based on this concession, we conclude the district court's adoption of the State's statement of material facts does not required reversal of the first count. What remains to be decided with respect to Tekippe's first count is whether he articulated a public

[1] His original petition alleged only one count but he amended the petition to add a second count.

policy exception to the at-will employment doctrine which would support his common law retaliatory discharge claim and whether, if he did, the State is nonetheless entitled to summary judgment based on an inability to prove causation. These issues will be addressed in separate sections.

We turn to the effect of adopting the State's statement of material facts on the second count. Tekippe asserts "there are material facts in dispute regarding the whistleblower claim with respect to whom reports were made, what actions, if any by the State were retaliatory, and who was responsible for the retaliation." We agree.

Iowa Code section 70A.28(2) identifies several individuals to whom an employee may report violations of the statute, including public officials and law enforcement agencies. Accordingly, a preliminary determination must be made as to who the employee notified of the claimed violation.

The State's statement of facts adopted by the district court noted the names of some people to whom Tekippe complained. Tekippe countered with an affidavit identifying additional individuals to whom he complained, including the acting director of the Department of Corrections and the County Sheriff. At a minimum, the director and sheriff, as a public official and law enforcement agent respectively, would be authorized reportees under the whistleblower statute. *See Hegeman v. Kelch*, 666 N.W.2d 531, 534 (Iowa 2003) (listing elements in determining whether a public employee is a public official); *see also* Iowa Code § 801.4(11) (defining "peace officers" and "law enforcement officers" in the context of the criminal procedure chapter of the Iowa Code). For that reason, Tekippe generated a disputed issue of material fact as to whether he complained

to individuals covered by the statute. As this fact issue must be resolved to determine whether Tekippe can maintain a statutory whistleblower claim, summary judgment would be precluded unless we accept the State's argument that causation cannot be established as a matter of law.

Turning to the merits, we will begin with whether Tekippe articulated a clear public policy to support the common law retaliatory discharge claim raised in Count I of his petition. We will then proceed to the question of whether causation fails as a matter of law on both of the counts.

III. Common Law Retaliatory Discharge Claim—Public Policy Exception to At-Will Employment Doctrine—Count I

In Iowa, an employment relationship is generally presumed to be at-will. *See Fitzgerald*, 613 N.W.2d at 280. There are exceptions for discharges that violate public policy. *Lloyd*, 686 N.W.2d at 228. Tekippe contends this State recognizes a public policy protecting an employee from discharge where the employee reports a theft by another public employee.

Iowa courts have been careful to limit the public policy exception "to cases involving only a well-recognized and clear public policy." *Fitzgerald*, 613 N.W.2d at 282. Our highest court has primarily found such policies in statutes. *Id.* at 283.

While Tekippe cites a number of statutes, the most pertinent is the whistleblower law on which he predicates his second count. Notably, the Iowa Supreme Court cited a prior version of this statute as an example of a law that "articulate[d] public policy by specifically prohibiting employers from discharging employees for engaging in certain conduct or other circumstances." *Id.* at 283 &

n.3. Although this language is dicta, it signals a view that, at least the older version of the whistleblower statute enunciated a clear public policy.

The current version of the statute states in pertinent part:

> **A person shall not discharge an employee from** or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, **a position in a state employment system administered by, or subject to approval of, a state agency as a reprisal** for a failure by that employee to inform the person that the employee made a disclosure of information permitted by this section, or **for a disclosure of any information by that employee to a member or employee of the general assembly, a disclosure of information to the office of citizens' aide, or a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.**

Iowa Code § 70A.28(2) (emphasis added). We find little basis for reaching a different view with respect to this version of the statute. Like the older version discussed in *Fitzgerald*, this version unambiguously prohibits the discharge of an employee for reporting what the employee reasonably believes to be a violation of law. Accordingly, we conclude there is a clear public policy against discharging a public employee who reports specified types of misconduct by another public employee. Contrary to the State's assertion, we further conclude this public policy will support a common law retaliatory discharge claim notwithstanding the existence of a wrongful discharge remedy within the statute. *See George v. D.W. Zinser Co.*, 762 N.W.2d 865, 871–72 (Iowa 2009) (recognizing common law wrongful discharged claim based on reporting of IOSHA violations notwithstanding administrative remedy within IOSHA statute).

Tekippe's common law retaliatory discharge claim, as well as his statutory claim, may nonetheless fail as a matter of law if he cannot establish a causal connection between his theft disclosure and his separation from employment. We proceed to that question.

IV. Causation

The State contends that, in the end, Tekippe cannot establish the causation element of either his common law claim or his statutory claim. Although this issue was raised by the State, the district court did not decide it. We may nevertheless address it, as we are permitted to affirm the district court on any ground that was raised below. *Lloyd*, 686 N.W.2d at 229 ("[O]ur rules of error preservation permit us to affirm the district court ruling on any ground urged in the trial court . . . .").

A. Common Law Claim—Count I. "The causation standard in a common law retaliatory discharge case is high." *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 301 (Iowa 1998). "The employee's engagement in protected conduct must be the *determinative* factor in the employer's decision to take adverse action against the employee." *Id.*

The State contends "TeKippe offers no reliable evidence that his accusation caused his discharge." The State elaborates as follows:

> Tekippe fails to offer any evidence answering such basic questions as [a] how Wood, who left the camp two years before Tekippe quit, could have possibly forced Tekippe's alleged constructive discharge, [b] why Denlinger would have "forced" Tekippe to quit when he was neither implicated by Tekippe's accusation nor in the position to fire Tekippe at the time of Tekippe's resignation (Dennis DeBerg was in that position at the time), or [c] what possible motivation Warden Ault would have had behind Tekippe's resignation when Ault was also not implicated by Tekippe's

> accusations, had no direct contact with Tekippe at Luster Heights, and actually initiated a thorough investigation of the matter that twice concluded Tekippe's accusations could not be proved. Tekippe's failure to provide any plausible causation theory is rightly fatal to his claim.

The State's use of the term "reliable evidence" and its reliance on factual weaknesses in Tekippe's claim are giveaways that the causation issue cannot be decided as a matter of law. But we need not simply rely on the State's prose. In resisting the State's summary judgment motion, Tekippe pointed to a series of disciplinary reports issued against him following his complaints about possible thefts by Wood. He noted the frivolous nature of some of the reports such as a report imposing discipline for having his shirt untucked. He also claimed the acting director of the department of corrections told him that a disciplinary transfer from Luster Heights to the Anamosa State Penitentiary would be reversed if he dropped his complaints. Finally, he cited a supervisor's affidavit attesting that the warden was intent on firing him. These statements were sufficient to generate an issue of material fact on the causation element of Tekippe's common law wrongful discharge claim.

In reaching this conclusion, we have considered the State's contention that the temporal relationship between the claimed protected conduct and Tekippe's discharge is so attenuated that the causation element is defeated as a matter of law. *See Butts v. Univ. of Osteopathic Med. & Health Scis.*, 561 N.W.2d 838, 842 (Iowa Ct. App. 1997) (affirming grant of summary judgment to employer where confrontation on the protected activity occurred more than a year prior to termination), *overruled on other grounds by Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296 (Iowa 1998). While this significant lapse of

time may ultimately be dispositive, Tekippe has a right to present to the fact-finder evidence of ongoing disciplinary actions during that time period and evidence that these actions were taken in reprisal for his allegations against Wood.

B. Statutory Whistleblower Claim—Count II. The State contends that even if Tekippe made a report to a "public official" or law enforcement agency, his statutory whistleblower claim fails as a matter of law "because there is no plausible evidence of causation between the accusation and his resignation."

We begin by noting that the causation standard cited by the State, whether the protected conduct is the determinative factor in the employer's firing decision, applies to common law retaliatory discharge claims. *See Teachout*, 584 N.W.2d at 301. Tekippe's second count raises a statutory cause of action. The pertinent causation language under the statute is whether the adverse employment action was taken "as a reprisal for" engaging in the protected activity. *See* Iowa Code § 70A.28(2); *accord id.* § 70A.28(6) (stating that section 70A.28(2) may be enforced through an administrative action if certain conditions are met and if negative employment action was taken "as a result of" disclosure of authorized information); *cf.* 5 U.S.C. § 1221(e)(1) (authorizing corrective action under federal whistleblower statute if protected disclosure "was a contributing factor in the personnel action"). We need not construe this causation language because, whatever the standard, the causation question as framed here raises disputed issues of material fact that cannot be resolved on summary judgment. *See Donnell v. City of Cedar Rapids*,

437 F. Supp. 2d 904, 927 (N.D. Iowa 2006) ("Causation, however, is generally a question for the jury.").

Again, the State's assertion that there is no "*plausible* evidence" is a giveaway that fact questions exist. But, in addition, the assertions contained in Tekippe's resistance to the summary judgment motion are sufficient to generate a fact issue on causation. Additionally, as with the common law count, we believe the attenuated temporal connection between the disclosure and Tekippe's separation from his employment is a factor for consideration by the fact-finder rather than a fact that precludes a finding of causation as a matter of law. *But see Miller v. Hersman*, 2011 WL 11491 (D.D.C. 2011) (noting temporal proximity of protected activities and removal was "not sufficiently close to give rise to an inference of causation" and, absent other evidence of causation, statutory retaliation claim failed as a matter of law); *see also* 5 U.S. § 1221(e)(1)(B) (noting causation may be proved by circumstantial evidence that "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action").

V. Disposition

Genuine issues of material fact precluded summary judgment for the State. Accordingly, we reverse and remand for further proceedings.

REVERSED AND REMANDED.