IN THE COURT OF APPEALS OF IOWA

No. 8-462 / 07-1695
Filed October 29, 2008

DAWN ARISPE,
Plaintiff-Appellant,

vs.

WALGREENS CO., RON FRANK, and ERIC RODE, Individually and in their Corporate Capacities,
Defendants-Appellees.

Appeal from the Iowa District Court for Cerro Gordo County, Stephen P. Carroll, Judge.

Plaintiff appeals from a district court ruling granting summary judgment in favor of defendants in her wrongful discharge action. **AFFIRMED.**

Andrew L. LeGrant and Mark D. Sherinian of Sherinian & Walker Law Firm, West Des Moines, for appellant.

Mark McCormick, Michael R. Reck, and Margaret C. Callahan of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Dawn Arispe appeals from a district court ruling granting summary judgment in favor of Walgreens Co., Ron Frank, and Eric Rode in her wrongful discharge action. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The summary judgment record reveals the following undisputed facts: Arispe began working for Walgreens in 1998. She became an executive assistant manager of a Walgreens store in Mason City in 2002 and continued in that position until September 29, 2005, when she was terminated.

On May 14, 2005, Jessica Mathre, one of the employees Arispe supervised, processed photographs for an adult female customer that contained images of a girl between the ages of ten and twelve years old. In some of the photographs, the girl was nude from the waist up. In other photographs, she was wearing lingerie. The girl was posed in a suggestive fashion with provocative facial expressions. Mathre felt the photographs were "questionable" due to the young girl's nudity and "sexual facial expression." She accordingly informed her immediate supervisor working that day, assistant store manager Danielle Zeien, about the photographs. Zeien likewise felt the photographs were "questionable, poor taste content."

Pursuant to Walgreens' "Photo Content/Suspected Pornography Policy,"[1] Zeien confiscated the troubling photographs, returned the negatives to the

[1] This policy provides in part that in situations involving suspected child pornography:

> Mere nudity of children may be unlawful, particularly when such factors as the setting and even facial expressions suggest sexual conduct. **Store**

customer, and contacted the store's loss prevention supervisor, Eric Rode. Because it was a Saturday, she was unable to speak directly to Rode and had to leave him a message. She also contacted Arispe and the store's manager, Ron Frank.

Arispe viewed the photographs the next day. Like Mathre and Zeien, Arispe was concerned by the content of the photographs, which she felt depicted a minor engaged in a sex act. She stated that in one of the photographs, the girl was "holding her breasts and leaning down towards the nipple." Arispe discussed the photographs with Frank when he came into work that Monday. After viewing the photographs, Frank called Rode. He told Rode "my employees noticed some pictures over the weekend that they showed me on Monday, and it was a topless girl." Due to a misunderstanding between Rode and Frank, the only copies of the photographs were destroyed before Rode was able to view them.

Believing the photographs, which had been ripped into pieces, "needed to be looked at," Zeien and another employee retrieved them from the garbage later that day. Zeien gave the pieces of the photographs that she salvaged to Arispe,

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> **Management must contact the District Loss Prevention Supervisor and District Manager regarding this type of film order.**
>
> . . . .
>
> **Procedure:**
>
> - Contact your Store Manager or EXA [executive assistant manager].
> - If the Store Manager or EXA views the photos and determines that they may contain child pornography, Loss Prevention is to be contacted immediately.
>
> . . . .
>
> - Loss Prevention will make the final determination whether or not to contact local police. **Under no circumstances should anyone other than Loss Prevention contact the police.**

who Zeien felt was "extremely upset at the situation" and "concerned for the welfare of the girl" depicted in them. Arispe reported the incident to a police officer after her work shift at Walgreens ended on May 16, 2005. She gave the officer the destroyed photographs and the name and address of the customer who had brought them to the store.

The police investigated the incident based on their belief that the photographs constituted child pornography and violated Iowa Code section 728.12 (2005), sexual exploitation of a minor. Arispe was instructed to contact the police should the same customer return to the store. An investigator with the police department also contacted Rode because she was concerned with his decision to not report the photographs to law enforcement.

Several months later, in early September 2005, the same customer returned to the store to develop the same set of photographs. Arispe was notified, and she immediately contacted the police, who then confiscated the photographs. Shortly after the second incident, Rode instructed Frank to review Walgreens' photo content policy with his store's employees. Arispe expressed disagreement with the policy and refused to sign it as requested.

On September 29, 2005, Rode met with Arispe. He asked Arispe to sign the photo content policy, which she again refused to do. She stated Rode told her "that if I did not sign this statement, that I would be terminated." Rode's written notes regarding the meeting indicated he advised her "that she was expected to abide by the company's policies as a condition of her employment." Rode also questioned Arispe about money Walgreens had given her in March 2005 to renew her pharmacy technician registration. He had discovered before

the meeting that her registration had not been renewed. After the meeting ended, Arispe was informed that she was being fired for misappropriating company funds.

Arispe sued Walgreens, Frank, and Rode for wrongful discharge, alleging she was terminated from her employment at Walgreens for reporting suspected child pornography to the police and for refusing to refrain from doing so in the future in violation of public policy. The defendants filed a motion for summary judgment, which the district court granted. The court found that Arispe had not established the existence of a well recognized and clearly defined public policy protecting her conduct that was jeopardized by her dismissal. The court further found she had not established a causal connection between her alleged protected conduct and discharge.

Arispe appeals. She claims Iowa Code chapter 232 and section 728.14 articulate well recognized and clearly defined public policies protecting her activity in this case. She additionally claims those public policies were undermined by her discharge. Finally, she claims there are genuine issues of material fact as to whether her conduct in reporting the photographs and refusing to refrain from doing so in the future was causally connected to her discharge.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact and the moving party is

entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). We review the record in the light most favorable to the party opposing the motion. *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 228 (Iowa 2004). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. No fact question arises if the only conflict concerns legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

III. Discussion.

The parties agree that Arispe was an employee-at-will. Therefore, she could be fired "for any lawful reason or for no reason at all." *Lloyd*, 686 N.W.2d at 228. However, a discharge is not lawful when it violates public policy. *Id.* When a protected activity has been recognized through the implementation of an underlying public policy that would be undermined if an employee were discharged from employment for engaging in that activity, an action for the tort of wrongful discharge exists. *Davis v. Horton*, 661 N.W.2d 533, 535 (Iowa 2003). An employee asserting a wrongful-discharge claim based on a violation of public policy must establish:

> (1) The existence of a clearly defined public policy that protects an activity.
>
> (2) This policy would be undermined by a discharge from employment.
>
> (3) The challenged discharge was the result of participating in the protected activity.
>
> (4) There was lack of other justification for the termination.

Id.; *see also Lloyd*, 686 N.W.2d at 228.[2] To withstand summary judgment, a plaintiff must not only satisfy the court on the public policy and jeopardy elements, but also offer adequate evidence from which a lack of justification for termination can be inferred. *Fitzgerald*, 613 N.W.2d at 282.

A. Iowa Code section 728.14.

Arispe initially claims Iowa Code section 728.14 articulates a clearly defined public policy in favor of reporting child pornography. She argues the "affirmative duties imposed on citizens [by that statute]—coupled with significant criminal penalties for non-compliance—reflect a clearly-articulated and well-defined public policy of preventing, reporting, and punishing child pornography." We conclude otherwise.

"Whether a public policy against discharge exists is a question of law appropriately decided on a motion for summary judgment." *Lloyd*, 686 N.W.2d at 228. In determining the existence of a public policy, we must "proceed cautiously" and "only extend such recognition to those policies that are well recognized and clearly defined." *Davis*, 661 N.W.2d at 536. Our supreme

[2] Arispe urges our court to "clarify the analytical framework for wrongful discharge cases." She asserts that the correct framework to be applied is articulated in *Teachout v. Forest City Community School District*, 584 N.W.2d 296, 299 (Iowa 1998), in which our supreme court identified the following three elements of a wrongful-discharge claim: "(1) engagement in a protected activity; (2) adverse employment action; and (3) a causal connection between the two." However, the court in *Fitzgerald* expounded on this three-element approach and identified the four elements detailed above as a "helpful guide . . . parallel[ing] the approach we have followed in addressing the tort on a case-by-case method." 613 N.W.2d at 282 n.2. Contrary to Arispe's assertions, the court did not merely reference these four elements in *Fitzgerald*; it actually applied them to the facts of that case. *See id.* at 284, 287, 289 (analyzing the jeopardy and absence-of-justification elements). Furthermore, our supreme court specifically adopted the four-element framework in *Davis*, 661 N.W.2d at 535, and *Lloyd*, 686 N.W.2d at 228. We thus find no need for clarification is needed, especially in light of the court's recognition in *Fitzgerald* that the four-element approach is harmonious with our courts' treatment of the tort in prior cases.

court's insistence on using only clear and well recognized public policies to serve as a basis for wrongful discharge actions "emphasizes our continuing general adherence to the at-will employment doctrine and the need to carefully balance the competing interests of the employee, employer, and society." *Fitzgerald*, 613 N.W.2d at 283. Only such policies are weighty enough to overcome the employer's interest in operating its business in the manner it sees fit, which our courts have long and vigorously protected. *Lloyd*, 686 N.W.2d at 229. We are thus reluctant to search too far beyond our legislative pronouncements and constitution "in order to find public policy to support an action." *Fitzgerald*, 613 N.W.2d at 283 (stating our courts have primarily looked only to our statutes and state constitution as sources of public policy).

Some statutes articulate public policy by specifically prohibiting employers from discharging employees engaging in certain conduct or other circumstances, while others define a clear public policy and imply a prohibition against termination from employment to avoid undermining that policy. *Id.*; *see also Borschel v. City of Perry*, 512 N.W.2d 565, 567-68 (Iowa 1994). Chapter 232, for example, both defines a clear public policy and prohibits an employer from interfering with an employee that is engaging in conduct furthering that policy. *See* Iowa Code §§ 232.67; .70; *see also Teachout*, 584 N.W.2d at 300-01 (recognizing chapter 232 articulates a clearly defined public policy in favor of reporting suspected child abuse). Section 728.14, on the other hand, does neither.

Pursuant to section 728.14(1),

> [a] commercial film and photographic print processor who has knowledge of or observes, within the scope of the processor's professional capacity or employment, a . . . photograph . . . which depicts a minor whom the processor knows or reasonably should know to be under the age of eighteen, engaged in a prohibited sexual act or in the simulation of a prohibited sexual act, shall report the depiction to the county attorney immediately or as soon as possible . . . .

There is no statement in that section, or elsewhere in chapter 728, expressing a clear public policy in favor of reporting suspected child pornography. *Cf.* Iowa Code § 96.2; *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994) (determining section 96.2 defines a clear and well recognized public policy in favor of permitting employees to seek unemployment benefits). Nor is there any specific or implied prohibition in section 728.14 against terminating employees who report depictions of child pornography. *Cf.* Iowa Code § 85.18; *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560-61 (Iowa 1988) (finding the protection afforded to employees in section 85.18 expresses a clearly defined public policy in favor of permitting employees to seek workers' compensation benefits).

Indeed, as Walgreens notes, section 728.14(1) provides that a processor shall not report photographs in certain instances. *See* Iowa Code § 728.14(1) (stating a processor shall not report depictions involving "mere nudity" of a minor). That section further provides that a processor is not required to review all photographs delivered to the processor in the course of his or her employment to search for prohibited depictions of minors. *Id.* Moreover, unlike chapter 232, section 728.14 contains no language encouraging reporting by individuals other than commercial film and photographic print processors. *Cf.* Iowa Code § 232.69(2) ("Any other person who believes that a child has been abused may

make a report . . . ."). It also does not provide any civil or criminal immunity for good faith reports, which is a feature of chapter 232 that the court in *Teachout*, 584 N.W.2d at 300-01, found significant in determining the existence of a well recognized and defined public policy. *See* Iowa Code § 232.73.

For the foregoing reasons, we conclude section 728.14 does not articulate a well recognized and clearly defined public policy in favor of reporting suspected child pornography, as laudable and socially desirable as that activity may be. *See Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 686 (Iowa 2001) (stating we must avoid declaring public policy with generalized concepts of fairness and justice). We must next determine whether, as Arispe alternatively claims, the clearly defined public policy expressed in chapter 232 and recognized in *Teachout* applies to protect her conduct in this case.

B. Iowa Code chapter 232.

As we intimated in the preceding discussion, our supreme court in *Teachout* determined chapter 232 articulates a well recognized and clearly defined public policy of Iowa mandating protection for an employee who in good faith makes a report of suspected child abuse. 584 N.W.2d at 300-01. The district court in this case determined that public policy did not apply to protect Arispe's conduct because she did not engage in conduct covered by the policy. We agree.

"Once a clear public policy is identified, the employee must further show the dismissal for engaging in the conduct jeopardizes or undermines the public policy." *Fitzgerald*, 613 N.W.2d at 283-84. This element, which is capable of resolution on summary judgment, requires the employee to show the conduct

engaged in not only furthered the public policy, but dismissal would have a chilling effect on the public policy by discouraging the conduct. *Id.* at 282, 284. The conduct of the employee must be tied to the public policy, so that the dismissal will undermine that policy. *Id.* Thus, an "essential element of proof to establish the discharge undermines or jeopardizes the public policy necessarily involves a showing the dismissed employee engaged in conduct covered by the public policy." *Id.* at 287. This element ensures an employer's personnel management decisions will not be challenged unless the public policy is genuinely threatened. *Id.* at 283-84 (emphasizing the need to carefully balance the competing interests of the employee, employer, and society).

We do not believe Arispe's reports of suspected child pornography and refusal to sign Walgreens' photo content policy is conduct covered by the public policy in chapter 232 in favor of reporting suspected cases of child abuse. According to Arispe, the photographs that she reported to the police on two separate occasions depicted a young girl between the ages of ten and twelve posing by herself in various states of undress. When Arispe reported these photographs to the police, she did not express her concern with the photographs as one of child abuse; instead, she repeatedly stated she was troubled by the photographs because she believed they depicted a "young girl engaged in a sex act." The police investigated the incident based on their belief that the photographs constituted child pornography and violated Iowa Code section 728.12, which prohibits the sexual exploitation of a minor. Neither Arispe nor the police made a report of suspected child abuse to the Iowa Department of Human Services pursuant to chapter 232.

We reject Arispe's assertion that "since sexual exploitation of a minor constitutes 'child abuse' under Iowa law, an employee engages in protected conduct by reporting, or intending to report, sexual exploitation of a minor." Section 728.12(1) prohibits any individual from engaging in the sexual exploitation of a minor by causing the minor to engage in a prohibited sexual act intending the act to be photographed, filmed, or otherwise preserved. Section 232.68(2)(c), on the other hand, provides that the sexual exploitation of a minor as defined in section 728.12(1) constitutes child abuse only when the exploitation occurs "as a result of the acts or omissions of the person responsible for the care of the child." There is no indication from the record presented here that the woman who brought the photographs into Walgreens to be developed was the caretaker of the young girl depicted in them.

As the district court noted, the child abuse reporting provisions of chapter 232 are "aimed at the detection of child abuse in various forms suffered by a child as a result of the acts or omissions of a person responsible for the care of that child." To that end, section 232.67 provides that

> [i]t is the purpose and policy of [this statute] to provide the greatest possible protection to victims or potential victims of abuse through encouraging the increased reporting of suspected cases of abuse, ensuring the thorough and prompt assessment of these reports, and *providing rehabilitative services, where appropriate and whenever possible to abused children and their families which will stabilize the home environment so that the family can remain intact without further danger to the child.*

(Emphasis added.) *See also* Iowa Code § 232.68(2) (defining child abuse in all its forms to require acts or omissions by "a person responsible for the care of the child"). At no time before her dismissal from Walgreens did Arispe allege or

express a concern that the young girl in the photographs was being sexually exploited or abused by a caretaker. Instead, her conduct in reporting the photographs to the police and refusal to abide by Walgreens' photo content policy related solely to her concern that the photographs constituted child pornography. We therefore reject Arispe's claim that she was engaging in conduct protected by the public policy set forth in chapter 232. Based on our holding in this regard, we need not and do not address her final claim that the district court erred in determining her conduct was not causally connected to her discharge.

IV. Conclusion.

We conclude section 728.14 does not articulate a well recognized and clearly defined public policy in favor of reporting suspected child pornography. We further conclude the public policy expressed in chapter 232 encouraging the reporting of suspected child abuse was not undermined by Arispe's dismissal. The judgment of the district court granting summary judgment in favor of the defendants is accordingly affirmed.

AFFIRMED.