IN THE COURT OF APPEALS OF IOWA

No. 8-937 / 08-0698
Filed December 17, 2008

NICHOLAS R. WILSON,
Plaintiff-Appellant,

vs.

CINTAS CORPORATION NO. 2, and
RYAN MILLS, Individually,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

An employee appeals from the district court's ruling granting summary judgment and dismissing his claims of intentional infliction of emotional distress and negligent retention. **AFFIRMED.**

Mark D. Sherinian and Melissa C. Hasso, West Des Moines, for appellant.

Justin E. LaVan, John Haraldson, and George Lamarca of LaMarca & Landry, P.C., Des Moines, for appellees.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Nick Wilson was hired to work in the Des Moines branch of Cintas on July 31, 2006. His job was to load and unload service trucks in the warehouse facility. While employed at Cintas, Wilson regularly worked with Ryan Mills, who was a driver for Cintas. Wilson estimated that he and Mills worked in the same area for five to ten minutes per day.

Wilson and Mills never got along. Wilson asserts that Mills verbally abused him and that his conduct escalated in September 2006. Wilson testified that by September, he had to withstand a "constant barrage of personal attacks, insults, and vile profanity" directed at him every day.[1] Specifically, Wilson asserts that Mills repeatedly called him a "lazy motherfucker," a "fat ass," a "fucking asshole," a "fat fuck," a "big fat lazy fuck," a "worthless piece of shit," and a "stupid motherfucker." Other employees testified that Wilson and Mills were mutually involved in bickering, arguing with, and swearing at one another.

Wilson reported Mills's conduct to his direct supervisor, Michael Sorensen, at the end of September. Wilson again reported Mills's yelling and screaming to Sorensen and Chris Jackson, the office manager and local human resources representative, in the second week of October. However, Wilson and Mills continued to fight, and toward the end of October, Wilson was written up for yelling at Mills. Wilson approached Sorensen again in mid-November, at the beginning of December, and at the end of December complaining about Mills.

[1] Mills admits that there was some sort of verbal altercation "towards the end, pretty much every day."

Wilson testified that Sorensen made very little effort to resolve the situation, and one time even told him to "stop fucking with [Mills]."

On December 22, 2006, Mills was given a written warning for verbally harassing another office worker.[2] On December 28, 2006, after an altercation with Mills, Wilson called the Cintas Hotline, one of several resources employees were directed to use to report inappropriate behavior. Wilson testified that he called the hotline because Mills's conduct had been occurring for two and a half months and his local supervisors were not improving the situation. The day after Wilson called the hotline, Mills was terminated for verbally harassing Wilson. Cintas documented that Mills was terminated because it was his fourth occurrence of shouting inappropriate language and because he ignored instructions given to him to remain professional and refrain from using inappropriate language. After Mills's termination, Wilson had some difficulties with Mills's brother, Quentin, who was also a driver for Cintas.

On January 30, 2007, Wilson voluntarily left his employment with Cintas to pursue a career in the medical field. Despite his problems with Mills, he reported in his exit interview that Cintas exceeded his overall employment expectations and that it was one of his best job experiences.

Several months later, Wilson sought counseling for the emotional distress he claimed was caused by Mills's harassment. He stated that his "condition was aggravated by his frustration and feelings of helplessness from Cintas management's failure to prevent further harassment despite his repeated pleas."

[2] Mills had also been verbally warned for reckless driving on November 2, 2006.

Wilson was diagnosed with anxiety, depression, paranoia, and post-traumatic stress disorder.

On May 2, 2007, Wilson filed a petition alleging claims of negligent retention against Cintas, intentional infliction of emotional distress against Mills, Quentin Mills, and Sorensen, and vicarious liability against Cintas for the acts of Sorensen.[3] Wilson later indicated that he wanted to dismiss the claims against Sorensen and Quentin Mills. Cintas, Sorensen, and Quentin Mills moved for a summary judgment, which the district court granted. Wilson appeals, arguing that the district court erred in finding that: (1) there was no issue of material fact as to whether Mills's conduct was outrageous; and (2) harassment is not a wrongful act that can support a negligent retention claim.

II. Standard of Review

We review a district court ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.4; *Rathje v. Mercy Hosp*., 745 N.W.2d 443, 447 (Iowa 2008). Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Farmers Nat'l Bank of Winfield v. Winfield Implement Co., Ltd.*, 702 N.W.2d 465, 466 (Iowa 2005). We review to determine: (1) whether there is a genuine issue of material fact; and (2) whether the district court correctly applied the law. *Ratcliff v. Graether*, 697 N.W.2d 119, 123 (Iowa 2005). A fact issue is genuine if reasonable minds can disagree on how it should be resolved. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). We review the

[3] He later amended his petition to include claims of vicarious liability against Cintas for the acts of Mills and negligence against Cintas for failing to protect him from an alleged assault.

evidence in the light most favorable to Wilson, and the defendants have the burden of showing the nonexistence of a material fact. *Burbach v. Radon Analytical Labs., Inc.*, 652 N.W.2d 135, 136 (Iowa 2002).

III. Outrageous Conduct

Wilson argues on appeal that the district court erred in finding that Mills's conduct, as a matter of law, was not outrageous. To establish a prima facie case of intentional infliction of emotional distress, Wilson had the burden of proving outrageous conduct by Mills. *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 156 (Iowa 1996). "It is for the court to determine in the first instance whether the relevant conduct may reasonably be regarded as outrageous." *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 118 (Iowa 1984). In making its determination, the court is to consider the relationship between the parties, as characterization of conduct as outrageous may result from an abuse of position by one who has power over another. *Id.*

We have defined "outrageous conduct" as conduct that is "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 801 (Iowa 1984). Our supreme court has adopted a portion of the Restatement that "highlights the egregiousness required" to classify conduct as outrageous:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible

> bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.
>
> Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 198 (Iowa 1985) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d). Iowa case law establishes that proving "outrageous conduct" is not easy. Our supreme court has found that "outrageous" conduct must be "extremely egregious; mere insult, bad manners, or hurt feelings are insufficient." *Van Baale*, 550 N.W.2d at 156.

> The liability [for intentional infliction of emotional distress] clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.

McClinton v. Iowa Methodist Med. Ctr., 444 N.W.2d 511, 514 (Iowa Ct. App. 1989) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).

Wilson acknowledges that individual instances involving behavior similar to Mills's would likely be insufficient to support a finding of outrageous conduct. However, Wilson asks the court to find that the ongoing, repetitive nature of the conduct could elevate the conduct to a level of outrageousness that could support a claim for intentional infliction of emotional distress. We find that Wilson's case is distinguishable from the cases he cites in support of this contention, including the one case he cites that has binding authority, *Blong v.*

Snyder, 361 N.W.2d 312 (Iowa Ct. App. 1984)[4]. In *Blong*, the employee was having problems with his supervisor. *Id.* at 313–14. In contrast, Mills was Wilson's coworker and was not in a position of authority over Wilson. The relationship between the parties is a significant factor to consider, and Mills's lack of authority strengthens the defendants' claim that Mills's behavior was not outrageous. *Vinson*, 360 N.W.2d at 118. In addition, the supervisor's conduct in *Blong* was more outrageous and extensive than Mills's conduct.

We conclude that the record does not support a finding that Mills's behavior was outrageous. The evidence establishes that Mills and Wilson did not get along and both engaged in conduct that could be described as inappropriate. The verbal abuse that occurred, even on a daily basis, for five to ten minutes per day does not rise to the level of extreme egregiousness that we have required in the past. We decline to expand the current scope of case law to allow behavior between employees that is not considered outrageous to constitute outrageous behavior simply because it occurs on a regular basis. We agree with the district court's finding that Mills's conduct was "undoubtedly inconsiderate, unkind, and offensive, and may even be characterized as malicious, but it does not rise to the level of outrageousness as envisioned by our courts." Because Mills's conduct does not fit within our definition of outrageous,

[4] Blong was discharged and filed a grievance; after negotiations, he was reinstated. *Blong v. Snyder*, 361 N.W.2d 312, 314 (Iowa Ct. App. 1984). After he was reinstated, he was falsely "accused of stealing, wasting time, intentionally breaking his machine, intentionally producing inferior parts, violating fifteen company rules, and 'playing with himself' in the restroom" and was given extra work without receiving the proper tools to do the job and "was then berated, threatened, and disciplined for his inability to properly complete the task." *Id.* at 317.

we find that granting summary judgment on the claim of intentional infliction of emotional distress was correct.

IV. Negligent Retention

Wilson also argues that the district court erred in finding that harassment is not a "wrongful act" that can support a negligent retention claim. In order to establish a case of negligent retention, Wilson must prove that: (1) a Cintas employee committed an underlying tort or wrongful act that caused a compensable injury; and (2) Cintas's negligent retention of the employee caused the injury. *Kiesau v. Bantz*, 686 N.W.2d 164, 172 (Iowa 2004). Thus, Wilson must prove "a case within a case" and show that Mills's underlying wrongful act caused a compensable injury. *Id.* The district court properly found that Wilson failed to show that Mills's wrongful act of harassment caused a compensable injury.

The only injury that Wilson alleges is emotional harm. Thus, Wilson has the burden of proving that his emotional harm is a compensable injury in order to succeed on his claim of negligent retention. A thorough reading of *Clark v. Estate of Rice ex rel. Rice*, 653 N.W.2d 166 (Iowa 2002), reveals the court's intention to allow damages for emotional harm in two cases. First, "emotional distress can be a proper element of damages in a tort action" because "the emotional distress lies at the very core of the tort itself." *Clark*, 653 N.W.2d at 170. Second, emotional distress "can also be a proper element of damages when associated with physical injury." *Id.* Wilson does not allege that he sustained any physical injuries. He correctly states the law established in *Niblo v. Parr Mfg., Inc.*, 445 N.W.2d 351, 353-54 (Iowa 1989), that the general rule in

Iowa is that emotional distress damages are permitted for *torts* involving willful or unlawful conduct. "When the *tort* involves willful or unlawful conduct, rather than negligence, recovery of mental distress damages has been allowed despite a lack of injury in a variety of different factual situations." *Niblo*, 445 N.W.2d at 354 (emphasis added). Iowa case law thus requires an underlying tort, not merely wrongful conduct, to establish damages for emotional distress when no physical damage is present.

While Wilson argues that wrongful conduct, even if it is not a tort, is enough to establish damages, the Iowa cases that he cites in support of this contention involve a tort. *See Kiesau*, 686 N.W.2d at 169 (holding that summary judgment on the grounds that no physical injury was incurred was improper on claim of negligent hiring, supervision, or retention involving the underlying tort of defamation); *Niblo*, 445 N.W.2d at 357 (allowing damages for mental distress in a case involving the tort of wrongful discharge). In addition, the Restatement comment cited by Wilson enumerating causes of action for which emotional distress damages are allowed also includes only torts. RESTATEMENT (SECOND) OF TORTS § 905 cmt. c (allowing emotional damages in cases of battery, assault, false imprisonment, defamation, and malicious prosecution). Wilson does not cite any controlling authority for his contention that Mills's wrongful conduct, even if intentional, created a compensable injury unless that conduct is also a tort.

Wilson alleges that Mills's harassment, which was intentional conduct, supports his claim for emotional distress. "[V]iolation of a criminal statute gives rise to a civil cause of action only if such an action appears, by express terms or clear implication, to have been intended by the legislature." *Seeman v. Liberty*

Mut. Ins. Co., 322 N.W.2d 35, 38 (Iowa 1982). We agree with an earlier persuasive opinion by this court finding that it does not "appear 'by express terms or clear implication'" that the legislature intended that harassment in violation of Iowa Code section 708.7 give rise to a civil cause of action for harassment. *Davenport v. City of Corning*, No. 06-1156 (Iowa Ct. App. Oct. 24, 2007). Thus, harassment is not a tort, and Wilson, though he has alleged a wrongful act, alleges no underlying tort that would support his claim of emotional harm. Because Wilson has shown no physical injury or underlying tort, his emotional distress damages are not compensable. Accordingly, Wilson has shown no compensable injury as required to establish a case of negligent retention. We therefore affirm the district court's finding that summary judgment should be granted in favor of the defendants.

AFFIRMED.