IN THE COURT OF APPEALS OF IOWA

No. 6-523 / 05-0607
Filed December 13, 2006

ALLISON M. JENSEN,
Plaintiff-Appellant/Cross-Appellee,

vs.

PRIME TIME, LTD., d/b/a PRIME N' WINE, THOMAS G. BARLAS, JR., Individually and in his Official Capacity, and UNKNOWN SUCCESSOR CORPORATION,
Defendants-Appellees/Cross-Appellants.

THOMAS G. BARLAS, JR.
Counterclaimant-Appellee,

vs.

ALLISON M. JENSEN,
Defendant to Counterclaim-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan H. McKinley, Judge.

Plaintiff appeals, and defendants cross-appeal, from district court rulings in a civil matter. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Mark D. Sherinian and Jill M. Zwagerman, West Des Moines, for appellant.

Darrell J. Isaacson, Mason City, for appellee.

Heard by Huitink, P.J., Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

Allison Jensen filed a petition at law and jury demand, seeking damages for claims of sexual abuse perpetrated by Thomas G. "Tommy" Barlas, Jr. and pregnancy discrimination by her former employer, Prime Time, Ltd. d/b/a Prime N' Wine, a restaurant owned by Tommy Barlas. The defendants answered and filed counterclaims against Jensen.

A jury returned a verdict in favor of Jensen and awarded damages on both claims. The jury found Tommy Barlas did not prove his claims of slander or fraudulent misrepresentation and the defendants did not prove their defenses to the pregnancy discrimination claim of waiver and failure to mitigate damages. However, the district court, ruling on defendants' posttrial motions, concluded defendants had established a defense of equitable estoppel, and therefore Jensen was barred from recovering damages for her pregnancy discrimination claim.

Jensen appeals, arguing the district court erred in concluding the defendants properly asserted an equitable estoppel defense. The defendants cross-appeal, arguing (1) the district court erred in interpreting Iowa Code section 668.15 (2001) to exclude evidence of Jensen's past sexual behavior with Tommy Barlas and (2) if this court determines equitable estoppel does not bar Jensen's pregnancy discrimination claims, then the trial court erred in (a) not directing a verdict in favor of defendants on those claims and (b) not finding that Jensen's claims were waived as a matter of law. Upon review for correction of errors at

law, Iowa R. App. P. 6.4, we affirm in part, reverse in part, and remand with directions.

I. Background Facts

In 1997 Allison Jensen began working as a hostess at Prime N' Wine, a restaurant in Mason City owned by Barlas and his brother, George Barlas. After approximately six months, Jensen went to work at the Hanford Inn, a hotel owned by Barlas's mother. Jensen returned to the Prime N' Wine in the fall of 1999 as a hostess, bartender, and waitress.

A few days prior to July 17, 2000, Tommy Barlas asked Jensen if she wanted to go with him to Minneapolis, Minnesota. As Jensen understood it, the trip was for business purposes. She agreed, and the two left after Jensen's shift on the 17th. Barlas brought alcohol along, and the two drank on the way to Minneapolis. During the trip, Barlas offered Jensen a promotion to assistant manager at the Prime N' Wine and promised her a raise of $1.50 per hour. After a night of drinking and visiting strip clubs in Minneapolis, the two returned to Barlas's home,[1] where they engaged in sexual intercourse. According to Jensen, she was intoxicated at the time, and the sex was nonconsensual. Afterwards, Barlas drove Jensen home.

The following day, Jensen worked at the restaurant. Barlas told her she could no longer be the assistant manager after what had happened, but she would still get her raise.

On August 14, 2000, a pregnancy test confirmed Jensen was pregnant. Jensen told the nurse practitioner she had been sexually active without using

[1] Barlas's wife, Michelle, was out of town at the time.

birth control, and that there were two possible instances where she could have gotten pregnant, one time four weeks prior and another time seven or eight days before that. Jensen and her boyfriend, Gregg Wettleson, had had intercourse on July 9. Jensen requested an ultrasound to determine the date of conception. Following the August 15 ultrasound, Jensen was informed her conception date was "around the middle of July 2000." When she asked for further clarification, Jensen was told "it was virtually impossible" for conception to have occurred on the 9th.

On August 24, 2000, Jensen told Barlas she was pregnant and the date of conception was July 17. It was common knowledge among the restaurant staff, including Barlas, that Jensen was dating Wettleson, but Jensen did not tell Barlas she had had sex with Wettleson on July 9. When she suggested DNA testing, Barlas refused, indicating he "couldn't be linked to this baby in any way."

Barlas and Jensen agreed that Barlas would give her $10,000 to help with expenses.[2] The two discussed Jensen moving to Hawaii, where her sister lived, and giving the baby up for adoption. Barlas told Jensen that in order to avoid suspicion, she would have to put in her two weeks' notice at the restaurant. Her last day was scheduled for September 9, 2000. When Jensen later asked to move her last day back because of a horse show that brought in extra business to the restaurant, Barlas refused. Jensen then approached George Barlas about working at North Beach, another restaurant owned by the family. George Barlas was unaware of Jensen's pregnancy at the time. Jensen worked at North Beach without incident until the restaurant closed in October 2000.

[2] Tommy Barlas gave Jensen $9062 in early September.

By November 2000 Jensen had changed her mind about moving to Hawaii. When she approached George Barlas, who was then managing the Prime N' Wine, about returning to work, he told her she could not return to the restaurant under the circumstances. Michelle and Tommy Barlas and Jensen spoke on numerous occasions over the next several months, in an attempt to resolve the situation. In one meeting on November 17, the three discussed an agreement whereby Barlas would pay $15,000 into an escrow account for Jensen pending a positive DNA test. The three discussed keeping the matter quiet and Jensen moving out of town.

The baby was born in March 2001. On April 1, 2001, Tommy Barlas and Jensen met. By that time, Jensen had filed a civil rights complaint against Barlas and the restaurant. Jensen secretly tape recorded the conversation, which she had done on at least one prior occasion during meetings with Michelle and Tommy Barlas. Barlas mentioned dropping the civil rights complaint against him, and the two discussed the baby and DNA testing. No specific agreement was reached.

Barlas eventually submitted a blood sample for DNA testing, which showed Barlas was not the father. Later DNA testing showed Gregg Wettleson was the father of Jensen's baby. The aforementioned litigation ensued, and we must now address the issues raised on appeal.

II. Equitable Estoppel

As mentioned, following the jury verdict in Jensen's favor, the district court ruled that the defense of equitable estoppel barred Jensen's recovery on her

pregnancy discrimination claim. On appeal, Jensen contends the district court erred in applying the defense of equitable estoppel to her discrimination claims. We agree.

> The equity maxim of clean hands
>
> > expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies.

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1, 6 (Iowa 2002) (quoting 27A Am. Jur. 2d *Equity* § 126, at 605 (1996)). Here, the jury found in favor of Jensen on her pregnancy discrimination claim. Thus, the jury found defendants engaged in unlawful conduct. It necessarily follows that defendants do not have the "clean hands" necessary to assert equitable estoppel as a defense. *See Smith v. World Ins. Co.*, 38 F.3d 1456, 1462-63 (8th Cir. 1994) (holding that employer's equitable estoppel defense "is redundant and unnecessary . . . because the constructive discharge analysis essentially encompasses the equitable estoppel analysis"). Accordingly, the district court erred in applying the defense of equitable estoppel to bar Jensen from recovering on her pregnancy discrimination claim.

III. Motion for Directed Verdict

Because we have determined that equitable estoppel does not bar Jensen's pregnancy discrimination claim, we must address defendants' argument on cross-appeal that the district court erred in failing to direct a verdict in favor of defendants' on the pregnancy discrimination claim, and on their affirmative

defense of waiver. Our review is for correction of errors at law. *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006). In reviewing such rulings,

> [t]he evidence is considered in the light most favorable to the nonmoving party. If there is substantial evidence in the record to support each element of a claim, the motion for directed verdict must be overruled. Additionally, if reasonable minds could reach different conclusions based upon the evidence presented, the issue is properly submitted to the jury.

Wolbers v. The Finley Hosp., 673 N.W.2d 728, 734 (Iowa 2003) (citations omitted).

The jury was instructed that in order for Jensen to prove her pregnancy discrimination claim, she must prove by a preponderance of the evidence (1) defendant Prime Time, Ltd. discharged her on September 9, 2000, or failed to rehire her after September 9, 2000, and (2) her pregnancy was a motivating factor in the defendant's decision. The jury was further instructed that "'pregnancy was a motivating factor' in the defendant's decision if it was a consideration that moved the defendant towards the decision," but that Jensen "need not establish that her pregnancy was the exclusive or sole motivating factor in the defendant's decision."

As it related to defendants' waiver defense, the court instructed the jury as follows:

> Defendants claim that Allison Jensen waived any right to make the claims she has asserted in this lawsuit as a result of any of a series of agreements reached between Jensen and Barlas from August 2000 to April 2001. Waiver means that a person has voluntarily and intentionally given up a right or claim that was known to the person. However, waiver may also be shown by an affirmative act of the party, or it may be inferred from such conduct as warrants

> the conclusion that a waiver was intended. If a party voluntarily waives a known right, said waiver cannot be retracted unless the other party consents to it.

The key witnesses at trial, Jensen and Tommy Barlas, provided vastly different versions of what happened on July 17, 2000, and in the months that followed. According to Jensen, Barlas told her to put in her two weeks' notice after he found out she was pregnant. He refused to allow her to continue working after September 9, 2000, when she asked to do so. George Barlas later told Jensen she could not return to the Prime N' Wine under the circumstances. Barlas's version of "agreements" between the parties differed from conversations described by Jensen. In the April 2001 taped conversation between Barlas and Jensen, Barlas referred to agreements and asked Jensen to drop the complaint against him. However, Jensen's response was equivocal at best and focused primarily on the issues of paternity and DNA testing.

Viewing this and other evidence presented at trial in the light most favorable to Jensen, "regardless of whether it was contradicted," *see Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005) (citation omitted), and drawing every legitimate inference from the evidence in support of Jensen, we conclude substantial evidence exists to support each element of pregnancy discrimination claim. Similarly, we conclude "reasonable minds could reach different conclusions based upon the evidence presented" related to defendants' waiver defense. *Wolbers*, 673 N.W.2d at 734. Accordingly, the pregnancy discrimination claim and waiver defense were properly submitted to the jury. We affirm the district court's denial of defendants' motion for directed verdict.

IV. Iowa Code section 668.15

Iowa Code section 668.15 provides:

> 1. In a civil action alleging conduct which constitutes sexual abuse, . . . sexual assault, or sexual harassment, *a party seeking discovery of information concerning the plaintiff's sexual conduct with persons other than the person who committed the alleged act* of sexual abuse, . . . sexual assault, or sexual harassment, must establish specific facts showing good cause for that discovery and that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence.
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> 2. In an action against a person accused of sexual abuse, . . . sexual assault, or sexual harassment, by an alleged victim of the sexual abuse, sexual assault, or sexual harassment, for damages arising from an injury resulting from the alleged conduct, *evidence concerning the past sexual behavior of the alleged victim is not admissible.*

(Emphasis added.) Prior to trial, Jensen filed a motion in limine, seeking to exclude the introduction of evidence of Jensen's past sexual behavior, including an alleged December 1999 encounter between Tommy Barlas and Jensen. The court, citing section 668.15, granted the motion. When the issue arose during trial, the court continued to stand by its prior ruling, excluding the evidence.

In their cross-appeal, the defendants argue the district court erred in interpreting section 668.15 to exclude evidence of Jensen's past sexual behavior with Tommy Barlas. The defendants contend subsections (1) and (2) must be read together, which leads to the conclusion that the blanket prohibition to admissibility of any evidence of past sexual behavior of the victim in subsection (2) "must be limited to such conduct with persons other than the perpetrator."

Our primary purpose in statutory construction is to determine legislative intent. *State v. Iowa Dist. Ct.,* 630 N.W.2d 778, 781 (Iowa 2001). We determine

intent from the words used by the legislature. *Id.* When text of the statute is plain and its meaning clear, we are not permitted to search for meaning beyond its express terms. *State v. Tesch,* 704 N.W.2d 440, 451 (Iowa 2005). In addition, "'legislative intent is to be gleaned from the statute as a whole, not from a particular part only.'" *Iowa Dist. Ct.,* 630 N.W.2d at 781 (quoting *De More v. Dieters,* 334 N.W.2d 734, 737 (Iowa 1983)).

We conclude the district court correctly applied section 668.15 in excluding evidence of Jensen's alleged past sexual behavior with Barlas. Subsection (1) of section 668.15 refers solely to the *discovery* of information concerning the plaintiff's past sexual conduct with persons *other than* the person who committed the alleged act of sexual abuse. Subsection (2), however, refers solely to the introduction of evidence of the alleged victim's past sexual behavior *at trial*, and essentially provides a blanket prohibition against the introduction of such evidence. The plain language of the statute indicates the legislature's intent to distinguish between the discovery of information concerning past sexual conduct and the admission of such evidence at trail. We recognize the protection offered to plaintiffs by section 668.15(2) goes beyond that offered to victims in criminal cases. *See* Iowa R. Evid. 5.412 (allowing the admission of evidence of the victim's prior sexual behavior in limited situations). However, it is not within our province to search for meaning beyond the express terms of the statute. We must look to what the legislature said, not what it should or might have said. *Stroup v. Reno,* 530 N.W.2d 441, 443-44 (Iowa 1995). Accordingly, we affirm the district court on this issue.

V. Conclusion

We reverse the district court's posttrial ruling applying equitable estoppel to bar Jensen from recovering on her pregnancy discrimination claim and remand for entry of judgment on this claim. We affirm the district court as to all other issues raised by the parties on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

Beeghly, S.J., concurs; Vogel, J., concurs in part and dissents in part.

VOGEL, J. (concurring in part and dissenting in part)

I partially dissent. I would affirm the district court's ruling that the defense of equitable estoppel barred Jensen's recovery on her pregnancy discrimination claim. As the court concluded,

> [G]iven the facts of this case where a false statement of paternity proximately caused the defendants' actions which gave rise to pregnancy discrimination, plaintiff should not now be allowed to claim that the defendants are without an equitable remedy, nor should the plaintiff be allowed to use the pregnancy discrimination verdict as a basis for unclean hands.

Although Jensen claimed that she did not intentionally mislead Barlas but was just mistaken as to the conception date and paternity of her child, the record supports that her employment at Prime N' Wine did not end because she was pregnant, but because she misled Barlas into believing he was the father of an employee's child. Jensen's own actions in emphatically claiming Barlas was the father and failing to disclose the possibility of alternative paternity caused Barlas to react to these allegations. Because I agree with the district court's factual findings that the record establishes the requisite elements for equitable estoppel in this particularly unique pregnancy discrimination case, *see Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005), I would uphold the bar from Jensen recovering damages that occurred as a result of her own statements and actions.