IN THE COURT OF APPEALS OF IOWA

No. 6-630 / 05-1962
Filed September 7, 2006

CHAD M. CHEEK,
Plaintiff-Appellant,

vs.

ABC BEVERAGE MANUFACTURERS, INC.,
d/b/a AMERICAN BOTTLING,
and CHUCK DENGER,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Plaintiff appeals from a district court order that denied his motion to amend his petition and from a partial summary judgment ruling dismissing several of his claims. **AFFIRMED.**

John J. Gajdel, Urbandale, for appellant.

Scott J. Beattie of Peddicord, Wharton, Spencer & Hook, LLP, Des Moines, for appellees.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Plaintiff Chad Cheek appeals from a district court order that denied a motion to amend his petition and from a ruling that granted the partial summary judgment motion of defendants ABC Beverage Manufactures, Inc. d/b/a American Bottling (American) and Chuck Denger. Upon our review for the correction of errors at law, Iowa R. App. P. 6.4, we affirm the district court.

Cheek was an at-will employee of American. He was terminated after Denger, American's warehouse distribution manager, observed Cheek and a former employee, Steve Templeton, remove American product from the warehouse without paying for it or providing an invoice or other written record. Denger also filed a police report accusing Cheek of theft. An investigation by law enforcement led to the filing of a preliminary complaint by the investigating officer and an assistant county attorney. The State then filed a trial information charging Cheek with theft in the third degree. Denger and other American employees cooperated in the investigation and testified during Cheek's March 2004 criminal jury trial. Following trial the jury returned a verdict of not guilty.[1]

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[1] The underlying incident occurred during an overnight weekend shift. Denger, who had been surreptitiously videotaping employees as part of his investigation of some recent tool thefts, witnessed Templeton and Cheek load their respective vehicles with American product. He also observed Cheek smoking in a nondesignated area and working on his personal vehicle, both of which violated company policy. Cheek was summarily terminated the following Monday after he confirmed that neither he nor Templeton had an invoice for or paid for the product at the time it was taken and stated he was writing a check to pay for the product he had taken. According to Cheek and some other American employees, it was common practice for employees who worked on weekends to take product with them at the end of their shift without payment or written record, then pay the following Monday. Cheek also asserted his immediate supervisor, Edward Newman, had told him Templeton would be arriving that evening to pick up or purchase some product, and that he assumed Newman had pre-approved Templeton's actions. Newman, who was not at work that night, denied Cheek's assertion.

In June 2004 Cheek filed the present suit against American and Denger, alleging their actions in terminating his employment and reporting his alleged theft to police constituted "outrageous conduct," gross negligence, abuse of process, malicious prosecution, and wrongful termination; and further that American had withheld wages contrary to Iowa Code chapter 91A. Trial was set for October 31, 2005, with a pleadings deadline of September 2, 2005.

On September 1, 2005, the defendants filed a summary judgment motion that sought dismissal of all but the chapter 91A claim. Cheek resisted the motion. On September 20 Cheek sought leave to amend his petition to add a "false light" invasion of privacy claim. The defendants moved to dismiss the amended petition for failure to state a claim.

Following a joint hearing, the court granted the defendants' summary judgment motion and dismissed all but the chapter 91A claim. By separate order the court concluded Cheek's proposed amendment did state a claim upon which relief could be granted, but "on its own initiative" denied leave to amend the petition because the amendment "comes too late and would substantially change the issues for trial," and "[a]dding such a claim at such a late date would significantly prejudice the defendants in their preparation for trial." Shortly thereafter American offered to confess judgment on the chapter 91A claim. Cheek accepted the offer, and a judgment was entered against American.

Cheek appeals. He asserts the district court abused its discretion when it denied him leave to amend his petition. He further asserts the court erred in dismissing his wrongful termination, abuse of process, malicious prosecution, and intentional infliction of emotional distress claims on summary judgment.

***Motion to Amend*.** Under the circumstances present here, Cheek was required to obtain the district court's leave to amend his petition. Iowa R. Civ. P. 1.402(4). "Leave to amend . . . shall be freely given when justice so requires." *Id*. Although allowing amendments is the rule and denial is the exception, "an amendment is not permissible which will substantially change the issue" for trial. *Allison-Kesley Ag Ctr., Inc. v. Hildebrand*, 485 N.W.2d 841, 845 (Iowa 1992). The decision to deny amendment is one entrusted to the considerable discretion of the district court, and the court's decision will be reversed only upon a clear abuse of discretion. *See Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996).

In support of his assertion the district court abused its discretion in denying his motion to amend, Cheek points out that, while the defendants moved to dismiss the amendment for failure to state a claim, they did not actually resist the request to amend the petition. He reasons that, because the defendants never asserted the amendment substantially changed the issues or prejudiced the defense, there is no basis to support the district court's findings that it would in fact do so. While the lack of resistance is a factor for our consideration, it does not, as Cheek suggests, deprive the district court's decision of a factual basis.

A simple review of the record, including the original petition and proposed amendment, demonstrates that Cheek was seeking to introduce new issues, including previously unspecified damages, nearly three weeks after the close of pleadings and less than six weeks before trial. Under the circumstances, it was not unreasonable for the district court to conclude the defendants would be prejudiced in their ability to defend against the new claim. We accordingly conclude the court did not abuse its discretion in denying Cheek leave to amend.

***Partial Summary Judgment Ruling*.** Summary judgment dismissing Cheek's claims was proper if the record, viewed in the light most favorable to Cheek, shows no genuine issue of material fact and that the defendants were entitled to judgment as a matter of law. *See* Iowa R. Civ. P. 1.981(3); *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 228 (Iowa 2004). We find no reasons to disagree with the district court's well-reasoned, ten-page ruling, which found this standard had been met regarding all four claims at issue on appeal.

Wrongful Termination. Because Cheek was an at-will employee, he could be terminated for any reason or no reason, so long as his termination did not violate a clearly defined public policy. *Lloyd*, 686 N.W.2d at 228. To establish a claim for wrongful termination Cheek must demonstrate, in relevant part, that his termination was the result of his participation in an activity protected by such a public policy, and was not justified on another basis. *Id*. The public policy relied on by Cheek is his right to pursue unemployment compensation. *See Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994). As the district court noted, there is no evidence Cheek's termination was in any way related to a pursuit of unemployment benefits. Cheek's attempt to bootstrap a violation of public policy into his termination for suspected theft is wholly without merit.

Abuse of Process and Malicious Prosecution. Cheek asserts it was error for the district court to dismiss either of these claims because the record raises at least an inference that Denger acted maliciously and with an improper motive when he filed a police report accusing Cheek of theft, then cooperated during the subsequent investigation and prosecution. Even if we assume for the sake of

argument that this assertion finds support in the summary judgment record,[2] we nevertheless conclude both claims were properly dismissed.

To establish a claim for abuse of process, Cheek must prove he suffered damages as a result of the defendants' use of a legal process in an improper or unauthorized manner. *Palmer v. Tandem Mgmt. Serv., Inc*., 505 N.W.2d 813, 817 (Iowa 1993). However, even if "[o]ne might criticize selfish or improper motives prompting a false or reckless report," "the mere report to police of possible criminal activity does not constitute legal process." *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 422 (Iowa 1997). Moreover, to satisfy the improper or unauthorized manner requirement, Cheek must prove the defendants used a legal process "primarily for an impermissible or illegal motive," which is "ordinarily an attempt to secure from another some collateral advantage not properly includable in the process itself and is a form of extortion in which a lawfully used process is perverted to an unlawful use." *Palmer*, 505 N.W.2d at 817. Mere "[p]roof of an improper motive . . . for even a malicious purpose" will not suffice. *Id*. Accordingly, even if we assume a malicious motivation, evidence Denger filed a police report and cooperated in the subsequent investigation and prosecution cannot support a claim for abuse of process.

We reach the same conclusion regarding Cheek's malicious prosecution claim. The claim requires proof of six elements. *See Wilson v. Hayes*, 464

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[2] Cheek points to no facts in support of this assertion. He merely states "there clearly have been a series of willful and purposely harmful acts against the Plaintiff." We presume Cheek is referring to the fact that he was summarily fired and reported to the police without being provided an opportunity to explain his actions, and despite the fact he was complying with a practice of which Denger, who had only worked at American for approximately six months, may or may not have been aware.

N.W.2d 250, 259 (Iowa 1990). As the district court determined, it is the second element, instigation or procurement of the prosecution by the defendants, *id*., that is most clearly lacking in this case.

"[M]erely furnishing information to the police is not the instigation of a criminal prosecution." *Winckel v. Von Maur, Inc*., 652 N.W.2d 453, 460 (Iowa 2002) (abrogated on other grounds by *Barreca v. Nickolas*, 683 N.W.2d 111, 121 (Iowa 2004)). Moreover, a person does not procure the instigation of a proceeding by another "'if it is left to the uncontrolled choice of [the] third person to bring the proceedings or not as he may see fit.'" *Lukecart v. Swift & Co.,* 256 Iowa 1268, 1281, 130 N.W.2d 716, 724 (1964) (citation omitted). Here, the record indicates the defendants did no more than file a police report and answer questions posed by law enforcement during the subsequent investigation. Thus, there is nothing in the record from which a jury could reasonably infer that the defendants instigated or procured the criminal proceedings.[3]

Intentional Infliction of Emotional Distress. Finally, we turn to Cheek's claim for intentional infliction of emotional distress. As a preliminary matter, such a claim requires proof of "outrageous conduct by the defendant." *Vinson v. Linn-Mar Cmty. Sch. Dist*., 360 N.W.2d 108, 118 (Iowa 1984). Cheek asserts this element is met because there is a disputed issue of material fact on the question of whether Denger acted with malice. Once again, even if we assume Denger's actions in filing the police report and cooperating in the subsequent investigation

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[3] *Cf*. *Winckel*, 652 N.W.2d at 460 (concluding defendant store procured criminal proceedings where "formal complaint filed with the magistrate as the basis for holding plaintiff in custody was executed by the store security officer" and police "required a complaint from a store official in order to make the arrest").

and prosecution were maliciously motivated, we cannot agree they amounted to "outrageous conduct." *See id*. ("It is for the court to determine in the first instance whether the relevant conduct may reasonably be regarded as outrageous.").

Outrageous conduct is that which 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.'" *Id*. (citations omitted). Conduct that is malicious or would justify an award of punitive damages, is motivated by tortious or criminal intent, or is done with the intent to inflict emotional distress, will not suffice. *Id*. Thus, mere participation in Cheek's prosecution, even if done with malicious intent, cannot establish "outrageous conduct."

Conclusion. The district court did not abuse its discretion in denying Cheek's motion to amend his petition. Nor did the court err in dismissing his claims for wrongful termination, abuse of process, malicious prosecution, or intentional infliction of emotion distress. The district court's order and summary judgment ruling are accordingly affirmed.

AFFIRMED.