IN THE COURT OF APPEALS OF IOWA

No. 9-902 / 08-1927
Filed January 22, 2010

SARA KOEPPEL,
Plaintiff-Appellant,

vs.

ROBERT SPEIRS,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

Sara Koeppel appeals from the district court order granting summary judgment in favor of Robert Speirs on her claims of invasion of privacy and sexual harassment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

John J. Rausch of Rausch Law Firm, P.C., Waterloo, for appellant.

Samuel C. Anderson and Kami L. Holmes of Swisher & Cohrt, P.L.C., Waterloo, for appellee.

Heard by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, P.J.

Sara Koeppel appeals from the district court order granting summary judgment in favor of Robert Speirs on her claims of invasion of privacy and sexual harassment. She contends the court erred in concluding the facts did not establish an intrusion upon the seclusion of another sufficient to support her claim of invasion of privacy. She also contends the court erred in determining Speirs cannot be held liable for sexual harassment under Iowa Code chapter 216 (2005) because he employed less than four people.

I. Background Facts and Proceedings. Koeppel and Deanna Miller were the only employees of Speirs, an insurance agent. A small (4' x 7') bathroom with a sink and toilet is located in the office. On December 27, 2005, Koeppel discovered a digital surveillance camera hidden inside the office bathroom. After contacting the Waterloo Police Department, a search warrant was obtained and officers located the camera in the bathroom. The camera was positioned to view the toilet and surrounding area. When confronted by police, Speirs produced the receiver and monitor for the camera from a locked drawer in his desk.

When questioned about the presence of the camera, Speirs admitted he had placed it in the bathroom on December 26, 2005, and stated he did so because he suspected one of his employees was abusing drugs while at work and was concerned she would embezzle money. Speirs claimed he was unable to get a signal from the camera when it was in the bathroom. At the time the officers arrived, the surveillance system was not set up to receive images from

the camera. However, set up could be completed by plugging the equipment found in Speirs's desk drawer into an electrical outlet.

After connecting the equipment, the officers tested it and found it did not work. Speirs told the officers the camera battery was likely dead. After changing the battery at Speirs's suggestion, a fuzzy picture of the toilet seat and bathroom wall was visible. The image would cut in and out every few seconds. Videotapes located in Speirs's office were blank.

Speirs purchased the camera on November 26, 2005. Miller told the police, when interviewed on December 28, she saw the camera in the bathroom on November 28, 2005. Speirs, in another proceeding, testified he used the camera to monitor Miller at her desk on December 10, 2005, and in seven or ten viewings, he observed no wrongdoing.

Koeppel filed a petition against Speirs, alleging counts of invasion of privacy and sexual harassment. Speirs answered and later filed a motion for summary judgment on the sexual harassment claim, claiming the Iowa Civil Rights Act does not apply to him because he employs less than four individuals as provided in Iowa Code section 216.6(6)(a). Koeppel resisted, arguing Speirs is liable individually as a supervisor. The district court rejected this argument and dismissed Koeppel's sexual harassment claim.

Speirs then filed a motion for summary judgment on the invasion of privacy claim, claiming there was no actual intrusion upon Koeppel's privacy because there is no evidence he viewed her in the restroom. Koeppel resisted, arguing Speirs's act of placing the camera in the bathroom with the intent to view

her was an invasion of her privacy. She also argued there was sufficient evidence for the jury to find the camera was operational. Following a hearing, the district court entered its ruling, granting Speirs's motion. The court agreed Speirs intended to view Koeppel while she was in the bathroom, but concluded Koeppel could only be liable for an actual intrusion on her privacy, not an attempted intrusion. Finding no evidence Speirs viewed Koeppel in the bathroom, the court dismissed the claim.

On November 25, 2008, Koeppel appealed both summary judgment rulings.

II. Scope and Standard of Review. We review the district court's grant of summary judgment for correction of errors at law. *Van Fossen v. MidAmerican Energy Co.*, ___ N.W.2d ___, ___ (Iowa 2009). Summary judgment is only appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We view the facts in the light most favorable to Koeppel and consider every legitimate inference that may be reasonably deduced from the record. *See id.*

III. Invasion of Privacy. Koeppel first contends the court erred in granting summary judgment on her invasion of privacy claim. She contends Speirs's act of placing a camera in the bathroom with the intent to view her is sufficient to support a cause of action for invasion of privacy. In the alternative, she contends there is a question of fact as to whether there was an actual intrusion into her privacy.

Iowa has adopted the tort of invasion of privacy, as set forth in the Restatement (Second) of Torts (1977), which provides the right to privacy can be invaded by "unreasonable intrusion upon the seclusion of another." *In re Marriage of Tigges*, 758 N.W.2d 824, 829 (Iowa 2008) (quoting Restatement (Second) of Torts § 652A(2), at ___ (1977)). Under this theory,

> [o]ne who *intentionally intrudes,* physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be *highly offensive to a reasonable person.*

Id. To recover under this theory, Koeppel must show Speirs intentionally intruded upon her seclusion, and that a reasonable person would find the intrusion "highly offensive." *Stressman v. American Black Hawk Broadcasting Co.*, 416 N.W.2d 685, 687 (Iowa 1987).

There is no question viewing or recording Koeppel while in the bathroom would be considered "highly offensive" by any reasonable person. There also can be no dispute a bathroom is a place where one enjoys seclusion. Nor is it debatable that Speirs acted intentionally in placing a recording device in the bathroom. The question presented in this case is whether there is enough evidence to create a question of fact as to whether there was an intrusion on Koeppel's privacy.

The district court concluded an actual invasion of privacy must occur for the cause of action to stand and found no facts supported an actual invasion. Koeppel argues intent to intrude on privacy is enough to maintain a cause of action. She cites to *In re Marriage of Tigges* and two cases outside this jurisdiction in support of her argument.

In the case of *Tigges*, our supreme court addressed the question of unreasonable intrusion upon the seclusion of another where a husband secretly videotaped his wife in their bedroom. *Tigges*, 758 N.W.2d at 825. The husband argued there was no invasion of privacy because the video captured nothing "private" or "sexual" in nature. *Id.* at 829. In rejecting this claim, our supreme court stated:

> The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that Cathy's activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a reasonable expectation of privacy.

Id. at 830. We disagree with Koeppel's assertion that *Tigges* supports the proposition that the focus of invasion of privacy claims are on the intent of the perpetrator; as our supreme court states, it's the fact the victim was *recorded* without her knowledge and consent that results in the intrusion. *See id.*

Koeppel also cites *Mauri v. Smith*, 929 P.2d 307, 310-11 (Or. 1996), in which the Oregon Supreme Court addresses the intent requirement of the "intentional intrusion" element of the tort of intrusion upon seclusion. Although the court held intent is a necessary element of the tort, it did not state intent is dispositive; an intrusion must also be proved. *Mauri*, 929 P.2d at 311 ("A plaintiff bears the burden to establish each element of a tort. That principle applies equally to elements that involve a defendant's state of mind."). In *Mauri*, there was no question as to whether there was an intrusion, where police officers and a third party entered an apartment without the occupant's permission. *Id.* at 309.

Finally, Koeppel cites *Harkey v. Abate*, 346 N.W.2d 174 (Mich. Ct. App. 1983). In that case, the plaintiffs brought an invasion of privacy suit after using a roller-skating rink restroom with see-through panels installed in the ceiling, which permitted surreptitious observation from above. *Harkey*, 346 N.W.2d at 179-80. The Michigan Court of Appeals stated:

> In our opinion, the installation of the hidden viewing devices alone constitutes an interference with that privacy which a reasonable person would find highly offensive. And though the absence of proof that the devices were utilized is relevant to the question of damages, it is not fatal to plaintiff's case.

Harkey, 346 N.W.2d at 182. Although this case does not support Koeppel's argument that mere intent to intrude on privacy is enough, it provides guidance in establishing the proof necessary to survive summary judgment on an invasion-of-privacy claim.

The *Harkey* court cites to a similar New Hampshire case. *Hamberger v. Eastman*, 206 A.2d 239, 239-40 (N.H. 1965). There the New Hampshire Supreme Court addressed the tort of intrusion upon the seclusion of another as it related to a landlord who inserted and concealed a listening and recording device into the bedroom of a couple who rented a house from him. The court found dismissal of the suit was improper, even though it was not alleged that anyone listened or overheard any sounds or voices originating from the plaintiffs' bedroom. *Hamberger*, 206 A.2d at 242.

The Maryland Court of Special Appeals adopted the *Hamberger* ruling in *New Summit Associates Limited Partnership v. Nistle*, 533 A.2d 1350 (Md. Ct. Spec. App. 1987). That case involved a claim of invasion of privacy based on

"peepholes" that were scratched in the back of a mirror. *Nistle*, 533 A.2d at 1354. The court held to establish an invasion of privacy, the plaintiff was not required to prove a particular individual *actually observed* her while she was in the bathroom. *Id.* Rather, "[t]he intentional act that exposed that private place intruded upon appellee's seclusion." *Id.*

Building on the foregoing is *Carter v. Innisfree Hotel, Inc.*, 661 So. 2d 1174, 1178-79 (Ala. 1995), which involves a claim of invasion of privacy where scratches were found on the backs of mirrors in a hotel, allowing for possible viewing into the rooms by agents of the hotel.

> Innisfree maintains that "[p]roof that someone had invaded the Carters' privacy is a prerequisite for recovery." It contends that, because the Carters did not actually see someone behind the wall and had only a suspicion that someone was watching them, there was no such proof. We disagree. Because the scratched mirror and the hole in the wall of Room 221 gave a secret viewing access into Room 221 from the adjoining room, a jury could find a wrongful intrusion into the Carters' right to privacy, and a jury could reasonably infer that the intrusion arose through the actions of Innisfree's agents, who have control over the hotel. The Carters need not prove the actual identity of the "peeping Tom," nor need they demonstrate actual use of the spying device, although, as we have already stated, a jury could reasonably infer from the evidence that the mirror and hole had been used to spy on them. There is no need for the Carters to establish that they saw another's eyes peering back at them through their mirror. Although the absence of proof that anyone used the scratches for spying may be relevant to the question of the amount of damages to which the Carters would be entitled, it is not fatal to their case. There can be no doubt that the possible intrusion of foreign eyes into the private seclusion of a customer's hotel room is an invasion of that customer's privacy . . . .

Carter, 661 So. 2d at 1179 (citations omitted).

Here, the district court cited the case of *Oliver v. Pacific Northwest Bell Telephone Co.*, 632 P.2d 1295 (Or. Ct. App. 1981) in support of its grant of

summary judgment. There, the Oregon Court of Appeals found summary judgment should have been granted on the plaintiff's invasion-of-privacy claim where there was no evidence to indicate the defendant intruded upon any of the plaintiff's phone conversations, even though the record showed intrusion on conversations of other employees. *Oliver*, 632 P.2d at 1299. The court noted the plaintiff's case was significantly weakened by the fact "it was possible to gather information about the monitoring and wiretapping of other traders' telephone conversations, but no similar evidence was presented as to plaintiff's calls." *Id.* The existence of evidence indicating other traders were wiretapped made the lack of evidence in the plaintiff's case more meaningful, a circumstance that does not exist in the case at bar.

In its summary judgment ruling, the trial court also cites *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182-83 (7th Cir. 1993), where a female business invitee brought an invasion-of-privacy claim after learning the defendant had a television camera trained on the entrance of a locker room for its female employees. The court held:

> Although it is a nice question of tort law whether a well-motivated but unavoidably indiscriminate effort at surveillance is actionable on behalf of a person, not the target of the surveillance, who accidentally wanders onto the scene and is photographed or recorded, we shall assume that it is actionable. . . . Even if such a case would be actionable, we do not understand Jones to be denying that the plaintiff, the stranger, must actually have been seen by a live human being (or heard, in the case of wiretapping, but that is not involved here), whether the monitor of the television camera or someone viewing the videotape afterward, . . .—or, at the very least, that the plaintiff have been in the place under surveillance so that if the equipment had been manned he (or, as here, she) would have been seen or overheard.

Brazinski, 6 F.3d at 1183. It concluded the plaintiff's claim could not stand because she was unable to show she had been in the locker room during the period the surveillance was being conducted. *Id.* at 1183. The case is distinguishable from Koeppel's case, however, because as a business invitee, the plaintiff in *Brazinski* was not presumed to have used the locker room as the defendant's female employees did. *Id.* at 1184. While the court acknowledges the possibility the plaintiff used the locker room, it notes that knowledge was in the plaintiff's hands and she "could by affidavit or otherwise have submitted evidence that she did in fact use the locker room. Her failure to present any such evidence dooms her case." *Id.* Unlike *Brazinski*, there is no doubt in the present case that Koeppel used the office bathroom.

The facts in the present case are analogous to those in *Henrandez v. Hillsides, Inc.*, 211 P.3d 1063, 1078 (Cal. 2009), where an employer

> secretly installed a hidden video camera that was both operable and operating (electricity-wise), and that could be made to monitor and record activities inside plaintiffs' office, at will, by anyone who plugged in the receptors, and who had access to the remote location in which both the receptors and recording equipment were located.

The California Supreme Court rejected the employer's argument there was no actual intrusion:

> As emphasized by defendants, the evidence shows that Hitchcock never viewed or recorded plaintiffs inside their office by means of the equipment he installed both there and in the storage room. He also did not intend or attempt to do so, and took steps to avoid capturing them on camera and videotape. While such factors bear on the offensiveness of the challenged conduct, as discussed below, we reject the defense suggestion that they preclude us from finding the requisite intrusion in the first place.
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> . . . .

> In sum, the undisputed evidence seems clearly to support the first of two basic elements we have identified as necessary to establish a violation of privacy as alleged in plaintiffs' complaint. Defendants secretly installed a hidden video camera that was both operable and operating (electricity-wise), and that could be made to monitor and record activities inside plaintiffs' office, at will, by anyone who plugged in the receptors, and who had access to the remote location in which both the receptors and recording equipment were located.

Hernandez, 211 P.3d at 1077-78.

The district court distinguished the facts of the *Hernandez* case[1] from of the case at bar, stating:

> The employer in *Hernandez* actually videotaped the activities in Plaintiff's office. While the court found that plaintiff's need not show they were actually videotaped, Defendant in that case at least completed the act of intrusion by actually videotaping. In the present case, Speirs intended to tape but could not get the equipment to function properly.

From the foregoing cases, we conclude to succeed on her claim, Koeppel must show the surveillance camera was capable of functioning while in the bathroom. Speirs claims it was not, that he was unable to receive any signal from the camera in the bathroom. Other evidence shows when a new battery was in the camera, a picture of the bathroom was visible on the monitor in Speirs's office, albeit not a clear and consistent one. The images obtained from the bathroom need not have been of high quality to establish an invasion of privacy, nor did the camera need to be pointed at the toilet—it is sufficient that

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[1] The district court cites *Hernandez v. Hillsides*, 48 Cal. Rptr. 3d 780 (Cal. App. 2006), which was superseded in part by *Hernandez v. Hillsides, Inc.*, 150 P.3d 692 (Cal. 2007), and reversed in part by *Hernandez*, 211 P.3d at 1063. The latter case, which we use for analysis, had not been decided when the district court entered its ruling.

the seclusion of the bathroom, a private area, was intruded upon. There is also evidence the camera was in the bathroom earlier in November.

Viewing the facts in the light most favorable to Koeppel and giving them every available inference, we find there is a genuine fact issue as to whether the surveillance equipment was functioning in the bathroom. Although the equipment was not operational when the police officers executed the search warrant, it only required plugging the receiver and monitor into an outlet and placing a 9-volt battery into the camera to obtain a picture. It functioned while observing Miller on December 10, and it also may have functioned in November. Officer Jeffrey Duggan, who observed the picture visible on the monitor from Speirs's office, testified he was able to see a picture that "was kind of fuzzy." Although the picture was not clear and would fade "in and out," Officer Duggan testified, "[Y]ou could still make out the image in the bathroom." The evidence is sufficient to survive summary judgment. Accordingly, we reverse the district court ruling granting summary judgment in favor of Speirs on this claim.

IV. Sexual Harassment. Koeppel also contends the district court erred in granting summary judgment in favor of Speirs on her sexual harassment claim.

The Iowa Civil Rights Act prohibits sexual harassment as a form of illegal sex discrimination. Iowa Code § 216.6(1); *Lynch v. City of Des Moines*, 454 N.W.2d 827, 833 (Iowa 1990). However, the Iowa Civil Rights Act does not apply to employers who regularly employ less than four individuals. Iowa Code § 216.6(6)(a). There is no dispute Speirs employed less than four individuals.

Accordingly, the district court found Speirs could not be held liable under chapter 216.

Koeppel argues Speirs is liable as an individual under chapter 216, citing our supreme court's ruling in *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999), where the court held a person may be subject to liability separately and apart from the liability imposed on an employer. In that case, the plaintiff was seeking to hold Madison, a supervisor, liable for unfair employment practices in addition to her employer, UPS. *Id.* at 872.

The case before it is qualitatively different than *Vivian* or any of the other cases in this jurisdiction holding an individual employee liable for violations of chapter 216 because here, the supervisor and the employer are one and the same. To allow plaintiffs to pursue claims against employers of less than four individuals as supervisors, rather than employers, would render the provisions of Iowa Code section 216.6(6)(a) superfluous, an interpretation we generally avoid. *Baker v. Shields*, 794 N.W.2d 404, 409 (Iowa 2009); *Goergen v. State Tax Comm'n*, 165 N.W.2d 782, 786 (Iowa 1969) ("[A] statute . . . should be read in its entirety and not be construed so part of it is rendered superfluous."). Because Speirs cannot be held liable under chapter 216, we find no error in the district court's dismissal of Koeppel's sexual harassment claim on summary judgment.

V. Conclusion. We affirm the district court's summary judgment ruling, dismissing Koeppel's sexual harassment claim. We conclude issues of material fact exist concerning Speirs's intrusion on Koeppel's privacy and reverse the

district court order granting summary judgment on Koeppel's invasion of privacy claim and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.