

IN THE COURT OF APPEALS OF IOWA

No. 9-910 / 09-0114
Filed January 22, 2010

ASHLEY ASH,
Plaintiff-Appellant,

vs.

**BURIM ALIU d/b/a RIVERSIDE
FAMILY RESTAURANT,**
Defendant-Appellee.

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson,
Judge.

Ashley Ash appeals from the district court's ruling dismissing her
complaint of pregnancy discrimination. **AFFIRMED.**

Victoria R. Siegel, Ottumwa, for appellant.

Gayla R. Harrison of Harrison, Moreland and Webber, P.C., Ottumwa, for
appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

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

POTTERFIELD, J.**I. Background Facts and Proceedings**

Ashley Ash began working as a waitress at Riverside Family Restaurant (RFR) in November of 2004. Burim Aliu owned the building in which the restaurant was located, and his uncle Selman Aliu (Sam) managed the restaurant. Sam's ex-wife, Cathy Aliu, also worked at RFR and sometimes helped write up the schedule. Sam's brother, Destan Aliu (Dave) helped with the restaurant in Sam's absence. In September of 2005, Ash became pregnant and later informed Sam that she was expecting a child. The parties differ in their recollections of Sam's response to the news of Ash's pregnancy and to Ash's application for employment after the birth of her child.

Ash testified that when she told Sam she was pregnant, he informed her she would not be allowed to work once she was six months pregnant. She testified that when she was six months pregnant, Sam told her that it was time for her to stop working. Ash stated Sam informed her that April 8, 2006, would be her last day, but that she could return after the birth of her child.

Ash did not return to work after April 8, and then filed a claim for unemployment benefits. Iowa Workforce Development (IWD) sent a notice of claim form to RFR on April 11, 2006, informing the employer that an employee, Ash, had made a claim for benefits for a "temporary layoff." The notice was sent to an address that was not the address of RFR. Sam testified the address was the address of a former bookkeeper of RFR and was therefore not received by anyone working at RFR. However, on April 21, 2006, the form was returned to IWD with handwritten remarks and a signature. In the section labeled "remarks,"

a handwritten note stated that Ashley was off work because she was going to have a baby but would have a job when she was done with her leave. "But if she has unemployment benefits coming to her, please give them to her. Thank you." In the section of the notice of claim form marked "Interview Participant," a signature reads Burim Aliu, followed by his title, owner, and the phone number for the restaurant.

On the worksheet completed after a telephone fact finding, in the section labeled "Employer Statement," the form contains the following handwritten notes: "Burim-not working because she is pregnant" and "Cathy-Ashley is on maternity leave." Burim, Sam, and Dave all deny submitting such comments or signing the claim form. Cathy did not testify.

Ash's claim for unemployment benefits was denied May 9, 2006, because of the conclusion of the hearing officer that Ash was "unable to work due to pregnancy." Ash appealed and participated in the appeal hearing; RFR did not participate. The administrative law judge took official notice of the agency administrative file, presumably including the claim form and the fact finding worksheet, received a note from Ash's doctor, and ruled Ash was eligible for benefits April 8 through June 9, the anticipated date of the birth of her child. The judge found:

The evidence in the record indicates that Ms. Ash has worked less than her normal schedule since the employer removed her from the work schedule effective April 8. Indeed, the employer has given Ms. Ash no hours at all on the schedule. Both parties intend for Ms. Ash to return to the employment after she has her baby and a subsequent six-week leave of absence.

Sam asserts that he never had a conversation with Ash regarding her ability to work during her pregnancy. He testified that during Ash's employ at RFR, several other pregnant women had worked at RFR up to and after the birth of their children. Dave and Ash confirmed this. Sam testified that in the past he had reprimanded Ash for arguing with other employees, arguing with customers, and leaving her shift early. Ash had also requested several days off and reduced hours during the weeks leading up to April 8. Sam stated that on April 8, 2006, he talked with Ash about some of these concerns and told her that she needed to change. During this conversation, Ash got mad, left, and never came back. Sam denies ever laying Ash off. Schedules from April of 2006 show that Ash continued to be scheduled to work for about one week after April 8, 2006, but she did not show up as scheduled.

After the birth of her child, Ash attempted to return to work at RFR. She called Sam about her job several times, and he told her she could have a job at a new restaurant Dave was opening in a few weeks. She spoke to Dave, who said he had no openings and was not looking to hire. However, Ash testified that at this time, RFR displayed signs saying it was seeking experienced waitresses and placed an ad for help in the newspaper.

Sam testified that when Ash was looking for work after the birth of her child, he did not hire her because he did not need help at the time and because of the way in which she had quit previously.

On August 24, 2007, Ash filed a complaint alleging RFR had discriminated against her by not allowing her to work during or after her pregnancy. On October 30, 2007, RFR offered Ash employment, which Ash declined. Dave

testified that RFR offered Ash employment in October of 2007 because RFR is a family restaurant that gives people a second and third chance.

A bench trial took place December 3, 2008, which the parties agreed was held in equity. The district court made credibility findings against Ash, found that Ash failed to establish a prima facie claim, and dismissed her complaint. Ash appeals, asserting: (1) she established a prima facie case of employment discrimination; (2) RFR failed to offer a legitimate nondiscriminatory reason for laying her off; and (3) she proved pretext as to RFR's failure to return her to work.

II. Standard of Review

We review this matter heard in equity de novo. Iowa R. App. P. 6.907 (2009); *Weinhold v. Wolff*, 555 N.W.2d 454, 458 (Iowa 1996) (finding that a matter which would ordinarily be reviewed at law is reviewed de novo when the parties agree to try the case in equity).

III. Discrimination

The Iowa Civil Rights Act prevents an employer from firing an employee because of her sex or pregnancy. Iowa Code section 216.6(1) (2005) states, "It shall be an unfair or discriminatory practice for any . . . [p]erson to . . . discriminate in employment against . . . any employee because of the . . . sex . . . of such . . . employee" Section 216.6(2)(a) provides that a "written or unwritten employment policy or practice which excludes from employment applicants or employees because of the employee's pregnancy is a prima facie violation of this chapter." "An employer shall not terminate the employment of a

person disabled by pregnancy because of the employee's pregnancy." Iowa Code § 216.6(2)(d).

To establish a prima facie case of pregnancy discrimination, Ash must demonstrate that: (1) she was pregnant; (2) she was qualified for her position; and (3) her termination occurred under circumstances giving rise to an inference of discrimination. *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6 (Iowa 2009). Once she proves this, the burden shifts to RFR to offer a legitimate nondiscriminatory reason for terminating Ash's employment. *Id.* If RFR makes such a showing, Ash must show RFR's reason was merely pretext and that unlawful discrimination was the real reason for her termination. *Id.* at 6-7. The district court found Ash had not established a prima facie case because she could not show discriminatory intent, but that even if she had, she did not establish that the reasons for her termination of employment with RFR were discriminatory.

We disagree with the district court that Ash did not prove a prima facie case that her termination occurred under circumstances giving rise to an inference of discrimination. The documents from Iowa Workforce Development, which were received in evidence, indicate that persons who gave their names as "Burim" and "Cathy" told the fact finder on the telephone that Ash was not working because she "is pregnant" and "on maternity leave."

Although Burim, Sam, and Dave testified they did not give that information to the IWD fact-finder, somebody convinced the fact-finder that Ash was "unable to work due to pregnancy." We find that Ash has satisfied the "minimal" burden required for the first phase of the burden-shifting analysis, her prima facie case

that she was terminated under circumstances giving rise to an inference of discrimination. *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005).

However, we agree with the district court that RFR offered a legitimate, non-discriminatory reason, namely that Ash was not terminated at all, but rather quit. Finally, we agree with the district court, giving deference to its credibility determination against Ash, that Ash failed to prove the reason offered by RFR was pretextual. Sam testified that on Ash's last day of work, he told her she needed to change, which made her mad. He testified Ash left the restaurant angry and did not show up for her next scheduled shifts. Ash admitted she was scheduled to work the following week but did not show up to work. She admitted Sam had previously called her into the back room to discuss her arguing with other employees. We believe the most credible evidence establishes that Ash was not terminated but chose to quit her job after her disagreement with Sam.

We also find Ash has not proven that RFR's decision not to rehire her after the birth of her child was discriminatory. Ash's prior job performance was such that RFR did not want to hire her again. While working at RFR, Ash argued with coworkers, left her shifts early without permission, argued with managers, and ultimately quit by walking off the job angry. Although RFR eventually offered to rehire Ash, her workplace behavior constitutes a legitimate nondiscriminatory reason for declining to rehire her.

Further, the record contains no evidence that RFR had a policy against allowing pregnant women to continue to work. Ash testified that during her employment at RFR, several women had children and were allowed to work during and after their pregnancies. This evidence corroborates the testimony

that RFR's decision not to rehire Ash was related to her job performance, not her pregnancy.

The record contains substantial evidence to support the district court's dismissal of Ash's complaint.

AFFIRMED.