STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2098

Johnnie B. Buckles,
Appellant,

vs.

State of Minnesota (d/b/a Minnesota
Correctional Facility and MCF-Faribault),
Respondent,

C W F Food Services,
Respondent.

Filed August 18, 2009
Affirmed
Johnson, Judge

Rice County District Court
File No. 66-CV-07-3097

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Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Johnnie B. Buckles, an inmate at the Minnesota Correctional Facility in Faribault (MCF-Faribault), was a victim of the criminal sexual conduct of Debra Lynn Johnson, who worked in the prison as an employee of Contingent Work Force Solutions, L.L.C. (which was identified in the complaint as CWF Food Services), a contractor of the state. Buckles sued CWF and the state, seeking to hold each defendant liable for its negligent supervision of Johnson and vicariously liable for Johnson's tortious conduct. The district court granted summary judgment to both defendants. We conclude that Buckles's evidence does not create a genuine issue of material fact as to whether Johnson's tortious conduct was foreseeable to CWF or to the state. Therefore, we affirm.

FACTS

Johnson was a supervisor in a food-service kitchen at MCF-Faribault for approximately two months, from March to May of 2006, during which time Buckles was incarcerated in the prison and working in the kitchen. During her short period of employment at the prison, Johnson was supervised by CWF managers.

Soon after Johnson began working at MCF-Faribault, her supervisor, Jo Hyatt, became concerned about Johnson's work performance. With respect to Johnson's job duties, Hyatt believed that Johnson did not ensure that the kitchen was properly cleaned at closing time each night. In addition, Hyatt believed that Johnson was "overly friendly" toward inmates and needed to "be more confrontational with the offenders vs. being their friend." Hyatt also was concerned about Johnson's appearance and attire because Johnson

used perfume, wore open-toed sandals, and exposed too much of her chest. Furthermore, Hyatt expressed concern that Johnson often remained in the kitchen area after 7:00 p.m., when security personnel left the area.

Hyatt took a number of steps to address Johnson's conduct. Hyatt informed Johnson of her concerns at an April 27, 2006, staff meeting. Hyatt spoke with Johnson again in a one-on-one meeting on May 3, 2006, at which she warned Johnson that she would be terminated if she did not change her behavior. On May 5, 2006, Johnson received additional training concerning proper forms of interactions with inmates. On May 15, 2006, Hyatt gave Johnson a verbal warning for violating safety practices. On May 29, 2006, Hyatt suspended Johnson after receiving a report from a correctional officer that Johnson had accepted a gift from an inmate. CWF terminated Johnson's employment on June 1, 2006, because of her receipt of the gift.

The matter was investigated further after Johnson's termination. On July 26, 2006, Johnson was interviewed by an investigator from the Department of Corrections (DOC) and an officer of the Faribault Police Department. In that interview, Johnson admitted to sexual contact with five inmates, including Buckles, and to smuggling illegal drugs and tobacco into the prison for the benefit of certain inmates. The DOC investigator then interviewed Buckles, who disclosed that he and Johnson had sexual contact on four or five occasions between May 14 and 29, 2006, in a small office near the kitchen. In October 2006, Johnson was charged with nine criminal offenses. In January 2007, she pleaded guilty to five counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(m)

(2004). In April 2007, she was sentenced to 46 months of imprisonment, and she now is an inmate at a different correctional facility.

In August 2007, Buckles commenced this action against CWF and the state. With respect to each defendant, he alleged claims of negligent supervision and vicarious liability for Johnson's tortious conduct. In his complaint, he alleged that Johnson "sexually assaulted or raped" him. In a subsequent affidavit, he elaborated by stating that Johnson did so by "coercing me to have sex with her against my will and without my consent." The district court granted the summary judgment motions brought by CWF and the state and dismissed the complaint in its entirety. Buckles appeals.

D E C I S I O N

A motion for summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03; *see also MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). "On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists, and whether the district court erred in its application of the law." *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009) (quotation omitted).

I. Claims Against CWF

Buckles argues that the district court erred by granting summary judgment on the two claims alleged against CWF. We address each claim in turn.

A. *Respondeat Superior*

Under the common-law doctrine of *respondeat superior*, an employer is liable for an intentional tort committed by an employee if the employee committed the tort "'within the course and scope of employment.'" *Frieler*, 751 N.W.2d at 583 (quoting *Schneider v. Buckman*, 433 N.W.2d 98, 101 (Minn. 1988)). There are, in essence, three requirements for a finding that an employee's intentional tort was committed in the course and scope of his or her employment: (1) that "'the source of the [tort] is related to the duties of the employee,'" (2) that "'the [tort] occurs within work-related limits of time and place,'" and (3) that the employee's acts were foreseeable. *Id.* (alteration in original) (quoting *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999)).

The district court granted summary judgment on this claim by reasoning that Johnson's job duties did not include sexual relations with inmates. This mode of reasoning does not focus on relevant facts. In this situation, "an employee's act need not be committed in furtherance of his [or her] employer's business." *Fahrendorff*, 597 N.W.2d at 910. More emphatically, "[i]t is irrelevant whether the [intentional tort] involves a motivation to serve the master." *Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306, 310 (Minn. 1982). Nonetheless, Buckles's claim against CWF fails because of the requirement that he present evidence sufficient to prove that Johnson's tortious conduct was foreseeable.

Under Minnesota law, foreseeability cannot be inferred as a matter of law. *Frieler*, 751 N.W.2d at 584. Rather, "for purposes of respondeat superior, the foreseeability of an employee's conduct is a question of fact to be analyzed based on the evidence presented in the particular case." *Id.* at 583-84. The strongest and most-often-recognized evidence of foreseeability is expert testimony that the type of tortious conduct at issue is "'a well-known hazard in this field.'" *Id.* at 583 (emphasis omitted) (quoting *Fahrendorff*, 597 N.W.2d at 911). A plaintiff who presents expert affidavits to that effect generally will create a genuine issue of material fact precluding summary judgment. *See, e.g.*, *Fahrendorff*, 597 N.W.2d at 911 (discussing expert affidavit stating that inappropriate sexual contact in group homes is well- known hazard); *Marston*, 329 N.W.2d at 311 (discussing expert affidavit stating that inappropriate sexual contact between psychologists and patients is well-known hazard). On the other hand, a plaintiff who does not present expert affidavits generally will fail to create a genuine issue of material fact precluding summary judgment. *See, e.g.*, *Frieler*, 751 N.W.2d at 583-84 (discussing lack of expert affidavit concerning sexual harassment in workplace); *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996) (discussing lack of expert affidavit concerning inappropriate sexual contact between teacher and student). Buckles did not submit any expert evidence on the factual issue whether criminal sexual conduct by a female employee toward a male inmate is a well-known hazard in prisons. For this reason, he has failed to present the best form of evidence of foreseeability.

In the absence of expert evidence, Buckles seeks to rely on evidence specific to this case that, he contends, shows that Johnson's criminal sexual conduct toward him was foreseeable to CWF. Although CWF had concerns about Johnson, those concerns were of a

different type. Hyatt was concerned that Johnson's approach toward inmates was not sufficiently assertive and confrontational so as to ensure proper control of the inmates. Hyatt sought to remedy that problem by arranging for Johnson to receive additional training from correctional officers in a high-security section of the prison so that Johnson might "see the offenders in a different light." In addition, Hyatt's concern about Johnson's tendency to remain in the kitchen after hours was not a concern for the safety of inmates but, rather, for Johnson's own safety. Hyatt's comment in an e-mail message that it was a "[h]uge security issue leaving her alone with offenders once security has left" is explained by the correctional officer who reported the issue, who stated in an affidavit, "I provided this information to [Hyatt] because I was concerned about Ms. Johnson's safety."

Even Hyatt's concern about Johnson's "overly friendly" approach to inmates is insufficient. At most, Hyatt's e-mail message tends to show the foreseeability of *consensual* sexual relations between Johnson and an inmate, which, though contrary to prison regulations, would not be injurious to Buckles. But that evidence does not tend to show the foreseeability of *nonconsensual* sexual conduct by Johnson toward an inmate, as Buckles has alleged, which would be injurious to him. *See Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 912 (Minn. 1983) (stating that some injury must be foreseeable, even if not "the particular injury" actually suffered by plaintiff or "the particular type of offense" committed by third person); *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 136 (Minn. App. 2007) (reasoning that alleged "red flags" not capable of proving foreseeability of pastor's sexual abuse of child because of innocent alternative explanations). In fact, "sexual assault . . . will rarely be deemed foreseeable in the absence

of prior similar incidents." *K.L. v. Riverside Med. Ctr.*, 524 N.W.2d 300, 302 (Minn. App. 1994), *review denied* (Minn. Feb. 3, 1995). In this case, there is nothing in Johnson's known background or in Hyatt's e-mail or elsewhere in the summary judgment record suggesting that Johnson previously had forced an inmate (or any other person) to submit to a nonconsensual sexual act. In fact, such a possibility is inconsistent with Hyatt's concerns that Johnson was not sufficiently confrontational in her interactions with inmates.

Buckles also contends that the foreseeability of Johnson's tortious conduct may be proved by DOC policies prohibiting "personal associations" between prison staff and inmates. But this evidence is insufficient as a matter of law. In *Frieler*, the supreme court reasoned that employers should not be penalized for implementing prudent, prophylactic policies. "The fact that an employer proactively adopts such a policy is insufficient, in and of itself, to create a genuine issue of material fact regarding whether the sexual harassment committed by an employee was foreseeable." *Frieler*, 751 N.W.2d at 584.

Thus, Buckles has failed to create a genuine issue of material fact on the issue of foreseeability and, accordingly, whether Johnson's actions were within the scope of her employment with CWF. Consequently, the district court did not err by granting summary judgment to CWF on Buckles's *respondeat superior* claim.

B. Negligent Supervision

As a general rule, a person does not have a duty to protect another person from a third person unless "(1) there is a special relationship between the parties; and (2) the risk is foreseeable." *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). If a plaintiff can establish both of these threshold requirements, then the employer has a duty to exercise

"ordinary care" in supervising the employee's activity within the scope of the employment. *M.L. v. Magnuson*, 531 N.W.2d 849, 858 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. July 20, 1995).

The district court granted summary judgment on this claim by reasoning, "as a matter of law, that it was not foreseeable to CWF that Johnson constituted an unreasonable risk of harm to Buckles." A risk of tortious conduct by a third person is foreseeable if "a defendant was aware of facts suggesting that a plaintiff was being exposed to an unreasonable risk of harm." *Stuedemann v. Nose*, 713 N.W.2d 79, 84 (Minn. App. 2006), *review denied* (Minn. July 19, 2006). Courts generally analyze foreseeability for purposes of a negligent supervision claim in the same manner as they analyze foreseeability for purposes of a *respondeat superior* claim. *L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. App. 2002) (relying on foreseeability analysis for *respondeat superior* claim when analyzing negligent supervision claim), *review denied* (Minn. Aug. 20, 2002). This uniformity of analysis with respect to foreseeability perhaps can be explained by the statement that the cause of action of negligent supervision, though a means of imposing direct liability, "derives from the respondeat superior doctrine." *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993).

In any event, because Buckles has not identified a genuine issue of material fact on the issue of foreseeability with respect to his *respondeat superior* claim, he also has not done so with respect to his negligent supervision claim. Thus, the district court did not err by granting summary judgment to CWF on Buckles's negligent supervision claim. *See Cooney v. Hooks*, 535 N.W.2d 609, 611 (Minn. 1995) (holding that inmate-on-inmate sexual

assault was not foreseeable to county because aggressor's history did not suggest "assaultive tendencies or a propensity toward violence").

II. Claims Against the State

Buckles argues that the district court erred by granting summary judgment on the two claims alleged against the state. We will address each claim in turn.

A. *Respondeat Superior*

The district court granted summary judgment to the state on this claim on the ground that Johnson was not an employee of the state and, thus, the state could not be held vicariously liable for Johnson's tortious conduct. On appeal, Buckles argues that the district court erred because the evidence shows that the state treated Johnson as an employee of the state.

In light of the parties' arguments, we analyze whether, despite Johnson's formal status as an employee of CWF, she should be deemed to have been an employee of the state. *See C.B.*, 726 N.W.2d at 133. To determine whether an employment relationship exists for purposes of a *respondeat superior* claim, courts consider several factors: "'(1) the right to control the means and manner of performance; (2) the mode of payment; (3) furnishing of materials and tools; (4) control of premises where work is performed; and (5) right of employer to hire and discharge.'" *Id.* (quoting *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 261 (Minn. App. 2003)). The most important factor is the first one, the right to control the means and manner of performance. *Id.*

A straightforward analysis of the five relevant factors leads to the conclusion that Johnson cannot be deemed to have been an employee of the state for purposes of Buckles's

respondeat superior claim. With respect to the first factor, the state submitted an affidavit of a DOC employee, who stated, "At no time while Johnson worked at MCF-FRB were State Defendants assigned to supervise Debra Johnson or responsible for supervising Jo Hyatt or Debra Johnson's work." Nothing in the evidentiary record contradicts this affidavit or otherwise indicates that the state exercised any meaningful control over Johnson. Johnson was selected for hire by CWF. Johnson's job description was prepared by CWF. Johnson was supervised by Hyatt, a CWF employee. Johnson ultimately was terminated by CWF. The most that can be said of the state's control over Johnson is that she was required to pass a criminal background check and undergo training regarding DOC policies, but these requirements were imposed on CWF by its contract with the state. "The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done." *Urban ex rel. Urban v. American Legion Post 184*, 695 N.W.2d 153, 160 (Minn. App. 2005) (quotation omitted), *aff'd on other grounds*, 723 N.W.2d 1 (Minn. 2006). It is undisputed that CWF, not the state, determined the manner in which Johnson performed her job. *See id.* (stating that "principals are generally not vicariously liable for the acts of independent contractors").

With respect to the fifth factor, it is undisputed that CWF, not the state, had the sole right to hire and fire Johnson. Despite the fact that Johnson's termination notice was printed on DOC letterhead, the termination was effectuated by CWF employees, and there is no suggestion that the state induced CWF to terminate Johnson's employment. With respect to the second factor, there is nothing in record indicating that the state paid Johnson's salary directly to her. Similarly, neither party has identified any evidence relevant to the third

factor, whether the state furnished any material or tools necessary to Johnson's position. The fourth factor, control of the premises where Johnson's job duties were performed, may lean toward Buckles, but that is due to the special considerations relating to prisons. Most of the five factors, especially the first factor, which is most important, lean strongly toward the conclusion that Johnson was not employed by the state.

Thus, Buckles has failed to create a genuine issue of material fact on the issue whether Johnson was an employee of the state. Even if Buckles could overcome that threshold issue, he would not, for the reasons stated above in part I.A., have evidence sufficient to prove that Johnson's actions were within the scope of her employment. Consequently, the district court did not err by granting summary judgment to the state on Buckles's *respondeat superior* claim.

B. Negligent Supervision

The district court granted summary judgment to the state on this claim on the ground that Johnson's actions were not foreseeable. In part I.B., we concluded that Buckles failed to present evidence sufficient to prove that Johnson's tortious conduct was foreseeable to CWF so as to impose a duty to protect Buckles from Johnson. In light of that conclusion, Buckles cannot prevail on his negligent supervision claim against the state unless he can show that the state was in possession of more information concerning the risks of tortious conduct by Johnson than was possessed by CWF. Buckles has not pointed to any such evidence. Thus, Buckles has failed to create a genuine issue of material fact on the issue of foreseeability. Consequently, the district court did not err by granting summary judgment to the state on Buckles's negligent supervision claim.

C. Vicarious Official Immunity

In the district court, the state pleaded the affirmative defense of vicarious official immunity in its answer. In its motion papers, the state presented vicarious official immunity as an alternative argument for summary judgment. The district court did not address the issue of vicarious official immunity in its ruling on the state's motion. In his appellate brief, Buckles raised the issue whether the state is entitled to vicarious official immunity. In light of the fact that the district court did not analyze the state's arguments, and in light of our disposition of Buckles's claims on the merits, we need not consider the issue.

Affirmed.