IN THE COURT OF APPEALS OF IOWA

No. 1999-588 (9-849) / 99-0650
Filed February 23, 2000

FILED
FEB 2 3 2000
CLERK SUPREME COURT

HARLEE MILLER,
Plaintiff-Appellee/Cross-Appellant,

vs.

DAVENPORT COMMUNITY SCHOOL DISTRICT,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley and David E. Schoenthaler, Judges

Defendant-Appellant Davenport Community School District appeals a judgment for damages and attorney fees in favor of plaintiff-appellee Harlee Miller. Plaintiff, an African-American, sued the defendant on several counts under the Iowa Civil Rights Act, Iowa Code chapter 216 (1994) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 1981 claiming defendant was racially motivated when it failed to promote him from the position of utility I to utility II worker. A jury entered a verdict in favor of plaintiff for $3,556 for lost wages and $27,500 in damages for mental pain and suffering for a total award of $31,056. The district court then awarded plaintiff $46,706.97 in attorney fees.

Defendant contends (1) the district court admitted evidence of racial bias over objection that it was irrelevant and prejudicial; and (2) there was not substantial evidence defendant had intentionally discriminated against plaintiff in denying his promotion as there was (i) no direct evidence of discrimination; (ii)

plaintiff did not establish a prima facie case; and (iii) rebuttal evidence showed there was no pretext in the hiring decision; (3) the award of damage for mental distress was not supported by the evidence; and (4) the award of attorney fees was excessive. **AFFIRMED.**

Anthony G. Scariano and Brian J. Fahey of Scariano, Ellch, Himes, Sraga and Petrarca, Chtd., Chicago, Illinois, and Stephen T. Fieweger of Katz, Balch, Lefstein, Fieweger & Edwards, P.C., Rock Island, Illinois, for appellant.

Dorothy A. O'Brien and Charles W. Brooke of Brooke & O'Brien, P.L.C., Davenport, for appellee.

Heard by Sackett, C.J., and Hecht, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

SACKETT, J.

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A fact finder could have found the following facts. Plaintiff was employed by defendant as a utility I worker in its maintenance department from September 21, 1992, until August 1995 when he resigned. During that time Bill Good was defendant's director of maintenance. Tom Pethoud was plaintiff's primary supervisor. On February 21, 1995, plaintiff applied for a vacant position as a

utility II worker. The job posting specified, in part, applicants are required to have "some history of equipment operation" and "be very mechanically inclined."

There was a three-part application including a test questionnaire, an interview by a committee appointed by Good, and references. The test and interview each accounted for forty percent of the decision since the references accounted for twenty percent. The members of the committee were Good, Pethoud, Dennis Robinson, Dale Moses, Todd Garstang, Dick Strong and Steve Watt. Robinson was the only African-American on the committee. The other committee members were white.

A white male applicant, Scott Ellis, was selected. Good testified plaintiff was not chosen because Good felt plaintiff was not the most qualified applicant for the job.

Plaintiff testified he was well qualified for the job and had actually done work that was part of the utility II position. Plaintiff was required to train Ellis. Plaintiff had received excellent performance evaluations from Good prior to that time.

Nothing was said to plaintiff about his race during his interview. However, during a break in the interview Robinson overheard Moses remark to the effect that "One black utility II worker is enough."

Plaintiff observed white workers had moved to utility II classifications without going through the posting process. Typically there were only three or four members of the selection committee, not seven as in this case.

No African-Americans who served as utility I workers were ever selected by the committee as utility II workers. Two well-qualified African-Americans had

applied for the job. The percentage of Africans-Americans working in utility I positions since 1992 was sixty-seven percent. The percentage of Caucasian or Native-Americans working in the utility II position since 1992 was ninety-three percent.

There was evidence during the time plaintiff was working for defendant racially derogatory remarks were made by maintenance department employees, three of whom were on the hiring committee. Moses, Garstang and Strong told jokes aimed at African-Americans. Moses told these jokes every day and he referred to black people as "monkeys." Moses also stereotyped black people as all being sports types or drug dealers. Moses and Garstang used the term "nigger" and Moses used it once in plaintiff's presence. Moses called plaintiff, Robinson and another African-American worker "homeys" after "homey the clown," a character on a black television show. Pethoud was present during the time the remarks and jokes were made. Moses gave Robinson what Moses called a nigger hat. A photograph was posted in the break room showing Moses and Strong dressed like African tribal men with their faces painted black. At the time of the O.J. Simpson trial, a black glove spotted with red paint hung in the break room. Written underneath the glove was, "Could it be O.J.'s glove?" Also, a newspaper clipping of boxer Leon Spinks who had his tooth missing was posted. The photo had a former African-American employee's name underneath it with a question mark. The former employee had a tooth missing. A black voodoo doll was displayed for several months. Pethoud commented the voodoo doll, "kind of looks like you, Robin" with reference to an African-American

employees. Good did not participate in the jokes but walked through the break room every day and was able to review the racial display.

In June of 1995, plaintiff filed a charge of racial discrimination contending that racial discrimination prevented him from getting the promotion to utility II. After that plaintiff began getting difficult job assignments. Jobs formerly assigned to three or four people were given to plaintiff and another African-American employee. Pethoud became sterner with plaintiff and they did not speak to each other. In July of 1995, plaintiff submitted a letter of resignation.

Defendant first contends that the district court erred in admitting evidence of testimony regarding work place comments and incidents. It asserts these incidents were not relevant and were prejudicial. Defendants contend they should have been excluded under Iowa Rules of Evidence 402 and 403.

Defendant made a motion in limine specifically directed to the following evidence. (1) another African-American employee being called "Bud" after a black television character; (2) plaintiff hearing maintenance department employees using the word "nigger"; (3) comments an African-American employee was dating a white woman; (4) racially termed jokes told by Moses and Garstang; and (5) Moses' reference to African-Americans as "monkeys."

The relevance of evidence and the comparative effect of any prejudice weighed against the probative value are matters within the sound discretion of the trial court. *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 289 (Iowa 1998); *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 178 (Iowa 1990). Evidence is relevant if it renders existence of facts more probable or less

probable than without it. Iowa R. Evid. 401; *Garren v. First Realty, Inc.*, 481 N.W.2d 335, 339 (Iowa 1992).

Defendant argues this evidence was not relevant because plaintiff's supervisors did not make the challenged statements or cause the challenged instances. Evidence of acts of discrimination was properly excluded because plaintiff's own supervisors had not engaged in the improper behavior. *See Callahan v. Runyun*, 75 F.3d 1293, 1298 (8th Cir. 1996).

Defendant also contends the comments were not relevant because they were not aimed at plaintiff. Evidence of discrimination by fire department employees against women other than plaintiff was found not relevant. *See Kline v. City of Kansas City Fire Dept.*, 175 F.3d 660, 668 (8th Cir. 1999).

Defendant also asserts these comments were unrelated to the promotion decision. The district court ruled the incidents were relevant as the comments demonstrated the discriminatory animosity by people involved in employment decisions.

In *Bershears v. Asbill*, 930 F.2d 1348, 1354, (8th Cir.1991), the court considered actions or remarks of the employer that reflected a discriminatory attitude to be direct evidence of discrimination. Comments uttered by individuals closely involved in employment decisions may constitute direct evidence within the meaning of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1975, 104 L. Ed. 2d 268 (1989) *See also Burns v. Gadsen State Comm. College*, 908 F.2d 1512, 1517-19 (11th Cir. 1990).

The next question is whether these comments were prejudicial. In general the prejudicial aspect of evidence becomes an important factor to be considered

only when the evidence challenged has a minimum of probative value. *Cowman v. LaVine*, 234 N.W.2d 114, 122 (Iowa 1974). The probative value of this evidence outweighed its potential prejudice. We affirm the trial court on this issue.

Defendant next contends that there was not substantial evidence plaintiff was denied a promotion because of his race. Defendant argues plaintiff did not provide direct evidence of discrimination, establish a prime facie case of discrimination nor prove pretext. Error was preserved. Defendant raised this issue in a motion for summary judgment, a motion for directed verdict, and a motion for judgment notwithstanding the verdict.

Our scope of review is for errors at law. Iowa R. App. P. 4; *Pappas v. Clark*, 494 N.W.2d 245, 247 (Iowa 1992). It is not necessary for us to evaluate whether the district court properly denied defendant's motion for summary judgment, since summary judgment is a procedure functionally akin to a directed verdict. *See Id.*

In reviewing denial of a motion for judgment notwithstanding the verdict, we consider whether the evidence, when viewed in the light most favorable to the nonmoving party, shows that the movant was entitled to directed verdict at the close of the evidence. *Lamb v. Manitowoc Co., Inc.*, 570 N.W.2d 65, 67-68 (Iowa 1997). Thus, this court's only inquiry is whether there is sufficient evidence to justify submitting the case to the jury. *Vogan v. Hayes Appraisal Assoc., Inc.*, 588 N.W.2d 420, 423 (Iowa 1999).

A disparate treatment discrimination claim can be analyzed under one of two frameworks, a direct evidence or indirect evidence analysis. *Rivers-Frison v.*

Southeast Missouri Community. Treatment Ctr., 133 F.2d 616, 619 (6th Cir. 1998).

To be entitled to a direct evidence analysis, plaintiff must present "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Rivers-Frison*, 133 F.3d at 619. Direct evidence of employment discrimination does not include stray remarks by non-decision makers. *See id.* It also must have some connection to the employment relationship. *Id.*

In an indirect evidence case, a plaintiff is not required to present direct evidence of discrimination. *Id.* at 620. Instead, the plaintiff must meet the burden shifting scheme set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973). According to *McDonnell Douglas,* the plaintiff has the initial burden to establish a prima facie case of racial discrimination by showing

> (i) that he belongs to a racial minority;
> (ii) that he applied for and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected;
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1817, 36 L. Ed. 2d at 677.

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.*

The court noted this standard was a flexible one "since the facts necessarily will vary in Title VII cases." *Id.* 411 U.S. at 802, 93 S. Ct. 1827, 36 L. Ed. 2d at 677 n.13. Accordingly, a plaintiff must prove by a preponderance of the evidence that he or she "applied for an available position for which he was qualified, but was rejected under circumstances which give rise to an inference of wrongful discrimination." *Texas Dep't. of Community Affairs v. Burdine,* 450 U.S. 248, 252, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207, 215 (1981). In effect, the prima facie case creates a presumption that the employer unlawfully discriminated against the employee. *Id.* 450 U.S. at 254, 101 S. Ct. at 1094, 67 L. Ed. 2d at 216. The burden that shifts onto the defendant is to rebut the presumption of discrimination by producing evidence that plaintiff was rejected or someone else was preferred, for a legitimate nondiscriminatory reason. *Id.* The employer's burden is satisfied if he simply explains what he has done or produces evidence of nondiscriminatory reasons. *Id.* 450 U.S. at 256, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217. The explanation provided by defendant must clearly be legally sufficient to justify a judgment for defendant. *Id.* 450 U.S. at 255, 101 S. Ct. at 1094, 67 L. Ed. 2d at 216.

If defendant carries the burden of production raised by the prima facie case, the presumption is rebutted. Plaintiff now has the opportunity to demonstrate the proffered reason was not the true reason for the employment decision. *Id.* 450 U.S. at 256, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217. Plaintiff has the ultimate burden of persuasion to show he or she has been the victim of intentional discrimination. *Id. see St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507, 113 S. Ct. 2742, 2747-48, 125 L. Ed. 2d 407, 416 (1993). In this

regard, plaintiff may show either (1) a discriminatory reason more likely motivated the employer or (2) the employer's preferred explanations are unworthy of credence. *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217.

The eighth circuit interpreted this standard of proof in *Ryther v. Kare 11*, 108 F.3d 832, 837 (8th Cir. 1997) as follows:

> When the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff.

Ryther, 108 F.3d at 837.

Alternatively, the analysis set forth in *Price Waterhouse* may be used when direct or circumstantial evidence is presented which tends to establish that an impermissible factor was a determining factor in the employment decision. *See Vaughan v. Must, Inc.*, 542 N.W. 2d 533, 538 (Iowa 1996). This is appropriate in a mixed-motives case when an employment decision was "the product of a mixture of legitimate and illegitimate motives". *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448 (8th Cir.1993) quoting *Price Waterhouse*, 490 U.S. at 247, 109 S. Ct. at 1788, 104 L. Ed. 2d at 268. In a mixed-motives case, the plaintiff must go beyond merely establishing a prima facie case of discrimination and present

> evidence of conduct or statements by *persons involved in the decision making process* that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision.

Radabaugh, 997 F.2d at 449 quoting *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992). Whether a case is a pretext case or a mixed-

motive case is a question for the court once all the evidence is received. *Radabaugh*, 997 F.2d at 448. If plaintiff is unable to meet the threshold requirement of *Price Waterhouse*, the case should be decided under the principles enunciated in *McDonald Douglas* and *Burdine*. *Id.*; *see Price Waterhouse*, 490 U.S. at 278, 109 S. Ct. at 1985, 104 L. Ed. 2d at 306 (O'Connor concurring). Comments demonstrating a "discriminatory animus in the decisional process" or those uttered by individuals closely involved in employment decisions are sufficient to entitle plaintiff to a *Price Waterhouse* instruction. *Radabaugh*, 997 F.2d at 449.

Once plaintiff has made this initial showing, the burden shifts to the employer to prove that it would have made the same decision even if it had not taken the illegitimate factor into account. *Id.* at 448. The critical inquiry is whether "[race] was *a factor at the moment it was made.*" *Price Waterhouse*, 490 U.S. at 241, 109 S. Ct. at 1785, 104 L. Ed. 2d at 281. The employer must be able to present some objective evidence as to its probable decision in the absence of an impermissible factor. *Id.*, 490 U.S. at 252, 109 S. Ct at 1791, 109 L. Ed. 2d at 289. It must also show that its legitimate reason, standing alone, would have induced it to make the same decision. *Id.* 490 U.S. at 252, 109 S. Ct. at 1792, 109 L. Ed. 2d at 289; *see Hy-Vee Food Stores v. Civil Rights Com'n.*, 453 N.W.2d 512, 516-17 (Iowa 1990) (discussion of burdens of proof in disparate treatment cases).

Plaintiff presented direct evidence of racial discrimination. Three people who were members of the hiring committee made racial slurs. One of these men commented during a break in the interviews, "One black utility worker is enough."

This evidence permitted the jury to infer that a discriminatory attitude was more likely than not a motivating factor in the employer's decision. Thus, plaintiff proved enough evidence for a jury also to infer an impermissible factor was a determining one in the employment decision. Accordingly, a *Price-Waterhouse* analysis is appropriate.

Defendant then needed to prove by objective evidence it would have offered the job to Ellis instead of plaintiff because of defendant's stated reason that plaintiff was not the best qualified applicant. The issues of (1) whether plaintiff's qualifications and performance on the written test and interview compared with Ellis and (2) whether the selective process was objective or subjective, are relevant to determining if there is objective evidence from which defendant would have made the hiring decision for that stated reason alone.

The defendant's claim its decision not to promote plaintiff was made solely by Good, was countered by substantial evidence the decision was made by the committee. There is evidence defendant told the Davenport Civil Rights Commission the committee made the hiring decision. The interview conducted by the committee counted forty percent towards the decision. This evidence in conjunction with the committee member's comments during the break in the interviews is sufficient for the jury to reasonably conclude defendant intentionally discriminated against plaintiff in the hiring decision. There was also ample evidence from which the jury could have reasonably inferred defendant's stated reason for not promoting plaintiff was not the sole reason for its decision. We affirm the trial court on this issue.

The defendant next contends that there was not substantial evidence to support an award of $27,500 in damages for emotional distress. There was evidence that after plaintiff resigned he had hurt feelings, suffered insomnia and loss of self-esteem, and became quiet and withdrawn. He did not seek medical attention for these problems. There was evidence these symptoms improved after his resignation although there was also evidence he continued to suffer these problems at the time of trial.

The district court found plaintiff's testimony about his insomnia, sleep interruptions and depression combined with the testimony of his spouse and friend about his withdrawn aspect and feelings of discouragement were sufficient for a reasonable mind to conclude plaintiff had suffered emotional distress and that such stress was proximately caused by defendant's discriminatory failure to promote him.

A civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress or outrageous conduct. *Hy-Vee*, 453 N.W.2d at 525. Viewing the evidence in the light most favorable to plaintiff we find the award of $27,500 in emotional distress damages not excessive.

Defendant next claims that the district court's award of attorney fees was excessive because plaintiff filed three claims but two were dismissed on summary judgment. The Federal Civil Rights Act of 1964, 42 U.S.C. section 200e-5(k) and the Iowa Civil Rights Acts, Iowa Code section 216.15(8)(a)(8) provide for an award of attorney fees and costs to the prevailing party. A party is prevailing for attorney fee purposes if they succeed on any significant issue in the

litigation that achieves some of the benefits the party sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40, 50 (1983). It then remains for the district court to determine what fee is reasonable. *Id.* The district court found the amount of $46,706.97 in attorney fees to be reasonable. It reduced the fees sought by $2,746.50 for time spent on claims that were dismissed. The district court determined plaintiff's attorney did not provide redundant trial services and the amount of time spent was reasonable. The court found plaintiff's theories on all counts were factually related and involved a common core of facts so that the discovery of all issues of fact was relevant to all the claims. The court further found it was not required by law to artificially compartmentalize time spent by the attorney preparing for a serious, complicated trial and it was not necessary to adjust the fees to reflect the results obtained. The district court did not consider the amount of settlement offers made at the pretrial conference relevant to the amount of the verdict since the information about any settlement offers made was not available.

The award of attorney fees is reviewed for an abuse of discretion. *Vaughan*, 542 N.W.2d at 541. The district court is in the unique position to ascertain the complexity of the case and thus to determine the reasonableness of counsel's time spent on a case. *Parton v. GTE North, Inc.*, 971 F.2d 150, 156 (8th Cir. 1992). An abuse of discretion will not be found unless it is shown that such discretion as exercised on grounds clearly untenable or to an extent clearly unreasonable. *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990).

In *Lynch*, the applicant's burden of proof and factors to be considered by the court in allowing attorney fees was set forth as follows:

> The burden is upon the applicant for attorney fees to prove both that the services were reasonably necessary and that the charges were reasonable in amount. Appropriate factors to consider in allowing attorney fees include the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service. The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case.

Id., 464 N.W.2d at 238 quoting *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990).

A reasonable attorney fee is initially calculated by multiplying the number of hours reasonably expended on the winning claims times a reasonable hourly rate. *Dutcher v. Randall Foods,* 546 N.W.2d 889, 896 (Iowa 1996); *Hensley,* 461 U.S. at 433, 103 S. Ct. at 1939, 76 L. Ed.2d at 50. The "results obtained" is a factor the district court may consider in its decision to adjust the fee upward or downward. *See Hensley,* 461 U.S. at 434-436, 103 S. Ct. at 1940, 76 L. Ed. 2d at 51. The court in *Hensley* stated further,

> In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

Id.

Plaintiff may recover for time spent on interrelated issues and theories upon which plaintiff did not prevail. *See Case v. City of Cabool,* 12 F.3d 799, 806 (8th Cir. 1993). Where a case involves interrelated facts and legal theories, it is not error for the district court to refuse to apportion the attorney fee award mechanically on the basis of a party's success or failure on particular issues.

See Hensley, 461 U.S. at 438, 103 S. Ct. at 1942, 76 L. Ed 2d at 53-54. However, where an adjustment is requested based on the limited nature of the relief obtained, the court should make it clear it has considered the relationship between the amount of the fee awarded and the results obtained. *Id.* 461 U.S. at 437, 103 S. Ct. at 1941, 76 L. Ed. 2d at 54. An amount of fees should only be awarded that is in reasonable relation to such results.

We find the district court did not abuse its discretion in awarding plaintiff $46,706.97 in attorney's fees to plaintiff. It reduced the amounts directly attributable to the dismissed claims. We affirm the district court's decision.

AFFIRMED.