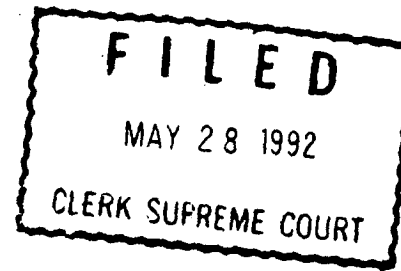


IN THE COURT OF APPEALS OF IOWA

No. 2-052 / 91-1088



**CLARK-PETERSON COMPANY, INC., JERALD F. CLARK and
JACK A. CLARK,**

Plaintiffs-Appellees,

vs.

**INDEPENDENT INSURANCE ASSOCIATES, LTD., and DICK WISSINK,
Individually,**

Defendants,

and

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County,
Joel D. Novak, Judge.

Cincinnati Insurance Company appeals a district court
decision finding coverage for the insured, Clark-Peterson
Company, under the reasonable expectations doctrine.

AFFIRMED BY OPERATION OF LAW.

Dawn R. Siebert, R. Todd Gaffney, and Hugh J. Cain of
Duncan, Jones, Riley & Finley, P.C., Des Moines, for
appellant.

John C. Conger of Wiggins & Anderson, P.C.,
West Des Moines, for appellees.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.,
but decided en banc.

PER CURIAM

The court being equally divided, the judgment is affirmed by operation of law. Iowa Code § 602.5106(1) (1991).

AFFIRMED.

For affirmance: Donielson, Schlegel and Sackett, JJ.

For reversal: Oxberger, C.J., and Hayden and Habhab, JJ.

Sackett, J., and Habhab, J., write separately.

SACKETT, J. (writing separately)

I write separately in support of affirming the trial court's decision.

Plaintiffs-appellees Clark-Peterson Company, Inc., Jerald F. Clark and Jack A. Clark brought this declaratory action seeking to establish the responsibility of the defendant-appellant The Cincinnati Insurance Co., to afford coverage for the claim of a former employee of plaintiffs who sued and obtained a judgment against plaintiffs on a claim that plaintiffs had discriminated against the employee because of the employee's alcoholism. In the employee's claim there was a finding that the act of discrimination was intentional.

The trial court found there was not coverage under the language of the policy, but the trial court applied the doctrine of reasonable expectations and afforded coverage.

I would affirm the trial court because I find coverage under the policy.

The focal issue is whether the employee's claim was an occurrence under the policy terms. The policy defines occurrence:

"occurrence" means an accident, or a happening or event, or a continuous or repeated exposure to conditions which occurs during the policy period which unexpectedly or unintentionally results in personal injury, property damage or advertising liability. . . .

I find the claim was a covered occurrence under the definition of the policy.

First, the policy provides the event can unexpectedly or unintentionally result in injury. The undisputed evidence is the event was unexpected. Therefore, a finding it was unintentional is not necessary.

Secondly, under the policy definitions, "occurrence" is an event which unexpectedly or unintentionally results in discrimination. It is not the event, or plaintiffs' conduct, which has to be unexpected or unintentional. Rather, the words "unexpectedly or unintentionally" modify the word "results." See Caims v. Grinnell Mutual Reinsurance Co., 398 N.W.2d 821, 824-25 (Iowa 1987). The evidence was undisputed that plaintiffs did not know their conduct was in violation of the laws prohibiting discrimination and did not expect it to result in liability. "Expected denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions." Weber v. IMT Insurance Co., 462 N.W.2d 283, 288 (Iowa 1990).

HABHAB, J. (writing separately)

Although this matter has been affirmed by operation of law, I write separately to explain why I believe this case should be reversed and the petition of the plaintiff dismissed.

Clark-Peterson Company, Inc. was insured under a contractor's umbrella liability policy issued by the Cincinnati Insurance Company (CIC). Clark-Peterson and two of its officers, Jack and Jerald Clark (Clark-Peterson), were sued in the underlying action by a former employee. He alleged his discharge was employment discrimination due to alcoholism.¹ The former employee was awarded judgment in the amount of \$344,822 plus interest. Clark-Peterson looked to CIC to pay this amount. However, CIC asserted its policy did not cover the former employee's discrimination claim.

¹The Iowa Supreme Court has recognized that employment discrimination can be based on either disparate treatment or disparate impact. Hy-Vee Food Stores v. Civil Rights Commission, 453 N.W.2d 512, 516 (Iowa 1990). Disparate treatment is established when the employer treats an employee less favorably than other employees because of his or her race, color, sex, or national origin. Id. This also includes discrimination based on a disability such as alcoholism. Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 526-27 (Iowa 1985); see Iowa Code § 601A.6(1)(a). Proof of intent to discriminate is generally required in order to prevail in disparate treatment cases. The trial court held in the present case that there is "no question that the [underlying employee discrimination] case involved a claim based on disparate treatment."

Clark-Peterson then filed the present declaratory judgment action against CIC and its agents (CIC). It sought a declaration the policy covered the employment discrimination claim. The district court ruled the policy, by its terms, did not cover the employment discrimination claim, as the act complained of was intentional.

However, the court nonetheless ruled coverage should be afforded under the doctrine of reasonable expectations. It held the policy's exclusions served to eviscerate all employment discrimination coverage. The court determined Clark-Peterson reasonably expected the policy to cover employment discrimination claims.

CIC appealed from the district court's declaratory judgment. It contends the court erred by applying the doctrine of reasonable expectations. CIC contends the policy was not ambiguous. Therefore, it argues the doctrine of reasonable expectations was not triggered. In addition, CIC argues there was no evidence Clark-Peterson reasonably expected coverage for intentional acts. Nor, according to CIC, was any evidence presented showing employment discrimination coverage was Clark-Peterson's dominant purpose in buying the insurance policy.

Clark-Peterson argues the doctrine of reasonable expectations was properly applied. It contends the district court erred in its preliminary holding the policy's terms did not cover the employment discrimination claim. CIC responds this issue cannot be raised in the

absence of a cross-appeal. Clark-Peterson asserts it merely seeks affirmance of the district court's ruling on an alternative ground.

Declaratory judgments are reviewed as any other judgment; thus, how the case was tried in district court governs our scope of review. Matter of Mt. Pleasant Bank & Trust Co., 426 N.W.2d 126, 129 (Iowa 1989). This case was tried at law; therefore, our review is for errors of law. Iowa R. App. P. 4.

I. The district court found certain provisions of the contested insurance contract relevant. I set out those provisions:

PART I -- DEFINED WORDS AND PHRASES

* * *

A. "You", "your" and "yours" means a person or organization shown as the Named Insured in the declarations;

* * *

G. "occurrence" means an accident, or a happening or event, or a continuous or repeated exposure to conditions which occurs during the policy period which unexpectedly or unintentionally results in personal injury, property damage or advertising liability. . . . [Emphasis added.]

H. Personal injury means:

* * *

(3) Discrimination or humiliation;

* * *

PART II -- THE COVERAGE

A. WE WILL PAY

We will pay on behalf of the insured the ultimate net loss for occurrences during the policy period in excess of the underlying insurance or for occurrences covered by this policy which are either excluded or not covered by underlying insurance because of Personal Injury,

B. THIS POLICY DOES NOT APPLY -- EXCLUSIONS

* * *

This policy does not apply:

- (h) to any liability for Personal Injury arising out of discrimination including fines or penalties imposed by law, if (1) insurance coverage therefor is prohibited by law or statute, or (2) committed by or at your direction;

* * *

D. WHO IS AN INSURED -- PERSONS OR ORGANIZATIONS WE WILL COVER

Each of the following is an insured under this policy to the extent set forth below:

* * *

- (f) Any executive officer, director, or other employee or stockholder of yours while acting within the scope of his duties as such.

When the district court reviewed the terms and provisions of the policy, it concluded that under the definition of "an occurrence" intentional discrimination was excluded. When considering the circumstances (disparate treatment) in the underlying action (see footnote 1) it specifically found the discrimination to be an intentional act by the Clarks and, thus, under the precise terms of the policy there was no coverage. In this respect, after finding that the specific exclusion for acts

"committed by or at your direction" also applied to the judgment at issue, it stated: "In the present case there is no question that the discriminatory acts were committed at the direction of the insured. . . . Thus, on this basis, the policy would not cover the . . . judgment." I agree with this analysis.

I note the appellee has not cross-appealed so as to challenge the district court's finding there was not coverage under the policy for employment discrimination, for the act complained of was intentional. However, as it relates to that finding, our supreme court, in Smithway Motor Xpress, Inc. v. Liberty Mutual Ins. Co., No. 91-285, slip op. (Iowa April 15, 1992), held that a retaliatory discharge was not an "occurrence" under an insurance policy with similar terms and definitions as our case, for such a discharge is not an accident and any resulting damages claimed are intended and expected. The supreme court cited with approval the following:

"If, in fact, plaintiff discharged Kathleen Wood from her employment because of her disability, it cannot be said that the mental and emotional injuries alleged by the Woods as flowing directly from plaintiff's intentional discriminatory practice were unexpected and unforeseen by plaintiff, the insured. While 'it is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional' such is not the case here, for the damages alleged in the Woods' complaint are the intended result which flows directly and immediately from plaintiff's intentional act, rather than arising out of a chain of unintended though foreseeable events that occurred after the intentional act"

Id. at 6-7 (citing Mary & Alice Ford Nursing Home, 86 A.D.2d 736, 737, 446 N.Y.S.2d 599, 601 (1982) (citations omitted)). As an alternative, it might also be argued that coverage exists under the policy because the judgment entered against the appellant for unlawfully discharging its employee constitutes a "personal injury, property damage or advertising liability" that somehow resulted from an "unexpected" "happening or event." I believe the Smithway case, although admittedly not directly on point, answers this contention, when it cited with approval the New York case of Mary & Alice Ford Nursing Home previously referred to. In that case, the following appears:

If in fact, plaintiff discharged Kathleen Wood from her employment because of her disability, it cannot be said that the mental and emotional injuries alleged by the Woods as flowing directly from plaintiff's intentional discriminatory practice were unexpected and unforeseen by plaintiff, the insured. (Emphasis added).

Mary & Alice Ford Nursing Home, 86 A.D.2d at 737, 446 N.Y.S.2d at 601. Thus in our case, if we superimpose the parties' names over those in the New York case, we reach the following significant result:

If in fact, plaintiff Clark-Peterson, discharged its former employee from his employment because of alcoholism, it cannot be said that the . . . injuries, alleged by the former employee as flowing directly from Clark-Peterson intentional discriminatory practice were unexpected and unforeseen by Clark-Peterson, the insured.

II. The district court then proceeded to analyze the insurance policy under the doctrine of reasonable expectations. It is at this point I conclude the district

court erred in its ruling. The first portion of the insurance policy clearly eliminates intentional torts. The language is clear and unambiguous. The appellant of course does not challenge this finding, and the appellee does not cross-appeal.

With this result in mind, I conclude there was little if any need for the district court to consider the second discrimination exclusion under Part II of the insurance policy under the doctrine of reasonable expectations. It found that the exclusion "eviscerate[d]" the discrimination coverage, apparently it believed because any discrimination would be intentional.

I agree the language of that exclusion is broad and far reaching. However, I do not believe it can be said on this record that, as a matter of law, no discrimination would ever be covered under this insurance policy. Although it need not now be decided, it does appear nonintentional discrimination is possible. See Washington v. Davis, 426 U.S. 229, 246-47, 96 S. Ct. 2040, 2051, 48 L. Ed. 2d 597, 611 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S. Ct. 849, 854, 28 L. Ed. 2d 158, 165 (1971) ("good intent or absence of discriminatory intent does not redeem employment mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"); see generally Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642, 659-61, 109 S. Ct. 2115, 2125-27, 104 L. Ed. 2d 733, 752-54 (1989).

The case of Weber v. IMT Insurance Co., 462 N.W.2d 283, 288 (Iowa 1990) casts light on the application of the reasonable expectations doctrine. There it is stated:

We strive to give effect to all the language of a contract and interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.

* * *

The doctrine of reasonable expectations. Webers argue that if the pollution exclusion precludes coverage under the liability policy, the doctrine of reasonable expectations compels us to ignore the exclusion. The district court disagreed and ruled that the doctrine of reasonable expectations was not applicable to the facts of this case.

The doctrine of reasonable expectations states that objectively reasonable expectations will be honored even though painstaking study of the policy provisions would have negated those expectations. C & J Fertilizer, Inc. v. Allied Mutual Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975). The doctrine obligates the court to ignore a policy exclusion if the exclusion: (1) is bizarre or oppressive; (2) eviscerates terms explicitly agreed to; or (3) eliminates the dominant purpose of the transaction. Lepic v. Iowa Mutual Ins. Co., 402 N.W.2d 758, 761 (Iowa 1987).

We agree with the district court that the pollution exclusion is not bizarre or oppressive, and does not eviscerate terms explicitly agreed to or eliminate the dominant purpose of the transaction. The dominant purpose of the liability policy was to insure Webers against a wide range of farm accidents which can cause serious personal injury or property damage. The pollution exclusion does not eliminate this purpose. It only denies coverage when specific materials are discharged by Webers, and, the discharge is not sudden or accidental. The insureds' reasonable expectations were not frustrated and, therefore, the doctrine of reasonable expectations is not applicable in this case.

I would conclude that even if it is necessary to reach the question of reasonable expectations, when I apply the reasoning of the Weber case to the facts of this case, the same result must be reached. See also Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co., No. 91-285, slip op. (Iowa April 15, 1992).

I would affirm the district court's finding the intentional discrimination at issue here was clearly excluded by the terms of the insurance contract. I would reverse the district court's finding for Clark-Peterson on the reasonable expectations issue. In this respect and under the facts and the insurance policy presented in this case, Clark-Peterson was apprised of the fact its intentional acts, including intentional discrimination, were clearly and explicitly excluded from coverage under the insurance contract.

I therefore would have reversed the district court's finding in favor of Clark-Peterson, affirmed the district court's finding the policy did not cover the intentional discrimination issue here and remanded with directions to dismiss.