FILED
APR 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CAROLYN SIX,

Petitioner-Appellant,

vs.

IOWA CIVIL RIGHTS COMMISSION and BLOOMFIELD FOUNDRY, INC.,

Respondent-Appellee.

Filed April 23, 1986
6-19
85-590

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Appeal from the Iowa District Court for Davis County (No. CE120-983-53-53-9) - Dan F. Morrison, Judge.

Appellant appeals from trial court's order affirming action of Iowa Civil Rights Commission. **AFFIRMED BY OPERATION OF LAW.**

Richard C. Bauerle, of Johnson, Bauerle, Hester & Walter, Ottumwa, and H. Edwin Detlie, of Knight & Detlie, Ottumwa, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Steven M. Foritano, Assistant Attorney General, for respondent-appellee Iowa Civil Rights Commission.

Jerome M. Beaver of Dull, Keith & Beaver, Ottumwa, for respondent-appellee Bloomfield Foundry, Inc.

Heard by Donielson, P.J., and Snell, and Sackett, JJ., but considered en banc.

On this appeal the judges of this court have evenly divided on the result they would reach. Judges Donielson, Hayden and Sackett would affirm; Chief Judge Oxberger, and Judges Schlegel and Snell would reverse. Accordingly, the decision of the trial court is affirmed by operation of law.

Three judges voted to affirm for the following reasons.

We would affirm. We fail to find the argument Six raised was raised before the commission. While Six argues on appeal throughout the entire investigation it has been the misconception by the commission that the alleged discrimination occurred in April of 1978, we fail to find this argument was made to the commission. And we note particularly it was never called to the commission's attention in Six's application for reconsideration or reopening filed with the commission.

We fail to find the question was before the commission. Our review is limited to those questions considered by the agency. See General Telephone Co. v. Iowa State Commerce Commission, 275 N.W.2d 364, 367 (Iowa 1979).

Judge Snell would reverse and remand for the following reasons:

I would reverse and remand for a determination of Six's claim on the merits. I do not agree with the conclusion that the question of whether the November 2, 1979, incident constituted a separate act of discrimination was not raised before the Iowa Civil Rights Commission.

Iowa Code section 601A.15(12) (1985), provides that a complaint before the commission must be filed "within one hundred eighty days after the alleged discriminatory or unfair practice occurred." (emphasis added). The 180-day limitations period runs from the date alleged by the complainant, not from whenever the commission determines. There is no question that Six alleged that she was discriminated against because of her disability on November 2, 1979. Her filed complaint reads, "Date of incident: November 2, 1979." It also states: "I returned to the Foundry on November 2, 1979 and informed Lee Pose, the Manager, that I had been released by Dr. Shultz to perform light work. At the time Mr. Pose refused to place me back to work and told me I could not return to work because I had a disability." The complaint was filed on December 13, 1979, well within the statutory limitations period running from the date that the alleged discriminatory practice occurred, November 2, 1979.

Throughout the agency proceedings, Six steadfastly maintained that the discrimination against her occurred in November of 1979. In response to the commission's theory that the discrimination occurred in April of 1979, Six argued below as she does now, that regardless of what occurred in April in her employer's mind, she did not discover that she was denied an employment position until she returned to work in November of 1979. I can perceive no clearer way for Six to raise the issue that the November 2 incident constituted a separate and distinct act of discrimination.

Furthermore, Iowa Code section 601A.5(2) obligates the Civil Rights Commission "to receive, investigate and finally determine the merits of complaints alleging unfair or discriminatory practices." Despite its statutory duty, it took the commission over three and one-half years of investigation to decide it did not have jurisdiction to determine the merits of Six's complaint. That complaint was on file with the commission as of December 13, 1979; the commission did not dismiss her complaint for lack of jurisdiction until June 21, 1983. For forty-two months Six awaited word on her complaint that she was wrongly denied the right to work only to be told by the commission that it could not even listen to her because she waited too long to complain. Justice would have been better served had a statute of limitations applied to the commission's baleful performance.