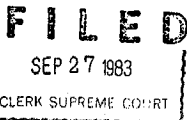


IN THE COURT OF APPEALS OF IOWA



ST. AMBROSE COLLEGE,)

Petitioner-Appellee,)

Filed September 27, 1983

99

vs.)

IOWA CIVIL RIGHTS COMMISSION,)

Respondent-Appellant.)

3-246
2-69158

Appeal from Scott District Court - Jack L. Burns, Judge.

The Iowa Civil Rights Commission appeals from the district court decision reversing its determination that St. Ambrose College was guilty of age and sex discrimination in denying a female instructor's request for a sabbatical leave and for employment beyond the age of sixty-five. **AFFIRMED.**

Thomas J. Miller, Attorney General of Iowa, and Victoria L. Herring, Assistant Attorney General, for respondent-appellant.

William C. Davidson of Lane & Waterman, Davenport, Iowa, for petitioner-appellee.

Sally A. Scoggin of Briggs & Morgan, St. Paul, Minnesota, for amicus curiae Sisters of St. Joseph of Carondelet.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden and Sackett, JJ.

PER CURIAM

The Iowa Civil Rights Commission appeals from the district court decision reversing its determination that St. Ambrose College was guilty of age and sex discrimination in denying a female instructor's request for a sabbatical leave and for employment beyond the age of sixty-five. The agency asserts the evidence established that any articulated nondiscriminatory reasons for the denials were mere pretext, that it properly delegated to an individual commissioner the authority to order a complaint to proceed to public hearing, and that it properly permitted amendment to the complaint to allege age as well as sex discrimination. The petitioner college asserts that the agency decision is invalid due to its pervasive disregard for applicable procedural rules, that any age discrimination was permitted under the exception for bona fide retirement plans or benefit systems in Iowa Code section 601A.15 (1973), and that the relief granted by the agency was inappropriate under the circumstances. We affirm the decision of the district court.

Sister Annette Walters, a Catholic nun with a Ph.D. in experimental psychology and a Diplomate in clinical psychology, was a tenured psychology professor at St. Ambrose College. She applied for sabbatical leave during the spring semester of 1975 so that she could accept a fellowship at Yale to do research for a book. Sister Annette Walters was sixty-three years old and had been employed by St. Ambrose College for a little over seven years at the time of the sabbatical request. She had founded the psychology department at St. Ambrose. John Schmits, a thirty-eight year old art professor with a B.A. in art, also sought a sabbatical leave so that he could complete work toward a master of fine arts degree. He had been employed by St. Ambrose College for over fourteen years at the time of the sabbatical request. During the year in question, the president of the college had instituted a policy that only one faculty member could be granted sabbatical leave during an academic year. This policy was

instituted for financial reasons. Based upon an evaluation of the expected benefit to the college and the expected benefit to the applicant, a committee of faculty members recommended that Mr. Schmits be granted the sabbatical leave. That recommendation was adopted by the president of the college.

The contract for tenured teachers at St. Ambrose provided that retirement from teaching should take place upon completion by a faculty member of the academic year in which their sixty-fifth birthday occurred. Upon recommendation by the Promotions, Tenure, and Standards (P.T.S.) Committee, which was composed of faculty members, the faculty member could be offered a contract on a yearly basis beyond normal retirement age. Pursuant to that contract, complainant was given notice that the 1974-75 academic year would be her last. Her tenured employment was ultimately extended through the 1975-76 academic year as a result of a dispute as to which academic year her birthday fell within. Her application for nontenured full-time employment after the 1975-76 academic year was denied by the PTS committee based upon a finding that complainant was not an outstanding teacher and was not especially needed in the psychology department. These determinations were based upon student evaluations and comments received by fellow teachers. The psychology department chairman, however, recommended complainant for full time employment beyond normal retirement. The PTS committee did offer complainant part-time employment for the 1976-77 academic year. Six other teachers, five male and one female, was shown to have been granted full-time employment by St. Ambrose College in recent years past the age of sixty-five. Prior to her death in 1978, Sister Annette Walters turned down offers of part-time employment and solicited employment only in the Quad Cities area.

Sister Annette Walters filed a complaint with the Civil Rights Commission in 1974 alleging that the sabbatical leave and termination decisions were the result of sex discrimination. During 1976, an investigation was undertaken, a finding of

probable cause was made, and conciliation was unsuccessfully attempted. Upon the finding of probable cause, the investigating commissioner, rather than the Civil Rights Commission as a whole, ordered the complaint to proceed to a public hearing. The complaint was amended by complainant to allege discrimination on the basis of age as well as sex in 1977. No new finding of probable cause was made nor was any conciliation on the amended complaint attempted. The college's motion for a continuance of the public hearing was granted and the public hearing was not held until January, 1978. The complainant died after the hearing but prior to the hearing officer's decision. The motion to dismiss the complaint was denied and the executor of complainant's estate and its attorney were substituted as parties. The hearing officer found the college guilty of discrimination on the basis of age, but not sex.

On administrative review, the full commission found discrimination on the basis of both age and sex and affirmed the hearing officer's award of damages for loss of earnings which, including interest, amounted to \$39,139.91. The commission also ordered St. Ambrose College to cease and desist from: (1) enforcing any provision in outstanding tenure contracts automatically denying tenure at age 65; (2) applying different standards of evaluating performance, different procedures for application of contract renewal, and different standards for contract renewal with regard to tenured professors based on whether they were over or under the age of sixty-five; and (3) considering age as a factor in determining whether sabbatical leave should be granted.

St. Ambrose College sought judicial review of the agency action pursuant to Iowa Code chapter 17A (1977). At the time of arguments, however, both parties agreed that the IAPA did not apply because the complaint was filed prior to July 1, 1975. See Iowa Code § 17A.23 (1983). On *de novo* review the district court found that the agency decision was not rendered invalid because an individual commissioner had been delegated the authority to order the complaint to proceed

to hearing, and that permitting amendment of the complaint was not prejudicial. The district court then found upon its *de novo* review that the evidence was insufficient to establish discrimination on the basis of either age or sex. Because of the voluminous record and our finding as to the nature of our review below, we will more fully set out additional facts as they become relevant to our decision.

I. Scope of Review. The review provisions of the IAPA do not apply to this action because it was "in progress" on July 1, 1975, the effective date of the I.A.P.A. Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d 729, 731-32 (Iowa 1981); Iowa Code § 17A.23 (1983). The fact the complaint was amended after the effective date of Iowa Code chapter 17A does not affect the applicability of that act. It is clear that once a complaint has been filed before a state or local agency with authority to grant relief from discriminating practices a "proceeding" has commenced. Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 732.

Because the review provisions of Iowa Code section 17A.19 do not apply in this case, the district court properly reviewed the evidence *de novo*. Id. at 732; see Iowa Code §§ 601A.10(6) and (7) (1973). Our review is also *de novo*. First Judicial Department of Correctional Services v. Iowa Civil Rights Commission, 315 N.W.2d 83, 86 (Iowa 1982).

II. Agency Procedures. Petitioner college asserts on appeal that this action should have been dismissed by the district court because of several alleged procedural violations by the agency in processing this complaint. The petitioner, in particular, complains (1) the amendment to the complaint alleging age as a basis of discrimination was far beyond the allowed 120-day period after the alleged act of discrimination within which to file a complaint allowed by Iowa Code section 601A.14(15) (1977); (2) the commission failed to make a probable cause finding with respect to the amended complaint; and (3) the full commission did not vote to send the original sex discrimination complaint to hearing in violation of Iowa Code section 601A.14(6) (1977) and the commission's own regulations. The petitioner

relies upon the Supreme Court's decision in Peterson v. Oxberger, 206 N.W.2d 87 (Iowa 1973), as authority for its proposition that failure of the full commission to make the determination to send the complaint to hearing requires dismissal of the complaint. In that case, the court held that the failure of the full commission to make a finding of discrimination before a cease-and-desist order was entered required dismissal. There the "determination" of discrimination was made by the hearing officer and then the hearing officer and one commission member signed the cease-and-desist order.

In this case, the "determination" that the matter should be sent to hearing was made by one commission member. Iowa Code section 601A.9(6) (1973) provides in relevant part that "If the commission determines that the circumstances warrant, it shall issue and cause to be served a written notice requiring the respondent to answer the charges of such complaint at a hearing" This is the same procedure that is provided for in Iowa Code section 601A.14(6) (1977).¹ Respondent agency asserts that although the language of this section and that of the statutory sections involved in Peterson are similar, there the determination was the final determination whereas this involves only the initial procedures. Peterson v. Oxberger, 206 N.W.2d at 88. Respondent also asserts that this section of the statute is directory and, therefore, the petitioner must show prejudice before dismissal is warranted. See Maquoketa Valley Community School District v. Maquoketa Valley Education Assoc., 279 N.W.2d 510, 514 (Iowa 1979). Moreover, it is asserted that the procedure followed by the agency in this case is more protective of the petitioner's rights because the full commission is not tainted by the performing of the initial functions of determining if a hearing is

¹ This statute has since been changed to essentially provide for the procedure undertaken in this case. See Iowa Code § 601A.14(5) (1983).

warranted when it also must make the final determination in this case. Respondent agency also contends that the provisions of the statute should be liberally construed to allow amendments after the period of time provided for filing complaints. See Iowa Code § 601A.11 (1973) (this chapter shall be construed broadly to effectuate its purposes.)

The provisions of Iowa Code chapter 601A relating to amendments at the time of hearing and at the time the complaint was initially filed are the same. "The commission or the complainant shall have the power to reasonably and fairly amend any complaint and the respondent shall have the like power to amend his answer." Iowa Code § 601A.14(10) (1977); Iowa Code § 601A.9(10) (1973). The provision which provides for a time limitation for filing original complaints after an alleged discriminatory act is a separate provision. See Iowa Code § 601A.14(15) (1977); Iowa Code § 601A.9(15) (1973). All parts of an enactment should be considered together and undue importance should not be given to any single or isolated portion. Loras College v. Iowa Civil Rights Commission, 285 N.W.2d 143, 148 (Iowa 1979). We do not read these provisions as requiring amendments to be made within the same time period required for filing original complaints. We believe under the facts of this case the agency "reasonably and fairly" allowed the amendment.

Moreover, the failure to process the amended complaint as an original complaint does not require dismissal of the amended complaint. While it may have been better to reattempt conciliation and make a formal finding of probable cause on the amended complaint, the agency's failure to do so does not require dismissal of the amended complaint. The amendment was made on the basis of the investigation conducted in response to the original complaint and a finding of probable cause had been already made upon the basis of that investigation. The petitioner suffered no prejudice because it had notice of its need to defend against complainant's allegations of discrimination when the original complaint was filed.

See Iron Workers Local, No. 67 v. Hart, 191 N.W.2d 758, 766 (Iowa 1971) (strict procedural rules in this area are not applicable).

The petitioner's position that the district court should have dismissed the complaint because the full commission did not determine that the matter should go to hearing pursuant to Iowa Code section 601A.14(6) (1973) is more substantial. We agree with the petitioner college that this matter is controlled by the principle established in Peterson v. Oxberger, 206 N.W.2d at 87-88. It is unclear, however, whether that decision applies to all stages of a proceeding under Iowa Code chapter 601A. Normally, the meaning of statutory language is determined by courts using established principles of statutory construction. Loras College v. Iowa Civil Rights Commission, 285 N.W.2d at 147-48. Where a statute's meaning is clear and a violation of the provisions of that statute is found, the effect of that violation in a pending action may be determined under a mandatory/directory analysis. Taylor v. Department of Transportation, 260 N.W.2d 521, 522-23 (Iowa 1977). The court in Peterson held that the provisions of Iowa Code section 601A.9(12) (1973) which provide that the "commission shall find . . ." require actions by the full commission. We believe that the language in Iowa Code section 601A.9(6) (1973) must also be read to require commission action rather than delegating its duty to a single commissioner. Pottawattamie County Department of Social Services v. Landau, 210 N.W.2d 837, 843 (Iowa 1973), provides that "[w]here jurisdiction of the subject matter exists neither insufficiency of allegations nor informality in proceedings will affect that jurisdiction." There, however, the commission's authority to entertain a complaint was being challenged by a writ of prohibition. The court held that the commission had authority to hear the action and the claim of lack of jurisdiction could properly be raised on appeal. Id. at 843. The petitioners have done so in this case. We believe the holding in Peterson requires the dismissal of this action. Because of

the importance of the rights involved and the legislative mandate of Iowa Code section 601A.11 (1973), however, we reach the merits of this appeal.

III. Sex Discrimination. The complainant has alleged that St. Ambrose College discriminated against her on the basis of her sex when it granted the sabbatical to Mr. Schmits and when it denied her full time employment after the loss of tenure. The nature of the evidentiary burden in a case of disparate treatment was recently discussed extensively by the Iowa Supreme Court in Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d 161, 165-68 (Iowa 1983) (racial discrimination); and in King v. Iowa Civil Rights Commission, 334 N.W.2d 598, 601-04 (Iowa 1983) (religious discrimination). Federal cases are also persuasive in selecting the analytical framework for deciding discrimination cases under the Iowa civil rights statute. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982).

First, the complainant has the burden of proving by a preponderance of evidence a prima facie case of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207, 215 (1981). A prima facie case of discrimination in discharge is established if the complainant can present substantial evidence (1) that she belongs to a group protected by the statute, (2) that she was qualified for the job from which she was discharged, (3) that, despite her qualifications, she was terminated, and (4) that, after her termination, the employer hired a person not in complainant's protected class or retained persons with comparable or lesser qualifications who was not in the protected group. Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d at 296. Although in this case the complainant alleges both discriminatory discharge and denial of benefits, the prima facie case analysis is flexible to fit differing factual situations. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 n.13, 93 S.Ct. 1817, 1824 n.13, 36 L.Ed.2d 668, 677 n.13 (1973).

Under Iowa Code section 601A.7(1)(a) (1973), it is an unfair or discriminatory practice for any person to "... discharge any employee, or to otherwise discriminate in employment against . . . any employee because of age, race, creed, color, sex, national original . . ." (emphasis supplied). Complainant is a member of a protected class. See Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 730 (sex discrimination). Also, there is no dispute that complainant was eligible to take a sabbatical and was fully qualified for the job of psychology professor. Despite her qualifications she was denied the sabbatical and her employment with St. Ambrose College was terminated. It is the fourth element of the prima facie case which the petitioner college challenges.

St. Ambrose College asserts that Mr. Schmits had been employed by it for twice as long as Sister Annette Walters. Petitioner also asserts that it had granted full-time employment past the age of sixty-five to another female instructor. We note that while Mr. Schmits had been employed at St. Ambrose College longer, Sister Annette Walters was undisputedly more academically qualified. Also, the facts indicate that although one other female instructor had been granted full time employment for one year past the age of retirement, several male instructors had been granted full time employment after the age of sixty-five for as many as eight years. While there is dispute as to whether these facts establish prima facie cases of sex discrimination, we assume for the purpose of this review that they do.

If the complainant succeeds in establishing a prima facie case, the burden then shifts to the employer to articulate or introduce evidence to show that the employment decision has not been motivated by discriminatory animus. King v. Iowa Civil Rights Commission, 334 N.W.2d at 602; Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Id. at 733, citing Burdine, 450 U.S. at 254, 101 S. Ct. at 1094, 67 L. Ed. 2d at 216. St. Ambrose College asserted

that the reasons for the denial of the sabbatical were that the financial condition of the college prevented the granting of two sabbaticals, that the receipt of a terminal degree by Mr. Schmits would be a greater benefit to the college than the authoring of another book by Sister Annette Walters, and that Mr. Schmits and others had much longer service to the college. Petitioner college further asserts as nondiscriminatory business reason for the denial of full-time employment beyond the 1975-76 academic year, that the complainant, although well qualified, is not an outstanding teacher. Petitioner finally asserts that the psychology department was to change emphasis from experimental (Sister Annette's specialty) to a more practical curriculum.

After the employer has articulated nondiscriminatory reasons for its employment decisions, the complainant has the opportunity to demonstrate that the proffered reasons given are pretextual. Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733. Complainant introduced evidence which indicated that sabbaticals are not normally given at other colleges and universities for the purpose of obtaining a higher degree. There was also evidence that the two sabbaticals would not have required the college to hire any additional instructors. Furthermore, the college, in an apparent change of policy, granted two sabbaticals the next academic year. The evidence also indicated, however, that the college had substantially changed its financial position for the better at that time. Moreover, the sabbatical policy of other schools, while probative, does not bind St. Ambrose College. The hearing officer found, and we agree, that in the college's denial of sabbatical to Sister Annette Walters, sex was not "a factor." See Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d at 296. The controlling consideration appears to have been the benefit to the college. It was not disputed that the acquiring by Mr. Schmit's of the terminal degree in his field would provide substantial benefit to the college.

The complainant introduced considerable evidence disputing the college's assertion that she was not an outstanding teacher. St. Ambrose College relied to some extent upon subjective student evaluation forms to determine whether an instructor was outstanding. Complainant's expert witness testified that the student evaluations were statistically unreliable. There was considerable testimony, however, which indicated that complainant, while qualified, was not an outstanding classroom instructor at the time the PTS committee considered her request for continued full-time employment. We agree with the agency hearing officer that the decision by St. Ambrose College to deny Sister Annette Walters full-time employment after the age of sixty-five, although perhaps based upon questionable evaluations, was not made upon the basis of her sex.

IV. Age Discrimination. The respondent agency's hearing officer found that the petitioner college impermissibly discriminated on the basis of age by providing for an automatic loss of tenure at age sixty-five. As a result of this loss of tenure, the complainant was required to show that she was indispensable to the college or an outstanding teacher in order to obtain full-time employment after the age of sixty-five. The agency hearing officer also found the denial of the sabbatical to Sister Annette Walters to be impermissible discrimination on the basis of age because the PTS committee in determining the relative benefits of the two proposed sabbaticals considered the fact that Sister Annette Walters would shortly lose tenure and that she was considerably older than Mr. Schmits. The full commission affirmed that portion of the hearing officer's decision and the district court reversed. The district court, upon its *de novo* review, held the tenure program of St. Ambrose College was not impermissibly discriminatory because it was not shown that the system was a mere subterfuge for the purpose of evading the provisions of the Iowa Civil Rights Act. See Iowa Code § 601A.14 (1973). Respondent agency contends on appeal that the retirement system at St. Ambrose College does not require mandatory retirement at age sixty-five and that

the exception contained in Iowa Code section 601A.14 (1973) does not apply in this case. Because we find this issue dispositive, we limit our discussion in this division to the applicability of the statutory exception.

We find the case of Loras College v. Iowa Civil Rights Commission, 285 N.W.2d 143 (Iowa 1979), to be controlling on this point. There was no question in that case as to whether Loras College had a "retirement plan or benefit system" within the meaning of section 601A.14. That question is disputed in this case. The legislative purpose and intent in enacting Iowa Code section 601A.15 (1973) was to exempt only those plans or benefit systems relating to retirement. Franklin Manufacturing Company v. Iowa Civil Rights Commission, 270 N.W.2d 829, 832 (Iowa 1978).

St. Ambrose College adopted an annuity retirement plan in February, 1969. The annuity contract with the insurance company did not require the recipient of the annuity to retire at age sixty-five. The retirement policy in the faculty handbook in effect at the time of the filing of this complaint, however, stated that retirement is to take place upon the completion of the academic year in which their sixty-fifth birthday occurs. The agency's argument that the "retirement plan" contained in the annuity agreement does not require retirement at age sixty-five and, therefore, falls outside the "retirement plan" exception is without merit. "The definition of 'retirement plan' cannot be limited to the mere document that provides the benefits to the employee, even though such a document constitutes a major portion of the plan." Loras College v. Iowa Civil Rights Commission, 285 N.W.2d at 149. Furthermore, the fact Sister Annette Walters chose not to participate in the annuity plan is irrelevant. Id. at 149. Also, the decision as to whether to apply the plan to a particular employee or not was made upon objective nondiscriminating factors. (Is the employee indispensable to the college or an outstanding teacher?)

We do not believe a retirement plan is a "mere subterfuge" when it provides for a mandatory retirement and benefit system while permitting those outstanding or indispensable employees the option of seeking continued employment. We reiterate the statement by the Loras court that we do not purport to pass on the wisdom of mandatory retirement at a particular age. Id. at 147. (The legislature, in amending the "retirement plan" exception, provided that a retirement plan or benefit system shall not require the involuntary retirement of a person under the age of seventy because of that person's age. Iowa Code § 601A.13(1) (1983)). We do believe, however, that the retirement plan provided by St. Ambrose College was excepted from the provisions of the Iowa Civil Rights Act of 1965. St. Ambrose College did not impermissibly discriminate against Sister Annette Walters on the basis of age.

AFFIRMED.