IN THE COURT OF APPEALS OF IOWA

No. 9-669 / 89-789

FILED
JUN 26 1990
CLERK SUPREME COURT

EUGENE VISLISEL,

Appellant,

vs.

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IOWA CIVIL RIGHTS COMMISSION and **INGA BUMBARY-LANGSTON,**

Appellees,

and

HUNTER RAWLINGS III, STATE UNIVERSITY OF IOWA, and **THOMAS J. MILLER, IOWA ATTORNEY GENERAL,**

Respondents.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Petitioner appeals a district court's affirmance of an Iowa Civil Rights Commission ruling. **AFFIRMED.**

Eugene Vislisel, Cedar Rapids, petitioner-appellant, pro se.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for respondents-appellees.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

PER CURIAM 291

Petitioner Eugene Vislisel has been engaged in seeking employment with the University of Iowa (University). As a result of his job search he filed a suit against the University challenging its application of the Veteran's Preference Law, Iowa Code chapter 70. See Vislisel v. The University of Iowa, 445 N.W.2d 771 (Iowa 1989). Vislisel continued to seek interviews at the University while this suit was pending. However, University personnel felt Vislisel was not a serious job candidate, but was using the interviews as an attempt to conduct discovery for his suit. Merle Wilna Fleming, an assistant attorney general, sent Vislisel a letter on June 18, 1987, informing him that if he did not quit his use of harassment and intimidation he would not be allowed further interviews. On September 23, 1987, the University suspended consideration of Vislisel's application.

Vislisel filed a claim with the Iowa Civil Rights Commission (Commission) alleging that the University barred him from interviewing on the basis of retaliation and age. After an investigation the Commission entered a finding of no probable cause. The Commission found that the University could reasonably question Vislisel's sincerity in seeking employment because of his obnoxious behavior during interviews. Vislisel filed a petition for judicial review. The district court affirmed the Commission.

Vislisel now appeals. He claims the letter from Fleming clearly shows he was being barred from interviewing because of his pending suit against the University. He feels he was within his rights to bring up his interpretation of the Veteran's Preference Law at job interviews. Vislisel believes that he made out a prima facie case of discrimination and that the burden of proof should have shifted to the University. Vislisel contends that he then should have been given an opportunity to show that the University's alleged reasons were pretextual. He asserts that the Commission erred in finding no probable cause and the court erred in not reversing the Commission. We affirm.

In determining our scope of review, we initially note that the present case involves a "no probable cause" ruling from the Iowa Civil Rights Commission, and as such, is governed exclusively by the Iowa Administrative Procedures Act, Iowa Code chapter 17A. Because the "no probable" determination was not proceeded by a contested case, our review is under the standard of "other agency action." Sheet Metal Contractors v. Comm'r of Ins., 427 N.W.2d 859, 867 (Iowa 1988). Under this standard, we do not hear cases de novo, but act in an appellate role to correct errors of law or unreasonable, arbitrary or capricious action. Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 439, 448-49 (Iowa 1983). Therefore, the lack of substantial

evidence ground set forth in Iowa Code section 17A.19(8)(f) is not applicable here. Mowrey v. Iowa Civil Rights Comm'n, 424 N.W.2d 664, 665 (Iowa App. 1988).

We first address Vislisel's argument that the trial court erred in finding no evidence of retaliation. The main thrust of Vislisel's argument is that the action warned of and advised by Assistant Attorney General Fleming to preclude him from applying for positions at the University, and subsequently carried out by the University, constitutes illegal retaliation. Retaliation suits require plaintiffs to establish a prima facie case based upon four elements: (1) the plaintiff filed a complaint of discrimination in opposition to practices made unlawful under Title VII, 42 U.S.C. section 2000e-2(a); (2) the plaintiff is a member of a protected class; (3) the plaintiff was subject to adverse treatment by the employer; and (4) there was a causal connection between his opposition or participation and the adverse treatment. Mosley v. General Motors Corp., 497 F. Supp. 583, 589 (E.D. Mo. 1980), aff'd 691 F.2d 504 (8th Cir. 1982); Taylor v. Amaturo Group, Inc., 518 F. Supp. 1331, 1336 (E.D. Mo. 1981); Windsom v. City of St. Louis, 427 F. Supp. 806, 812-13 (E.D. Mo. 1977), aff'd 568 F.2d 78 (8th Cir. 1977).

Vislisel has, without question, satisfied the first element. Vislisel was participating in an Iowa Code chapter 601A proceeding (or Title VII proceeding) in which

he had filed a prior complaint. Iowa Code section 601A.11(2) provides that it shall be considered a discriminatory practice for "[a]ny person to discriminate against another . . . because such person has lawfully opposed any practice forbidden . . . or has filed a complaint . . . or assisted in any proceeding under this chapter." Thus, Vislisel has met the second element. In addition, there is no question that Vislisel was subjected to adverse treatment, since the Attorney General's office did advise the University to suspend Vislisel's right to apply for employment, and the University acted upon said advice. The remaining question, however, is whether there was a causal connection between his filing of a complaint and the adverse treatment. We believe there was not.

The Commission found, and we agree, that the record was replete with evidence of Vislisel's obnoxious and boorish behavior. Vislisel's conversations with various members of the University administration reveal his rude and insensitive comments towards persons who attempted to answer his questions. An examination of various interviews granted Vislisel reveal that the interviews appeared to be used by Vislisel to gather further information for his pending complaint. The University warned Vislisel that his continued hostile behavior would result in his being denied the opportunity to interview, yet Vislisel refused to modify his behavior, using the interviews as a sort of

vehicle for discovery. Vislisel was told not to contact various persons in the University administration, yet he persisted in doing so. No one in the Attorney General's office or the University suggested to Vislisel that he withdraw his complaint or he would be suspended from interviewing. All that the University required was Vislisel's promise that he would cease his insulting behavior.

In Rollins v. State of Fla. Dep't of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989), the Eleventh Circuit Court of Appeals, in considering suit brought under Title VII alleging retaliation, held that "the manner in which an employee expresses her opposition to an allegedly discriminatory employment practice must be reasonable." In Rollins, the plaintiff had alleged that the Florida Department of Law Enforcement had denied her opportunities to advance because she was a Black. 868 F.2d at 399. The Rollins court noted that the plaintiff was unruly, antagonistic, insubordinate, a chronic complainer, and lodged her complaints in an incorrect and disruptive manner. Id. at 399-400. The Rollins court held that if the manner in which the employee complains is unreasonable, such conduct falls outside the protection of the statute, and a legitimate basis for denial of a promotion may be found. Id. at 401.

We believe this analysis is applicable to the present case. Vislisel's cantankerous behavior created tension and anger among those with whom he interviewed. Vislisel earned a reputation among the University staff as someone who was rude, combative, and not at all interested in interviewing for a particular job. Vislisel's disruptive behavior wasted time, and possibly resulted in equally qualified applicants being denied the opportunity to interview. The district court found, and we agree, that the Commission applied the proper law, and that its "no probable cause" decision was not unreasonable, arbitrary or capricious. Frank v. Iowa Department of Transportation, 386 N.W.2d 86,87 (Iowa 1986).

We also believe Vislisel's reliance on McDonnell Douglas Corp. v Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), is misplaced. Unlike the present case, the McDonnell Douglas case involved the question of whether an agency finding of no probable cause was a jurisdictional prerequisite to raise a claim under section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1). 411 U.S. at 797, 93 S. Ct. at 1822, 36 L. Ed 2d at 675. In McDonnell Douglas, the supreme court was dealing with an adversarial case brought as a separate action from the agency. Id. Under the McDonnell Douglas framework, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to rebut the

inference of discrimination. Id. at 802-03, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677-78. The plaintiff still has the ultimate burden of establishing discrimination by a preponderance of the evidence. Id. In the present case, we are not dealing with an adversarial, contested case proceeding, but an investigation wherein the agency is only to produce a record upon which the agency hearing officer can make a determination of "probable cause."

Vislisel has raised numerous other issues, but because of our holding today, and upon our consideration of these issues, we find they have no merit and we need not discuss them.

AFFIRMED.