FILED
MAR 31 1986
CLERK SUPREME COURT

390

IN THE COURT OF APPEALS OF IOWA

MARK A. TROBAUGH,

Plaintiff-Appellant,

vs.

HY-VEE FOOD STORES, INC., CLIFF DEVERELL, and JERRY ISRAEL,

Defendants-Appellees.

Filed March 31, 1986

5-501
84-1526

Appeal from the Iowa District Court for Plymouth County (No. 24431) - Michael S. Walsh, Judge.

The plaintiff appeals the trial court's judgment dismissing plaintiff's action against the defendants for damages resulting from the defendants' termination of the plaintiff's employment at a grocery store in violation of the Iowa Civil Rights Act, Iowa Code chapter 601A (1979). **REVERSED AND REMANDED.**

James W. Redmond and Daniel D. Dykstra of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for plaintiff-appellant.

F. Joseph DuBray of Shull, Marshall & Marks, Sioux City, for defendants-appellees.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ.

SNELL, J.

Plaintiff Mark Trobaugh began working part-time for the Hy-Vee Food Store in LeMars, Iowa, (hereinafter Hy-Vee) on October 13, 1972. At that time Mark was still a high school student. He worked in a courtesy position in the grocery department, stocking shelves, sweeping, unloading trucks, sacking, and carrying out groceries for customers. Mark worked twenty to thirty hours a week from 1972 to 1975 when he graduated from high school. In June of 1975, Mark began working full-time at Hy-Vee. At first he was assigned to the bakery department to make donuts. After about three months, the bakery manager determined that Mark was too slow. Therefore, Mark returned to the grocery department on a full-time basis and was assigned the same duties he had performed there before. When the Iowa legislature passed the bottle redemption bill, Mark was also trained to run the redemption register. Mark continued working in this capacity until 1980, and between 1972 and 1980 he worked for four different Hy-Vee managers. In May of 1980, Mark was the most senior member of Hy-Vee's staff. He was earning $5.15 per hour and Hy-Vee also provided pension benefits and health insurance.

In the spring of 1980, Mark's hours were changed from Monday through Friday, 8:00 a.m. to 5:00 p.m. to a six-day work week with split night and day hours. Mark testified that on May 27, 1980, he was sorting bottles in the back room of the store. One of the checkers in the front of the store called for courtesy help in sacking groceries, but because Mark was in the back room, he did not hear the call. Hy-Vee's assistant manager, Jerry Israel, went to the back room and told Mark to be sure to tell the checker when he went to the back room. Mark assumed that Israel would advise the checker as to his whereabouts at that time but apparently Israel did not do so, as a second call was made which Mark did not hear. Israel then came again to the back room and advised Mark

to punch out on the clock and not to return until he spoke to Israel or Hy-Vee's manager, Cliff Deverell. At trial, Israel could not recall these circumstances. The next morning, May 28, 1980, when Mark returned to work in the morning, neither Deverell nor Israel were present and Mark checked in and began work. Deverell called Israel into his office to discuss the termination of Mark that morning. Deverell had just attended an inventory meeting and was concerned about controlling costs in the store. Later on in the day Mark spoke with Deverell alone in Deverell's office and was advised by Deverell that he would be laid off because of labor costs given the slow economy, but that he would be kept in mind if someone else would be needed at the store. The separation report filled out by Deverell indicated that Mark's layoff was permanent. It stated that the store was "long some on help," that Mark was having some problems keeping his mind on his work, and was acting weirdly around customers. Deverell testified that he had observed Mark shadow boxing outside the store while waiting to load groceries, and dropping boxes on the floor aggressively when stocking. Deverell also stated that he had received a customer complaint about a comment Mark made. Mark's personnel file contained no references to any of these incidents. However, Deverell was sure he had talked to Mark about this conduct.

Mark's mother testified that when she contacted Deverell regarding Mark's layoff Deverell indicated that Mark was not capable and that his termination was something Deverell would have to live with. Israel testified that he knew on the day of Mark's layoff that Mark was done working at Hy-Vee. He stated that Deverell had already decided to terminate Mark before he spoke with him on the morning of May 28. Israel concluded that the fact that Mark was making more money than a part-time employee was a factor in the termination decision.

Mark finished out the work week of May 29, 1980, and was paid through

June 12, 1980. Mark also received a check for $1,154.22, which represented forty percent of the value of his retirement trust fund.

Mark did not have a written employment contract with Hy-Vee. He was never promised seniority or employment for a specific period of time. While Mark's personnel file indicated that he was given the titles of "aisleman" and "swingman" at some point in his employment, he was never given the opportunity to perform the additional duties which came with these promotions. He never ordered for an aisle, ran a cash register for a check-out lane, managed the store at night, nor opened and closed the store. Israel described Mark's position throughout his employment as "full-time courtesy." Israel testified that from his observations he felt Mark was a little slow but he did not know why Mark did not run the check-out registers. Because Mark was trained before Israel began working in the store, Israel figured that Mark's position was full-time sacker. Deverell also testified that he felt Mark had limited capabilities and thought Mark would have had problems working on a register. Mark contended at trial that at least once he requested to be trained on a check-out register, but his request was ignored. Israel and Deverell stated that Mark never sought out an advancement in his position or requested training to qualify for further responsibilities in the store.

Mark was the only full-time employee who was not trained on the check-out registers. Even thirty to fifty percent of Hy-Vee's part-time clerks are trained on the registers. Mark testified that he took inventory for quite awhile but was taken off the task because he was needed in the front of the store. All in-house personnel are expected to assist in taking inventory. Neither Israel nor Deverell could remember whether Mark ever worked inventory or not. Both felt that Mark would have been capable of taking inventory.

Israel testified that he began work as assistant manager at the LeMars Hy-Vee Store in September of 1978 and continued in that capacity until February of 1984. As assistant manager, it was his responsibility to run the grocery department, and most of his time was spent working with the employees in the operation of the store. It was also his obligation to hire and fire part-time people. Israel stated that in the event of business slowdown, the normal policy is to allow attrition to eliminate extra help because turnover among employees is common.

Israel testified that Hy-Vee policy required a personnel file be maintained on all employees, the file containing applications for employment, pay history, and any other matters of importance. He stated that his practice was to note improper conduct which required confrontation of an employee in the employee's file. Mark's file only contained an application for employment, an evaluation, an employee separation report, a pay history, a status history, and a copy of a cover letter sent to Mark which accompanied his trust fund payment.

Israel testified that he could not recall having a complaint about Mark's job performance. He stated that Mark was a good employee, friendly and courteous. Furthermore, Mark's January 1979 evaluation by Hy-Vee management included the following comments: "Super with people," "always friendly," "never complains," "dependable," "industrious," "absolute minimum supervision," "very prompt," "neat and clean," "Hy-Vee type person."

Deverell became manager of Hy-Vee in May of 1979. This was his first position as manager of a store, and as manager he was responsible for all operations of the store. Deverell testified that Mark did a fine job on all of his employment duties.

Within a month of his layoff, Mark spoke to Israel requesting work. Israel told Mark that no job was available for him. While Israel and Deverell vehemently insisted that no full-time person was hired to replace Mark, at least five part-time people were hired within six weeks of Mark's layoff to perform courtesy work. None of these individuals had a physical or learning disability as far as Israel knew. Nine part-time employees left Hy-Vee from May to July 10, 1980. Israel testified that turnover during the summer of six to ten people is common due to high school graduations. Three of these people had given notice prior to Mark's layoff that they were leaving. Hy-Vee's wage expense averaged eleven percent of its gross sales from 1978 through 1980.

After the plaintiff was terminated he applied for work at several different grocery stores and subsequently obtained employment at a convenience store in Sioux City. However, he was fired because he was unable to do the work involved, particularly handling the cash register and gas pumps. Subsequently, the plaintiff obtained work at a dairy but was unable to do the job of putting boxes in sleeves and making some minor machinery repairs. After training, the plaintiff obtained work as an orderly in a nursing home.

On November 12, 1980, Mark filed a complaint with the Iowa Civil Rights Commission alleging that Hy-Vee discriminated against him by terminating his employment because of his learning disability. Mark obtained an administrative release stating that he had the right to commence an action in district court. On June 18, 1981, Mark filed a petition claiming that he was discharged because of a mental condition and that his discharge was an unfair and discriminatory practice in violation of Iowa Code chapter 601A. After trial the court entered judgment in favor of defendants. While the court recognized that Hy-Vee's treatment of Mark was unfair, it concluded that the plaintiff failed to show by preponderance of the evidence that he was "a substantially handi-

capped person" as defined by Iowa Code chapter 601A. The court also concluded that the plaintiff failed to show by a preponderance of the evidence that Hy-Vee's discharge was an action taken with the intent to discriminate against the plaintiff based upon any disability. The court determined that the economic reasons offered by Hy-Vee and the plaintiff's unusual behavior were credible and believable reasons for laying off the plaintiff. The court also determined that the claims made against the individual defendants were not presented to the Iowa Civil Rights Commission and thus were not preserved. The court also determined that in any case the plaintiff failed to show by a preponderance of the evidence that the actions of the individual defendants were motivated by discriminatory intent.

On appeal, Mark contends that 1) the trial court erred in finding that Mark was not a substantially handicapped person as defined in chapter 601A and the regulations promulgated thereunder, 2) the court erred by requiring Mark to prove by a preponderance of the evidence that a discriminatory reason likely motivated his discharge, and 3) the court erred in finding that plaintiff failed to show by a preponderance of the evidence that the action taken by Hy-Vee in terminating Mark was an action taken with intent to discriminate.

Because this action was tried at law, this court's duty is to determine whether the district court correctly applied the law. Iowa R. App. P. 4. The district court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Substantiality of Handicap. Mark initially contends that the trial court erred in finding that he is not a substantially handicapped person.

Iowa Code section 601A.6 (1983) provides in pertinent part:

> 1. It shall be an unfair or discriminatory practice for any:

> a. Person . . . to discharge any employee or to otherwise discriminate in employment against . . . any employee because of the . . . disability of such . . . employee, unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

The term "person" as used in section 601A.6(1)(a) includes individuals and corporations. Iowa Code § 601A.2(2) (1983). The term "disability" is defined as follows:

> The physical or mental condition of a person which constitutes a substantial handicap. In reference to employment, under this chapter, "disability" also means the physical or mental condition of the person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation.

Iowa Code § 601A.2(11) (1983). A "substantial handicap" is defined in the regulations adopted pursuant to section 601A.5(10) which grants the Iowa Civil Rights Commission authority to promulgate regulations consistent and necessary for the enforcement of chapter 601A.

A "substantially handicapped person" is defined in Iowa Admin. Code 240—6.1(1) as "any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." The rules following 6.1(1) further refine this definition:

> 6.1(2) The term "physical or mental impairment" means:
>
> a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
>
> b. Any mental or psychological disorder, such a mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

> 6.1(3) The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
>
> 6.1(4) The term "has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> 6.1(5) The term "is regarded as having an impairment" means:
>
> a. Has a physical or mental impairment that does not substantially limit major life activities but that is perceived as constituting such a limitation;
>
> b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> c. Has none of the impairments defined to be "physical or mental impairments", but is perceived as having such an impairment. (emphasis added)

Iowa Admin. Code 240—6.1(2)-(5).

Mark bears the burden to prove by a preponderance of the evidence that he is a member of a protected class under section 601A.6. Woodbury County v. Iowa Civil Rights Comm., 335 N.W.2d 161, 165 (Iowa 1983). Mark presented much evidence at trial concerning his difficulties in school as a child and the results of vocational testing after his layoff from Hy-Vee.

Mark's mother testified that they began to suspect Mark had some learning problems early on in Mark's development. She testified that Mark walked at age seventeen months, spoke his first words at age two and a half, used sentences at four, and could not ride a bike until he was ten years old. Mark was seen twice at the State Services for Crippled Children in 1961 and in 1962 and 1963 at the Cherokee Mental Health Institute. Doctors diagnosed his condition as a visual motor problem and diffuse organic brain disease. In 1965 he was taken to the University of Iowa for study, and it was there noted that there existed

a great difference between verbal skills and performance skills. At the time, under normal progression, he should have been in the fifth grade, but his scores and actual class standing indicated third grade ability. Mark was found to be of low average intellectual ability, and the conclusion of the expert was that his problem was of an organic basis, as manifested by incoordination, visual motor problems, esotrophia, and difficulty with school work. It was at that time that Mark's family fully realized that Mark had a learning disability.

Mark repeated kindergarten and third grade. Throughout grade school he was graded on his own ability and had difficulty in keeping up in studies. His grades throughout his school career were consistently D's and F's. Testing in 1965 indicated an I.Q. of 78, the range of 90 to 110 being average. In grade 11, Iowa Tests of Educational Development indicated that he was in the eighth percentile on the composite score and in the fifth percentile on quantitative thinking. Mark eventually graduated from high school at the age of twenty ranked 201 of 214 students.

For nine years of his schooling, 1961 through 1970, Mr. Ray Beamer counseled Mark as the LeMars director of special education and the school psychologist. It was his conclusion that Mark's difficulties were neurological deficits (improper functioning of the central nervous system) indicated by his strong vocabulary and verbal skills, but poor performance scores, his low average I.Q., poor eye/hand coordination, and poor articulation and speech. Mr. Beamer's conclusion was that Mark had a learning disability, i.e. average intelligence but deficits which interfere with the learning situation. School officials recommended placing Mark in special education classes, but his family felt he would learn more in regular classes. Therefore, a program was developed for school which included work on speech, special physical education to refine motor skills, remedial reading and arithmetic, and advice to teachers to encourage Mark's

self-worth. No learning disability classes were available in LeMars at the time Mark was in school. Had they been in existence as they are now, Beamer's opinion was that Mark would have qualified for those classes. Mark has never handled his own financial affairs but relies on his mother to control his finances.

Mark never represented himself as having a disability to Hy-Vee or any of six other employers for whom he worked or to whom he applied for work since his high school graduation. A specific question on the Hy-Vee employment application asked for "physical handicaps or limitations." Mark did not describe a disability when he filled out this form.

A specific question on the dairy employment application form asked for a description of "any physical limitations, chronic diseases, mental disorders, or disabilities you now have or have had in the past." Mark answered this question "None."

On July 22 and August 7 of 1980 (two months after Mark's layoff from Hy-Vee), tests were conducted at Western Iowa Tech to determine Mark's job skills and potential for employment. The Weschler Adult Intelligence Scale indicated a large discrepancy between verbal and performance scores. The general aptitude test battery indicated intelligence at the seventh percentile and an educational equivalent of the sixth to seventh grade. In addition, Mark demonstrated difficulty with spatial relationships or organizing forms and shapes in his head. Mark's counselor, Dr. Gratia Gilbert, was concerned with these results, as they indicated neurological problems, and referred Mark to the Vocational Rehabilitation Services Program. In order to participate in the Vocational Rehabilitation Services Program organized through the Iowa Department of Education, Mark had to qualify for the program by having his disability diagnosed. Dr. Phillip Pugh of Sioux City, a psychiatrist holding a post-doctorate degree

in neurology-psychiatric, ran tests and did the evaluation for purposes of that qualification.

His conclusion was that Mark had a low average I.Q., a learning disability, and a secondary personality disorder. He noted a large discrepancy again between verbal and performance skills. Mark could not even copy a simple box-type figure. It was his conclusion that any vocational and socio-economic adjustment would be difficult for Mark and that any job that had too much input such as one requiring mathematical skills would be a problem.

As a result of Dr. Pugh's examination, Mark qualified for vocational rehabilitation services, and two weeks of testing were done in Des Moines, Iowa. Part of the vocational rehabilitation program, according to Dan Johnson, the Sioux City director, is to provide testing to determine the feasibility for employment in different areas. The goal is to fit individuals to jobs compatible with their abilities and disabilities. The testing done indicated that Mark's work pace involving eye/hand coordination was extremely slow. Tests concluded that he could not run a cash register sufficiently to obtain employment in that regard. He was functioning on a borderline to low average intelligence. He was overly conventional and socially conforming and often unaware of the impact that his behavior had on others. He needed an unpressured work setting. He needed a work supervisor who would give concrete instructions and have concrete expectations.

The trial court apparently concluded that Mark was not a substantially handicapped person because he never represented himself as having a disability and Mark himself claimed that he was capable of managing his own affairs. The court relied on Mark's deposition testimony where he stated that his disability does not prevent him from doing anything if he is given enough time to study the situation. Mark also stated that his condition does not prevent him from

watching TV, bowling, hunting, or fishing, but primarily affects his ability to read things quickly.

The trial court erred in determining that Mark was not substantially handicapped on these grounds. Truthfulness about a physical or mental condition on an employment application is not a prerequisite to recovery under Chapter 601A. See Foods, Inc. v. Iowa Civil Rights Comm., 318 N.W.2d 162, 165-66 (Iowa 1982). We find that the fact that an employee misrepresents his handicap to his employer is not sufficient to allow the court to find that the agency's determination of no disability is supported by substantial evidence.

Given the wealth of uncontroverted testimony concerning Mark's learning disability and how it affected his educational and vocational performance, we conclude that Mark's condition constitutes a disability, as defined in section 601A.2(11) and rule 6.1.

Burden of Proof. Mark next contends that the trial court erred in requiring him to prove by a preponderance of the evidence that the discriminatory reason likely motivated Hy-Vee to terminate Mark. Mark argues that he is required only to show by a preponderance of the evidence that the discriminatory reason was one factor in motivating the employer's decision to terminate.

A prima facie case of discrimination must be established by a complainant by a preponderance of the evidence. Woodbury, 335 N.W.2d at 165. The necessary preliminary showing is made if substantial evidence is shown "(1) that [plaintiff] belongs to a group protected by statute, (2) that he was qualified for the job from which he was discharged, (3) that, despite his qualifications, he was terminated, and (4) that, after his termination, the employer hired a person not in complainant's protected class or retained persons with comparable or lesser qualifications who are not in the protected group." Iowa State Fairgrounds Sec. v. Iowa Civil Rights, 322 N.W.2d 293, 296 (Iowa 1982). The burden of proof

does not shift at any time to the employer. Lynn Co-Op Oil Company v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981). "However, a prima facie case creates a 'presumption' of discrimination which, if believed, will require a finding of discrimination. . . . An employer wishing to dispel the presumption must produce evidence showing 'some legitimate, nondiscriminatory reason' for the challenged action." Fairgrounds, 322 N.W.2d at 296 (quoting in part McDonnell-Douglas Corp., 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973)). However, the employer need not prove that it was actually motivated by its proffered reason. Lynn Co-Op, 305 N.W.2d at 733.

The burden of persuasion then shifts back to the complainant to show that the employer's reason was merely a pretext for discrimination. Fairgrounds, 322 N.W.2d at 296. The complainant's burden to show pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 217 (1981); see also Woodbury, 335 N.W.2d at 166. This determination bears upon the employer's motive. The complainant has the burden of ultimately establishing that the prohibited conduct was a factor in the challenged action. Satz v. ITT Financial Corp., 619 F.2d 738, 746 (8th Cir. 1980).

The language in the district court's decree which Mark contends is erroneous reads as follows: "the plaintiff must then prove by a preponderance of the evidence that a discriminatory reason likely motivated the employer or indirectly show that the employer's proffered explanation is unworthy of belief." This

language precisely parallels the United States Supreme Court's explanation of the complainant's ultimate burden of proof in Burdine. This explanation was adopted verbatim by the Iowa Supreme Court in Woodbury.

We agree with Mark that a discriminatory reason need not be the sole or primary factor motivating Hy-Vee's decision to discharge him. A discriminatory reason must just be one factor in the employer's decision. However, we cannot agree with Mark's assertion that the standard enforced by the trial court imposes a greater burden of proof upon him. Requiring that Mark prove the discriminatory reason motivated Hy-Vee's decision to discharge him is no different than requiring that the discriminatory reason be a factor in Hy-Vee's decision. We conclude that the trial court correctly stated the law in this regard.

Intent to Discriminate. Mark's final contention is that the trial court erred in finding that Mark failed to show that his termination by Hy-Vee was the result of Hy-Vee's intent to discriminate against Mark because of his learning disability. Mark also argues that the nondiscriminatory reasons for the termination offered by Hy-Vee are not credible.

Mark has satisfied his burden to establish a prima facie case of discrimination. We have found that Mark is handicapped and therefore is a member of a protected class. Hy-Vee's testimony coupled with Mark's eight-year employment attests to the fact that Mark was well qualified for his courtesy position. Despite his qualifications, he was terminated. Shortly after Mark's termination, several nonhandicapped persons were hired in courtesy positions. Mark, then, has created a presumption of discrimination. We next must examine whether Hy-Vee successfully dispelled the presumption of discrimination with legitimate nondiscriminatory and nonpretextual reasons for the termination.

The trial court found that Hy-Vee articulated believable nondiscriminatory reasons for its action in laying off Mark and that Mark failed to prove that

these reasons were pretextual. The reasons advanced by Hy-Vee for the layoff were the slow down of the economy which generated a necessity to cut labor costs and recent weird or unusual behavior by Mark.

We believe that Mark successfully showed that Hy-Vee's explanation for his discharge is pretextual. The following factors indicate that Hy-Vee's proffered reasons are unworthy of credence.

Deverell testified regarding two isolated instances where Mark was seen shadowboxing and stocking aggressively. Despite Hy-Vee's policy requiring improper conduct to be noted in the employee's personnel file, Mark's file is devoid of any reference to such conduct. In fact, Mark's file reveals only laudatory comments regarding his character and job performance throughout his eight years of employment. Moreover, Israel testified that he could not recall having a complaint about Mark, and the quality and quantity of Mark's work was more than satisfactory. Deverell agreed that Mark did a fine job on all of his employment duties. We find that Hy-Vee's claim that Mark's alleged wierd behavior justified his dismissal without even a warning after eight years of satisfactory performance is not worthy of belief.

Neither does Hy-Vee's "cost-savings" allegation withstand scrutiny. Israel testified that in the event of business slowdown, Hy-Vee's policy is to allow attrition to eliminate extra help due to high employee turnover. Yet, in this instance, when the economy slowed down, Deverell chose to lay off a full-time eight-year exemplary employee. Mark's dismissal occurred for alleged economic reasons despite the fact that Deverell was aware that a number of part-time employees would be leaving over the next several months. Even more telling is the fact that at least five new part-time employees were hired within six weeks of Mark's layoff. Furthermore, Hy-Vee's wage expense never decreased after Mark's termination. Hy-Vee's characterization of Mark's dismissal as

a "layoff" is also unbelievable given the number of persons hired to perform courtesy services immediately thereafter and the fact that Mark requested an opportunity to return to work during this period and was informed that no work was available.

We hold that under this record the only conclusion supported by substantial evidence is that Mark showed that Hy-Vee's alleged nondiscriminatory reasons for his termination are merely a pretext for discrimination. We therefore conclude that the district court erred in upholding the agency's decision. We reverse the district court and remand for determination of damages.

REVERSED AND REMANDED.