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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **JEFF L. HALSEY,** | ) | |
| Plaintiff-Appellant, | ) | Filed February 25, 1987 |
| vs. | ) | 45 |
| **COCA-COLA BOTTLING COMPANY MID-AMERICA, INC., d/b/a COCA-COLA BOTTLING COMPANY OF QUAD CITIES,** | ) | 6-399<br>86-169 |
| Defendant-Appellee. | ) | |

Appeal from the Iowa District Court for Scott County (No. 69352) James E. Kelley, Judge.

Plaintiff appeals from the district court's dismissal of his petition in equity in which he claimed that his employment was terminated because of a physical disability in violation of Iowa Code section 601A.6(1)(a) and corresponding administrative rules promulgated by the Iowa Civil Rights Commission. **REVERSED AND REMANDED.**

Michael J. McCarthy of McCarthy & Lammers, Davenport, for plaintiff-appellant.

William C. Martucci and L. Camille Hebert of Spencer, Fane, Britt & Browne, Kansas City, Missouri, and Patrick J. Flynn of Rehling, Lindburg & Gosma, Davenport, for defendant-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

**SNELL, P.J.** 46

The appellant, Jeff Halsey, was hired in January 1983 by the appellee, Coca-Cola Bottling Company of Mid-America, as a vending machine service repairman. His job duties in that capacity included the repair, maintenance, installation, and pickup of soft drink vending machines throughout the territory served by Coca-Cola's Davenport, Iowa, facility. Subsequently, Halsey was promoted to the position of lead serviceman. The responsibilities of this position are much the same as Halsey's earlier position, except that they include some degree of supervisory responsibility for two other servicemen.

In April 1983, Halsey participated in a federal Department of Transportation physical examination which was required by Coca-Cola of all its drivers. He failed the vision test, discovering for the first time that he has a degenerative eye condition that cannot be corrected with lenses. Halsey informed his supervisor of his eye condition at this time. Halsey continued to drive for Coca-Cola until August 1983, when he failed the Iowa Department of Transportation vision test and was consequently denied an Iowa driver's license. Coca-Cola decided at this time that, in light of Halsey's eye condition and his related inability to drive, Halsey's employment would be terminated. Alternative jobs were considered but rejected by Coca-Cola and were not offered to Halsey. Upon hearing of the decision to terminate his employment, Halsey proposed to Coca-Cola that, if retained as an employee in his current position, he would furnish his own vehicle, driver, and insurance. Coca-Cola rejected this proposal and terminated Halsey's employment on September 2, 1983.

The present action was commenced by Halsey on August 8, 1984. Prior to that date, Halsey filed a complaint with the Iowa Civil Rights Commission and was issued a right-to-sue letter on May 15, 1984. A year after his employment was terminated, Coca-Cola offered alternative employment to Halsey

as a bottle sorter. The offer was declined. Halsey alleges that Coca-Cola's termination of his employment is in violation of the Iowa Civil Rights Act of 1965, Chapter 601A of the Code of Iowa, and administrative rules promulgated pursuant to that chapter. The district court found that the ability to drive and maintain a driver's license was a bona fide occupational qualification for Halsey's position and that, consequently, Coca-Cola's termination of Halsey was legally justified. Halsey thinks this determination erroneous and accordingly brings this appeal. As this case sounds in equity, our review is de novo. Iowa R. App. P. 4.

Under section 601A.6 of the Iowa Code (1985), it is an unfair or discriminatory practice for any

> [p]erson to . . . discharge any employee . . . because of the . . . disability of such applicant or 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.

Coca-Cola asks that we short-circuit Halsey's argument on appeal by holding that his eye condition falls outside of the statutory definition of "disability." That definition, contained at Iowa Code section 601A.2(11), provides as follows:

> "Disability" means 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 a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation.

Coca-Cola states that the ability to drive a car is required for the job of lead serviceman and is therefore related to Halsey's ability to engage in this occupation. From this hypothesis follows their conclusion that Halsey's eye condition is not a disability. The necessary and immediate consequence of adopting Coca-

Cola's argument would be to place Coca-Cola's discharge of Halsey outside of the statute's ambit altogether; i.e., if Halsey's physical condition is not a "disability" within the meaning of the statute, Coca-Cola's discharge of him because of that condition cannot constitute a prohibited "discharge [of] any employee . . . because of the . . . disability of such . . . employee . . . ." Iowa Code section 601A.6. We refuse to adopt such a narrow construction of the statute's protection as to do so would, we think, erroneously place outside the ambit of the statute conduct which the legislature intended to be subject to analysis under it.

In rejecting Coca-Cola's construction of the reach of the Civil Rights Act, we are guided by several familiar principles. In cases of statutory construction, the judicial task is to interpret words of the relevant statute in light of the purposes the legislative branch sought to serve by its enactment. Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 118, 103 S. Ct. 986, 995, 74 L. Ed. 2d 845, 858, reh'g denied, 461 U.S. 911, 103 S. Ct. 1887, 76 L. Ed. 2d 815 (1983); Matter of Estate of Keegan, 369 N.W.2d 447, 450 (Iowa 1985). To ascertain the legislative intent in construing a statute, a court may properly consider not only the language of the statute, but also its subject matter, object sought to be accomplished, purpose to be served, underlying policies, remedies provided, and consequences of various interpretation. Kifer v. Liberty Mutual Insurance Co., 777 F.2d 1325, 1332 (8th Cir. 1985); see Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 499 (Iowa 1985). In order to determine and effectuate legislative intent, a statute must be considered in its entirety. Kifer, 777 F.2d at 1332; State v. Whetstine, 315 N.W.2d 758, 760 (Iowa 1982). Remedial legislation should be construed liberally consistent with its statutory purpose. International Nutrition Inc. v. U.S. Dept. of Health and Human Services, 676 F.2d 338, 341 (8th Cir. 1982); State ex rel. Turner v. Koscot Interplanetary, Inc., 191

N.W.2d 624, 629 (Iowa 1971). This mandate for a liberal construction is written directly into the Civil Rights Act. Iowa Code section 601A.16 (1985).

Consistent with these principles, our courts are loath to adopt a narrow construction of conduct subject to protection under this definition as to do so would allow an employer to discharge an employee whenever the employee's physical condition "in any way related to his or her ability to perform the job." Foods Incorporated v. Iowa Civil Rights Commission, 318 N.W.2d 162, 167 (Iowa 1982). Such a result would be contrary to both the remedial purpose of the statute, id., and the legislative mandate that the Iowa Civil Rights Act "shall be construed broadly to effectuate its purposes." Iowa Code section 601A.16 (1985). Accordingly, our courts recognize that "a disability is protected under this definition when it does not prevent the individual from performing the job in a reasonably competent and satisfactory manner." Consolidated Freightways, Incorporated v. Cedar Rapids Civil Rights Commission, 366 N.W.2d 522, 526 (Iowa 1985). In addition, as a logical and necessary corollary to the law as set forth in Consolidated Freightways, we think an individual is not to be denied protection under the Civil Rights Act unless his or her physical or mental condition prevents the individual from performing the essential functions of the job in a reasonably competent and satisfactory manner. For example, proper eyesight is essential to pilot an airplane or drive a bus. We think, however, that even a demonstrably significant relationship between a physical impairment and an employment task is not sufficient to disqualify an individual from statutory protection unless that task goes to the essence of the occupation at issue. We think such a construction is mandated by a consideration of the substantive provisions of the Civil Rights Act, considered infra, which provide only the narrowest of justifications for employer action based upon the physical or mental impairment of employees. For us to acknowledge the restrictions placed upon

employers by the substantive portions of the Act while simultaneously allowing the definitional section of the Act to expansively exclude individuals from the Act's protection would be the type of absurd result we are required to avoid in our construction of statutes. Emmetsburg Ready Mix, 362 N.W.2d at 499. For reasons that we develop in our analysis of the merits of Halsey's claim that follows, we think the ability to obtain a valid driver's license and operate a motor vehicle is sufficiently unrelated to the position of lead serviceman so as to bring Halsey within the protection of the Iowa Civil Rights Act. Stated correlatively, we do not believe that Halsey's eye condition prevents him from performing the essential functions of the job of lead serviceman in a reasonably competent and satisfactory manner.

Coca-Cola defends the result reached by the district court on several fronts in addition to the definitional ground discussed above. First, Coca-Cola contends that the ability to drive a motor vehicle and to be licensed to do so is a bona fide occupational qualification (BFOQ) for the position of lead serviceman, thus justifying its discharge of Halsey. Second, Coca-Cola argues that Halsey fails to qualify as an "otherwise qualified handicapped" employee and that, consequently, it is under no duty to make reasonable accommodation to him. Finally, Coca-Cola maintains that, even assuming Halsey's status as an "otherwise qualified handicapped" employee, the accommodation proposed by Halsey was not reasonable.

Although the Iowa Civil Rights Act generally prohibits the discharge of an employee based upon that employee's disability, such action escapes that prohibition if "based upon the nature of the occupation." Iowa Code section 601A.6 (1985). Our courts construe this exception as "akin to the 'bona fide occupational qualification' exception present in the federal fair employment legislation." Iowa Beer and Liquor Control Department Store 1023 v. Iowa Civil

Rights Commission, 337 N.W.2d 896, 897 (Iowa 1983) (quoting Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 492 (Iowa 1975)). Such a construction is consistent with administrative rules promulgated under the Act which state, in part, that

> [i]t shall be lawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under these rules where mental or physical ability is a bona fide occupational qualification necessary to the normal operation of the particular business.

240 Iowa Administrative Code section 6.7.

The scope given the bona fide occupation qualification by courts is narrow and focuses around those employment functions essential to the particular job at issue. As stated by the United States Supreme Court, the bona fide occupational qualification "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities" contained in fair employment legislation. Dothard v. Rawlinson, 433 U.S. 321, 333, 97 S. Ct. 2720, 2729, 53 L. Ed. 2d 786, 799-800 (1977). In determining the validity of a BFOQ defense to a claim of sex discrimination, the Fifth Circuit Court of Appeals stated that the defense is legally acceptable "only when the essence of the business operation would be undermined" by employing those the business sought to exclude. Diaz v. Pan American Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950, 92 S. Ct. 275, 30 L. Ed. 2d 267 (1971). The Supreme Court, in Dothard, likewise focused its analysis around the essence of the job at issue. See Dothard, 433 U.S. at 335-36, 97 S. Ct. at 2730, 53 L. Ed. 2d at 801-02. In addition, the administrative rules promulgated under the Iowa Civil Rights Act tightly restrict the scope of the BFOQ defense. 240 Iowa Administrative Code 6.7.

Furthermore, we note that the BFOQ issue cannot be viewed in isolation from the remainder of the Act. "[I]nextricably linked" with the BFOQ question is that of "reasonable accommodation." Beer, 337 N.W.2d at 898; see also Foods,

318 N.W.2d at 168-69 (employer's reasonable accommodation duty considered as element of BFOQ determination). The administrative rules promulgated under the Iowa Civil Rights Act provide as follows:

> Reasonable accommodation. An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> a. Reasonable accommodation may include:
>
> (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and
>
> (2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devises, the provision of readers or interpreters, and other similar actions.
>
> b. In determining pursuant to the first paragraph of this subrule whether an accommodation would impose an undue hardship on the operation of an employer's program, factors to be considered include:
>
> (1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;
>
> (2) The type of the employer's operation, including the composition and structure of the employer's workforce; and
>
> (3) The nature and cost of the accommodation needed.
>
> c. An employer may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

240 Iowa Administrative Code section 6.2(6).

An "otherwise qualified handicapped" employee is an employee who, in spite of his or her handicap, is capable of performing all the necessary and legitimate functions of a particular occupation. Simon v. St. Louis County, Missouri,

735 F.2d 1082, 1084 (8th Cir. 1984); cf. Southeastern Community College v. Davis, 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980, 988 (1979) (treatment of "otherwise qualified handicapped" individual in context of educational program). Although Coca-Cola attempts to completely separate the concept of "otherwise qualified handicapped" employee from the issue of "reasonable accommodation," we think such an artificial dichotomy is contrary to the intent of the statute. For guidance on this matter, we look to cases involving similar language contained in section 504 of the Federal Rehabilitation Act, 29 U.S.C. § 794 (1973). Cases under that legislation classify as an "otherwise qualified handicapped" employee an individual faced with a "surmountable impairment barrier." Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981); Nelson v. Thornburgh, 567 F. Supp. 369, 378 (E.D. Pa. 1983), aff'd, 732 F.2d 146 (3rd Cir. 1984), cert. denied, 469 U.S. 1188, 105 S. Ct. 955, 83 L. Ed. 2d 962 (1985); see also Note, Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act, 55 N.Y.U.L. Rev. 881 (1980). This phrase refers to barriers to job performance that can be fully overcome by an employer's reasonable accommodation. Prewitt, 662 F.2d at 307 (unlawful discrimination exists where employment applicant rejected even though he could have performed all essential job functions if afforded reasonable accommodation); Nelson, 567 F. Supp. at 378. In addition, particularly illustrative of the interaction envisioned by fair employment legislation between the concepts of "otherwise qualified handicapped" employee and "reasonable accommodation" is the federal administration regulation defining a "qualified handicapped person." That definition posits as qualified "a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 45 C.F.R. § 84.3(k)(1) (emphasis added).

We believe these federal authorities closely parallel the remedial thrust of this state's fair employment legislation on the issue of what is a bona fide occupational qualification (BFOQ) for the position of lead serviceman. Accordingly, while acknowledging that an "otherwise qualified handicapped" employee is one who is able to perform the necessary functions of the job in question in spite of his or her handicap, we believe an employer's attempt at reasonable accommodation is a necessary precursor to the "otherwise qualified" determination. An employer can avoid the duty to make a reasonable accommodation only if it can show "that the accommodation would impose an undue hardship on the operation of its program." 240 Iowa Administrative Code section 6.2(6); Fitzgerald v. Green Valley Area Education Agency, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984).

In the case at bar, Halsey requested that he be allowed to hire his wife as a driver for him at his own expense. Cf. Cerro Gordo Care Facility v. Iowa Civil Rights Commission, No. 86-487 (Iowa, filed February 18, 1987) (wherein the driving responsibilities of complainant were reassigned to other employees and thus borne by the employer). Coca-Cola takes the position that such an accommodation is unreasonable as it would impose the following "costs and burdens" on Coca-Cola: (1) "potential liability under the Fair Labor Standards Act to compensate the driver"; (2) "potential costs concerning a workmen's compensation claim by the driver"; (3) the company's "lack of control over the driver's actions," particularly with respect to potential absenteeism; and (4) the possibility that this arrangement would not be allowed under the applicable collective bargaining agreement.

David Burks, Vice President of Employee and Industrial Relations for Coca-Cola, testified at trial relative to these concerns. His testimony, however, fails to support Coca-Cola's argument on appeal. Burks testified that at the

time Coca-Cola refused Halsey's request, neither the "potential" applicability of the Fair Labor Standards Act to Halsey's situation nor the "possibility" of a conflict with the pertinent collective bargaining agreement had been investigated. We also note that the record on appeal does not contain evidence proffered by Coca-Cola tending to establish the validity of these concerns. We do not think the unsupported articulation of "potential" difficulties is sufficient to support an employer's burden to show "undue burden." In addition, we hasten to point out, with respect to the collective bargaining agreement, that, even assuming a conflict, rights created by our fair employment legislation are not subject to the labor-management bargaining process. Cedar Rapids Community School District v. Parr, 227 N.W.2d 486, 497-98 (Iowa 1975). Halsey's statutory right to accommodation would prevail over a conflicting collective bargaining agreement. Id.

Coca-Cola's contentions under the Fair Labor Standards Act and state workmen's compensation law are, we think, specious, unsupported hypotheticals. In this case, Halsey is not requesting that Coca-Cola be ordered to employ a driver for him; he merely asks that he be allowed to personally hire one. Thus the burdens upon the employer here are far short of those determined to be imposed by the analogous provisions of the Federal Rehabilitation Act in Nelson v Thornborough, 567 F. Supp. 369 (E.D. Pa. 1983). In that case, the court held that the employer was obligated to provide visually-impaired employees with readers in order to enable them to retain their employment. We note that the administrative rules applicable in this case provide for "job restructuring" which includes "the provision of readers or interpreters, and other similar actions." 240 Iowa Administrative Code section 6.2(6)(2). Here, Halsey was seeking only to be allowed to personally hire a driver. He does not seek to obligate Coca-Cola to provide that driver, and so the costs associated with such an obligation are

not properly a part of this case. Accordingly, we find that Coca-Cola's hypothetical "parade of horribles" contentions under the Fair Labor Standards Act and state workmen's compensation law fail to support its burden to demonstrate undue burden.

Neither are we persuaded that undue hardship to Coca-Cola will result from its lack of control over the actions of Halsey's driver. Coca-Cola Vice President Burks cited "safety factors," "department discipline factors," and potential absenteeism as problems which would confront Coca-Cola if Halsey were allowed to hire his own driver. We do not think such concerns, even assuming their eventual existence, would place an undue burden upon Coca-Cola. No real legal difference is presented than if Halsey hired a taxicab driver to take him to work. Surely, if Halsey were to begin to present Coca-Cola with these types of problems, he could not successfully defend by blaming his driver. Coca-Cola retains the ability, within the limits imposed by law and applicable labor-management agreements, to discharge Halsey for failing to see that his essential job duties are satisfactorily performed.

Coca-Cola cites, in support of its contention that Halsey's suggested accommodation is unreasonable, the cases of Jasony v. U.S.P.S., 755 F.2d 1244 (6th Cir. 1985), and Laws v. Philadelphia County Board of Assistance, 50 Pa. Cmwlth 340, 412 A.2d 1377 (Pa. Comm. Ct. 1980). We think these cases distinguishable on a point which provides the bridge between the issue of "reasonable accommodation" and that of the BFOQ defense: The "essential" functions of the job. In both Jasony and Laws, the respective courts held that an employer is not obligated to accommodate an employee by eliminating an essential job function. Jasony, 755 F.2d at 1250; Laws, 30 F.E.P. Cases at 397. This holding is also implied in Davis, 442 U.S. at 410-13; 99 S. Ct. at 2369-70; 60 L. Ed. 2d at 989-93 (reasonable accommodation is not extended to affirmative action).

First of all, Halsey does not ask Coca-Cola to "eliminate" any job function. He will still be required to repair vending machines in locations other than Coca-Cola's Davenport facility. All he asks is that he be allowed to hire a driver to get him there. In addition, we do not think that the ability to drive an automotive vehicle constitutes "the essence of the business operation" at issue. Diaz, 422 F.2d at 388. Halsey was, we think, hired primarily to repair vending machines. There is no dispute on this record that he was performing that task to the satisfaction of his employers. We do not believe that the percentage of time which Halsey spent on the road is solely determinative on this question. While we agree these percentages are significant, we note that in Beer we affirmed an administrative finding that the ability to engage in heavy lifting did not constitute a BFOQ even though an employee spent 50-80% of his or her time performing duties requiring heavy lifting. Beer, 337 N.W.2d at 899. In addition, the relevant job description is not controlling. See Beer, 337 N.W.2d 896. Although convenience and employer preference no doubt would be served by his ability to obtain a valid driver's license, these criteria are expressly disavowed by the pertinent administrative rules. 240 I.A.C. § 6.7(2).

The intimation by fact reference only that Coca-Cola offered alternative employment fails of its own impotence to raise a legal issue. No argument was made and no authorities were cited to support any claim that a late offer by Coca-Cola was a sufficient accommodation. No offer of alternative employment was made prior to or at the time of discharge. Consequently, the case at bar is totally different from Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, No. 86-487 (filed February 18, 1987), holding that the alternative employment offered prior to the time of discharge was a reasonable accommodation. The question of alternative employment in the case at bar was not

stated as a legal issue, was neither argued nor was authority cited. We deem it waived in accordance with Iowa Rule of Appellate Procedure 14(a)(3).

*In conclusion, we think that Coca-Cola has failed to carry its burden of* "demonstrat[ing] that the accommodation [sought by Halsey] would impose an undue hardship on the operation of its program." 240 Iowa Administrative Code section 6.2(6). In light of this failure and our review of the record, we think the accommodation sought by Halsey is within the bounds of both reason and the statute. In addition, we think that the ability to operate a motor vehicle and obtain a valid license to do so does not constitute a bona fide occupational qualification under our fair employment *legislation. Accordingly, we reverse* the judgment of the district court and remand this case with directions that the district court order Halsey reinstated to the position of lead serviceman. In addition, the district court will also determine the proper amount of back pay to be awarded pursuant to its authority under Iowa Code sections 601A.16(5) and 601A.15(8). In addition, we award Halsey reasonable attorney's fees, which the district court will also determine. Costs are charged to Coca-Cola.

**REVERSED AND REMANDED.**