IN THE COURT OF APPEALS OF IOWA

No. 9-555 / 89-524

FILED
JUN 26 1990
CLERK SUPREME COURT

AGNES PERKINS,

Appellee,

vs.

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 234, and IOWA CIVIL RIGHTS COMMISSION,

Appellants.

Appeal from the Iowa District Court for Harrison County, Leo F. Connolly, Judge.

The respondents-appellants appeal the decision of the district court reversing the decision of the Iowa Civil Rights Commission finding no probable cause for Agnes Perkins's claims of discrimination on the basis of age and sex. **REVERSED AND REMANDED.**

MacDonald Smith of Smith & Smith, Sioux City, for respondent-appellant Local 234.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for respondent-appellant Iowa Civil Rights Commission.

Marti D. Nerenstone, Legal Services Corporation of Iowa, Council Bluffs, for petitioner-appellee.

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

OXBERGER, C.J.

The respondents-appellants appeal the decision of the district court reversing the decision of the Iowa Civil Rights Commission finding no probable cause for Agnes Perkins' claims of discrimination on the basis of age and sex. We reverse the decision of the district court.

Petitioner Agnes Perkins had been a member of the International Union of Operating Engineers, Local 234, (Union) since 1970. She is a heavy equipment oiler, with the proficiency of journeyman. The Union has the responsibility of making job referrals to its members. Perkins was the subject of sexual harassment, at times by a union member who became its business agent in 1979. She filed a complaint with the Iowa Civil Rights Commission (Commission) alleging that there had been work available for which she was qualified, but for which she was not referred. At that time she was sixty years old. She alleged that the Union had discriminated against her on the basis of sex and age.

The Commission conducted an investigation. A hearing officer issued a decision finding that probable cause existed to support Perkins' allegations. The case was ordered to continue to conference and conciliation. However, a second decision was issued by a different hearing officer. This decision found no probable cause for the discrimination claim. The Commission denied Perkins' subsequent application for reopening.

Perkins filed a petition for judicial review. The district court reversed the finding of no probable cause and ordered that Perkins was entitled to a full and fair evidentiary hearing if the case was not settled. The Commission and the Union appeal.

I.

The Commission claims that the court failed to apply the proper scope of review for judicial review of agency action. The Commission maintains that although the court stated it was applying the standard of review found in section 17A.19, the court actually engaged in de novo review. It asserts that the court exceeded its authority by making a probable cause determination and ordering the Commission to conduct a contested case hearing.

Perkins asserts that although the district court did not cite a specific provision of section 17A.19(8) in exercising its authority to review the Commission's action, "it is apparent that the court believed the Commission violated its duty to 'investigate' complaints, and further acted unreasonably, arbitrarily, and capriciously in its investigation." Thus, the Commission's action violated section 17A.19(8)(a) and (g).

The district court, when exercising the power of judicial review over agency action, is functioning in an appellate capacity to correct errors at law. Iowa Code § 17A.19(8) (1989). Iowa Code section 17A.19(8) provides:

> 8. The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is:
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> a. In violation of constitutional or statutory provisions;
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> b. In excess of the statutory authority of the agency;
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> c. In violation of an agency rule;
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> d. Made upon unlawful procedure;
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> e. Affected by other error of law;
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> f. In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; or
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> g. Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

Our review is limited to a determination of whether the district court made errors of law when it exercised its power to review the Commission's decision under Iowa Code section 17A.19. The Commission's probable cause determination is not a contested case decision. Therefore, the "lack of substantial evidence" ground set forth in section 17A.19(8)(f) is not applicable in this case. "Even though we find we cannot use the 'substantial evidence' test because this is an uncontested case decision, we apply the other standards of section 17A.19(8) to the agency action to determine whether our conclusions are the same as those of the district court." Mowrey v. Iowa Civil Rights Comm'n, 424 N.W.2d 764, 765 (Iowa App. 1988). Our scope of review is limited to the correction of errors at law. Iowa R. App. P. 4. "Our 'hands-off' policy on judicial review

recognizes 'that final agency determinations must be undisturbed when based on accurate application of legal principles, and when they are within the scope of expertise assigned to the agency.'" Office of Consumer Advocate v. Utilities Board, 452 N.W.2d 588, 592 (Iowa 1990) (quoting Office of Consumer Advocate v. Utilities Board, 449 N.W.2d 383, 385 (Iowa 1989)).

II.

The Commission argues that the court erred in concluding that the agency decision was affected by error of law. It states that the court improperly held the investigation to a standard based on the order and burden of proof of a trial. We agree.

A. Perkins has the burden of establishing a prima facie case of discrimination in this civil rights action. Mowrey, 424 N.W.2d at 766. Iowa Code section 601A.6 prohibits unfair or discriminatory practice in employment. The Iowa Supreme Court recently summarized the analytical framework for allocating the burden and order of presentation of proof in cases alleging discriminatory treatment under chapter 601A in Hy-Vee Food Stores, Inc., v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 516-17 (Iowa 1990) (citing Hamilton v. First Baptist Elderly Hous. Found., 436 N.W.2d 336 (Iowa 1989)). The court in Hy-Vee stated:

> There are three stages in this analysis. In the first stage the employee must establish a prima facie case of intentional discrimination by a preponderance of the evidence. An employee establishes a prima facie case by showing that

> (1) the employee belonged to a protected group, (2) the employee made application and was qualified for a job for which the employer was seeking applicants, (3) the employee was rejected, (4) the position remained open and the employer continued to seek applicants with similar qualifications. Once the prima facie case is established, a presumption arises that the employer discriminated against the employee.
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> In the second stage the employer must go forward with evidence to rebut the presumption of discrimination. The employer does so by producing evidence that the employee was not hired or promoted for a legitimate, nondiscriminatory reason.
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> In the third stage the employee has the burden to show that the employer's proffered reason was not the true reason for the employment decision. The employee may meet this burden in two ways. The employee may directly persuade the fact finder that a discriminatory reason more likely motivated the employer or may indirectly show the employer's proffered reason is not worthy of belief.
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> In all three stages the burden of persuasion rests with the employee. The only burden the employer shoulders is the burden to go forward with the evidence to rebut the presumption of discrimination.

Hy-Vee, 453 N.W.2d at 516-17. (Citations omitted).

Perkins claims there was sex and age discrimination by the Union because she was not refered to available oiler jobs for which she was qualified. At the time she filed a complaint with the Commission she was sixty (60) years old. She alleges that as a journeyman she was bypassed in favor of younger male apprentices by the Union.

The record as developed by the Commission's investigation reveals that the Commission's probable cause decision was not affected by any error of law. The investigation established that the Union implemented a

monthly call-in rule for out-of-work members in September 1975. The rule provides that if a member does not call in on a monthly basis his or her name is removed from the active out-of-work list until the member calls in to be replaced on the list. The rule was published in the Union's newsletter in October 1975. The Union also published a March 1983 bulletin reminding members of the call-in procedure. Perkins was a member of the Union since 1970. The Union removed Perkins name from the active list in late 1975 for failing to call in.

Perkins claimed that she was not aware of the union's call-in policy. However, Perkins informed the Commission during its investigation that, "in 1981, she had been in constant contact with Mr. Eugene Partridge [the Union's business agent], and told him that she could not afford to keep calling him about work inquiries because she had no money and was not receiving any kind of compensation." Perkins also stated that a deal was struck with the Union in which Mr. Partridge agreed that if any work ever came up, that he would call her. She further asked the Commission to check with the Union to see if she could write in to comply with the call-in rule. Perkins in fact called in at least once in 1979. We find no merit in Perkins claim that she was not aware of the Union's call-in policy.

Perkins contends she received no job referrals after 1979. There was evidence that Perkins received a job referral on or about April 6, 1981 as an operator. Perkins, however, maintains that if there was such a referral, she would have declined it because she is an oiler not an operator.

The Commission's probable cause investigation summary revealed the following:

> It would appear to the staff investigator that this call-in procedure was not strictly enforced but rather if members did not call in every six months to one year, or refused a job referral, or quit a job then it was enforced. From an examination of the referral lists for 1979 through 1984 and talking with witnesses it would appear that not all union members were entirely aware of the procedure from 1975 to 1985. However, it does not appear that Respondent [Union] used the call in procedures to discriminate against any one particular group of members -- i.e. women or members over 60 years old, but rather it was applied somewhat loosely. No union member appeared to telephone each and every month if out of work at least from records maintained by the Respondent.

The investigation summary further stated:

> Staff reviewed the referral lists provided by the Respondent concerning the union members as old or older than the Complainant and female members for the time period 1979 through 1984. In regard to the call-in procedure, refusal to take a particular job, and general referrals it did not appear that Respondent treated Complainant differently than members who were younger than Complainant. It appeared that all members 60 years old and older were journeymen. There were no females who were as old as the Complainant. All females with the exception of one other than the Complainant were apprentices. It would appear that females were not treated any differently than males in regard to the call in procedure and referrals. It appeared all members were subject to be referred to possible different job positions (two or more).

. . . .

> The investigation revealed that the reasons offered by the Respondent were not pretextual. The investigation revealed the Respondent reasons have credence. The call in procedure of Respondent was started in October 1975 on a monthly basis. As a union member the Complainant should have been aware of it through the monthly union bulletin and by her association with union members from 1975 to 1979. The Complainant did call in more than once in 1979 to report she was out of work. The Complainant did not call-in in 1980, 1981, 1982 or 1983. The call-in procedure of the Respondent was not strictly enforced. Very few if any union members called-in each and every month to report they wanted their names on the referral list or were out of work
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> However, the investigation revealed that if a member called in, he or she would most likely receive the next referral or a referral within a month or so. It did not appear that either sex or age was a factor. It did appear that when a member refused a referral for whatever reason and then did not call in for three of four months thereafter that person's name was removed from the referral list. The investigation very clearly showed that oilers were subject to being referred to other job positions and that this was true for loaders, rollers, operators, etc. Most if not all members who called in on a regular basis (every two or three months) were referred to jobs (perhaps not of their first choice but jobs).

The district court stated Perkins clearly met her initial burden of establishing a prima facie case of discrimination. The court further stated, "[s]ince the Commission did not make it clear whether it had properly shifted the burden of proof to Respondent, it cannot be assumed that it did so." We disagree. We note here, as previously outlined, the only burden placed upon the Union in this case is the burden to go forward with the evidence to rebut the presumption of discrimination. See Hy-Vee,

453 N.W.2d at 517. We believe the Commission's investigation clearly analyzed this stage of discriminatory treatment claims as evidenced by the investigation summary.

Applying the principles of law previously stated to the foregoing facts as developed by the Commission's investigation in this case relative to claims of sex and age discrimination in job referrals, we find that the Commission's finding of no probable cause should be affirmed. The Commission's decision was not affected by any error of law. Additionally, the decision was neither unreasonable, arbitrary, capricious nor characterized by an abuse of discretion.

B. The Commission believes that the court erroneously concluded that Perkins had established a disparate impact case when Perkins did not allege such a theory in her complaint. The purpose of the Iowa Civil Rights Act is to correct broad patterns of behavior by exposing unlawful discrimination. Hulme v. Barrett, 449 N.W.2d 629, 633 (Iowa 1989). In Hulme, the Iowa Supreme Court stated:

> While we have not specifically addressed the question of whether a subsequent petition for judicial review under chapter 601A is narrowly limited to the exact complaint submitted to the commission, federal precedent, administrative economy, and the stated purpose of the Iowa Civil Rights Act compel a negative reply.

Id. Consequently, we do not find error on the part of the district court in conducting a disparate impact analysis. However, we do not believe the Commission was unreasonable, arbitrary or capricious in failing to pursue a disparate impact analysis.

In Hy-Vee, the supreme court also summarized the analytical framework of the disparate impact theory. Hy-Vee, 453 N.W.2d at 517-19; see also Mowrey, 424 N.W.2d at 766. The disparate impact theory--like a disparate treatment case--proceeds through three stages. Id. at 517. "In the first stage the employee must show that a particular employment practice has an adverse impact on a protected group in 'marked disproportion to its impact on employees outside that group.'" Id. The complainant does not have to prove a discriminatory intent on the part of the employer under a disparate impact theory. Mowrey, 424 N.W.2d at 766. In the second stage, "the burden of persuasion shifts to the employer to show the business necessity of the challenged employment practice." Hy-Vee, 453 N.W.2d at 518. In the third stage, "the employee must show there are other reasonable alternatives that would have less adverse impact." Id.

We disagree with the district court that the Union's call-in policy established a prima facie case of disparate impact discrimination. Applying the principles of law as stated above to the facts of this case, the call-in policy

does not fall more harshly on members of the protected groups that Perkins is a member of--women or older workers. Perkins was dropped from the out-of-work list because she stopped calling the Union. There is no basis upon which Perkins could satisfy the first stage of the disparate impact analysis. The Commission was not unreasonable, arbitrary nor capricious in failing to pursue a disparate impact analysis.

III.

The Commission also contends that the court erroneously concluded that Perkins' sexual harassment allegations were timely. It states there was no evidence of continuing violations. We agree.

Iowa Code section 601A.15(12) provides that

> [a] claim under [chapter 601A] shall not be maintained unless a complaint is filed with the commission within one hundred eighty days after the alleged discriminatory or unfair practice occurred.

In connection with this statutory limitation a commission rule provides that

> [i]f the alleged unlawful discriminatory practice or act is of a continuing nature, the date of the occurrence of the alleged unlawful practice shall be deemed to be any date subsequent to the commencement of the alleged unlawful practice up to and including the date upon which the unlawful practice has ceased.

161 Iowa Admin. Code 3.3(2) (1989) (formerly 240 Iowa Admin. Code 1.3(3) "b" (1983)). This Commission rule codifies the "continuing violation" doctrine. Hy-Vee, 453

N.W.2d at 527. "So under the rule if the alleged discriminatory act is of a 'continuing nature,' then the act is considered to have occurred as of the last date of the act." Id.

"In general the 'continuing violation' doctrine does not excuse compliance with the time limits for filing a charge. But if a violation is continuing, the time does not begin to run when the discrimination first happens. Instead the action is considered filed in time if there are discriminatory acts within the limitations period." Id. The Hy-Vee court noted that the federal courts have recognized two types of continuing violations. The "series of acts" type of continuing violation and the "maintenance of a system or policy which discriminates" type of continuing violation. The court stated:

> Four elements make up the "series of acts" type of continuing violation. These include the following: (1) the alleged discrimination pervades the series of events, (2) there is a present violation of the statute, (3) the present acts of alleged discrimination are related to the time-barred events, and (4) the charge covering the present violation is filed within the limitations period.

Id. The court further noted "that the first and third elements refer to the same thing: the acts in the series must be shown to be related, and not isolated." Id. at 528 (citing Milton v. Weinberger, 645 F.2d 1070, 1076 (D.D.C. 1981)). The court cited several factors delineated in Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 981

(5th Cir. 1983), to help determine whether elements one and three--the pervasiveness of the alleged discrimination and the relation of present acts to time-barred events--have been established.

> The factors include subject matter, frequency, and permanence. As to subject matter, the relevant question is whether "alleged acts involve the same type of discrimination tending to connect them in a continuing violation." Frequency deals with the question whether the alleged acts are of a recurring nature or more in the nature of an isolated employment.
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> The last factor--permanence--deals with the question whether an employee should or should not realize the employer is discriminating. For example, the discriminatory acts may be so persistent and long-standing that the employee should realize the employer is discriminating. At that point the statute of limitations is triggered. The limitations period, however, is not triggered when the consequences of the discriminatory acts is something the employee might reasonably expect without suspecting discrimination. For example, an employee would probably not suspect that the employer is discriminating when the employer's reasons for the acts are pretextual and seemingly legitimate.

Hy-Vee, 453 N.W.2d at 528. (Citations omitted).

Perkins claims that the Union's failure to refer her for employment should have been considered a continuing expression of sexual harassment, making all antecedent sexual harassment allegations timely under the continuing violation theory. Perkins cites an incident surrounding the giving of a sexual object as an example of the hostile and abusive work environment.

Perkins' complaint was filed on March 12, 1984 and alleged an incident date of 1979 and continuing. The

Commission concluded that Perkins' allegations of sexual harassment were not filed within the 180-day time limitation as prescribed by Iowa Code section 601.15(12). The district court concluded that Perkins had established that she was subjected to a hostile and abusive work environment. The court stated the Union's business agent which created the hostile work environment, created a continuation of ongoing discrimination when he refused to refer work to Perkins. We disagree.

Applying the previously stated factors to the facts of this case, it is clear that sexual harassment and refusal to refer on the basis of age or sex or both do not entail the same subject matter. The acts of sexual harassment do not involve the same type of alleged discrimination by the Union in refusing to refer jobs to Perkins tending to connect them in a continuing violation. Furthermore, we do not believe the alleged incidents of sexual harassment in 1975-1976, separated by three to four years from the alleged failure to refer for employment are of a recurring nature to satisfy the frequency factor of our analysis. Consequently, we do not agree with the district court that the Commission committed an error of law in concluding sexual harassment allegations were untimely.

IV.

We have thoroughly considered all of the contentions raised by the parties, whether or not expressly addressed

in this opinion. We conclude that the district court erred in reversing the Commission's decision. Accordingly, we reverse the judgment of the district court and remand for entry of a new judgment consistent with this opinion.

REVERSED AND REMANDED.