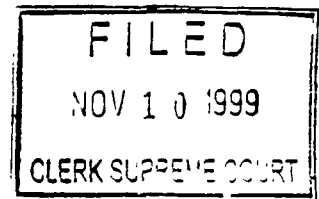


IN THE COURT OF APPEALS OF IOWA

No. 1999-190 (9-414) / 98-1556
Filed November 10, 1999



RHONDA GOETHALS, n/k/a RHONDA WADSWORTH, and REGINA BOREL,

Plaintiffs-Appellants,

vs.

GENE MUELLER and GENE MUELLER FAMILY PRACTICE and PROFESSIONAL DENTURE GROUP, P.C.,

Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Plaintiffs appeal from the district court's judgment in favor of defendants after
a bench trial in their action for pregnancy discrimination and sexual harassment.

AFFIRMED.

Dorothy A. O'Brien and Brad A. Reynolds of Brooke & O'Brien, P.L.C.,
Davenport, for appellants.

Richard M. Batcher of Bozeman, Neighbour, Patton & Noe, Moline, Illinois,
for appellees.

Considered by Streit, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

Rhonda Goethals Wadsworth and Regina Borel asserted in a district court petition that Dr. Gene Mueller engaged in “sex discrimination, sex harrassment, and pregnancy discrimination,” in violation of the Iowa Civil Rights Act. Following trial to the bench, the district court dismissed the petition. On appeal, we affirm.

I. Background Facts and Proceedings

In April 1996, Mueller, a Davenport dentist, hired Goethals as a dental assistant. She worked for approximately five months. Mueller hired Borel in late April 1997. She worked for nine days.

In September 1997, Goethals and Borel filed a civil petition, alleging that Mueller, Gene Mueller Family Practice, and Professional Denture Group, P C violated the Iowa Civil Rights Act. Specifically, Goethals claimed she was terminated in September 1996 because she was pregnant. She also asserted she was subjected to a sexually hostile work environment. Borel asserted she was constructively discharged as a result of a sexually hostile work environment. The petition contained no recitation that the plaintiffs had complied with procedural prerequisites for filing suit set forth in the act.

The defendants’ answer asserted in part that “neither Gene Mueller Family Practice nor Professional Denture Group, P.C. was an employer of either plaintiff,” “a no probable cause letter was issued in the Goethals case,” and “[p]laintiffs have not made a showing of compliance with the administrative procedures which are a condition precedent to filing this lawsuit.” No dispositive motions were filed in

pursuit of these affirmative defenses and the case proceeded to trial before the court.¹

Addressing only the merits, the district court concluded that Goethals and Borel failed to prove by a preponderance of the evidence that Mueller discriminated against them. The court dismissed the petition.

II. Scope of Review

We review discrimination claims tried to the court on error. *Zepeda v. Fort Des Moines Men's Correctional Facility*, 586 N.W.2d 364, 365 (Iowa 1998). The district court's findings of fact are binding if they are supported by substantial evidence. *Id.* Evidence is reviewed in the light most favorable to upholding the district court's judgment. *Id.* When a district court hears evidence and concludes a party has not sustained its burden of proof on an issue, we will not alter the conclusion unless we find that "the evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn." *Falczyński v. Amoco*

¹ The Iowa Supreme Court recently reaffirmed that a civil rights case "may proceed to district court only after the Iowa Civil Rights Commission issues a right-to-sue release." *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 790 (Iowa 1999); cf. *Clay v. City of Cedar Rapids*, 577 N.W.2d 862, 866 n.1 (Iowa App. 1998) (noting plaintiff could not try discrimination claims in state district court after Iowa Civil Rights Commission made a finding of no probable cause on complaint). However, because the defense was not pursued, we have no authority to consider the issue on appeal. See *State v. Mandicino*, 509 N.W.2d 481 (Iowa 1993) (holding challenge to authority of court to hear particular case was distinct from subject matter jurisdiction and could be waived if not timely raised); *Lynch v. City of Des Moines*, 454 N.W.2d 827, 831 n.1 (Iowa 1990) (noting district court has subject matter jurisdiction over cases arising under Iowa Civil Rights Act but could exercise jurisdiction only if it is properly invoked); *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989) (noting noncompliance with procedural prerequisites of the Iowa Civil Rights Act did not implicate subject matter jurisdiction of court but authority of court to hear a particular case).

Oil Co., 533 N.W.2d 226, 230 (Iowa 1995). We are not bound by a district court's application of legal principles or its conclusions of law. *Id.*

III. Standard For Analyzing Pregnancy Discrimination Claim

Goethals first contends the district court applied an incorrect standard in reviewing her pregnancy discrimination claim. The Iowa Supreme Court has recognized two alternate standards for reviewing discrimination claims. *See Vaughan v. Must*, 542 N.W.2d 533, 538 (Iowa 1996). Both standards were developed under federal discrimination law, which Iowa courts view as persuasive but not binding in analyzing similar claims under chapter 216. *See Lynch*, 454 N.W.2d at 833 n.5

The *Price-Waterhouse* standard is used when a plaintiff tenders direct evidence of discrimination in an employment decision. *Vaughan*, 542 N.W.2d at 538. A direct discrimination case may be proved by circumstantial evidence. *Id.*; *Landals*, 454 N.W.2d at 893. Direct evidence as articulated by the Eighth Circuit Court of Appeals is "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the fact finder to infer that attitude was more likely than not a motivating factor in the employer's decision." *Walton v. McDonnell Douglas Corp.* 167 F.3d 423, 426 (8th Cir. 1999) (quotations and citations omitted). Direct evidence "might include proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in a work context, or stated hostility to women being in the workplace at all." *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999). While stray remarks in the workplace.

statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself will not suffice, proof of an employer's discriminatory attitude or discriminatory animus in the decisional process may suffice. *Kneibert v Thomson Newspapers, Michigan Inc.*, 129 F.3d 444, 452 (8th Cir. 1997) (citations and quotations omitted). An employee must establish a causal link between the comments and the adverse action. *Walton*, 167 F.3d. at 426-27.

After an employee presents direct evidence, an employer must establish by a preponderance of the evidence it would have made the same decision even in absence of the improper motive. See *Vaughan*, 542 N.W.2d at 538; cf. *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 517 (Iowa 1990) (suggesting employer's burden was more appropriately viewed as affirmative defense rather than shift in burden). But cf. *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (adopting modified *Price-Waterhouse* test under which proof that employer would have made same decision absent the discriminatory motive is only relevant to determining appropriate remedy).

Under the alternate *McDonnell Douglas* standard, an employee who asserts a discriminatory termination must first make out a *prima facie* case which requires a showing that the employee "was a member of a protected class, performing his work satisfactorily, and had adverse action taken against him." *Vaughan*, 542 N.W.2d at 538; cf. *Breeding*, 64 F.3d at 1157 (additionally requiring proof that nonmembers of the class were not treated the same). The employer then must articulate a legitimate non-discriminatory basis for the action. *Id.* If the employer does so, the burden

shifts back to the plaintiff to prove the reason given by the defendant was a pretext and the real reason was discrimination. *Id.*

The district court elected to use the *McDonnell-Douglas* standard. Goethals asserts the court should have applied the *Price-Waterhouse* standard. She claims she presented direct evidence of a discriminatory pregnancy policy as well as statements and conduct establishing Mueller's stereotypical attitudes about women and establishing pregnancy as a motivating factor in the termination decision. Goethals states she would have prevailed under the *Price-Waterhouse* standard because Mueller did not demonstrate he would have fired Goethals absent the discriminatory motive. We do not need to determine whether she would have prevailed under this standard because we conclude the district court correctly refused to apply the *Price-Waterhouse* test.

IV. Applicability of Price-Waterhouse Standard

The district court found that Mueller, by his own admission, possessed "attitudes regarding pregnant women that constitute impermissible employment considerations, the major one being, of course, that it is his prerogative to decide how long a pregnant employee can continue to work, and in what capacity." The court concluded, however, that "there was no credible, direct evidence of discrimination based on pregnancy" to warrant use of the *Price-Waterhouse* standard. The court explained:

Plaintiff does not meet her burden to prove by a preponderance of the convincing evidence that Defendant's attitudes about pregnant women played a role in his decision to terminate her employment. No other

witness than Plaintiff herself testified Defendant had a “policy” that required a pregnant woman to be laid off at her fourth month of pregnancy or when she started to “show.” It is not credible that such a policy existed, despite her belief, especially after being directly told by all other co-employees that there was no such “policy.”

We agree with the district court’s conclusion that the *Price-Waterhouse* standard is inapplicable, but for a different reason than asserted by the court. See *Iowa Telephone Ass’n v. City of Hawarden*, 589 N.W.2d 245, 252 (Iowa 1999) (we may affirm “on any basis appearing in the record and urged by the prevailing party”). In our view, the district court’s finding relating to Mueller’s admitted attitudes about pregnant women would have mandated application of the *Price-Waterhouse* standard, if those views had been asserted at the time and in the context of Mueller’s decision to terminate Goethals. Although Mueller expressed these attitudes just one month prior to Goethals’ termination and immediately after Goethals advised Mueller of her pregnancy, the record is replete with evidence that Goethals precipitated her own termination through excessive absenteeism and overall poor attitude. Because Goethals failed to establish a causal link between Mueller’s admittedly discriminatory attitudes and her termination, we conclude the district court did not err in refusing to apply the *Price-Waterhouse* standard.

V. Sufficiency of Evidence-Pregnancy Discrimination

Goethals next challenges the sufficiency of the evidence to support judgment for Mueller on the pregnancy discrimination claim. The district court apparently conceded that under the *McDonnell Douglas* standard, Goethals established a prima

facie case of discrimination. However, because Mueller presented legitimate, non-discriminatory reasons for the termination, Goethals was then obliged to show those reasons were merely pretextual. We agree with the district court that Goethals failed to do so. Goethals essentially admitted her attitude towards Mueller and his patients deteriorated during the last month of her employment. She also appeared to concede that certain of her absences were unexcused. Viewing the evidence in the light most favorable to the judgment, we find substantial evidence supports the district's court conclusion that Goethals failed to establish her discrimination claim by a preponderance of the evidence.

VI. Hostile Work Environment

In their statement of issues, the plaintiffs do not address the district court's dismissal of their hostile work environment claim. However, because their brief alludes to the issue, we conclude that error was preserved. *See Pierce v. Staley*, 587 N.W.2d 484, 486-87 (Iowa 1998); *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999). We therefore examine the record for sufficiency of the evidence to support the district court's dismissal of these claims.

A plaintiff seeking to prove sex discrimination through a hostile work environment must establish: 1) membership in a protected class; 2) unwelcome harassment; 3) the harassment was based on sex; 4) the harassment affected a term or condition of employment; and 5) the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action. *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38 (Iowa 1993). The plaintiff must demonstrate the

harassment is severe or pervasive. *Edmunds v. Mercy Hosp.*, 503 N.W.2d 877, 879 (Iowa App. 1993); see also *Burlington Indus., Inc. v. Ellerth*, ___ U.S. ___, ___, 118 S.Ct. 2257, 2264, 141 L.Ed.2d 633, 646 (1998). The plaintiff must be forced to choose between an “unreasonably offensive environment” or quitting working. *Lynch*, 454 N.W.2d at 833; see also *Oncale v. Sundowner Offshore Servs., Inc.*, ___ U.S. ___, ___ 118 S. Ct. 998, 1003, 126 L.Ed.2d 295, 302 (1998) (conditions must be “so objectively offensive as to alter the conditions of the victim’s employment”) Additionally, “if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295, 302 (1993).

The district court considered and rejected the plaintiffs’ claims, concluding the plaintiffs failed to establish a pattern of harassment over time and furnished no evidence they “were a target of anything which would constitute sexual harassment or ‘which affected a term, condition or privilege of employment.’” We agree.

A. Goethals

In support of her hostile work environment claim, Goethals points to various remarks made by Mueller in the workplace. Those remarks were primarily directed to pregnant employees, non-pregnant employees, customers, and women in general and not specifically to Goethals. Goethals additionally points to evidence that Mueller referred to her as “quarterback,” but, neither she nor any other witness

explained whether this reference related to her pregnancy or was connected to her termination. Goethals also cites Mueller's stated policy that women staff should look like they were going on a date. Again, however, she did not connect this policy to herself or her termination. Finally, Goethals relies on what she perceives as a policy to terminate pregnant women. As the district court noted, however, other female employees contradicted Goethal's claim that Mueller had such a policy. We find Goethals' evidence was insufficient to establish severe and pervasive discrimination based on a hostile work environment. Conversely, the record contained substantial evidence to support the district court's dismissal of her claim.

B. Borel

At trial, Borel relied on the following incidents to establish a hostile work environment: 1) Mueller's statement to her during the job interview that he was a male chauvinist and he expected his employees to work under his terms; 2) a policy requiring his staff to look like they were going on a date; 3) Mueller's placement of his arms around her when he was introducing her to a colleague; and 4) a conversation he had with Borel about her wish not to be touched or sexually harassed. Borel admitted the first three incidents did not particularly offend her, although she considered Mueller's single touching incident inappropriate. Therefore, the district court correctly considered only the final conversation between Borel and Mueller. That conversation related to the terms of Borel's employment and amounted to a

thinly veiled threat that she should not complain about sexual harassment.² We agree with the district court, however, that a claim based on a sexually hostile work environment requires more evidence of offensive conduct than the single incident at issue here. *Cf. Lynch*, 454 N.W.2d at 831-32 (pointing to repeated sexual remarks made over a period of years). The record evidence supports the district court's conclusion.

VII. Constructive Discharge of Borel

Borel claims she was constructively discharged. The district court did not expressly address this contention and Borel concedes she did not file a rule 179(b) motion to enlarge findings and conclusions. We have held that a rule 179(b) motion is necessary for preservation of error when a trial court fails to resolve a matter properly submitted. *See Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994).

Whether Borel preserved error turns on whether her assertion of constructive discharge was an independent claim or an element of her hostile work environment claim. If construed as an independent claim, our review is barred because the district court's ruling contains no findings or conclusions. Giving Borel the benefit of the doubt, we construe her assertion of constructive discharge as an element of a hostile work environment claim, a claim which was addressed by the district court. *Cf.*

²This is not a "quid pro quo" sexual harassment claim, however, because Mueller did not actually fire Borel for complaining about inappropriate touching. *See Ellerth*, ___ U.S. at ___, 118 S.Ct. at 2265, 141 L.Ed.2d at 648 (noting distinction between quid pro quo discrimination and hostile environment discrimination).

Sievers v. Iowa Mut. Ins. Co., 581 N.W.2d 633, 639 (Iowa 1998) (noting constructive discharge element included in instruction on elements of prima facie discrimination case); *Edmunds*, 503 N.W.2d at 879 (noting where sexual harassment forced person to quit working, harassment affected “condition of employment” as required for hostile work environment claim).

The district court ruled Borel was not subjected to a hostile work environment. We assume an additional finding that she therefore was not constructively discharged. See *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983) (where no motion to enlarge findings made under rule 179(b), court assumes as fact unstated finding necessary to support judgment for plaintiff). We conclude substantial evidence supports this assumed finding, because the conditions in the nine days that Borel worked for Mueller were not so intolerable as to have compelled her to resign. Cf. *Haberer v. Woodbury County*, 560 N.W.2d 571, 575-576 (Iowa 1997) (concluding substantial evidence supported county civil service commission’s decision that sheriff was not constructively discharged). Given our conclusion, we find it unnecessary to rule on Borel’s added assertion that the district court should have applied the *Price-Waterhouse* mixed motives standard to her claim.

We affirm the district court’s ruling dismissing the plaintiffs’ petition.

AFFIRMED.