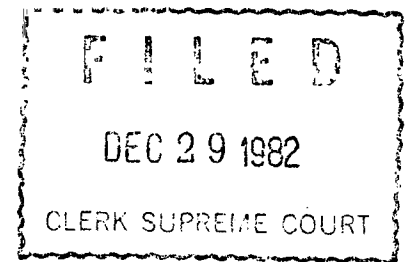


IN THE COURT OF APPEALS OF IOWA



WOODBURY COUNTY, IOWA,)

Petitioner-Appellee,)

vs.)

IOWA CIVIL RIGHTS COMMISSION,)

Respondent-Appellant.)

Filed December 29, 1982

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2-307
2-67655

Appeal from Woodbury District Court - Charles R. Wolle, Judge.

Respondent agency appeals from the district court decision on judicial review reversing its determination that petitioner was guilty of racial discrimination when it failed to hire complainant for a position as a fiscal officer, asserting that substantial record evidence supports the agency decision. Judgment of district court vacated and decision of agency reinstated.

Thomas J. Miller, Attorney General of Iowa, and Victoria L. Herring, Assistant Attorney General, for respondent-appellant.

Roger E. McEntaffer, Sioux City, Iowa, for petitioner-appellee.

Heard en banc.

Respondent, Iowa Civil Rights Commission, appeals from the district court's decision on judicial review reversing its determination that petitioner, Woodbury County, was guilty of racial discrimination when it failed to hire complainant, Carolyn Lee, for a position as a fiscal officer, asserting that substantial record evidence supports the agency decision. We vacate the judgment of district court and reinstate the agency decision.

Complainant, a Chinese-American with a degree in economics and some graduate work in accounting, applied for a job as fiscal officer at the county employment training center. The position required a high school degree or the equivalent, plus three years of experience with the possibility that specialized education in bookkeeping or accounting could substitute for experience on a one-to-one basis. During the interview with complainant, which did not last as long as some with other applicants, the interviewer did not ask her to demonstrate hypothetical problem-solving skills, as some other candidates had been asked to do. The successful candidate had a degree in accounting and management, but no graduate work. Both she and complainant had some work experience involving accounting. Although complainant stated that she could handle and would be intrigued by potentially frustrating changes in the regulations with which she would be working, the interviewer found her too reticent and felt that she would be too rigid to adapt to change. He may also have had an unstated concern about how long she would stay on the job. Finding, inter alia, that complainant was more qualified than the successful job applicant and that she was more credible as a witness than the interviewer, the agency hearing officer found that the employer had violated the Iowa Civil Rights Act in a decision which respondent commission adopted with one amendment to the findings of fact. The district court reversed, finding no substantial record evidence to support the commission's findings. From the reversal of the district court, respondent appeals.

I. Scope of Review. Our review of district court's order reversing respondent's finding of employment discrimination based on race is at law. § 17A.20, The Code 1979; Jackson County Public Hospital v. Public Employment Relations Board, 280 N.W.2d 426, 429 (Iowa 1979); City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). In its exercise of section 17A.19 review powers, the district court acted in an appellate capacity to correct errors of law specified for contested cases in section 17A.19(3)(f). This court's review then is limited to the sole question of whether the district court correctly applied the law. To make that determination, we ask whether the agency action is supported by substantial evidence in the record before the agency when the record is viewed as a whole. § 17A.19(3)(f); City of Des Moines v. Iowa State Commerce Commission, 285 N.W.2d 12, 14 (Iowa 1979). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. City of Davenport, 264 N.W.2d at 311. Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Id. We are limited to the record made before the hearing officer. § 17A.19(7); Farmers Elevator Company, Kingsley v. Manning, 286 N.W.2d 174, 176 (Iowa 1979). If our conclusions are the same as district court's, affirmance is in order; if not, reversal may be required. Jackson County, 280 N.W.2d at 430. See also Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 443, 446 (Iowa Ct. App. 1981).

II. Burden of Proof. In civil rights cases, the complainant, not the employer, has the burden of proof. Iron Workers Local 67 v. Hart, 191 N.W.2d 758, 772 (Iowa 1971). The burden of persuasion does not shift. McDowell v. Town of Clarksville, 241 N.W.2d 904, 908 (Iowa 1976). The most recent and authoritative federal court exposition regarding the burden of proof in these cases was by the United States Supreme Court in Texas Department of Community Affairs v.

Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). See also Linn Co-op Oil Co. v. Quigley, 305 N.W.2d 729 (Iowa 1981) (discussion of the ramifications and implications of the Burdine decision on Iowa law).

The Court in Burdine reaffirmed its decision in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973), in holding that a prima facie case presented by the complainant may be rebutted by the employer when the employer produces "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257, 101 S. Ct. at 1096, 67 L. Ed. 2d at 218. Nor need the employer "persuade the court that it was actually motivated by the proffered reasons." Id. at 254, 101 S. Ct. at 1094, 67 L. Ed. 2d at 216.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now 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.

Id. at 256, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217. See also Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982).

III. Findings of the Agency. The major focus in this controversy is on paragraphs 15 and 18 of the respondent's findings and the district court's rejection of the findings in those paragraphs. Respondent contends that these findings assessed the credibility of the witnesses before the agency and that the district court exceeded its scope of review in rejecting these paragraphs.

Paragraphs 15 and 18 of the respondent's decision are as follows:

15. The complainant interviewed with the director and the deputy director [Bruce Lambertson] for the job. The Hearing Officer notes that the recollections of Bruce

Lambertson, and of Carolyn Lee, were somewhat unclear after the passage of time. However, the Hearing Officer finds the testimony of Carolyn Lee to be more definite and clear, and more credible. The interview included no hypothetical problem-solving, as some others had, and lasted approximately twenty minutes. That finding is supported not only by Carolyn Lee's testimony. It is corroborated by Bruce Lambertson's interview notes. The remarks as to each of thirteen applicants indicates that seven were asked for hypothetical responses, including Sandra Miller. No note of a hypothetical is contained on Carolyn Lee's form. Carolyn Lee was told that the job would be frustrating because of frequent changes in regulations and forms from the Federal government, in overseeing the CETA funds.

* * *

18. Bruce Lambertson did not tell Carolyn Lee that he felt she would have trouble dealing with people, because she was too "reticent" in the interview. That was the main reason that his testimony revealed, for the decision not to select her as a "finalist," among the best three or four, and for the decision not to hire her. The Hearing Officer notes that Bruce Lambertson appeared more reticent during the hearing than did Carolyn Lee. In addition, Bruce Lambertson offered the observation that Carolyn Lee would not be flexible enough for the changing Federal regulations and forms. There was nothing but a record of a subjective observation to support that theory. His testimony that that [sic] complainant had less relevant experience seems inaccurate. The Hearing Officer can give no greater weight to his observation about the complainant being too "rigid." Common sense would dictate that one with greater education and experience would be more open to changes in forms and procedures.

In rejecting these findings, the district court stated:

The Court finds that there was not substantial evidence to support specific findings of fact of the Hearing Officer, subsequently adopted by the Commission with respect to his findings of fact 15 and 18, and conclusions of law 10 through 19 inclusive; there is not substantial evidence either that Lee was more qualified for the described position than Sandra Miller, the person hired, nor that she was as well qualified; there is not

substantial evidence in the record as a whole that the failure to hire Lee was in any way discriminatorily motivated; and there is not substantial evidence in the record as a whole that Woodbury's articulated reasons for not hiring her for the position were pretextual.

In analyzing the weight to be accorded to a hearing officer's assessment of credibility when the agency's findings disagree with the hearing officer's findings, the court in Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d at 295, stated:

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is "substantial."

(Quoting Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 496-97, 71 S. Ct. 456, 469, 95 L. Ed. 456, 472 (1951)). See also Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d 87 (Iowa 1982). In the case before the court the findings of the hearing officer were incorporated en toto as the findings of the agency.

"[W]hen credibility is involved, the agency ... is charged with the authoritative responsibility to decide what the evidence means under the governing statute." Iowa State Fairgrounds Security, 322 N.W.2d at 295. The courts recognize the expertise and experience of the agency. Id. at 293.

We find that paragraphs 15 and 18 of the agency's decision involved the credibility of the witnesses before the hearing officer. We further find that the district court reversed the agency primarily on the basis of paragraphs 15 and 18 and that such was error.

The legislature has prescribed a method of judicial review which permits the district court to review only a "cold record." This is the precise reason why deference is accorded the agency's assessment of credibility since the hearing officer has viewed the demeanor of the witnesses. By this decision today we do not intimate that the agency's assessment of credibility is absolute but rather only that there was no overwhelming compelling evidence to the contrary. See General Dynamics v. Occupational Safety & Health Rev. Comm., 599 F.2d 453, 463 (1st Cir. 1979). Judgment of district court is vacated and decision of agency reinstated.

All judges concur except Donielson and Snell, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent.

I agree with the trial court's conclusion that there is not substantial evidence in the record to support the agency's finding that petitioner was guilty of racial discrimination when it failed to hire complainant. While the ultimate burden of persuasion is on the complainant, the burden of proof is a shifting one. Once the complainant produces evidence establishing a prima facie case, a presumption of discrimination arises whereupon the burden of proof shifts to the defendant to show nondiscriminatory reasons for the decision. The burden then shifts back to the claimant to show that the reasons given were mere pretext, and that the true reason was discriminatory. This burden of proof is the product of federal decisions and has recently been adopted by the Iowa Supreme Court to govern employment discrimination cases under chapter 601A:

The elements of a prima facie case of disparate treatment in hiring under the federal statutory counterpart are delineated in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973). By analogy, the same burden can be met in a federal discharge case if the complainant presents substantial evidence (1) that he belongs to a group protected by the 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. See Lujan v. State of New Mexico Health and Social Services Department, 624 F.2d 968, 970 (10th Cir. 1980). The risk of nonpersuasion remains on the complainant throughout the proceeding. However, a prima facie case creates a "presumption" of discrimination which, if believed, will require a finding of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). An Employer wishing to dispel the presumption must produce evidence showing "some legitimate nondiscriminatory reason" for the challenged action. McDonnell-Douglas Corp., 411 U.S. at 802,

93 S. Ct. at 1824, 36 L. Ed. 2d at 668. The employer need not persuade the trier of fact that it was actually motivated by the proffered reason. Burdine, 450 U.S. at 254, 101 S. Ct. at 1094, 67 L. Ed. 2d at 216. The complainant then has the burden of persuading the trier of fact that the reason was merely a pretext for discrimination. Pretext can be shown through cross-examination or additional evidence. Id. at 256, 101 S. Ct. at 1095, 67 L. Ed. 2d at 217. This determination bears on 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). We adopt these principles for application to disparate treatment employment discrimination cases under chapter 601A.

Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d at 296 (emphasis added).

I do not believe complainant met the initial burden to prove a prima facie case of discrimination. At no time did she allege in her complaint, or testify that Sandra Miller was less qualified for the job position. In fact, the record discloses that claimant's undergraduate degree was in economics even though she had taken accounting courses. Complainant received her undergraduate degree from National Taiwan University in Taiwan. At the time of the job interview, complainant did not have a graduate degree. She was taking courses toward her masters of business administration degree but this fact does not mean that complainant would be more qualified for the job. The major focus of her study was not necessarily in accounting or management, two areas which would be germane to the job of fiscal officer. In fact, much of complainant's graduate study was in the area of computer training. Sandra Miller, on the other hand, had a degree in accounting and had more relevant job experience and more recent relevant job experience than did complainant. Following her undergraduate schooling, complainant worked as an accountant for a newly-established school in Taiwan for one year. After she moved to the United States, she worked in an

editorial capacity which had only a minor relation to accounting. She quit work to have her first child thus dating substantially the limited work experience she does have. In 1975 she worked in a Chinese restaurant and later worked for three months in the County Auditor's Office dealing with real estate taxes, a job which did not involve accounting. Sandra Miller, on the other hand, has worked recently as an accounts payable clerk, a bank reconciliation clerk, a bank management intern, and part-time tax return preparator. I believe that the hearing officer's and the Commission's conclusion that complainant was more qualified for the job is not supported by the record.

Moreover, even if complainant had made a prima facie case of discrimination, I believe that the employer demonstrated sufficient nondiscriminatory reason for not hiring complainant. Complainant was not hired because some of her background did not seem as relevant and because of the employer's reaction to her in the interview procedure. The employer felt that complainant "would have trouble dealing with people." This is a legitimate nondiscriminatory reason for not hiring an employee which would shift the burden to claimant to show that the employer's motive was really discriminatory.

I do not believe complainant has met this burden to show that the employer's reason for not hiring her was motivated by discrimination. The majority's emphasis on the credibility of witnesses is somewhat misplaced in this analysis. The officer only noted that complainant's testimony was "more definite, and clear, and more credible." It appears that the officer believed Lambertson, the interviewing employer, to be lying as to the real reason why complainant was not hired. But without any evidence in the record to support this 'hunch', it cannot stand. Complainant offers no evidence to show that the reasons given for not selecting her were pretextual. She has the ultimate burden to prove that the decision was based on a discriminatory motive. The record is void of evidence to

support this conclusion. I would affirm the trial court's ruling dismissing the complaint.

Snell, J., joins this dissent.