IN THE COURT OF APPEALS OF IOWA

No. 0-375 / 89-1242

FILED
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CLERK SUPREME COURT

ORVILLE DE WAYNE KARR,

Plaintiff-Appellee/Cross-Appellant,

vs.

MONROE FEED CENTER, INC., a/k/a MONROE FEED CENTER,

Defendant-Appellant/Cross-Appellee.

170

Appeal from the Iowa District Court for Jasper County, Arthur Gamble, Judge.

Employer appeals judgment awarding employee damages for discriminatory discharge. **AFFIRMED.**

Steven J. Holwerda of Selby, Updegraff, Smith & Holwerda, Newton, for appellant.

Donald G. Beattie of Skinner, Beattie & Wilson, P.C., Altoona, for appellee.

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

OXBERGER, C.J.

The defendant Monroe Feed Center, Inc. employed the plaintiff Orville Karr from 1964 until August 1986. In March 1986, Karr injured his back while working. The injury required back surgery. Karr's physician released him, with weight-lifting restrictions, to return to work in August 1986. Karr had undergone back surgery for another work-related back injury in 1981. Upon his return to work in August 1986, the Feed Center informed Karr he was being discharged due to a lack of available work. Karr has limited formal education and his work experience is limited to physical labor. Karr eventually found other work as a night watchman.

Karr filed a complaint with the Iowa Civil Rights Commission and obtained a right to sue letter. Karr brought this suit in district court alleging the Feed Center discriminated against him on the basis of his weight-lifting disability. A jury awarded Karr $150,000 in damages. The court entered judgment in this amount and awarded Karr attorney fees of $25,000. The Feed Center appeals and Karr cross-appeals.

The Feed Center first contends Karr is not "disabled" within the meaning of Iowa Code section 601A.2(11). Secondly, the Feed Center argues Karr's work restrictions have not substantially limited his ability to do many types of work, pointing out Karr has only a 5% disability.

Thirdly, the Feed Center contends Karr's work restrictions were not a factor in its decision to terminate him. The Feed Center urges the poor farm economy led to a need for less workers.

Fourthly, the Feed Center argues that, assuming Karr was handicapped, reasonable accommodation was not practical because it would cause undue hardship on the business' operation. The Feed Center employed only five other employees, and it believes attempts to accommodate Karr's restrictions would result in too great a burden on the other employees.

Lastly, the Feed Center contends the verdict was excessive because Karr was 52 years old, had made only $5.65 per hour working for the Feed Center, and failed to make reasonable efforts to mitigate his damages.

On cross-appeal Karr claims his attorney fees award was insufficient due to the complicated nature of the case. Karr also asks for appellate attorney fees.

We review this case at law for correction of errors. Iowa R. App. P. 4.

IS KARR DISABLED? The Iowa Civil Rights Act of 1965 defines "disability" as a "physical or mental condition of a person which constitutes a substantial handicap." The supreme court clarified the definition in Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432, 434 (Iowa 1988), by evaluating the administrative rules relating to the term.

Probasco, found a "substantially handicapped person" means "any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment." Id. (quoting 161 Iowa Adm. Code 8.26(1)(1987)). "Major life activities" means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Id. (quoting 161 Iowa Adm. Code 8.26(3)(1987)).

The Probasco, court then evaluated the terms of Iowa's Civil Rights Act with respect to a disability only impairing an individual's ability to work by finding:

> the statute protects those with 'substantial physical impairment[s] affecting [their] ability to perform on the job.' .... The degree to which an impairment substantially limits an individual's employment potential must be determined with reference to a number of factors: the number and type of jobs from which the impaired individual is disqualified, the geographic area to which the individual has reasonable access, and the individual's job training experience and expectations. An impairment that interferes with an individual's ability to do a particular job but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not substantially limiting within our statute.

Id. at 436 (brackets in original)(citations omitted).

Karr presented substantial evidence to support his disability claim. The evidence included medical records related to the disability resulting from his back injury and surgery as well as evidence of the number and types of

jobs for which he would be disqualified, the job availability in his geographic are and his job training, experience, and expectations. Karr also presented an expert who testified virtually no jobs were available in Karr's geographic area which he could perform. Karr had worked for the Feed Center for 22 years and had only an eighth-grade education. We view the evidence in the light most favorable to upholding the judgment. Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 177 (Iowa App. 1988)(citation omitted). Substantial evidence exists if a reasonable mind would accept it as adequate to reach a conclusion. Id. We find substantial evidence existed to reach the conclusion Karr was disabled within the meaning of the Iowa Civil Rights Act.

WAS KARR'S DISABILITY A FACTOR IN HIS DISCHARGE? The Feed Center asserts Karr failed to disprove it terminated his employment for economic reasons. The Feed Center goes so far as to state the uncontroverted evidence showed Karr's discharge was due to the poor farm economy.

To successfully establish a discriminatory discharge, a disabled employee must show the disability "more likely motivated the employer" in the termination, or the employer's nondiscriminatory justification is pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986). Karr presented evidence of the Feed Center hiring additional employees after his termination as well

as the Feed Center's owner admitting he refused to allow Karr to return to work until he obtained a full release without restrictions.

We find substantial evidence exists to support a finding that Karr carried his burden of establishing his disability was a factor in the Feed Center's decision to terminate his employment.

SUFFICIENCY OF THE EVIDENCE REGARDING ACCOMMODATION. Karr claims the Feed Center failed to preserve the issue of reasonable accommodation by not raising it at trial. We are uncertain if the issue was preserved and the Feed Center failed to provide us with the area within the record where the issue was raised at trial. Due to our lack of certainty regarding the preservation of the issue, we will address the issue but caution the Feed Center that only those issues raised and ruled upon by the trial court can be reviewed by an appellate court. Suckow v. Neowa FS, Inc., 445 N.W.2d 776, 780 (Iowa 1989).

If an employee is "handicapped," an employer shall make reasonable accommodation to the known physical limitations of an otherwise qualified handicapped employee unless the employer can demonstrate the accommodation would create undue hardship on the operation of its program. 161 Iowa Admin. Code 8.27(6)(1988). Therefore, once a handicapped employee introduces a prima facie case of discrimination, the employer bears the burden of demonstrating undue

hardship on the business which would result from accommodating the disabled employee.

The record is devoid of any evidence of any attempt on the Feed Center's part to accommodate Karr in the work place following his second back surgery. The Feed Center's owner, Mr. Roorda, admitted at one point he never considered making a reasonable accommodation for Karr's disability. Mr. Roorda said he would employ Karr only on the condition Karr's physician provide a full release. The Feed Center's claims consist of assertions of the hardship on fellow workers who would have to lift for Karr and the economic hardship to the business of maintaining an employee on the payroll who was unable to fulfill all possible duties of the Feed Center. The Feed Center's claims consist mainly of bald assertions without any evidentiary basis.

In considering the reasonableness of an employer's accommodation of an employee's disability, economic realities faced by the employer as well as the employee's needs must be considered. Halsey v. Coca-Cola Bottling Co., 410 N.W.2d 250, 253 (Iowa 1987)(citing Cerro Gordo County Care Facility v. Iowa Civil Rights Commission, 401 N.W.2d 192, 197 (Iowa 1987)).

Karr's case is distinguishable from the situation in Frank v. American Freight Systems, 398 N.W.2d 797 (Iowa 1987), where the supreme court found it unreasonable to

require an employer to accommodate a truck driver with a lifting restriction. In Frank, part of the job of a truck driver for the employer included unloading trucks at destination sites. Id. at 801. The Frank, employer showed that due to federal minimum sleep requirements for drivers, at times, plaintiff's co-workers would be unable to unload the truck upon arrival, therefore slowing the delivery process down. Id. at 803. Further the Frank, employer showed it was not always possible to hire unloading assistants at destination sites. Id. The Feed Center failed to provide any such specific hardships as well as failing to show the unavailability of jobs not requiring lifting.

We find substantial evidence existed for the jury to determine the Feed Center failed to prove an undue hardship would result from accommodating Karr's disability.

REASONABLENESS OF THE $150,000 JURY AWARD. The Feed Center claims Karr failed to show a reasonable effort to mitigate his damages and therefore the jury awarded excessive damages. We find jury instruction number 13 fully apprised the jury of Karr's duty to mitigate his damages and clearly informed the jury any failure to mitigate must be taken into account when awarding damages. Substantial evidence exists in the record to support the jury's award and we will not disturb it on appeal.

ATTORNEY FEES AWARD. Iowa Code section 601A.15(8) (1989) provides: "[p]ayment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees." Iowa courts possess considerable discretion in awarding attorney fees. In re Marriage or Cooper, 451 N.W.2d 507, 510 (Iowa App. 1989). To overturn an award an abuse of discretion must be shown, but awards of attorney fees must be for fair and reasonable amounts. Id.

We agree with the trial court that plaintiff counsel's fees appear to be at the upper limit of local fees but we find the amount awarded proper and no abuse of discretion in the trial court's award of fees. Further, we find Karr should be awarded appellate attorney fees incurred as a result of defending the judgment awarded by the trial court. See Willson v. City of Des Moines, 386 N.W.2d 76, 83 (Iowa 1986), cert. denied 479 U.S. 948, 107 S. Ct. 432, 93 L. Ed. 2d 382 (1986). Accordingly, we order the appellee to pay the costs of this appeal and award the appellant $4,976.80 of attorney fees to be paid by the appellee.

AFFIRMED.