IN THE COURT OF APPEALS OF IOWA

No. 1999-396 (9-649) / 98-2257
Filed January 12, 2000

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CLERK SUPREME COURT

SHIRLEY J. WAKEHOUSE,
Plaintiff-Appellant,

vs.

WARNER IMPLEMENT, CO.,
Defendant-Appellee.

Appeal from the Iowa District Court for Harrison County, James M. Richardson, Judge.

Plaintiff appeals following the dismissal of her sexual discrimination claim against her employer. She contends the court erred in considering work attendance as a term of employment and holding that she was not qualified for the position because of excessive absences. **AFFIRMED.**

C.R. Hannan of Reilly, Petersen, & Hannan, P.L.C., Council Bluffs, for appellant.

Christopher M. Bikus and Ronald M. Comes of McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska, for appellee.

Heard by Streit, P.J., and Miller and Vaitheswaran, J.J.

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MILLER, J.

Shirley Wakehouse appeals a district court decision that dismissed her claims that her former employer, Warner Implement Co. (Warner), violated the Iowa Civil Rights Act when it terminated her employment. Her claims were tried to the court, without a jury. We affirm.

Shirley Wakehouse began her employment with Warner Implement Co., a small John Deere dealership, on December 3, 1979. Throughout her employment with Warner, Wakehouse continually received raises and promotions. Wakehouse also attended numerous classes offered by John Deere and paid for by Warner to further her knowledge and ability to perform her job. Wakehouse was an at-will employee, as no contract for employment existed between her and Warner. Warner had no written policies for sick or medical leave.

In 1992 Wakehouse suffered a non-work-related back injury, and was gone from work for about three and one-half to four months. In 1995, she required hysterectomy surgery, was off work for about eight weeks, and had restrictions when she returned to work. The hysterectomy surgery took place during the business' "busy season." Warner had requested that her surgery be postponed for a month or two to accommodate the "busy season." Wakehouse, upon medical advice, proceeded to have the surgery.

During each of these extended absences, Wakehouse kept Warner informed of her status and when she could return to work. When Wakehouse was unavailable for

work on these two occasions, Paul Theulen filled in for her. At these times, Wakehouse was the parts manager.

On October 11, 1996, Wakehouse suffered a nervous breakdown, purportedly to some extent brought on by work-related stress. This time she did not keep her employer informed of her status and probable return date to work. On December 10, 1996, Wakehouse went back to Warner to tell her employer that she could return to work the following Friday. At this point Warner told Wakehouse she was fired, saying that it was for the good of the company.

Wakehouse then filed a Complaint with the Iowa Civil Rights Commission pursuant to the Code of Iowa, Sec. 216.15, and with the Equal Employment Opportunity Commission. On May 29, 1997, the Iowa Civil Rights Commission granted Wakehouse her Administrative Release, and Wakehouse filed a petition at law on August 21, 1997. In her petition she alleged she was discriminated against and fired because of her age, sex, and physical disability, all in violation of the Iowa Civil Rights Act of 1965. *See* Iowa Code § 216.1 et seq. (1999). She also included a claim for sexual harassment.

Trial to the court commenced October 1, 1998. The court filed its ruling on November 25, 1998. Summarily stated, the court found that while Wakehouse had presented a prima facie case of discrimination, Warner had presented legitimate, nondiscriminatory reasons for the firing, which Wakehouse did not rebut. Therefore,

judgment was for Warner on all claims. Wakehouse appeals that part of the decision that found for the defendant on the sex discrimination claim.

We review the court's judgment for errors at law. Iowa R. App. P. 4. The trial court's findings of fact have the effect of a special verdict. *Id.* We are bound by the court's factual findings if substantial evidence supports them. *Falczynski v. Amoco Oil Co.*, 567 N.W.2d 447, 449 (Iowa App. 1997).

Evidence is substantial if reasonable minds would find it adequate to reach the same findings, even if we might draw a contrary inference. *Id.* "The possibility of drawing two inconsistent conclusions from the same body of evidence does not prevent a finding from being supported by substantial evidence." *Id.* (quoting *Baty v. Binns*, 354 N.W.2d 777, 780 (Iowa 1984)).

When determining whether evidence is substantial, we view the evidence in the light most favorable to upholding the trial court's judgment. *Falczynski,* 567 N.W.2d at 449. We do so whether the evidence is contradicted or not, and we do not weigh the evidence or pass on the credibility of witnesses. *Id.*

When, as here, the trial court denied recovery because a party did not meet its burden of proof, the judgment will stand unless we find the party carried its burden as a matter of law. *Id.* We will so find "only when evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn." *Id.*

In deciding sex discrimination disputes, we follow the analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct.

1817, 1824-25, 36 L. Ed. 2d 668, 677-79 (1973). *See Board of Sup'rs of Buchanan County v. Iowa Civil Rights Com'n*, 584 N.W.2d 252, 256 (Iowa 1998) (citing *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990)). The plaintiff has the burden of establishing a prima facie case of discrimination. *Id.* Once the plaintiff establishes such a prima facie case, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the challenged action. *Id.* If the defendant does produce such evidence, the plaintiff retains the ultimate burden of proof to show that the justification offered by defendant was pretextual and that the real basis for the disparate treatment was the differing gender of the employees. *Id.* This is the most recent application of the *McDonnell Douglas* analysis approved by the Supreme Court. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407, 418-19 (1993).

To establish a prima facie case of sexual discrimination, Wakehouse was required to show that she is a member of a protected class, that she met applicable job qualifications, that her employment was terminated and that the position sought was filled by a male or remained open while the employer continued to seek applicants with similar qualifications. *Reiss v. ICI Seeds, Inc.*, 548 N.W.2d 170, 174 (Iowa App. 1996) (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677).

At the close of evidence, Wakehouse moved for a "directed verdict." In denying the motion, the trial court expressed a belief that Wakehouse had established

a prima facie case as to her discrimination and sexual harassment claims. Therefore, the final ruling must be seen as holding Warner had come forward with legitimate, nondiscriminatory reasons for its decision to terminate Wakehouse, thus rebutting the prima facie case. The reasons stated in the final ruling included the facts she had been gone from work two months in late 1996 with little or no contact with her employer and no indication to her employer when she might return, her continuing absence was at a busy time for her employer, when the company needed all employees, and her mental illness and absence from work made it impossible for her to perform an essential element of her employment, managing the parts department. The trial court found Wakehouse had not met her burden of showing that the reasons put forth by Warner were pretextual, and had thus failed to prove her claims.

Wakehouse claims the trial court erred in finding for the defendant on her sex discrimination claim because it added terms to the employment contract that did not previously exist in finding she was not qualified for her position and not meeting the expectations of her employer. There is no substantial evidence of any employment contract, and it is clear Wakehouse was in fact an employee at-will. Additionally, in finding for the defendant on the sex discrimination claim, the trial court simply stated that "While Mr. Thulen did have less experience in the position, the plaintiff offered no testimony that he was not qualified for the position. Simply replacing her with a male is not enough to show her gender was a determinative factor in her discharge." We agree with the trial court Wakehouse did not rebut the legitimate

nondiscriminatory reason for her dismissal, and Wakehouse failed in her ultimate burden of proof.

Wakehouse argues because Warner did not discharge her for missing work for extended periods on two prior occasions, the fact it did so this time must mean her discharge was because of her gender. However, there is substantial evidence supporting the trial court's findings that Wakehouse failed to prove her claims of sex discrimination. The trial court reasonably could find, as it did, that Warner had dispelled the presumption of discrimination by articulating and presenting evidence of legitimate, nondiscriminatory reasons for firing Wakehouse -- her third extended absence from work in approximately four years, together with no contact or information as to when or if she would return, leading into Warner's busiest time of year -- and that Wakehouse had not shown that the articulated reasons were merely pretextual. Further support for the trial court's decision can be found in Gus Warner's testimony. He testified the reason for Wakehouse's dismissal was not because of her gender, but because he hadn't heard from her during her lengthy absence.

The ultimate burden of persuasion remained with Wakehouse. The evidence was not so overwhelming that the only reasonable inference that could be drawn was that she was discriminated against on the basis of sex. We cannot find that Wakehouse carried her burden as a matter of law. Accordingly, we affirm the trial court's judgment.

AFFIRMED.