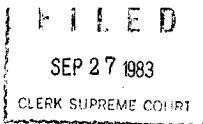


IN THE COURT OF APPEALS OF IOWA



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RAVENWOOD HEALTH CARE CENTER)
and CONTINENTAL CARE CENTERS,)
INC.,)

Petitioners-Appellants,)

Filed September 27, 1983

vs. -)

IOWA CIVIL RIGHTS COMMISSION,)

Respondent-Appellee,)

and)

PAM ROBINSON,)

Intervenor-Appellee.)

3-198
2-69350

Appeal from Black Hawk District Court - R. J. Curnan, Judge.

Ravenwood Health Care Center and Continental Care Centers, Inc. appeal from the district court decision on judicial review affirming the decision of respondent agency finding them guilty of racial discrimination and awarding intervenor Pam Robinson back pay and reinstatement with seniority. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

W. D. Sindlinger of McCrindle, Bergstrom & Sindlinger, P.C., Cedar Falls, for petitioners-appellants.

Thomas J. Miller, Attorney General, and Scott H. Nichols, Assistant Attorney General, for respondent-appellee.

Harry W. Zanville of Reed, Merner, Sabbath, Strever, Zanville, Oppold & Hansen, Cedar Falls, for intervenor-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ. Sackett, J., takes no part.

SCHLEGEL, J.

Ravenwood Health Care Center and Continental Care Centers, Inc. appeal from the district court decision on judicial review affirming the decision of respondent agency finding them guilty of racial discrimination and awarding intervenor Pam Robinson back pay and reinstatement with seniority. Petitioners assert that the unnecessary and unreasonable delay by the Iowa Civil Rights Commission was prejudicial and constituted laches, that the agency decision was based upon unreliable hearsay and opinion evidence, that the agency decision was unsupported by substantial evidence in the record, and that the agency action was unreasonable, arbitrary, capricious, and an unwarranted exercise of discretion. We affirm in part, reverse in part, and remand.

Pam Robinson, a black woman, filed a complaint with the Iowa Civil Rights Commission on December 13, 1976, alleging that her employment as a nurse's aide at Ravenwood Health Care Center had been terminated as a result of racial discrimination. A copy of the complaint was served by registered mail upon Ravenwood Health Care Center on December 22, 1976. On March 8, 1979, an investigation of this complaint by respondent's staff was completed and two case summaries, dated March 9, 1979 and April 4, 1979, were prepared recommending a finding of probable cause. Intervenor, apparently in response to the March 9 report, filed an amended complaint on March 13, 1979, adding petitioner Continental Care Centers, Inc., the corporate owner of Ravenwood Health Care Center.

Intervenor, on October 26, 1976, became upset and requested that she be allowed to leave her shift early. She believed that the supervisory nurse was supervising her and another black nurse's aide more closely than the other nurse's aides on duty. The supervisory nurse refused intervenor permission to leave early and called the employer's administrator, who advised intervenor that if

she left before her shift ended she would be considered to have voluntarily terminated her employment. The employer's policy manual stated that leaving the job without permission may be grounds for summary dismissal. Intervenor, despite the warning, left early.

Upon the agency's finding probable cause, conciliation was unsuccessfully attempted. At the agency hearing hearsay evidence was presented by intervenor which tended to show that the administrator held racially prejudicial views. There was also evidence that approximately one and one-half months prior to the termination of intervenor's employment, a different supervisory nurse had granted a white nurse's aide permission to leave in the middle of the shift after she became upset on the job. Following the hearing, the agency found the petitioners guilty of racial discrimination and awarded intervenor back pay and reinstatement with seniority. On judicial review, the district court affirmed in part but remanded to the agency for reconsideration of issues relating to the possibility that its decision had improperly shifted the burden of proof. The agency, on remand, clarified the burden of proof employed and reached the same result. When the district court affirmed the agency action on judicial review, the petitioners appealed.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, provides for judicial review of final agency action. Iowa Code § 17A.19. See also Iowa Code § 601A.17(1). Appeal is to be taken as in "other civil cases." Iowa Code § 17A.20 (1983). In "other civil cases" this court sits to correct errors of law. Iowa R. App. P. 4. When this court reviews a decision of the district court rendered pursuant to Iowa Code section 17A.19, the sole question is whether the district court correctly applied the law. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 165 (Iowa 1982). In order to make that determination, this court applies the standards of Iowa Code section 17A.19(8) to the agency action to

determine whether this court's conclusions are the same as those of the district court. Id. at 165.

I. Agency Delay in Prosecution of Complaint

Petitioners' principal complaint, as a ground for reversal, is that the agency delay in making an investigation and a determination of probable cause was a violation of Iowa Code section 601A.15(3)(a) (formerly Iowa Code § 601A.14(3) (1975)) and resulted in substantial prejudice to the defendant. Iowa Code section 601A.15(3)(a) provides:

After filing a verified complaint, a true copy shall be served within twenty days by certified mail on the person against whom the complaint is filed. An authorized member of the commission staff shall make a prompt investigation and shall issue a recommendation to a hearing officer under the jurisdiction of the commission, who shall then issue a determination of probable cause or no probable cause. (emphasis added)

There was nothing in the record to indicate why the investigation was not completed until March 9, 1979, or when the investigation was actually commenced. Moreover, we find nothing in the statute or in the administrative regulations to suggest what is a "prompt" investigation. See Wilson & Co. v. Oxberger, 252 N.W.2d 687, 689 (Iowa 1977). We believe that a determination of what is "prompt" action in order to determine if there was a statutory violation requires the application of equitable principles and consideration of all the relevant facts and circumstances for the purpose of doing justice for all the parties involved. Kansas Commission on Civil Rights v. Sedgwick County Mental Health Clinic, 220 Kan. 653, 657, 556 P.2d 180, 183 (1976) (dissenting opinion) cited with approval in Wilson & Co. v. Oxberger, 252 N.W. 2d at 689. There was no evidence presented from which we can determine a statutory violation.

Moreover, as a general rule of law, statutes directing the mode of proceeding of public officers, relating to time and manner, are directory. Maquoketa Valley Community School District v. Maquoketa Valley Education Assoc., 279 N.W.2d 510, 514 (Iowa 1979). If the duty is not essential to

accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown. Taylor v. Department of Transportation, 260 N.W.2d 521, 522-23 (Iowa 1977). It is well established that the Iowa Civil Rights Act of 1965 was primarily designed to correct a broad pattern of behavior rather than merely affording a procedure to settle a specific dispute. Estabrook v. Iowa Civil Rights Commission, 283 N.W.2d 306, 308 (Iowa 1979). It is clear, therefore, that even assuming the petitioners had established a violation of section 601A.15(3)(a), they must also establish prejudice as a result of the procedural violation to void the Commission's action. C.O.P.E. v. Behnke, 276 N.W.2d 838, 842 (Iowa 1979) appeal dismissed, 444 U.S. 805, 100 S. Ct. 27, 62 L. Ed. 2d 19 (1979). A party seeking to void agency action based upon delay must establish prejudice as a result of that delay. Maquoketa Valley Community School District v. Maquoketa Valley Education Assoc., 279 N.W.2d at 514.

The federal courts, in holding that courts have discretionary equitable powers to dismiss Title VII suits for inordinate EEOC delay, have also required a showing that any delay be unduly prejudicial to the position of the employer. Equal Employment Opportunity Commission v. Westinghouse Electric Corporation, 592 F.2d 484, 485 (8th Cir. 1979); Equal Employment Opportunity Commission v. Liberty Loan Corporation, 584 F.2d 853, 857 (8th Cir. 1978). A defendant must establish "with such clarity as to leave no room for controversy" that it has been substantially and unduly prejudiced in its ability to defend the lawsuit because of the EEOC's delay. Id. at 857. Under all the theories for reversal in the above cited cases, the petitioners must establish prejudice as a result of the delay alleged here.

The hearing officer, in this case, found that the delay was not shown to have been prejudicial to "any identifiable defense exhibit or witness for either party."

Under Iowa Code section 17A.19(8)(f), we uphold the agency determination if the finding is supported by "substantial evidence in the record made before the agency when that record is viewed as a whole." Peoples Memorial Hospital v. Iowa Civil - Rights Commission, 322 N.W.2d 87, 91 (Iowa 1982). Evidence is substantial if a reasonable person would find it adequate for reaching a decision. Id. at 91. The defendant Ravenwood Health Care Center received notice of this action nine days after the complaint was filed by intervenor. Under the provisions of chapter 240 I.A.C. section 1.3(5)(a)(b), when a complaint or notice of investigation has been served on an employer, the employer must preserve all records relevant to the investigation until the complaint or investigation is finally adjudicated. It is clear that the petitioners had the opportunity to investigate the alleged incident and preserve evidence with which to defend the charges. Furthermore, petitioners' claim that they suffered prejudice as a result of the accumulation of back pay is without merit. Petitioners did lose the services of Robinson while the complaint was pending, but that loss was voluntarily incurred. They could have terminated their loss at any time by reinstating Robinson. See Chicago & North Western Railroad v. Labor and Industry Review Commission, 91 Wis. 2d 462, 480-81, 283 N.W.2d 603, 612-13 (Wis. App. 1979), aff'd 98 Wis. 2d 592, 297 N.W.2d 819 (Wis. 1980). The agency's decision that the petitioners suffered no prejudice as a result of the alleged delay is supported by substantial evidence. Cf. Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d 161, 164 (Iowa 1983) (delay of five years).

II. Sufficiency of the Evidence

The petitioners make numerous allegations of error which challenge the Commission's findings of disparate treatment. The petitioners allege the Commission improperly shifted the burden of proof. The Iowa Supreme Court has recently explained at length the proper analysis in employment discrimination cases. See Woodbury County v. Iowa Civil Rights Commission, 335 N.W.2d at 165;

King v. Iowa Civil Rights Commission, 334 N.W.2d 598, 601-02 (Iowa 1983). It would serve no useful purpose for us to set out those principles here. We have reviewed the Commission's decision made on remand from the district court, and hold that the burden of proof was not improperly shifted. We, therefore, need only review the evidence to determine if there was substantial evidence supporting the agency's determination of disparate treatment. Id. at 602. As noted above, evidence is substantial if a reasonable person would find it adequate for reaching a decision. Peoples Memorial Hospital v. Iowa Civil Rights Commission, 322 N.W.2d at 91.

The record made before the hearing officer contained some hearsay evidence as to views and prejudices of the petitioners' administrator at the time of intervenor's discharge. The petitioners contend on appeal that it was improper for the agency to consider this testimony in determining whether there was discriminatory treatment. Iowa Code section 17A.14(1) conforms with the general rule that administrative agencies are not bound by technical rules of evidence, and that generally hearsay evidence is admissible at administrative hearings. McConnell v. Iowa Department of Job Service, 327 N.W.2d 234, 237 (Iowa 1982). The weight each item of hearsay should receive is to be determined by an evaluation of the item's truthfulness, reasonableness, and credibility. Johnson v. United States, 628 F.2d 187, 190 (D.C. Cir. 1980). The administrative tribunal must determine whether the evidence is the kind of evidence on which "reasonably prudent persons are accustomed to rely for the conduct of their serious affairs."

The hearsay evidence primarily relied upon by the hearing officer was the testimony of Nancy Stradley, the petitioners' director of nursing at the time of the alleged incident. Nurse Stradley testified as to the discriminatory attitude and hiring preferences of the petitioners' administrator, Uda Coon. The hearing officer found the testimony to be very convincing because of the witness's position with the defendant, her demeanor, and the absence of any self-serving motive. It

was not error for the hearing officer to consider the evidence in making its determination.

Following the principles established in King v. Iowa Civil Rights Commission, 334 N.W.2d 598, we hold that there was substantial evidence supporting the Commission's determination that the intervenor suffered disparate treatment because of her race, resulting in the loss of her employment. The intervenor initially established a prima facie case of race discrimination in the treatment she received during employment for the petitioners. See McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973); Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 298 (Iowa 1982). When intervenor became upset as a result of what she believed to be unfair treatment by her supervisor, she asked to be allowed to leave before the end of her shift. Although a white employee had been allowed to leave her shift when she became upset a few weeks before without losing her job, the intervenor was told she would be considered as voluntarily terminating her employment if she left prior to the end of her shift.

The petitioners asserted, as legitimate non-discriminatory business policy for the action, that everyone who left work without permission was automatically terminated. The hearing officer found, however, that intervenor had proven that the business justification articulated was a pretext that merely veiled the employer's discriminatory practices. See King v. Iowa Civil Rights Commission, 334 N.W.2d at 602. We agree with the district court that there is substantial evidence to support this determination.

III. Award of Damages and Reinstatement

Approximately a year after her dismissal, intervenor obtained a higher-paying job as a nurse's aide which she quit after eight months. She has not been employed since. A letter written by an employee of respondent during the unsuccessful attempts at conciliation proposed that intervenor's damages be

measured up to the time that she accepted new employment, which would have resulted in an award of approximately \$5,500. The agency's ultimate award of damages in excess of \$20,000 was based on a computation of back pay accruing through the time of the evidentiary hearing minus the amount actually received during the subsequent employment. The agency also ordered reinstatement with full seniority. The petitioners assert that the agency abused its discretion in granting this award and that its actions were unreasonable, arbitrary, and capricious. We agree.

The ultimate purpose in awarding damages as compensation for injury is to place the injured party in the position he or she would have been in had there been no injury. Dealers Hobby, Inc. v. Marie Ann Linn Realty Co., 255 N.W.2d 131, 134 (Iowa 1977). The Commission, pursuant to Iowa Code section 601A.15(8), has considerable discretion in fashioning an appropriate remedy. Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 171 (Iowa 1982). "Arbitrary, capricious and unreasonable action on the part of an administrative agency occurs when it can be said to be without rational basis; unconsidered, willful and irrational choice of conduct, unsupported by competent and substantial evidence." In re Lone Tree Community School District, 260 Iowa 719, 724, 150 N.W.2d 637, 640 (1967). Robinson's loss of wages up to the date of her subsequent employment would not have occurred but for the discriminatory discharge by the petitioners. The agency did not abuse its discretion in allowing back pay to the date of her subsequent employment.

Intervenor, however, had a duty to minimize her damages and her voluntary resignation from her subsequent job bars her recovery of back pay after that period. First, we note that the letter of conciliation whether or not properly before us on this appeal, does not bind the agency in its final decision. See Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d at 294-95. That does not relieve complainant of her obligation to mitigate her damages.

The issue of mitigation, however, was not raised before the agency. "Where a plaintiff seeks damages for wrongful act of defendant, plaintiff has the duty to minimize his damages, but the duty of proving that the damages could be minimized is on defendant." Whewell v. Dobson, 227 N.W.2d 115, 120 (Iowa 1975). Iowa Code sections 619.7 and 619.8 treat the matter of minimizing damages as a special defense which the defendant must plead and prove or he is limited to circumstances growing out of plaintiff's testimony. Id. at 120. Intervenor presented tax statements at the hearing concerning her subsequent earnings. This was clear evidence of complainant's subsequent employment and should have been considered in mitigation of damages. The Commission, under these facts, abused its discretion in awarding back pay to the date of the hearing. The backpay award should have only been awarded to the date of complainant's subsequent employment.

The respondent, Iowa Civil Rights Commission, also asserts on appeal that intervenor should be awarded back pay and seniority during the pendency of this appeal. Respondent did not cross-appeal from the decision of the district court nor was this claim asserted during agency proceedings. This contention presents nothing for review in this court. See Regal Insurance Company v. Summit Guaranty Corporation, 324 N.W.2d 697, 706 (Iowa 1982).

We remand this action to the respondent agency for the limited purpose of calculating the backpay award to complainant under the terms of this decision.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Dissent by Donielson and Hayden, JJ.

DONIELSON, J. (dissenting)

I cannot agree with the majority that the record in this case contains "substantial evidence" that intervenor Robinson's discharge was motivated by racially-discriminatory practices. Accordingly, I dissent.

The record shows that Robinson and a co-employee asked Sharon Boyce, their supervisor and the charge nurse at the time, if they could leave early because of perceived unequal treatment. They asked because they were aware of the written policy requiring such permission. This request was denied and Boyce told Robinson that, pursuant to employer policy, she would be considered to have voluntarily terminated her employment if she left early without permission. It was only after her request was denied that Robinson demanded or requested to speak with administrator Uda Coon even though it was then approximately 1:30 a.m. Coon in turn confirmed what Boyce had told them and affirmed Boyce's refusal of her request to leave early. Despite these warnings, Robinson left early without permission and her employment was therefore terminated.

The only evidence indicating any racial animus whatsoever is some hearsay statements of Uda Coon made at some time or another to another employee indicating that she had little confidence in blacks. Her racial views are no more than marginally relevant at best. Coon's only role in this matter was merely to confirm what Boyce told Robinson; i.e. that leaving early without permission would be grounds for termination. The main dispute was between Robinson, who wanted to leave early, and Boyce, her immediate supervisor, who refused permission to do so. There is no evidence of any kind in the record that Boyce was motivated by any racial views one way or the other in refusing Robinson's request. Certainly, a different case would be presented if Coon had initiated the confrontation with Robinson. The fact remains in this case, however, that Robinson voluntarily left early after twice being warned that such action would

result in discharge and knowing full well the written policy that permission must be obtained.

In my mind, the fact that a white employee, Edna Greenway, was allowed to leave early a few weeks before without losing her job proves nothing. The factual circumstances surrounding that case and the present case are not at all comparable. Greenway had been ill for a number of months, was having problems at home with her mentally retarded teenage son, and it was suggested by her own supervisor (a Ms. McGivern) to leave early when Greenway became upset, partly because there was already a full complement of nurses' aides working that shift. There is no mention in this record that either Boyce or Coon was involved or even knew about this incident. None of these extra circumstances were present in Robinson's case; she and her co-worker wanted to leave early because they felt they were being "picked on" by Boyce. To use the Greenway incident as demonstrative of disparate treatment between white and black employees completely distorts the substantial evidence rule where the factual circumstances surrounding the two incidents are so different that no meaningful comparison may be made.

Hayden, J., joins this dissent.