IN THE COURT OF APPEALS OF IOWA

No. 9-157 / 98-0089
Filed Augusst 27, 1999

TIMOTHY MADAI TAYLOR,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Webster County, Kurt L Wilke, Judge.

Plaintiff appeals the court's decision, following a bench trial, in favor of the defendant, the Iowa Department of Correctional Services and Department of Corrections. **AFFIRMED.**

Jeane W. Pearson of Price & Pearson, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, and R. Andrew Humphrey, Assistant Attorney General, for appellee.

Heard by Huitink, P.J., and Streit and Zimmer, JJ. Vogel, J., takes no part.

ZIMMER, J.

Timothy Madai Taylor appeals the trial court's decision in favor of the Iowa Department of Correctional Services and Department of Corrections, holding that he could not recover on his state civil rights claim alleging discrimination on account of his race. We affirm.

I. Background Facts and Proceedings. In 1993 Taylor, a forty-two year old African American, submitted applications four times for various positions with the Second Judicial District Department of Correctional Services ("Department"). In April 1993, Taylor applied for a position as a PPO II (probation and parole officer level II). There were one hundred sixty-one applications for that position. The Department interviewed the top five applicants. Taylor was not interviewed. In August 1993, Taylor applied for a position as a PPO III. He was interviewed, but was not hired. In September 1993, Taylor applied for another PPO II position. He was interviewed, but was not hired. In October 1993, he applied for a position as a Residential Assistant (RA) for the Fort Dodge Residential Correctional Facility. He was again interviewed, but was not hired.

On September 5, 1995, Taylor filed a petition charging the Department with discrimination in hiring in violation of Iowa Code section 216.6 (1993), alleging both disparate treatment and disparate impact. Following a bench trial the court ruled in favor of the Department. It found Taylor had been rejected for legitimate, nondiscriminatory reasons, in particular that other applicants for the same positions were more qualified. It also found Taylor had removed himself from consideration

for a fourth position by failing to complete the application process. The court dismissed Taylor's claim of disparate treatment.

The court also dismissed Taylor's claim of disparate impact. It concluded that although Taylor offered statistical evidence showing few minorities in the Department's workforce, such evidence did not alone prove the Department's hiring practices caused disparate impact. It found Taylor had not shown a causal relationship between the challenged practices of the Department and the alleged statistical disparities in the Department's work force. Further, the court did not find the challenged hiring practices did not serve in a significant way the legitimate employment goals of the Department.

Taylor now appeals. He contends the district court improperly considered his failure to complete the RA application process in dismissing his disparate treatment claim. He also alleges the district court failed to fully consider his disparate treatment claim pursuant to the analysis set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). He finally contends the district court erred in dismissing his disparate impact claim.

II. Scope of Review. Our review of discrimination claims tried to the court is at law. *See* Iowa R. App. P. 4; *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). We are not bound by the trial court's application of legal principles or conclusions of law. *See Fuller v. Iowa Dep't of Human Serv.*, 576 N.W.2d 324, 328 (Iowa 1998).

The trial court's findings of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. *See* Iowa R. App. P. 14(f)(1); *Reiss v. ICI Seeds, Inc.*, 548 N.W.2d 170, 173 (Iowa App. 1996). We are prohibited from weighing the evidence or the credibility of the witnesses. *See Reiss v. ICI Seeds, Inc.*, 548 N.W.2d at 173. We construe the trial court's findings broadly and liberally; and in the event of doubt or ambiguity about those findings, we construe them to uphold rather than defeat the trial court's judgment. *Id.* Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings. *Id.* Evidence is not insubstantial merely because it could support contrary inferences. *Id.*

III. Employment Discrimination Theories. Taylor bases his employment hiring discrimination claims on Iowa Code chapter 216, our state law counterpart to Title VII (42 U.S.C. § 2000e) under federal law. Taylor alleges disparate treatment and disparate impact theories of employment discrimination.

Disparate treatment cases involve discrimination addressed to persons on the basis of race, color, religion, etc.; disparate impact cases involve employment practices neutral on their face but which nevertheless result in discrimination. *See Clark-Peterson Co., Inc. v. Independent Ins. Assocs., Ltd.*, 492 N.W.2d 675, 679 n.7 (Iowa 1992); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990). "In short, the disparate treatment theory focuses on the employers motivation" while "the disparate impact theory focuses on the

consequences of the employer's conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 516.

*A. **Disparate Treatment.*** We follow the Title VII analytical framework developed in *McDonnell Douglas Corp v Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) for allocating the burden and order of presentation of proof under Iowa Code chapter 216. *See, e g., Bd. of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n*, 584 N.W 2d 252 (Iowa 1998), *Sievers v. Iowa Mut. Ins. Co*, 581 N W 2d 633 (Iowa 1998); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N W.2d 512 (Iowa 1990); *Hamilton v First Baptist Elderly Hous. Found.*, 436 N.W.2d 336 (Iowa 1989).

Under *McDonnell Douglas* and its progeny, the complainant must first establish a prima facie case of intentional discrimination by a preponderance of the evidence. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N W 2d at 516. Once the prima facie case is established, a presumption arises the employer discriminated against the complainant. *See Hamilton v. First Baptist Elderly Hous. Found.*, 436 N.W.2d at 338.

Defendant must then articulate or otherwise produce evidence of a legitimate nondiscriminatory reason for not hiring plaintiff. *See Vaughan v. Must, Inc.*, 542 N.W.2d at 538; *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 517.

If the defendant succeeds in producing a legitimate nondiscriminatory explanation, the plaintiff must then prove the asserted reasons are pretextual, are not worthy of belief or that a discriminatory reason nevertheless more likely motivated the employer. *See Vaughan v. Must, Inc.*, 542 N.W.2d at 538; *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 517.

In all three stages the burden of persuasion rests with the employee. The only burden the employer shoulders is the burden of production of evidence to rebut the presumption of discrimination. *See Hamilton v First Baptist Elderly Hous. Found.*, 436 N.W.2d at 338.

B. Disparate Impact. As with disparate treatment, our courts have used federal cases in analyzing disparate impact questions under Iowa Code chapter 261.

Disparate impact analysis involves three stages. The plaintiff must first establish a prima facie case of discrimination by showing "that a particular employment practice has an adverse impact on a protected group in 'marked disproportion to its impact on employees outside that group.'" *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 517. This stage depends almost entirely on statistical evidence. *See Dubuque City Assessor's Office v. Dubuque Human Rights Comm'n*, 484 N.W.2d 200, 203. However, it is also incumbent upon the complainant to isolate and identify "'the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *Id.* (quoting *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656, 109 S. Ct. 2115, 2124, 104 L. Ed. 2d 733, 751 (1989)). There must be showing of "causal link between the challenged

employment practice and the disparate impact." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 518.

Once the prima facie case is established, the burden shifts to the employer to produce evidence that the challenged employment practice serves, in a significant way, a legitimate employment goal of the employer. *See Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 519 (citing *Wards Packing Co. v. Antonio*, 490 at 659–60, 109 S.Ct. at 2125–26, 104 L.Ed.2d at 752–53). However, it remains upon the plaintiff to disprove the employer's assertions. *See Wards Packing Co. v. Antonio*, 490 at 659–60, 109 S. Ct. at 2126; 104 L. Ed. 2d at 752–53

The complainant may still prevail even if he or she is unable to persuade the fact finder the employer did not have a business justification for its employment decision. "To prevail, the [complainant] must convince the fact finder that (1) the employer has alternative hiring practices that could reduce the disparate impact and (2) the employer refuses to adopt these alternatives." *See Hy-Vee Food Stores, Inc., v. Iowa Civil Rights Comm'n*, 453 N.W.2d at 519 (citing *Wards Packing Co. v Antonio*, 490 at 659–60, 109 S. Ct. at 2125–26, 104 L. Ed. 2d at 752–53).

The burden of persuasion in disparate impact cases rests with the complainant in all three stages of proof. *Id.*

IV. Merits of Disparate Treatment Claim. Taylor avers failure to apply for a job opening does not bar a Title VII disparate treatment plaintiff from establishing a prima facie case. *See generally EEOC v. Metal Service Co.*, 892 F.2d 341 (3d Cir. 1990). However, the district court found, and the defendants do not dispute, that

Taylor has established a prima facie case of disparate treatment discrimination. We need not further consider this matter.

Taylor next argues the district court erred in failing to consider the third prong of *McDonnell Douglas*. After concluding Taylor had presented a prima facie case, the district court stated:

> Here, the Defendants argue that Plaintiff's rejection for the PPO positions was due to more qualified applicants. This court agrees . This court finds that Defendants' rejection of the Plaintiff for the PPO positions was based on a legitimate, nondiscriminatory reason.

If Taylor believed the district court failed to consider a legal issue properly presented to it, he should have afforded the district court an opportunity to address the alleged error through a rule 179(b) motion. This was not done. Taylor has therefore failed to preserve this matter for our review. *See Bellach v. IMT*, 573 N.W.2d 903, 904 (Iowa 1998); *Lawrence v. Grinde*, 534 N.W.2d 414, 418 (Iowa 1995) (holding when a case proceeds to a non-jury trial, the law requires a party to file a rule 179(b) motion requesting the trial court to enlarge or amend its findings in order to preserve an issue for appeal when the court fails to resolve an issue, claim, defense, or legal theory the parties have properly submitted to it for adjudication); *see also State v. Rosenstiel*, 473 N.W.2d 59, 61 (Iowa 1991) (holding "a party who fails to alert the district court to its contentions at trial cannot thereafter rely on those contentions to seek reversal on appeal"). The order of the district court dismissing Taylor's disparate treatment claim is therefore affirmed.

However, even if error had been preserved, Taylor would not prevail. Though the district court did not explicitly address the third element of *McDonnel Douglas*, we conclude the court did consider the matter. The court did not state the Department merely presented evidence of legitimate reasons for not hiring Taylor. Rather, it made a specific finding the Department actually had a legitimate reason for not hiring Taylor. The language of the court's order implies the court, as fact finder, did not believe Taylor had proven the Department's legitimate, nondiscriminatory reasons for not hiring him were merely pretextual. Having carefully reviewed the record, we find this conclusion supported by the evidence In particular, we reject his contention that his failure to complete the job application for the RA position was a pretextual excuse for not hiring him.

V. Merits of Disparate Impact Claim. Taylor argues the district court erred in dismissing his disparate impact claim on the basis he had failed to present a prima facie case of discrimination. That is, that the district court erred in concluding the hiring practices of the Department do not operate to exclude a disproportionate number of members of a protected class. He also alleges his claim should not have been dismissed on the basis that he had failed to show the hiring practices do not serve legitimate employment goals of the department.

Even assuming the court erred in concluding Taylor had not presented a prima facie case, reversal is not required. Taylor claims the Department had the burden of proving its hiring practices served legitimate employment goals. However, the Department only had the burden of production, not persuasion. This burden of

production was satisfied. The burden then shifted to Taylor to persuade the finder of fact that the Department's practices do not serve legitimate goals. The district court concluded Taylor had not met his burden of persuasion. Taylor has not directed this court to any evidence which discredits the district court's conclusion.

Assuming he made a prima facie case, having been unable to persuade the fact finder on the question of the Department's business necessity defense would not have ended his case. He could still have prevailed if he proved the Department refused to adopt available alternative hiring practices that could reduce the disparate impact. However, Taylor apparently did not raise this argument to the district court and the court did not address the issue in its order. It is not alleged the district court erred in this respect.

Thus, even if the court erred in determining no prima facie case had been presented, its dismissal order must nevertheless be upheld (1) because plaintiff has failed to prove the Department's hiring practices do not serve legitimate goals and (2) because he has not proven the Department refused to adopt alternative hiring practices which could have reduced the alleged disparate impact. The order dismissing Taylor's disparate impact claim is therefore affirmed.

AFFIRMED.