IN THE COURT OF APPEALS OF IOWA

No. 4-280 / 93-0873

FILED
JAN 23 1995
CLERK SUPREME COURT

JO ANN ANDERSON,

Plaintiff-Appellant/Cross-Appellee,

vs.

ROLAND CARRILLO, SUE FOLLON, and CONSTANTINE CURRIS,

Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

Plaintiff appeals from the district court's dismissal of her civil rights action. **AFFIRMED BY OPERATION OF LAW.**

Herbert Rogers, Sr. of Rogers Law Offices, P.C., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Steven K. Young and Dean A. Lerner, Assistant Attorneys General, for appellees.

Heard by Sackett, P.J., and Habhab and Cady, JJ., but decided en banc.

PER CURIAM

The court being equally divided, the judgment is affirmed by operation of law. Iowa Code § 602.5106(1) (1995).

AFFIRMED.

For affirmance: Donielson, C.J., and Sackett, and Habhab, JJ.

For reversal: Hayden, Cady, and Huitink, JJ.

Donielson, C.J., and Cady, J., write separately.

CADY, J. (writing separately)

I write separately to express my view that the plaintiff was entitled to have her discrimination claims against the Defendants submitted to the jury. I do this because I believe guidance and clarification is needed in the rapidly expanding body of employment discrimination law.

The district court determined Anderson failed to make a prima facie showing of racial discrimination because she did not demonstrate she was treated differently from similarly situated white employees. In reaching this conclusion the court relied on the criteria for establishing a prima facie case set out in Wright v. Waterloo Water Works, 493 N.W.2d 889, 894 (Iowa App. 1992). In Wright, this court held that an employee can establish a prima facie case of race discrimination by demonstrating: (1) that the employee belongs to a protected group; (2) she was adversely impacted by the defendants' actions (the decision to discharge her); and (3) similarly situated white employees were not subjected to the same treatment. Id. This statement of the criteria for a prima facie case, however, must not be broadly applied in light of our Supreme Court's statement of the

prima facie case requirements in Hamer v. Civil Rights Comm'n, 472 N.W.2d 259, 264 (Iowa 1991) and Miller v. Sioux Gateway Fire Dept., 497 N.W.2d 838, 840-41 (Iowa 1993).

The Wright criteria are applicable where comparison evidence forms the entire factual basis for the plaintiff's discriminatory treatment claim. See Williams v. Ford Motor Co., 14 F.3d 1305, 1307 (8th Cir. 1994), Jones v. Frank, 973 F.2d 673, 675-76 (8th Cir. 1992); Timms v. Frank, 953 F.2d 281, 286-87 (7th Cir. 1992) cert. denied sub nom. Timms v. Coughlin, 112 S. Ct. 2307 (1992). Using the Wright criteria in cases such as Anderson's, where the plaintiff's claim does not rest solely on comparator evidence, implies the plaintiff must show disparate treatment for similarly situated employees in her prima facie case.

While comparator evidence is a persuasive and commonly used method of establishing a prima facie case, it is not the sole means of demonstrating a prima facie case. In Texas v. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), the United States Supreme Court offered an alternative formulation of the prima facie case requirements. In Burdine, the Court stated: "The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. Id. at 253, 101 S. Ct. at 1094, 67 L. Ed. 2d at 215. Furthermore, in Furnco Constr. Co. v. Waters,

438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), the Court held a prima facie case of disparate treatment can be established by "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." Id. at 580, 98 S. Ct. at 2951, 57 L. Ed. 2d at 969. Moreover, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, (1973), does not require plaintiffs to identify specific persons who were treated differently in order to establish an inference of discrimination. See Hill v. Metropolitan Atlanta Rapid Transit Auth., 841 F.2d 1533, 1540 (11th Cir. 1988).

Based on this authority, I believe, evidence that a plaintiff was treated differently than similarly situated employees who are not in the plaintiff's protected class is evidence of a plaintiff's prima facie case. It is not, however, a required element of the prima facie case in every situation. The prima facie case is intended to be flexible and will necessarily vary in different factual situations. McDonnell Douglas, 411 U.S. at 802 n.13, 93 S. Ct. at 1824 n.13, 36 L. Ed. 2d at 677-78 n.13.

The threshold of proof necessary to make a prima facie case is minimal. Johnson v. Arkansas State Police, 10 F.3d 547, 551 (8th Cir. 1993). The prima facie showing is not an ultimate finding of fact as to discrimination. See

Furnco, 438 U.S. at 579-80, 98 S. Ct. 2951, 57 L. Ed. 2d at 969. It simply raises an inference of discrimination. Id. Courts "must not conflate the prima facie case with the ultimate issue of discrimination." Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994).

The formulation of the criteria for a prima facie showing of racial discrimination in an employee termination situation was initially set out by our Supreme Court in Hamer. The criteria are: "(1) that the employee belongs to a protected group; (2) that the employee was qualified to retain the job; (3) the claimant was terminated; and (4) it is more likely than not that the termination was based on an impermissible consideration." Hamer, 472 N.W.2d at 264; See also Miller, 497 N.W.2d at 840-41 (reiterating the criteria established in Hamer).

Our formulation of the framework for evaluating discrimination claims under 601A is modeled on the United States Supreme Court's application of Title VII of the Civil Rights Act of 1964 in McDonnell Douglas. Hamer, 472 N.W.2d at 265. Logically, our modification of this framework to fit varying factual situations has paralleled the federal Title VII cases. See id. (relying the Eighth Circuit decision in Reeb v. Marshall, 626 F.2d 43, 45 (8th Cir. 1980)). In discriminatory discharge cases the Eighth Circuit has held a plaintiff establishes a prima facie case by showing that (1) he or she is a member of a protected class; (2) he or she was capable of performing his or her

job satisfactorily; and (3) he or she was discharged. Johnson v. Arkansas State Police, 10 F.3d at 551; Hervey v. City of Little Rock, 787 F.2d 1223, 1231 (8th Cir. 1986); Johnson v. Yellow Freight System, Inc., 734 F.2d 1304, 1307 (8th Cir.); cert. denied, 469 U.S. 1041, 105 S. Ct. 525, 83 L. Ed. 2d 413 (1984); Boner v. Board of Comm'rs., 674 F.2d 693, 696 (8th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981); Osborne v. Cleland, 620 F.2d 195, 198 (8th Cir. 1980). The only additional element Title VII has been interpreted to require is a showing by the plaintiff "that his or her discharge occurred under circumstances which create an inference of unlawful discrimination." Williams, 14 F.3d at 1308.

In light of this authority, I would conclude the district court erred in granting a directed verdict. It was only necessary for Anderson to establish a prima facie case as outlined in Hamer. Upon reviewing the evidence in the light most favorable to Anderson, a jury could reasonably infer from the evidence the existence of every element of Anderson's prima facie case.

As an African-American, Anderson showed she was a member of a protected class. She also proffered evidence that she was qualified to retain her job. She had been employed by the University for over eleven years prior to her termination. During that time, she received satisfactory or better performance appraisals, was continually promoted, received merit pay increases, and was

never reprimanded. Anderson also demonstrated she was terminated. Finally, Anderson presented evidence that it was unclear whether the office policy she was dismissed for violating existed. The position of financial aid counselor was newly created when Anderson entered it. She received minimal instruction and training and was given authority to administer the scholarship application process. She had never been reprimanded for disposing of the applications prior to her termination and she testified scholarship applications had not previously been retained.

Keeping in mind the burden of establishing a prima facie case is not onerous, I would conclude these circumstances are sufficient to find "it is more likely than not that the termination was based on an impermissible consideration." I would remand this case to the district court for a new trial in accordance with the criteria articulated in Hamer and Miller.

Anderson also asserts she established a prima facie case of racial discrimination under section 1983. To support this claim, Anderson must prove: (1) The defendant's deprived her of a right protected by the constitution and laws of the United States and (2) the defendant acted under color of state law. Christenson v. Ramaeker, 366 N.W.2d 905, 907 (Iowa 1985) (citing Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed. 2d. 420, 428 (1981)). Anderson has established the second element of this cause of action, because defendants

were acting at all pertinent times in their official capacities as employees of the University of Northern Iowa. The appeal concerns only the first element, the claim that the defendants violated Anderson's constitutional rights.

Initially, it must be determined what constitutional right Anderson contends was violated by the defendants' conduct. Anderson asserts that the defendants deprived her of her constitutional rights and violated section 1983 by terminating her employment and failing to reinstate her to her previous position due to her race. The Equal Protection Clause of the Fourteenth Amendment prohibits intentional employment discrimination based on membership in a particular class. Triggs v. Fort Wayne Community Sch., 766 F.2d 299, 300 (7th Cir. 1985); Whiting v. Jackson State Univ., 616 F.2d 116, 122 (5th Cir. 1980).

In order to establish a violation of the Equal Protection Clause, the plaintiff must prove the defendant had a discriminatory intent or motive. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265, 97 S. Ct. 555, 563 50 L. Ed. 2d 450, 464 (1977); Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 2048, 48 L. Ed. 2d 597, 607-08 (1976). The purposeful discrimination element of the plaintiff's section 1983 claim against the defendant is the same as the purposeful discrimination element of his or her Title VII claim. St Mary's Honor Center v. Hicks, 970 F.2d 487,

490-91 (8th Cir. 1992) rev'd on other grounds 113 S. Ct. 2742 (1993); Briggs v. Anderson, 796 F.2d 1009, 1021 (8th Cir. 1986). The McDonnell Douglas, framework is, therefore, fully applicable to racial-discrimination-in-employment claims under section 1983. St. Mary's Honor Center v. Hicks, ____U.S. ___, 113 S. Ct. 2742, 2746 n.1, 125 L. Ed. 2d 407, 415 n.1 (1993). Thus, I would remand Anderson's section 1983 claim to the district court for the same reasons expressed in the analysis of her 601A claim.

DONIELSON, C.J. (writing separately)

I write separately to express my view that the district court decision should be affirmed. I cannot find the circumstances of this case are sufficient to find it is more likely than not the termination was based on an impermissible consideration. The plaintiff was a scholarship coordinator/financial aid counselor. She was accused of having awarded a scholarship in exchange for sexual favors. When an attempt was made to investigate the accusation, it was discovered the plaintiff had discarded student financial aid records, including those pertaining to the student with whom she was personally involved.

The plaintiff was terminated for discarding student financial aid records. She contends she has established a prima facie case because she presented evidence indicating it was unclear whether a records retention policy even existed. I do not agree a dispute about the existence or scope of such a policy is sufficient to create an inference the plaintiff was terminated for an impermissible consideration. The plaintiff held a professional position, and, regardless of the existence of an official policy, it should have been inherent within her job responsibilities that she would retain pending and recent scholarship-related records. Discharging an employee for failing to exhibit common sense does not create an inference of unlawful discrimination.

If every element of the plaintiff's discrimination claim is not supported by substantial evidence, a directed verdict is appropriate. Netteland v. Farm Bureau Life Ins. Co., 510 N.W.2d 162, 169 (Iowa App. 1993). Evidence is substantial if a jury could reasonably infer from it the existence of every element of a claim. Id. While recognizing that establishing a prima facie case is not to be an onerous burden, I cannot find the plaintiff in this case has introduced substantial evidence to establish her termination was based on an impermissible consideration.