IN THE COURT OF APPEALS OF IOWA

No. 1-252 / 90-993

FILED
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CLERK SUPREME COURT

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MARY JANE WALSH,

Appellant,

vs.

SCHNEIDER NATIONAL CARRIERS, INC.,

Appellee.

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

The plaintiff appeals a judgment of the district court, entered following a jury trial, finding she has not proven her sexual discrimination claims against the defendant. **AFFIRMED.**

Thomas Mann, Jr. of Mann and Mann Law Offices, Des Moines, for appellant.

Jeffrey A. Krausman and Dennis P. Ogden of Belin Harris Helmick Lamson McCormick, Des Moines, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

In 1988 Mary Jane Walsh, a former taxi driver, decided to pursue a career in the trucking industry. She completed a 300-hour training course and then applied for employment with Schneider National Carriers, Inc. Schneider hired Walsh.

Schneider sent Walsh to its advanced training school in Green Bay, Wisconsin. Walsh testified at trial that while at this school she received inconsistent instruction and was assigned to a new instructor each day. Walsh completed the one-week course, graduating eighth out of a class of thirty-nine. She testified that while the male trainees received final evaluations upon graduation, she did not. She also stated the male trainees were given one instructor rather than several.

Upon completion of the advanced training, Walsh was paired with David Harshbarger for over-the-road training. She testified that during this training Harshbarger refused to stop for restroom breaks and made her do much of the heavy lifting, causing her to injure her arm, shoulder, and back. Walsh also claims Harshbarger refused to stop for meals, often for twenty-four hours at a time. She further alleges she was improperly trained in how to fill out the necessary paper work and was told by Harshbarger that trucking was too difficult for women.

Walsh then returned to Des Moines to receive a regular assignment. She reported to work that day at 10 a.m., but

was kept waiting over five hours while her new trainer slept and later ate lunch with her supervisor. She testified she informed her supervisor, Richard Lampkin, that she was being subjected to differential treatment.

Later that day Walsh and her new trainer, Marlin Woosley, began a trucking assignment to Keller, Texas. The two have conflicting stories about the events of the trip, but it is clear that Woosley and Walsh did not get along. At one point Walsh missed the Keller turnoff, and, according to Walsh, Woosley became very upset and stated he wanted to hit someone because his delivery bonus might be in jeopardy. The rest of the trip deteriorated badly to the point where neither party was speaking to the other unless absolutely necessary. Walsh testified there were numerous yelling incidents and that Woosley once ran a tow motor or electric jack into her leg. She stated she became afraid when Woosley allegedly began laughing out loud to himself for no apparent reason. Walsh claims that when she attempted to call for help on the C.B., Woosley yanked the microphone from the unit.

Walsh also testified at trial that during these periods of hostility she attempted to contact her supervisor about the problem but could never be connected to him through the dispatcher. Ultimately, at an exit near Holbrook, Arizona, Walsh grabbed the keys from the truck as Woosley pulled over and walked to a nearby motel, where she called the police and filed a complaint against Woosley. Walsh called

her manager; he told her to get a motel room and that she would be put on a new job with a new trainer.

Once Walsh returned to Des Moines a meeting was held between Duane Boswell, the head of Schneider's Des Moines operations, Woosley, and Walsh. Boswell judged the problem as a personality conflict and felt the best thing to do was to split the parties apart and allow them to continue working for the company. Walsh was assigned to a new trainer; however, she never returned to employment at Schneider.

Walsh subsequently filed the present suit, alleging sexual discrimination in violation of Iowa Code chapter 601A and 42 U.S.C. section 2000e, et seq. Walsh sought to receive compensation for lost wages, fringe benefits, and humiliation and emotional distress associated with the discrimination. Schneider denied the claim, alleging that Walsh had been uncooperative and combative during her training period, and that she was treated in the same manner and trained in a similar fashion as any of its male employees.

Schneider filed a motion to strike Walsh's jury demand, which the trial court denied. The trial court, however, granted Schneider's motion for summary judgment on the issue of lost wages. Trial was subsequently held with the jury returning a verdict for Schneider. Walsh filed a motion for judgment notwithstanding the verdict and new trial, requesting the trial court to rule on her Title VII

claim. The trial court subsequently denied both motions. Walsh appeals.

Our scope of review is for correction of errors at law. Iowa R. App. 4. Findings of facts in a law action are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial or sufficient when a reasonable mind would accept it as adequate to reach the same findings. Waukon Auto v. Farmers & Merchants Sav. Bank, 440 N.W.2d 844, 846 (Iowa 1989). We construe the trial court's findings broadly and liberally. Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). In case of doubt or ambiguity we construe the findings to uphold, rather than defeat, the trial court judgment. Id.

I.

We first address the issue of claim preclusion. Schneider claims Walsh's appeal challenging the jury verdict on her state claim for sex discrimination is barred because of the trial court's valid final ruling on her Title VII claim. Schneider states that since Walsh does not explicitly appeal the trial court's decision on the Title VII claim, that decision constitutes a final judgment on the claim. Schneider believes the trial court's ruling on the Title VII claim, unchallenged on appeal, precludes Walsh from attacking the jury's verdict on appeal under the doctrine of res judicata. We disagree with Schneider's factual premise.

Walsh notes that throughout the trial she treated her sex discrimination claims, brought pursuant to 42 U.S.C. section 2000e and Iowa Code chapter 601A, as legal equivalents. The trial court also treated the claims as the same: "The claims in the context of the record in this matter should be submitted for the jury's determination, and the Court will consider the result of the jury's verdict as having spoken to the claims being submitted."

Walsh did not explicitly state, until in her reply brief, that she was also challenging the trial court's ruling dismissing her Title VII claim because the trial court did not make independent evidentiary findings. The trial court merely applied the jury's verdict to the Title VII sex discrimination claim. We determine Walsh intended her challenge to the jury's verdict to be a challenge to the trial court's ruling as well and find neither challenge waived. See Hy-Vee Food Stores v. Iowa Civil Rights Commission, 453 N.W.2d 512, 516-17 (Iowa 1990) (elements of federal Title VII sex discrimination case used to determine such claims under Iowa Civil Rights Act).

Because a jury trial is no longer available for a chapter 601A claim, Smith v. A.D.M. Feed Corp., 456 N.W.2d 378, 384 (Iowa 1990), this specific problem of claim preclusion should not occur in the future.

II.

Walsh first claims the trial court erred in instructing the jury that she had to prove both sex discrimination and

a constructive discharge in order to prevail. The trial court submitted the case to the jury with the following instruction:

> To entitle Plaintiff to recover on her civil rights claim the burden is upon the Plaintiff to establish by a preponderance of the evidence the following:
>
> 1. Plaintiff is a female.
> 2. Defendant, its agents and employees, subjected Plaintiff to different conditions of employment than similarly situated male employees which resulted in her constructive discharge. . . .

Walsh objected to the instruction and believes the instruction contains error because it required the jury to find that she was both subjected to disparate treatment and constructively discharged in order to succeed on her claim. She states a better instruction would have been an "either/or instruction," permitting the jury to find for her if it either found she was subjected to disparate treatment or was constructively discharged.

Schneider argues that since Walsh claimed the actions of Schneider employees toward her were sex discrimination and resulted in her constructive discharge, the trial court was correct in requiring Walsh to establish a discharge in order to prevail. We agree.

Walsh's proposed either/or instruction would permit her to win a sex discrimination case merely on the basis of proving differences in treatment between female and male employees and not requiring her to show that such differences resulted in adverse employment action or

hostile work environment. Such an action is not permitted under Iowa Code chapter 601A or Title VII.

Walsh argues the trial court's instruction ignores the fact that she could have been subjected to sex discrimination without it resulting in a constructive discharge. A sex harassment cause of action is separate from a disparate treatment case. To prove a sexual harassment claim a plaintiff must show that "(1) she belongs to a protected group, (2) she was subject to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a 'term, condition, or privilege' of employment, and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action." Hall v. Gus Constr. Co., 842 F.2d 1010, 1013 (8th Cir. 1988) (citations omitted).

However, in resisting a motion for directed verdict, Walsh argued at trial that hers was not a harassment case, but a disparate treatment case. Because Walsh did not assert a sexual harassment claim, she was not entitled to an instruction on sexual harassment. See id.; Lynch v. City of Des Moines, 454 N.W.2d 827, 833 (Iowa 1990). We conclude the trial court made no error in instructing the jury that Walsh was required to prove a constructive discharge in order to prevail on her sex discrimination claim.

III.

Walsh next claims the trial court erred in granting Schneider's motion for summary judgment on her claim for

lost wages and in refusing to instruct the jury on her lost wages claim. She notes that Iowa Code section 601A.15(8)(a)(1) states only interim earned income and unemployment compensation reduce a damage award in a civil rights case. She cites cases from other states to support her contention that a back pay award should include lost salary.

Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, id., and the evidence must be viewed in the light most favorable to the nonmoving party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). Every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Miline, 424 N.W.2d at 423.

Under the Iowa Civil Rights Act, a party may be awarded 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 Code § 601A.15(8)(a)(8) (1991). "Actual damages" is defined as "the amount awarded to a

injury." Chauffeurs, Local Union v. Iowa Civil Rights Commission, 394 N.W.2d 375, 382 (Iowa 1986) (adopting definition of Black's Law Dictionary 352 (5th ed. 1979)).

In order for Walsh to recover lost wages under the act, she must have an actual and real loss or injury caused by the discrimination. The trial court granted Schneider's motion for summary judgment on the back wages element of damage because Walsh stated she was physically unable to work from the time she left her employment at Schneider to the time of trial, and the physical injuries were not claimed to be the result of discriminatory acts by Schneider. We believe the court acted properly.

Walsh also claims the trial court erred in instructing the jury that she could only recover emotional distress suffered as a result of her constructive discharge from employment. She argues the trial court was wrong as a matter of law and cites Iowa Code section 601A.15(8). We determine the trial court's instruction merely explained to the jury that any claims of emotional distress which could be related to Walsh's physical injuries were not matters for which she could recover. For the same reasons we affirm the the summary judgment on the claim for lost wages, we find the instruction was proper.

IV.

Finally, Walsh states the trial court erred in failing to grant her motion for judgment notwithstanding the verdict. She claims the jury verdict is not consistent

with the evidence in the record. The jury's verdict cannot be overturned unless it would have been appropriate for Walsh to win her case on summary judgment. Iowa R. Civ. P. 243(b). The jury's verdict will be upheld if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

After review of the record, we conclude there is substantial evidence to support the jury's verdict. Walsh definitely had a personality conflict with Woosley, but in this record there is substantial evidence showing this conflict and her treatment by Schneider do not constitute discrimination.

We affirm the trial court in all respects. Costs are assessed to the appellant.

AFFIRMED.