IN THE COURT OF APPEALS OF IOWA

No. 6-302 / 05-0439
Filed September 21, 2006

LISA HARNEY,
Plaintiff-Appellant,

vs.

IOWA CIVIL RIGHTS COMMISSION,
Defendant-Appellee,

DEVON DISTRIBUTING CORP., d/b/a CARPENTER EROSION CONTROL,
Intervenor-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Lisa Harvey appeals following the denial of her petition for judicial review. **AFFIRMED.**

Gordon R. Fischer of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for appellee Iowa Civil Rights Commission.

Thomas M. Werner, West Des Moines, for appellee Devon Distributing Corp.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

Lisa Harney appeals from the district court's ruling on her petition for judicial review affirming the Iowa Civil Rights Commission's finding of no probable cause on her pregnancy discrimination claim against her former employer, Devon Distributing Corp. d/b/a Carpenter Erosion Control (Devon). The applicable standard of review requires us to affirm the district court's decision.

Background Facts and Proceedings.

Devon hired Harney in July of 1998 as its full-time office manager. Harney became pregnant approximately one year later. Although it was not required to do so by law or contract, Devon provided Harney with eight weeks of paid maternity leave. After Harney indicated to her boss, Tom Carpenter, that she wished to return to work, Carpenter suggested a job-sharing arrangement in which Harney and Chris Eller would each work twenty hours per week as office manager. Harney agreed, finding this arrangement to her liking.

Harney learned that she was again pregnant and informed Carpenter of this fact in April of 2001. Eller was also pregnant at that time, and she gave birth to a child on May 15, 2001. In early June during her paid maternity leave, Eller informed Carpenter that she did not wish to return to work for Devon following her leave.

On June 26, 2001, Carpenter told Harney that her employment was terminated because the position of part-time office manager had been eliminated. Carpenter also informed Harney that the company had decided to restore the manager position to its former full-time status. The company then offered the

fulltime position to Chris Eller, but she declined it citing her decision to remain home with her baby. Devon later hired Heidi Dagner, a woman in her mid-thirties, to fill the position. Dagner's employment was terminated one month later, however, during her probationary period. Devon then hired Lavonne Pruitt, a woman in her fifties, as its fulltime office manager.

On September 5, 2001, Harney filed with the Iowa Civil Rights Commission a pregnancy discrimination complaint against Devon. After an investigation, the commission's investigator reported:

> There is no pattern evidence that shows that Carpenter discriminated against his pregnant employees. On the contrary, there is a lot of pattern evidence indicating that he was very considerate to his female employees who had babies and to at least one male employee so he could be with his wife after their baby was born. . . . Thus, this Investigator believes that the reason Carpenter has given for terminating [Harney] (her unacceptable work performance) is his real reason and is not pretextual for terminating her because she was pregnant.

The commission announced its determination of "no probable cause" on March 12, 2003. After her application to reopen the case was denied by the commission, Harney filed a petition for judicial review on November 6, 2003. Harney appeals from the district court's ruling affirming the commission's decision.

Scope and Standards of Review.

Review of agency action by the Iowa Civil Rights Commission is governed by Iowa Code chapter 17A. Iowa Code § 17A.19 (2003). Because a no probable cause finding is not the result of a contested case but is "other agency action," *Iowa Civil Rights Comm'n v. Deere & Co.*, 482 N.W.2d 386, 389 (Iowa 1992), we reverse the agency only upon a showing it committed errors at law or took action

that was "[o]therwise unreasonable, arbitrary, capricious, or an abuse of discretion." Iowa Code § 17A.19(10)(n).

An agency's action "is arbitrary or capricious when it is taken without regard to the law or facts of the case". *Dico, Inc. vs. Iowa Employment Appeal Bd.*, 576 N.W. 2d 352, 355 (Iowa 1998). An abuse of discretion "occurs when the agency action rests on grounds or reasons clearly untenable or unreasonable." *Id.*

Analysis.

Iowa Code section 216.15(3)(a) (2001) provides that after a civil rights complaint has been filed, an "authorized member of the commission staff shall make a prompt investigation and shall issue a recommendation to an administrative law judge . . . who shall then issue a determination of probable cause or no probable cause." In this case, the commission's investigator concluded "there is no pattern evidence that shows that [Devon] discriminated against his pregnant employees." The investigator further reported that "there is a lot of pattern evidence indicating that [Devon] was very considerate to [its] female employees who had babies and to at least one male employee . . . ." An administrative law judge conducted a review consistent with the statute and found no probable cause supporting Harney's claim of pregnancy discrimination.

As we review the commission's resolution of this matter, we are mindful of our supreme court's observation that "the legislature did not intend [in chapter 216] to require the [Iowa Civil Rights Commission] to process every complaint which merely generated a minimal prima facie case." *Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306, 310 (Iowa 1979). Rather, the court reasoned

"the legislative intent was to permit the commission to be selective in the cases singled out to process through the agency, so as to better impact unfair or discriminatory practices with highly visible and meritorious cases." *Id.* at 311.

Harney maintains she easily met her burden to prove Devon discriminated against her because of pregnancy; and that the commission's finding of no probable cause was unreasonable, arbitrary, capricious, and the product of an abuse of discretion. The district court acknowledged that the record in this case does contain evidence that could have supported a contrary decision by the commission. But the court also noted the record contains evidence supporting Devon's benign explanation for its decision to terminate Harney's employment. Where the evidence before the agency could have adequately supported either Harney's or Devon's preferred outcome, we believe the district court's characterization of the dispute is apt: "The bottom line in this case . . . is that the parties are merely arguing over matters of credibility and the weight to be given to the evidence." Moreover, as the district court correctly observed, it is the function of the agency to resolve factual issues including matters of credibility. *E.N.T. Assocs v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994). Where, as here, the commission resolved those issues and made a factual determination on the probable cause issue supported by substantial evidence in Devon's favor, we must affirm the commission and reject Harney's claims of unreasonableness, arbitrariness, and capriciousness.

In our assessment of the reasonableness of the commission's decision we find significant Devon's treatment of Harney following her first pregnancy. Harney clearly was not retaliated against during this period and, in fact, the

company was quite accommodating to her situation, going so far as to provide eight fully-paid weeks of maternity leave to her. Harney returned to her position with Devon immediately following that leave period and was allowed to work in a job-sharing arrangement that was apparently consistent with her preference as the mother of a new-born child.

In addition, the evidence is quite convincing that Devon treated other similarly situated individuals in an equally accommodating fashion. When male employee Mel Plasencia's wife had a child in the Spring of 2001, Devon provided him with a form of "paternity leave," granting him substantial time off to spend with his family, notwithstanding it was during a busy period for the company. When Harney's co-worker, Chris Eller, became pregnant and gave birth to a child, Devon provided her with six weeks of paid maternity leave. When Carpenter decided to terminate Harney in June of 2001, he offered the fulltime position to Eller, a woman of child-bearing age. And after Eller declined the offer, the full-time position was initially filled by a woman in her thirties. A reasonable agency could certainly conclude these facts do not evidence a history of or predilection toward pregnancy discrimination by Devon.

Although it was not articulated to Harney before her termination, Devon's benign explanation for its decision to terminate Harney from her half-time position is also supported by substantial evidence in the record. Carpenter noted that he came to believe the shared work arrangement between Harney and Eller was not functioning well in the spring of 2001. He claimed the factual basis for this belief was Harney's failure to perform her share of the work in the shared position, her tendency to maintain a disorganized work area, her involvement in excessive

personal phone calls while at work, and her tendency to make errors in the performance of her work duties. Lisa Ricci-Carpenter, Tom Carpenter's wife and the company's corporate secretary, claimed she frequently observed Harney showing up for work late and talking excessively on the phone. Although Harney claims, and the Commission could have found on this record, that these claims of deficient work performance are pretextual because they were not made known to her before termination, we conclude the commission was not obligated on this record to agree with her. The record contains evidence from which a reasonable fact-finder could find Devon had a legitimate business preference to reorganize its office management by eliminating the shared part-time office manager's position and restoring its former full-time position. When that evidence is joined with the substantial evidence of Devon's history of accommodating the family interests of Harney, Eller, and a male employee who took paid time off following the births of their children, we cannot conclude the agency's finding of no probable cause was unreasonable, arbitrary, capricious, or characterized by an abuse of discretion. Accordingly, we affirm the district court's decision.

AFFIRMED.