

IN THE COURT OF APPEALS OF IOWA

No. 7-366 / 06-1542
Filed October 12, 2007

DAVID BOTSKO, D.M.D.,
Petitioner-Appellant,

vs.

DAVENPORT CIVIL RIGHTS COMMISSION
and INGELORE NABB,
Respondents-Appellees.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

David Botsko appeals the district court's affirmance on judicial review of the decision of the Davenport Civil Rights Commission finding Ingelore Nabb was subjected to a sexually hostile work environment, was constructively discharged, and awarding damages and attorney fees. **AFFIRMED.**

Richard Davidson of Lane & Waterman, Davenport, for appellant.

Judith Morrell, Davenport Civil Rights Commission, for appellee Davenport Civil Rights Commission, and Dorothy O'Brien of Brooke & O'Brien, Davenport, for appellee Ingelore Nabb.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

David Botsko appeals a ruling of the Davenport Civil Rights Commission in favor of Ingelore Nabb. He contends (1) Commission proceedings were marred by procedural irregularities, (2) the Commission's findings of fact are not supported by substantial evidence, (3) the Commission's damage award is not supported by adequate evidence, and (4) attorney's fees and costs are not recoverable under Davenport's civil rights ordinance. We affirm.

I. Background Facts and Procedural History

Ingelore Nabb was born in Germany in 1936. She moved to the United States as an adult. Nabb worked as a dental assistant for Davenport dentist David Botsko.

While working for Botsko, Nabb complained to him that some of his behavior was offensive. She said he spoke of sex at least several times a week, made sexually offensive gestures, and asked inappropriate questions about her sex life. She also complained that he referred to her as a Nazi and saluted and clicked his heels around her.

Nabb filed a complaint with the Davenport Civil Rights Commission. She alleged Botsko created a hostile work environment that discriminated against her based on her age, ethnic origin, and gender. She also claimed she was constructively discharged.

Following a hearing, an administrative law judge (ALJ) issued a decision recommending dismissal of the complaint. Nabb appealed to the Commission which, after hearing oral arguments, conducted deliberations in two closed sessions. The Commission's final order adopted the ALJ's findings of fact but rejected his conclusions

of law on the sexual harassment and constructive discharge claims.¹ Concluding Nabb proved the elements of these claims, the Commission awarded Nabb damages for lost pay and emotional distress, as well as attorney fees and costs.

Botsko sought judicial review. The district court remanded the matter to the Commission for additional findings. The court held its final ruling on all issues in abeyance pending the remand decision. After the Commission filed its additional findings of fact and conclusions of law, the district court issued a final ruling that is the subject of this appeal.

II. Procedural Irregularities

Botsko maintains that the Commission proceedings were tainted by the following: (A) the Commission Director's presence during the closed sessions; (B) the closed session deliberations; (C) the Commission's failure to produce the minutes and audiotapes of the closed sessions; and (D) the Commission's failure to consider deposition testimony submitted to the administrative law judge. Our review of these issues is governed by Iowa Code section 17A.19(10)(d) (1999) (affording relief where agency action was "[b]ased upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process").

A. Director's Presence in Closed Sessions

Botsko contends that Commission Director Judith Morrell investigated Nabb's initial complaint, acted as a prosecutor on behalf of the Commission throughout the proceedings, and was impermissibly present at closed sessions during which the

¹ The Commission affirmed the ALJ's dismissal of Nabb's complaints based on age and ethnic origin.

commissioners deliberated on the final decision. He premises his contention on Iowa Code section 17A.17, which states in pertinent part:

An individual who participates in the making of any proposed or final decision in a contested case shall not have personally investigated, prosecuted, or advocated in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case, involving the same parties. However, this section shall not be construed to preclude a person from serving as a presiding officer solely because that person determined there was probable cause to initiate the proceeding.

Nabb and the Commission respond that, although Morrell was present during the commissioners' deliberations, she did not (1) "personally investigate this case" and she did not (2) "participate in the making of the proposed or final decision in this case." The first argument is dispositive.

Iowa Civil Rights Commission rules define "personally investigated" as follows:

The term "personally investigated" means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term "personally investigated" does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person's investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other agency functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case.

Iowa Admin. Code r. 161-4.13(2) (1999). Local civil rights commissions are to maintain their agencies "consistent with commission rules adopted pursuant to chapter 17A."

Iowa Code § 216.19.

Morrell testified she did not interview witnesses directly but did supervise the investigating paralegal. She also made the finding that there was probable cause to initiate a proceeding against Botsko.

Rule 4.13 expressly exempts these functions from the definition of “personally investigated.”² Accordingly, we conclude Morrell did not “personally investigate” the Nabb complaint. Her assistance with the final decision, therefore, did not taint that decision.

B. Closed Session Deliberations

Botsko argues the Commission’s closed sessions were illegal. The district court rejected this argument based on a plain reading of Iowa Code section 21.5(1)(f). That provision allows a “governmental body” to hold a closed session “[t]o discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A.” Iowa Code § 21.5(1)(f). A governmental body includes “[a] board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.” *Id.* § 21.2(1)(b). Because the Commission is an independent local civil rights agency established pursuant to section 216.19, closed sessions are authorized by section 21.5(1)(f).³

C. Production of Minutes and Audiotapes

Botsko next argues that the district court should have ordered the Commission to turn over the minutes and audiotapes from the closed sessions. He bases his argument on the following premises: (1) “the Commission has no authority to hold closed sessions in the first instance” and (2) “Director Morrell was present during the Commission’s deliberations.” We have addressed and rejected both these grounds for reversal.

² This exemption has been subject to criticism. See Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667 as Adopted) Report on Selected Provisions to Iowa State Bar Association and Iowa State Government 47-50 (1998)*.

³ We find it unnecessary to address the Commission’s alternate argument for affirmance based on the untimeliness of Botsko’s challenge.

Therefore, we conclude the district court did not err in declining to order the release of these items. See Iowa Code § 21.5(4) (authorizing release of minutes and tapes in an action to enforce chapter, after engaging in a balancing test).

D. Failure to Consider Deposition Testimony

Finally, Botsko argues the Commission did not consider the entire record during deliberations. He points to one of the commissioner's assertions that she was denied parts of the record, including certain deposition testimony.

As a preliminary matter, we note that the district court struck an affidavit proffered by the commissioner who made this assertion, raising serious doubts about whether we have anything to review. Assuming without deciding that this issue is properly before us, we conclude Director Morrell addressed this assertion in her testimony during a remand proceeding. She stated that some of the exhibits were initially incomplete but, when this fact was discovered, complete exhibits were obtained and mailed to all the commissioners. We conclude the entire record generated before the administrative law judge was available to the commissioners.

III. Substantial Evidence

Botsko argues that the "Commission's findings are completely and diametrically opposed to the credibility and veracity determinations made by the ALJ, and the Commission offers no explanation why it chose to overrule the ALJ's credibility determinations."

In assessing an agency's fact findings, we are obligated to consider "any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses." Iowa Code § 17A.19(10)(f)(3).

The ALJ made several veracity determinations. As to Nabb's allegations, the ALJ stated: "Part of the difficulty with Mrs. Nabb's [sexually hostile work environment] allegations in this regard, and recognizing that this is, to say the least, an uncomfortable subject, is a lack of specificity as to statements, including their time or place." The ALJ noted, however, that Nabb's allegations were supported by credible testimony from a former employee. The ALJ also rejected suggestions that Nabb rather than Botsko initiated sex talk in the office. He found these suggestions "contrived and false" and inconsistent with Nabb's character, demeanor, and general deportment.

The Commission explicitly considered these credibility determinations, noting that the ALJ found Nabb credible. After considering these determinations, the Commission reached a different conclusion than the ALJ. The Commission was authorized to do so. *See Iowa State Fairground Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293, 295 (Iowa 1982) ("Even when credibility is involved, the agency, not the hearing officer, is charged with the authoritative responsibility to decide what the evidence means under the governing statute.").

As for the fact findings supporting the Commission's conclusions, we agree with the district court that the Commission's additional findings on remand, as well as the ALJ's original findings adopted by the Commission, are supported by substantial evidence when that record is viewed as a whole. Iowa Code § 17A.19(10)(f).

There remains the question of whether the Commission's fact findings support its conclusion that Nabb was subjected to a hostile work environment and was constructively discharged. No useful purpose would be served by summarizing the

Commission's application of law to fact. Suffice it to say that, on our review of the pertinent law in relation to the Commission's fact findings, we cannot conclude that the Commission's decision was "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." *Id.* § 17A.19(10)(m); see *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 746 (Iowa 2006) (setting forth elements of hostile work environment claim); *Van Meter Indus. v. Mason City Human Rights Comm'n*, 675 N.W.2d 503, 511 (Iowa 2004) (setting forth elements of constructive discharge claim). For this reason, we affirm the final agency decision.

IV. Damages

The Commission awarded Nabb \$20,000 in lost wages and \$5000 for emotional distress. With respect to the lost wages award, Botsko argues his unemployment compensation payments to Nabb should have been set off against the award. This issue was not raised before the Commission and, accordingly, was not preserved for our review. *Strand v. Rasmussen*, 648 N.W.2d 95, 100 (Iowa 2002).

Botsko also maintains that Nabb offered no medical evidence to support the Commission's award of emotional distress damages. However, he concedes that such an award may be based on the claimant's testimony alone. *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999). The record contains substantial evidence to support the Commission's finding that Nabb experienced emotional distress. See *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007) ("An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record.").

V. Attorney Fees and Costs

The Commission awarded Nabb attorney fees of \$30,081.86. The Commission also ordered Botsko to pay costs totaling \$2935.70. Botsko challenges these awards.

The district court affirmed the attorney fee award but did not address the cost issue. Therefore, the cost issue is not preserved for our review. *Strand*, 648 N.W.2d at 100.

Turning to the attorney fee award, Botsko contends it is not authorized by the Davenport Civil Rights Ordinance. Nabb and the Commission counter that the Iowa Civil Rights Act authorizes the payment of “reasonable attorney fees.” Iowa Code § 216.15(8)(a)(8). They also note that Davenport’s civil rights provisions are designed “[t]o provide for the execution within the city of the policies embodied in the Iowa Civil Rights Act of 1965.” Davenport, Iowa Municipal Code § 2.58.010(B) (2000). We concur with this reasoning. See Iowa Code § 216.19 (requiring every city with a population of twenty-nine thousand or greater to maintain an independent local civil rights agency or commission that shall “effect cooperative undertakings with the Iowa civil rights commission and . . . aid in effectuating the purposes of [chapter 216]”); *cf. Van Meter Indus. v. Mason City Human Rights Comm’n*, 675 N.W.2d 503, 515-16 (Iowa 2004) (recognizing the authority of a local civil rights commission to protect the rights of citizens secured by the Iowa Civil Rights Act). Like the district court, we conclude the Commission was authorized to award attorney fees.

VI. Appellate Attorney Fees

Nabb requests appellate attorney fees. See *Van Meter Indus.*, 675 N.W.2d at 516. We decline the request.

AFFIRMED.