IN THE COURT OF APPEALS OF IOWA

No. 8-938 / 08-0722
Filed December 31, 2008

APRIL THOMAS,
Plaintiff-Appellant,

vs.

STATE OF IOWA CHILD SUPPORT COLLECTIONS,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

April Thomas appeals from a district court summary judgment ruling in favor of the State. **AFFIRMED.**

Alfredo Parrish and Tammy Westhoff Gentry of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Barbara E.B. Galloway, Assistant Attorney General, for appellee State.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

April Thomas appeals from a district court summary judgment ruling in favor of the State. Thomas contends the district court erred because genuine issues of material fact exist concerning each of her claims. Upon our review, we affirm the judgment of the district court.

***I. Background Facts and Proceedings*.**

Thomas, an African-American female, began employment with the State of Iowa through Iowa Workforce Development on October 30, 1998. Thomas was laid off on January 31, 2002, but returned to work with the State of Iowa as a mail clerk with the Iowa Child Support Collections Services Center (CSC) on October 4, 2002. Thomas continues to be in CSC's employ.

CSC has a statutory mandate that it disburse payments it receives within two working days. Iowa Code § 252B.15 (2007). As a CSC mail clerk, Thomas has set work hours. Pursuant to CSC's written work polices, flex time is not allowed to accommodate a particular employee's schedule. Additionally, "continual and punctual work attendance" is required and is an essential function of Thomas's position, given the above-stated statutory mandate.

In approximately 2003, Thomas was diagnosed with fibromyalgia, which often caused her to wake up stiff and fatigued. Her stiffness and fatigue would sometimes cause Thomas to be late to work in the morning. Because Thomas was not allowed to make up the time she missed in the morning by working late or by working through her lunch break pursuant to CSC's policy disallowing flex time, in 2003 and again in 2005, Thomas requested and received leave pursuant to the Family and Medical Leave Act (FMLA) to accommodate her tardiness

resulting from fibromyalgia. From 2003 through January 24, 2008, Thomas requested and was approved to use a total of 17.09 hours of FMLA leave for the time in the mornings that she was late as a result of her fibromyalgia.

On October 20, 2005, Thomas broke her ankle near her apartment, requiring surgery. Thomas subsequently requested and received FMLA leave for the time she would be recuperating from the surgery, estimated to be eight weeks. During her leave, Thomas's supervisor advised Thomas by letter that Thomas had exhausted her sick leave and that effective January 3, 2006, Thomas would reach the 480 hours of FMLA leave entitlement. Consequently, CSC was granting Thomas a ninety-day medical leave without pay pursuant to the collective bargaining agreement covering Thomas after her FMLA leave ended. Although Thomas returned to work on February 15, 2006, she received unpaid medical leave totaling 180 days, from October 24, 2005, through April 21, 2006.

On September 22, 2006, Thomas filed a complaint against CSC with the Iowa Civil Rights Commission (ICRC) and the Equal Employment Opportunity Commission (EEOC) alleging discrimination based upon physical disability, color, and race. Thomas's complaint alleged her team leader discriminated against her. Specifically, she claimed her team leader was overheard by three employees "talking bad" about Thomas's FMLA problems. Additionally, Thomas stated:

> Since I was off on FMLA for the broken [ankle], I had no vacation time left. As such, I was getting my pay docked. It seems to me that [my team leader], my supervisor, feels that since I am out of FMLA time, I should not get sick.

> She even told [my supervisor] . . . that I am playing games when I call in sick; however, I have FMLA papers from my doctor. [Three coworkers] overheard [the conversation between my team leader and my supervisor]. I complained to the union about [my team leader] loudly criticizing employees.
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> [One coworker] also sent an e-mail about how [my team leader] is abusive to her employees. [This coworker] overheard [my team leader] using profanity and loudly complaining about us not opening doors for people who are locked out. [My team leader] said that "we are too lazy to get off our butts and open the front door for people."
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> I feel that [my team leader] does not like me at all because I am a disabled black woman. This is why she goes to other employees trying to instigate trouble. [My team leader] has told me that my fellow employees are the ones who became most upset by my tardiness. However, I go to work sick most of the time and work hard when I am there. Everyone knows how hard I work and get how I get the job done. Everyone also knows that [my team leader] does not like me.
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> Furthermore, I notice harassment of all employees using FMLA, except [my team leader's] daughter, who also works with me. [My team leader's] daughter is late almost every day and, to my knowledge, has not [so] much as received a verbal reprimand. [My team leader's] daughter will arrive late, and then take an immediate cigarette break with [my team leader] and another woman.
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> The stress of this hostile work environment causes me pain and sickness.

After receiving right to sue letters from the ICRC and EEOC, Thomas filed suit against CSC, amended June 29, 2007, alleging that CSC discriminated against her based upon: (I) her disability in violation of the Iowa Civil Rights Act (ICRA), Iowa Code section 216.6; (II) her race in violation of the ICRA, Iowa Code section 216.6; and (III) her race in violation Title VII of the Federal Civil Rights Act, 42 U.S.C. § 2000(e). Regarding Count III, Thomas further alleged that CSC took adverse employment and disciplinary action against her, and that her race was a motivating or determining factor in CSC's discrimination and harassment of her.

Following discovery, CSC moved for summary judgment, contending it was entitled to summary judgment as a matter of law because Thomas could not show sufficient facts to prove her discrimination claims. Specifically, CSC asserted that, among other things, Thomas's physical impairment did not substantially limit any major life activity; Thomas could not prove she had been subjected to discipline, reprimands, or race-based harassment; and Thomas was not similarly situated to her team leader's daughter. Thereafter, Thomas filed her resistance alleging genuine issues of material facts existed such that summary judgment was not proper. Along with her resistance, Thomas filed her response to CSC's statement of undisputed facts and additional undisputed facts. However, no depositions, answers to interrogatories, admissions, or affidavits were provided or specifically referenced in her response.

On April 3, 2008, the district court granted CSC's motion. The district court concluded Thomas failed to establish that material facts were in dispute, and determined CSC was entitled to summary judgment as a matter of law.

Thomas appeals.

***II. Scope and Standards of Review*.**

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc*., 730 N.W.2d 198, 199 (Iowa 2007).

"In reviewing the district court's ruling, the evidence presented must be viewed in the 'light most favorable to the party opposing the motion for summary judgment.'" *Cemen Tech, Inc. v. Three D Indus., L.L.C.*, 753 N.W.2d 1, 5 (Iowa 2008).

The party moving for summary judgment has the burden to prove the facts are undisputed. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). When a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of the pleadings, but, by affidavits, depositions, answers to interrogatories, admissions on file, or as otherwise provided in rule 1.981, must set forth specific facts showing the existence of a genuine issue for trial. Iowa R. Civ. P. 1.981(5); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 299 (Iowa 1996). A fact question arises if reasonable minds can differ on how the issue should be resolved. *Walderbach*, 730 N.W.2d at 199. "Speculation is insufficient to create a genuine issue of material fact." *Cemen Tech, Inc.*, 753 N.W.2d at 5. However, no fact question exists if the dispute only concerns the legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

***III. Discussion*.**

On appeal, Thomas contends the district court erred because genuine issues of material fact exist concerning each of her claims. Upon our review, we affirm the judgment of the district court.

***A. Disability Discrimination Claim*.**

The ICRA generally prohibits an employer from discriminating against a qualified person because of a disability. Iowa Code § 216.6(1); *see also Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003). In construing the ICRA, the corresponding federal statutory framework—in this case the Americans with Disabilities Act (ADA)—is instructive. *See Casey's*, 661 N.W.2d at 519. With these principles in mind, we note that Thomas did not put forth direct evidence of discrimination. Consequently, her disability discrimination claim is assessed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green* and its progeny. 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677-78 (1973); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 2746-47, 125 L. Ed. 2d 407, 415-16 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15, 103 S. Ct. 1478, 1481-82, 75 L. Ed. 2d 403, 409-10 (1983). Under this framework, a claimant must first establish a prima facie case of discrimination. *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1021 (8th Cir. 1998). If the plaintiff satisfies this initial burden, a rebuttable presumption of discrimination is created, and the burden then shifts to the defendant-employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for its actions. *Young*, 152 F.3d at 1021; *see also Casey's*, 661 N.W.2d at 519-20. If the employer proffers such a reason, the presumption of discrimination disappears and the claimant must demonstrate the nondiscriminatory reason asserted by the employer is merely a pretext for intentional discrimination. *Young*, 152 F.3d at 1021; *Casey's*, 661 N.W.2d at 520.

In order to succeed on her claim of disability discrimination, Thomas must first establish a prima facie case of discrimination by showing (1) she has a disability as defined by the ADA, 42 U.S.C. § 12102(2)(2); (2) she is qualified to perform the essential functions of her job, with or without reasonable accommodation; and (3) she has suffered an adverse employment action from which an inference of unlawful discrimination arises. *Casey's*, 661 N.W.2d at 519; *see also Allen v. Interior Constr. Servs., Ltd.*, 214 F.3d 978, 981 (8th Cir. 2000) (setting forth the elements of a prima facie case of discrimination under the ADA). The district court concluded Thomas failed to generate factual issues on the elements of her status as a disabled person and the existence of any adverse employment action, and accordingly determined CSC was entitled to summary judgment in its favor on the claim.

1. Disability.

A disabled person is defined as "any person who has a physical or mental impairment which *substantially limits* one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." Iowa Admin. Code r. 161-8.26(1) (2007); *Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432, 434 (Iowa 1988) (emphasis added). It is an undisputed fact that Thomas has the physical impairment of fibromyalgia. The fighting issue here is whether the district court erred in finding Thomas's fibromyalgia did not "substantially limit" a major life activity.

"'[S]ubstantially' in the phrase 'substantially limits' suggests 'considerable' or 'to a large degree.'" *Hansen v. Seabee Corp*., 688 N.W.2d 234, 240 (Iowa 2004) (quoting *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196, 122

S. Ct. 681, 691, 151 L. Ed. 2d 615, 630 (2002)). Consequently, the word "substantial" "clearly precludes impairments that interfere in only a minor way with [a major life activity] from qualifying as disabilities." *Id*. (citations omitted). Pertinent regulations provide that:

> The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. (quoting 29 C.F.R. § 1630.2(j)(1)), *see also Bearshield v. John Morrell & Co*., 570 N.W.2d 915, 920 (Iowa 1997).

In support of its motion for summary judgment, CSC provided portions of Thomas's deposition and her doctor's deposition to show she could not generate genuine issues of material fact to support her disability claim. The part of Thomas's deposition provided only states that because of her fibromyalgia, "it's kind of hard for me to get up in the morning. Sometimes it feels like I get up with a truck running over me . . . . [I]t hurts when I move. It's so bad, I can't even bend down . . . ." The part of Thomas's doctor's deposition provided only states, when asked to describe Thomas's condition of fibromyalgia: "the first time that I saw her, she was having generalized pain . . . and some sleep disturbance, which is the usual story in people who have fibromyalgia. . . . [S]he told me that she had severe fatigue, that she was stiff for hours . . . ." Although Thomas, in response, claimed that she suffered from "symptoms of extreme pain, stiffness, and reduced mobility," and that fibromyalgia affected her "ability to care for

herself, prepare meals, get restful sleep, and prepare herself for her workday," Thomas neither provided nor referenced any depositions, answers to interrogatories, admissions, or affidavits to support her assertions.

Viewing the record in a light most favorable to Thomas, we agree that Thomas's unsupported assertions did not create issues of fact for purposes of resisting the CSC's summary judgment motion. Iowa R. Civ. P. 1.981(5); *Bitner*, 549 N.W.2d at 299. Consequently, the only established activities in which Thomas claimed to have been limited was getting up and around in the morning as a result of pain and fatigue caused by fibromyalgia. Furthermore, we agree with the district court's conclusion:

> [T]he amount of restriction [Thomas] has encountered (just over [seventeen] hours over the course of almost five years, as measured by her FMLA leave), while inconvenient, cannot be interpreted as substantial. A reasonable fact-finder would not find these limitations significant.

We therefore conclude the district court did not err in determining Thomas failed to establish genuine issues of material fact existed regarding whether fibromyalgia substantially limited any of Thomas's major life activities.

***2. Adverse Employment Action*.**

Even assuming Thomas could establish genuine issues of material fact existed regarding the first two elements of discrimination, viewing the record in a light most favorable to Thomas, we conclude the district court did not err in determining Thomas failed to establish genuine issues of material fact existed regarding whether she suffered an adverse employment action from which an inference of unlawful discrimination arose.

An adverse employment action is defined as "an action that detrimentally affects the terms, conditions, or privileges of employment. Changes in duties or working conditions that cause no materially significant disadvantage to the employee are not adverse employment actions." *Channon v. United Parcel Serv., Inc*., 629 N.W.2d 835, 862 (Iowa 2001) (citation omitted). "[T]he question whether an employee has suffered a materially adverse employment action will normally depend on the facts of each situation." *Id*. (quoting *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996)). Consequently, "a wide variety of actions, some blatant and some subtle, can qualify," such as the loss of professional titles, deprivation of advancement opportunities, as well as "disciplinary demotion, termination, unjustified evaluations and reports, loss of normal work assignments, and extension of probationary period." *Id*. (citations omitted). "[F]ormal criticisms or reprimands, without additional disciplinary action such as a change in grade, salary, or other benefits, do not constitute adverse employment actions." *Singletary v. Missouri. Dep't of Corrs*., 423 F.3d 886, 891 n.5 (8th Cir. 2005) (citing *Stewart v. Evans*, 275 F.3d 1126, 1136 (D.C. Cir. 2002)).

Thomas's amended petition alleges that "she has been subjected to adverse employment actions" because she is "discipline[d] and reprimand[ed] on those occasions she is unable to make it to work in a timely fashion." Specifically, Thomas maintains "the fact that [Thomas's] supervisor made [Thomas's] job more difficult to perform and increased her stress at work constitutes adverse employment action." However, Thomas's alleged facts are not supported by any depositions, answers to interrogatories, admissions, or

affidavits to support her assertions, as required by rule 1.981(5). Viewing the record in a light most favorable to Thomas, Thomas has not provided any evidence that conceivably could result in a finding that she was disciplined and reprimanded for coming into work late, or that her supervisor made her job more difficult to perform and increased her stress at work. We therefore conclude the district court did not err in determining Thomas failed to establish genuine issues of material fact existed regarding whether she suffered an adverse employment action from which an inference of unlawful discrimination arises. Consequently, we further conclude the district court did not err in determining CSC was entitled to summary judgment as a matter of law concerning Thomas's disability discrimination claim.

***B. ICRA Racial Discrimination Claim*.**

The ICRA generally prohibits an employer from discriminating against a qualified person because of race. Iowa Code § 216.6(1). "Because the ICRA is modeled after the federal legislation, Iowa courts have traditionally looked to federal law for guidance in interpreting it." *Pecenka v. Fareway Stores, Inc*., 672 N.W.2d 800, 803 (Iowa 2003). "The basic elements of a prima facie case of racial discrimination in employment are: (1) plaintiff is a member of a protected class; (2) plaintiff was performing the work satisfactorily; and (3) plaintiff suffered an adverse employment action." *Farmland Foods, Inc. v. Dubuque Human Rights Com'n*, 672 N.W.2d 733, 742 n.1 (Iowa 2003) (citing *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998)).

Thomas contends the district court erred in determining she failed to establish that genuine issues of material fact existed as to her claim, and asserts

she suffered an adverse employment action from which an inference of unlawful discrimination arose. Specifically, Thomas alleges her supervisor subjected her to extreme and disparate scrutiny, criticisms, informal verbal reprimands, negative attitude, and disparaging public remarks, constituting an adverse employment action. However, as stated above, Thomas has not supported these allegations by any depositions, answers to interrogatories, admissions, or affidavits as required by rule 1.981(5). Furthermore, the alleged criticisms or reprimands are not supported by any additional disciplinary action such as a change in grade, salary, or other benefits to evidence an adverse employment action. Consequently, viewing the record in a light most favorable to Thomas, we agree with the district court's determination that Thomas failed to establish genuine issues of material fact existed regarding whether she suffered an adverse employment action from which an inference of unlawful discrimination arises.

***C. Title VII Harassment/Hostile Work Environment Claim*.**

Like the IRCA, "Title VII of the Civil Rights Act of 1964 (Title VII) makes it an unlawful employment practice for an employer to 'discharge any individual . . . because of such individual's race, color, religion, sex, or national origin.'" *Twymon v. Wells Fargo & Co*., 462 F.3d 925, 933 (8th Cir. 2006) (quoting 42 U.S.C. § 2000e-2(a)(1)). Thomas asserts that her supervisor harassed her, subjecting her to a hostile work environment in violation of Title VII. To establish a prima facie hostile work environment claim for coworker harassment under Title VII, Thomas must prove:

> (1) she was a member of a protected group; (2) the occurrence of unwelcome harassment; (3) a causal nexus between the harassment and her membership in the protected group; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

Jenkins v. Winter, 540 F.3d 742, 748 (8th Cir. 2008).

Thomas contends the district court erred in granting CSC summary judgment because a genuine issue of material fact existed regarding her claim of racial harassment/hostile work environment. Specifically, she asserts that she has been the subject of unwelcome harassment by her supervisor, in the form of loud and disparaging criticisms in Thomas's absence but in the presence of her coworkers, disparate scrutiny, gossip, and hostile comments. At her deposition, when asked how she was harassed, Thomas testified that: "[H]arassment can be attitude, the way they show you . . . they didn't appreciate the things you did by just body language, looks and just letting you know." Thomas further testified that her team leader "acts like a monster when she's having attitudes," and testified her team leader showed Thomas attitude by her team leader's body language and her team leader's "moods" towards Thomas. When asked if anyone at CSC had stated any racial slurs against her, Thomas testified: "No. It's by action you can tell," but did not detail any actions by her team leader beyond those described above.

Although Thomas maintains "there is sufficient evidence in the record to demonstrate that [Thomas] perceived that she is being harassed by [her supervisor]," we disagree. Thomas has not supported her allegations that she was the subject of unwelcome harassment by her supervisor, in the form of loud

and disparaging criticisms in Thomas's absence but in the presence of her co-workers, disparate scrutiny, gossip, and hostile comments by any depositions, answers to interrogatories, admissions, or affidavits as required by rule 1.981(5). Additionally, we agree with the district court's conclusion:

> While [Thomas] may have felt this conduct was subjectively harassing, it is well-settled that criticism, close supervision of work activities and antipathy between a supervisor and an employee, absent direct evidence of racial discrimination, is insufficient to establish that a reasonable person would find the conduct abusive or hostile. [*Farmland Foods, Inc*.], 672 N.W.2d at 744-45. Further, there is nothing in this record to suggest that [Thomas's team leader's conduct] was racially motivated. Finally, as stated above, there is no proof that [Thomas] has been subjected to adverse employment action.

We therefore conclude the district court did not err in granting CSC summary judgment because no genuine issue of material fact existed regarding Thomas's claim of racial harassment/hostile work environment under Title VII.

***IV. Conclusion*.**

Because we conclude the district court did not err in determining Thomas failed to establish genuine issues of material fact existed regarding her disability and racial discrimination claims and CSC was entitled to judgment as a matter of law, we affirm the judgment of the district court.

AFFIRMED.