

IN THE COURT OF APPEALS OF IOWA

No. 2-788 / 12-0643
Filed February 13, 2013

LISA KLEIN,
Petitioner-Appellant,

vs.

**DUBUQUE HUMAN RIGHTS
COMMISSION,**
Respondent-Appellee,

vs.

**GEORGIA-PACIFIC CORRUGATED,
L.L.C., and PATRICK NEECE,**
Intervenors.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

Lisa Klein appeals from the district court's judicial review ruling, affirming the Dubuque Human Rights Commission's determination of "no probable cause" on her sex discrimination, disability discrimination, and hostile work environment claims. **AFFIRMED.**

Jason D. Lehman of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Crenna Brumwell, Dubuque, for appellee.

Brendan T. Quann of O'Connor & Thomas, P.C., Dubuque, for intervenors.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Lisa Klein appeals from the district court's judicial review ruling, affirming the Dubuque Human Rights Commission (DHRC)'s determination of "no probable cause" on her sex discrimination, disability discrimination, and hostile work environment claims. Klein contends the agency's decision is in violation of Iowa Code section 17A.19(10)(d), (f), (j), and (n) (2011) because the DHRC failed to conduct an adequate investigation and its findings are not supported by substantial evidence. We affirm.

I. Background Facts & Proceedings

In May 2007, Lisa Klein began working for Georgia-Pacific as a Flexo Assistant. On February 1, 2010, Klein injured her shoulder while cleaning out a pit under one of Georgia-Pacific's machines. Klein reported the injury to two supervisors, Patrick Neese and Peter Heimsness. Heimsness asked Klein to complete an employee incident form. Klein responded, "You can write me up, suspend me, send me home, I don't care. It's the end of my shift and I'm going home."

On February 2, 2010, Heimsness discovered Klein had not filled out the injury report per company policy. Neese contacted Klein and asked her to complete the paperwork. At that time, Klein reported she was injured while shoveling snow at home—not on the job. Georgia-Pacific conducted an investigation into Klein's injury. On February 10, 2010, Georgia-Pacific terminated Klein for refusing to cooperate with an investigation and lying about a work-related injury.

On or about April 23, 2010, Klein filed a civil rights complaint with the DHRC. Klein alleged she “was singled out and treated less favorably than her male co-workers, harassed about doctor appointments and made to take [Family Medical Leave Act (FMLA)] while male employees were not, and [was] subjected to sexual harassment by her supervisor [(Neese)] and other male co-workers.”

The DHRC investigated Klein’s complaints. As part of the investigation, the DHRC investigator interviewed Klein and one of her co-workers, Chris Frommelt, gathered documentary evidence, and reviewed an investigation of a complaint another employee had previously filed at the same workplace. The investigation revealed that Klein served a five-day suspension in 2008 for violating safety procedures. She later received an oral warning after she made an error that resulted in the production of 2,400 incorrect product pieces. The investigation also indicated that Klein received treatment for depression and an anxiety reactive disorder. In December 2009, she reported exacerbated depression symptoms. Her nurse practitioner signed FMLA forms to allow Klein to take several days off of work. In January 2010, Klein also used FMLA leave to receive dental treatment.

As a result of the investigation, the DHRC investigator recommended a no probable cause determination. The DHRC’s administrative law judge (ALJ) independently reviewed the evidence and issued a no probable cause order.

Klein then sought judicial review with the district court. Klein contended the investigation was inadequate and there was insufficient support for the no probable cause determination. The DHRC filed an appearance and denied

Klein's claims. Georgia-Pacific and Neese each filed motions to intervene, and denied Klein's claims respectively.

The district court affirmed the ALJ, and determined that "the finding of a lack of probable cause was supported by the record." The district court denied Klein's motion to reconsider. Klein now appeals the district court's decision affirming the agency's action.

II. Standard of Review

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs review of this agency decision. See *Farmland Foods, Inv. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 740 (Iowa 2003). A no probable cause order is not the result of a contested case proceeding but is "other agency action." *Iowa Civil Rights Comm'n v. Deere & Co.*, 482 N.W.2d 386, 389 (Iowa 1992). We apply the standards of chapter 17A to the agency action, and review the district court's decision "to determine if our conclusions are the same reached by the district court." *Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 612 (Iowa 2002). We review final agency actions for correction of errors at law. *Houck v. Iowa Bd. of Pharmacy Exam'rs*, 752 N.W.2d 14, 16 (Iowa 2008). If substantial evidence supports the agency's findings, those findings are binding upon us. *Hough v. Iowa Dep't of Pers.*, 666 N.W.2d 168, 170 (Iowa 2003). "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." *Mercy Health Ctr. v. State Health Facilities Council*, 360 N.W.2d 808, 811–12 (Iowa 1985). A court may grant "relief from agency action . . . if it determines that

substantial rights of the person seeking judicial relief have been prejudiced because the agency action . . . was taken without following the prescribed procedure or decision-making process.” Iowa Code § 17A.19(10).

III. Analysis

A. Prescribed Procedure or Decision-Making Process

Klein contends the district court’s refusal to vacate the agency’s no probable cause order is contrary to Iowa Code section 17A.19(10)(d). The crux of Klein’s argument is (1) the DHRC’s investigation failed to follow a prescribed procedure because it conducted an inadequate investigation, and (2) the DHRC failed to follow prescribed decision-making process because the appropriate remedy was to issue an administrative closure, rather than a no probable cause order.

After a civil rights complaint is filed, Iowa Code section 216.15(3)(a) provides that, an “authorized member of the [Iowa Civil Rights 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.” An agency release is required before a claimant may pursue a discrimination action in district court. *Id.* § 216.16(2). A finding of no probable cause prohibits a claimant from obtaining an agency release. *Id.* § 216.16(2), (3)(a)(1); Iowa Admin. Code r. 161–3.10(4)(a). Thus, a no probable cause finding precludes a claimant from filing suit in district court. See *Clay v. City of Cedar Rapids*, 577 N.W.2d 862, 865 n.1 (Iowa Ct. App. 1998).

Pursuant to Iowa Code section 216.19, the city of Dubuque promulgated city ordinances to enforce civil rights. Toward a similar end, the DHRC adopted administrative rules which are similar to those found in Iowa Administrative Code chapter 161. When a civil rights complaint is filed, DHRC Administrative Rule 2.13 provides: “The commission staff shall make a prompt investigation of the complaint and issue a recommendation. An administrative law judge shall review the recommendation and issue a determination of probable cause or no probable cause for the commission.” Pursuant to DHRC Administrative Rule 2.13(1),

After a complaint has been filed, a member of the investigatory staff shall make a prompt investigation of the complaint. The investigator shall review all of the evidence and make a recommendation of probable cause or no probable cause The administrative law judge shall review the case file and issue an independent determination of probable cause or no probable cause.

Neither the Iowa Code, nor the Iowa Administrative Code, nor the Dubuque city ordinances, nor the DHRC administrative rules define “probable cause” or provide guidance on making a probable cause determination. Black’s Law Dictionary defines the term variously as “having more evidence than against[, and a] reasonable ground for belief in the existence of facts warranting the proceedings complained of.” Black’s Law Dictionary 1081 (5th ed.) As part of its investigation, the DHRC interviewed Frommel, a Georgia-Pacific employee with whom Klein worked. During the interview, Frommel was asked and answered the following questions:

Q. Did you feel that Pat Neese treated you and other male employees better because of your sex? Do you think he was hard on Lisa [Klein] because she was female? A. I don’t know if it’s because she was female. I don’t know about that. She was an

assistant and if she messed up she is going to get yelled at just like anybody else would have.

Q. So you don't think he treated her worse than . . . A. Because she is a woman? I don't see that. Maybe.

Q. What I am looking at is he targeting female employees? Are they held to different expectations and then yelled at when they don't meet those? Is it about these folks being women or is it about being the least senior employee? A. It could be because she is a woman. Maybe that is what she felt like.

Q. Have you heard other female employees complain? A. I've heard one . . . we brought this up last night. I had to stay late. I said to this woman that I was working with, Jane Fishler. She said, uhm, she goes well; he did treat women worse than men. I said he yelled at everybody.

The DHRC did not interview Jane Fishler. Nor did the DHRC interview Neese.

Klein alleges the DHRC investigation, in failing to interview Fishler and Neese, is contrary to the DHRC Administrative Rule 2.13(1) requiring the investigator to review all of the evidence prior to making a probable cause recommendation. The agency exercised its discretion in directing the investigation into the alleged civil rights violations. The agency reviewed and evaluated all of the evidence before it and determined the investigation was sufficient to render its recommendation without pursuing any further leads. Under the facts and circumstances of this case, we find the DHRC did not fail to adequately investigate, and thus there was no violation of a procedure prescribed by Iowa Code section 17A.19(10)(d).

Alternatively, Klein argues the no probable cause determination is in violation of a prescribed decision-making process because the appropriate remedy was an administrative closure, rather than a no probable cause order. Underlying Klein's argument is the assumption that the DHRC conducted an administrative review, rather than full probable cause investigation, and

determined her case did not warrant further processing. Pursuant to DHRC Administrative Rule 2.12(1), “When the periodic review occurs prior to the determination of whether there is probable cause, then further processing is warranted when the information collected indicates a reasonable probability of a probable cause determination.” However, DHRC Administrative Rule 2.12(5) provides, “An administrative closure need not be made as a result of the procedures governing a determination of whether there is probable cause.”

In this case, the agency reviewed all the evidence before it, conducted an investigation, and recommended a no probable cause determination. The ALJ conducted an independent review of the evidence, and issued a no probable cause order. As a result, the administrative closure was not necessary. We find no violation of the prescribed decision making process under Iowa Code section 17A.19(10)(d).

B. Iowa Code section 17A.19(10)(f), (j), and (n)

Klein contends the district court’s refusal to vacate the no probable cause order is in violation of Iowa Code section 17A.19(10)(f), (j), and (n). Klein argues (1) the no probable cause order is not supported by substantial evidence; (2) the agency did not consider a relevant and important matter that a rational decision maker in similar circumstances would have considered prior to taking action; and (3) the decision is unreasonable, arbitrary, capricious, or an abuse of discretion. See Iowa Code § 17A.19(10)(f), (j), and (n). We consider Klein’s arguments in the context of her sex discrimination, disability discrimination, and hostile work environment claims.

First, we consider whether substantial evidence supports the no probable cause order in relation to Klein's sex and disability discrimination claims. In order to establish a prima facie case of discrimination, the evidence must show: "(1) that the employee belongs to a protected group; (2) that the employee was qualified to retain the job; (3) the employee was terminated; and (4) it is more likely than not that the termination was based on an impermissible consideration." *Miller v. Sioux Gateway Fire Dep't*, 497 N.W.2d 838, 840 (Iowa 1993).

Under the framework prescribed in *McDonnell Douglas Corp. v. Green*, a claimant alleging discrimination in a contested case proceeding carries the initial burden to establish a prima facie case. 411 U.S. 792, 802–04 (1973). After the claimant establishes a prima facie case of discrimination, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the termination. *Id.* If the employer is able to articulate a legitimate, nondiscriminatory reason, the claimant shall "be afforded a fair opportunity to show that [the employer's] stated reason for [the termination] was in fact pretext." *Id.*

A probable cause hearing is not a contested case proceeding. *Deere*, 482 N.W.2d at 389. The agency investigator, rather than the claimant or the employer, investigates and presents evidence of the civil rights claim. The agency then makes a probable cause recommendation to the ALJ. Consequently, the parties to a probable cause hearing do not carry the burdens set forth in *McDonnell*. 411 U.S. at 802–04. Notwithstanding the nature of the

present case, the ALJ and the district court followed essentially the same analytical framework under *McDonnell* in reviewing the agency action. *See id.*

The DHRC found the facts sufficient to establish a prima facie case of sex and disability discrimination. Georgia-Pacific and Neese asserted Klein's termination was a result of her failure to report a workplace injury, refusal to cooperate in the investigation into her injury, and deliberate misrepresentation of facts during an investigation. The DHRC found the employer's reasons for termination Klein were legitimate and nondiscriminatory. *See id.*

The DHRC then considered whether "a discriminatory reason likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence." *Woodbury Cnty. v. Iowa Civil Rights Comm'n*, 335 N.W.2d 161, 166 (Iowa 1983) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). The DHRC found "that there is ample evidence that the immediate supervisor did not treat employees well These issues, however are not limited to people within certain protected classes and, as such, there is insufficient evidence of discrimination based on either gender or disability." As a result, the DHRC found the reasons for Klein's termination were not merely pretextual.

Klein argues the agency's investigation was inadequate and prevented discovery of evidence that would have shown that the proffered justifications were pretextual. Under Iowa Code section 17A.19(10)(j), Klein argues Fishler's statement about the disparity in treatment between men and women was a relevant and important matter that a rational decision maker in similar

circumstances would have considered prior to taking action. Under Iowa Code section 17A.19(10)(j), Klein asserts the agency's inadequate investigation led to findings that are not supported by substantial evidence. In light of the alleged inadequate investigation leading to findings not supported by substantial evidence, Klein urges us to find the agency's decision was unreasonable, arbitrary, capricious, or an abuse of discretion. See Iowa Code § 17A.19(10)(n).

The agency exercised its discretion in directing the investigation of Klein's claims. As part of its investigation, the agency reviewed a statement from Neese. The agency was in the best position to determine whether additional information from Neese or any other source would assist in making a probable cause recommendation. The agency was also in the best position to determine whether Fishler's reported statements were the sentiments of an empathetic co-worker, or evidence of objectively discriminatory practices. Under the circumstances of this case and in view of the evidence as a whole, we find the DHRC investigation was adequate.

Klein argues Neese refused to allow her to attend medically necessary doctor appointments, and alleges Neese treated men and women differently in allowing them to take leave without accruing "points" for absences. Accrual of a specified number of points, could lead to negative employment action. However, Neese initially allowed Klein to attend appointments without accruing points. Although later appointments resulted in point accrual, Neese removed these points after Klein completed FMLA paperwork. Klein is unable to assert

instances in which other employees were not required to use FMLA leave under the same or similar circumstances.

The DHRC investigation revealed Georgia-Pacific's strict enforcement of its work-related injury policy. Two male Georgia-Pacific employees delayed reporting work-related injuries in violation of company policy. Georgia-Pacific suspended both men. Klein not only refused to cooperate in filing paper work for her work-related injury, she deliberately misrepresented the cause of her injury during an investigation into her injury. As a result, her penalty was more severe than the two male employees who delayed reporting the injuries. We find no evidence to demonstrate that either Georgia-Pacific's or Neese's proffered justifications for terminating Klein are unworthy of credence. See *Woodbury Cnty.*, 335 N.W.2d at 166 (describing pretext).

We now turn to Klein's hostile work environment claim. In order to establish a hostile work environment claim, the evidence must show: "(1) [the claimant] belongs to a protected group; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; and (4) the harassment affected a term, condition, or privilege of employment." *Farmland*, 672 N.W.2d at 744. The conduct must be "sufficiently severe or pervasive so that a reasonable person would find the [claimant]'s work environment to be hostile." *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 747 (Iowa 2006). "To establish [that] the harassment was severe or pervasive, [the evidence must] show [the claimant] subjectively perceived the conduct as

abusive and that a reasonable person would also have found the conduct to be abusive or hostile.” *Id.*

Neese made remarks to Klein about her personal hygiene and her inability to perform work. The DHRC’s investigation revealed testimony that Neese was generally unpleasant toward all employees, both male and female. The district court found, “Other employees who were interviewed indicated that Mr. Neese was non-discriminate in his rudeness to other employees. He yelled and screamed on a regular basis and truly did not seem to care if you were male or female.”¹ The district court found Neese’s remarks to Klein were not repetitive. Consequently, the district court affirmed the agency’s decision finding the evidence did not establish a prima facie hostile work environment claim.

Klein again argues the DHRC’s investigation failed to pursue credible evidence likely to show she was harassed based on a protected characteristic. In support of her contention, Klein again asserts DHRC should have interviewed Fishler and Neese. As previously articulated, we find DHRC conducted an adequate investigation into Klein’s allegations.

The question before us on review is not whether the district court could have reached a contrary conclusion, but whether evidence supports the conclusions actually made. See *Mercy*, 360 N.W.2d at 811–12. Upon our review, we find substantial evidence supports the finding that Georgia-Pacific and Neese offered legitimate, nondiscriminatory reasons for Klein’s termination and these reasons were not merely pretextual. We further find substantial evidence

¹ Georgia-Pacific later terminated Neese.

supports the ALJ's no probable cause order on Klein's hostile work environment claim because no evidence establishes that the alleged harassment was severe or pervasive. See *Farmland*, 672 N.W.2d at 744. We find the agency's decision was not unreasonable, arbitrary, capricious, or an abuse of discretion. See Iowa Code section 17A.19(10)(n); *Meyer v. I.B.P.*, 710 N.W.2d 213, 219 (Iowa 2006). Upon our review, we find no violation of Iowa Code section 17A.19(10)(f), (j), or (n).

IV. Conclusion

We find the DHRC conducted an investigation into Klein's claims, reviewed all the evidence, and the agency's findings were supported by substantial evidence. We find no violation of Iowa Code section 17A.19(10)(d),(f),(j), or (n). Accordingly, we affirm the district court's judicial review ruling.

AFFIRMED.

Vogel, P.J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I write separately to concur in the majority's opinion but to elaborate upon what the majority's ruling does not decide. The ruling concludes that the DHRC performed its role. The majority makes no conclusion whether res judicata principles apply and preclusive effect be given to the decision of the DHRC. See *George v. D.V. Zinser Co.*, 762 N.W.2d 865, 870-71 (Iowa 2009) (concluding that where a party does not have a full and fair opportunity to present evidence or any control over the proceeding it is inherently unfair to apply the doctrine of res judicata in a subsequent action).