IN THE COURT OF APPEALS OF IOWA

No. 0-401 / 09-1661
Filed October 20, 2010

JENNIFER KERN,
Petitioner-Appellant,

vs.

IOWA CIVIL RIGHTS COMMISSION,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert Hutchison, Judge.

Jennifer Kern appeals from the district court's judicial review ruling, which affirmed the Iowa Civil Rights Commission's determination of "no probable cause" on her claim of pregnancy and sex discrimination. **AFFIRMED.**

E.J. Flynn and Steven Lawyer of the Law Firm of Steven V. Lawyer & Associates, P.L.C., Des Moines, for appellant.

Debra Hulett, Des Moines, for amicus curiae.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for appellee.

Heard by Sackett, C.J., Potterfield and Tabor, JJ.

TABOR, J.

Jennifer Kern appeals from the district court's judicial review ruling, which affirmed the Iowa Civil Rights Commission's "no probable cause" determination on her claim of pregnancy and sex discrimination. She contends the agency's decision should be reversed because it runs afoul of the standards set forth in Iowa Code section 17A.19(10) (2007). We conclude it does not and agree with the district court's decision to affirm the "no probable cause" finding.

I. Background Facts and Proceedings. Halbrook Excavating hired Jennifer Kern as a receptionist on January 18, 2005. She gained additional job duties and eventually worked as an accounts receivable clerk. Her job duties included collections, billing, making deposits, entering and maintaining customer accounts and files, invoicing, filing, processing payments, answering phones, greeting customers, and typing proposals for the company president.

Near Thanksgiving 2007, Kern informed Ann Halbrook, a co-owner of the company, that Kern was pregnant. According to Kern, Halbrook seemed "surprised" and "caught off guard" by the news. When Kern stated her intent to take between eight and twelve weeks of maternity leave following her July due date, Halbrook allegedly stated it "wouldn't be good timing" because it was the company's busiest time of year. Kern asked whether she could accumulate additional vacation time by working hours in advance and was told she could not. At that point, Halbrook said that the company had never had a pregnant employee before. Halbrook told Kern they could "work something out."

Halbrook's version of events is somewhat different. She claims that Kern was the one who expressed concern about her July due date, stating that she knew it was the company's busiest month. Halbrook then reassured Kern that the company had been able to work around employee absences and vacations during summer months and her maternity leave would be accommodated as well. She informed Kern the company had never had a pregnant employee before in response to Kern's question about benefits and leave, stating Halbrook would need to check on that information and get back to Kern. Kern requested to work from home after the baby was born, a request Halbrook declined because of concerns about files being lost if they were removed from the office. The pair also discussed the possibility of Kern bringing her baby to work.

On February 25, 2008, Bobby Hanson in Human Resources told Kern that she was being laid off due to company downsizing. Hanson told Kern he did not know if the layoff was permanent. Two weeks later, Kern called to see if there was a chance she would be rehired from her layoff and was told her position had been eliminated. Kern sought, and received, unemployment benefits. Despite being told her position was eliminated as a result of downsizing, Kern noticed newspaper advertisements in which Halbrook Excavating sought additional employees.

Kern believed her position was essential to handling the amount of business the company would be doing in the coming months, and thus found her dismissal strange. Kern also believed that her work at the company was valued, based on her written and verbal performance evaluations and her pay increases.

According to Halbrook Excavating, her previous duties have been redistributed among existing employees.

On June 9, 2008, Kern filed a complaint with the Iowa Civil Rights Commission (ICRC) alleging discrimination based on sex and pregnancy. The ICRC conducted an investigation. During this investigation, concerns about Kern's performance came to light. The ICRC did not inform Kern of these concerns, which involved her internet usage and billing errors.

Halbrook Excavating documented the concerns over Kern's billing errors in her 2007 written performance review, signed and dated December 13, 2007. Kern noted the following area needed improvement:

> Need to slow down when invoicing to avoid mistakes. Try to focus on one project at a time instead of jumping from one thing to another.

For her goals and objectives to achieve by the next review period, Kern wrote, "Less stupid mistakes on invoicing and work on keeping up on filing paperwork." On a separate 2007 written performance review, signed and dated the same day, Halbrook made the following note:

> Talked to Jenny about invoicing. Physically presented numerous things missed in billing to the amount of $10,000--. Also discussed (asked) if she was instant messaging during the day. She responded, "No, I don't even know how." She then said what I saw was pop ups caused by the new Windows "Vista." I told her she needed to talk to David about these. She said she had been trying to get rid of them herself but they popped up even when she was working on Peachtree.
>
> In regards to the problems invoicing, I tried to stress financially it was not good for the company.
>
> Filing problems were also discussed. Things seemed to be setting around for up to a month at times. Misfiling was happening and papers were hard to find.

The company initiated an investigation into the instant messaging. Bobby Hanson kept records of when he spotted Kern online and emailing from her personal account. These records cover the time period from February 15 through February 21, 2008. But "the investigation was not completed and no conclusion was made because the decision was made to eliminate the position."

Halbrook stated during her interview with the ICRC investigator, "I just want to clarify that the performance issues were not the reason for her termination; the job was eliminated." Halbrook claimed the company was performing less residential business and therefore the workload no longer justified keeping Kern's position. As part of the downsizing, the company also eliminated a "somewhat similar" position held by Todd Austin in June or July of 2008. In September 2008, Dave McDonald was moved from his position as a dispatcher in the office back to his position operating machinery in the field. During this same period, the company hired approximately eleven new employees to perform field work.

The ICRC investigator recommended a finding of "no probable cause" as to the allegations in Kern's complaint. On November 25, 2008, an administrative law judge agreed with the investigator's recommendations and entered an order finding "no probable cause." The following month, Kern requested her case be reopened. The administrative law judge denied her request on February 27, 2009. In that order, the allegations of Kern's poor work performance are discussed at some length. The order concludes with the following paragraph:

> The Respondent undertook other measures to counter the economic downturn they saw coming. They delayed purchasing

> equipment, reducing overtime, changing phone plan and other measures. There were three laborers who were discharged in December 2007. These three male employees were not expected to be recalled and were not a part of the seasonal layoffs occurring during the winter months. There were a couple of other male laborers discharged after the Complainant was discharged. There were some laborers hired during 2008. An employer may wish to eliminate a position and invest in positions that would potentially generate some income. That would not run afoul of the Iowa Civil Rights Act unless there was an intent to discharge an employee because of a protected characteristic. The Complainant's pregnancy was not the reason she was discharged. She was discharged because the company determined they could reduce their administrative staff by one and cause little disruption to the business.

Kern filed a petition for judicial review on March 30, 2009. The court held a hearing on July 31, 2009, and in its September 21, 2009 ruling, affirmed the ICRC's decision. Kern appeals.

II. Scope and Standard of Review. Iowa Code section 17A.19(10) governs judicial review of the commission's "no probable cause" determination. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Woomert v. Iowa Civil Rights Comm'n*, 755 N.W.2d 617, 619 (Iowa Ct. App. 2008). The court of appeals is to apply the standards of section 17A.19(10) to determine if it reaches the same results as the district court. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner and if the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n). *Id.* Our review of the district court's disposition is limited to the correction of errors at law. *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991).

When considering claims the record lacks substantial evidence to support the agency's determination, we are mindful that evidence is not insubstantial merely because the court could draw a different conclusion from the record; the ultimate question is whether the record when viewed as a whole supports the finding actually made. *Swiss Colony, Inc. v. Deutmeyer*, ___ N.W.2d ___, ___ (Iowa 2010). With regard to claims the agency abused its discretion, we note that an abuse of discretion occurs when the agency's exercise of discretion is based on untenable grounds or is clearly erroneous. *IBP, Inc. v. Al-Gharib,* 604 N.W.2d 621, 630 (Iowa 2000).

III. Analysis. Iowa Code section 216.15(3)(a) provides that after a civil rights complaint has been filed, an "authorized member of the [ICRC] 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." A finding of "no probable cause" prohibits a complainant from obtaining a right-to-sue letter. Iowa Admin. Code r. 161-3.10(4)(a). An agency release, or right-to-sue letter, is required before a complainant can pursue a discrimination action in the district court. Iowa Code § 216.16(2). Accordingly, a finding of "no probable cause" forecloses a complainant's ability to seek redress against an employer in district court. *Clay v. City of Cedar Rapids*, 577 N.W.2d 862, 866 n.1 (Iowa Ct. App. 1998) (noting plaintiff could not try discrimination claims in state district court after the ICRC made a finding of "no probable cause" on complaint).

The legislature did not provide a standard for making a probable cause determination in chapter 216. However, our supreme court observed that "the legislature did not intend [in chapter 216] to require the [ICRC] 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 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.

Kern asserts five categories of error by the commission in making its determination of "no probable cause." She argues: (1) the commission failed to consider an important matter that a rational decision maker would have considered, *see* Iowa Code § 17A.19(10)(j); (2) the "no probable cause" finding was not supported by substantial evidence, *see id*. § 232.17A.19(10)(f); (3) the commission's determination was inconsistent with the law, *see id.* § 17A.19(10)(d), (g), (h); (4) the finding of "no probable cause" was unreasonable, arbitrary, capricious, or an unwarranted exercise of discretion, *see id.* § 17A.19(10)(n); and (5) the determination was based upon irrational or illogical application of the law to the facts, *see id.* § 17A.19(10)(i).

Kern's arguments all stem from the same basis. Despite the employer's statements that her termination was solely part of a reduction in the workforce and was not related to misconduct, the ICRC investigator continued to probe the claims involving Kern's poor work performance and the administrative law judge discussed the allegations in the order denying the motion to reconsider. Kern

claims the commission considered the allegations in making its finding of "no probable cause," and that she was never informed of the allegations or given an opportunity to rebut them. Because of the similarity among her claims, we will consider them together.

The order denying the motion to reconsider states the company's termination decision resulted from a plan to reduce its expenses in response to an economic downturn by reducing its workforce. On appeal, Kern does not challenge the factual basis behind this non-discriminatory reason for eliminating her position. Instead, Kern alleges, "Neither the district court nor the Court of Appeals can know whether or not the ALJ's decision would have been different had the agency not considered the error and email allegations that had been concealed from Ms. Kern." The standard set forth in section 17A.19(10) is whether the agency's decision was "[b]ased upon" a determination of fact that is not supported by substantial evidence in the record when viewed as a whole. Iowa Code § 17A.19(10)(f); *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 856 (Iowa 2009) (holding the supreme court may grant relief to a party based on a finding of fact not supported by substantial evidence only when the agency's action was based upon that determination of fact).

We conclude Kern has failed to show the determination of "no probable cause" was based upon the allegations of poor work performance investigated by the ICRC. In the order denying rehearing, the administrative law judge discusses three events that occurred at approximately the same time: Kern's pregnancy, the allegations of poor work performance, and the shift in business. The

administrative law judge does not conclude Kern's work performance was the reason for her discharge. The order does conclude, "The Complainant's pregnancy was not the reason she was discharged. She was discharged because the company determined they could reduce their administrative staff by one and cause little disruption to the business." The commission's determination was "based upon" the employer's workforce reduction plan, not on evidence regarding Kern's job performance.

In considering the record before us, we conclude substantial evidence supports the "no probable cause" determination. The record supports the agency's finding that there was a shift in Halbrook Excavating's focus from residential to commercial work. Due to the economic downturn, the company looked for ways to cut its expenses. Kern's duties dealing with residential construction could be eliminated and her remaining duties could be redistributed among the office staff as a cost-saving measure. The commission's determination was not inconsistent with the law, an abuse of discretion, or based upon an illogical application of law to the facts.

Because we agree with the district court that the commission did not err in determining no probable cause existed on Kern's claims of sex and pregnancy discrimination, we affirm.

AFFIRMED.