IN THE COURT OF APPEALS OF IOWA

No. 9-1059 / 09-0918
Filed February 24, 2010

BARBARA J. MCCUNE,
Plaintiff-Appellant,

vs.

STATE OF IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

A former employee appeals the district court's grant of summary judgment for the State of Iowa in her age discrimination lawsuit against the State. **AFFIRMED.**

James L. Sayre, Clive, for appellant.

Thomas J. Miller, Attorney General, and Jeffrey C. Peterzalek and Matthew Oetker, Assistant Attorneys General, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

Barbara McCune appeals the district court's grant of summary judgment in favor of the State of Iowa in her age discrimination lawsuit against the State.

I. Background Facts and Proceedings

McCune was employed by the State of Iowa from 1975 until her retirement in 2006. At the time of her retirement, McCune had accumulated a significant amount of sick leave. She elected to use some of the sick leave to pay for health insurance premiums, a practice authorized by the State's Sick Leave Insurance Program ("SLIP"). *See* Iowa Code § 70A.23(3)(c) (2007). McCune applied for and qualified for benefits under the SLIP. She received those benefits for approximately thirteen months.

The State terminated McCune's SLIP benefits when she turned sixty-five and qualified for federal Medicare benefits. McCune sued the State, alleging that its termination of SLIP benefits amounted to unlawful age discrimination under the Iowa Civil Rights Act.[1]

The State moved for summary judgment, and McCune responded with her own motion for summary judgment. The district court granted the State's motion and denied McCune's motion. McCune appealed.

II. Analysis

Under the Iowa Civil Rights Act, it is unlawful to discriminate against an employee on the basis of the employee's age. *Id.* § 216.6(1)(a). However, that anti-discrimination provision does not apply to

[1] McCune also filed but did not pursue a claim under Iowa's wage payment law.

> a retirement plan or benefit system of an employer unless the plan or system is a mere subterfuge adopted for the purpose of evading this chapter.

Id. § 216.13.

The district court concluded that the State's actions fell within this exception. As the facts are essentially undisputed, our review is for errors of law. *Barreca v. Nickolas*, 683 N.W.2d 111, 116 (Iowa 2004).

There is no question that the SLIP is "a retirement plan or benefit system" within the meaning of Iowa Code section 216.13, as the program applies to a "state employee eligible to receive retirement benefits under an eligible retirement system." Iowa Code § 70A.23(1)(b). Under the program, eligible State employees may convert the value of their unused sick leave above $2000[2] to a payment for "that portion of the employee's state group health insurance premium that would otherwise be paid for by the state if the employee were still a state employee." *Id.* § 70A.23(3)(c). The benefit has no cash value. *Id.*[3] Employees may use the benefit until the "earliest of when the eligible state employee's available remaining value of sick leave is exhausted, *the employee otherwise becomes eligible for federal Medicare program benefits*, or the employee dies." *Id.* (emphasis added). Because McCune's SLIP benefits terminated when she became eligible for the age-based Medicare program, McCune argues that the SLIP is a "subterfuge" adopted for the purpose of evading the Iowa Civil Rights Act.

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[2] By statute, retiring State of Iowa employees may receive a cash payout of up to $2000 for the value of the retiring employee's accrued but unused sick time. *See* Iowa Code § 70A.23(2).

[3] At the time the lawsuit was filed, the amount remaining in her accumulated sick leave bank was $81,020.84.

The Iowa Supreme Court recently defined "subterfuge" as a "'scheme, plan, stratagem, or artifice of evasion.'" *Weddum v. Davenport Cmty. Sch. Dist.*, 750 N.W.2d 114, 119 (Iowa 2008) (citation omitted). The court obtained the definition from *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 167, 109 S. Ct. 2854, 2861, 106 L. Ed. 2d 134, 148 (1989), an opinion which examined the same term in the Age Discrimination in Employment Act of 1967 ("ADEA"). *Betts* was later superseded by a statute that does not include the "subterfuge" provision. *See* 29 U.S.C. § 623(f)(2)(B)(ii); *Auerbach v. Bd. of Educ. of the Harborfields Cent. Sch. Dist. of Greenlawn*, 136 F.3d 104, 112 (2d Cir. 1998) ("[T]he Older Workers' Protection Act eliminates from § 4(f)(2) the broadly constructed employee benefit plan's exemption that was subject to the troublesome and controversial 'subterfuge' provision. The word 'subterfuge' does not appear in the new section."). Our civil rights act, however, was not similarly amended. Therefore, the United States Supreme Court's discussion of "subterfuge" is instructive. *See Weddum*, 750 N.W.2d at 120 (looking to federal law for guidance).

In *Betts*, the issue before the Court was whether a state retirement plan requiring disability retirees to be under the age of sixty at the time of their retirement was "a subterfuge to evade the purposes of" the ADEA, so as to render inapplicable the exception comparable to section 216.13. *Betts*, 492 U.S. at 175–76, 109 S. Ct. at 2866, 106 L. Ed. 2d at 153. The Court conceded that, on its face,

> It is difficult to see how a plan provision that expressly mandates disparate treatment of older workers in a manner inconsistent with the purposes of the Act could be said not to be a subterfuge to

> evade those purposes, at least where the plan provision was adopted after enactment of the ADEA.

Id. at 177, 109 S. Ct. at 2866, 106 L. Ed. 2d. at 154. The Court concluded, however, that such a reading would "eviscerate" the exception. *Id*. at 177, 109 S. Ct. at 2867, 106 L. Ed. 2d at 155. To give effect to the ADEA's prohibition against age discrimination and the exception to that prohibition as then written, the Court read the exception "as exempting the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id*. at 177, 109 S. Ct. at 2866, 106 L. Ed. 2d at 154. The Court explained that "[a]ny attempt to avoid the prohibitions of the Act by cloaking forbidden discrimination in the guise of age-based differentials in benefits" would fall outside the exemption. *Id.* at 180, 109 S. Ct. at 2868, 106 L. Ed. 2d. at 156. The Court cited non-inclusive examples such as the adoption of plan provisions "formulated to retaliate against" employees who filed lawsuits or which "reduce[d] salaries for all employees while substantially increasing benefits for younger workers." *Id.*

In *Weddum*, the Iowa Supreme Court's application of the term "subterfuge" indicates that it construed the term in the same fashion as the Court in *Betts*. Asked to decide whether an early retirement plan with a minimum age requirement of fifty-five was a subterfuge to evade the Civil Rights Act, the court stated:

> There is no evidence in the record to suggest the school district acted with age-related animus toward Weddum. Nor is there evidence to suggest Weddum was otherwise being singled out. To

> the contrary, two other employees did not qualify for the early retirement plan because they were also too young.

Weddum, 750 N.W.2d at 119. The court continued, "[T]here was no evidence to suggest the plan was 'a mere subterfuge adopted for the purpose of evading' the ICRA." *Id.* at 120 (quoting Iowa Code § 216.13).

Like *Weddum*, this summary judgment record contains no indication that the State terminated McCune's SLIP benefits for any reason other than the fact that she became eligible for Medicare benefits. There is nothing to suggest an "age-related animus" toward McCune and nothing to suggest she was "otherwise being singled out." *See Id.* at 119. Therefore, the district court correctly concluded that the SLIP was not a "mere subterfuge" adopted for the purpose of evading the Iowa Civil Rights Act.

We recognize that *Weddum* contains dicta arguably supporting a contrary conclusion. Specifically, the court stated,

> [T]he school district's plan in the present case "offered the same incentives to all eligible persons and did not employ an age-based phase-out where plan benefits decreased over time or were reduced to zero upon a certain age in order to encourage employees to participate in the plan."

Id. at 120 (quoting *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1042 (8th Cir. 2007)). This language does not mandate a different result because, in making this statement, the court was attempting to distinguish federal case law premised on the post-*Betts* ADEA exception that did not include the word "subterfuge." *See Jankovitz v. Des Moines Indep. Sch. Dist.*, 421 F.3d 649, 654–55 (8th Cir. 2005) (holding that an early retirement plan for employees under the age of sixty-five violated the ADEA). Although the SLIP does "employ an age-

based phase-out," insofar as it reduces a retiree's benefits to zero upon the retiree's eligibility for Medicare benefits, neither *Jankovitz* nor *Weddum* reached the issue of whether such an "age-based phase out" is a "mere subterfuge" to evade the age-discrimination provisions of the ADEA or the Iowa Civil Rights Act. Therefore, *Jankovitz* and the *Weddum* court's commentary on *Jankovitz* are inapposite.

Additionally, the challenged plan in *Jankovitz*, as amended, did not provide health insurance that bridged the gap between the termination of private health insurance and the start of Medicare.[4] A federal rule provides that this type of "coordination of retiree health benefits with Medicare" is exempt from the anti-discriminatory provisions of the ADEA. *See* 29 C.F.R. § 1625.32(b).[5] While McCune correctly points out that the rule does not apply to the State of Iowa, it nonetheless provides guidance to the State on the interrelationship between the SLIP and the Iowa Civil Rights Act.

For these reasons, we affirm the district court's grant of the State's motion for summary judgment and the court's denial of McCune's motion for summary

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[4] The amended plan provided a lump sum payment based on the number of the employee's unused sick-leave days. *See Jankovitz*, 421 F.3d at 650.

[5] The rule referenced by the court provides:

> Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan, whether or not the participant actually enrolls in the other benefit program. Pursuant to the authority contained in section 9 of the Act, and in accordance with the procedures provided therein and in § 1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

29 C.F.R. § 1625.32(b).

judgment. We find it unnecessary to address the remaining arguments raised on appeal.[6]

AFFIRMED.

[6] The State argues that McCune is asking us to hold that one Iowa law (Iowa Code section 70A.23) violates another (Iowa Code section 226.13), and that this is an impossibility. The State maintains that to the extent there is a conflict between the two laws, the legislature's subsequent enactment (i.e., the SLIP program—Iowa Code section 70A.23) must take precedence. In light of our resolution of this appeal on other grounds, we need not reach this argument.