

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – Third Floor
Des Moines, Iowa 50319

IOWA CIVIL RIGHTS COMMISSION,)	Docket No. 14ICRC001
)	
State Law Enforcement Agency,)	
)	
and)	
)	
LYNNEA DAVIS,)	
)	
Complainant,)	
)	
v.)	
)	
ON POINT SECURITY GROUP, LLC)	PROPOSED DECISION
and HOWARD JOHNSTON,)	
)	
Respondents.)	

A contested case hearing was held at the Wallace State Office Building on January 27, 2015. Attorneys Ben Humphrey and Alex Smith represented the Iowa Civil Rights Commission and Complainant Lynnea Davis. Mrs. Davis and her husband, Michael Davis, testified on behalf of the Commission. Attorney Thomas Graves represented Respondents On Point Security Group, LLC (“On Point”) and Howard Johnston. Eric Kennedy, James McClaskey, and Johnston testified on behalf of On Point. Exhibits 1, 4 through 6, 8 through 18, and Exhibit A were admitted into the record. The record was left open for receipt of written closing arguments.

FINDINGS OF FACT

Johnston formed On Point in 2010 while he was in Afghanistan. Johnston ran an advertisement for employees on Craigslist before he returned to the United States. Mr. and Mrs. Davis were the first two people who responded to the advertisement. Johnston contacted Mr. Davis. Mr. Davis informed him he had 11 or 12 years of experience in security and he had been trying to start his own security company in Newton. Mr. Davis reported he had contacts in the Newton area.

Mrs. Davis had previously worked as a security guard at Jordan Creek Town Center and NPI Security. Mrs. Davis received training on using handcuffs and pepper spray when she worked at Jordan Creek Town Center. She did not receive any practical training when she worked for NPI Security.

Mr. Davis had many years of security experience when he contacted Johnston. Mr. Davis had more training and experience than his wife. He was a certified instructor and he possessed a permit to carry weapons.

Mr. and Mrs. Davis completed employment applications for On Point. Johnston met with Mr. and Mrs. Davis on December 29, 2011. Johnston hired Mr. and Mrs. Davis, but did not guarantee them any hours of work per week. Over the next three months Johnston hired 12 additional security officers in the Des Moines area.

On Point provides security for bars, construction sites, government agencies, and other businesses. On Point's customers include the Des Moines Water Works, the Blank Park Zoo, and the Iowa National Guard. Some of the businesses require armed guards.

On Point employs 70 to 100 employees, the majority of whom work part-time. In 2012, On Point had 18 or 19 employees. On Point pays its employees between \$8 and \$12 per hour, depending on each employee's experience. On Point has a high amount of employee turnover.

On Point employs four females. Two of the female employees are in management positions. The other two employees work at a construction site and at Camp Dodge. The Camp Doge position is an armed position.

McClaskey is a patrol sergeant for On Point who is African American. He reported On Point's workforce contains a mix of people. McClaskey testified 40% to 45% of On Point's employees are African American or Hispanic. McClaskey testified one business told On Point it did not want On Point to place African American guards at its business and Johnston dropped the account.

Training is important to On Point. Johnston provides regular training opportunities for On Point's employees. The training is free of charge. On Point does not pay for its employees' permits to carry. If an employee wishes to work an armed account, the employee must pay for his or her own permit to carry.

When On Point hired McClaskey he did not have any military, law enforcement, or security experience. McClaskey received training from On Point on FEMA, defensive tactics, responding to domestic incidents, pepper spray, baton, handcuffs, and firearms. The only fee McClaskey paid was the \$55 fee for his permit to carry.

Mrs. Davis testified Johnston gave her credit for 18 months of experience. During the hearing Mrs. Davis insisted she earned \$8 per hour while working for On Point. Johnston testified because her prior security experience, he paid Mrs. Davis \$9 per hour. The evidence at hearing supports Mrs. Davis earned \$9 per hour.

Mr. Davis testified he started working accounts for On Point the first or second week of January. Mr. Davis reported he worked nearly every weekend.

Mrs. Davis testified she received her first assignment in the spring of 2012. Mr. Davis reported the assignment occurred about four months after Johnston hired Mrs. Davis. Mrs. Davis accompanied her husband to Des Moines while he was working at a bar, the Marquee. Mrs. Davis was not scheduled to work, but she was dressed in her On Point uniform. Mrs. Davis sat in her car and waited for her husband. Mr. Davis testified the crowd at the Marquee was bigger than expected and the security guards needed help. Mrs. Davis reported her husband called Johnston and placed the call on speakerphone. Mrs. Davis testified her husband told Johnston the Marquee needed a female guard to search the female patrons. Mr. Davis testified when he called Johnston he asked if Mrs. Davis could work because it was busy. Mrs. Davis reported that Johnston stated it was fine for her to work the front door to search the female patrons. Mrs. Davis worked three hours.

Johnston denied speaking with Mr. and Mrs. Davis the first night she worked at the Marquee. He testified he found out Mrs. Davis had worked and told her she could not work without being assigned. Johnston reported Mrs. Davis offered to work for free and he told her she would be paid.

Johnston described the Marquee has a rough hip/hop bar. He has worked at the Marquee himself and considers the clientele dangerous. The guards who work the front door at the Marquee are armed, but the bouncers are not. Johnston places bouncers at the Marquee who are experienced because of the danger. On Point employees have been injured during altercations with patrons.

Mrs. Davis' next assignment occurred a few weeks later at the Marquee. The Marquee's owner contacted Johnston and requested a female guard to pat down female patrons. Johnston contacted Mrs. Davis and told her the Marquee had requested a female guard to pat down female patrons. Mrs. Davis completed the assignment.

On Point employed Mr. and Mrs. Davis to work at VEISHA in Ames. Mrs. Davis testified they worked from 10:00 p.m. through 3:00 a.m. for one week. Mrs. Davis reported she was responsible for checking students' wristbands to ensure students were going to the correct dorm rooms.

McClaskey worked for On Point during VEISHA. On Point provided subcontract security services for the event and was responsible for ensuring members of the public were not accessing an apartment building. McClaskey assigned Mr. Davis to stand by one entrance and Mrs. Davis to stand by another entrance. McClaskey testified that when he checked on the building, he found Mr. and Mrs. Davis covering one entrance only. He reported he also overheard Mrs. Davis discussing that she would own On Point. McClaskey instructed Mr. and Mrs. Davis to work both entrances of the building.

Mr. Davis was scheduled to work at Pier 1 Imports from 10:00 p.m. through 6:00 a.m. for four days, or 32 hours. The position required Mr. Davis to sit in his vehicle to ensure patrons did not go into the store. Mr. Davis had a migraine headache and he did not want to drive to Des Moines. Mr. Davis called Johnston and told him he had blurred

vision due to his migraine and requested Mrs. Davis be permitted to work instead. Johnston did not agree to the substitution.

Mrs. Davis testified she called Johnston to inquire about the position and he informed her, "I don't feel safe putting a woman there." Mrs. Davis reported she felt belittled and cried. In her Complaint, Mrs. Davis reported Johnston stated "His exact words to me was 'No, I will not put a female there all night by herself. It's my policy and I will not bend it.'" (Exhibit 1).

Johnston denied making the statement to Mrs. Davis. He reported that the Pier 1 Imports account was new and he wanted a long-term contract with the business. Johnston testified he wanted to send his most qualified employees to the job site to try to secure an ongoing account.

Mrs. Davis reported she worked one additional time for On Point in Ames at the JCPenny store during the summer of 2012. Mrs. Davis sat in her car and watched the front of the building to ensure no patrons went inside during remodeling from 8:00 p.m. through 6:00 a.m. Mrs. Davis described the JCPenny assignment as similar to the Pier 1 Imports assignment. Mrs. Davis reported she interacted with five male construction workers during the assignment.

Mrs. Davis testified she did not request any other assignments from On Point. Mr. Davis received assignments from On Point every weekend at different bars. Johnston reported he offered Mrs. Davis other assignments, but she would state she was working for her father, or busy.

Mrs. Davis testified she received no opportunities for training through On Point. Mrs. Davis stated the training was not available for her. Mrs. Davis reported Johnston told her she could not attend the shooting range because she did not have a permit to carry. Johnston testified Mr. Davis is a certified trainer, who could have provided training to his wife.

Mrs. Davis reported she told her husband that things needed to change. Mrs. Davis testified she argued with her husband because he would commute to Des Moines from Newton and work only four hours. She stated that she told him he needed to find something different with more hours. Mr. and Mrs. Davis went to six sessions of marriage counseling in 2013.

Mr. Davis testified that when he was working for On Point his wife would become angry, cry, and yell at him. She would ask why he was getting assignments and she was not. Mrs. Davis reported his wife did not understand why she was not working.

Johnston testified he offered Mrs. Davis a full-time position to work at Red Lobster in Ames. Johnston reported the first day of the assignment Mrs. Davis called one hour before her shift and quit stating she had found a better job. Johnston was concerned about the account and called McClaskey. McClaskey testified that he received a call from Johnston to work at Red Lobster on short notice.

Mrs. Davis denies Johnston offered her a position at Red Lobster. She contends Johnston denied her one assignment, at Pier 1 Imports, and that he made one comment to her about her gender.

Mrs. Davis secured employment as a firefighter with the City of Bloomfield and moved to Bloomfield with her family in October 2013. Mrs. Davis was not working for On Point when she moved to Bloomfield. Mr. Davis also works as a firefighter with the City of Bloomfield, and as a mechanic.

The Commission filed a Statement of Charges alleging On Point and Johnston refused to allow Mrs. Davis to work at the Marquee in May 2012, Pier 1 Imports in July 2012, and refused to grant her additional requests to work other security assignments. At hearing Mrs. Davis testified Johnston refused her request to work at one assignment, Pier 1 Imports. She did not identify any additional times Johnston refused a request she made to work.

CONCLUSIONS OF LAW

The Iowa Civil Rights Act (“ICRA”) precludes an employer from discriminating against an employee because of the employee’s sex.¹ “Generally, an employer engages in unlawful sex discrimination when the employer takes an adverse employment action against an employee and sex is a motivating factor in the employer’s decision.”²

Title VII and the ICRA recognize both disparate impact and disparate treatment claims.³ A disparate impact claim involves a facially neutral employment practice that results in one group being treated more harshly than another and cannot be justified by business necessity.⁴ A disparate treatment claim exists when an employer treats an employee differently than another employee because of sex.⁵ Mrs. Davis’ claim raises an issue of disparate treatment based on sex.

In its written Closing Argument the Commission avers the burden-shifting method set forth in *McDonnell Douglas v. Green* “is no longer relevant” because this case was fully tried on the merits citing to *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). (Commission’s Closing Argument at 2). *Aikens* notes that after a plaintiff establishes a prima facie case of discrimination, the defendant must rebut the presumption of discrimination, and when the defendant fails to do so, the fact finder must then decide whether the [defendant’s action] was discriminatory within the meaning of Title VII,” and “the *McDonnell-Burdine* presumption ‘drops from the case, and the factual inquiry proceeds to a new level of specificity.’”⁶

¹ Iowa Code § 216.6(1)a.

² *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 67 (Iowa 2013).

³ *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 803 (Iowa 2003).

⁴ *Id.*

⁵ *Id.*

⁶ *Aikens*, 460 U.S. at 714-15 (citations omitted).

An employee may prove discrimination under the ICRA through direct evidence or the *Price Waterhouse* method, or through the burden-shifting method established in *McDonnell Douglas Corp. v. Green*.⁷ In its Closing Argument, the Commission argues the Commission “presented evidence in support of its discrimination charge and Respondents articulated a legitimate, nondiscriminatory rationale for the challenged decisions.” (Commission’s Closing Argument at 1). The Commission’s argument tracks the *McDonnell Douglas* burden-shifting method, as opposed to the *Price Waterhouse* direct evidence method.

Under the burden-shifting method, the Commission must first establish a prima facie case of discrimination, by showing: (1) Mrs. Davis is a member of a protected class; (2) she was qualified for the position; and (3) she experienced an adverse action giving rise to an inference of discrimination.⁸ If the Commission establishes a prima facie case of discrimination, then the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for its action.⁹ If the employer offers a legitimate, nondiscriminatory reason for its action, then the Commission must establish the employer’s stated reason was a mere pretext for discrimination.¹⁰

While the Commission discusses On Point’s legitimate, nondiscriminatory reason for its action, the Commission presented direct evidence of discrimination at hearing, through Johnston’s statements.

Under the direct evidence method, the Commission “must present credible evidence of conduct or statements of supervisors which may be seen as discrimination sufficient to support an inference that the discriminatory attitude was a motivating factor.”¹¹ If the Commission presents sufficient evidence, “the employer bears the burden of establishing by a preponderance of the evidence it would have made the same decision even in the absence of the improper motive.”¹² The employer’s burden “is not satisfied by merely articulating a reason” for its action.¹³

Mrs. Davis testified she called Johnston and asked whether she could substitute for her husband at the Pier 1 Imports job. Mrs. Davis contends Johnston responded, “I don’t feel safe putting a woman there.” Mrs. Davis reported she felt belittled and cried. In her Complaint, Mrs. Davis reported Johnston stated “His exact words to me was ‘No, I will not put a female there all night by herself. It’s my policy and I will not bend it.’” (Exhibit 1). If true, these statements are direct evidence of discrimination.

The investigator inquired about Mrs. Davis’ allegations in the Complaint and Johnston

⁷ *Reiss v. ICI Seeds, Inc.* 548 N.W.2d 170, 174 (Iowa 1996); *Vaughn v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). *Cf. Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6-7 (Iowa 2009) (applying the burden-shifting standard for pregnancy discrimination case that was tried to a jury).

⁸ *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005) (applying burden-shifting method to pregnancy discrimination claim).

⁹ *Id.* at 15.

¹⁰ *Id.*

¹¹ *Vaughn*, 542 N.W.2d at 538.

¹² *Id.* at 539.

¹³ *Id.*

responded, as follows:

Right, and that's, and then she's like why won't you work me here? I'm like look, I cannot work a girl at a thug bar, where I have guys getting beat up every day. I told her, I can't even work your husband there, because he's not the right person for that account. Well, why can't I work this account? Because the owners of the building told me this is what they want, you know?

These are like 101, downtown. That's where the cops were all shot at and stuff. After that they called us in. If I would have put, like I had her husband there as an armed guard in the parking lot. People on the inside were all, they're bar bouncer type guys. These are guys, military experience, that when they're jumped by four or five people, they might be able to make it out okay. And that was the problem. She wanted to work there. And I'm like, if I put you there, you're going to get hurt, you know, and that's why I just didn't understand, you know, all of this. So.

* * * *

Well, the Pier One was because she wasn't an NCO. Because that was an unarmed, it was a four day spot unarmed. It was like our trial run, our test run. And I was putting my NCO's there first. And then the people that work the places, the hard places for me. You know I told her, look, because it was the first easy gig we had. I'm going to reward the people that's been working the hard places. You know, if my NCO's won't work there first. Because I had to do a good job at this account.

(Exhibit 16 at 8). The investigator inquired whether Johnston had refused to place Mrs. Davis at bars because she was female. Johnston responded "it wasn't that she was female, it was because she was so small and she had no experience working in bars, ever." (Exhibit 16 at 8).

The investigator asked whether employees have to have a certain physical stature to work in bars. Johnston responded,

Let me put, if I put . . . it don't matter if it's a girl or a guy. If I put a 115 pound, 125 pound security guard there, they're going to get beat up because these are the type of people that would just wanna test them. Just to prove their self. I mean these are people that shoot at cops. You know, they shot, they executed two people behind the place one night. Before we got there. It's that bad of a place. But if she was an armed guard, I would have put her out front, because I have to have armed guards. It would have worked, but she wasn't an armed guard. That's what I told her, you have to be armed to work there. Then she's like, well Pier One you don't have to be armed. I'm like yes, but you don't call me and tell me where you're going to work at. I'm putting my NCO's there first. And then if I can't have no NCO's that want to work it, I'm going to go through the list

and the people that been doing the hard work for me and that are experienced are going to get the time there. Well I'm experienced, I work at the mall. But you're calling me telling me you're working something. And that's what got me so mad. Is that I'd schedule her husband somewhere and she'd call me, no I'm going to work for him. I'm like it don't work that way.

(Exhibit 16 at 10).

Johnston made another statement set forth in his interview as follows:

I told her I could not assign her to the [Marquee], because I have to have armed guards there and I can't put a woman that's unarmed at a place like that. I told her, I'm like, you'll get hurt there. And the clients will pull my contract. Because that, they need people that can do the job.

(Exhibit 16 at 11).

Johnston's statements about not being able to place a "woman," or a "girl" at a location to work may also be seen as discrimination sufficient to support an inference that a discriminatory attitude was a motivating factor in Johnston's refusal to assign Mrs. Davis to work at bars and at Pier 1 Imports.¹⁴ Therefore, On Point and Johnston bear the burden of establishing, by a preponderance of the evidence that Johnston would have made his decisions even in the absence of the improper motive.

Johnston testified he did not place Mrs. Davis at Pier 1 Imports because the account was new and he wanted to place his best security guards at the assignment. Johnston had originally assigned the account to Mr. Davis. Mr. Davis is a certified trainer and he has many years of experience in security. Moreover, Mrs. Davis admitted at hearing Johnston placed her at JCPenny in Ames after the Pier 1 Imports assignment, an assignment she considered to be similar.

The Commission further argues Johnston refused to provide Mrs. Davis with assignments. Mrs. Davis testified Johnston denied her one assignment. Johnston did not promise Mrs. Davis she would work a certain number of hours. Before Johnston hired Mr. and Mrs. Davis, Mr. Davis told Johnston he had security contacts in the Newton area and he believed he could secure accounts for Johnston. Mr. Davis was unable to secure security accounts for Johnston.

¹⁴ Compare *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1324 (8th Cir. 1994) (in direct evidence case, comment that "women were the worst thing" that had happened to the company, however, warrants such an inference, even though it was not made during the decisional process") with *Torgerson v. City of Rochester*, 643 F.3d 1031, 1046 (8th Cir. 2011) (statement made by a council member in recommending hiring of male for firefighting position because "he was a big guy and that he'd make a good firefighter" did not relate to the plaintiff or the abilities of all female applicants to constitute direct evidence of discrimination).

At hearing Johnston testified about the dangerous nature of the work his company performs. Mrs. Davis could not work the armed accounts because she did not possess a permit to carry weapons. Mrs. Davis had some experience in security, but her experience was not equal to that of her husband, who also possessed a permit to carry weapons. While few women work for On Point, On Point employs a female employee at an armed account for the National Guard. The Commission has not established On Point or Johnston engaged in an unfair or discriminatory practice when Johnston did not place Mrs. Davis at the Pier 1 Imports location or at other locations.

ORDER

The Commission has not proven On Point or Johnston engaged in an unfair or discriminatory practice in employment. This matter is dismissed. The Commission shall take any steps necessary to implement this decision.

Dated this 25th day of February, 2015.



Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: Lynnea Davis (first class mail)
Benjamin Humphrey (electronic mail)
Alex Smith (electronic mail)
Thomas Graves (electronic and first class mail)
Howard Johnson (first class mail)

Notice

Any adversely affected party may appeal this decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.¹⁵ The appeal must be signed by the appealing party or representative of the appealing party and contain a certificate of service upon the other parties, and specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.¹⁶

¹⁵ 161 IAC 4.23(1).

¹⁶ *Id.* 4.23(3).

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.¹⁷

¹⁷ *Id.* 4.23(2).