



STATE OF IOWA

Chester J. Culver, GOVERNOR
Patty Judge, LT. GOVERNOR

IOWA CIVIL RIGHTS COMMISSION
RALPH ROSENBERG
EXECUTIVE DIRECTOR

Minutes ---- Iowa Civil Rights Commission – April 1, 2010. These minutes are for the open or public session and do not include the closed portion of the Commission meeting. The Commission voted to close the session for consideration of the Nabb v. Botsko case.

- I. Roll Call—Attendance—Commissioners: Claypool, Eychaner, Witt, Chapman, Morain, Gitchell, & Johnson; Wendy Meyer; David Botsko; Inga Nabb; Dorothy O'Brien
- II. Recognition of Public and Press – Charlotte Eby, Lee Newspapers
- III. Commission consideration of INGELORE NABB, complainant vs : DAVID BOTSKO, D.M.D., respondent , a Davenport Civil Rights Commission on remand from the Iowa Supreme Court
 - A. Attorney O'Brien on behalf of Nabb—(*Ed. Notes: These are not complete notes, just an example of some of the points made*).
 1. Law on gender and national origin discrimination.
 2. The Commission should set standards for what constitutes allowed and prohibited conduct.
 3. Question: does this work environment comply with requirements of law?
 4. Complainant was harassed on continuing basis.
 5. ALJ decision references
 - i. Noted credibility of Complainant
 - ii. Noted (did not agree with) ALJ found level of harassment did not rise to severe and pervasive
 - iii. Counsel argued that ALJ was wrong in law and common sense, by isolating individual events
 - iv. ALJ should have looked at totality of workplace
 - v. Error in compartmentalizing and separating the two
 6. Review of the facts
 7. Physical mistreatment
 8. National origin
 - i. Nazi references and heel incidents
 9. Criticisms of ALJ findings
 - i. Reference insufficient evidence on national origin discrimination
 - ii. ALJ-no evidence that Nazi was used
 - iii. ALJ discounted witness statement (Because statements were made at home and not office
 - iv. ALJ discounts comments because of 'efficiency' of people of Germanic heritage
 10. Absence of non-discrimination and sex harassment policy at Bostko workplace
 11. Nabb protested treatment and Respondent wanted her to quit
 12. What does it take to be severe and pervasive
 - i. Harassment of Nabb occurred on almost a daily basis
 13. Not okay to treat people this way

14. Criticisms of ALJ

- i. Why is ALJ looking down nose at client?
 - ii. Woody Allen movie quote—harms credibility of ALJ
15. ALJ did make references to Complainant as a playboy, cad, boorish—
16. How can this conduct be allowable under Davenport and ICRC acts?
17. Respondent wanted Complainant to quit
18. Requested remedy: one years pay + mental anguish of 50,000
19. Respondent must be sanctioned
20. Community of Iowa employers need to know
21. Reserves time for rebuttal remarks

B. Attorney Meyer on behalf of Botsko

1. No testimony or evidence of discrimination.
2. Commission should give deference to ALJ, who actually saw and heard testimony of witnesses and demeanor
3. Citing Iowa Code—if ALJ is not avail to draft findings of fact, you either start over or dismiss the case
4. Credible—no specificity on sex harassment, just trying to string together events
5. Re: O'Brien brief (gesture of intercourse)
 - i. Reference to Kevin on the Office— (Ralph – who is Kevin?)
 - ii. Only one reference to strip clubs
 - iii. Conversations came from patient Hansen (and then Botsko made him apologize)
6. Kout found to be most credible witness by ALJ
 - i. Contested allegations about Nazi and salute
7. Last day discussion about Respondent yelling at Complainant, ice in parking lot, etc.
 - i. Respondent told assistant to salt parking lot
 - ii. Allegedly hit C in shins with chair
 - iii. Issues with credibility of witnesses
8. Complainant has burden: harassment based on gender or national origin
9. Respondent went out of his way to accommodate
 - i. Respondent did not want her to quit
10. Complainant had already told Respondent she was going to quit
11. Case has to be proven on subjective and objective grounds
 - i. None of other employees testified to this
 - ii. Never saw harassment
12. ALJ decision—argues that Complainant did not prove case, but wanted to be kind
 - i. ALJ—even if he (Botsko) did live this lifestyle, he did not bring it into the workplace.
13. Importance—civil rights laws are not civility codes, or purge workplace of vulgarity
 - i. Complainant has to prove she was subject because of gender or national origin

C. OBRIEN rebuttal

1. Witnesses supported Complainant
2. Unnecessary to make reference not specific to time and place
3. ALJ found Botsko not believable
4. ALJ found Nabb credible, but none on not credible

D. Eychaner questions

1. O'Brien—why didn't Respondent fire Complainant, if he did not want her in workplace?
 - i. References roots of sex harassment
 - ii. He used her, because she was a good assistant
2. Morain
 - i. Davenport Comm dismissed national origin. Are we here today to include national origin or not?
 1. AG defer to parties.
 2. O'Brien—based on Supreme Court order, put aside everything Davenport Commission did
 3. O'Brien —not pursuing age claim
3. Johnson
 - i. Re: technological age—why was she fired from previous position—(she was not)
 - ii. Why she left prior position?
 - iii. Meyer—some sort of technological based falling out with Complainant
4. Morain
 - i. O'Brien --Botsko wanted Complainant to quit..Where was that in brief? 4 -15, page 33
 - ii. Meyer—no direct testimony
5. Johnson
 - i. Chair situation—patient/Dr. working on other sides; patient testified nothing had happened
 - ii. How could it have hit her?
 - iii. O'Brien—still hit her
6. Witt
 - i. Comments made to salesman or other Dr. —if she overheard, even if not directed at her, are they still harassment?
 1. Meyer—directed because of sex, does not have to be sexual
 2. O'Brien—sex based conversations are still 'polluting the atmosphere'
7. Eychaner
 - i. Standards of proof
 1. Meyer—agree preponderance
 - a. What is not severe or pervasive
 - i. 8th circuit. —rubbed ; called baby doll; insinuated would go further if went along with him;
 2. O'Brien—preponderance of evidence—slightly more believable than not
 - a. Courts look whether substantial evidence in record
 - b. Frequently or severe enough to affect condition of employment
 - c. Do we believe sufficient?
8. Witt
 - i. Were witnesses asked if they had overheard other instances?
 1. Meyer—they were asked
 2. Kout—overheard Respondent on phone with Bell and with Mark Wolfe
9. Morain
 - i. Is Respondent claiming chair could not have injured?
 1. Meyer notes Complainant is arguing ring itself hurt her

2. O'Brien—could have been either chair...
10. Claypool
 - i. Location of dental chair
 - ii. Meyer—patient denied anything happened
 - iii. O'Brien—dental chair goes up and down and it is possible for chair to run into legs
11. Gitchell—any other comments regarding "kiss my ___"—why didn't Respondent mention this?
 - i. Meyer—we do not have prove our defense; Complainant has to prove her case; testimony Complainant provided statements about welfare;
12. Chapman—no anti-discrimination, sex harassment policy reference—is it required like in public institutions?
 - i. O'Brien—law treats employers differently, depending whether they have policies
 - ii. Meyer—10 years ago—mention of poster
 - iii. O'Brien—p. 42 of April 14 transcript— Complainant asked whether she saw posters about discrimination and what to do? She said no.
 - iv. Meyer—Dr. was never asked.
13. Eychaner—any corroboration /evidence on stepping on foot --no
14. Johnson—dates and times
 - i. Why not dates and times for harassment and did she confront and did he correct behavior?
 - ii. O'Brien— Complainant did confront and R brushed off complaints—
 1. "woman of your age"
 2. No journal—law does not require journal
 3. Happened daily or several times/week
 - iii. Why didn't she quit?
 1. Husband was retiring and had surgery and she was concerned she had to stay and work
 2. Mercedes ownership?
 3. O'Brien—does a person have to make good financial judgments to receive protection from civil rights act? No.
 4. O'Brien—95/99% do not have courage;most ignore and hope it gets better
 - iv. Meyer—she did not complain
 1. Botsko called patient to apologize
 2. Nabb had special parking spot for car
 3. Respondent not shy about giving opinion
 - v. O'Brien—do not have to complain to have liability to attach
 - vi. Meyer—law is that you just can't work, that you have to give employer reasonable opportunity to cure what is bothering Complainant
15. Eychaner
 - i. Some documents were not accepted by ALJ
 - ii. Meyer—2 documents exh. 5 and 6 were not accepted
 - iii. PC finding is not controlling
16. Morain
 - i. Exh. 20—not in record

- E. Issue on whether commission can still ask questions. AG—yes.. Eychaner—make only written responses
- F. Reconvened after break –
- G. Discussion on open vs. closed session deliberations –concern over chilling of discussion
- H. Move to have commissioners go into closed session, according to 17A and exception under 21.5(1) f. Witt moved, Chapman seconded .Roll call
 - 1. Ayes: Chapman; Witt; Eychaner; Gitchell; Johnson; Claypool
 - 2. Nays: Morain

- IV. Tentative break for lunch 12:30 – 1:30 p.m.
- V. Administrative rules update — the administrative rules, approved at the Feb. commission meeting were formally filed. The hearing for public input is set for April 6 at the Commission offices. Staff will be present. It is not necessary for Commissioners to attend.
- VI. Went back into open session at 4:50 p.m. Final vote will be delayed until end of April/early May
- VII. Adjournment until the end of April

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