BEFORE THE IOWA CIVIL RIGHTS COMMISSION

CHERYL L. LEVITT, Complainant,

VS.
GENERAL ELECTRIC COMPANY, and JOHN CRIST, Respondents.

CP# 09-85-13498

THIS MATTER, a complaint filed by Cheryl Levitt (Complainant) with the Iowa Civil Rights Commission (Commission) charging General Electric Company of Burlington, Iowa and Fairfield, Connecticut and John Crist (Respondents) with discrimination in employment on the basis of sex came on for hearing in Burlington, Iowa on the 4th day of August 1987, before lone G. Shadduck serving as Hearing Officer. Complainant was represented by Teresa Baustian, Assistant Attorney General. Respondents were represented by Robert A. Engberg, Attorney at Law.

The issues in this case are as follows:

ISSUE I - DID THE REFUSAL TO HIRE CHERYL LEVITT FOR THE STATED REASON THAT SHE WOULD BE UNAVAILABLE FOR THE ENTIRE EMPLOYMENT PERIOD CONSTITUTE DISCRIMINATION ON THE BASIS OF SEX (PREGNANCY)?
ISSUE II - WHAT IS THE PROPER DEFENSE IF EXCLUSION FROM EMPLOYMENT BECAUSE OF POTENTIAL UNAVAILABILITY DUE TO PREGNANCY IS DISCRIMINATORY?

After having reviewed the record, testimony, and exhibits the Hearing Officer makes the following findings of fact, conclusions of law, recommended decision and order.

FINDINGS OF FACT

1. The Complainant, Cheryl Levitt, timely filed verified complainant CP# 09-85-13488 with the Iowa Civil Rights Commission on September 3, 1985, alleging a violation of Iowa Code section 601A.6, discrimination in employment on the basis of sex (pregnancy) in that Respondents failed to hire her on or about August 20, 1985.

2. The complaint was served on the Respondents, General Electric Company of Burlington, Iowa and Fairfield, Connecticut and John Crist on September 20, 1985.

3. The complaint was investigated, probable cause found, conciliation unsuccessfully attempted and Notice of Hearing issued on December 31, 1986.

4. Complainant had been a utility operator for General Electric from October 1980 to July 1982. The last six months of that period she was a publication clerk. She was laid off and her right to recall expired in July of 1983. In 1985, she heard that General Electric was recalling prior

employees. She called the office to talk with Crist. He was on vacation, so she talked with the secretary, Cathy Garrison. This was around August 3, 1985. Garrison agreed to leave a message for Crist who was to return around August 18. On August 19, Levitt called Crist and discussed returning to work for General Electric. Crist made an appointment for a physical examination of Levitt with the nurse, Dora Horn, for August 20.

5. Levitt kept her appointment with Nurse Horn who then examined her. Levitt was pregnant at the time. The nurse asked her due date. Levitt said it was October 12, 1985.

6. Levitt also was given an appointment with the plant doctor for the 21st at 2:00 p.m.

7. Before she could keep her appointment with the plant doctor, Crist called Levitt and informed her that he had not realized she was pregnant and if he had known he would not have offered her the position. Crist canceled her appointment with the plant doctor and did not hire Levitt.

8. At this time, Levitt was employed at the Summer Street Road Animal Clinic as a secretary-receptionist. She performed a variety of tasks with no restrictions. She wanted to work at General Electric because the pay and benefits were better. She continued to work at the Clinic after General Electric failed to hire her.

9. Levitt delivered her baby on October 23, 1985. She was released to work in November with no restrictions. She was off work approximately four weeks.

10. The end of January 1986, Crist called Levitt and offered her a job. She started working for General Electric on February 3, 1986, at a rate of $10.60 per hour. She worked on the second shift, as a utility operator, the same position she held in her earlier employment with General Electric. Levitt required no retraining in order to assume these duties. She was laid off again approximately August 15, 1986.

11. General Electric provided disability insurance immediately upon hire for its employees for up to 26 weeks. The rate was 60% of weekly pay up to $225.00 a week maximum. Benefits started on the 8th day of disability or first day of either hospitalization as a bed patient or surgery performed in an approved ambulatory surgical facility, whichever was earlier. Benefits for disability caused by pregnancy or complications of pregnancy were the same. (See Complainant's Exhibit 2).

12. General Electric also had an Individual Development Program (IDP) under which they reimbursed tuition expense for approved courses. Eligibility occurred when a full-time employee completed at least six months of service at the time the course started, or when an employee was laid off, but retained recall rights. (See Complainant's Exhibit 3).

13. Levitt did attend Southeastern Community College beginning August 19, 1986. The tuition paid was $858.00. She was laid off August 15, 1986, and did not have recall rights. She did not apply for the program while working.

14. Levitt retained Attorney Goddard to assist her with this Complaint. His fees amounted to $270.00 (See Complainant's Exhibit 5).

15. The probable starting date had Levitt been hired was September 3, 1985.

16. Levitt earned $653.63 at the Animal Clinic in 1986 prior to starting with General Electric. She was earning $5.25 an hour. During the period September 3, 1985 through December 31, 1985, she earned $2,912.5 1. She worked less than full-time for about a month prior to delivery, in order to train her replacement on the job and was off work for four weeks after delivery.

17. Mark Miller, a prior General Electric employee (1974- 1977), was hired on September 22, 1985, as a temporary employee and worked until August of 1986. He does not recall Crist asking him specifically if he would be available for the entire temporary period.

18. Daniel Wood who was on lay off from the Iowa Army Ammunition Plant (IAAP) was hired by General Electric for temporary employment. During this period he was recalled and quit his job with General Electric to return to the IAAP. He doesn't remember whether Crist asked him specifically as to his continued availability. He required no training for the temporary work. [Tr. R. 60]

19. Steven Hill, another employee of IAAP on lay off, applied and was hired for a temporary position with General Electric. He started approximately the last week in October and left the last week in November when he was recalled by IAAP. Hill had worked for General Electric 8 years ago. He required no training for his temporary work. [Tr. R. 88]

20. The Burlington operation of General Electric, since 1961, was the manufacturing of switch gears, an electrical distribution business. In 1983, as a result of economic conditions, they undertook a study which resulted in reorganization. Layoffs resulted. In January 1984, the business was restructured and a vacuum interrupter operation was brought into the Burlington plant from Philadelphia. In January 1985, the low voltage product line was transferred from North Carolina to Burlington and the Burlington switchboard product line of about 200 employees transferred to Philadelphia. This transition necessitated hiring temporary employees. Crist was requested to consider first individuals with recall rights, then individuals with General Electric experience but no recall rights and next people with manufacturing experience. This order was to minimize retraining. The temporary jobs were expected to last through December 1985.

21. Respondents state that their failure to hire Levitt was not based on her pregnancy, but was based on the fact that she would not be available to work during the entire period of the temporary employment.

22. Respondents also state that they would not have hired anyone who either indicated, or the company learned, would not be available. However the G.E. employee relations specialist did not ask applicants about continued availability (Tr.pp. 197-198), and none of the applicants who were hired could recall the Crist asked them about availability. (Tr.pp.49,79,87,140).

23. Respondents further state that had Levitt's due date been after December 31, 1985, she would have been hired.

24. One-hundred sixteen (116) temporary employees were hired during this transition time. Prior to that, 88 employees were recalled. The last temporary employee hired in 1985 was hired on November 18, 1985. All but 3 completed their temporary term of employment.

25. Ellen Halton-Dean, a former employee, was called back to work. She held another full-time job and Crist expressed his concern for her ability to handle both jobs. She continued working until August 1986. She testified that the length of training required depended upon the person and task. The training could last for a couple hours to a couple of weeks.

26. Dora L. Horn, Plant Nurse, has been employed by Respondents for 18 years. She interviewed Levitt on August 20, 1985. When Horn found out Levitt was pregnant and that her expected delivery date was October 12, she told Crist. From her experience, Horn believed the average time off because of childbirth was six weeks. She did not discuss the amount of time off with Levitt.

27. Dolhancyk, employee relations manager for General Electric, testified that if Levitt had been applying for a permanent position the unavailability because of pregnancy would not have made a difference.

28. John Crist was a specialist in employee relations for General Electric during the time at issue. After he was informed by Horn that Levitt was pregnant and her delivery date was in October, he assumed she would be unavailable for work for possibly six weeks and that under those circumstances it would not be feasible to hire her.

29. To qualify for the IDP program, it was necessary to be a full-time employee for six or more months or to have recall rights. To have recall rights, the employee was required to have 52 consecutive weeks of employment prior to lay off. It was also required that employees absent for more than two weeks during the 52 consecutive weeks have the excess of two weeks deducted from their total number of weeks.

30. The utility operators' area of work included a variety of jobs.

31. Crist testified that during this period of time he posted jobs on almost a daily basis and that it was difficult to fill some jobs because employees did not want to transfer into a temporary job. He said that in a few cases he even hired off the street.

32. Levitt did not again contact Crist. The next contact was when Crist called her in January 1986 to see if she was available to start work in February.

33. The rate of pay for employees starting in September 1985 was $9.655, for first shift work.

34. The temporary employees hired in 1985 were covered by the company's insurance policy.

CONCLUSIONS OF LAW

1. The complaint was timely filed, processed and the issues in the complaint are properly before the Hearing Officer and ultimately before the Commission.

2. General Electric Company, and John Crist are "employers" and "persons" as defined in Iowa Code section 601A.2(2) and (5)(1985), and are therefore subject to Iowa Code §601A.6 and do not fall under any of the exceptions of §601A.6(5).

ISSUE I - DOES THE LAW PROHIBITING DISCRIMINATION ON THE BASIS OF SEX (PREGNANCY) PROHIBIT DISCRIMINATION ON THE BASIS OF POTENTIAL UNAVAILABILITY DUE TO PREGNANCY RELATED CONDITIONS?

1. The applicable statutory, provision is as follows:

1. It shall be an unfair or discriminatory practice for any:

a. Person to refuse to hire, accept, register, classify, or refer for employment .... or to otherwise discriminate in employment against any applicant for employment ... because of the ... sex ... of such applicant ... unless based upon the nature of the occupation. If a disabled person is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by this subsection.

240 Iowa Admin. Code §3. 10 provides:

(1) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Chapter 601A, and may be justified only upon showing a business necessity.

(2) Disabilities caused or contributed to by pregnancy, miscarriage, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health , or temporary disability insurance or sick . leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availabilities of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Complainant claims she was not hired because she was pregnant. Respondents claim that they did not hire Complainant because she would not be available the entire period of the temporary employment and not because she was pregnant. The law is clear that treatment on the basis of pregnancy is included in the coverage on the basis of sex. 240 Iowa Admin. Code section 3.10; 42 U.S.C. 2000e(k), Title VII of the Civil Rights Act of 1964. The Pregnancy Discrimination Act

enacted in 1978 provides that discrimination on the basis of "pregnancy, childbirth, or related medical conditions" constitutes sex discrimination under Title VII. The Act amended Title VII's section on definitions as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work...

42 U.S.C. §2000e(k).

The law is also clear in that it not only protects pregnant women, but it protects women affected by childbirth and related medical conditions. The unavailability espoused as the reason for failure to hire Complainant would be unavailability due to childbirth and medical related conditions. The broad purpose of the Act is to prevent discriminatory treatment of women in all aspects of employment including the opportunity to be hired for a job. General Electric urged that pregnancy was not a factor in their refusal to hire Cheryl Levitt, but that her anticipated delivery date which indicated unavailability for some part of the period of employment precluded her employment. General Electric further urged that there was a critical need to minimize inefficiencies which would be attendant with the hire of someone who would require a 4 to 6 week leave of absence.

It is not logical to separate unavailability because of pregnancy from the state of pregnancy. Women who are pregnant will have a child unless prior miscarriage or abortion occurs. Either of the latter events may result in medical related conditions which are protected under the Act. General Electric also suggested that unavailability during the employment period for any reason would have disqualified an applicant for employment; however, G.E. had no consistent practice or procedure with which to inform itself or the potential unavailability of non- pregnant applicants. None of the persons who were interviewed by John Crist and hired for this temporary employment could recall any inquiry by G.E. as to their continued availability. It is not relevant to our inquiry whether various applicants volunteered information concerning potential unavailability. Three male applicants who were hired during this period in fact left the employment of G.E. before the employment period ended. The only person denied employment on the initiative of G.E. was Cheryl Levitt. It is therefore concluded that the policy of Respondents was to exclude applicants on the basis of unavailability due to childbirth and related medical conditions, and that this is discrimination on the basis of sex.

ISSUE II - WHAT IS THE PROPER DEFENSE IF EXCLUSION FROM EMPLOYMENT BECAUSE OF POTENTIAL UNAVAILABILITY DUE TO PREGNANCY IS DISCRIMINATORY?

Respondents state in defense that their policy is to not hire anyone who cannot assure them of their continued availability when they are hiring applicants for temporary positions, that this is not their policy for permanent positions. They state that they would have hired Levitt had her

delivery date not fallen within the temporary employment period. Respondents urge that they did not treat Levitt any differently than they treated other applicants.

Under the McDonnell-Douglas Con). v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1975), basic allocation of burdens and order of presentation of proof in a different treatment case, Levitt would also have established a prima facie case. She is female, a member of a protected class, applied and was qualified for an available position, she was not hired, and General Electric continued to hire non-pregnant applicants.

Respondents did not sustain their burden under a different treatment theory in that the testimony offered negated the existence of any policy or practice on the part of General Electric of assuring the continued availability of all applicants for employment. The Respondent's witnesses did not remember being asked about continued availability or specifically requested to commit to the entire period.

Where a case of discrimination is proved by direct evidence, it is incorrect to rely on differential treatment method of proof as set forth in McDonnell Douglas v. Greene; Lee v. Russell County Board of Education, [30 EPD ¶33,022] 684 F.2d 769,
774 (11th Cir. 1982).

The legal standard changes:

> Once an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached absent the presence of that factor.

Id. (citing Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471) (emphasis added); Bell v. Birmingham Linen Service, 32 EPD ¶33, 831 (11th Cir. 1983). The court in Bibbs v. Block, 749 F.2d 508 (8th Cir. 1984), also held that after a finding of unlawful discrimination is made, the defendant is allowed a further defense in order to limit relief if it can prove by a preponderance of evidence that the plaintiff would not have been hired even in the absence of the proven discrimination.

This Respondents have failed to do. As a matter of fact, Respondents stated that, but for her unavailability based on the projected date of delivery (childbirth) and possible additional time off due to related medical conditions, Levitt would have been hired.

The BFOQ (bona fide occupational qualification) is the statutory, provided defense applicable to intentional sex discrimination. The EEOC Guidelines on pregnancy discrimination, 29 CFR §1604.10(1980), establish that employment policies or practices that negatively impact on female employees because of pregnancy, childbirth and related medical conditions constitute disparate treatment based on sex. BFOQ occurs where an employer takes adverse action against or excludes persons because of their sex. The business necessity defense comes into play where the employer has a criterion for work which is facially neutral, but excludes members of one sex at a greater rate than members of the other sex, thus creating an adverse impact. The focus is on

the validity of the job qualifications and their relationship to the work performed. The focus in a BFOQ case is on the legitimacy of an assigned stereotype. B. Schlei & P. Grossman, Employment Discrimination Law, 359 (2nd Ed. 1983). Respondents do not claim a BFOQ defense in that they deny their refusal to hire Levitt was based on her sex (pregnancy). Respondents claim they have a neutral policy which treats all applicants the same if they cannot promise to work the entire period of employment. The record, however, fails to establish any such neutral policy: the only Potential unavailability uncovered by G.E. and acted upon by G.E. was the pregnancy-related unavailability of Cheryl Levitt.

The General Electric plant in Burlington was in a period of transition with exchanges of manufacturing units with their plants in Philadelphia and North Carolina. It became necessary to hire temporary employees to facilitate the transition. Applicants were considered in at least three categories: 1) former employees with right of recall, 2) former employees without right of recall; and, 3) people with manufacturing experience. Levitt belonged to the second group. She had worked as a utility operator for General Electric for approximately two years. Respondents were attempting to minimize retraining. Levitt was experienced. Retraining, if any, would have been minimal. Had Levitt been hired she would have started about September 3rd. Her projected due date was October 12. Crist assumed she would need a possible leave of six weeks and that it wouldn't be feasible to hire her under those circumstances. Levitt actually was off work four weeks pregnancy leave from the job she had.

In a similar case, Marafino v. St. L. County Circuit Court, 29 FEP Cases 621 (1982) the court ruled that the pregnant applicant had proven a prima facie case under the different treatment theory, but the Respondent successfully rebutted the prima facie case because he was concerned about the impact her planned leave of absence would have upon the respondent and complainant's training. The Court found further that the complainant had not demonstrated respondent's proffered reason was a pretext. Marafino can be distinguished in several ways. General Electric had a policy and practice in this temporary hiring period of excluding pregnant females with delivery date falling within the projected time period. The fact that a woman who is already an employee is allowed to take pregnancy leave has no relevance to the inclusion or exclusion of pregnant women in the hiring process.

In Marafino, the training process was from a few days to four months depending on the prior experience and ability of the applicant and was in a highly specialized body of law. In the case at issue, Levitt had two years experience in a job for which there was hiring. Levitt required no training in order to perform her expected tasks at General Electric.

CONCLUSION

It is concluded, that because unavailability based on pregnancy is inextricably connected to pregnancy, and there was no evidence of any neutral, even-handed policy by G.E. to screen all applicants for all reasons for potential unavailability, that G.E. denied Cheryl Levitt employment on the basis of pregnancy (sex).

Respondents have violated Iowa Code section 601A.6, in refusing to hire Complainant on the basis of sex (pregnancy).

REMEDIES

Iowa Code section 601A.15(8)(a) provides for remedial action when it is determined that respondents have engaged in a discriminatory or unfair practice. Complainant requests back pay, maternity leave benefits, education benefits and attorney fees.

The evidence does not support an award of educational benefits. Levitt does not meet any of the requirements necessary to request those benefits. She did not request benefits while she was employed by General Electric. She was not eligible for recall rights when she enrolled for the college courses.

Statements from her attorney, Goddard, are itemized in Complainant's Exhibit 5. Respondent should pay Complainant $270.00 for those fees.

Levitt's probable starting date had she been hired was September 3, 1985. She was actually hired on February 3, 1986. The rate of pay for first shift work was $9.655 per hour. The rate of pay for second shift work was $10.60 per hour. There was a 50-50 chance of working on either shift, therefore, her back pay should be based on the average of the two (20.255 - 2) = $10.1275. Based on a 40 hour week the weekly wage would have been $405. 10. There would have been 20 weeks between September 3 and February 3, less 4 weeks of pregnancy leave or 16 weeks at $405. 10 = $6481.60. Pay during leave was 60 % of the weekly pay beginning with the 8th day with a maximum of $225.00 a week. Sixty percent of $405. 10 = $243.06, therefore, pay during pregnancy leave would have been $225.00 x 3 weeks = $675.00. The total "would have" earnings is $7156.60. Levitt actually earned $2912.51 from September 3, 1985 to December 31, 1985 and $653.63 from January 1, 1986 to February 3, 1986, for a total of $3566.14. Levitt should receive as back pay the difference between her "would have" earnings of $7156.60 and actual earnings of $3566.14, or $3590.46 plus interest at 10 % per annum from September 3, 1985, the date her complaint was filed, until paid in fall.

RECOMMENDED DECISION AND ORDER

1. The Respondents, General Electric Company and John Crist, violated Iowa Code section 601A.6 in failing to hire Cheryl Levitt.

2. IT IS HEREBY ORDERED that Respondents shall pay Cheryl L. Levitt $270.00 for her attorney fees.

3. IT IS FURTHER ORDERED THAT Respondents shall pay Cheryl L. Levitt $3590.46 as back pay plus 10% interest per annum beginning on September 3, 1985, and accruing until paid in full.

4. IT IS FURTHER ORDERED that Respondents shall pay hearing costs in the amount of $745.90, the cost of the transcript.

Signed this 12th day of February, 1988.

JOHN STOKES, Commissioner

Iowa Civil Rights Commission

NOTE: On November 27, 1989, the Iowa Court of Appeals affirmed a District Court Decision reversing this Commission Decision. This decision shall be published in the next volume of the case reports.