

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

DEBRA VAN SCOY, Complainant,

VS.

BURLINGTON MEDICAL CENTER and BOARD OF DIRECTORS OF BURLINGTON MEDICAL CENTER, Respondents.

CP# 12-84-12383

THIS MATTER, a complaint filed by Debra Van Scoy (Complainant) with the Iowa Civil Rights Commission (Commission) charging the Burlington Medical Center and the Board of Directors of the Burlington Medical Center (Respondent) with retaliation based on the filing of a complaint with the Commission, came on for hearing in Des Moines, Iowa on the 28th day of April 1987 before Ione G. Shaddock serving as Hearing officer. Complainant was represented by Teresa Baustian, Assistant Attorney General. Respondent was represented by Gerald D. Goddard, Attorney at Law.

Any ruling reserved on motion or objection will be made in this proposed decision or be deemed denied.

The issues in this case are as follows:

ISSUE I - Did Respondent terminate Complainant in retaliation for the filing of a prior complaint?

ISSUE II - If Respondent did retaliate against Complainant for filing a complaint with the Commission, what should the remedy be?

ISSUE III - Respondent moved for dismissal for failure to establish a prima facie case; Respondent urges entitlement to a jury trial; and, Respondent moved that any claim for damages for emotional distress be stricken. (See Transcript pp. 103-105).

FINDINGS OF FACT

1. The Complainant, Debra Van Scoy, timely filed verified complaint CP# 12-84-12383 on November 24, 1984, charging Respondents, Burlington Medical Center and Burlington Medical Center Board of Directors, with retaliation based on filing a complaint with the Commission.
2. The case was investigated, probable cause found, conciliation unsuccessfully attempted and the case proceeded to public hearing with Notice issued on January 21, 1987.
3. Complainant started to work for Respondent in August 1976 as a nurse's aide. She continued to work while going to school to get her certification as a Licensed Practical Nurse, (LPN). In November 1980, she began working as an LPN. She worked on what is called 3-North, Klein

Unit, and 5-West. 3-North was basically a cardiac unit; Klein a nursing home unit; 5-West an orthopedic and surgery unit.

4. Complainant, in 1983, worked full-time (40 hours) on the 3- 11:30 p.m. shift.

5. In August 1983, Complainant became pregnant and put in a request for an every-other-weekend position (16 hours per pay period) because she did not want to work full time after the baby was born. On September 1, 1983, her request was granted for an every other weekend position, 3-11:30 p.m. on 5-West. The change was to start with pay period beginning December 5, 1983. Complainant understood that her full time position would be posted, i.e.. open for bids on October 1, 1983.

6. Complainant started to have back problems due to her pregnancy. She was restricted in lifting, pushing, pulling, bending and stooping. She then took a medical leave of absence beginning November 7, 1983. Note that this occurred after her full- time job was posted, but before she started working every other weekend. Her anticipated delivery date was January 27, 1984. Her planned return date was in March 1984.

7. In late February 1984, Complainant talked with Respondent about returning to work in March. She was told there were no positions available. She was also told that they would call her on March 12 and inform. her of positions available. They did not call, nor did Complainant call again. The next contact was in August when Complainant was offered the job mentioned in Finding of Fact #9.

8. Complainant's husband also worked for Respondent. They had worked out their shift arrangement so one or the other would be home to care for the children. He worked the 7-3 shift and she had worked the 3-11 shift.

9. On April 6, 1984, Complainant filed complaint CP# 04-84-11582 with the Commission alleging discrimination on the basis of sex against Respondent. Respondent was aware of this filing. This case was pending during the time at issue.

10. In August 1984, Complainant went to the office of Respondent and requested papers from her personnel file for the CP# 04-84-11582 complaint. On August 29, 1984 Respondent offered Complainant a 7:00 - 3:30 position in the psychiatric unit. She told them she did not want to work the day shift. Her reason was that she didn't want to worry about finding and paying for a baby sitter. On August 31, 1984, she received a call from Respondent offering her a float position on the 7:00-3:30 shift. Complainant told Respondent she did not want a float position. Respondent asked Complainant at that point where she would like to work in the hospital.

11. On September 12, 1984, Respondent called Complainant and offered her a 3:00 - 11:30 shift in the Klein unit. This was the shift that Complainant wanted. She refused the offer because she did not like to work in that particular unit. She had not, however, worked in that unit as an LPN, but only as a nurse's aide. Complainant was upset with Respondent over the fact that she had not been contacted between March and August. She was "mad" and admits that is part of the reason for refusing the job offers.

12. On September 20, 1984, Complainant received a letter from Respondent stating that she had been terminated for failure to take the jobs offered.

13. Complainant had exhausted her leave benefits in November 1983 and was on unpaid leave status. She understood that she was not guaranteed a position on 5-West or the 3:00 11:30 shift, that the policy stated only that she would be given preference for such an opening.

14. In January 1984, a Martha Lawrence was given a position in the Klein unit, every other weekend, 16 hours per pay period, 7:00 to 3:30 shift. It is noted that, not only was this position in the Klein unit which Complainant did not want and on the day shift which Complainant did not want, but Complainant was still on pregnancy leave at this time.

15. During the period of time encompassing June 1984, there was a decreased patient census and increased patient acuity at the hospital. It was during this time that Sherry Trumbo was placed in a position on 5-West. This, however, was a full time position. Trumbo had greater seniority and a better work record than Complainant. The work hours vacated by Trumbo were allotted to an RN as opposed to an LPN position. There were no other part-time positions available for Complainant between March 1984 and the time the job offers were made to her.

16. The "Request for Leave of Absence" form, signed by Complainant, includes the following provisions:

3. I cannot be granted the same unit when returning from my leave of absence except as stated in #4.

4. If I have completed one year of employment I can be eligible for a six weeks period for major surgery, a fractured bone or bones requiring an absence of six weeks or for a pregnancy delivery without having my position posted. To be eligible I must agree to take accrued and earned sick leave and vacation for the entire six weeks period, if accrued.

5. If there are not any openings I shall be given preference for an opening with the same number of hours and shift as I was working just prior to my leave of absence.

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. Burlington Medical Center and Burlington Medical Center Board of Directors, come under the definition of "employer" or "person" in Iowa Code section 601A.2(2) and (S)(1983), and are therefore subject to Iowa Code section 601A. 11. The applicable statutory provision is as follows:

It shall be an unfair or discriminatory practice for:

2. Any person to discriminate against another person in any of the rights protected against discrimination on the basis of .. sex ... by this chapter because such person has lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter, or has filed a complaint ... under this chapter.

ISSUE I - DID RESPONDENT TERMINATE COMPLAINANT IN RETALIATION FOR THE FILING OF A PRIOR COMPLAINT?

1. In order to establish a claim of retaliation, complainant must show: a) protected participation or opposition known by the retaliator; b) action(s) disadvantaging person engaged in protected activity; and, c) a causal connection between the first two elements, i.e., a retaliatory motive playing a part in the adverse action. Grant v. Bethlehem Steel Corp., 622 F.2d 43, 22 FEP 1596 (2d Cir. 1980). Generally, then the order and allocation of proof set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-05, 5 FEP 965, 969-70 (1973) follows.

2. In the case at issue, Van Scoy did file CP# 04-84-11582 in April 1984, which is protected activity under Chapter 601A. She was terminated by Respondent on September 20, 1984, disadvantaging her in the area of employment. Was there a causal connection between the protected activity and the termination?

Several types of circumstantial evidence have been identified which can support an inference that a retaliatory motive played some part in adverse treatment: a) after learning of the protected action, the employer treated the employee differently from similarly situated nonprotected employees; b) after learning of the protected activity, the employer treated the employee differently than before the protected activity, including surveillance; c) closeness in time between the employer's knowledge of the protected activity and the adverse activity; d) attempts to conceal the fact that the protected action was known at the time of the adverse action. Schlei B. and Grossman P., Employment Discrimination Law, 558-559 (2d Ed. BNA 1983).

There is no evidence that after learning of the protected activity, Respondent treated Complainant differently from similarly situated nonprotected employees.

There is no evidence that Respondent attempted to conceal knowledge of the protected action. Respondent was served the complaint on April 19, 1984. Therefore, they had no knowledge of the complaint when they hired Martha Lawrence in January 1984. In any case, Van Scoy was still on pregnancy leave. Respondent would have known of the complaint when they placed Trumbo in the position on 5-West. That was in June and the termination did not occur until September. There was no closeness in time between those two events.

Van Scoy appears to be alleging that her visit to the office of Respondent to request papers from her personnel file for the complaint then pending set off a series of three job offers to her - all of

which were deliberately undesirable. Her refusal of the dim job offers then resulted in her termination. The allegation is that Van Scoy was suddenly offered the opportunity to return to work when she had not been offered that opportunity from the end of March when her leave was up and August when she requested the papers. The question is whether the jobs offered were jobs that Respondent knew Van Scoy would not take so that they could then terminate her or whether the jobs offered were jobs which then became available? This action, whatever the motive, supports an inference that a retaliatory motive played some part in the treatment of Complainant. Once this stage is reached, there are at least two reasons for the action, one of them retaliation. Schlei and Grossman have identified various standards of causation which have been applied in Section 704(a) cases (42 U.S. C. Section 2000 et seq.) a) retaliation plays any part or taints the decision to take adverse action; b) retaliation is "a significant" or "a motivating" factor or a cause to "any substantial degree"; c) retaliation is a "moving cause", "determining factor", or the "principle reason", d) proof that the nonretaliatory motive would not have caused the adverse action without the protected activity [at 560-561, cites omitted). The burden of proof remains with the Complainant.

Van Scoy wanted a part-time, every other weekend, 16 hour per pay period, 3:00 to 11:30 p.m., LPN position. The first job offered her fit the criteria except that it was the day shift which she did not want because of a baby sitting problem. The second job became available because of Complainant's refusal to take the first offer. The person in the float position took the job which Complainant refused thereby opening up the "float" position. Van Scoy did not want a "float" position. The third job offered fit all of Complainant's criteria. This time the offer was refused because she did not want to work in the particular unit. Van Scoy was aware that opportunity to bid into other positions would be available once she was back on the job. She was angry at Respondent, however, and felt they should have offered her a job earlier. Except for the two positions, the Lawrence position for which she was unavailable and the Trumbo position for which she had less seniority, there was no evidence that there were other positions available prior to the time of the first job offer. Complainant offered no evidence that the jobs offered to her were not actual job vacancies. Under the terms of the leave of absence, Complainant was not guaranteed her same unit. She was on leave more than six weeks. She was offered the same number of hours and shift as scheduled for her prior to the leave. There was not sufficient evidence to prove that Respondent made the job offers with full knowledge that they would not be accepted by Complainant. It cannot be concluded that the job offers and subsequent termination would not have occurred had Complainant not filed the prior complaint nor that retaliation was the motive for Respondent's actions. The Complainant has failed to prove by a preponderance of the evidence that Respondent retaliated against her. This case should be dismissed.

ISSUES II and III - Based on the decision in Issue I, these issues need not be addressed.

RECOMMENDED DECISION AND ORDER

1. The Complainant, Debra Van Scoy, has failed to establish a violation of Iowa Code section 601A.11 based on retaliation for filing a complaint with the Iowa Civil Rights commission.
2. This case, CP# 12-84-12383, is dismissed.

Signed this 19th day of August, 1987.

IONE G. SHADDUCK

Hearing officer

FINAL DECISION AND ORDER

The Iowa Civil Rights Commission has received and reviewed the Proposed Findings of Fact, Conclusions of Law, Rulings, Recommended Decision and Order of the Hearing Officer dated August 19, 1987, Respondent's Brief in Support of Hearing Officer's Recommended Decision, and Brief on Behalf of Complainant.

On September 25, 1987, the Iowa Civil Rights Commission, at their regularly scheduled meeting, adopted the proposed decision as its own Findings of Fact, Conclusions of Law, Rulings, Recommended Decision and Order.

Signed this 7th day of October, 1987.

John Stokes, COMMISSIONER