

Supreme Court No. 20050311

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

DEBORA HENG,

Appellee,

vs.

**ROTECH MEDICAL CORPORATION AND
PSI HEALTHCARE, INC.,
d/b/a ARROWHEALTH MEDICAL SUPPLY,**

Appellants.

**APPEAL FROM THE DISTRICT COURT
COUNTY OF CASS
STATE OF NORTH DAKOTA**

BRIEF OF APPELLEE, DEBORA HENG

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT CORRECTLY PLACED THE BURDEN OF PROOF UPON DEFENDANT ARROWHEALTH TO REFUTE THE PRESUMPTION CREATED BY HENG'S SUCCESSFUL PRESENTATION OF A PRIMA FACIE CASE OF RETALIATION.
- II. WHETHER THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY FINDING THAT DEFENDANT ARROWHEALTH UNLAWFULLY RETALIATED AGAINST HENG IN VIOLATION OF N.D.C.C. § 34-01-20.
- III. WHETHER THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY NOT BELIEVING DEFENDANT'S ARROWHEALTH'S ALLEGED NON-RETALIATORY REASON FOR TERMINATING HENG'S EMPLOYMENT.
- IV. WHETHER THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY EXCLUDING DEPOSITION TESTIMONY UNRELATED TO THE DEPOSITION TESTIMONY OFFERED BY HENG.
- V. WHETHER THE COSTS AND ATTORNEYS FEES AWARDED TO HENG BY THE TRIAL COURT WERE REASONABLE.

STATEMENT OF THE CASE

This suit arises out of Defendants Rotech Medical Corporation and PSI Healthcare, Inc., d/b/a Arrowhealth Medical Supply (“Arrowhealth”) termination of Plaintiff Debora Heng’s (“Heng”) employment in violation of the North Dakota Whistleblower Law, N.D.C.C. § 34-01-20. Specifically, Heng was employed by Arrowhealth as its Fargo Locations Manager from August of 2001 until January 18, 2002. (App.¹ 87:1; 92:35; 176:17-19; Supp. App.² 5, Tr. 52:17; Supp. App. 30, Tr. 98:5-7). Heng was terminated from her position at Arrowhealth shortly after she complained to her supervisor, Adam Blumenshein (“Blumenshein”) and Arrowhealth’s Corporate Compliance Coordinator, Julie Johnson (“Johnson”), that Arrowhealth’s policies for the delivery of oxygen supplies violated North Dakota Respiratory Care regulations.

Heng initiated this lawsuit against Arrowhealth on July 24, 2002, for breach of contract, retaliatory termination in violation of N.D.C.C. § 34-01-20, and intentional infliction of emotional distress. (Docket³ No.1, App.18). The Honorable Cynthia Rothe-Seeger granted Arrowhealth summary judgment dismissal of Heng’s claims for retaliatory termination and breach of contract, (Docket: No.45, No. 82), and Heng subsequently voluntarily dismissed her claim for emotional distress in order to appeal the dismissal of the Whistleblower Claim. (Docket No. 96). Arrowhealth subsequently moved the trial court for an award of attorneys fees related to Heng’s whistleblower claim, (Docket No. 111), which the trial court granted in the amount of \$57,707.00 on April 19, 2004. (Docket No. 121.) This Court then affirmed dismissal of the breach of

¹ “App.” Refers to the Appendix to Brief of Appellant filed on January 31, 2006.

² “Supp. App.” refers to Supplemental Appendix to Brief of Appellee filed on March 6, 2006.

³ “Docket” followed by a number is in reference to the assigned number for the document as referenced in the Docket of the Cass County District Court, found at Appendix page 1.

contract claim, but remanded the Whistleblower Claim for retaliatory termination for trial. (Docket No. 167, No. 168.)

Arrowhealth listed Mark Rye, Angie Leiss, and Julie Johnson as “will call” witnesses in its pretrial statement to the trial court. (App. 58-59.) Heng’s counsel had requested Arrowhealth’s counsel to make Johnson available during her case in chief, as Johnson was an Arrowhealth employee, and could not be subpoenaed because she was a Minnesota resident. (Supp. App. 42, Tr. 250:16-21.) Arrowhealth refused to make Johnson available for Heng’s case-in-chief, and insisted that because Johnson would be testifying as a part of Arrowhealth’s defense, Heng’s counsel could simply examine her at that time. (Supp. App. 43, Tr. 251:23-252:1.) Heng’s counsel moved the trial court for permission to read portions of Johnson’s deposition testimony into the record, which was granted. (Supp. App. 47, Tr. 257:8-13.) Arrowhealth’s counsel responded by moving the trial court for permission to read additional portions of Johnson’s deposition transcript into the record, which was denied. (Supp. App. 44-45, Tr. 252:16-253:25.)

On the fourth day of trial, Arrowhealth’s counsel notified the trial court and opposing counsel that it did not intend on calling Rye or Leiss as witnesses after all. (Supp. App. 81-82, Tr. 838:24-839:13.) In response, Heng’s legal counsel moved the trial court for permission to introduce deposition testimony of them taken during the discovery phase of this suit, which was granted. (Supp. App. 1, Tr. 30:20-21; Supp. App. 2, Tr. 33:11-12; Supp. App. 3, Tr. 35:24-36:1.) Arrowhealth’s counsel requested that it introduce additional portions of both depositions; the trial court admitted all of the portions of Leiss’ transcript that Arrowhealth requested, but excluded some portions of the Rye deposition on the grounds that they exceeded the people of Heng’s case on

rebuttal. (Supp. App. 81, Tr. 838:7-15; Supp. App. 83, Tr. 840:4-10; Supp. App. 84, Tr. 863:14-25.)

After a six-day bench trial, the Honorable John Irby issued Findings of Fact, Conclusions of Law, and Order for Judgment in Heng's favor. (App. 86). The Order for Judgment included an award of \$35,195.00 in backpay to Heng, and an award of reasonable costs and attorneys fees. (App. 96). After subsequent briefings and a hearing held on July 7, 2005, Judge Irby amended his Order for Judgment to include attorney's fees in the amount of \$207,147.70 and costs in the amount of \$13,615.22. (App. 165).

Arrowhealth has appealed the entry of judgment and award of attorney's fees and costs in Heng's favor. (App. 167). This brief is submitted in opposition to that appeal.

STATEMENT OF FACTS

Heng was hired as Arrowhealth's Fargo Location Manager by Blumenshein on August 10, 2001. (App. 98:1; Supp. App. 4, Tr. 50:9; Supp. App. 5, Tr. 52:17-18.) Blumenshein was her immediate supervisor during her employment. (Supp. App. 6, Tr. 53:17-19.) There were only a handful of employees who worked out of the Fargo office, who included service technicians, Danny Finseth ("Finseth"), Randy Huss ("Huss"), and Michael Jacobson ("Jacobson"); respiratory therapist, Brenda Lusty ("Lusty"); customer service representative, Angie Leiss ("Leiss"); and marketing person, Cathie Kays ("Kays"). (Supp. App. 7, Tr. 54:2-17). Kays, Lusty, and the service technicians spent most of their workday outside the office, while Leiss and Heng normally were the only employees present at the Fargo office during the workday. (Supp. App. 8, Tr. 55:10-14; Supp. App. 9, Tr. 59:7-12; Supp. App. 10, Tr. 61:2-7, 15-24).

Heng assisted the company in overcoming many professional obstacles during her employment at Arrowhealth. First, she moved the entire office from its Fargo location to its West Fargo location. (Supp App. 11, Tr. 64:11-24). Heng then worked diligently preparing the office for the JHACO accreditation inspection, which the office passed with flying colors. (Supp App. 12, Tr. 65:11-25; Supp. App. 13, Tr. 66:1-25). At the same time, she was personally dealing with the unfortunate task of caring for her dying mother and arranging her funeral services during the week of the JHACO inspection. (Supp. App. 14-15, Tr. 67 - 68).

I. The North Dakota Regulatory Non-Compliance Reports.

Arrowhealth's customary practice and procedure prior to December 20, 2001, was to have its service technicians, who were not licensed healthcare professionals, assemble its customers' oxygen delivery systems and instruct those customers how to use those devices. (App. 87:8, Findings, Irby J. 5/12/05). Specifically, Arrowhealth's job description for service technicians stated "educate customers in proper use and care of respiratory and HME equipment in a home setting." (App. 88:10, Findings, Irby J. 5/12/05). In November of 2001, Arrowhealth hired Jacobson as a service technician. (App. 89:15, Findings, Irby J. 5/12/05).

During his interview Jacobson asked Heng if it was legal that service technicians assemble oxygen systems and instruct patients on their use because his previous employer, Altru Health Systems, prohibited him from performing these duties as a service technician. Heng told him she believed it was. (Supp App. 65, Tr. 534:17-25; Supp. App. 66, Tr. 535:1:3). Heng then asked her superior, Blumshein, about the

regulation and was informed Arrowhealth was in compliance. (App 89:15, Findings, Irby 5/12/05.).

In December, Jacobson mentioned to Huss that he believed Arrowhealth's practice of having service technicians assemble oxygen delivery systems and instructing customers in how to use them was illegal. (Supp. App. 53, Tr. 311:6-312:2; Supp. App. 57, Tr. 320: 16-19). Huss eventually passed Jacobson's concern to Heng. (Supp. App. 57, Tr. 320:20-25). Heng, in turn, reported Jacobson's concern to Blumenshein over the phone in late November or early December of 2001. (Supp. App. 16, Tr. 74:16-21, App. 89:16, Findings, Irby J. 5/12/05). Blumenshein responded that Arrowhealth complied with all of the applicable rules and regulations. (Supp App. 16, Tr. 74:19-25). Although Heng told Huss and Jacobson about her inquiry to Blumenshein, they both continued to express their concern about the legality of this practice. (Supp App. 54, Tr. 314:10-315:13; Supp. App. 17, Tr. 75:6-12). Because of their concern, Heng reported the issue again, this time to Blumenshein and Johnson in person during a manager's meeting at Arrowhealth's Duluth, Minnesota, office on December 19, 2001. (App. 90:18, Findings, Irby J. 5/12/05; Supp. App. 17, Tr. 75:1-3, 13-15). Heng clearly recalls bringing her concern to Blumenshein and Johnson's attention at that time. (Supp. App. 17, Tr. 75:13-25; Supp. App. 18, Tr. 76:1-4; Supp. App. 39, Tr. 211:2-9).

Blumenshein perused the regulation with Johnson and Heng at the December 19, 2001, meeting, and indicated that he didn't think it applied to Arrowhealth. Johnson also read it and said Arrowhealth was in compliance. (Supp. App. 18, Tr. 76:1-11; App. 90:21, Findings Irby J. 5/12/05; 1.) Blumenshein later characterized this meeting of December 19, as partly disciplinary although he admits Heng was only told that the

purpose of the meeting was to discuss the Fargo office's current financial condition. (Supp. App. 39, Tr. 211:7-212:1).

Subsequent to her meeting with Blumenshein and Johnson, Heng telephoned her friend Joan Kirk and spoke with her husband, Judge Michael Kirk. (Supp. App. 19, Tr. 81:1-10; Supp. App. 48, Tr. 293:1-21.) Judge Kirk testified that at this time, Heng was very upset by Blumenshein's position that Arrowhealth was not violating the North Dakota regulation pertaining to the assembly of oxygen delivery systems and they discussed the regulation. (Supp. App. 19, Tr. 81:1-4; Supp. App. 48, Tr. 293:6-21.) Later that evening Heng went to Judge Kirk's home with a copy of the regulation and discussed the matter with him in more detail. She was still upset and concerned that Arrowhealth was illegally compromising patient safety to decrease costs. (Supp. App. 20, Tr. 82:15; Supp. App. 49-50, Tr. 296:2-297.)

Judge Kirk testified that Heng was conflicted by her interpretation of the regulation and Blumenshein's and Johnson's interpretation but his sense was that she knew her interpretation of the regulation was correct. (Supp. App. 49-50, Tr. 296:14-297:1-15.) Judge Kirk then told Heng that she should research the matter further, including talking to someone from the North Dakota Respiratory Care Board. (Supp. App. 52, Tr. 300:2-23.) He knew that Heng's personality would not allow her to continue a practice she believed to be illegal. (Supp. App. 52, Tr. 300:2-4).

On December, 21, 2002, after she returned to Fargo from the Duluth meeting, Heng learned that her predecessor, Barb Strum, had also addressed concerns about the Fargo office's compliance with this regulation, and had been told by the corporate office

that Arrowhealth's policies complied with North Dakota law. (Supp. App. 20, Tr. 82:1-13; Supp. App. 21, Tr. 84:1-8; Supp. App. 77, Tr. 790:7-18).

However, Heng still had misgivings about Arrowhealth's compliance with the regulation based upon the clear language of the regulation and her previous conversation with Judge Kirk, and telephoned the North Dakota Respiratory Care Board ("Board") to find out its view of the matter. (Supp. App. 21-22, Tr. 84:23-85:2).

Heng talked to David Muggurud, the Board Chairman of the Respiratory Care Board, who told her that the Board also considered Arrowhealth's current practice of having service technicians' assemble oxygen systems and instruct customers in their use to be a violation of North Dakota respiratory care regulation N.D.A.C. § 105-03-01-02.⁴ (Supp. App. 22, Tr. 85:2-10; Supp. App. 23, Tr. 86:18-19). Muggurud testified that while he does not recall this specific conversation with Heng, the Board's view has always been that § 105-03-01-02 prohibits non-licensed healthcare professionals such as service technicians from assembling the oxygen therapy systems and instructing customers in their use in the state of North Dakota. (Docket No. 228, Ex-P 32). After talking with Mr. Muggurud, Heng immediately relayed this information by telephone to Johnson. (Supp. App. 24, Tr. 87:9-14.) Johnson later left Heng a message on her telephone answering machine stating that she should stop having service technicians assemble or instruct customers about oxygen delivery systems for the time being, and that she would contact Blumenshein about further resolution of the issue. (Supp. App. 25, Tr. 90:15-91:12.)

⁴ N.D.A.C. § 105-03-01-02 states: Home medical equipment and delivery. North Dakota Century Code chapter 43-42 prohibits the setup and instruction of medical devices related to the practice of respiratory care, gases, and equipment by a non-licensed health care professional.

Heng then ordered the Fargo office employees to discontinue the practice for North Dakota customers. (Supp. App. 26, Tr. 92:2-25, Supp. App. 27, Tr. 93:1-4, 19-24).

On or about December 26, 2001, Heng telephoned Blumenshein while he was on vacation in Texas to again seek a directive on how Arrowhealth's parent company, Rotech, planned to address compliance with the North Dakota respiratory care regulation on a long-term basis. (Supp. App. 34, Tr. 161:18-24, Supp. App. 35, Tr. 162:6-17.) This matter was important to Heng because Lusty was the only respiratory therapist working at the time and she would be unable to perform all of the setups and instructions for Arrowhealth's North Dakota customers by herself. (Supp. App. 38, Tr. 200:20-201:2.)

Blumenshein's response to Heng was as follows:

"But keep focused on working around doing driver setups. Just don't have driver setups as absolutely as much as possible.

...

And, if you have, you know, a six-hour away setup, you know, you might have to force your hand and do a driver setup.

...

Just stay away from it as much as possible. I think we got them. I mean I really do. I think if once we get our legal counsel together and start working with, um, the state law and the Federal OIG, which if you remember, Medicare doesn't require any respiratory therapists visits.

...

So I'm optimistic on what the outcome is going to be, but I don't like where it puts us currently."

(App. 71-72.) Blumenshein believed the regulation to be a joke to the extent that the state's law supersedes what federal law and many other states require. (App. 73.)

Heng met with Blumenshein and Johnson on January 3, 2002, at Arrowhealth's Fargo office. (Supp. App. 28, Tr. 95:1-5; Supp. App. 36-37, Tr. 171:24-172:1; Supp. App. 64, Tr. 529:7-9.) During this meeting Heng, Blumenshein, and Johnson discussed how Fargo was going to ensure compliance with the respiratory care regulation. (Supp. App. 37, Tr. 172:21-25.)

During that meeting Blumenshein also told Heng that she needed to be friendly with Kays for the office to be successful. (Supp. App. 29, Tr. 97:1-8.)

II. Arrowhealth' Alleged Non-Retaliatory Reasons for Heng's Termination.

Blumenshein terminated Heng's employment on January 18, 2002. (Supp. App. 30, Tr. 98:5-7; Supp. App. 64, Tr. 529:19-21.) Blumenshein testified at trial that he terminated Heng because she created a hostile work environment and because she alienated referral sources. (Supp. App. 63, Tr. 515:8-10.)

A. Interactions Between Employees at the Fargo Office.

Blumenshein testified that Heng was the supervisor of all of the Fargo employees, including Kays. (Supp. App. 68-69, Tr. 541:19-542). However, Heng and Kays both believed that Kays reported directly to Blumenshein. (Supp. App. 7, Tr. 54:20-25).

On January 3, 2002, while in the Fargo office, Blumenshein informed Heng her working relationship with Kays must improve in order for the Fargo office to be successful. (Supp. App. 29, Tr. 97:2-4; Supp. App. 40, Tr. 234:14-23.) Blumenshein believed that the Fargo office could not be successful, regardless of its financial success, unless Heng and Kays maintained a friendly work relationship. (Id.)

Blumenshein terminated Heng on January 18, 2002. (App. 276, Tr. 514:3-23.) Arrowhealth's primary reason for terminating Heng's employment was her creation of a

“hostile work environment.” (App. 61, Ex.-P 16.) However, one of the Fargo office service technicians, Randy Huss, testified that the hostile environment at the office was **not** of Heng’s creation, had existed prior to Heng’s employment, and continued after Heng’s termination. (Supp. App. 55, Tr. 316:2-11; Supp. App. 56, Tr. 317:3-10.)

Heng had no interaction, via telephone or otherwise, with Kays between January 3 to January 18. Between January 3, 2002, and January 18, 2002, Kays had been on vacation and was only present at the Fargo office for less than two days, a morning meeting on the 4th and for work on the 8th. (Supp. App. 31, Tr. 99:1-7.)

In Addition, Blumenshein did not visit the Fargo office between January 3 and January 18. (Supp. App. 41, Tr. 236:21-23.) He only consulted with Johnson and Craig Stuart (“Stuart”), the location manager of Detroit Lakes office. (Supp. App. 78, Tr. 814:16-25; Supp. App. 79, Tr. 826:4-9.) Between January 3, 2002 and Heng’s termination on January 18, 2002, Johnson had no contact with Blumenshein about any problems at the Fargo office. (Supp. App. 62, Tr. 454:12-18.)

B. Arrowhealth “Referral” Sources.

Blumenshein pointed to two instances when Heng offended referral sources, thus negatively affecting the business of the Fargo office: (1) a heated telephone conversation between Heng and Mark Rye (“Rye”), a Veterans Administration representative; and (2) a visit to the Fargo office by Pam DeTeinne (“DeTeinne”) to pick up a job application. (Supp. App. 72A, Tr. 581:3-18; Supp. App. 72B, 588:11-20.) Arrowhealth was under contract with the Veterans Administration to be the exclusive provider of oxygen services to Veterans Administration patients until the end of 2003. (Supp. App. 80, Tr. 827:13-22.)

On December 6, 2001, Heng called Mark Rye because a Fargo office employee told her that Mark Rye was spreading negative rumors about her. (Supp. App. 21, Tr. 84:8-14.) They engaged in a heated discussion over the telephone. (App. 202, Tr. 184:16-24.) Heng then told Blumenshein what happened, and he told her not to contact Rye, because he would do so himself. (App. 204, Tr. 189:18-21.) However, Mark Rye called Heng that same day and the two apologized to each other and agreed “to be professionals.” (App. 300, Tr. 864:21-22.) At no time prior to Heng’s termination did Blumenshein discuss the situation with Rye like he told Heng he would do. (Supp. App. 72, Tr. 558:9-11.)

The alleged incident with DeTeinne occurred in early January of 2002. (Supp. App. 73, Tr. 742:14-23.) DeTeinne came to the Fargo office and was greeted by Customer Service Representative, Angie Leiss (“Leiss”). (Supp. App. 74, Tr. 743:6-10.) DeTeinne was also greeted by Kays and Lusty who visited with her and gave her a tour of the office. (Supp. App. 74, Tr. 743:18-25.) When Heng was told that DeTeinne was there for a job application, Heng gave one to her. (Supp. App. 86, Tr. 898: 4-10). Heng may have asked DeTeinne why she wanted to work there and provided DeTeinne an application and DeTeinne left. (Supp. App. 87, Tr. 917:21-24, Supp. App. 88, Tr. 918:10-11; Supp. App. 89, Tr. 921:14-25.)

DeTeinne then called Kays and told Kays that she was offended when she was in the office and that she was possibly going to call Blumenshein. (Supp. App. 76, Tr. 771:6, 4-18.) DeTeinne called Blumenshein a couple of days later and told him that she was upset by how Heng treated her and would feel uncomfortable “referring” patients there. (App. 282-283, Tr. 745:21 – 746:1-14.) However, DeTeinne knew as an agent of a

health care provider, it would not be legal for her to make a positive or negative referral of Arrowhealth or any other oxygen delivery service provider. (App. 283, Tr. 746:23-747:7.)

III. Heng's Termination.

On January 18, 2002, Blumenshein terminated Heng's employment. (Supp. App. 30, Tr. 98:5-7; Supp. App. 64, Tr. 529:19-21.) Blumenshein refused to tell her the reason for her termination. (Supp. App. 63, Tr. 515:15-16; Supp. App. 30, Tr. 98:5-12.) Blumenshein has no specific recollection of talking to Johnson or to any employees of the Fargo office, including Kays, between January 3 and January 18, 2002, about Heng's job performance or the office's work environment. (Supp. App. 41A-C, Tr. 238:13 – 240:9.)

Blumenshein also admitted that Arrowhealth's progressive disciplinary policy was not followed when he terminated Heng. (Supp. App. 69, Tr. 542:16-20.)

LAW AND ARGUMENT

Arrowhealth submitted five bases for reversal of the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment issued in Heng's favor. For the following reasons, those arguments are either without merit, or constitute mere harmless error that would not justify a reversal of the trial court's judgment. Interest of F.H., 283 N.W.2d 202, 206 (N.D. 1979) ("An error is not reversible error unless it affects the substantial rights of the parties.").

I. The Trial Court Correctly Applied the "Modified McDonnell-Douglas" Test From Schweigert to Heng's Claim.

The North Dakota Whistleblower Law provides an employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's

compensation, conditions, location, or privileges of employment because the employee, in good faith, reports a violation or *suspected violation* of federal, state, or local law, ordinance, regulation, or rule to his or her employer. N.D. Cent. Code § 34-01-20. This Court has held that to maintain a successful cause of action under the North Dakota Whistleblower Law, a plaintiff must first make a prima facie showing that “(1) [t]he employee engaged in protected activity; (2) [t]he employer took adverse action against the employee; and (3) [t]he existence of a causal connection between the employee’s protected activity and the employer’s adverse action.” Dahlberg v. Lutheran Social Services, 2001 ND 73, ¶ 34, 625 N.W.2d 241, 253. Once the plaintiff presents a prima facie case, the burden of persuasion shifts to the employer to rebut the presumption by proving by a preponderance of the evidence that its action was motivated by a legitimate, nonretaliatory reason. Heng v. Rotech Medical Corp., 2004 ND 204, ¶ 36, 688 N.W.2d 389 (quoting Engel v. Montana Dakota Utils., 1999 ND 111, ¶ 8, 595 N.W.2d 319).

A. Arrowhealth Agreed to the Burden-Shifting Test Presented in this Court’s Opinion in *Schweigert*.

First and foremost, Arrowhealth agreed with the burden-shifting framework outlined in Schweigert v. Provident Life Ins. Co., 503 N.W.2d 225 (N.D. 1993), opinion at all times prior to this most recent appeal. Arrowhealth’s appellate brief in *Heng I* stated that would assume for the sake of argument that the Schweigert burden-shifting test would apply. Heng, at ¶ 36, n. 1. Arrowhealth also specifically referenced Schweigert in its discussion of the burdens of proof in the Pretrial Statement it submitted to the trial court, and did not argue to the court that it should apply the federal burden-shifting test for employment discrimination cases outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). (App. 55.) Therefore, Arrowhealth’s argument on this

point should be disregarded because it was not raised at any time prior to the present appeal.

B. The Modified McDonnell-Douglas Test as Described in *Schweigert* Should Apply to Retaliatory Termination Claims Under N.D.C.C. § 34-01-20.

Contrary to Arrowhealth's contention, the modified version of the McDonnell-Douglas test used in cases for unlawful employment action under the North Dakota Human Rights Act should be utilized in cases brought pursuant to the North Dakota Whistleblower Law. Appellants argue that this Court should disregard Rule 301 of the North Dakota Rules of Evidence and hold that the burden-shifting standard of McDonnell-Douglas, unmodified, should apply to claims premised on N.D.C.C. § 34-01-20. That argument is without merit and should be rejected.

As this Court aptly stated in Schweigert, the burden-shifting test of McDonnell-Douglas must be modified for cases of discrimination under the North Dakota Human Rights Act because Rule 301 of the North Dakota Rules of Evidence is “dramatically different” from Rule 301 of the Federal Rules of Evidence. Schweigert, 503 N.W.2d at 228-229. The McDonnell-Douglas test was constructed from Rule 301 of the Federal Rules of Evidence because the plaintiff's presentation of a prima facie case gives rise to a presumption of discrimination. Id. Rule 301 of the Federal Rules of Evidence provides that this presumption of discrimination merely shifts the **burden of production** to the opposing party, and the **burden of persuasion** stays with the proponent of the presumption. Id.

In contrast, Rule 301 of the North Dakota Rules of Evidence provides that “[a] party against whom a presumption is directed has the burden of proving that the

nonexistence of the presumed fact is more probable than its existence.” N.D.R. Evid. 301. Thus, “under North Dakota law, if a plaintiff persuades the trier of fact of facts giving rise to a presumption, the burden of persuasion shifts to the defendant to rebut that presumption.” Schweigert, 503 N.W.2d at 229. However, this Court did decide in Schweigert to adopt a modified version of the McDonnell Douglas test, modified to take North Dakota Rule of Evidence 301 into consideration, because it provided a useful model for the presentation of evidence and burdens at trial. Id. The test, as modified, is as follows:

[T]he plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. Establishment of the prima facie case creates a presumption that the employer unlawfully discriminated against the plaintiff. If the plaintiff meets his or her burden of persuasion, and succeeds in establishing the presumption, then, under Rule 301, NDREvid, the burden of persuasion shifts to the employer to rebut the presumption of discrimination by proving by a preponderance of the evidence that its action was motivated by one or more legitimate, nondiscriminatory reasons. If the employer fails to persuade the trier of fact that the challenged action was motivated by legitimate, nondiscriminatory reasons, the plaintiff prevails. If, however, the employer persuades the fact finder that its reasons were nondiscriminatory, the employer prevails.

Id.

Application of the Schweigert test to claims under N.D.C.C. § 34-01-20 would not violate its defined elements as Arrowhealth suggests. The Schweigert test does not address the elements of the claim, but rather the presentation of evidence and burdens of proof at trial. Schweigert, 503 N.W.2d at 229. The language of § 34-01-20 does not address presumptions or burdens of proof that the legislature wished to have courts apply to cases brought pursuant to it. The plaintiff in a §34-01-20 case must establish a prima facie case in order to create the presumption of unlawful retaliation; the presumption does

not arise simply from a plaintiff's allegations. If the defendant fails to meet his burden of disproving the presumption, then the plaintiff succeeds by virtue of the evidence presented in support of his or her prima facie case. Schweigert, 503 N.W.2d at 229.

Moreover, if this Court were to adopt Arrowhealth's argument, it would in essence re-write Rule 301 because adoption of an unmodified McDonnell-Douglas test would not follow North Dakota's provisions with respect to presumptions. It would be illogical for this Court to hold that Rule 301 of the North Dakota Rules of Evidence applies to employment discrimination claims under North Dakota Century Code Chapter 14-02.4, but not under § 34-01-20. Although a defendant in an employment discrimination or retaliation case bears a higher burden of persuasion under North Dakota law than he would under Federal law, that same higher burden is applied to every North Dakota litigant who has to rebut a presumption as part of his or her case. Arrowhealth has not put forth any legal or equitable reason why defendants in § 34-01-20 cases should not be subject to the same legal effect of Rule 301 as any other litigant. Accordingly, Arrowhealth's argument for application of the McDonnell-Douglas test to retaliation cases under § 34-01-20 instead of the Schweigert test should be rejected.

C. The Trial Court Correctly Applied the *Schweigert* Test.

The trial court clearly followed the modified McDonnell-Douglas test in this case. Under the modified framework outlined in Schweigert, the plaintiff still keeps the ultimate burden of proving unlawful retaliation by virtue of proving a prima facie case leading to the presumption of unlawful retaliation. The employer's burden is simply to prove by a preponderance of the evidence that the employee was terminated for a legitimate, nonretaliatory reason. N.D.R. Evid. 301; Schweigert, 503 N.W.2d at 229.

Heng still faces the burden of refuting Arrowhealth's asserted legitimate non-retaliatory reason for termination in order to convince the trier of fact that, in fact, it was more likely than not that she **was** terminated in retaliation for reporting illegal activity. Schweigert, 503 N.W.2d at 229. A strong prima facie case may be sufficient to meet that burden if the defendants' case for a legitimate, nonretaliatory reason for termination is insufficient to convince the trier of fact that the presumption created by the prima facie case is incorrect. Id.; Schuhmacher v. North Dakota Hospital Ass'n, 528 N.W.2d 374, 379 (N.D. 1995) (a plaintiff may prevail on the basis of the prima facie case combined with a finding of the incredibility of the employer's proffered explanation for its employment decision).

This Court clearly held that the above test was intended to be a formula for assisting litigants in the presentation of relevant evidence and trial courts in analyzing employment discrimination cases. Schweigert, 503 N.W.2d at 229. The Schweigert test was never meant to be rigid and formulistic. Id. Rather, it is only intended to be a "helpful guide" to the court and to counsel. Id.

In Schweigert, this Court held that a plaintiff is successful under the modified McDonnell Douglas test if the defendant fails to successfully refute the presumption created by the plaintiff's prima facie case. Id. In this case, the trial court found that all of the elements of Heng's prima facie case were satisfied. (App. 92-93). The trial court also found that Arrowhealth failed to prove by a preponderance of the evidence that it terminated Heng for legitimate, nonretaliatory reasons. (App. 95). Those findings are sufficient under Schweigert to allow the trial court to conclude that Heng prevailed, because Arrowhealth failed to successfully refute the presumption of retaliation created

by Heng's prima facie case. Therefore, Arrowhealth's argument that the trial court opinion should be reversed because it failed to properly apply the Schweigert burden-shifting test is without merit.

II. The Trial Court Did Not Commit Clear Error When it Found Heng Proved Her Prima Facie Case.

Heng's claim for retaliatory termination was brought pursuant to N.D.C.C. § 34-01-20, which states in relevant part:

An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

- a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.

N.D. Cent. Code § 34-01-20(1)(a). Pursuant to § 34-01-20(3), a bench trial was held on Heng's claim.

The plaintiff's prima facie case consists of a showing that: "(1) [t]he employee engaged in protected activity; (2) [t]he employer took adverse action against the employee; and (3) [t]he existence of a causal connection between the employee's protected activity and the employer's adverse action." Dahlberg, at ¶ 34, 625 N.W.2d at 253; Heng, at ¶ 20, 688 N.W.2d at 397. The trial court issued findings of fact, conclusions of law, and an order for judgment in Heng's favor on May 12, 2005. In that order, the trial court found that Heng had successfully proven all of the elements of her prima facie case of unlawful retaliation. (App. 93). Arrowhealth claims that finding was clearly erroneous and unsupported by the evidence. That argument is without merit.

A. This Court Does Not Repeat the *Schweigert* Analysis on Appeal.

A trial court's decision of whether an employer discriminated against an employee is a finding of fact. Schweigert, 503 N.W.2d at 229. This Court need not review the adequacy of the evidence at each stage of the burden-shifting framework, but instead should "concentrate on whether the record supports the ultimate finding" of retaliation. Sanders V. Alliance Home Health Care, Inc., 200 F.3d 1174, 1176 (8th Cir. 2000) (appeal of judgment against employer in racial discrimination suit). "Once a finding of discrimination or retaliation has been made and that judgment is being considered on appeal, the McDonnell-Douglas presumptions fade away, and the appellate court should simply study the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial." EEOC v. Kohler Company, 335 F.3d 766, 773 (8th Cir. 2002), quoting Sherman v. Runyon, 235 F.3d 406, 409 (8th Cir. 2000).

"A trial court's findings of fact on appeal are presumed to be correct, and the complaining party bears the burden of demonstrating a finding is clearly erroneous." Piatz v. Austin Mut. Ins. Co., 2002 ND 115, ¶24, 646 N.W.2d 681, 688. A finding of fact is clearly erroneous if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law. Moen v. Thomas, 2001 ND 95, ¶ 19, 627 N.W.2d 146, 152. A trial court's findings of fact are not clearly erroneous if evidence was presented at trial to support it. Piatz, at ¶ 24, 646 N.W.2d at 688. "A choice between two permissible views of the the evidence is not clearly erroneous." Citizens State Bank, Enderlin v. Schlagel, 478 N.W.2d 364, 366 (N.D. 1991).

This Court's application of the clearly erroneous standard was aptly stated in the case of Buri v. Ramsey, 2005 ND 65, 693 N.W.2d 619:

In a bench trial, the trial court is the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations. We do not reweigh evidence or reassess credibility, nor do we reexamine findings of fact made upon conflicting testimony. We give due regard to the trial court's opportunity to assess the credibility of the witnesses, and the court's choice between two permissible views of the evidence is not clearly erroneous.

Buri, at ¶ 10, 693 N.W.2d at 623.

Moreover, there is no clear error even if a trial court's findings were not as explicit as they could have been. Corbett v. Corbett, 2002 ND 103 at ¶ 8, 646 N.W.2d 677, 680; see also Schlagel, 478 N.W.2d at 366 (trial court's findings of fact must only be explicit enough for this Court to understand its reasoning"). This Court will not retry a case to substitute findings it might have made for those of the trial court. Thompson v. City of Watford City, 1997 ND 172, ¶ 12, 568 N.W.2d 736, 738. The trial court's failure to use the "magic words" envisioned by the losing party is not reversible error. Lyman Lumber of Wisconsin v. Yourcheck Video, Inc., 695 N.W.2d 903, ¶ 10, n.1 (Wisc. Ct. App. 2005)(unpublished).

A. The Trial Court Did Not Commit Clear Error When it Found Heng Engaged in Protected Activity.

The clear language of the North Dakota Whistleblower Law states that for a "report" to constitute protected activity, it must have been made in good faith. N.D. Cent. Code § 34-01-20. Whether a report is made in good faith is normally a question of fact. Dahlberg, at ¶ 40-42, 625 N.W.2d at 255-256. The standard for determining whether a report was made in good faith is as follows:

[I]n order to determine whether a report of a violation or suspected violation of law is made in good faith, we must look not only at the **content** of the report, but also at the reporter's **purpose** in making the report. The central question is whether the reports were made for the purpose of blowing the whistle, i.e., to expose an illegality. We look at the reporter's purpose **at the time** the reports were made, **not after** subsequent events have transpired. In part, the rationale for looking at the reporter's purpose at the time the report is made is to ensure that the report that is claimed to constitute whistle-blowing was in fact a report made for the purpose of exposing an illegality and not a vehicle, identified after the fact, to support a belated whistle-blowing claim. (emphasis added.)

Dahlberg, at ¶ 36, 625 N.W.2d at 254 (emphasis added) (quoting Obst v. Microtron, Inc., 614 N.W.2d 196,202 (Minn. 2000) (citations omitted)); see also Heng, at ¶ 21, 688 N.W.2d at 397. Dahlberg mandates that the determination of whether “good faith” exists is made by considering the content of the report and the purpose of the report. Dahlberg, at ¶ 36, 625 N.W.2d at 254. Events transpiring after the report is made are irrelevant. Id. A report that “only incidentally implicated potential violations of state law” is not protected by § 34-01-20. Heng, at ¶ 24, 688 N.W.2d at 398, quoting Dahlberg, at ¶ 40, 625 N.W.2d at 255. The content of all of Heng's reports and the circumstances surrounding those reports support the trial court's finding that Heng believed Arrowhealth was violating N.D.A.C. § 105-03-01-02.

The trial court found in its findings of fact that: (1) Heng informed Blumenshein and Johnson that she believed Arrowhealth was not complying with North Dakota respiratory care regulations; and (2) Heng continued to press Blumenshein for clarification on how to effectuate corporate compliance with the regulation. (App. 90-91). For these reasons, the trial court concluded in its conclusions of law that Heng had engaged in protected activity. (App. 92).

The trial court's findings of fact were supported by the factual evidence presented at trial. Blumenshein and Johnson both admitted that Heng reported to them on December 19, 2001, that she believed Arrowhealth was noncompliant with North Dakota respiratory care regulations. (Supp. App. 18.) Heng testified that she reported her belief that Arrowhealth was noncompliant with the regulation on December 19, 2001. (Supp. App. 17-18.) Heng also testified that she reported this noncompliance out of concern for the oxygen patients that Arrowhealth serviced; in fact, Heng's mother was a recipient of Arrowhealth's oxygen services. (Supp. App. 32-33, 51.) Judge Kirk testified that Heng was very concerned about the effect of Arrowhealth's noncompliance with the regulation on the health of the patients it served, and that he instructed her research the issue further for her own legal protection. (Supp. App. 51, 52.) Heng also testified that she continued to press Blumenshein for directive about how to comply with the regulation because the Fargo location did not have enough respiratory therapists on staff to do all of the oxygen deliveries and setups that the service technicians had performed prior to December 21, 2001. (Supp. App. 38.) Therefore, the trial court's finding that Heng made a good faith report of a suspected violation of law, and thus engaged in protected activity under § 34-01-20, was not clearly erroneous.

C. The Trial Court Did Not Commit Clear Error When it Found a Causal Connection Between Heng's Reports of Unlawful Activity and Her Termination.

This Court has held that the temporal proximity between an employee's report an an adverse employment action is "particularly significant" in determination causation, and that "in an appropriate situation, circumstantial evidence may provide an inference of causation." Anderson v. Meyer Broadcasting Co., 2001 ND 125, ¶ 35, 630 N.W.2d 46,

55. Minnesota courts, whose reasoning the trial court chose to adopt in its order granting summary judgment dismissal of Heng's whistleblower claim have generally held that causation is a question of fact. Jones v. Minneapolis Public Schools, 2003 WL 1962062, * 3 (Minn. Ct. App. 2003); Paider v. Hughes, 615 N.W.2d 276, 281 (Minn. 2000). In addition, Minnesota courts have held that a causal connection may be established with circumstantial evidence justifying an inference of retaliatory motive. Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 327 (Minn. 1995).

The trial court also found in its conclusions of law that Heng's termination was caused by her protected activity. (App. 93.) The trial court based this conclusion on factual findings it made, including: (1) Blumenshein directed Heng to violate the North Dakota Respiratory Care regulation if necessary; (2) Blumenshein expressed displeasure with the effect of compliance with the regulation; (3) Heng was terminated for not fostering a good working relationship with Kays even though Kays and Heng had minimal contact with each other between Heng's "final warning" and termination; and (4) Spratt, Arrowhealth's national clinical director, stated that using Respiratory Therapists to do the oxygen setups and patient instructions instead of service technicians was more costly to Arrowhealth. (App. 91-92.)

The trial court's findings of fact were supported by the factual evidence presented at trial. Blumenshein's directive to Heng to violate the regulation "if necessary" was audiotaped and thus is undisputed, as is Blumenshein's statements of how he disliked the effect compliance with the regulation would have on the Fargo branch. (App. 72, 76-77.) Blumenshein also stated that he terminated Heng because she created a hostile work environment, (Supp. App. 61, 63), yet Arrowhealth employees testified that the hostile

work environment began prior to Heng's employment and continued after her termination. (Supp. App. 55, 56.) Finally, Spratt specifically testified at trial that it cost the company more to have respiratory therapists perform the initial customer setups and instruction, as required by North Dakota law, than it did to have service technicians perform those tasks. (Supp. App. 58.) Therefore, the trial court's findings of fact and conclusion of law on the issue of causation were substantiated by the evidence presented at trial.

1. Arrowhealth's Disagreement with North Dakota Law is Relevant to Causation.

Arrowhealth claims that the trial court's reliance upon Blumenshein's dislike of North Dakota's respiratory care regulations was clear error. However, a claim of retaliation has more force when the misconduct complained of by an employee is true. See Washington v. Thurgood Marshall Academy, 230 F.R.D. 18, 22 (D.C. D.C. 2005). Arrowhealth contends Blumenshein's comments about the respiratory care regulation are not evidence of causation because they contain no retaliatory animus, citing to Zhaugn v. Datacard Corp., 414 F.3d 849, 857 (8th Cir. 2005).

However, in this case, the trial court found that Blumenshein's comments **did** contain retaliatory animus. Specifically, Blumenshein testified that he "hates" what compliance with the regulation would mean for Arrowhealth's VA contract, (App. 72), and that he thought the regulation was "a joke". (App. 77.) He also testified that Arrowhealth's lawyers were going to "take it to another level", (App. 76), and that he thought the respiratory care board was going to "get hit upside the head with a hammer" over their interpretation of what the regulation requires of oxygen service corporations. (Id.) All of these facts support the trial court's conclusion that Blumenshein harbored a

retaliatory animus against Heng for her report of Arrowhealth's noncompliance with the regulation.

2. The Temporal Proximity Between Heng's Reports of Unlawful Activity and Termination is Relevant to Causation.

This Court has stated that when determining whether causation has occurred, “[t]he proximity in time between the protected activity and the discharge is particularly significant.” Anderson v. Meyer Broadcasting Company, 2001 ND 46, ¶ 35, 630 N.W.2d 46, 55. Moreover, Minnesota courts have also held that simple proximity in time between an employee's protected activity and his discharge, by itself, *is* sufficient to constitute a genuine issue of material fact, thereby making summary judgment inappropriate. Hubbard v. United Press Int'l, 330 N.W.2d 428 (Minn. 1983) (two days between protected activity and termination); Meyer v. Electro Static Finishing, Inc., 1995 WL 366093 (Minn. Ct. App. 1995) (thirty-three days between protected activity and termination); Rodvold v. Eli Lilly & Co., 1998 WL 865679 (Minn. Ct. App. 1998) (two and one-half months between protected activity and termination). The significance of temporal proximity rises in significance the closer the adverse employment action occurs to the protected conduct. Kohler, 335 F.3d at 774. Therefore, the trial court's consideration of temporal proximity with respect to the element of causation was proper.

III. The Trial Court Did Not Commit Clear Error When it Found That Arrowhealth Failed to Prove it Terminated Heng for a Legitimate, Non-Retaliatory Reason.

Arrowhealth also appeals the trial court's judgment in Heng's favor on the grounds that the trial court clearly erred in finding that Arrowhealth did not prove that it terminated Heng for a legitimate, non-retaliatory reason. This argument is meritless.

The trial court found that Arrowhealth's stated reasons for terminating Heng were pretextual. (App. 95.) Arrowhealth argues that this finding is erroneous because it constitutes an impermissible attack on its business judgment prerogative. However, while the trial court may not second-guess an employer's valid, non-discriminatory employment decisions, it still must analyze whether Arrowhealth's proffered reasons are a pretext for retaliation. Ledbetter v. Alltel Corporate Services, Inc., ___ F.3d ___, ___ (2006 WL 278127 (8th Cir. Feb. 7, 2006)). The trial court acted within its authority by weighing the evidence, determining the credibility of witnesses, and concluding that Arrowhealth's proffered reason for Heng's termination was pretext for retaliation. Id. In short, the trial court was uniquely positioned to determine whether Arrowhealth's stated reasons for terminating Heng were pretextual. Id.

Arrowhealth first complains that the trial court found causation from the fact that Blumenshein was unhappy with the effect compliance with the regulation would have on the company. However, the trier of fact may find that unlawful retaliation occurred despite an employer's asserted non-retaliatory reason for discharge when the employee's supervisor became hostile towards the employee after her complaint, and the adverse employment action occurred shortly after the complaint. Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1246 (8th Cir. 1998). Whether the employer's decision to subject the plaintiff to an adverse employment action is causally linked to her protected activity requires credibility determinations by the jury on the employer's proffered reason. Nelson v. Wahpeton Public School District, 310 F.Supp.2d 1051, 1059 (D.N.D. 2004). Therefore, the trial court's interpretation of Blumenshein's comments as being indicative of a retaliatory animus and evidence of causation was a proper exercise of discretion.

Arrowhealth also complains that the trial court found that the fact that Blumeshein didn't follow the corporate progressive discipline policy when terminating Heng to be indicative of retaliation. However, "[a]n employer's failure to follow its own policies may support an inference of pretext." Floyd v. Missouri Dep't of Social Servs., 188 F.3d 932, 937 (8th Cir. 1999). This is particularly true if the policies not followed pertain to progressive discipline and termination of employment. EEOC v. Trans States Airlines, Inc., 356 F.Supp.2d 984, (E.D. Miss. 2005). Ultimately, an employer's lax enforcement of company policies and disciplinary procedures provides additional evidence of retaliatory motive. Kohler, 335 F.3d at 775. Thus, the trial court's reliance upon Blumenstein's failure to follow Arrowhealth's progressive discipline policies as supporting its legal finding of causation was not erroneous.

Arrowhealth also objects to the trial court's statement in its findings of fact that "[a]n investigation would have revealed that the stated reasons for the Plaintiff's termination did not exist" and its conclusion of law that "[e]mployment termination is the capital punishment of employment sanctions." These arguments are similarly without merit.

The trial court's finding that an investigation would have revealed Blumenshein's reasons for terminating Heng were based upon evidence presented at trial. Blumenshein stated that one of the reasons he terminated Heng was because she had an argument over the telephone with Rye, a referral source for the VA, (Supp. App. 72A), yet the VA was under contract and not a "referral" (Supp. App. 80), and Rye and Heng had resolved their differences one day after the telephone argument. (App. 300.) Blumenshein also stated that he terminated Heng because she created a hostile office environment, (App. 61), yet

the other employees at the office testified that the Fargo office was in a state of chaos both before and after Heng's employment there. (Supp. App. 55, 56.)

In addition, the trial court's conclusion of law that "termination is the capital punishment of employment sanctions" was not erroneous. Arrowhealth has not pointed to any evidence presented at trial that would contradict that conclusion, or that it is contrary to established law. That Arrowhealth objects to the language and "characterization" of the trial court's findings is not reversible error.

Ultimately, the trial court's finding of retaliation was based upon evidence presented at trial and therefore not clear error. Jury verdicts finding retaliation have been upheld on appeal when the evidence presented at trial included the termination of the plaintiff less than one month after his first report of unlawful practices, the plaintiff's supervisor was upset with the substance of the plaintiff's report, and the employer did not follow its past practices with respect to the progressive discipline and the plaintiff's termination. Kohler, 335 F.3d at 776-777. The evidence presented at Heng's trial tending to support causation exceeded that presented in Kohler. Thus, the trial court's finding of causation was not clearly erroneous.

IV. Arrowhealth Was Not Prejudiced by the Trial Court's Treatment of Julie Johnson's and Mark Rye's Deposition Testimony.

Arrowhealth listed Mark Rye, Angie Leiss, and Julie Johnson as "will call" witnesses in its pretrial statement to the trial court, (App. 58-59.) In addition, Heng's counsel had requested Arrowhealth's counsel to make Johnson available during her case in chief, as Johnson was an Arrowhealth employee, and could not be subpoenaed because she was a Minnesota resident. (Supp. App. 42.)

Arrowhealth refused to make Johnson available for Heng's case-in-chief, and insisted that because Johnson would be testifying as a part of Arrowhealth's defense, Heng's counsel could simply examine her at that time. (Supp. App. 43.) Heng's counsel then moved the trial court for permission to read portions of Johnson's deposition testimony into the record, which was granted. (Supp. App. 47.) Arrowhealth's counsel responded by moving the trial court for permission to read additional portions of Johnson's deposition transcript into the record, which was denied. (Supp. App. 44-45.)

On the fourth day of trial, Arrowhealth's counsel notified the trial court and opposing counsel that it did not intend on calling Rye or Leiss as a witnesses after all. (Supp. App. 81-82.) In response, Heng's legal counsel moved the trial court for permission to introduce deposition testimony of them taken during the discovery phase of this suit, which was granted. (Supp. App. 1-3.) Arrowhealth's counsel requested that it introduce additional portions of both depositions; the trial court admitted all of the portions of Leiss' transcript that Arrowhealth requested, but excluded some portions of the Rye deposition on the grounds that they exceeded the people of Heng's case on rebuttal. (Supp. App. 59.)

The trial court clearly acted within its discretion with respect to the admittance or exclusion of deposition testimony at trial. Rule 32(a)(4) of the North Dakota Rules of Civil Procedure provides in relevant part that:

- (a) Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

...

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

...

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state,

...

(E) upon application and notice, that **such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.**

...

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part **which ought in fairness to be considered with the part introduced**, and any party may introduce any other parts.

N.D.R. Civ. P. 32(a)(emphasis added). “The admission of deposition testimony lies within the trial court’s discretion, and reversal is appropriate only upon a clear showing that the trial judge abused his discretion.” FDIC v. Jahner, 506 N.W.2d 57, 59 (N.D. 1993). In addition, the trial court does not abuse its discretion by “relying on a procedural representation of counsel that is not contradicted by opposing counsel.” Id. In Jahner, plaintiff’s counsel sought admission of deposition testimony from a witness he believed to be located in South Dakota, which the trial court admitted over the defendants’ objection that plaintiff’s counsel must show more proof of unavailability of the witness. Id. This Court held that the trial court’s admission of the deposition testimony was not an abuse of discretion. Id.

A. The Trial Court Did Not Abuse its Discretion with Respect to the Julie Johnson Deposition.

Arrowhealth informed the Court and Heng prior to trial that it would not make Johnson available as a witness for Heng's case in chief. (Supp. App. 58-59.) Johnson could not be subpoenaed because she was a Minnesota resident. (Supp. App. 46.) Therefore, the trial court allowed the use of Johnson's deposition testimony for Heng's case in chief, but disallowed Arrowhealth to designate additional deposition portions because of Arrowhealth's representation that it would be producing Johnson as a witness for their case. (Supp. App. 43.) The trial court's decision promoted the interests of justice in this case because it allowed Heng to produce evidence in support of her prima facie case in order to avoid a directed verdict, and also promoted Rule 32(a)(4)'s mandate to use live testimony when possible. Thus, that decision was not an abuse of discretion.

B. The Trial Court Did Not Abuse its Discretion with Respect to the Mark Rye Deposition Testimony.

Moreover, the trial court's decision to limit the Rye deposition testimony offered by Arrowhealth was not an abuse of discretion. This case is similar to that of Huff v. Marine Tank Testing Corp., 631 F.2d 1140 (4th Cir. 1980). In Huff, during a pre-trial conference the trial court was assured by counsel representing Mr. and Mrs. Perry, trial witnesses, that they would be present at trial and available as witnesses. Huff, 631 F.2d at 1142. The Perrys then failed to appear at trial, and plaintiff's counsel requested that their deposition testimony be admitted into evidence, which the trial court granted. Id. The Fourth Circuit held that the situation constituted "exceptional circumstances" under Rule 32(a)(3)(e) because the absence of the Perrys was completely unexpected, and admitted the testimony served the interests of justice. Id. at 1143.

In this case, it was similarly not an abuse of discretion to admit portions of Rye's deposition testimony, because Arrowhealth's counsel represented that he would be testifying throughout the first four days of trial and his absence was completely unexpected by Heng and his testimony with respect to his telephone conversations with Heng was at the heart of Arrowhealth's alleged nonretaliatory reason for terminating Heng's employment.

In addition, the trial court did not abuse its discretion by excluding from evidence some of the Rye deposition portions that Arrowhealth requested be read into evidence. Many portions of the deposition testimony that Arrowhealth sought to introduce were completely unrelated to the portions of testimony that Heng introduced and irrelevant to the issues to be tried. The trial court carefully examined each and every portion of testimony that Arrowhealth sought to introduce in order to admit those deposition portions which ought in fairness to be considered with the portions Heng introduced and exclude those portions that were unrelated to the portions Heng was introducing. (App. 296-301; Supp. App. 81-83.) Rule 32(a)(4) does not allow Arrowhealth to designate into the record every word of deposition testimony it would like to introduce; it only allows for the inclusion of that supplementary portions of testimony which ought in fairness to be considered with the portions introduced by Heng. Accordingly, the trial court did not abuse its discretion by limiting the portions of Rye's deposition testimony admitted at trial.

V. The District Court Did Not Abuse its Discretion by Awarding Heng Unreasonable Attorneys Fees and Costs.

The amount of fees awarded under fee-shifting statutes is largely within the trial court's discretion. Dushcherer v. W.W. Wallwork, 534 N.W.2d 13, 16 (N.D. 1995).

Therefore, “[t]he appropriate standard of review in an appeal challenging a trial court’s award of damages in a bench trial is whether the trial court’s findings of fact on damages are clearly erroneous.” Buri, at ¶ 17, 693 N.W.2d at 624. The trial court’s award of attorneys fees will not be reversed on appeal unless it acts in an arbitrary, unconscionable, or unreasonable manner, or misapplies the law. Duschcherer, 534 N.W.2d at 16. If two claims in a suit have a “common core of facts” and “related legal theories”, necessitating the lawyer to generally devote his time to the litigation as a whole, then an award of attorneys fees for the entire action is not an abuse of discretion, even if only one of the claims is ultimately successful. Id. at 19. “The rate and hours expended by opposing counsel are often probative of the reasonableness of attorney fees for prevailing counsel.” Id.

After a bench trial, the trial court found in Heng’s favor, and ordered that attorneys fees shall be awarded in the amount of \$207,147.70. (App. 165.) For the following reasons, the amount of fees awarded did not constitute an abuse of discretion.

Section 34-01-20 of the North Dakota Century Code states that “in any action under this Section, the Court may award reasonable attorney’s fees to the prevailing party as part of the costs of litigation.” N.D. Cent. Code § 34-01-20. The amount of damages recovered does not control the amount of attorneys fees reasonably awarded. Duschcherer, 534 N.W.2d at 18. Rather, this Court has held that in determining the reasonableness of an attorney’s fee, the trial court should first “decide the number of hours reasonably expended and then determine a reasonable hourly rate.” T.F. James Co. v. Vakoeh, 2001 ND 112, ¶ 23, 628 N.W.2d 298. After applying the calculation of the number of hours reasonably expended and the determination of a reasonable hourly rate,

the trial court must then look at the factors under North Dakota Rule of Professional Conduct 1.5(a) to determine the reasonableness of the fees it shall award. Id. The factors considered when determining the reasonableness of a fee include: (1) the time and labor required of the services; (2) the preclusion of other employment by the lawyer; (3) the customary fee charged by the lawyer; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. N.D.R. Prof. Cond. 1.5(a).

A. The Trial Court Exercised Its Discretion When Awarding Attorneys Fees to Heng.

Arrowhealth argues that the trial court failed to exercise its discretion when awarding Heng her attorneys fees. This argument is simply without merit. The trial court clearly stated that he reviewed the billing records submitted by Heng's counsel, and the only time he believed was unnecessary was that of Attorney Hourigan's attendance at the Rule 16 conference and the trial, which amounted to 50.5 hours. (Supp. App. 90-91, 93.) The trial court also based its award on the basis that Arrowhealth's counsel also billed Arrowhealth for over \$200,000 in attorneys fees for defending the suit; it was surprised that litigation for \$35,000 in backpay could generate so much fees **on both sides of the case**. (Supp. App. 91-93.) The trial court's award of attorneys fees to Heng were within its sound discretion, and not arbitrarily exercised. Accordingly, the trial court's award of attorneys fees to Heng should not be reversed.

In addition, the trial court properly followed the lodestar formula when calculating the amount of attorneys fees to award Heng. The trial court examined the

billing records submitted by her counsel, and counsel deducted those fees incurred solely for litigating the emotional distress and breach of contract claims from their request. (Supp. App. 90.) Arrowhealth also admits that the trial court also had the color-coded “review” of that fee record prepared by Arrowhealth’s counsel, and the trial court did make deductions for time it felt was “unnecessary” to tax to Arrowhealth. (Supp. App. 91, 93.) That the trial court found dual representation at various depositions and mediation is not reversible error, but rather an exercise of the trial court’s discretion; Arrowhealth cites no rule or statute mandating that if the trial court finds dual representation unnecessary in one context that it is also unnecessary in other aspects of a suit. Thus, Arrowhealth’s argument that the trial court made little effort to determine a reasonable number of hours is incredible.

B. The Trial Court’s Award of Costs to Heng Was Not an Abuse of Discretion.

Arrowhealth contends that the trial court’s award to Heng of legal costs for westlaw research and mediation services was an abuse of discretion. This argument is similarly without merit.

Plaintiff submitted both disputed items under N.D.C.C. § 28-26-10, which states that “[i]n actions other than those specified in sections 28-26-07, 28-26-08, and 28-26-09, costs may be allowed for or against either party in the discretion of the court.” N.D. Cent. Code § 28-26-10. Thus, the Westlaw charges and mediation fee are allowable costs in the trial court’s discretion. Courchene v. Delaney Distribs., Inc., 421 N.W.2d 811 (N.D. 1988); Andrews v. O’Hearn, 387 N.W.2d 716 (N.D. 1986); Liebelt v. Saby, 279 N.W.2d 881 (N.D. 1979). The case of Brisco-Wade v. Carnahan, 297 F.3d 781 (8th Cir. 2002), is inapplicable to this case as it pertains solely to attorneys fees allowed in prisoner civil

rights cases under federal law. Brisco-Wade, 297 F.3d at 782. That decision is therefore inapplicable to state civil litigation where statutory law allows for the recovery of costs in the general discretion of the trial court. Accordingly, the trial court's award of costs including westlaw charges and mediator charges was not an abuse of discretion and should not be reversed.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Court to affirm the District Court's Findings of Fact, Conclusions of Law, and Order for Judgment as well as the District Court's subsequent award of attorneys fees and costs in her favor.

Dated this 6th day of March, 2006.



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STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

AFFIDAVIT OF SERVICE

JENNIFER MJONESS, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Fargo, North Dakota, not a party to nor interested in the action, and that she served the attached:

Brief of Appellee Debora Heng; and

Appendix of Appellee Debora Heng.

On:

**Adele Hedley Page
DORSEY & WHITNEY LLP
Dakota Center
51 North Broadway, Suite 402
Fargo, ND 58102**

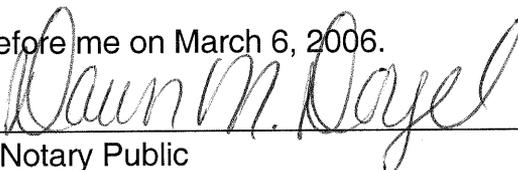
Via E-Mail at **apage@pagelf.com** on March 6, 2006 a true and correct copy thereof.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.



JENNIFER MJONESS

SUBSCRIBED AND SWORN to before me on March 6, 2006.



Notary Public

(SEAL)

