ORIGINAL

20020342

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20020342
DUNN DISTRICT COURT NO. 01-C-00056

BARBARA RAMEY Plaintiff and Appellant, vs. TWIN BUTTES SCHOOL DISTRICT Defendant and Appellee.	FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT MAR 05 2003 STATE OF NORTH DAKOTA

APPELLEE'S BRIEF

Appeal from the District Court's Judgment of Dismissal, dated September 17, 2002 and Order Denying Plaintiff's Motion for Reconsideration, dated December 4, 2002, Honorable Zane Anderson, District Judge, presiding.

COUNSEL FOR APPELLANT

Kent M. Morrow
Attorney at Law
411 North 4th Street, Suite 6
Bismarck, North Dakota 58501
(701) 255-1344

COUNSEL FOR APPELLEE

Thomas W. Fredericks
Fredericks, Pelcyger & Hester, LLC
1075 South Boulder Rd., Suite 305
Louisville, Colorado 80027
(303) 673-9600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Others

STATEMENT OF THE ISSUES

1. Whether the District Court erred by granting summary judgment in favor of the Defendant, Twin Buttes School District ("the School"), thereby finding that the Plaintiff failed to establish a prima facie case of discrimination under the North Dakota Human Rights Act?
2. Whether the District Court erred by denying Plaintiff's Motion for Reconsideration in the underlying action?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY AND RELEVANT FACTS

1. The Plaintiff, Barbara Ramey, is a member of the Standing Rock Sioux Tribe, who, according to the Plaintiff, currently resides on the Fort Berthold Indian Reservation.
2. The Defendant, Twin Buttes School District (School), is a Tribally operated public school district located in Dunn County, North Dakota on the Fort Berthold Reservation.
3. In July or August, 1999, the Plaintiff applied for employment with the Twin Buttes School for positions as a Computer Technician and an Instructional Aide, submitting to the School a completed application and her résumé. See Appendix, pp. 37-39.
4. Ramey's applications for employment with the School did not include any evidence or documentation establishing that she was entitled to

Indian preference of any sort. See Affidavit of Elaine Incognito, Appendix, pp. 63-64.

5. On August 20, 1999 the School Board voted to hire other persons whom it deemed more qualified for the advertised openings. See Affidavit of Melissa Starr, Appendix, p. 74. At or around the same time Ms. Ramey was considered for employment, the School hired at least two individuals who were not members of the Three Affiliated Tribes for similar Title VII Program positions. See Affidavit of Elaine, Appendix, p. 64.
6. The Plaintiff initiated this action after the School declined to hire her for either of these positions.
7. In her Complaint, the Plaintiff alleged that the School violated the North Dakota Human Rights Act, N.D.C.C. § 14-02.4, by discriminating against her based on her status as a member of the Standing Rock Sioux Tribe, and that the School failed to afford her preference under the Indian Preference Policy of the Three Affiliated Tribes of the Fort Berthold Reservation. Pl. Compl., ¶¶ 3, 4, Appendix, p. 4-5.
8. The Plaintiff and Defendant each filed cross-motions for summary judgment.
9. In support of her Motion, the Plaintiff submitted an affidavit of Barbara E. Ramey, a copy of the job announcements for the Computer Specialist and Instructional Aide positions, an excerpt of the School's Personnel Policies, a description of the Instructional Aide position,

copies of the Plaintiff's resume and application, the minutes from the School District's meeting on August 20, 1999, and the Plaintiff's Certificate Degree of Indian Blood for the Standing Rock Sioux Tribe.

10. In support of its Motion for Summary Judgment, the School submitted sworn affidavits from School Principal, Elaine Incognito, School Board President, Melissa Starr and Tribal Employment Rights Office Director and EEOC Specialist, Wade Baker, excerpts from the School's Personnel Policies and Procedures and the Tribal Employment Rights Ordinance, and the Plaintiff's application and resume.

11. The Plaintiff submitted no further evidence in response to the School's Motion for Summary Judgment or in support of her own Motion.

12. On July 16, 2002, the Court ruled in favor of the Defendant, finding that the Plaintiff did not establish a prima facie case of discrimination because she failed to demonstrate that she was a member of a protected class or that she was qualified for the positions she applied for. See Memorandum Opinion and Order, Appendix, p. 99. On September 17, 2002, the Court entered an Order of Dismissal, dismissing the Plaintiff's claims with prejudice. Appendix, p. 116.

13. The Plaintiff filed a Notice and Motion for Reconsideration of the judgment on October 30, 2002.

14. In her Motion, the Plaintiff claimed that the Court erroneously found that there was no genuine issue of material fact as to whether the Plaintiff "claimed entitlement to Indian preference." See Plaintiff's

Motion for Reconsideration, Appendix, p. 118. Nowhere in her Motion for Reconsideration did the Plaintiff address the fact that the District Court had also found that she had failed to demonstrate that she was qualified for the positions she applied for.

15. In its Response to Plaintiff's Motion for Reconsideration, the School argued that reconsideration was inappropriate as no exceptional circumstances existed for disturbing the Court's final order and, in any event, such motions may not be used as a means to relitigate old issues or as a substitute for appeal.

16. The School further argued that the Plaintiff's motions should be denied since the Court correctly ruled that the Plaintiff had failed to demonstrate a prima facie case of discrimination under the North Dakota Human Rights Act.

17. On December 4, 2002, the District Court issued an order denying Plaintiff's Motion for Reconsideration.

ARGUMENT

I. Summary Judgment

"Summary judgment is a procedural device for promptly and expeditiously disposing of an action without a trial if either party is entitled to judgment as a matter of law and if no dispute exists as to either the material facts or the reasonable inferences to be drawn from undisputed facts or if the resolving the factual disputes will not alter the result." BTA Oil Producers, et al. v. MDU Resources Group, Inc., et al., 2002 N.D. 55, 642 N.W.2d 873. Although the

movant bears the initial burden of showing the absence of a genuine issue of material fact, once they have met this burden the opposing party may not rest on mere allegations or denials in their pleadings. See Hummel v. Mid Dakota Clinic, P.C., 526 N.W.2d 704, 707 (N.D. 1995). On the contrary, to successfully defeat a motion for summary judgment, the opposing party must present "competent admissible evidence by affidavit or other comparable means to show the genuine issues of material fact." Id. The opposing party must also "explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief." BTA Oil Producers, 2002 N.D. 55, 642 N.W.2d 873.

Summary judgment is appropriate where a party fails to "make a showing sufficient to establish the existence of an element essential to that parties case and, on which that party will bear the burden of proof at trial." Dahlberg v. Lutheran Social Services of North Dakota, 2001 N.D. 73, ¶ 11, 625 N.W.2d 241, 246. The Plaintiff, in an action alleging discrimination under the North Dakota Human Rights Act, bears the initial burden of establishing a prima facie case. See Anderson v. Meyer Broadcasting Co., 2001 N.D. 125, ¶ 18, 630 N.W.2d 46, 51. To establish a prima facie case of discriminatory non-hiring under the Human Rights Act, the plaintiff must demonstrate each of the following elements: 1) that she is a member of a protected class under the Act; 2) that she sought and was qualified for the position; 3) that she suffered an adverse employment decision; and, 4) that the position remained available or was given to other

persons who were not members of the protected class. See Anderson, 2001 N.D. at ¶ 18, 630 N.W.2d at 51; Thompson v. Olsten Kimberly Qualitycare, Inc., 33 F.Supp.2d 806, 812 (Dist. Ct. Minn. 1999). To avoid summary judgment, the Plaintiff must have presented competent evidence creating a factual dispute as to each essential element. See Anderson, 2001 N.D. at ¶ 15, 630 N.W.2d at 51. When no such evidence is presented on an element, it is presumed that the evidence does not exist. See id.

The District Court specifically found that the Plaintiff failed to demonstrate that she was a member of a protected class and that she was qualified for the positions she applied for. See Memorandum Opinion, Appendix, p. 99 . For the reasons set forth below, the District Court did not err when it made these findings and, as such, summary judgment in favor of the School was proper.

II. The Plaintiff failed to establish a prima facie case of discrimination under the North Dakota Human Rights Act

The District Court correctly found that the School was entitled to summary judgment because the Plaintiff failed to establish the first and second elements of a prima facie case under the North Dakota Human Rights Act. Specifically, the Plaintiff failed to demonstrate that she was a member of a protected class and that she was qualified for the positions she applied for. See Memorandum Opinion, Appendix, p. 99. The Plaintiff also failed to establish, as a necessary corollary to demonstrating her qualifications, that the School did not have "another, nondiscriminatory reason to issue the adverse employment decision." Miller v. Medcenter One, 1997 N.D. 231, ¶ 11, 571 N.W.2d 358, 360. Such

evidence is necessary to separate legitimate claims of discriminatory non-hiring from claims by similarly situated individuals who are not hired for legitimate, nondiscriminatory reasons. See id. In her affidavit and brief filed in support of her Motion for Summary Judgment, the Plaintiff made only conclusory statements regarding her status as a member of a protected class, her entitlement to Indian preference and her qualifications for the positions. See Ramey Affidavit, ¶ 15, Appendix, p. 29. For purposes of opposing a motion for summary judgment, however, "[a]ffidavits containing conclusory statements unsupported by specific facts are insufficient to raise a material factual dispute." Norwest Mortgage, Inc. v. Nevland, 1999 N.D. 51, ¶ 4, 591 N.W.2d 109, 111.

Specifically, in her brief, the Plaintiff alleges that the School rejected her application for the teacher's aid position because she was not a member of the Three Affiliated Tribes. See Plaintiff's Brief, Appendix, p. 19. Her primary support for this contention comes from a notation in the minutes of a School Board meeting that reads:

> The Board stressed being Three Affiliated Tribe and Residence Preference [sic], and they felt with Barb Ramey's qualifications she could be better utilized in different places. Also, the Board had just hired her husband, P.J. Little Owl.

See Plaintiff's Brief, Appendix, p. 23. Nothing in this note, however, suggests that her Tribal affiliation was the reason Ramey was not hired, nor does it suggest, as Ramey claims, that the board thought she was qualified for the positions. Ramey also relied on numerous hearsay statements in her affidavit, which are not only inadmissible in court, but also go no further to bolster her allegations that she was denied employment based on her tribal membership.

Affidavit of Barbara Ramey, ¶¶ 6, 11,15, 16, Appendix, pp. 28-30. She has provided no other evidence to support these statements.

Nothing else in the evidence submitted by the Plaintiff demonstrates that she was qualified for either position or that she was discriminated against based upon her membership in the Standing Rock Sioux Tribe. On the contrary, the Plaintiff's resume indicates that she was, in fact, not qualified for the positions sought. See Memorandum Opinion, Appendix, pp. 105-107. Although mention was made of the School's Tribal and Resident preference policy, Barbara Ramey's application was ultimately rejected because she was not qualified for any of the positions she applied for. See Affidavit of Melissa Starr, Appendix, pp. 74-75. A review of her résumé provides ample support for the Board's decision. With regard to her alleged "qualifications" as a computer specialist, Plaintiff's résumé listed experience with "personal computers, Windows 95, Windows 6.0 and some knowledge of DOS/Microsoft Office Suite." Appendix, pp. 31-32. The School submits that a passing acquaintance with PC's and their basic operating systems hardly qualifies a person as a computer specialist. More importantly, Plaintiff's work and education background demonstrate *no* experience with computers and do not support her claim to be qualified for this position.

With regard to the School Board's consideration of Plaintiff for an instructional aide position, her résumé provides absolutely no evidence of any experience working with children or teaching of any kind. See Appendix, pp. 31-32. Furthermore, the fact that a motion to hire her was voted down by the Board does nothing to establish any entitlement to the position. The five member

School Board makes decisions by a majority vote. She was not hired because three of the five members of the School Board considered other persons to be better choices for the employment opening. In this case, the Plaintiff's qualifications were not impressive enough to a majority of the Board for her to be offered a position. Because Ms. Ramey failed to present sufficient evidence to demonstrate the she was qualified for either of the positions sought or to refute the Defendant's sworn affidavits that Ms. Ramey was not hired because of her lack of qualifications, she failed to establish a prima facie case of discrimination. As a result, summary judgment was correctly granted in favor of the School.

As the District Court correctly found, the Plaintiff also failed to provide the School with any evidence that she was a member of a protected class or that she was entitled to Indian preference. According to the sworn statements of School Principal, Elaine Incognito, School Board President, Melissa Starr, and Tribal Employment Rights Office Director, Wade Baker, it is generally known on the Fort Berthold Reservation that persons seeking Indian preference need to submit proof of entitlement with their job application. See Affidavits of Elaine Incognito, Melissa Starr and Wade Baker, Appendix, pp. 63-65, 75, 91. In fact, many of the applications submitted for the positions in which the Plaintiff applied included evidence of tribal enrollment or entitlement to preference. See Incognito Affidavit, Appendix, pp. 63-64. Nothing Ms. Ramey submitted with her application indicated that she was in any way entitled to Indian preference. As the District Court correctly noted in its Memorandum Opinion, although an employer may not discriminate based on tribal affiliation, awarding preference

based upon an applicant's status as an Indian is permissible. In this case, however, Ms. Ramey failed to claim any entitlement to such preference when she applied for the two positions in the school, even though attaching proof of ones' status as an enrolled Indian to an application for employment is the general practice on the Reservation.

Furthermore, Ms. Ramey submitted nothing to the District Court to refute Ms. Incognito's sworn statements that Ramey failed to demonstrate her entitlement to preference. Instead, Ms. Ramey relied solely upon her conclusory allegations in her pleadings and affidavit that she was discriminated against based on the fact that she was not a member of the Three Affiliated Tribes. As discussed above, the party opposing summary judgment "may not simply rely upon the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact . . . ." Engel v. Montana Dakota Utilities, 1999 N.D. 111, ¶ 7, 595 N.W.2d 319, 321. The Plaintiff has simply failed to present competent evidence in this case that she disclosed to the School that she was a member of a protected class or that she was entitled to Indian preference.

Also persuasive in the establishment of a prima facie case of discrimination is proof that "similarly situated employees not in a protected class were treated more favorably." Miller, 1997 N.D. at ¶ 14, 571 N.W.2d at 362. In other words, Ramey must show that she was treated differently than others similarly situated because of her status as a member of a protected class.

Ramey relies solely on the above-quoted notation in the School Board meeting minutes and the hearsay statements in her affidavit to support her contention that she was, indeed, treated differently because of her tribal affiliation. Her reliance on these vague and uncorroborated statements, however, do not establish the reason for the School Board's action and, as the District Court accurately pointed out, do not establish a consensus of the board with regard to its ultimate decision. As such, these statements fail to satisfy the Plaintiff's burden in this matter. Furthermore, it is important to note that in and around the time Ramey was considered for employment, at least two individuals who were not members of the Three Affiliated Tribes were hired by the School to fill Title VII program positions. See Incognito Affidavit, Appendix, p 64. Ms. Ramey has not disputed this fact. It is clear then, as recognized by the District Court, that although the Tribes' Employment Rights Ordinance includes a provision for preference in hiring based on tribal membership[1], the School gives ample consideration to all of the applicants' qualifications regardless of their tribal affiliation. In the case of Ms. Ramey, three of the five Board members simply felt that she was not qualified enough to fill the positions. For any or all of these reasons, Ramey has failed to establish a prima facie case for discrimination under the North Dakota Human Rights

[1] The District Court noted in its Memorandum Opinion that the Plaintiff failed to properly present a case challenging the Constitutionality of the Tribal Employment Rights Ordinance (TERO) and, as such, the issue was not before the Court. See Memorandum Opinion, Appendix, pp. 13-14. The Plaintiff has not challenged this issue on appeal.

Act. As such, summary judgment in favor of the Defendant was proper and should not be disturbed on appeal.

III. The District Court's Order Denying Plaintiff's Motion for Reconsideration was Appropriate

Finally, the Plaintiff appeals the District Court's denial of her Motion for Reconsideration. Because the Plaintiff was not entitled to reconsideration of her case, however, the Court's Order was appropriate and should not be overturned. North Dakota law does not recognize a Motion for Reconsideration but instead treats such motions as Rule 60(b) Motions to Vacate. Relief under Rule 60(b) is an extraordinary remedy. See Nucor Corp. v. Nebraska Public Power Dist., 999 F.2d 372, 375 (8th Cir. 1993). Rule 60(b) should not be used as "a substitute for other legal remedies, and relief under this rule is to be granted only when exceptional circumstances prevented a party from seeking redress through the usual channels." Id.; See also, Follman v. Upper Valley Special Education Unit, 2000 N.D. 72, ¶10, 609 N.W.2d 90, 93, ("[T]he procedure provided by Rule 60(b) is not a substitute for appeal.") This Court similarly recognizes that "the principal of finality serves a most useful purpose for society, the courts, and the litigants – in a word, for all concerned." Follman, 2001 N.D. at ¶10, 609 N.W.2d at 93, citing First Nat'l Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 796 (N.D. 1986). Accordingly, the moving party bears the heavy burden of establishing sufficient grounds for disturbing a final decree. See id.

To justify relief under Rule 60(b), the movant may not rely on "conclusory recitations of the grounds for relief, but must set forth specific details underlying the assertions." Frafjord v. Ell, 1997 N.D. 16, ¶ 13, 558 N.W.2d 848, 852 . In

addition, Rule 60(b) motions "are not vehicles for relitigating old issues." Dvorak v. Dvorak, 2001 N.D. 178, ¶ 8, 635 N.W.2d 135, 137, citing Steven Baiker-McKee, William M. Jannsen, and John B. Corr, Federal Civil Rules Handbook 800 (2001). Accordingly, motions for reconsideration may not be used to directly attack the grounds upon which an order was issued. See id. (Arguments directly challenging the issuance of a protection order should have been taken up on appeal and not in motion for reconsideration.)

In Ramey's Motion for Reconsideration, she contended that the Court erred in finding that there were no genuine issues of material fact. Motion for Reconsideration, Appendix, p. 118. To support her argument, the Plaintiff pointed to the statements made in her affidavit, alleging that certain School Board members told her she was not hired because she was not a member of the Three Affiliated Tribes. In addition, the Plaintiff argues that because the Board allegedly told her she could not be hired because the School had recently employed her husband, this proves that the Board "impliedly acknowledged that the Board knew of her . . . residency on the reservation." Id. These allegations in no way entitle the Plaintiff to an order vacating the Court's final judgment. First of all, the determination of whether the Plaintiff established a prima facie case of discrimination was decided by the Court based on the evidence presented by the parties. By seeking reconsideration of the judgment, the Plaintiff was merely attempting to relitigate the very same issue, based on the very same evidence already before the court. As stated above, Rule 60(b) motions may not be used to relitigate old issues. See Dvorak, 2001 N.D. at ¶8, 635 N.W.2d at 137.

Secondly, the Plaintiff attacked the grounds upon which the Court issued its summary judgment order in favor of the Defendant, instead of demonstrating the necessary exceptional circumstances required to prevail on a Rule 60(b) motion. These are not proper grounds to vacate a final judgment under Rule 60(b).

In addition, as discussed in detail above, the Court ruled that the Plaintiff failed to present sufficient evidence demonstrating that she was a member of a protected class, or that she was qualified for the positions she applied for. See Memorandum Opinion, Appendix, p. 99. As these are two necessary elements of a prima facie case of discrimination under the North Dakota Human Rights Act, failure to demonstrate either one is sufficient grounds for granting summary judgment in favor of the Defendant. The Court noted that nothing in the Plaintiff's affidavit or supporting documents demonstrated that she applied for Indian preference by submitting proof of enrollment to the Tribe, or that she was in any way qualified for a position as a teacher's aide or computer specialist. See Memorandum Opinion, Appendix, pp. 102, 105-106. As this Court has made clear, Rule 60(b) motions will not relieve a party of its obligation to present adequate evidence at an appropriate time in the proceeding. See U.S. Bank National Assoc. v. Arnold, 2001 N.D. 130, ¶27, 631 N.W.2d 150, 157 ("Under Rule 60(b), a decision to submit only certain evidence at a stage in the proceedings generally cannot constitute exceptional circumstances justifying relief from judgment.") Accordingly, the Plaintiff's decision to submit an affidavit, which contained only conclusory statements of her entitlement to preference and her qualifications for the positions, together with the other documentation, which

goes no further to help the Plaintiff establish a prima facie case, cannot justify relief from summary judgment through Rule 60(b).

Finally, and most importantly, the Plaintiff was not entitled to an order vacating the underlying judgment because she failed to establish a prima facie case of discrimination under the North Dakota Human Rights Act and, as such, summary judgment was proper. For this reason as well, the District Court's Order denying the Plaintiff's Motion for Reconsideration should be affirmed.

CONCLUSION

For any or all of the reasons stated herein, the School requests that the District Court's Orders granting summary judgment in favor of the Defendant and denying the Plaintiff's Motion for Reconsideration be affirmed.

Respectfully submitted this 5th day of March, 2003.

FREDERICKS, PELCYGER & HESTER, LLC

By: _____

Thomas W. Fredericks
1075 South Boulder Road
Louisville, CO 80027
Telephone: (303) 673-9600

ATTORNEY FOR APPELLEE TWIN BUTTES SCHOOL DISTRCT