IN THE SUPREME COURT

STATE OF NORTH DAKOTA

George A. Ellis, Plaintiff/Appellee, v. North Dakota State University, Defendant/Appellant.	STATE OF NORTH DAKOTA **Supreme Court No. 20070005** **District Court No. 09-05-C-02821**

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE STEVEN MARQUART

REPLY BRIEF OF DEFENDANT/APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Tag C. Anderson
Assistant Attorney General
State Bar ID No. 04858
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Defendant/Appellant.

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INTRODUCTION

The starting point is the district court's opinion, the blue-print of its analysis upon which its findings rest. This Court must review the findings through the lens of the opinion's expressed reasoning.

After reading the district court decision, who was found to have actually, as a matter of reality, subjectively considered Ellis's age in the decisional process and was determinatively influenced by that consideration. Who in essence concluded, "He has to be fired because he is too old." The district court casts such ugliness at NDSU but no real person.

Re-articulating Ellis's trial approach of "throw it in the pot and stir." instead of articulating any rational thought process on why one fact may lead to a reasonable inference impacting another fact, the district court finds discrimination based upon wholly unrelated comments and actions. To suggest that the primary evidentiary basis for its decision—the Dorn comment—is strengthened by Taylor's comment at the administrative hearing or when Taylor started contemplating terminating Ellis is simply illogical.

How does Taylor's testimony before the Staff Personnel Board that Goergen was "a good young administrator" strengthen the inference Dorn's inquiry reflected a thought Ellis was too old to handle the job at the Division-I level? How does it strengthen the inference Dorn harbored that belief over three years later? How does it strengthen the inference Dorn not only speculated such a belief and held it over three years later but actually acted on that belief? How does it strengthen the leap she not only acted on that belief but acted upon it to determinatively influence the outcome?

Likewise, how does the fact Taylor visited with Human Resources to discuss possibly dismissing Ellis in January, before Ellis's formal evaluation was completed, strengthen the inference Dorn's inquiry reflected a view that Ellis

was too old to handle the job? How does it strengthen the inference she held and would act upon that view over three years later? How does it strengthen the conclusion she was principally responsible for the decision to terminate and age was a primary motivating factor in her decision?

The district court further does not explain how its "findings" of a prima facie case and pretext interrelate with the stated "primary" evidentiary basis for its decision. Either a preponderance of the evidence proved Dorn was principally responsible for the decision to terminate and the primary motivating factor for her decision was age or Taylor dismissed Ellis because of his age, not some synergistic combination of the two, resting on rank speculation at best, or court imposed notions of fairness at worst.

FACTS

The relevant facts are simple and straight forward, notwithstanding a week long trial unnecessarily and improperly delving into the minutia of Ellis's job performance. The men's coaches were not satisfied with Ellis and repeatedly brought that to Taylor's attention. (App. 358-359,520-524,535,540-541.) That fact is objective and undeniable. Taylor did not have first hand information but relied upon feedback from others—the men's coaches and Goergen. (App. 202,233,267,331.)

However, the reports Taylor received from the women's coaches were favorable. (App. 233-234.) Both Schwartz and Goergen testified about things Schwartz did to alleviate the coaches' frustrations for the women's programs. (App. 466-470,471-482,557-560,563-564.) Again objective and undisputed facts. Ellis simply asserts such things as he was busy with football, no one told him his plan to improve his performance was not as good as Schwartz's, diabetes prevented him working longer hours, insufficient resources to accomplish the job, different expectations than Taylor etc. (App. 73,89,91,94,114-117,131-132,155-

156,610,613,623,661.) The district court obviously bought Ellis's excuses, chastised Ellis's immediate supervisor as needing to "share the blame" for performance problems and dismissed the men's coaches as being too demanding. But that's an improper inquiry. Taylor explained what was communicated to him regarding Ellis's job performance and there is absolutely no dispute he received this information. (App. 131-132,233-234,278-300,329-331,619,620,658.) The coaches' and Ellis's immediate supervisor's testimony was entirely consistent. (App. 350-380,463-507,518-542,548-552.)

So did Taylor ignore the complaints of the men's coaches and the reports provided by Ellis' immediate supervisor and instead rely on Dorn? Of course not. There is no evidence Dorn provided any information that Taylor relied upon in deciding to terminate and the district court made no finding she did. Did Taylor simply allow Dorn to make the decision to terminate without any substantive basis for the action? Again, of course not. There is no evidence Dorn even urged Taylor to dismiss Ellis and the district court makes no such finding that she did.

NDSU, as an institution, cannot intentionally do anything. Yet in carefully chosen language, the district court makes that ultimate finding of NDSU's intentional discrimination without identifying any agent who actually did so. The district court's finding rests incorrect understandings and misapplications of the McDonnell Douglas framework and an irrational reliance upon an entirely acceptable inquiry about retirement plans made by a non decision-maker.

LAW AND ARGUMENT

I. Burden Shifting.

Under federal law, once an employer articulates non-discriminatory reasons for the action, the burden shifting framework drops from the picture, with the issue remaining solely whether intentional discrimination is proven. But

under North Dakota law, this Court stated a prima facie case shifts the very burden of persuasion, making a proper determination of a prima facia case an important component of any effective and meaningful appellate review. Further, here, the district court's analysis of the indirect evidence was little more than mechanical application of the burden shifting framework with wholly improper standards.[1]

The district court found a prima facie case based upon the mere fact Ellis is over forty and was replaced. But Ellis was never replaced. After Ellis received the pre-action letter in May, Schwartz temporarily assumed some of Ellis's duties as best he could. Months later, a decision to reorganize both Ellis's vacant position and Schwartz's position was made. (App. 249-257,300-306,320-322,345-346,402,460-462,483-486.) Schwartz applied for and was hired for a new position, assuming overall responsibility for the sports information

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[1] Ellis mischaracterizes isolated statements as direct evidence. They are not. Taylor testified at the administrative hearing that Goergen was a "good young administrator." Taylor acknowledged this prior testimony. But this comment cannot rationally be direct evidence of age animus and the district makes no such finding it was. Rather, the district court found Taylor was simply comparing Goergen's age with those he supervised. The district court possibly treated the Dorn comment as direct evidence of her motivation for inquiring about retirement, although it does so through inference. Regardless, the comment can't be viewed as direct evidence of Dorn's motivation for everything relating to Ellis three years later, let alone direct evidence of Taylor's motivation. Frieze v. Boatmen's Bank, 950 F.2d 538 (8th Cir.1991); Acker v. Deboer, Inc., 429 F.Supp.2d 828 (N.D.Tex. 2006); Wilsbach v. Filene's Basement, Inc., 1997 WL 805164 (E.D.Pa. 1997); Jones v. BE&K Engineering, 146 Fed.Appx. 356 (11th Cir.2005); Templeton v. Bessemer Water Service, 154 Fed.Appx. 759 (11th Cir.2005). As argued in Ellis's Staff Personnel Board brief, the issue was a pure question of pretext. The only question is whether the comments reasonably prove Taylor's explanations are but a lie to cover his true discriminatory motivations. Quite obviously they do not and the district court does not suggest otherwise. Bunk v. G.S.A., 408 F.Supp.2d 153 (W.D.N.Y. 2006); Nelson v. Long Lines Ltd., 335 F.Supp.2d 944 (N.D.Iowa 2004).

department for both men's and women's programs. Ellis's position ceased to exist. Still months to over a year later, individuals that had been grad-assistants when Ellis was dismissed applied for and were hired for newly authorized and different positions. Those considerations that might give rise to a permissible inference of discrimination without further explanation from the employer are simply absent in this case.[2]

On the issue of pretext, does the district court make a finding Taylor was being dishonest? The only fair reading of the language from the district court opinion is that it did not. How could it? The explanations Taylor gave were exactly the same as expressed by the head coaches for the men's programs and Ellis's immediate supervisor who recommended Ellis's termination. Even Ellis does not assert the district court found false testimony designed to hide discrimination, simply asserting NDSU cites no authority for the proposition. (Ellis Br. 26.) Ridiculous. The explanations for a given employment action must be false to give rise to a rational inference at all, and the arising inference must be that the actual motivation was an intent to discriminate. Schumacher v. N.D. Hospital Association, 528 N.W.2d 374, 382 (N.D. 1995); Rothmeier v. Investment

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[2] In addition, the district court does not address the decisional process, and the employer's explanations for the actions it seemingly relies upon. For example, the decision to reorganize was made after discussions with the coaches. (App. 483-484.) Not addressed by the district court, Dorn opposed the reorganization. A new position was created. The hiring decision was made by search committee consisting of the women's basketball coach, men's basketball coach, an individual from outside the Department, Taylor and Goergen. Some 30-40 applications were reviewed with three candidates interviewed. Schwartz was assesed the best candidate and offered the position. (App. 483-485.) The district court does not address this decisional process. Additionally, the decision on how to use the remaining position, and the position obtained the following year and who was to be hired into those positions was made by Schwartz, not Taylor or Dorn. (App. 485-486.) The district court relies upon proffered more favorable treatment of grad-assistants months to a year later, but inexplicitly does not address that the decisions were made by Schwartz.

Advisors, Inc., 85 F.3d 1328, 1336 (8th Cir. 1996). The Human Rights Act addresses discrimination, not unreasonable, irrational, unfair, or mistaken employment decisions.

The district court states that, based upon its finding Ellis's performance was "satisfactory" but not "perfect" as part of its prima facie case analysis, Taylor's explanations were unworthy of belief. But there is no explanation why. Ellis argues on appeal that a fact-finder's "rejection" of the employer's stated reasons together with a prima facie case may allow a finding of discrimination without further evidence. But rejecting for what reasons? The issue is veracity--the permissible basis for rejecting is limited to that reason. Public officials are presumed to be acting properly. If a court finds testimony dishonest, it must do so explicitly and explain its reasoning. But of course there are no explanations going to honesty in this case—e.g. demeanor of a witness. The actual explanations provided: "it is unfair" of the coaches to be "competitive" and "demand perfection," Goergen needs to "share the blame," all while ignoring the actual explanations provided for the decision.

An individual's motivation can be elusive and is often proven by circumstantial evidence. But where resting on indirect evidence, the facts must actually suggest discrimination in the absence of further explanation and a finding of pretext must be based on the falsity of the explanations and must actually suggest the true motivation is one prohibited by law. Neither is present here.

II. Separation of Powers and Administrative Res Judicata and Collateral Estoppel

Ellis and the district court misapprehend the nature of the Staff Personnel Board. The State Board of Higher Education("SBHE") has full power over employees at the institutions of higher education. Pursuant to SBHE Policy, all

employees hold either faculty, broadband, or non-broadband non-faculty positions. SBHE Policy 606.1. Pursuant to SBHE Policy, broadband staff employees are governed by the University System Human Resource Policy Manual. As required by the SBHE, every institution must have a Staff Personnel Board to entertain appeals from regular staff employees. See NDUS Human Resource Manual Policy 27. The Staff Personnel Board is not a separate agency, but rather is an entity of the SBHE that conducts staff employee appeals on behalf of the SBHE and as delegated to the President at each institution.

The only distinction between this case and Peterson is the SBHE no longer participates in the process and issues a final decision but rather completely delegates that function to the Staff Personnel Board and President. But Peterson and its concern for separation of powers did not rest on the fact the SBHE had not delegated that final responsibility. Judicial restraint does not end the moment a constitutional body, charged with full control and authority, delegates authority to a subordinate adjudicative body. Prior decisions from this Court do not rest on such artificial distinctions.

Ellis also suggests the issues were different. They were not. Look at the administrative record the district court ignored. (See Docket 13.) Ellis could not have exhausted administrative remedies had he not pursued identical discrimination claims. The same remedies were available--reinstatement plus backpay. The district court's suggestion otherwise rests on its misapprehension it could simply award damages as a mere substitute for reinstatement.

III. Equitable Estoppel.

Equitable Estoppel is statutory in North Dakota. and it is the statutory language that must followed. N.D.C.C. § 34-11-06. In this case, Ellis does not assert and the district court makes no findings Rick Johnson engaged in affirmative deception. Rather, citing Muhammed v. Welch, 2004 ND 46, 675

N.W.2d 402, the district court concludes Johnson was under some ill-defined duty to disclose. But disclose what? Johnson did not intentionally hide some fact unknown to Ellis as in Muhammed. All Johnson could have done was repeat what he already communicated. He intended to send it to Risk Management and did so, and believed it would take about a week to work its way through Risk Management with the date of service to be left open, and effectuated in the future by others.

Ellis did not rely upon silence in the face of some duty to disclose. On the thirteenth day, did Ellis fail to serve because of silence? Of course not. Assuming there was any reliance at all (an unreasonable assertion assumed by the district court with no actual evidentiary support), it could only be because thirteen days remains "about a week" with subsequent days no different. Furthermore, Ellis wrote Johnson indicating he would serve President Chapman if he didn't receive the admission of service by a certain date. (App. 660.) Why couldn't Johnson or others simply say "OK" and rely upon Ellis's assertion he would serve under Rule 4?[3]

Language can be inexact. But equitable estoppel is not a vehicle for excusing the consequences of miscommunications whenever it seems fair. Johnson did not deliberately mislead Ellis into believing something to be true for which NDSU is now "falsifying" by raising statute of limitations. Whatever misapprehensions Ellis had, the suggestion Johnson's e-mail was taken as a promise to effectuate service before the statute of limitations ran is not reasonable, and the actions of Johnson are not the "stuff" for which equitable estoppel applies, particularly against the sovereign.

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[3] After service was effectuated on April 29th executing an admission of service would have made no sense.

CONCLUSION

The State of North Dakota, by and through the State Board of Higher Education and NDSU, respectfully request that the judgment below be reversed.

Dated this 17 day of August, 2007.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
Tag Anderson
Assistant Attorney General
State Bar ID No. 04858
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Defendant/Appellant.