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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lindsey Hysjulien,	)	
	)	**Supreme Court Case No. 20120163**
Appellant,	)	
	)	
vs.	)	
	)	
Hill Top Home of Comfort, Inc., and Greg Armitage,	)	
	)	
Appellees.	)	
	)	

REPLY BRIEF OF APPELLANT LINDSEY HYSJULIEN

APPEAL FROM MEMORANDUM OPINION GRANTING SUMMARY JUDGMENT DATED JANUARY 11, 2012, AND JUDGMENT DATED JANUARY 24, 2012, DUNN COUNTY DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT THE HONORABLE H. PATRICK WEIR

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I. REPLY TO BRIEF OF APPELLEES, GENERALLY.

1 There is a genuine issue of fact as to when Plaintiff received unequivocal notice of termination, and therefore, the District Court erred in granting Defendant's motion for summary judgment. Defendants' brief does nothing more than argue that Plaintiff "created" this issue in an attempt to survive summary judgment. However, Defendants have asserted no testimonial or physical evidence that refutes Plaintiff's recitation of the facts; they merely argue that if it was not stated in the first place, it cannot be true. Due to the documentation that supports Plaintiff's assertion that she did not receive unequivocal notice of her termination until September 8, 2008, Plaintiff has at least shown that the issue of *when* notice was unequivocally given remains a genuine issue of material fact, and therefore, Defendants' motion for summary judgment should not have been granted.

II. THE PLAINTIFF'S CLAIM OF DISCRIMINATION HAS BEEN BROUGHT WITHIN 300 DAYS OF RECEIPT OF "UNEQUIVOCAL WRITTEN . . . NOTICE OF THE ACTION" AND THEREFORE IS NOT TIME-BARRED.

2 According to the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"), a discrete act, such as termination, must be challenged within 300 days of the date that the charging party received "unequivocal written . . . notification of the action, regardless of the action's effective date." *EEOC, §2-IV, TIMELINESS*. Because Lindsey Hysjulien (hereinafter referred to as "Hysjulien") was led to believe that she still had an opportunity to change the employment decision when she was notified of the possibility of termination on September 2, 2008, Hysjulien did not receive "unequivocal" notice of her termination until September 8, 2008, when she was informed

unequivocally that her department was being closed and her position terminated after nobody applied for the advertised job. This makes the sexual discrimination claim fall within the 300 day time period stated by N.D.C.C. § 14-02.4-19 of the North Dakota Human Rights Act and 42 U.S.C. § 2000e-5(e)(1) and therefore, it is not barred. At the very least, taking all reasonable inferences in the light most favorable to the non-movant, the Plaintiff, these circumstances create a genuine issue of fact that should survive the Defendant's motion for summary judgment.

A. Hysjulien's Affidavit to Deny Summary Judgment is Not A "Sham" Affidavit Solely Because it Brings to Light Previously Unmentioned, Undisputed Facts.

3 On September 2, 2008, Plaintiff and Defendant Armitage had a discussion that left Hysjulien with the impression that the reason her position was being terminated was that the department was short-staffed, and if someone responded to the *Bismarck Tribune* advertisement, which ran through September 5th, her position would not be terminated. Affidavit of Lindsey Hysjulien, J.A. p. 000050-000051. Because Hysjulien still had hope that her position would not be terminated after the September 2 discussion, she was not given unequivocal notice; instead, she received unequivocal notice on September 8 *after* the *Bismarck Tribune* ad had run its course.

4 Defendants allege that Hysjulien's Affidavit to Deny Summary Judgment is merely a "sham affidavit" used to "create" issues of fact, but this is clearly an erroneous claim. *Brief of Appellee*, p. 13-14. Defendants refer specifically to the addition of Hysjulien's testimony regarding the September 8, 2008, email and subsequent back-dating of the termination letter. *Id*. at 13. It is clear that Hysjulien's Affidavit is not a sham affidavit, and the facts alleged in the aforementioned Affidavit create a genuine

issue of fact regarding which date began the statutory time period during which Hysjulien could file her claim.

5 First, Hyslunien's Affidavit, and the facts therein, are supported by reputable physical evidence in the form of an email addressed to Defendant. It can be readily proved that Hysjulien is not making up facts just to "create" issues of fact, as Defendants allege. Hysjulien did not know that this fact would make a difference, and it was not at issue until Defendants filed their summary judgment motion. At that point, Hysjulien shared what was **now** a material fact; prior to that point there was no need to testify that the letter of termination was backdated. There is admissible testimony verifying that Hysjulien was told on September 2nd to allow the advertisement to run its course and to keep responding to inquiries. There is admissible documentation that Hyslunien did not receive her letter of notice of termination until *after* the advertisement in the *Bismarck Tribune* ran its course; prior to September 8th, she was still under the belief that if someone applied for the advertised job, her department would not be closed and her job would not be terminated. See Affidavit of Lindsey Hysjulien, Ex. 1, J.A. p. 000053; Affidavit of Lindsey Hysjulien, Ex. 2, J.A. p. 000054. Giving all favorable inferences to the non-movant, Hysjulien's claim was clearly made within the 300 day time period, or at least there is a genuine issue of fact about whether the claim was made during the 300 day period, and therefore the District Court erred in granting Defendants' motion for summary judgment.

6 Secondly, Defendants have offered no admissible evidence, physical or testimonial, refuting Hysjulien's depiction of what happened or supporting their allegations that her Affidavit is a "sham." There has been no affidavit from Defendant

Armitage asserting that after the September 2, 2008, discussion with Hysjulien, he sent the notice letter forthwith rather than waiting to see if anyone responded to the advertisement. There has been no physical evidence showing that Defendant unequivocally notified Plaintiff of her termination on September 2nd. Defendants have offered no material evidence whatsoever that meets their burden of showing that there is no genuine issue of fact. Because Defendants have not responded in any manner whatsoever, there is an inherent conflict regarding when Hysjulien received unequivocal notice of her termination, thus, there is a genuine issue of material fact concerning which date begins the statutory period during which the claim must be filed. Therefore, summary judgment should not be granted.

7 Defendants seek to dismiss the issue regarding the date of notice of termination by simply arguing that if a fact wasn't stated before, it can't be true. *Brief of Appellees*, pg. 12-13. Here, however, the fact was merely not mentioned before because, at the time, it wasn't relevant. Once the issue of *when* Hysjulien was notified of her termination came into play, Hysjulien readily testified that the September 2nd letter was backdated. This testimony is not a sham just because it wasn't previously mentioned—it is a documented fact that is backed up by admissible physical evidence. Defendants have asserted no evidence countering Hysjulien's depiction of how the September 2nd letter was backdated. Therefore, Hysjulien's testimony that she was not unequivocally notified of her termination until September 8th, rather than September 2nd, creates a genuine issue of fact, and not a sham one.

B. The Date of When a Termination Decision is Final and When Unequivocal Notice is Given is a Genuine Issue of Material Fact that Must Survive a Motion for Summary Judgment.

8 "[T]he date on which an unlawful employment practice occurs – in this case, when a termination decision is final and when unequivocal notice is given – is a question of fact." *Flannery v. Recording Industry Ass'n of America*, 354 F.3d 632, 640 (7th Cir. 2004). "[N]otice of termination contingent on some future event that may or may not occur at some indefinite point in the future cannot qualify [as unequivocal notice] because of the uncertainty regarding whether the employee will actually be terminated; intervening events might well lead to a reversal of the termination decision." *Connolly v. Mills Corp.*, 430 F.Supp.2d 553, 560 (E.D.V.A. 2006).

9 From the conversation between Hysjulien and Defendant Armitage on September 2, 2008, Hysjulien was left with the reasonable belief that while her department was at *risk* for termination soon due to short staffing, if someone applied for the position that was being advertised in the *Bismarck Tribune*, her department might be saved, and she would retain her job. This is evidenced by the email requesting written confirmation of termination of employment after the advertisement ran its course on September 8, 2008. However, whether or not it was made clear on September 2, 2008, that the employment was contingent on this advertisement being run and not being answered by a qualified person is a question of material fact that should survive summary judgment.

III. CONCLUSION.

10 The District Court granted Defendants' motion for summary judgment because the claims were not made within 300 days of notice of termination. Hysjulien has clearly shown that unequivocal notice was not given on September 2, 2008; instead, Hysjulien

was given warning that if no one applied for the position that was being advertised through September 5, 2008, her position would be terminated. Hysjulien, on September 8, 2008, requested backdated written notice of her termination, as evidenced by the email. Because this factual discrepancy exists, there is a genuine issue of material fact as to when unequivocal notice was given, and when the statute of limitations began to run. Therefore, the District Court erred in granting Defendant's motion for summary judgment.

Respectfully submitted this 12th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant , Lindsey Hysjulien and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 1,507 words from the portion of the brief entitled “Law and Argument " through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

DATED this 12th day of June, 2012.

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