

In the Supreme Court
State of North Dakota

No. 20150083

Lori Yahna,

Plaintiff and Appellant,

v.

Altru Health System,

Defendant and Appellee.

Appeal from the Judgment entered on January 22, 2014, and the summary judgment opinion dated January 16, 2015, Grand Forks County District Court, Case No. 18-2014-CV-00735

The Honorable Jon J. Jensen, Presiding

REPLY BRIEF OF PLAINTIFF AND APPELLANT

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I. LAW AND ARGUMENT

A. **Being replaced by a younger employee is sufficient to establish an inference of discrimination.**

[¶1] Altru claims that, under Hillesland v. Fed. Land Bank Ass'n of Grand Forks, 407 N.W.2d 206, 215 (N.D. 1987), Yahna needs to establish “proof of age-conscious statements, writings, policies or discriminatory actions.” However, direct evidence is not required to prove an age discrimination claim. Indeed, while there can be cases with such direct evidence, “[i]n Schweigert v. Provident Life Ins. Co., a majority of this court adopted a modified version of federal procedural law to assist plaintiffs relying on indirect evidence to prove employment discrimination claims under the Human Rights Act.” Schuhmacher v. North Dakota Hosp. Assn., 528 N.W.2d 374, 377-78 (N.D. 1995). Thus, a plaintiff in an age discrimination claim needs prove the prima facie elements of age discrimination and can do so by relying on circumstantial evidence. Id.

[¶2] Altru’s reliance on Luhrs v. Newday, LLC, 326 F. Supp. 2d 30 (D.D.C 2004), is misplaced because the Luhrs court determined that being replaced by younger and lower paid employees was not sufficient to establish an inference of age discrimination. Under North Dakota law, Yahna can rely on such evidence because in North Dakota one of the elements of the prima facie case is whether younger people were treated more favorably than she was. See Spratt v. MDU Res. Group, Inc., 2011 ND 94, ¶ 16, 797 N.W.2d 328 (stating one of the elements of a prima facie case is whether others not in the protected class were treated more favorably). North Dakota is in accord with numerous other jurisdiction that have determined that bringing forth evidence that the plaintiff was replaced by a younger employee is sufficient to establish an inference of discrimination. See Chambers v. Metro. Prop. & Cas. Ins. Co., 351 F.3d 848, 855 (8th

Cir. 2003) (stating that under Minnesota law, “[r]eplacement by a younger person is ordinarily sufficient circumstantial evidence to demonstrate that age was a factor in the termination decision.”); Barkhoff v. Bossard N. Am., Inc., 684 F. Supp. 2d 1096, 1107-08 (N.D. Iowa 2010) (stating that the plaintiff established a prima facie case of age discrimination when her replacements were eleven and twenty years younger); Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1114 (9th Cir. 2011) (providing that a plaintiff in an age discrimination case may raise a triable issue of pretext by bringing forth evidence that younger similarly situated employees were treated more favorably than her); Williams v. Greater Chattanooga Pub. Television Corp., 349 S.W.3d 501, 510 (Tenn. Ct. App. 2011) (opining that a plaintiff can establish an inference of age discrimination when a substantially younger employee replaces the plaintiff); Garnes v. Passaic Cnty., 100 A.3d 557, 568 (N.J. Super. 2014) (stating that even though a budget crisis existed requiring terminations, there was no justification for addressing that budget crisis by leaving investigators who were younger and higher paid on the job while terminating an older and lower paid employee); Dell, Inc. v. Wise, 424 S.W.3d 100, 112 (Tex. App. 2013) (stating the hiring of younger, similarly situated employees, is sufficient to establish disparate treatment).

1. Derek Todd did not have to take call, held Yahna’s position, and was a younger and lower paid employee.

[¶3] Altru ignores Yahna’s deposition testimony regarding Derek Todd replacing her, not having to take call, and being a younger person. A question of fact exists regarding Yahna’s age discrimination claim because she was replaced by a younger, lower paid, employee that did not have to take call.

[¶4] Yahna explained in her deposition that she remained the technical director of the lab until she was terminated, as Derek Todd had not even been trained for that position at the time Yahna was terminated. (App. P. 33, Dep. P. 29, ll. 12-25, P. 94, ll. 8-16). Yahna likewise continued to have QA responsibilities. (App. p. 33, Dep. p. 29, ll. 9-12, 16-25, p. 30, ll. 1-3, 9-17, p. 68, ll. 9-13, p. 94, ll. 8-16, p. 95, ll. 13-17, p. 96, ll. 3-5, p. 181, ll. 17-25, p. 182, ll. 1-4). Derek Todd replaced Yahna in her supervisory position. (App. P. 34, Dep. P. 30, ll. 8-25). Derek Todd was a younger person, and he is the one who most closely took over Yahna's position at the time she was terminated. (App. p. 71, Dep. p. 181, ll. 15-25; App. P. 71, ll. 1-4). Altru was able to pay Derek Todd half the salary Yahna received. (App. p. 234). Mahin acknowledged in her deposition that Derek Todd did not have to take call because he had the QA Coordinator responsibilities. (App. p. 126, Dep. p. 87, ll. 4-9).

[¶5] Moreover, whether full-time was actually a job requirement is a disputed fact. After Yahna was terminated and four younger technologists were hired, Dr. Paulson stated that "they're full-time unless they get sent home, because there's not enough work for them," which he went on to state there was "not at the moment." (App. p. 204, Dep. p. 26, ll. 10-17). Further, Dr. Paulson stated Altru is "full of people" who work part-time. (App. p. 203, Dep. p. 22, ll. 23-25, p. 23, ll. 1-11).

2. Yahna was satisfactorily performing her job since call was not required for her position.

[¶6] Yahna was satisfactorily performing her job. Altru acknowledges Yahna was a good employee, but contends call was required for her job. Yahna was an excellent employee, but call was not required for those with supervisory responsibilities. (App. p. 126, Dep. p. 87, ll. 4-9).

[¶7] Further, even if call was required for Yahna, it is a question of fact whether Yahna's inability to take call "at this time" meant she was not satisfactorily performing her job. Taking call would have required a major shift in Yahna's job responsibilities because she no longer would have had a set work schedule. Yahna's response that she could not take call at the time was appropriate since Altru only let her know of the call requirement on June 18, 2012. (App. p. 42, Dep. p. 62, ll. 2-25, p. 118, ll. 18-19). Yahna informed Altru she could not take call at that time. (App. p. 44, Dep. p. 72, ll. 10-25, p. 73, ll. 1-4, p. 99, ll. 23-24, p. 100, ll. 1-13). Instead of working with Yahna to see when she could take call, Mahin emailed Yahna the call schedule on June 28, 2012, for call duties starting July 2, 2012. (App. p. 94, Dep. Ex. 19). Yahna's response that she could not take call at the time did not mean she was not satisfactorily performing her job. Altru never gave Yahna adequate time to meet the call requirement, if that was even a requirement for her job.

[¶8] Finally, at the time Yahna was terminated, Altru was "short-handed . . . in ultrasound, so she was kind of unreplaceable." (App. p. 201, Dep. p. 19, ll. 21-23). Altru was "having trouble keeping up with the workload at that point." (App. p. 204, Dep. p. 26, ll. 5-7). Moreover, Altru knew that the only vascular technologist aside from Yahna would be leaving in September. (App. p. 113, Dep. p. 37, ll. 20-24). Thus, the vascular ultrasound department at Altru was "in a little bit of a hurt bag there for doing things" after Yahna was terminated. (App. p. 205, Dep. p. 31, ll. 22-24). Disputed issues of fact exist regarding whether Yahna was satisfactorily performing her job.

B. The Bykonen case does not preclude a determination that Altru violated its policies and procedures by terminating her.

[¶9] Altru relies on Bykonen v. United Hospital, 479 N.W.2d 140 (ND 1992), for the proposition that policy 3204 is not a contract of employment as a matter of law. In Bykonen, this court relied on a disclaimer in the personnel handbook that provided the handbook could not be construed as a contract of employment. Id. at 142. The plaintiff’s testimony unequivocally established she understood her at-will status. Id. Importantly, the plaintiff failed to offer the entire manual into the record, making “it impossible to determine the possible existence of a conflict between the manual and the handbook that might create a factual issue of whether Bykonen’s at will status was somehow changed or enhanced by the manual.” Id.

[¶10] Here, Yahna did offer conflicting policies in the record. (App. P. 194-196, 220-228). For example, policy 3203 allows for informal grievances to be addressed with a Manager without fear of being penalized. (App. p. 223). Policy 3220 allows a procedure for conflict resolution among the leadership team. (App. p. 227). Further, Yahna explained:

[W]hile having an open and honest communication with my manager, I was terminated because of a call issue. . . . I was not able to do call at a certain point and time. I was then terminated for the same reason, without going through any sort of conflict resolution procedure.

(App. P. 234). Thus, there is a question of fact about whether Altru violated its informal grievance process.

II. CONCLUSION

[¶11] Questions of fact exist regarding Yahna’s age discrimination claim because Yahna was replaced by a younger and lower paid employee. Further, questions of fact exist regarding whether Yahna was satisfactorily performing her job because call was not required for her position. Finally, questions of fact exist regarding whether Altru

violated its policies and procedures, because Altru immediately terminated Yahna without any conflict resolution procedure when she could not take call at a certain point in time. Yahna respectfully requests this Court reverse the district court's order granting summary judgment.

Dated this 25th day of June, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Petitioner in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 1,602.

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District Court Case No. 18-2014-CV00735

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Plaintiff and Appellant,

v.

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

The undersigned, being first duly sworn, deposes and says that she served the attached:

REPLY BRIEF OF PLAINTIFF AND APPELLANT

on June 25, 2015, by email as follows, to-wit:

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To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Pamela Burman

Pamela Burman

Subscribed and sworn to before me this 25th day of June, 2015.

/s/ Robyn L. Tande

Notary Public, Robyn L. Tande
Cass County, North Dakota
My Commission Expires: 10.09.2018