

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

BRIEF OF PLAINTIFF AND APPELLANT

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I. STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in granting summary judgment when questions of fact exist regarding whether Lori Yahna satisfactorily performed her job duties and whether others not in the protected class were treated more favorably than Lori Yahna.

[¶2] Whether the district court erred in granting summary judgment when questions of fact exist regarding Lori Yahna's claim that Altru Health System's decision to terminate her violated Altru Health System's policies and procedures.

II. STATEMENT OF THE CASE

[¶3] Lori Yahna ("Yahna") brought a complaint against Altru Health System ("Altru") on October 19, 2012. (App. p. 4). The complaint alleged Altru wrongfully terminated Yahna in violation of Altru's policies and procedures and in violation of the North Dakota Human Rights Act. Id.

[¶4] Altru moved for summary judgment on August 19, 2014. (App. p. 1). The district court granted Altru's motion for summary judgment. (App. p. 11). The district court determined Altru's policies and procedures did not abrogate the employment-at-will relationship. (App. p. 8). The district court further determined Yahna failed to satisfactorily perform her job duties, individuals outside the protected class were not treated more favorably than her, and Altru had a legitimate non-discriminatory reason for terminating Yahna. Id.

[¶5] The district court entered a Judgment of dismissal, with prejudice, pursuant to the Order Granting Summary Judgment on January 22, 2015. (App. p. 24).

Altru noticed entry of the Judgment of Dismissal on January 30, 2015. (App. p. 30).
Yahna proceeded to notice this appeal on March 16, 2015. (App. p. 238).

III. STATEMENT OF THE FACTS

[¶6] Yahna graduated from North Dakota State College of Science in Wahpeton in 1983 as a Licensed Practical Nurse (“LPN”) and began working for Grand Forks Clinic, which later became Altru, in January 1984. (App. p. 28, Dep. p. 8, ll. 13-25, p. 9, ll. 1-2). Yahna worked as a float nurse for approximately one year, and then was asked to attend special training in the vascular field in order to work with Dr. Rolf Paulson (“Dr. Paulson”). (App. p. 28, Dep. p. 9, ll. 6-8, 21-25, p. 10, ll. 1-6). Yahna trained in Sioux Falls, Minneapolis, Chicago, and Seattle and, by approximately 1986, Yahna no longer performed any LPN work and was solely a vascular technologist. (App. p. 29., Dep. p. 10, ll. 11-14, p. 11, ll. 9-10, p. 15, ll. 23-25, p. 16, l. 1, p.17, ll. 14-15). Yahna became a Registered Vascular Technologist in 1992 when she passed her boards. (App. p. 29, Dep. p. 11, ll. 17-22, p. 14, ll. 14-25, p. 15, ll. 1-10).

[¶7] When Yahna began her work with Dr. Paulson, Yahna was the Technical Director of the Vascular Lab and developed the Vascular Medicine Practice with Dr. Paulson. (App. p. 31, Dep. p. 19, l. 25, p. 20, ll. 1-2; App. p. 199 Dep. p. 6, ll. 21-25, p. 7, ll. 1, 11-13). Yahna trained other ultrasound technologists to work in the Vascular Lab and helped with quality assurance (“QA”). (App. p. 32, Dep. p. 22, ll. 12-17; App. p. 199, Dep. p. 9, ll. 20-25, p. 10, ll. 1-10, p. 38, ll. 2-6). Yahna became the Supervisor of Vascular Ultrasound around 1997. (App. p. 107, Dep. p. 11, ll. 7-9, 20-25).

[¶8] In 2001, Yahna received approval to move to part-time and began working three days a week, at 24 to 30 hours per week. (App. p. 32, Dep. p. 23, ll. 1-2, p. 24, ll. 1-4).

In 2006, Yahna could have moved to full-time and retained her Supervisor role, but decided to remain part-time and became the Coordinator and Technical Director of the Vascular Lab. (App. p. 33, Dep. p. 27, ll. 11-21, p. 28, ll. 8-14, 21-22).

[¶9] In 2012, near the time of Yahna's termination, the role of Coordinator went to Derek Todd, but Yahna maintained her position as Technical Director of the Vascular Lab and understood she would still be doing QA and reviewing technologists' films as she was never given notice otherwise. (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). Yahna was not directly informed about the position Derek Todd received, nor was she ever approached about applying for the position, despite being the employee who functionally held the position. (App. p. 33, Dep. p. 28, l. 25, p. 29, ll. 1-3, 9-11, p. 30, ll. 25, p. 31, ll. 1-3). Yahna still believed she held the QA responsibilities. (App. p. 33, Dep. p. 29, ll. 9-12, 16-25, p. 30, ll. 1-3, 9-17, 22-24, 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).

[¶10] By all accounts, Yahna excelled in vascular ultrasound, was very good with patients, quick and efficient, hardworking, thorough, and knowledgeable. (App. p. 200, Dep. p. 12, ll. 3-15; App. p. 117, Dep. p. 51, ll. 12-18, p. 53, ll. 5-16, p. 54, ll. 6-18; App. p. 216, Dep. p. 8, ll. 22-25, p. 9, ll. 1-6, p. 11, ll. 13-15). In addition, Yahna was "always willing to work over the noon hour, work late . . . go that second mile." (App. p. 200, Dep. p. 12, ll. 16-18). Although Yahna did not take call for many years, she would fill in if Altru was short-staffed. (App. p. 32, Dep. p. 25, ll. 1-3, p. 91, ll. 9-23). Other technologists could, and would, call Yahna at any time, and she would come in to help or answer their questions over the telephone. (App. p. 32, Dep. p. 25, ll. 1-3, p. 91, ll. 9-23). Moreover, when asked

to change her schedule from Monday/Tuesday/Wednesday to Monday/Tuesday/Friday because they were short staffed and other employees were complaining, Yahna agreed to do so. (App. p. 34, Dep. p. 32, ll. 16-22, p. 33, ll. 10-13; App. p. 121, Dep. p. 68, ll. 15-17, p. 69, ll. 1-5). Similarly, when Yahna was asked to help out by the manager, Andrea Eichhorst, in early June 2012, she agreed to do so by working extra hours to train new hires. (App. p. 37, Dep. p. 44, ll. 9-18, p. 45, ll. 17-22).

[¶11] Although the ultrasound department had included both general ultrasounds and vascular ultrasounds for many years, Altru decided to split the departments late in May or early June 2012. (App. p. 113, Dep. p. 35, ll. 13-16, p. 41, ll. 3-14). Laurie Mahin (“Mahin”) originally believed that all employees would have to be full-time in ultrasound because of the department split. (App. p. 123, Dep. p. 74, ll. 5-12, p. 75, ll. 1-4). Mahin informed Yahna that she was to be a full-time employee on June 12, 2012, stating “I can’t lie to you anymore, you’ve always been considered full-time” in the upcoming changes. (App. p. 40, Dep. p. 56, ll. 4-11, 23-25). By June 21, 2012, Yahna still believed she would be required to be full-time permanently. (App. p. 40, Dep. p. 57, ll. 21-25, p. 58, ll. 1-7, Dep. Ex. 18). Her belief was confirmed on June 22, 2012, when the manager, Andrea Eichhorst, sent an email to Jackie Walsh stating Yahna needed to be full-time. (App. p. 184, Dep. Ex. 9).

[¶12] Unbeknownst to Yahna, the full-time requirement changed when Andrea Eichhorst stated that part-time employees could have a shared schedule with another part-time employee or utilize flex scheduling. (App. p. 123, Dep. p. 75, ll. 5-25, p. 76, ll. 3-11). This would have been a real possibility for Yahna, as there was at least one other ultrasound technologist also seeking part-time employment, and the department was looking for new

vascular lab hires as well. (App. p. 116, Dep. p. 48, ll. 18-25, p. 49, ll. 1-2, p. 72, ll. 1-4). Yahna, however, was never told that this was an option. (App. p. 43, Dep. p. 69, ll. 1-15). Rather, Andrea Eichhorst and Margo Svoboda informed Yahna it was not an option for her to seek part-time employment because she also need to take call. (App. p. 43-44, Dep. p. 69, ll. 1-15, p. 70, ll. 1-19).

¶13 Although Altru had allowed Yahna to not take call for over a decade, in her first meeting with Human Resources (“HR”) on June 18, 2012, she was told that she would now be required to take call. (App. p. 42, Dep. p. 62, ll. 2-25, p. 118, ll. 18-19). Yahna was informed that everyone was required to take call because ultrasound was short-staffed, but Mahin, Derek Todd, and others were still not required to take call. (App. p. 42, Dep. p. 64, ll. 18-25, p. 65, ll. 1-13).

¶14 Yahna told the other supervisors, management and HR she would not be able to take call “at that time” due to family and farm obligations; nobody at Altru asked Yahna at what time she would be able to take call. (App. p. 44, Dep. p. 72, ll. 10-25, p. 73, ll. 1-4, p. 99, ll. 23-24, p. 100, ll. 1-13). Rather than continue discussions with Yahna about a feasible time to begin taking call, even though Yahna was still performing QA and acting as the Technical Director, Mahin emailed Yahna the call schedule on June 28, 2012, with her scheduled to take call duties immediately after the weekend on July 2, 2012. (App. p. 94, Dep. Ex. 19). When Yahna received the email on her next work day, Friday, June 29, 2012, she went to Mahin to discuss it. (App. p. 26, Dep. p. 76, ll. 11-25, p. 77, ll. 1-15). Mahin told Yahna “I want to stay out of it,” effectively limiting any recourse or discussions that Yahna could have before the first day she was scheduled to take call. (App. p. 26, Dep. p. 76, ll. 11-25, p. 77, ll. 1-15).

[¶15] Margo Svoboda in HR set up a meeting on the afternoon of July 2, 2012. (App. p. 46, Dep. p. 79, ll. 1-10, p. 80, ll. 1-9). Jackie Walsh was the only member of management to attend this meeting, even though she claims she was not involved in any discussions related to Yahna's termination (despite sending an email regarding Yahna's employment on June 25, 2012). (App. p. 171, Dep. p. 22, ll. 9-17; Dep. Ex. 9). When Jackie Walsh came to the meeting she asked if Yahna was not willing to take call; Yahna repeatedly responded that she was unable to take call "at this time." (App. p. 47, Dep. p. 82, ll. 21-25, p. 83, ll. 1-5). Jackie Walsh then terminated Yahna. (App. p. 171, Dep. p. 22, ll. 7-25). Prior to terminating Yahna, Jackie Walsh did not look into Yahna's skill with patients and doctors, communication or problem-solving skills, ethics, or any other relevant skills. (App. p. 173, Dep. p. 30, ll. 18-25, p. 31, ll. 1-16, p. 33, ll. 7-25, p. 34, ll. 1-7).

[¶16] Derek Todd was given the coordinator position. (App. p. 33, Dep. p. 29, ll. 9-25, 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 was a newer, 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). Derek Todd did not have to take call. (App. p. 42, Dep. p. 64, ll. 18-25, p. 65, ll. 1-13).

IV. STATEMENT OF THE STANDARD OF REVIEW

[¶17] The Court reviews the District Court's decision to grant summary judgment de novo. Dunford v. Tryhus, 2008 N.D. 212 ¶ 5, 776 N.W.2d 539. Summary judgment is a procedural device used to promptly and expeditiously dispose of a case without a trial when there "is no genuine issue of material fact, or if the law is such that resolution of the factual disputes will not alter the result." Strom-Sell v. Council for

Concerned Citizens, Inc., 1999 N.D. 132, ¶ 16, 597 N.W.2d 414. In deciding whether to grant a motion for summary judgment, the court must look at the evidence in a light most favorable to the party opposing the motion. Riemers v. Grand Forks Herald, 2004 N.D. 192, ¶ 4, 688 N.W.2d 167. When a court must make a finding of fact, summary judgment is inappropriate. Krueger v. St. Joseph’s Hospital, 305 N.W.2d 18, 22 (N.D. 1981).

V. LAW AND ARGUMENT

A. **Questions of Fact Exist Regarding Yahna’s Age Discrimination Claim.**

[¶18] The North Dakota Human Rights Act provides that “[i]t is a discriminatory practice for an employer . . . to discharge an employee . . . because of . . . age.” N.D.C.C. § 14-02.4-03. Age is defined as “at least forty years of age.” N.D.C.C. § 14-02.4-02. “To establish a prima facie case of discrimination under the North Dakota Human Rights Act, a plaintiff must prove: (1) membership in a protected class under the Act; (2) satisfactory performance of the duties of the position; (3) an adverse employment decision; and (4) others not in the protected class were treated more favorably.” Spratt v. MDU Res. Group, Inc., 2011 ND 94, ¶ 16, 797 N.W.2d 328; see also Anderson v. Meyer Broad. Co., 2001 ND 125, ¶ 18, 630 N.W.2d 46 (“Thus, in order to show a prima facie case of age discrimination, Anderson must show she is a member of the protected class (at least forty years old), *see* N.D.C.C. § 14–02.4–02(1), and others not in the protected class (under forty) were treated more favorably.”). “A plaintiff must prove the discharge was unlawful discrimination and may, but does not necessarily, prevail on the basis of the prima facie case combined with a finding of the incredibility of the defendant employer’s proffered explanation for its employment decision.” Jacob v. Nodak Mut. Ins. Co., 2005 ND 56, ¶ 13, 693 N.W.2d 604.

1. There is no dispute that Yahna is a member of a protected class and that an adverse employment decision occurred on July 2, 2012.

[¶19] There is no dispute that Yahna is over 40 years of age and a member of the protected class, since Yahna was born in 1963. (App. p. 5). Nor is there any dispute that there was an adverse employment decision when Yahna was terminated on July 2, 2012. Therefore, Yahna can prove elements one and three of the age discrimination test.

2. There are genuine issues of material fact regarding Yahna's satisfactory performance of her job duties.

[¶20] While the district court determined Yahna did not satisfactorily perform the duties of her job, this is a disputed material fact, as is whether others not in the protected class were treated more favorably than her. As such, the district court should not have granted summary judgment.

[¶21] Mahin noted that Yahna did not have to take call between 2000 and 2012 “because she was supervisor. Or QA, educator, whatever her title was at that time.” (App. p. 108, Dep. p. 15, ll. 20-25, p. 16, ll. 1-3). However, Yahna remained QA, reviewing other technologists' films, at the time she was terminated. (App. p. 33, Dep. p. 29, ll. 9-12, 16-25, p. 30, ll. 1-3, 9-17, App. P. 43, p. 68, ll. 9-13, App. P. 50, p. 94, ll. 8-16, p. 95, ll. 13-17, p. 96, ll. 3-5). Mahin herself noted that those with a QA role did not need to take call, yet not being able to take call became the stated reason for terminating Yahna. (App. p. 108, Dep. p. 15, ll. 20-25, p. 16, ll. 1-3; App. P. 171, Dep. p. 22, ll. 22-25, p. 23, ll. 1-3). Whether Yahna satisfactorily performed her job by not taking call is a disputed fact, because those with the QA role did not have to take call.

[¶22] Moreover, Yahna never refused to take call at any time. Rather, Yahna informed Jackie Walsh she would not be able to take call “at that time.” (App. P. 48, Dep.

p. 82, ll. 21-25, p. 83, l. 1). While the district court determined Yahna had not satisfactorily performed her job because she could not take call “at that time,” Yahna’s response was reasonable given that she was only told she would be required to take call one week beforehand, and only received notice of the first day she was scheduled to take call the work-day before.

[¶23] Finally, Dr. Paulson explained in his deposition that Yahna satisfactorily performed her job. (App. p. 200, Dep. p. 12). Dr. Paulson testified:

Q. Why was she good?

A. I guess, for one thing, she’s great with patients. I think that’s her biggest forte.

Another thing, and this, I think just happened, she’s really good with her hands. I mean, some people tried it and just weren’t as good, and so our scheduler said she was good, she could work about twice as fast as anybody else and do good work.

But, also, she’d always be willing to work over the noon hour, work late, she always would go that second mile.

Q. So she was a hard worker too?

A. Very hard worker, efficient worker. . . .

Id. As such, there are disputed facts regarding whether Yahna satisfactorily performed her job.

3. There are genuine issues of material fact regarding whether others not in the protected class were treated more favorably than Yahna.

[¶24] Younger employees were treated in a more favorable manner than Yahna. Yahna’s Coordinator job was given to Derek Todd, an employee who was both younger and less experienced than her, and who was still in need of training. (App. p. 34, Dep. p. 30, ll. 9-24, p. 94, ll. 8-16, p. 96, ll. 3-5, p. 181, ll. 15-16; App. p. 104, Dep. p. 87, ll. 2-3). Mahin claimed 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). Yahna was never

approached about the position, even though it was functionally hers previously, and she still believed she held the QA responsibilities when she was terminated. (App. p. 33, Dep. p. 29, ll. 9-12, 16-25, p. 30, ll. 1-3, 9-17, 22-24, 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). Therefore, a younger employee was given Yahna's job and her benefit of not having to take call, while she was then pushed into a less desirable technologist position that was also required to be full-time. Similarly, when Altru claimed that Yahna was just a regular ultrasound technologist at the very end of her employment because of her functional demotion, she was then replaced by new graduates, none of whom had any experience. (App. p. 115, Dep. p. 43, ll. 3-21, 25, p. 44, ll. 1-4; see also App. p. 197, Dep. p. 26, l. 25, p. 27, ll. 1-4).

[¶25] These, like the questions regarding Yahna's satisfactory performance, are all disputed questions of fact that should not have been decided on summary judgment. "[T]he burden of establishing a prima facie case is not onerous" in age discrimination cases. Spratt v. MDU Res. Group, Inc., 2011 ND 94, ¶ 18, 797 N.W.2d 328, 334. Viewing the evidence in a light most favorable to Yahna, there are genuine issues of material fact regarding whether others not in the protected class were treated more favorably than her.

B. The district court erred in granting summary judgment on Yahna's claim that her termination violated Altru's policies and procedures, because questions of fact remain regarding whether Altru violated its policies and procedures.

[¶26] The district court determined Yahna was an at-will employee. (App. p. 20). However, questions of fact exist regarding whether Altru followed its policies and procedures for terminating Yahna.

[¶27] Under North Dakota law, an employee can overcome the at-will presumption. Hunt v. Banner Health System, 2006 ND 174, ¶ 16, 720 N.W.2d 49, 50. In Hunt, this court determined that summary judgment in a wrongful termination case was inappropriate, even though the employee handbook conspicuously stated on the welcome page: “Nothing contained herein shall be construed as a guarantee of continued employment. Banner does not guarantee continued employment to employees and reserves the right to terminate or lay off employees.” Id. This Court noted that “an employee handbook must be read and construed in its entirety and all of its provisions taken into consideration so that the true intent of the parties is determined.” Id. at ¶ 10. This court further opined that the determination regarding the validity of claims regarding contract or wrongful termination should assess “the parties’ intent in determining whether a contract existed and not merely searching the handbook for a disclaimer.” Id. at ¶ 11. This Court held in Hunt that “[s]ummary judgment was improper because the ambiguities in the handbook created a question of material fact whether the handbook was intended by the parties to establish required terms of the employment relationship.” Id. at ¶ 18.

[¶28] Here, similar to Hunt, there are ambiguities in the policies and procedures. The district court relied on a disclaimer in policy No. 3204 for its determination to dismiss Yahna’s claim. Policy No. 3204 states: “While this policy provides an option for addressing substandard work performance, it does not restrict Altru Health System’s ‘At Will’ employment rights, nor create any contract of employment.” (App. p. 194 (emphasis added)). At best, however, this means that this one policy alone does not restrict at-will employment – by its own language, it does not apply to any other policies or procedures. The issue,

however, is with the policies and procedures as a whole, and there is no general disclaimer regarding all the policies and procedures.

[¶29] Altru’s Code of Ethics, as described in Policy No. 2402, states that “Altru Health System recognizes its responsibility to its . . . staff . . . to conduct patient care and all other operations in an ethical manner based on its values, mission, vision, and strategic plan.” (App. p. 220). These values go on to explain that “employees . . . will be treated with dignity, respect and courtesy;” “[e]mployees will be provided with . . . support;” and “[e]mployees . . . will be encouraged and supported in efforts to collaborate [and] problem-solve.” (App. p. 21).

[¶30] Additionally, Altru’s Grievance Process, as described in Policy No. 3203, states that: “[a] grievance exists when an employee is dissatisfied with a decision, which impacts their employment. It is the right of employees to openly, directly and respectfully address a grievance with their Manager without fear of being penalized or retaliated against.” (App. p. 223) (emphasis added). The policy goes on to explain informal and formal grievance procedures. Id. Altru allows employees to state grievances as their “right.” Id. Further, Altru’s Conflict Resolution Process, Policy No. 3220, furthers this claim by providing a clear procedure for conflict “among the Leadership Team (including Medical Staff Leadership).” (App. p. 227).

[¶31] As noted previously, when Yahna expressed her grievance, Mahin, the ultrasound supervisor, told her that she did not want to get involved. When Yahna proceeded to make a grievance with HR and her manager, she was fired almost immediately for “insubordination.” Viewing the evidence in a light most favorable to Yahna, because Yahna was almost immediately terminated when she expressed her grievance, there is a question of fact regarding whether Altru violated its own policies and procedures by not following its own

grievance process. Thus, there are issues of fact regarding whether the Policies and Procedures of Altru altered the at-will employment rights, and whether the policies and procedures were followed.

VI. CONCLUSION

[¶32] Yahna respectfully requests this Court reverse the district court's order granting summary judgment.

Dated this 4th day of May, 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 3,992.

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