

CASE NO. 2018-0027

IN THE NORTH DAKOTA SUPREME COURT

David A. Ramirez,

Plaintiff-Appellant,

v.

Walmart Store 1649,

Defendant-Appellee.

Appeal from the December 7, 2017, Order on Motion to
Dismiss, District Court, Southeast Judicial District, Stutsman
County, North Dakota

Case No. 47-2017-cv-651

The Honorable Cherie L.
Clark
District Judge

BRIEF OF APPELLEE

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WITH ADDENDUM

Table of Contents

TABLE OF AUTHORITIES ¶ 1

STATEMENT OF JURISDICTION..... ¶ 2

STATEMENT OF ISSUES FOR APPELLATE REVIEW ¶ 6

STATEMENT OF THE CASE..... ¶ 8

STATEMENT OF FACTS ¶ 12

ARGUMENT ¶ 15

 I. Standard of Review..... ¶ 17

 II. Ramirez Fails to State a Claim of Retaliatory Discharge..... ¶ 20

CONCLUSION..... ¶ 26

CERTIFICATE OF SERVICE ¶ 28

CERTIFICATE OF COMPLIANCE WITH N.D.R. APP. P. 32(a)(8) ¶ 29

ADDENDUM ¶ 30

WITH ADDENDUM

[¶ 1] TABLE OF AUTHORITIES

CASES

<i>Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161</i> , 2011 ND 185, 803 N.W.2d 827	¶ 18
<i>Brodell v. Brodell</i> , 293 N.W.2d 137 (N.D. 1980).....	¶ 19
<i>Cnty. Homes of Bismarck, Inc. v. Clooten</i> , 508 N.W.2d 364 (N.D. 1993)	¶ 3
<i>Dahlberg v. Lutheran Social Services</i> , 2001 ND 73, 625 N.W.2d 241	¶¶ 21, 23
<i>Haugenoe v. Bambrick</i> , 2003 ND 92, 663 N.W.2d 175	¶ 4
<i>Lang v. Schafer</i> , 2000 ND 2, 603 N.W.2d 904.....	¶ 18
<i>Northington v. Jackson</i> , 973 F.2d 1518 (10th Cir. 1992)	¶ 19
<i>Runck v. Brakke</i> , 421 N.W.2d 487 (N.D. 1988)	¶ 4
<i>Sanders v. Kohler Co.</i> , 641 F.3d 290 (8th Cir. 2011).....	¶ 24
<i>Sanderson v. Walsh Cty.</i> , 2006 ND 83, 712 N.W.2d 842.....	¶ 4
<i>Towne v. Dinius</i> , 1997 ND 125, 565 N.W.2d 762.....	¶ 18
<i>Vandall v. Trinity Hosps. No. 51-03-C-0154</i> , 2003 WL 25853077 (N.D. Dist. Ct. June 17, 2003)	¶ 24
<i>Vandall v. Trinity Hosps.</i> , 2004 ND 47, 676 N.W.2d 88.....	¶¶ 18, 21
<i>Ziegelmann v. Daimler-Chrysler Corp.</i> , 2002 ND 134, 649 N.W.2d 556.....	¶¶ 14, 18

STATUTES

29 U.S.C.A. § 2101	¶ 24
N.D. Cent. Code Ann. § 28-27-02	¶¶ 3, 4
N.D. Cent. Code Ann. § 34-01-20	¶¶ 5, 7, 9, 21, 23, 24, 27

RULES

N.D.R. Civ. P. 12(b)(vi).....	¶¶ 18, 25
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CONSTITUTIONAL PROVISIONS

N.D. Const. art. VI, § 6.....	¶ 3
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WITH ADDENDUM

¶ 2] STATEMENT OF JURISDICTION

¶ 3] The North Dakota State Constitution states that, appeals "shall be allowed from decisions of lower courts to the supreme court as may be provided by law." N.D. Const. art. VI, § 6; *see also Cmty. Homes of Bismarck, Inc. v. Clooten*, 508 N.W.2d 364, 365 (N.D. 1993) ("This right to appeal is statutory.") (internal citation omitted). In civil matters, a party may appeal, in relevant part, an "order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken." N.D. Cent. Code Ann. § 28-27-02(1).

¶ 4] Generally, an order of dismissal without prejudice is not an appealable order under NDCC § 28-27-02. *Runck v. Brakke*, 421 N.W.2d 487, 488 (N.D. 1988). "Because either side may commence another action, the order dismissing this action neither 'determines the action' nor 'prevents a judgment from which an appeal might be taken.' NDCC § 28-27-02(1)." *Id.* A dismissal without prejudice may be appealable, however, where the dismissal has the "practical effect of terminating the litigation in the plaintiff's chosen forum." *Haugenoe v. Bambrick*, 2003 ND 92, ¶ 2, 663 N.W.2d 175. Consequently, where the statute of limitations has run on a plaintiff's claims, a dismissal without prejudice is appealable. *See, e.g., Sanderson v. Walsh Cty.*, 2006 ND 83, ¶6, 712 N.W.2d 842, 845.

¶ 5] Plaintiff-Appellant David Ramirez ("Ramirez") purports to bring claims against Defendant-Appellee Walmart Inc. (improperly identified as "Walmart Store 1649") ("Walmart") under N.D. Cent. Code Ann. § 34-01-20 ("§ 34-01-20," North Dakota's employer anti-retaliation statute). [Appellant's Appendix ("Appx."), pg. 2]. In relevant part, the statute provides that actions under this provision must be brought within one hundred eighty days of the violation or completion of any grievance procedure available to the employee. § 34-01-20(3). Walmart

WITH ADDENDUM

terminated Ramirez's employment on April 18, 2017 (though Ramirez did not provide this date in his Complaint), and thus the statute of limitations expired on or about October 15, 2017. The District Court dismissed the action without prejudice on December 7, 2017. [Appx. at 35]. Because the District Court's dismissal occurred after the statute of limitations had run, this Court has jurisdiction to hear the appeal.

[¶ 6] STATEMENT OF ISSUES FOR APPELLATE REVIEW

[¶ 7] Whether the District Court correctly dismissed Ramirez's retaliatory discharge claim under N.D. Cent. Code Ann. § 34-01-20 for failure to state a claim upon which relief could be granted?

[¶ 8] STATEMENT OF THE CASE

[¶ 9] Ramirez filed suit against Walmart on or about October 13, 2017, alleging that he was terminated in violation of § 34-01-20 for raising complaints regarding unfair "serial dismissals" of other employees. [Appx. at 2-4].

[¶ 10] On November 6, 2017, Walmart filed a Motion to Dismiss, stating that Ramirez's Complaint failed to allege any facts to support a claim that he had engaged in any protected activity or suffered retaliatory discharge. [Appx. at 5-9]. Ramirez filed an "Answer Brief to Motion for [sic] Dismiss" on November 22, 2017, which included a number of facts and documents not provided in his Complaint. [Appx. at 10-34].

[¶ 11] On December 7, 2017, the District Court, having reviewed the briefs and positions of each party, granted Walmart's Motion to Dismiss, and ordered that the case be dismissed without prejudice. [Appx. at 35]. This appeal followed.

WITH ADDENDUM

¶ 12] STATEMENT OF FACTS

¶ 13] The following facts are taken from Ramirez's Complaint and are assumed to be true solely for the purposes evaluating Walmart's Motion to Dismiss. The precise nature of Ramirez's claim is unclear. As best Walmart can surmise, Ramirez appears to allege that he began working for Walmart in or about November 2, 2016. [Appx. at 3]. He alleges that over a period of approximately two years, Walmart has discharged a large number of associates (the term Walmart uses to refer to all of its employees). *Id.* On March 26, 2017 (and unspecified times thereafter), Ramirez claims that he told an assistant manager that the dismissals are "unfair." *Id.* at 3-4. Ramirez pleads that, in retaliation for speaking out against associate terminations, Walmart "cancelled" his job and provided pretextual justification for doing so. *Id.* at 4.

¶ 14] In his Answer Brief to Motion for [sic] Dismiss and in Appellant's Brief, Ramirez improperly relies on additional facts, documents, and photos that were not included in his initial Complaint. *See Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 15, 649 N.W.2d 556, 565 ("It is within the trial court's discretion to exclude material outside the pleadings on a motion to dismiss for failure to state a claim."). Nevertheless, such allegations contain the same basic contentions that Walmart hired and fired a large number of associates over a multi-year period, [Appx. at 11-16], and that Ramirez felt his own termination and the terminations of other employees were not truly based on misconduct. [Appx. at 19, 27-30].

WITH ADDENDUM

¶ 15] ARGUMENT

¶ 16] Ramirez fails to set forth any facts upon which the District Court could have found a right to relief. As such, the District Court correctly dismissed the action without prejudice.

I. ¶ 17] Standard of Review

¶ 18] “The purpose of a N.D. R. Civ. P. 12(b)(vi) motion is to test the legal sufficiency of the statement of the claim presented in the complaint.” *Ziegelmann*, 2002 ND at ¶ 5, 649 N.W.2d at 565. When reviewing the District Court's ruling on a Motion to Dismiss brought under N.D.R. Civ. P. 12(b)(vi), this Court construes the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint. *Vandall v. Trinity Hosps.*, 2004 ND 47, ¶ 5, 676 N.W.2d 88, 90. Dismissal is proper where “it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted.” *Id.* (quoting *Lang v. Schafer*, 2000 ND 2, ¶ 7, 603 N.W.2d 904). Thus, on appeal, the Court will affirm the dismissal of a complaint for failure to state a claim if it cannot “discern a potential for proof to support it.” *Id.* (quoting *Towne v. Dinius*, 1997 ND 125, ¶ 7, 565 N.W.2d 762). This Court reviews the District Court's decision under N.D.R. Civ. P. 12(b)(vi) de novo. *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827, 829.

¶ 19] Ramirez is not relieved of his pleading requirements simply because he has chosen to proceed *pro se*. *Brodell v. Brodell*, 293 N.W.2d 137, 138 (N.D. 1980) (“[W]e are not about to grant special exemptions to pro se litigants.”); *see also Northington v. Jackson*, 973 F.2d 1518, 1520-21 (10th Cir. 1992) (noting that although the court should liberally construe a pro se plaintiff's complaint, “the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations”).

WITH ADDENDUM

II. ¶ 20 Ramirez Fails to State a Claim of Retaliatory Discharge

¶ 21] Ramirez's factual allegations are insufficient to support a claim of retaliatory discharge. In relevant part, N.D. Cent. Code Ann. § 34-01-20, forbids employer retaliation against an employee for reporting a violation: “An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because: a. The employee ... in good faith, reports a violation or suspected violation of [law] to an employer...” § 34-01-20; *see also Vandall*, 2004 ND 47, ¶ 7, 676 N.W.2d at 90. An employee claiming retaliation under § 34-01-20 must show (1) he engaged in protected activity; (2) the employer took adverse action against him; and (3) the existence of a causal connection between his protected activity and the employer's adverse action. *Dahlberg v. Lutheran Social Services*, 2001 ND 73, ¶ 34, 625 N.W.2d 241, 253.

¶ 22] Here, Ramirez has not pleaded any facts to establish the first element—that his complaints regarding Walmart's terminations—constituted protected activity. Ramirez does not allege that Walmart's actions were discriminatory or otherwise illegal; rather, Ramirez alleges only that he felt the terminations were "unfair" and that Walmart did not have just cause to terminate him or other associates. Appellant's Brief, Subpart C, ¶¶ 1-4.

¶ 23] Ramirez admits that he and the other terminated associates were employed at-will. Appellant's Brief, Subpart E, ¶ 1. Ramirez alleges a reduction in the total number of workers at his Walmart location of approximately 43% over two years (42 positions out of 98 total positions). [Appx. at 3]. Even if true, a large amount of turnover in a retail business such as Walmart does not, by itself, support any inference of illegal activity. As this Court made clear in *Dahlberg*, 2001 ND at ¶ 38, 625 N.W.2d at 254-55, § 34-01-20 was not intended to protect an employee who acts for a purpose other than exposing an illegality.

WITH ADDENDUM

[¶ 24] Moreover, such turnover is insufficient to constitute a mass layoff that would trigger any protections under federal Worker Adjustment and Retraining Notification (WARN) Act. *See* 29 U.S.C.A. § 2101(3) (defining "mass layoff" as a 33% reduction in force, or at least 50 employees, in a 30 day period); *see also Sanders v. Kohler Co.*, 641 F.3d 290, 295 (8th Cir. 2011) ("[E]mployees who are fired but replaced by others are not part of a reduction in force and are not part of the aggregate calculation that determines whether the numerosity threshold has been met."). Ramirez likewise cannot state a common law claim of retaliatory discharge because § 34-01-20 preempts common law retaliation claims. *Vandall v. Trinity Hosps.*, No. 51-03-C-0154, 2003 WL 25853077 (N.D. Dist. Ct. June 17, 2003).

[¶ 25] Ramirez provides no grounds for the Court to find, or even reasonably infer, that Walmart's actions violated any law, regulation, ordinance or rule, or that Ramirez's complaints were a good faith attempt to protest any such violation. Consequently, even under the liberal pleading standard of Rule 12(b)(vi), Ramirez fails to state a claim upon which relief can be granted.

[¶ 26] CONCLUSION

[¶ 27] Plaintiff-Appellant Ramirez alleges no facts to demonstrate that he engaged in any protected activity under § 34-01-20. Thus, the Complaint fails to set forth a claim upon which relief can be granted. Therefore, Defendant-Appellee Walmart Inc. respectfully requests that this Court affirm the District Court's Order on Motion to Dismiss.

WITH ADDENDUM

Respectfully submitted this 29th day of March, 2018.

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Appellee-Defendant,

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¶ 28] CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via email and certified mail, this 29th day of March, 2018, to the following:

David Ramirez
1615 Western Park Village
Jamestown, ND 58401

/s/Christopher R. Hedican
Christopher R. Hedican

¶ 29] CERTIFICATE OF COMPLIANCE WITH N.D.R. APP. P. 32(a)(8)

I certify that this brief complies with the type-volume limitation set forth in N.D.R. App. P. 32(a)(8). This brief contains 2,349 words, exclusive of the cover page, table of contents, and table of authorities.

WITH ADDENDUM

[¶ 30] ADDENDUM

NDCC § 34-01-20. Employer retaliation prohibited--Civil action for relief—Penalty

1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.

b. The employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.

c. The employee refuses an employer's order to perform an action that the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.

2. An employer who willfully violates this section is guilty of an infraction.

3. An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within one hundred eighty days after the alleged violation, completion of proceedings under subsection 4, or completion of any grievance procedure available to the employee under the employee's collective bargaining agreement, employment contract, or any public employee statute, rule, or policy, whichever is later. If the court determines that a violation has or is occurring under this section, the court may order, as the court deems appropriate, reinstatement of the employee, backpay for no more than two years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee, from the same employer, must reduce backpay otherwise allowable. In any action under this section, the court may award reasonable attorney's fees to the prevailing party as part of the costs of litigation. An employee whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for conduct prohibited by subsection 1 is available must exercise that process to completion before commencing an action under this subsection, and if that process provides for judicial review by statutory appeal, then recourse under this subsection is not available.

4. The department of labor and human rights shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. In order to receive assistance from the department of labor and human rights, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the department of

WITH ADDENDUM

labor and human rights under this subsection before proceeding under other provisions of this section.

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WITH ADDENDUM