

No. A06-0966

STATE OF MINNESOTA  
IN COURT OF APPEALS

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CHARLES E. MEADS,

Appellant,

vs.

BEST OIL COMPANY d/b/a  
THE LITTLE STORES AND LINDA WIITA,

Respondents.

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**APPELLANT'S BRIEF**

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## LEGAL ISSUES

Appellant Charles Meads presents the following issues to this Court:

1. Whether a factual dispute exists regarding Appellant Meads' qualifications for a cashier's position at Respondents' convenience store, despite his criminal conviction some 12 years ago.

### **The Trial Court erroneously found:**

That no material factual dispute exists with respect to whether Mr. Meads would have not been hired had his true criminal history been revealed on his employment application.

### **Most Apposite Authorities:**

Frey v. Ramsey County Cmty. Human Services, 517 N.W.2d 591 (Minn. Ct. App. 1994).

Welch v. Liberty Mach. Works, 23 F.3d 1403 (8<sup>th</sup> Cir. 1994).

2. Whether there is a material fact issue associated with Respondents' pretext for refusing to hire Appellant Meads.

### **The Trial Court inaccurately found:**

That Appellant Meads had the burden to produce direct evidence demonstrating a racially motivated non-hiring decision, and failed to meet that burden.

### **Most Apposite Authorities:**

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Kaster v. Indep. Sch. Dist., 284 N.W.2d 362 (Minn. 1979).

State v. Scientific Computers, Inc., 393 N.W.2d 200, 203 (Minn. Ct. App. 1986).

## STATEMENT OF THE CASE

This case began as an investigation of the City of Duluth Human Rights Office into Respondents' discriminatory failure to hire Appellant Meads as a cashier in their convenience store. (Appellant Meads' Complaint, Appx.-2, ¶ 7.) The City of Duluth Human Rights Commission found probable cause to believe that the non-hiring decision was the result of racial discrimination. (Id.)

By Complaint dated September 2, 2005, the City of Duluth initiated suit against Respondents and on behalf of Appellant Meads, alleging that Respondents' failure to hire Mr. Meads was in violation of the City's Human Rights Ordinance – Chapter 29C of the Duluth City Code. (Id. at ¶¶ 9-10.) In their Answer of September 8, 2005, Respondents denied Mr. Meads was qualified for the position he had applied for and denied they had discriminated against him in their non-hiring decision. (Appx.-5.)

On or about January 26, 2006, Respondents brought a motion for summary judgment before the Trial Court. (Appx.-6.) The motion was heard on February 21, 2006, and was granted in its entirety by Order dated March 22, 2006. (The Trial Court's Order, Judgment and Memorandum are reproduced at Appx.-7.) Specifically, the Trial Court summarily dismissed Mr. Meads' discrimination claim on two grounds: (1) by considering after-acquired evidence of wrongdoing under Frey v. Ramsey County Cmty. Human Services, 517 N.W.2d 591 (Minn. Ct. App. 1994), Appellant Meads is allegedly not qualified for a cashier position at Respondents' convenient store; and (2) Mr. Meads allegedly failed to demonstrate that Respondents' proffered reasons for their non-hiring decision are merely pretext for discrimination. (See the Trial Court's Memorandum, pp. Appx.-11 through Appx.-15.)

With this appeal, Appellant Meads challenges and seeks a complete reversal of both aspects of the Trial Court's summary-judgment decision. (See the Notice of Appeal, Appx.-16.) As *amicus curiae*, the American Civil Liberties Union of Minnesota [hereinafter, "ACLU-MN"] additionally seeks a declaration of this Court that the Courts of Minnesota will follow United States Supreme Court precedent stating that after-acquired evidence of wrongdoing in discrimination cases cannot act to bar a complainant's suit. (Appx.-17 through Appx.-19.)

### **STATEMENT OF THE FACTS**

Appellant Meads, who is an African-American male, first applied for a cashier position at Respondents' convenience store on October 25, 2004. (See Appx.-89 through Appx.-90.) Appellant Meads denied having been convicted of a crime on his employment application, which reads, "A criminal record does not constitute an automatic bar to employment and will be considered only as it relates to the job in question." (Appx.-89.) The application goes on to state that if the information given in the application is found to be false, that the applicant "may" be subject to termination. (Appx.-90.)

Prior to applying for employment, Appellant Meads was a regular customer in Respondents' store, averaging approximately one to two visits per day. (Deposition of Charles Meads, Appx.-27, p. 32, ll. 17-20.) He saw no blacks working there on any of his numerous visits. (*Id.* at Appx.-31, pp. 46, l. 25 – 48, l. 1.) Additionally in speaking with some of the other employees, Mr. Meads got the impression that Respondent Linda Wiita "has a problem with that." (*Id.* at 47, ll. 1-18.)

Indeed, Respondent Wiita, the manager of Respondents' convenience store, did not review Appellant Meads' application until after he called her for an interview. (Deposition of Linda Wiita, Appx.-65, p. 32, ll. 5-9.) Respondent Wiita interviewed

Appellant Meads for a cashier position in November 2004. (Id. at Appx.-65, p. 29, ll. 17-20.) Mr. Meads was on time and dressed appropriately for his interview. (Id. at Appx.-66, p. 34, ll. 13-17.) Respondent Wiita recognized Mr. Meads as a customer of the store, but claims to have not made the non-hiring decision at that time. (Id. at Appx.-68, p. 41, ll. 10-15.)

Respondent Wiita recalls very little about the substance of her interview with Mr. Meads; and it does not appear that they discussed Mr. Meads' visits to the store as a customer. (Id. at Appx.-66 through Appx.-67, pp. 34, l. 22 – 38, l. 18; Appx.-83 through Appx.-84, pp. 104, l. 20 – 107, l. 11.) Moreover, Respondent Wiita does not make a practice of taking notes during her interviews and does not recall taking notes during Mr. Meads' interview. (Id. at Appx.-67, p. 39, ll. 8-19.) Respondent Wiita did testify during her deposition that Mr. Meads was not unfriendly during the interview, that his demeanor during the interview differed from that observed of him as a customer and that his demeanor during the interview was appropriate for a cashier in Respondents' store. (Wiita Depo., Appx.-68, pp. 41, l. 18 – 42, l. 3.) There was nothing that Mr. Meads did during his interview to indicate to Respondent Wiita that he was unqualified for the cashier job. (Id. at 42, ll. 8-11.)

At around the same time as Mr. Meads' interview, Joseph Biermaier and Lonnie Cameron applied for the same position. (Appx.-91 through Appx.-94.) Both are white. (Wiita Depo., Appx.-69, p. 48, ll. 19-20; Appx.-70 through Appx.-71, pp. 52, l. 15-53, l. 6.) Both were ultimately hired as cashiers in Mr. Meads' place. (Id. at Appx.-69, p. 45, ll. 16-18.)

The only management training that Respondent Wiita had prior to Mr. Meads' interview was through her job at Respondents' store. (Id. at Appx.-63, p. 23, ll. 6-18.) Cheryl Sievers, her supervisor, trained Respondent Wiita on the store's hiring

procedures. (Deposition of Cheryl Sievers, Appx.-46 through Appx.-47, pp.16, l. 15 – 19, l. 14.) She did not instruct Respondent Wiita to ask any particular questions during an interview because according to Ms. Sievers, it does not matter what questions are asked. (Id. at Appx.-47, pp. 19, l. 11-20, l. 10.) All that matters according to Ms. Sievers is how the individual evaluator feels about an applicant's personality. (Id. at 20, ll. 5-10.)

In their memorandum supporting summary judgment, Respondents' counsel described Respondents' hiring procedures as follows:

Little Stores has no formal criteria for determining which applicant should be hired for cashier positions. Rather, Little Stores relies on the store managers to determine who should be interviewed, and who should ultimately be hired based on the qualifications of the applicant as well as the general impression.

(Appx.-144). For instance, Respondent Wiita testified that Respondents do not check an applicant's references. (Wiita Depo., Appx.-67, p. 37, ll. 6-9.) Ms. Sievers testified that work history is also unimportant to Respondents in making their hiring decisions. (Sievers Depo., Appx.-45, p. 11, ll. 1-4.)

Respondent Wiita testified that she is unaware of anything that might disqualify a person for the position of cashier. (Wiita Depo., Appx.-65, p. 31, ll. 14-16.) For the purpose of this case, however, Ms. Sievers claims that Respondents do not hire felony burglars. (Sievers Depo., Appx.-45, p. 12, ll. 17-21.) As it turns out, the white Mr. Cameron, who Respondents hired instead of Mr. Meads, has a burglary conviction in his past. (See Appx.-95 through Appx.-100.) In particular, he was convicted of burglary in the third degree on two occasions in 1995. (Id.) Mr. Cameron failed to disclose his criminal background on the employment application. (Appx.-93.) Nonetheless, his employment was apparently terminated for reasons wholly unrelated to his burglary convictions or failure to disclose the same. (Wiita Depo., Appx.-70, p. 49, ll. 2-11.)

In addition, Respondents' Employee Handbook purports to replace all verbal statements of company policy. (Appx.-104.) Reminiscent of the language on Respondents' employment application, the handbook states that any misrepresentations on an employment application "may" result in termination of employment. (Appx.-107.) Based on this evidence, the Trial Court commented:

Facially a factual dispute is thus created because a false statement is apparently forgiven in certain cases or at least may potentially be overlooked. The circumstances where that might occur are not spelled out in either document leading to the conclusion they are likely a matter of managerial discretion.

(Appx.-13.) Respondents' Employee Handbook also states, "Persons hired are selected solely on the basis of such qualifications as ability, aptitude, experience, education, and desire." (Appx.-106.) No mention of an applicant being disqualified on account of a felony burglary conviction can be found. (Id.)

Respondents first learned during Appellant Meads' deposition in this case that he had been convicted of a felony, aiding in burglary, some 12 years ago, and that he had failed to disclose the crime on his employment application. (Meads Depo., Appx.-22, p. 9, ll. 2-15.) Despite not knowing this information at the time of their non-hiring decision, Respondents relied upon it as a basis for summary judgment. (Appx.139 through Appx.-144.)

Additionally, Respondent Wiita's proffered reason for failing to hire Mr. Meads in defense of this case was allegedly the personal impression he left upon her as a customer. (Wiita Depo., Appx.-67, p. 40, ll. 4-24.) On the other hand, she is unsure of the precise reasons why she hired Mr. Cameron. (Wiita Depo., Appx.-70, p. 50, ll. 12-19.) Respondent Wiits further does not know or remember why she chose to hire Mr. Biermaier over Mr. Meads. (Id. at Appx.-71, p.53, ll. 18-19.) Respondent Wiita also testified that she would not expect her customers to behave the same way in a non-

work setting as they would behave in a work setting. (Id. at Appx.-67 through Appx.-68, pp. 40, l. 25-41, l. 3.) Appellant Meads does not recall having ever been waited on by Respondent Wiita prior to his interview in November of 2004. (Meads Depo., Appx.-30, pp. 42, l. 11 – 43, l. 3.)

Another one of Respondents' employees, Aaron Potopinski, who waited on Mr. Meads daily as a customer, described Mr. Meads as "very friendly." (Deposition of Aaron Potopinski, Appx.-35 through Appx.-36, pp. 8, l. 11 – 9, l. 5.) According to Mr. Potopinski, Mr. Meads was always courteous, nice and polite. (Id. at 9, ll. 7-11; Appx.-37, p. 16, ll. 14-25.) He had never seen Mr. Meads be unfriendly or rude to anyone else in the store. (Id. at Appx.-37, p. 16, ll. 23-25.) In fact, because of Mr. Meads' "great demeanor" when he was in the store, Mr. Potopinski was willing to be a reference for Mr. Meads in his application for employment. (Id. at Appx.-36, p. 10, ll. 11-25.)

Ms. Sievers, who participated in the non-hiring decision, had seen Mr. Meads in and around the store, but formed no opinion about him as a result. (Sievers Depo., Appx.-56, pp. 53, l. 23 – 54, l. 6.) She never witnessed Mr. Meads to be rude. (Id. at Appx.-50, p. 30, ll. 1-5.) As far as Ms. Sievers knew, Mr. Meads was rude to Respondent Wiita one time; and because of that, Ms. Sievers claims she decided not to hire him. (Id. at Appx.-51, p. 33, ll. 13-16.) She knew nothing about his job experience, nor did she review his application. (Id. at 33, ll. 17-22.) What is more, Ms. Sievers testified that if a person came into the store as a customer and was rude on one occasion, she would not use that against the customer in evaluating his or her application for employment. (Id. at Appx.-50, p. 32, ll. 1-10.)

In addition to the primary proffered reason for Respondents' non-hiring decision – i.e. that Respondent Wiita allegedly observed Mr. Meads to be unfriendly as a customer – Ms. Sievers claims to have not hired Mr. Meads based on rumors regarding

Mr. Meads' relationship with Lavon McEwen. (Id. at Appx.-52, p. 38, ll. 11-25; Appx.-49, pp. 27, l. 3 – 28, l. 21.) Ms. Sievers claims that Ms. McEwen described Mr. Meads as “hot”, stated that she was afraid of Mr. Meads and told Ms. Sievers that Mr. Meads had been in an altercation with Ms. McEwen's son. (Sievers Depo., Appx.-49, pp. 27, l. 10 – 28, l. 10.) Although Ms. Sievers had seen the police over at Mr. Meads and Ms. McEwen's residence on one occasion, she did not know whether the authorities were there on account of Mr. Meads or any other reason. (Id. at Appx.-49 through Appx.-50, pp. 28, l. 22 – 29, l. 11.) Respondent Wiita, for her part, testified that she did not know whether the rumors regarding Mr. Meads and Ms. McEwen would have had any affect on her non-hiring decision. (Wiita Depo., Appx.-85, pp. 109, l. 6-111, l. 24.)

In a sworn affidavit submitted to the Trial Court, Ms. McEwen denied having ever told Ms. Sievers that Mr. Meads is “hot”. (Affidavit of Lavon McEwen, Appx.-88, ¶ 4.) At no time has Ms. McEwen had to call authorities to report actions taken by Mr. Meads; and even though she used Respondents' telephone to call authorities on one occasion, that occurred prior to Mr. Meads moving in with Ms. McEwen and involved someone else. (Id. at Appx.-87, ¶ 2.) Ms. McEwen further denied that Mr. Meads had been in an altercation with her son, or that she told Respondents' employees any such thing. (Id. at Appx.-88, ¶ 3.) According to her affidavit, Ms. McEwen has been diagnosed with a social phobia, which makes it difficult for her to speak to other people. (Id. at ¶ 4.) As a result, Ms. McEwen simply does not speak about her personal life with casual acquaintances. (Id.)

### **ARGUMENT**

Appellant Charles Meads is entitled to a trial on the merits, since genuine issues of material fact exist with respect to the elements of his discrimination claim. At the forefront, Mr. Meads agrees with *amicus curiae* ACLU-MN that the Courts in this state

should follow United States Supreme Court precedent regarding after-acquired evidence of wrongdoing in discrimination cases generally. In fact, this Court has evaluated its previous decision in Frey v. Ramsey County Cmty. Human Services, 517 N.W.2d 591 (Minn. Ct. App. 1994), juxtapose to the holding of the United States Supreme Court in McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995), and followed the latter. The same course of action should be taken here.

Even if this Court applies the rule announced in Frey, Mr. Meads' case should have survived summary judgment because there is a material fact issue as to whether Respondents Best Oil Company and Linda Wiita would have hired Mr. Meads had he disclosed his prior criminal conviction on the employment application. In addition, the Trial Court inaccurately determined that no proof of a racially motivated pretext had been presented. In truth, there was ample circumstantial evidence related to Respondents' subjective hiring criteria to raise a material fact issue on that subject. Moreover, there was plenty of proof to suggest that Respondents' proffered explanation for their non-hiring decision is unworthy of credence, and therefore pretext for discrimination. Summary judgment in Respondents' favor should be reversed.

## **I STANDARD OF REVIEW.**

This Court is asked to review, and reverse in its entirety, the Trial Court's Order granting summary judgment of Mr. Meads' discriminatory refusal to hire claim in favor of Respondents. "When reviewing a grant of summary judgment, this court must determine whether there are any genuine issues of material fact and whether the court below erred in applying the law." S. Minn. Mun. Power Agency v. Boyne, 578 N.W.2d 362, 363 (Minn. 1998); Fairview Hosp. & Health Care Services v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995). The "standard of review for summary judgment is de novo." Sentinel Mgnt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819,

827 (Minn. 2000). Likewise, an appellate court uses “a de novo standard of review in determining whether the court below erred in its application of the law or the construction of a statute.” Boyne, 578 N.W.2d at 364.

The salutary purpose and useful function of summary judgment proceedings as a means of securing the just, speedy, and inexpensive determination of the action (Rule 1) is well recognized, but resort to summary judgment was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists.

Burner Serv. & Combustion Controls Co. v. Minneapolis, 250 N.W.2d 224, 226 (Minn. 1977). “It is the rule that a motion for summary judgment should be denied if under the evidence reasonable men might reach different conclusions.” Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 605 (Minn. 1957). “In other words a summary judgment is proper where there is no issue to be tried but is wholly erroneous where there is a genuine issue to try.” Burner Serv., 250 N.W.2d at 226.

“It is also the rule that all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment for the court is without right to draw inferences favorable to a movant for summary judgment or pleadings.” Anderson, 84 N.W.2d at 605. A court making a summary judgment determination is not at liberty to weigh the evidence or make factual determinations. Teffeteller v. Univ. of Minn., 645 N.W.2d 420, 432 (Minn. 2002). It also “may not examine the quantum of evidence when deciding a summary judgment motion.” Louwagie v. Witco Chem. Corp., 378 N.W.2d 63, 68 (Minn. Ct. App. 1985).

“It is essential to bear in mind that the moving party has the burden of proof and that the non-moving party has the benefit of that view of the evidence which is most favorable to him.” Burner Serv., 250 N.W.2d at 226. Furthermore, because “all factual inferences must be drawn against the movant for summary judgment, it follows that,

even where the movant's supporting documents are uncontradicted, they may in themselves be insufficient to sustain his burden of proof." Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955). Respondents failed to sustain that burden in this case.

**II. APPELLANT CHARLES MEADS' DISCRIMINATORY REFUSAL TO HIRE CLAIM SHOULD NOT HAVE BEEN SUMMARILY DISMISSED.**

The evidence before the Trial Court was adequate to raise a material fact issue with respect to the elements of Mr. Meads' discrimination claim, and should have therefore precluded summary judgment in favor of Respondents. "Summary judgments should seldom be used in cases alleging employment discrimination." Johnson v. Minn. Historical Soc., 931 F.2d 1239, 1244 (8<sup>th</sup> Cir. 1991). In order for such a motion to be granted, all of "the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the non-moving party." Id.

Both sides agreed at the Trial Court level that although Mr. Meads' case was brought pursuant to Chapter 29C of the Duluth City Code (reproduced at p. AD-1 of Appellant's Addendum hereto), the case is properly decided under cases interpreting the Minnesota Human Rights Act, which makes it an unfair employment practice for an employer to refuse to hire a person because of race. *See* MINN. STAT. § 363A.08, Subd. 2(a) (2001). Indeed, the Code relies upon and incorporates by reference certain provisions of the state law in order to set forth an identical standard for determining discrimination claims brought under its provisions. DULUTH CITY CODE §§ 29C-7 and 29C-8(a), *with reference to* MINN. STAT. §363A.03, Subd. 48 (2004).

The Minnesota Supreme Court has mandated "that in employment discrimination cases involving claims of disparate treatment and brought under the Minnesota Human Rights Act, the trial court, in making its findings of fact and conclusions of law, must explicitly apply the three-step *McDonnell Douglas* analysis." Sigurdson v. Isanti

County, 386 N.W.2d 715, 721 (Minn. 1986). See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). “Disparate treatment cases involve allegations that the employer has treated ‘some people less favorably than others because of their race, color, religion, sex, or national origin.’” Sigurdson, 386 N.W.2d at 719 n1 (*quoting Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). Since Mr. Meads’ Complaint alleges that as an African-American man, he was treated less favorably than the two white men hired by Respondents as cashiers, the *McDonnell Douglas* analysis is appropriate here. See also Rademacher v. FMC Corp., 431 N.W.2d 879, 882 (Minn. Ct. App. 1988) (approving such analysis for use in the summary judgment context).

“The *McDonnell Douglas* analysis consists of a prima facie case, an answer, and a rebuttal.” Sigurdson, 386 N.W.2d at 720. In general, a complainant’s “prima facie case is established upon a showing of unequal treatment.” Lamb v. Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

McDonnell Douglas Corp., 411 U.S. at 802. In a case such as the present, where the sought after job requires little to no discretion or judgment, “the rejection by an employer of a minority applicant with the requisite ability, coupled with the employer’s ongoing search for a similarly qualified employee, raises a clear inference of discrimination and should shift to the employer the burden of demonstrating some legitimate non-discriminatory purpose for his conduct.” Kaster v. Indep. Sch. Dist., 284 N.W.2d 362, 364-65 (Minn. 1979). “At this stage of analysis, the trial court should look for evidence presented by the employer that its actions were related to some legitimate business purpose.” Sigurdson, 386 N.W.2d at 720. “If the employer succeeds in

carrying its burden of production, the third step of the *McDonnell Douglas* analysis requires the plaintiff, in order to prevail, to show that the reason or justification stated by the employer is actually a pretext for discrimination.” Id.

**A. This Court Should First Confirm Its Holding In Bichsel v. State That After-Acquired Evidence Of Wrongdoing Does Not Automatically Bar A Discrimination Claim.**

As an initial matter, *amicus curiae* ACLU-MN is correct in its assertion that Minnesota Courts should adopt the United States Supreme Court’s view on the use of after-acquired evidence of wrongdoing in discrimination cases. Indeed, this Court has already adopted that view, albeit in an unpublished decision.

In Frey, this Court decided that an employer defending an employment discrimination claim may rely on evidence acquired after the employment decision had been made as a means to attack a complainant’s qualifications under the *McDonnell Douglas* analysis. 517 N.W.2d at 599. Approximately six months after that decision was made, the United States Supreme Court issued its decision in McKennon. In that case, the highest Court in our land recognized that the goal of anti-discrimination laws to eliminate discrimination in the workplace is “furthered when even a single employee establishes that an employer has discriminated against him or her.” McKennon, 513 U.S. at 358. The United States Supreme Court concluded that the objective of eliminating discrimination would not be fostered if after-acquired evidence of a complainant’s wrongdoing operates to bar relief for an earlier violation of anti-discrimination laws. Id. It wisely reasoned that an employment decision could not have possibly been motivated by knowledge the employer did not have at the time. Id. at 360. The Court ultimately held that where evidence of wrongdoing is discovered only after the employment decision was made, that evidence could be used to reduce the remedy to be awarded a

complainant that has been discriminated against, but not to bar a complainant's case in the first instant. Id. at 360-63.

Since McKennon was decided, this Court has on three occasions evaluated after-acquired evidence of wrongdoing in discrimination cases. See Bichsel v. State, No. C1-95-240, 1995 Minn. App. LEXIS 955, at \*6-\*10 (Minn. Ct. App. July 25, 1995) (reproduced at p. AD-7 of Appellant's Addendum hereto); White v. City of N. Branch, No. C3-95-1437, 1995 Minn. App. LEXIS 1528, at \*4-\*6 (Minn. Ct. App. Dec. 12, 1995) (reproduced at AD-17); Hamlin v. Super 8 Motel of Fosston, No. C3-99-1284, 2000 Minn. App. LEXIS 460, at \*6 n.1 (Minn. Ct. App. May 16, 2000) (reproduced at AD-22). In Bichsel, this Court compared and contrasted the Frey and McKennon decisions to determine whether after-acquired evidence of wrongdoing, which would have provided the employer with a legitimate basis for its employment decision, acted to bar all claims of an employee. Bichsel, 1995 Minn. App. LEXIS 955, at \*6-\*10. The Bichsel Court found the reasoning in McKennon to be consistent with the reasoning in Frey, at least with respect to situations where an employee was originally qualified for a job, "but committed misconduct during the course of employment that would have justified dismissal." Id. at \*7. It ultimately followed McKennon, and held that after-acquired evidence of wrongdoing cannot automatically bar a complainant's discrimination or other claims. Id. at \*7-\*10.

In White, this Court instead followed Frey in relying on after-acquired evidence of wrongdoing to bar a complainant's discrimination claims. White, 1995 Minn. App. LEXIS 1528, at \*4-\*6. However, the White Court neither acknowledged nor considered the McKennon or Bichsel decisions. Id.

Similarly, the Court in Hamlin cited Frey as authority without reference to or acknowledgment of McKennon or Bischel. 2000 Minn. App. LEXIS 460, at \*6 n.1. The

complainant's discrimination claim survived in that case because the employer failed to sustain its burden of proof with respect to the after-acquired evidence. Id.

Although the case has not been followed, probably because it is unpublished, the last and only time this Court has been asked to undertake the same determination as that requested by the ACLU-MN in this case – i.e. Minnesota Courts will follow the rule articulated in McKennon, as opposed to that set forth in Frey – it sided with the ACLU-MN. Appellant Meads respectfully requests the Court to do the same here, and confirm the holding of Bichsel in a published decision, so as to solidify the standard to be used in future discrimination cases decided under Minnesota law.

**B. Even If This Court Follows Frey, Respondents Are Not Entitled to Summary Judgment Because They Failed To Produce Sufficient Evidence To Show They Would Not Have Hired Mr. Meads Had They Known About His Criminal Conviction.**

Should this Court choose to follow Frey in lieu of McKennon, an affirmation of summary judgment is not appropriate because Respondents failed to meet their burden of proof with respect to after-acquired evidence of wrongdoing. Under Frey, “The very act of dishonesty in completing an employment application may bar a claim that a refusal to hire was discriminatory.” 517 N.W.2d at 597. However, such a claim may only be precluded if an applicant for employment engaged in that or other conduct before applying, and such conduct would legitimately act to disqualify the applicant from the sought after employment. Id. at 598; Hamlin, 2000 Minn. App. LEXIS 460, at \*6 n.1. A movant for summary judgment on this issue bears “the significant burden of establishing that it had a settled policy of never hiring individuals similarly situated to ...[the complainant.]” Welch v. Liberty Mach. Works, 23 F.3d 1403, 1406 (8<sup>th</sup> Cir. 1994) (followed in Hamlin, 2000 Minn. App. LEXIS 460, at \*6 n.1). In doing so, the employer must establish that the policy pre-dated the hiring decision “and that the policy

constitutes more than mere contract or employment application boiler plate.” Welch, 23 F.3d at 1406. By itself, self-serving testimony from the employer’s representatives is unsatisfactory to meet its burden. Id.

In this case, Respondents rely entirely on the self-serving testimony of their representative, Cheryl Sievers, to establish that Respondents do not hire individuals as cashiers if they have a prior burglary conviction. There is absolutely nothing more in the record to corroborate Ms. Sievers’ testimony on that subject, and there is evidence to show that Respondents have no settled policy in that regard. First, Respondents failed to cite even one instance or example of a situation where they failed to hire an individual based on a prior felony burglary conviction. Secondly, in spite of the training provided by Ms. Sievers, Respondent Wiita testified during her deposition that she is unaware of *anything* that would disqualify a person for the position of cashier. Third, the application itself states that a criminal record does not constitute an automatic bar to employment. Fourth, both the application and Respondents’ Employee Handbook, which expressly replaces any verbal statements of policies, state that misrepresentations on an employment application “may” result in termination of employment of current employees. Even the Trial Court, based on this fact, concluded as follows:

Facially a factual dispute is thus created because a false statement is apparently forgiven in certain cases or at least may potentially be overlooked. The circumstances where that might occur are not spelled out in either document leading to the conclusion they are likely a matter of managerial discretion.

Finally, the Employee Handbook states, “Persons hired are selected *solely* on the basis of such qualifications as ability, aptitude, experience, education, and desire.” (Emphasis added.) Nowhere does it state that a person convicted of felony burglary would never be hired for a cashier position.

Simply put, Respondents failed to meet their “significant burden” to establish a settled policy of never hiring individuals who misrepresent a prior burglary conviction on the employment application. In fact, the evidence shows that any so-called policy in that regard is far from settled. Respondents are not entitled to summary judgment as a result.

Moreover, the person most similarly situated to Mr. Meads in terms of misrepresenting a burglary conviction on his employment application is Lonnie Cameron, who was considered for employment at the same time as Mr. Meads. He too stated on his employment application that he had never been convicted of a crime, yet he was convicted of burglary in the third degree on not one, but two occasions in 1995. Despite the fact that Mr. Meads’ burglary conviction occurred some 12 years ago and was a one-time event, the white Mr. Cameron was hired and Mr. Meads was not. The fact that he was terminated for wholly unrelated reasons indicates a convicted burglar is perfectly capable of performing the job.

Along those lines, the Trial Court determined that Mr. Meads established a prima facie case of discrimination under the *McDonnell Douglas* analysis, with the exception of his qualifications under Frey. At a minimum, the evidence presents a genuine fact issue on that topic. As a result, Respondents were not entitled to summary judgment; and this Court should reverse the Trial Court on that point.

**C. Ample Evidence Exists To Raise A Genuine Issue Of Material Fact As To Whether Respondents’ Stated Reasons For Their Non-Hiring Decision Are Pretext For Discrimination.**

Summary dismissal of Appellant Meads’ discrimination claim was also improper because he raised a material factual dispute on the element of pretext. Under the third prong of the *McDonnell Douglas* analysis is the burden of a complainant “to demonstrate by competent evidence that the presumptively valid reasons for his

rejection were in fact a coverup for a racially discriminatory decision.” McDonnell Douglas Corp., 411 U.S. at 805. “In carrying the burden of persuasion, the complainant may succeed either by persuading the trier of fact that it is more likely the defendant [employer] was racially motivated or that the defendant’s proffered explanation is unworthy of credence.” Lamb, 310 N.W.2d at 510. As has been recognized by the Minnesota Supreme Court, “direct proof of discrimination may often be difficult, if not impossible, to demonstrate.” Kaster , 284 N.W.2d at 365.

1. Evidence of Respondents’ subjective hiring criteria suggests racial motivation.

Appellant Meads first met his burden of raising a material fact issue on the subject of pretext by providing the Trial Court with evidence of Respondents’ subjective hiring criteria. According to the Minnesota Supreme Court, “any subjective procedure has within it the potential to favor applicants who are most like those doing the selecting.” Kaster, 284 N.W.2d at 366. “Subjective and vague criteria may thus be insufficient reasons given by an employer for its failure to hire because such criteria do not allow a reasonable opportunity for rebuttal, and the plaintiff is left without any objective criteria to point to in order to show pretext.” State v. Scientific Computers, Inc., 393 N.W.2d 200, 203 (Minn. Ct. App. 1986). *See generally* McDonnell Douglas Corp., 411 U.S. at 805 (requiring that complainants be given “a full and fair opportunity” to demonstrate pretext).

One indicator of discriminatory motive is the placement of little emphasis on an applicant’s credentials or letters of recommendation, factors the Minnesota Supreme Court believes to “have a tendency to remove some of the subjectivity from the selection procedure.” Kaster, 248 N.W.2d at 366. This Court has similarly considered

evidence pertaining to an employer's lack of objective hiring standards as support for the conclusion that an applicant had been discriminated against on account of race. Scientific Computers, Inc., 393 N.W.2d at 204. Additionally, where an employer keeps no records of the reasoning behind an employment decision, such as an evaluator's notes or comments, it creates precisely the "type of situation that maximizes the possibility of a selection being made, consciously or otherwise, on the basis of race, color, sex, religion or national origin." Kaster, 284 N.W.2d at 366. Further, where a white evaluator fails to question a complainant during his or her interview about the proffered reason for the employment decision, it "provides a ready mechanism for racial discrimination." Scientific Computers, Inc., 393 N.W.2d at 203.

Here, perhaps Respondents' counsel best described their subjective hiring practices in Respondents' supporting summary-judgment memorandum:

Little Stores has no formal criteria for determining which applicants should be hired for cashier positions. Rather, Little Stores relies on the store managers to determine who should be interviewed, and who should ultimately be hired based on the qualifications of the applicants as well as the general impression.

Indeed, Respondents' proffered reason for failing to hire Mr. Meads is based primarily on the personal impression he allegedly left upon Respondent Wiita as a customer. However, Ms. Sievers testified that she too saw Mr. Meads in and around the convenience store, but formed no opinion of him. Another employee, Aaron Potopinski, waited on Mr. Meads often and testified that Mr. Meads was always courteous, nice and polite when he came into the store as a customer. Mr. Potopinski never observed Mr. Meads to be rude or unfriendly to anyone in the store, and offered to be a reference for Mr. Meads in his application for employment based on his "great demeanor" as a customer. The very fact that Mr. Meads made one impression upon Respondent Wiita, the exact opposite impression upon Mr. Potopinski and no impression whatsoever upon

Ms. Sievers demonstrates the subjective nature of Respondents' purported hiring criteria.

Ms. Sievers further testified that the objective criteria of work history is not important and that she knew nothing about Mr. Meads' job experience when she recommended that he not be hired. Similarly, Respondent Wiita testified that Respondents never check an applicant's references. Respondent Wiita went on to admit that it was not her practice to take notes during interviews and that she does not think she took notes during Mr. Meads' interview. No interview notes have been submitted as evidence in this case. Finally, even though Respondent Wiita recognized Mr. Meads as a customer when he arrived for his interview, there is no evidence to show Respondent Wiita inquired about her perception of Mr. Meads' personality traits as a customer, so as to give him the opportunity to explain his alleged behavior or make Respondent Wiita realize she may be thinking of someone else. Pursuant to Kaster and Scientific Computers, Inc., Respondents' hiring practices provide an avenue by which to discriminate.

In addition to Respondents' subjective hiring criteria, during his numerous visits to the store, Mr. Meads never observed a black working there. He got the sense from speaking with other employees that Respondent Wiita "had a problem with that"; and Respondent Wiita could not articulate why she chose to hire the white Joseph Biermaier and Lonnie Cameron instead of Mr. Meads. A reasonable inference that Respondents' hiring decision was due, consciously or otherwise, to Mr. Meads' race could easily be made. Besides, Respondent Wiita's subjective view of Mr. Meads' personality as a customer leaves no reasonable opportunity for rebuttal, in contradiction to the *McDonnell Douglas* analysis.

At the very least, genuine factual issues exist on the element of pretext, which should have precluded summary judgment in Respondents' favor. The Trial Court's decision in that regard should thus be reversed.

2. Enough evidence was presented to infer that Respondents' proffered reasons for their non-hiring decision are not worthy of credence.

Appellant Meads also met his burden to raise material factual disputes on the element of pretext by showing that Respondents' proffered reasons for their employment decision are unworthy of credence. Under the *McDonnell Douglas* analysis, a "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000). "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Id. at 147. "Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." Id. This Court has additionally found a lack of objective hiring criteria indicative of the credence to be given a proffered non-discriminatory reason. Scientific Computers, Inc., 393 N.W.2d at 204.

The lack of objective hiring criteria outlined above is one illustration of the falsity of Respondents' proffered reasons for their non-hiring decision in this case. Also illustrative is Respondent Wiita's testimony that at the time of Mr. Meads' interview she recognized him as the customer she had allegedly waited on before, but claims she did not make the decision not to hire him at that point. According to Respondent Wiita, Mr. Meads was not unfriendly and displayed demeanor appropriate for a cashier position

during his interview. He did nothing to disqualify himself for employment during the course of the interview. Respondent Wiita also testified that Mr. Meads' demeanor at the time of the interview was different from the demeanor Mr. Meads had as a customer. If Respondent Wiita was allegedly willing to hire Mr. Meads at the beginning of the interview and, through the course of his interview, Mr. Meads demonstrated a demeanor unlike and improved from the demeanor Respondent Wiita claims he demonstrated as a customer, and appropriate for the position of cashier, the idea that Respondent Wiita would revert to her prior observations is suspect. Especially since Respondent Wiita testified that she would not expect her customers to behave in a non-work setting the same way they would behave in a work setting. Mr. Meads, for his part, testified that he does not recall ever having been waited on by Respondent Wiita prior to his interview.

As further proof of falsity, Ms. Sievers explained in her deposition that she would not use it against an applicant if he or she were rude as a customer one time. Yet, she decided not to hire Mr. Meads because as far as she knew, he was not friendly to Respondent Wiita on one occasion.

Ms. Sievers claimed during her deposition that a second reason for Respondents' non-hiring decision was because of rumors she had heard regarding Mr. Meads' relationship with Levon McEwen. The truth of this proffered excuse is also questionable. Granted, Ms. Sievers saw the police in front of Mr. Meads and Ms. McEwen's residence one time, but she could not say whether the police were there on account of Mr. Meads or any other reason. Ms. Sievers claims to have had a conversation with Ms. McEwen, who allegedly told her that Mr. Meads was "hot", that she was afraid of him and that Mr. Meads had an altercation with Ms. McEwen's son. Ms. McEwen, on the other hand, submitted an affidavit stating that she had never had to call authorities to report actions taken by Mr. Meads; that an incident triggering a

telephone call to authorities from Respondents' store involved someone other than Mr. Meads and took place prior to Mr. Meads moving into the home; and that she never told Ms. Sievers that Mr. Meads was "hot". Ms. McEwen further deposed that as a result of having a social phobia, she finds it very difficult to talk to people and does not speak about her personal life with casual acquaintances. More importantly, Respondent Wiita was unable to say whether the alleged rumors about Mr. Meads and Ms. McEwen's relationship had any affect on the non-hiring decision.

Viewed in its entirety, the above evidence raises questions about the truth of Respondents' proffered reasons for their decision not to hire Mr. Meads. Consequently, there is a material factual dispute that should be decided at a trial of this matter. The Trial Court's summary dismissal of Mr. Meads' claim should be reversed, and the case should be remanded so a trial may be conducted.

### CONCLUSION

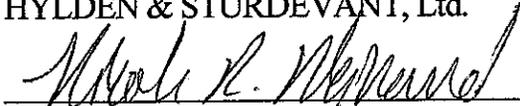
For all the above reasons, Appellant Charles Meads respectfully asks that the Trial Court's summary judgment decision be reversed in its entirety. First, Appellant Meads agrees with *amicus curiae* ACLU-MN's request that Minnesota Courts follow the McKennon decision with respect to after-acquired evidence of wrongdoing. Secondly, even if Frey is determined to be controlling, Respondents have failed to meet their burden of establishing that they would not have hired Mr. Meads if they would have known about his prior criminal conviction, and are therefore not entitled to summary judgment on that basis. Finally, material factual disputes exist to preclude summary judgment on the element of pretext. This case should be remanded for a trial on the merits.

Respectfully submitted,

REYELTS LEIGHTON BATEMAN

Dated: June 19, 2006 By:

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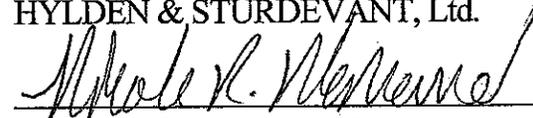
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**CERTIFICATION AS TO LENGTH**

I hereby certify that this brief conforms to the requirements contained in Rule 132.01, Subdivision 3(a)(1) of the Minnesota Rules of Appellate Procedure for a brief using a proportional serif font. This brief has been prepared with Microsoft Word X for Macintosh. The length of this brief is 7,125 words.

Dated: July 19, 2006 By:

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