

No. A06-0966

STATE OF MINNESOTA
IN COURT OF APPEALS

CHARLES E. MEADS,

Appellant,

vs.

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

Respondents.

APPELLANT'S REPLY BRIEF

REYELTS LEIGHTON BATEMAN
HYLDEN & STURDEVANT, LTD.
Charles B. Bateman #135343
Nicole R. Weinand #0314183
332 West Superior Street, Ste 700
Duluth, Minnesota 55802
218/727-6833
Attorneys for Appellant
Charles Meads

BROWN, ANDREW
& SIGNORELLI, P.A.
Thomas F. Andrew #2628
306 W. Superior Street, Ste. 300
Duluth, MN 55802
218/722-1764
Attorney for Respondents
Best Oil Company, et al.

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INTRODUCTION

Appellant Charles Meads submits this brief in reply to Respondents' Brief, pursuant to Rule 128.02, Subd. 3 of the Minnesota Rules of Civil Appellate Procedure. In doing so, Appellant relies upon and incorporates by reference the content of his primary brief.

STATEMENT OF FACTS

Appellant submits an additional Statement of Facts in this reply solely to address the copious inaccuracies contained in Respondents' "factual" statements. As an initial matter, without providing any citation whatsoever of quoted material attributed to Appellant Meads, Respondents erroneously accuse Appellant Meads of inaccurately presenting the record as it relates to the individuals responsible for their discriminatory refusal to hire Mr. Meads. (See Respondents' Brief, p. 23.) Actually, Appellant informed the Court on page 7 of his brief that Cheryl Sievers participated in Respondents' non-hiring decision.

Respondent also harshly and falsely accuses Appellant of attempting to mislead the Court "by stating that Sievers 'decided not to hire Mr. Meads because as far as she knew, he was not friendly to Respondent Wiita on one occasion.'" (Respondents' Brief, p. 14) (quoting Appellant's Brief, p. 22.) Ms. Sievers gave the following testimony in that regard:

Q. Okay. So because as far as you know, one time Charles wasn't friendly to Linda, you decided not to hire him?

A. Yes.

Q. Did you review his application?

A. No.

Q. You didn't see his application?

A. No.

Q. You didn't know anything about his job experience?

A. No.

(Deposition of Cheryl Sievers, Appx.-51, p. 33, ll. 13-22.)

Next, Respondents imply that Linda Wiita allowed rumors about Appellant's interactions with his girlfriend to influence her part of Respondents' non-hiring decision. (Respondents' Brief, pp. 5, 15) (stating "both" Wiita and Sievers.) In fact, Respondent Wiita testified on that subject as follows:

Q. Did that interaction have some impact on your hiring decision with regards to Mr. Meads?

A. I don't remember. I'm sure it had a little bit to do with it; that, and the – I don't know.

Q. Why would that have something to do with whether you're going to hire him or not?

A. I don't know if it did or not. I don't remember. I only seen the one time, and I don't know about the other one so I don't know if it would or not.

Q. Well, you just, I believe, said – testified that you're sure it had something to do with it. Why did you say that?

A. I don't know.

(Deposition of Linda Wiita, Appx.-85, p. 111, ll. 9-21.)

In addition, Respondents speciously claim that store managers rely on a particular booklet, entitled "Standard Techniques to Solve Attrition, Recruiting, Interviewing and Hiring," in making their hiring decisions. (Respondents' Brief, p. 12.) Really, that is mostly untrue, at least for Respondent Wiita and Ms. Sievers. (Wiita Deposition, Appx.-82 through Appx.-84, pp. 98-106.¹) Neither manager uses the form rejection letter recommended in that booklet. (*Id.* at Appx.-83, pp.101, l. 22 – 102, l. 24.) Nor do they

use the recommended interview reference worksheet. (Id. at 103, l. 13 – 104, l. 5.) Respondent Wiita even neglects to ask the majority of the interview questions suggested by that booklet. (Id. at Appx.-83 through Appx.-84, pp. 104, l. 6 – 106, l. 17.) Indeed, Respondent Wiita testified that she has her own list of questions she likes to use. (Id. at Appx.-84, p. 106, ll. 18-22.)

Respondents also claim, “customer service was the number one qualification for a cashier at Little Stores.” (Respondents’ Brief, p. 3.) Nevertheless, they offer no legitimate, objective means by which they evaluate an applicant’s ability to provide customer service. Indeed, Mr. Meads’ application revealed that he had over two years experience working in sales and promotions prior to submitting his application to Respondents. (Appx.-90.) Respondent Wiita had the following to say about that:

Q. Would you agree that to be successful in sales and promotions, one must be able to create a positive relationship with one’s customers?

A. I would guess so.

(Id. at Appx.-66 through Appx.-67, pp. 36, l. 24 – 37, l. 2.)

Finally, it should be clear that Respondents’ proffered means of evaluating customer service – i.e. one’s subjective opinion about the manner an applicant might display as a customer – falls flat in the case of the white Mr. Biermaier, who was hired in place of Mr. Meads. (See Respondents’ Brief, p. 4.) The truth of the matter is Respondent Wiita had no impression at all of Mr. Biermaier as a customer prior to his interview. (Wiita Deposition, Appx.-70, p. 52, ll. 15-22.)

¹ It should be noted that Wiita Exhibit 11 was the hiring booklet referred to by Respondents. (Wiita Deposition, Appx.-57, p. 3.)

ARGUMENT

In addition to the numerous mistakes of fact contained in Respondents' Brief, they have done little to support the Trial Court's decision legally. Appellant addresses only those things not raised in his primary brief below.

I RESPONDENTS' ANALYSIS WITH RESPECT TO FREY IS FLAWED.

In support of the continued application of Frey v. Ramsey County Cmty. Human Services, 517 N.W.2d 591 (Minn. Ct. App. 1994) by Minnesota courts, Respondents make a number of illogical arguments. First, they encourage this Court to place after-acquired evidence cases into three categories, but fail to even address the category in which Appellant Meads' case would fall. Specifically, to analyze Mr. Meads' situation, Respondents rely upon the second line of cases categorized in Frey, which involve an *employee* who misrepresented information on his or her resume, and further encourages the Court to apply the same rules by which it would evaluate a contract. (Respondents' Brief, pp. 18-19.) *See Frey*, 517 N.W.2d at 597 (describing second category of case where "an *employee* may commit misconduct by lying on or submitting a fraudulent resume when applying for a job.") (emphasis added). That framework is highly unworkable in this case, since Mr. Meads was never an employee of Respondents. Indeed, because of Respondents' discriminatory refusal to hire Mr. Meads in the first place, no contractual relationship was ever formed. Therefore, contract principles are wholly inappropriate here.

In truth, should this Court engage in a categorization of after-acquired evidence cases under Frey, Mr. Meads' case falls under category three. The Frey decision describes that category as follows: "A third category of cases involves cases of discriminatory failure to hire. Such a claim may be precluded if an applicant for employment engaged in conduct before applying that would disqualify the applicant

from employment.” 517 N.W.2d at 598. Importantly, Frey adopted this rule from two federal decisions (*see Id.*), both of which interpreted federal discrimination laws. *See Smallwood v. United Air Lines*, 728 F.2d 614 (4th Cir. 1984) (interpreting the Age Discrimination in Employment Act); *Murnane v. American Airlines, Inc.*, 482 F. Supp. 135 (D.C. 1979), *aff’d*, 667 F.2d 98 (D.C. Cir. 1981) (also interpreting the ADEA). Based on that fact, Respondents’ idea that Minnesota Appellate Courts should not follow federal case law when evaluating the utility of Frey is ludicrous. (See Respondents’ Brief, pp. 21-2.) The holding in that case initially derived from federal case law, so the most sensible place to look for guidance is federal cases. What is more, one of the cases upon which Frey is based – Smallwood – is one of the cases specifically corrected and overruled by the United States Supreme Court in *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 356 (1995). If the case upon which it relies has been overruled by McKennon, so too should Frey.

Finally, Respondents look to California case law for the proposition that at least one other state has refused to adopt the reasoning of the McKennon Court with respect to the use of after-acquired evidence in discrimination cases. (Respondents’ Brief, p. 22.) In reality, the California Court of Appeals has explicitly stated, “We decline to adopt a blanket rule that material falsification of an employment application is a complete defense to a claim that the employer, while still unaware of the falsification, terminated the employment in violation of the employee’s legal rights.” *Cooper v. Rykoff-Sexton, Inc.*, 29 Cal. Rptr. 2d 642, 644 (Cal. Ct. App. 1994). The Court went on to reason:

Although resume fraud is a serious social problem, so is termination of employment in violation of antidiscrimination laws or in breach of contract. Automatic forfeiture of all employment rights regardless of the circumstances can be too harsh a penalty in many cases. Where an employer has fired a worker in violation of a statutory ban on discrimination in the workplace, the purpose and effect of the antidiscrimination statutes are unacceptably undermined by a principle

that would allow a fact that played no part in the firing decision to bar any recovery.

Id.

Further contrary to the assertion of Respondents, the California Court of Appeals in the case they cite did not “refuse” to follow the reasoning of McKennon. (Respondents’ Brief, p. 22.) Rather, in Camp v. Jeffer, Mangels, Butler & Marmaro, the California Court expressly looked to the McKennon decision for guidance, but did not reach the same conclusion because of a factual distinction not present in this case. 41 Cal. Rptr. 2d 329, 336-40 (Cal. Ct. App. 1995). In particular, the Camp Court recognized that cases following the McKennon decision involve after-acquired evidence of misrepresentations on an employment application, which “disqualified him from employment based on the employer’s internal, self-imposed requirements for the job (e.g., a refusal to hire applicants previously fired by another employer).” Id. at 338. In Camp, however, both a contract with the federal government and a federal administrative rule disallowed the employment of a convicted felon. Id. The Court commented, “While the job requirements and employer policies in all of those [other] cases may have served legitimate business goals, the fact remains that they were self-imposed. Here, in contrast, the Camps misrepresented a job qualification imposed by the federal government, such that they were not *lawfully* qualified for the job.” Id. (emphasis in original). Under that limited circumstance, the California Court concluded that equity compelled a result other than that reached in McKennon. Id. at 339. Yet in the same breath, it appreciated “that the facts in *McKennon* (and the cases it overruled) presented a situation where balancing the equities *should permit a finding of employer liability* – to reinforce the importance of antidiscrimination laws – while limiting an

employee's damages – to take account of an employer's business prerogatives.” Id. (emphasis added).

This case is precisely the type of case to which McKennon should apply, according to the analysis of the California Courts of Appeal. Respondents' so-called “policy” of not hiring felony burglars is completely self-imposed. There are no government contracts or rules to mandate such a policy. Accordingly, for whatever it is worth,² decisions of the California Courts of Appeal support the application of McKennon here.

In sum, Respondents have failed to raise even one plausible reason why Minnesota Courts should follow Frey as opposed to McKennon generally, and certainly on the specific facts before this Court. Consequently, this Court should follow McKennon to decide that after-acquired evidence of Mr. Meads' felony conviction may not act as a complete bar to his discrimination claims. On that basis, the Trial Court should be reversed.

II RESPONDENTS HAVE MISSTATED THE LAW WITH RESPECT TO PRETEXT.

Next, in an attempt to set forth the standards applicable to a determination of whether Respondents' proffered reasons for their non-hiring decision are pretext for discrimination, Respondents rely almost exclusively on cases out of the Seventh Circuit Court of Appeals. (Respondents' Brief, pp. 16-17.) This Court need not look to other jurisdictions for guidance in this area, since Minnesota has established case law on the subject.

To defeat a summary dismissal of his discrimination claims on the element of pretext, Appellant Meads must only “establish that there is a question about whether

the employer's justification is pretextual that creates a genuine issue of material fact for trial." Benassi v. Back & Neck Pain Clinic, Inc., 629 N.W.2d 475, 482 (Minn. Ct. App. 2001). He "may sustain this burden 'either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986) (*quoting Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Further, even if Respondents were able to demonstrate a legitimate reason for not hiring Appellant Meads, Mr. Meads need only show that an illegitimate reason "more likely than not" influenced their decision. Benassi, 629 N.W.2d at 482 (*quoting Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 627 (Minn. 1988)).

At the very least, Appellant Meads has raised a material fact dispute on the issue of pretext, in accordance with Minnesota law. Respondents' subjective hiring procedures raise serious questions about whether their non-hiring decision was racially motivated, consciously or subconsciously. (See Appellant's Brief, pp. 18-21.) Similarly, Mr. Meads has produced more than enough evidence to raise an inquiry as to whether the alleged bases upon which Respondents refused to hire Mr. Meads are truth or fiction. (Id. at 21-3.) As a result, the Trial Court's summary dismissal of Mr. Meads' discrimination claims should be reversed in its entirety.

CONCLUSION

For all the reasons stated above, and for the reasons outlined in his primary brief, Appellant Meads respectfully requests that this Court reverse the Trial Court's summary

² Of course, California case law is not binding, and has no value of precedent, to this Court.

judgment decision and remand the case for a trial on the merits. Material factual disputes exist, which should be determined through a live evidentiary hearing.

Respectfully submitted,

REYELTS LEIGHTON BATEMAN
HYLDEN & STURDEVANT, Ltd.

Dated: Aug. 3, 2006

By:

Nicole R. Weinand

Charles B. Bateman #135343

Nicole R. Weinand, # 0314183

Attorneys for Appellant

Charles Meads

700 Providence Building

Duluth, MN 55802-1801

(218) 727-6833

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 2,260 words.

Dated: Aug. 3, 2006

By:

REYELTS LEIGHTON BATEMAN
HYLDEN & STURDEVANT, Ltd.

Nicole R. Weinand
Charles B. Bateman #135343

Nicole R. Weinand, # 0314183

Attorneys for Appellant

Charles Meads

700 Providence Building

Duluth, MN 55802-1801

(218) 727-6833