

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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**RESPONDENTS' BRIEF**

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## LEGAL ISSUES

Respondents' Statement of the issues presented to this Court:

1. Has Meads carried his burden of persuasion that the Little Stores' reasons for not hiring him were racially motivated or that the Little stores proffered explanation is unworthy of credence?

The trial court answered no by granting Little Stores' Motion for Summary Judgment.

Apposite cases:

*Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319 (Minn. 1995)

*Rademacher v. FMC Corporation*, 431 N.W.2d 879 (Minn. App. 1988)

2. Should this Court overrule its holding in *Frey v. Ramsey County Cmty. Human Services*, 517 N.W.2d 591 (Minn. Ct. App. 1994) that dishonesty in completing an employment application bars a claim that a refusal to hire was discriminatory?

The trial court answered no and cited the *Frey* case as an alternative basis for its grant of Little Stores' Motion for Summary Judgment.

Apposite cases:

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

App. 1994)

3. Has the Little Stores presented sufficient evidence to show it would not have hired Meads had it known of his felony burglary conviction.

The trial court answered yes, finding the Little Stores submitted sufficient evidence of its policy against hiring applicants with a felony burglary conviction.

Apposite cases:

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

### **STATEMENT OF THE FACTS**

Little Stores owns and operates a convenience store at 1831 West Superior Street, Duluth, Minnesota, commonly referred to as the "West End Little Store. Between 1989 and October, 2004, defendant Linda Wiita was an Assistant Manager and Cheryl Sievers was the Manager in the West End Little Store. (Appellant's Appx. p. 60; Wiita Dep. p.9). " Wiita became the West End Little Store Manager in October, 2004. (Appellant's Appx. p 60; Wiita Dep. p.12). On November 1, 2004, Sievers was promoted to the position of Area Manager (Appellant's Appx. p. 44; Sievers Dep. p.7). The West End Little Store was one of the stores in Sievers' area.

Little Stores has a policy against discrimination in employment, and has hired numerous minority members as employees. (Appellant's Appx. p. 106; Appellant's Appx. pp. 51-52; Sievers Dep. pp 35-38).

In mid-November, 2004, the West End Little Store had openings for two store clerks. A Little Stores clerk informed Meads of the job openings and provided him with an application for employment. (Appellant's Appx. p. 21; Meads Dep. p.8). There were several applicants for these openings, including Meads. (Appellant's Appx. p. 67; Wiita Dep. p.38). Wiita, prior to interviewing Meads and the two candidates eventually hired, interviewed three

or four other candidates, but after consulting with Sievers, decided not to hire any of those other candidates. (Appellant's Appx. p. 49; Sievers Dep. p.25). Wiita then interviewed Lonnie Cameron, Joseph Biermaier, and Meads for those two cashier positions. (Appellant's Appx. p. 49; Sievers Dep. p.25).

Meads had lived across the street from the store, and had visited the store as a regular customer, once or twice a day, during the four months prior to submitting his application (Appellant's Appx. pp. 21 and 27-28; Meads Dep. pp.8, 32-33). He testified that on average he went to the Little Store ten to thirteen times a week (Appellant's Appx. p. 27; Meads Dep. 31-32). Wiita had waited on Meads and seen him on almost a daily basis during this period (Appellant's Appx. p. 67-68; Wiita Dep. 40-42).

In deciding who to hire, Sievers had taught Wiita the importance of customer service.

As Wiita put it:

Customer service was the main objective, personable, being able to relate with customers and other employees. Basically, your-- your -- your rapport with other people, make sure you have good customer service, and being able to get along with other workers and customers. I know that's the one main thing.

(Appellant's Appx. p. 60; Wiita Dep. p. 11). Sievers confirmed in her deposition that customer service was the number one qualification for a cashier at Little Stores. (Appellant's Appx. p. 45; Sievers Dep. p. 11).

Meads called Wiita and asked to be interviewed for the cashier position. (Appellant's Appx. p. 65; Wiita Dep. p.32). Wiita interviewed Meads for one of the clerk positions on

November 22, 2004. (Appellant's Appx. p. 28; Meads Dep, p.36). Wiita recognized Meads as a regular customer in the store. (Appellant's Appx. p. 67; Wiita Dep. p.40). Meads gave Wiita the impression that he was not personable. (Appellant's Appx. p. 67; Wiita Dep. p.40). This impression was gained from his behavior during his frequent visits to the West End Little Store. *Id.* Wiita's impression of Meads was that Meads "was not personable, no responses to good mornings or anything. Especially when he came to the til, there was no greeting, there was no - no rapport, there was no - nothing back with him so. . .". (Appellant's Appx. p. 67; Wiita Dep.40). When asked how one's personality as a customer was relevant in the hiring decision, Wiita stated:

Because you need good customer service, and if you're walking into a store and you're being greeted - good morning, hello, how are you - and you're getting nothing in response or anything, that - I mean, I watched it a couple of months, I know. That's just what I got.

Appellant's Appx. p. 67; Wiita Dep. p.40.

The two applicants who were ultimately hired, Joseph Biermaier and Lawrence Cameron, like Meads, had been regular customers of the West End Little Store, and were familiar to Wiita. (Appellant's Appx. p. 69, 70; Wiita Dep. pp.48, 52). After the interviews, Wiita consulted with Sievers before deciding to hire Biermaier and Cameron. (Appellant's Appx. p. 71; Wiita Dep. p.53-54).

Sievers was familiar with Cameron, Biermaier, and Meads as customers. (Appellant's Appx. p. 50; Sievers Dep.p.30). Both Wiita and another Little Stores employee told Sievers

that Meads was rude while a customer in the store. (Appellant's Appx. p. 50; Sievers Dep. p.30). This was the main reason Sievers told Wiita not to hire Meads. (Appellant's Appx. p. 52; Sievers Dep. p.38).

A second reason for not hiring Meads was what both Wiita and Sievers had heard from Lavonne, Meads' live-in girlfriend. (Appellant's Appx. p. 85; Sievers Dep. p.38, Wiita Dep. p.109). Lavonne told Sievers that Meads was abusive, that she was afraid of him, and that when her son had stood up for her in an argument, Meads either struck her son or attempted to strike her son. (Appellant's Appx. p. 49; Sievers Dep. pp.27,28). Sievers had heard from other employees that the police had been to Lavonne and Meads' apartment, and that Meads was drinking heavily and raised his voice. (Appellant's Appx. p. 49; Sievers Dep. p.28). A month or two before Meads put in his application, Lavonne had asked Wiita to use the telephone to call 911 because there were problems at home. (Appellant's Appx. p. 85; Wiita Dep. pp. 109, 110). Wiita has heard from other employees that on a few other occasions Lavonne had been over to use the telephone to call 911 because she said she was getting hit. (Appellant's Appx. p. 85; Wiita Dep. p. 110).

Meads' application for employment was completed on November 17, 2004. The application asked whether the applicant had ever been convicted of a crime, except a minor traffic violation. Meads checked the box beside "No." (Appellant's Appx. p. 89, 90). Immediately after this question, the application clearly stated that "a criminal record does not constitute an automatic bar to employment, and will be considered only as it relates to the job

in questions." *Id.* Meads testified that he read this statement. (Appellant's Appx. p. 22; Meads Dep. p.10). Finally, at the end of the application, in text that is set apart from the other portions of the application, the applicant was asked to certify "that the information given by me in this application is true in all respects," and to "agree that if employed and it is found out to be false in any way, that I may be subject to dismissal without notice, if and when it is discovered." (Appellant's Appx. p. 89, 90). Meads applied his signature immediately below this agreement and certification. *Id.*

Little Stores' policy regarding employees who falsify information on their applications is reflected on page four of the Employee Handbook, where it states:

APPLICATION FOR EMPLOYMENT

The Little Stores relies upon the accuracy of information contained in the employment application, as well as the accuracy of other data present throughout the hiring process and your employment. Any misrepresentations, falsifications, or material omissions in any of this information or data may result in your termination of employment.

Appellant's Appx. p. 107.

Sievers explained that what crime the felony conviction was for determined if Little Stores would hire the applicant. (Appellant's Appx. p. 45; Sievers Dep. p.12). Sievers stated that conviction of a felony burglary charge would disqualify an applicant. (Appellant's Appx. p. 45; Sievers Dep. p. 12). This disqualification would even be for a felony conviction over five years ago, such as Meads, because it showed the applicant was capable of doing it. (Appellant's Appx. p. 45, 46; Sievers Dep. pp. 12, 13).

During his deposition, Meads admitted he lied on his application because he had been convicted of a burglary felony. Meads' deposition testimony was as follows:

Q. Okay. Now, you say here you've never been convicted of a crime. Is that true?

A. No.

Q. That's not true?

A. No.

Q. What crime have you been convicted of?

A. I was convicted of aiding in a burglary.

Q. When was that?

A. That was about ten years ago, exactly about 12, I'd say about 12 years ago.

Q. And where was that?

A. Michigan City, Indiana.

Q. And that was a felony?

A. Yes.

Q. Did you serve any time?

A. I got - - I served a little bit of time and got some probation.

....

Q. Have you ever had any other criminal convictions?

A. Not that I can recall right now.

(Appellant's Appx. p. 22; Meads Dep. pp.9-10).

Meads has lived in Duluth since August 2004. (Appellant's Appx. p. 26; Meads Dep. p.26). Meads testified he has submitted several applications for employment at various companies throughout the Duluth area since he arrived, besides the West End Little Store. (Appellant's Appx. p. 31-32; pp.48-49, 51). He has not had an interview with any company other than the West End Little Store. (Appellant's Appx. p. 33; Meads Dep. p. 53). Meads has not filed a claim of discrimination against any company that did not hire him other than Little Stores, because Meads "didn't have an interview with any of those places." (Appellant's Apps. p. 32; Meads Dep. p. 52).

## STANDARD OF REVIEW

The “standard of review for summary judgment is de novo.” *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 827 (Minn. 2000).

When reviewing a grant of summary judgment, appellate courts 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. 1968).

Summary judgment should be granted when the moving party demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Minn. R. Civ. Proc. p. 56.03. A fact is material when it aids the establishment of a claim affecting the outcome of the claim. See *Brenner v. Nordby*, 306 N.W.2d 126, 127 (Minn. 1981).

The party opposing a summary judgment motion cannot rely on general statements of fact, but instead must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial." *Moundsview Ind. Sch. Dist. No. 621 v. Buetow & Assoc., Inc.*, 253 N.W.2d 836, 838 (Minn. 1977); *In the Matter of an Assessment Issued to Leisure Hills Health Care Center on March 2, 1992*, 518 N.W.2d 71, 75 (Minn. Ct. App. 1992). Mere speculation without some concrete evidence, is not enough for a nonmoving party to avoid summary judgment. *Nguyen v. Nguyen*, 565 N.W.2d 721, 724 (Minn. Ct. App. 1997).

In deciding a motion for summary judgment, the trial court does not decide or resolve the fact issues, but rather determines if there exists room for an honest difference of opinion among reasonable people, and will grant the motion when no such debate is possible. *Trepanier v. McKenna*, 267 Minn. 145, 149-50, 125 N.W.2d 603, 606 (1963). Here, the District Court found there was no room for an honest difference of opinion regarding the material facts. Meads admits he lied on his employment application and has not come forth with concrete evidence indicating that he was illegally discriminated against. Meads has presented no evidence that Little Stores' stated reason for not hiring him was a pretext for racial discrimination. Therefore, this Court should affirm the District Court's grant of summary judgment in favor of Respondents.

Meads argues that "Summary Judgment should seldom be used in cases alleging employment discrimination." Appellant's Brief p. 11. However, the Minnesota Supreme Court explicitly rejected this position in *Dietrich v. Canadian Pacific Ltd.*, 536 N.w.2d 319, 326 (Minn. 1995) ("We take this opportunity to express our disapproval of the court of appeals' sweeping statement that summary judgment is generally inappropriate in discrimination cases.").

## ARGUMENT

- I. **Best Oil Co. d/b/a The Little Stores and West End Little Store Manager Wiita have articulated legitimate, non-discriminatory reasons for refusing to hire Meads, and Meads has failed to carry his burden of persuasion that the reason for not hiring him was racially motivated or that the Little Stores proffered explanation is unworthy of credence.**

Under the Minnesota Human Rights act, it is an unfair employment practice for an employer to refuse to hire a person because of race. Minn. Stat. §363A.08, subd. 2. When a plaintiff brings a claim of employment discrimination under the Minnesota Human Rights Act, the claim is analyzed using the three-part *McDonnell Douglas* Test. A plaintiff may establish a prima facie case of discrimination either by offering direct evidence of discriminatory intent or by establishing an inference of discriminatory intent under the *McDonnell Douglas* burden shifting analysis. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001).

### No Prima Facie Case.

Meads has offered no direct evidence of race discrimination and therefore he must establish a prima facie case in accordance with the three-part test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), adopted by the Minnesota Supreme Court for analysis of MHRA discrimination claims. *State of Minnesota v. Scientific Computers, Inc.*, 393 N.W.2d 200, 202 (Minn. Ct. App. 1986). Under this formula, if the plaintiff can make out a prima facie case of discrimination, the employer may rebut this claim by articulating a legitimate, non-discriminatory reason for the action taken. *Fisher Nut Co. v. Lewis ex rel.*

*Garcia*, 320 N. W.2d 731 at 734 (1982). If the employer does so, then the employee must prove that the proffered reason is merely a pretext for discrimination. *Id.*

In order to make out a prima facie case, Meads must show that he was a member of a protected minority; that he applied for and was qualified for the cashier position at West End Little Store; and that he was rejected for the position, after which the employer continued to seek applicants. *Id.* However, Meads cannot make a prima facie case because his burglary felony conviction disqualified him for the cashier position.

Legitimate Non-Discriminatory Reason for Refusal to Hire.

But even assuming Meads can establish a prima facie case, the trial court's Summary Judgment Order should be affirmed. After all, Meads has come forth with no concrete facts to contradict the assertion that Wiita and Sievers based their decision not to hire him on his general demeanor that Wiita and other Little Store employees witnessed when he was a customer in the store over several months. Race was simply not a factor in Sievers' and Wiita's decision.

Because many of the applicants the Little Stores ultimately hires as cashiers come into the positions with little or no experience, one of the most important characteristics a manager looks for during the interview process is customer assistance and the ability to be personable to customers and other employees. (Appellant's Appx. p. 60; Wiita Dep. p.11). One must create a positive relationship with the customers to be successful. (Appellant's Appx. pp. 66,

67; Wiita Dep. p.36-37). Customer service is the number one qualification of a cashier for Little Stores. (Appellant's Appx. p. 45; Sievers Dep. p.11).

The document the Little Stores store managers refer to in helping to make hiring decisions is entitled "Standard Techniques to Solve Attrition, Recruiting, Interviewing and Hiring." This document, reproduced as Lutterman Exhibit 1 at page 1, makes it clear that rude behavior is a disqualifying factor for hiring. On that page it states: "Screen applicants immediately (i.e., poor personal appearance, rude behavior)." At page 6 of the same document, it again emphasizes this point by stating "At any point, should the candidate display an unbecoming personality trait or attitude, conclude the interview in a polite manner, without being abrupt."

Meads cites the case of *Kuster v. Ind. School District No. 625*, 284 N.W.2d 362 (Minn. 1979) to criticize the Little Stores supposedly subjective and vague hiring criteria. (Appellant's Brief pp. 18 to 20). *Kuster* was a Jewish school teacher with 19 years teaching experience in the defendant School District. This gave him more seniority than a significant number of other applicants. *Kuster's* letters of recommendation were superior to those of other applicants. *Kuster*, had acquired at least 3 years of administrative experience. Despite these credentials, he was denied promotion 5 times to an administrative position. Obviously subjective criteria used to deny a promotion to such a responsible position is suspect. But is not unreasonable for the Little Stores to rely heavily on the reasonable goal of picking applicants for the entry level position who would be personable to customers and other

employees. The Little Stores so-called subjective criteria simply does not provide any proof of a discriminatory intent.

Little Stores has presented ample evidence to prove that its reason for not hiring Meads was legitimate and non-discriminatory. Wiita was familiar with Meads prior to his interview because Meads had been a regular customer in the store for the past four months, and based on her interactions with him, she concluded he would not be personable and friendly to Little Stores customers. (Appellant's Appx. p. 67; Wiita Dep. p.40).

We stress that there is no factual dispute that Wiita had ample opportunity to observe Meads as a customer of the store during the three or four month period prior to his interview. While an assistant manager, Wiita's typical schedule was 7:00 a.m. to 3:00 p.m. Monday through Friday, but she would work whenever necessary or needed, including day, nights and weekends. (Appellant's Appx. p. 61; Wiita Dep. p. 13). This did not change when she became the manager on November 1, 2004. Wiita had waited on Meads in the store and seen him as a customer on almost a daily basis because he lived across the street from the store. (Appellant's Appx. p. 67-68; Wiita Dep. p. 40-42).

Meads confirmed this in his deposition, he acknowledged that he lived in the apartment across the street from the West End Little Store for four months before his interview and that during this period he was a customer at The Little Stores once or twice a day. He testified that in an average week he went to the Little Store 10, 12, 13 times a week. (Appellants Appx. p. 27; Meads Dep. p. 31-32).

Wiita stated her impression of Meads was: "wasn't personable, no responses to good mornings or anything. Especially, when he came to the till, there was no greeting, there was no - no rapport, there was no - nothing back with him, so ...". (Appellant's Appx. p. 67; Wiita Dep. p.40). Wiita and Sievers hired two qualified applicants, both of whom they knew from prior interactions as store customers, as outgoing, personable, and friendly. (Appellant's Appx. p. 69; Wiita Dep. p.48). Wiita explained why Meads' personality as a customer was relevant to her hiring decision as follows:

Q: How is one's personality as a customer relevant to what they're going to be like on the job.

A: Because you need good customer service, and if you're walking into a store and you're being greeted - good morning, hello, how are you - and you're getting nothing in response or anything, that - I mean, I watched it a couple months, I know. That's just what I got."

Completely ignoring this testimony, Meads attempts to mislead this 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.” Appellant's Brief p. 22. What's more, Sievers actual testimony was far different than claimed by Meads. Wiita told Sievers that Meads “. . . was rude when he would come in, there wouldn't be a response or anything.” (Appellant's Appx. p. 50, 51; Sievers Dep. p. 30-33). Another female employee of the West End Little Store told Sievers that Meads “. . . was rude to her at one point.” (Appellants Appx. p. 50; Sievers Dep. p. 31).

Meads attempts to concoct a fact issue by arguing that Aaron Potopinski, a cashier in the West End Little Store, did not agree with Linda Wiita's opinion that Meads wasn't

personable. (Appellant's Brief p. 17). The trial court's rejection of this argument was correct. As the Court put it:

Arguably Wiita and Sievers may have been wrong about Mr. Mead's personality traits. But that is not the issue. The issue is whether the professed reason for the hiring decision was a pretext for discrimination.

Appellant's Appx. p. 14.

A secondary reason the Little Stores did not hire Meads was because of his relationship with his girlfriend. Wiita testified that Meads' girlfriend has asked her to use the Little Stores' phone to call 911 to get the police because: ". . . she was getting hit." (Appellant's Appx. p. 85; Wiita Dep. p. 108-109). Wiita was aware that a few other times other Little Store employees were also asked to use the phone by Meads' girlfriend because there were problems at home. (Appellant's Appx. p. 85; Wiita Dep. pp. 109, 110).

Sievers had also heard about what was going on across the street and particularly that Meads' girlfriend had told her that he was abusive to her and she was afraid of him. (Appellant's Appx. p. 49; Sievers Dep. p. 27-29, 38). Wiita and Sievers both indicated that what they had heard about Meads' abusive behavior towards his girlfriend had a secondary impact on their decision not to hire him. (Appellant's Appx. p. 85; Wiita Dep. p. 111) (Appellant's Appx. p. 49; Sievers Dep. 27, 28).

In the end, Meads has no factual support that the decision to not hire him was an act of racial discrimination. At most, he only presents a prima facie case, and a prima facie case of race-based employment discrimination only means that there are enough facts to support

a mere inference of discrimination. *Gee v. Minnesota State Colleges and Universities*, 700 N.W.2d 548, 552 (Minn. Ct. App. 2005). That inference is rebutted (as here) by credible evidence showing that the employer had a legitimate, non-discriminatory reason for the employment decision in question. *Fisher Nut Co. v. Lewis ex rel. Garcia*, 320 N.W.2d 731, 734 (Minn. 1982).

Here, an inference is all that Meads can demonstrate. Meads has not produced any facts whatsoever that contradict Little Stores proffered legitimate and non-discriminatory reasons for refusing to hire him.

#### No Pretext.

Finally, assuming that the explanations given for not hiring Meads are legitimate and non-discriminatory, Meads may still demonstrate that these proffered reasons are merely a pretext for a decision that was actually based on racial discrimination. *Id.* A "pretext" is a lie, specifically a phony reason for some action. *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7<sup>th</sup> Cir. 1995). "Pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks". *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1005 (7<sup>th</sup> Cir. 2001). The question is not whether the employer properly evaluated the competing applicants, but whether the employer's reason for choosing one candidate over the other was honest. *Brill v. Lante Corp.*, 119 F.3d 1266 (7<sup>th</sup> Cir. 1997). Even if the employer's reasons for selecting one candidate over the other were mistaken, ill-considered or foolish, so long as the employer

honestly believed those reasons, pretext has not been shown. See *Jordan v. Summers*, 205 F.3d 337, 343 (7<sup>th</sup> Cir. 2000). (“The proper scope of inquiry on the issue of pretext is limited to whether the employer gave an honest explanation of its behavior.”) *Benassi v. Back and Neck Pain Clinic, Inc.* 629 N.W.2d 475, 482 (Minn. Ct. App. 2001). As the trial court stated:

Arguably Wiita and Sievers may have been wrong about Mr. Mead’s personality traits. But that is not the issue. The issue is whether the professed reason for the hiring decision was a pretext for discrimination.

(Appellant’s Appx. p. 14).

Since Meads has failed to prove an essential element of his claim (that Little Stores’ stated reason for not hiring him was a pretext for discrimination), summary judgment should be affirmed.

**II. This Court Should Not Reverse its Holding in *Frey v. Ramsey County Cmty. Human Services*, 517 N.W.2d 591 (Minn. Ct. App. 1994), that precludes a recovery for Meads, on his claim of employment discrimination because he lied on his employment application when asked whether he had ever been convicted of a crime other than a minor traffic violation.**

There is no genuine dispute that Meads lied on his employment application. At his September 28, 2005 deposition, he stated that he had been convicted of the felony of aiding in a burglary and couldn’t recall if he had any other criminal convictions. (Appellant’s Appx. p. 22; Meads Dep. pp. 9-10).

In *Frey v. Ramsey County Community Human Services*, 517 N.W.2d 591, 597 (Minn. Ct. App. 1994), the Minnesota Court of Appeals held “that the very act of dishonesty in completing an employment application may bar a claim that a refusal to hire was discriminatory.” The *Frey* court stated that “if the employee would not have been hired without the lie or fraud, refusal to allow the employee to profit from that misconduct is proper.” *Id.*

*Frey* involved a county employee who sued under the MHRA, alleging, among other things, disability discrimination for refusal to renew her emergency shelter care contract. The court was asked to determine whether the fact that the claimant withheld information regarding her qualification for the position, which was discovered by the employer after her termination, could be used to justify the termination. *Frey*, 517 N.W.2d at 596. The court noted the disagreement among jurisdictions regarding the proper effect of after-acquired evidence on discrimination claims.

The *Frey* court divided these cases into three categories of cases:

Critical distinctions may be made, in fact, in three categories of cases: In the first category are cases in which an employee, although initially qualified for the job, commits misconduct which would justify termination regardless of whether the actual reason for discharge was discriminatory.

Second, an employee may commit misconduct by lying on or submitting a fraudulent résumé when applying for a job.

A third category of cases involves claims 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 application from employment. 517 N.W. 2d at 587, 598.

Because Meads lied on his employment application, this case falls within the second category. In analyzing this second category of cases, the *Frey* court applied a contract approach:

When an employee has obtained employment by lying or withholding information in the application process, a contract analysis is useful. . . . The employer's agreement to employ an individual, having been obtained by fraud, is voidable at the employer's option, and the employee cannot claim any rights against the employer.

*Frey*, 517 N.W.2d at 598 (citations omitted).

The Minnesota Court of Appeals has addressed the issue of after-acquired evidence of application falsification and its effect on employment discrimination claims brought by unsuccessful applicants for employment in three unpublished cases since *Frey*. *Hamlin v. Super 8 Motel of Fosston, Inc.*, 2000 WL 622264 (Minn. Ct. App. 2000) (unpublished) (Appellant's Add. p. 22); *White v. City of North Branch*, 1995 WL 731340 (Minn. Ct. App. 1995) (unpublished). (Appellant's Add. p. 17); *Bichsel v. State*, No. C1-95-240, 1995 Minn. App. Lexis 995, 1995 WL 731340 (Minn. Ct. App. 1995) (unpublished). (Appellant's Add. p. 7). Both *Hamlin* and *White* were category two cases that cited and followed the *Frey* rule that a false statement on an employment application bars the applicant's discrimination claim. In *Hamlin*, the court stated that a "claimant's misrepresentation on an application can bar recovery on a claim of discriminatory discharge or failure to hire." (Appellant's Add. p. 27).

In *White*, an applicant for a city job appealed a district court decision dismissing her MHRA claim on summary judgment. The Court of Appeals affirmed summary judgment for the employer, holding that the applicant's claim was barred because of the fraudulent misrepresentations on her employment application. The *White* court affirmed dismissal based on the *Frey* analysis, and noted that the information withheld "would have added to the City's reasons for not hiring her." (Appellant's Add. p. 20).

*Bichsel* is within the first category of cases discussed in *Frey*. In *Bichsel*, although the plaintiff initially qualified for the job, she committed misconduct which would justify termination regardless of whether the actual reason for discharge was discriminatory. Citing *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L.Ed. 852, 115 S.Ct. 879 (1995), the *Bichsel* court held that, in this category of cases, ". . . after acquired evidence cannot automatically bar *Bichsel's* discrimination claims." The *Bichsel* court stated its decision was consistent with the *Frey* holding that involved a category two (lying on job application or resume) claim. Appellant's Add. p. 12.

Meads asks this court to "confirm its holding in *Bichsel v. State* that after-acquired evidence of wrong doing does not automatically bar a discrimination claim." But *Bichsel* has no "holding" to "follow" because it is unpublished and unpublished opinions of the Court of Appeals are not precedential. See Minn. Stat. §480A.08, Subd. 3(c); *Dynamic Air, Inc. v. Block*, 502 N.W.2d, 796, 801 (Minn. App. 1993). In any event, *Bichsel* is a category one case, and does not apply here.

Meads really is urging this court to abandon its holding in *Frey* that fraudulent statements on an employment application can bar a wrongful termination claim. But the doctrine of stare decisis directs that this court adhere “. . . to former decisions in order that there be stability in the law”. *Oanes v. Allstate Ins. Co.* 617 N.W.2d 40, 405 (2000). This court, should be “extremely reluctant” to overrule its previous cases. . . .” *Id.* p. 405.

Meads claims that this court should overrule its holding in *Frey* based on the United States Supreme Court’s ruling in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 115 St. Ct. 879 (1995). *McKennon* involved a category one case (during employment, employee commits misconduct which would justify termination) and not a category two case (lying on an employment application) such as presented here or in *Frey*.

Even if this Court determines not to follow the distinction between the two types of cases made in *Frey*, the *McKennon* decision does not mandate the overruling of *Frey*. The Minnesota Appellate Courts, when deciding cases under the Minnesota Human Rights Act, have not always followed the precedent of the U. S. Supreme Court in interpreting federal discrimination laws. For example, in *Anderson v. Hunter, Keith, Marshall Co., Inc.*, 417 N.W.2d 619 (Minn. 1988), the Minnesota Supreme Court rejected the federal cases that apply a different analysis to “mixed motives” cases as opposed to “single motive cases.” The Minnesota Supreme Court decided that it would apply the *McDonnell Douglas* analysis in all cases and rejected federal court decisions holding otherwise. See *Anderson*, 417 N.W.2d at 623, 624; see also *McGrath v. TCF Bank Savings*, 502 N.W.2d 801, 806 (Minn. App.

1993) (discussing the Minnesota Supreme Court's rejection of the "same decision" analysis in a wrongful termination action brought under the Minnesota Human Rights Act).

At least one other state has declined to follow *McKennon* in state law claims. In *Camp v. Jeffers*, 35 Cal. App. 4<sup>th</sup> 620, 41 Cal. Rptr. 2d 329 (1995) the California Court of Appeals refused to follow *McKennon* in a category two case (plaintiffs failed to disclose felony convictions on their employment applications) and upheld summary judgment, dismissing the plaintiff's discrimination claims.

Amicus Curiae American Civil Liberties Union of Minnesota (hereinafter "Amicus") argues that *Frey* should be overruled because it sets forth an arguably discriminatory rule. Amicus Brief p. 11. This argument was never presented to the Trial court. This court should not consider this argument because:

A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it. . . .' Nor may the party obtain review by raising the same general issue litigated below but under a different theory on appeal.

*Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

If this Court does decide to consider this argument, it should be aware that neither the Minnesota Human Rights Act, the Duluth Human Rights Act, or any Minnesota state court has held that convicted felons are a protected class. Even the EEOC guidelines only note that it is unlawful to disqualify a person of one race for having a conviction while not disqualifying a person of another race who has a similar record. Here the trial judge found:

There is no evidence the policy about which Sievers testified disqualification for certain prior convictions, would not of applied to Cameron, who was white, should his record have been discovered.

Appellant's Appx. p. 12.

**III. There is no material fact dispute that Meads' felony burglary charge would have disqualified him from being hired.**

In order to argue there is a fact issue as to whether Meads' admitted lie on his application would have disqualified him from being hired, plaintiff inaccurately presents the record. Meads claims that Linda Wiita "... was the individual who made the decision not to hire Meads." But both Wiita and Sievers confirmed that it was their joint decision not to hire Meads. (Appellant's Appx. p. 71; Wiita Dep. p. 53-54; Appellant's Appx. p. 52; Sievers Dep. p. 38). Wiita, having only been the store manager for less than a month at the time of the facts giving rise to this litigation, depended heavily upon Sievers in making this decision. After all, Sievers had been the store manager at the West End Little Store for five years and was Wiita's Area Manager. Sievers clearly and unequivocally testified that if Meads had honestly answered the question on his application regarding whether he had ever been convicted of a crime, except a minor traffic violation, and had stated that his crime was a felony burglary, it was The Little Stores' and Sievers' policy not to hire him. (Appellant's Appx. pp. 45-46; Sievers Dep. p. 12-13).

The fact that the disqualification of an applicant because of a felony burglary conviction was not stated in The Little Stores Employee Handbook or hiring brochure does

not create a fact issue as to this policy. The Little Stores Employee Handbook is given to employees after they are hired and states the positive reasons for hiring and promotion, not the negative. Clearly these documents were not intended to be all-inclusive.

Simply put, the crime conviction question would not have been included in The Little Stores application if it was not relevant to The Little Stores hiring decision. As the trial court stated:

[Plaintiff's argument] of course ignores the fact that the unmentioned items [felony crime conviction] were made the subject of specific inquiry on the application. The lack of mention of certain items in the hiring manual does not create a genuine factual dispute on the issue of whether Best considered manual-unmentioned items inquired about in its employment application as unimportant to the hiring decision.

Appellant's Appx. pp. 12, 13.

Meads asserts that the Little Stores does not have a policy of refusing to hire applicants with a felony burglary because it hired Lonnie Cameron, who was considered for employment at the same time as Meads. (Appellant's Brief p. 17). The trial court responded to this contention as follows:

. . . record does not reflect Best ever became aware of the falsehood before Cameron left its employment for wholly unrelated reasons. There is thus no evidence the policy about which Sievers testified, disqualification for certain prior convictions, would not have applied to Cameron, who was white, should his record have been discovered.

Appellant's Appx. p. 12.

## CONCLUSION

Meads has failed to present any facts whatsoever to indicate that the legitimate, non-discriminatory reason for not hiring him is a pretext for discrimination. Little Stores hires the people its managers feel are the most qualified for the job, and this includes members of racial minorities who are current and past employees of Little Stores. (Appellant's Appx. p. 51, 52; Sievers Dep. pp. 35-38). Summary Judgment for the Little Stores should be affirmed because there simply is no room for an honest difference of opinion among reasonable people regarding the fact that Little Stores' refusal to hire Meads was based not on his race, but rather on his personality.

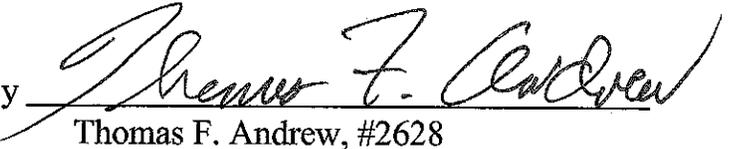
The courts do not serve as "super personnel departments" that reexamine an entity's business decisions and thus, the proper scope of inquiry on the issue of pretext "is limited to whether the employer gave an honest explanation of its behavior". *Krenik v. County of LeSeuer*, 47 F.3d 953, 960, (8<sup>th</sup> Cir. 1995) (quoting *Harvey v. Anheuser-Busch, Inc.* 38 F.3d 968, 973 (8<sup>th</sup> Cir. 1994)).

Meads' false statement on his employment application that he had not been convicted of a crime also bars his discrimination claim. *Frey v. Ramsey County Cmty Human Services*, 517 N.W.2d 591 (MN Ct. App. 1994) should not be overruled. The Little Stores' evidence shows it would not have hired Meads if he had honestly completed his employment application.

The trial court's grant of Summary Judgment was proper and should be affirmed.

Respectfully submitted,

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