

No. A08-1791

State of Minnesota
In Court of Appeals

ELIZABETH NIEMI,

Respondent,

VS

GIRL SCOUTS OF MINNESOTA AND WISCONSIN LAKES AND PINES,

Appellant,

APPELLANT GIRL SCOUTS OF MINNESOTA AND WISCONSIN
LAKES AND PINES' REPLY BRIEF

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Standard of Review

The standard of review with respect to the interpretation of the Minnesota Rules of Professional Conduct is the de novo standard. Prod. Credit Ass'n of Mankato v. Buckentin, 410 N.W.2d 820, 823 (Minn. 1987); Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 662 N.W.2d 125, 129 (Minn. 2003); Helgemo v. Pampered Chef, 2005 WL 949155, at *4 (Minn. Ct. App. April 26, 2005). As the Minnesota Supreme Court has held, Appellate courts retain "...independent interpretive authority to define the scope and application of [the Minnesota Rules of Professional Conduct]. Though trial court interpretation of the rules are informative, and may be helpful, we do not give to them the same deference we are inclined to afford to factual findings." Prod. Credit Ass'n of Mankato, 410 N.W.2d at 820, 823 (internal citation omitted).

Ms. Niemi has argued that the Girl Scouts have not challenged the District Court's interpretation of the Minnesota Rules of Professional Conduct and, therefore, the de novo standard is not appropriate. Pl. Br. at 10. In fact, the Girl Scouts have challenged the District Court's interpretation of Rule 1.9. Among other things, the Girl Scouts have argued that the District Court improperly considered the "appearance of impropriety." Def. Br. at 10. Therefore, the de novo standard is the appropriate standard of review. However, regardless of the standard of review, the District Court erred.

Argument

In its order the District Court took the unprecedented action of disqualifying defense counsel on the basis of his prior representation of Ms. Niemi in a case involving completely different causes of action, facts, defendants, witnesses (save Ms. Niemi),

evidence, and legal theories which was commenced **more than a quarter of a century ago.**

I. The District Court erred by disqualifying defense counsel under Rule 1.9 of the Minnesota Rules of Professional Conduct because the prior case and the present case do not involve the same or a substantially related matter.

Rule 1.9 of the Minnesota Rules of Professional Conduct governs duties to former clients. Minn. R. Prof. Conduct 1.9. As one court has noted, “The disqualification inquiry centers on the often difficult determination of whether the pending suit is ‘substantially related’ to the prior representation.” Arctic Cat, Inc. v. Polaris Indus., Inc., 2004 WL 2944110, at *2. This Court must engage in “...a factual inquiry comparing” the prior case and the present case. ABA, Formal Op. 415 (1999). Such an inquiry here leads to the inescapable conclusion that the prior case and the present case do not involve the same or a substantially related matter.

Ms. Niemi has argued that the prior case and the present case involve “substantially related, even identical issues.” Pl. Br. at 16. Ms. Niemi has identified such issues as Ms. Niemi’s “work ethic, supervision style, ability to prioritize tasks, experience, problem solving skills, tolerance for employee disputes, public perception of her employment, her interactions with the public, and qualifications for the job.” Id. As an initial matter, the items listed above are not properly characterized as “issues.” Rather, those items are aspects of Ms. Niemi’s job performance, and Ms. Niemi’s job performance cannot be divorced from the facts of each case. The cases involve Ms. Niemi’s job performance in two completely different positions, involving different work

environments, different employers, different co-workers and supervisors, and different job duties. Even if the positions were similar, which they clearly are not, the fact that Ms. Niemi's employment in each position is separated by **more than a quarter of a century** cannot be ignored.

Ms. Niemi has also argued that the prior case and the present case involve the same defenses. Pl. Br. at 18. Ms. Niemi has argued that the employers in both cases alleged that their actions were the result of Ms. Niemi's inferior abilities and qualifications, not discrimination. *Id.* Ms. Niemi mischaracterizes job performance as "defenses," and once again fails to address the significant factual differences between the cases and the substantial amount of time between them.

The context in which the issues and defenses in the prior case and the present case arise also cannot be ignored. In the prior case, Ms. Niemi alleged that she received unequal pay because of her sex and was retaliated against by the City of Duluth for asserting her right to equal pay in 1979, all in violation of the federal Equal Pay Act. In the present case, Ms. Niemi alleges that she was discriminated against by the Girl Scouts on the basis of her age and her association with and protected conduct regarding individuals in a protected class (sexual orientation) in 2007, all in violation of the Minnesota Human Rights Act. It is obvious when considering the details of the two cases, such as the asserted claims, the applicable law, the complained-of acts, the employers, and the evidence, that the 1979 case and the 2007 case bear no relationship to each other. There is simply no commonality of causes of action, facts, witnesses (save Ms. Niemi), employers, employees, documents, or legal theories.

Ms. Niemi has also argued that confidential factual information obtained by defense counsel during the prior case may be relevant in the present case. That is simply not the case. In the District Court, Ms. Niemi argued that her “job experience, qualifications, supervisory skills, relationship with peers and staff, and approach to litigation” was the “confidential factual information” obtained by defense counsel. Niemi Aff. ¶ 5; Appdx. 2. Again, most of the items listed above are aspects of Ms. Niemi’s job performance, and there is nothing defense counsel learned about Ms. Niemi’s job performance in the City of Duluth in 1979 which would constitute confidential information. While Ms. Niemi has argued that her “approach to litigation” is confidential information, Pl. Br. at 17, that is obviously a fiction. How one would approach litigation is not a confidential fact, and one’s approach to an Equal Pay Act case against a public employer in 1979 would certainly have no bearing on one’s approach to a Minnesota Human Rights case against a private employer in 2007.

Moreover, any confidential information that may have been obtained during the prior case is simply irrelevant to the present case. It is, for instance, difficult to imagine how knowledge of Ms. Niemi’s relationships with her co-workers in the City of Duluth’s Department of Planning and Development in 1979 will “materially advance” the Girl Scouts’ position in this case. Minn. R. Prof. Conduct 1.9, 2005 cmt. Once again, the different facts involved in both cases and the passage of time between the cases cannot be ignored.

Contrary to Ms. Niemi’s assertions, defense counsel is **not** in the untenable position of attempting to maintain both his duty to preserve Ms. Niemi’s confidential

information and his duty to diligently represent the Girl Scouts. Defense counsel does not possess any confidential information material to the present case.

The salience of the commentary to Rule 1.9, and comment 2 in particular, cannot be overlooked. As the Minnesota Supreme Court has held, in determining whether matters are substantially related, courts should rely upon "...the interpretive guidance furnished in the commentary following Rule 1.9." Prod. Credit Ass'n of Mankato, 410 N.W.2d at 820, 823-824. Comment 2 provides, in relevant part, as follows:

...a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

Minn. R. Prof. Conduct 1.9, 2005 cmt.

Comment 2 is clearly applicable here. Defense counsel handled a "type of problem" for Ms. Niemi – an employment law problem. Comment 2 unambiguously states that defense counsel may subsequently represent another client in a "factually distinct problem of that type," i.e., in another employment law problem, even if the new representation is adverse to Ms. Niemi, as long as the two problems are "factually distinct." As was discussed above, the prior case and the present case are factually distinct. Therefore, defense counsel can represent the Girl Scouts in the present case. As the Girl Scouts noted in their brief, Def. Br. at 10-11, any other result would have widespread ramifications.

II. The District Court erred by disqualifying defense counsel because the facts satisfy none of the three Jenson test elements.

As the Girl Scouts noted in their brief, Def. Br. at 14-15, Minnesota courts have applied the Jenson test in evaluating disqualification issues under Rule 1.9, reasoning that Jenson was codified in Rule 1.9. See Prod. Credit Ass'n of Mankato, 410 N.W.2d at 820, 825 cited with approval in Lennartson, 662 N.W.2d at 125, 132. However, in light of the factual distinctions between Jenson and this case, it is especially important to consider the language of Rule 1.9, along with the comments, and not focus solely on the Jenson test. See Prod. Credit Ass'n of Mankato, 410 N.W.2d at 820, 823-824. See also Keystone Bluffs, LLC v. Life Care Servs., LLC, 2003 WL 23024123, at *4 (Minn. Ct. App. Dec. 30, 2003) (holding that, since the case could be decided under Rule 1.9, it was not necessary to apply the Jenson test).¹ Regardless, as is shown below, the outcome of this case is the same under both Rule 1.9 and the Jenson test.

The analysis with respect to the first element of the Jenson test – a substantial, relevant relationship or overlap between subject matters of the two representations – is essentially the same as the analysis under Section I above. Since, as was shown above, this element is not satisfied, disqualification was not appropriate under the Jenson test and further analysis is not required.

¹ Ms. Niemi has suggested that the Girl Scouts rely upon Rule 1.9 because the Jenson test weighs in favor of disqualification Pl. Br. at 13. The same could be said of Ms. Niemi – she relies upon the Jenson test because both Rule 1.9 and the comments thereunder weigh against disqualification. Tellingly, Ms. Niemi failed to address the Girl Scouts' extensive discussion of the rule and comments, particularly comment 2, in her brief.

If this Court reaches the second element of the Jenson test, there is an irrebuttable presumption that defense counsel received confidences from Ms. Niemi in the prior case, and a rebuttable presumption that defense counsel conveyed those confidences to his affiliates. Ms. Niemi has argued that the Girl Scouts have not rebutted the presumption. Pl. Br. at 20. However, defense counsel has averred that he does not remember much if anything about the prior case. Roby Aff. ¶ 6a; Appdx. 78. If defense counsel cannot remember any confidences, he certainly cannot have conveyed any confidences to the Girl Scouts or his affiliates. Since this element is not satisfied, disqualification was not appropriate under the Jenson test and further analysis is not required.

If this Court reaches the third element of the Jenson test, it must weigh the competing equities. Minnesota courts have considered the following competing equities:

...the right to choose one's own counsel, the desire not to use disqualification as a sword, and the need to sanction even the appearance of impropriety in order to secure the public's faith in the judiciary.

EOP-Nicollet Mall, L.L.C. v. County of Hennepin, 2003 WL 22717610, at *3 (Minn. Tax Reg. Div. Nov. 13, 2003).

In this case, the competing equities weigh heavily in favor of the Girl Scouts. The Girl Scouts have the right to be represented by the counsel of their choice. In recognition of that right, the Girl Scouts' Board of Directors passed a certified resolution providing, in relevant part, as follows:

...GSMWLP invokes the right of any litigant to be represented by counsel of his, her, or its choice in litigation;

...GSMWLP reaffirms that it chooses to be represented by [Johnson Killen] in Ms. Niemi's litigation; and,

...GSMWLP notifies the court that it respectfully objects to removal of [Johnson Killen] from representing GSMWLP in Ms. Niemi's litigation.

Wade Aff. Ex. 1; Appdx. 59.

Moreover, disqualification may only be used as a shield, not a sword. Ms. Niemi has argued that she has "nothing to gain" by defense counsel's disqualification. Pl. Br. at 20. If that were true, there would be no need to seek disqualification. Presumably, Ms. Niemi hopes that, by wielding the sword of disqualification, she will ensure that the Girl Scouts are represented by counsel who is less experienced and less effective than defense counsel. The significant factual differences between the prior case and the present case, the passage of a substantial amount of time between the cases, and the representation of Ms. Niemi first by Mr. Fredin's firm and then by her present lawyers during that time all suggest that disqualification is being used impermissibly as a sword.

Conclusion

In light of the foregoing, the disqualification of defense counsel was erroneous under both Rule 1.9 of the Minnesota Rules of Professional Conduct and the Jenson test. Appellant respectfully requests that this Court reverse the District Court's order and reinstate the Girl Scouts' counsel of choice.

Respectfully submitted,

Dated: December 18, 2008

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Certificate of Brief Length

We hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional 13-point font. The length of this brief is 2,465 words. This brief was prepared using Microsoft Office Word 2003 software.

Respectfully submitted,

Dated: December 18, 2008

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