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STATE OF MINNESOTA

IN COURT OF APPEALS

A11-2082

Terrance Sipe,

Appellant,

vs.

STS Manufacturing, Labor Ready/
True Blue,

Respondents.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

I. Whether a claim brought under the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA") is governed by two-year or six-year statute of limitations.

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STATEMENT OF THE CASE

This is an appeal from a ruling by Hennepin County District Court, the Honorable Joseph R. Klein presiding, dismissing Appellant's case under the Minnesota Drug Testing in the Workplace Act ("DATWA") on the grounds that the statute of limitations is two years. Appellant contends the statute of limitations should be six years.

STATEMENT OF THE FACTS

In April 2008 Appellant Terrance Sipe injured his rotator cuff muscle while at work. As a result of the injury, Respondents required that Sipe submit to a drug test. Three days later, Respondents terminated Sipe for failing the drug test. Almost three years later, on March 17, 2011, Sipe initiated this lawsuit alleging that Respondents violated the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA"). Sipe alleged that Respondents violated DATWA in five (5) ways:

1. Respondents fired Sipe after a first positive test in violation of Minn. Stat. Section 181.953, subd. 10(b);
2. Respondents did not provide Sipe with a form to acknowledge that he had seen Respondents' drug testing policy in violation of Minn. Stat. Section 181.953, subd. 6;
3. Respondents did not provide Sipe with a copy of his test results in violation of Minn. Stat. Section 181.953, subd. 7;
4. Respondents did not provide Sipe with written or other notice of its drug testing Policy in violation of Minn. Stat. Section 181.952(2);
5. Respondents did not give Sipe an opportunity to explain his positive test result in violation of Minn. Stat. Section 181.953, subd. 6(b).

Respondent's made a motion to dismiss contending that Sipe's claims were time-barred by a two-year statute of limitations. The district court agreed and dismissed Sipe's claims.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a district court's granting of a motion to dismiss, the standard of review is *de novo*. In re Individual 35W Bridge Litigation, 786 N.W.2d 890 (Minn. App. 2010).

II. SIPE'S CLAIMS UNDER DATWA ARE SUBJECT TO A SIX-YEAR STATUTE OF LIMITATIONS BECAUSE LIABILITY IS IMPOSED ENTIRELY BY STATUTE AND NO EXCEPTIONS APPLY.

Minnesota Statutes, Section 541.05 provides that a six-year statute of limitations applies to causes of action created by statute other than those (...) where a shorter period is provided by section 541.07. In turn, Minn. Stat. Section 541.07 states "the following actions shall be commenced within two years: 1) for libel, slander, assault, battery, false imprisonment, or other tort, resulting in personal injury..."

In Christenson v. Argonaut Ins. Co., 380 N.W.2d 515 (Minn. App. 1986), the court formulated a three-part test to determine whether actions are subject to a two-year statute of limitation under Minn. Stat. Section 541.07. These actions are those 1) that are intentional or strict liability torts; 2) that involve injury to the person; and 3) that usually can be the basis for criminal prosecution. Id. at 518.

In Larson v. New Richland Care Center, 538 N.W.2d 915 (Minn. App. 1995) , the court applied the Christenson test to claims brought under the Minnesota whistleblower statute, Minn. Stat. Section 181.932, *et seq*. The Larson court concluded that a violation of the whistleblower statute satisfies all of the Christenson criteria so as to invoke a two-year statute of limitations. First, the whistleblower statute requires an employee to prove that the employer intentionally retaliated against him or her for reporting violations or suspected violations of the law or for

refusing an employer's order to violate the law. Thus, the whistleblower statute is an intentional tort. Second, wrongful discharge under the whistleblower statute is a personal wrong that meets the personal injury requirement. Third, the court determined that actions giving rise to whistleblower claims usually can be the basis for criminal liability because if the employer violates the law, it could be subject to criminal prosecution.

The district court erred in finding that Sipe's claims under DATWA meets the Christenson test. First, the court found that a violation of DATWA is an intentional tort because "DATWA provides that an employer may not discharge, discipline, discriminate against...an employee on the basis of a positive test result from an initial screening that has not been verified by a confirmatory test. Minn. Stat. Section 181.953." Sipe, however, did not bring a claim that Respondents did not perform a confirmatory test on his urine sample. Furthermore, only one of Sipe's claim constitutes and intentional act – terminating him after a first positive. The other four claims against Respondents are for negligence – failure to provide a form to acknowledge seeing the drug testing policy, failure to provide him a copy of his test results, failure to provide notice of drug testing policy, and failure to provide an opportunity to explain the positive test result.

The second prong of the Christenson test is not satisfied because only one of Sipe's claims constitutes a personal injury – his termination after a first positive. The negligent actions of Respondent's did not lead to any personal injury. They simply made the drug test unlawful,

The third prong of the Christenson test is also not satisfied because a violation of DATWA cannot be the basis of criminal prosecution. In Larson, the court stated:

> ...actions giving rise to whistleblower claims usually can be the basis for criminal liability. In the instant case, an employee claims that her employer violated state

> or federal law, or that her employer required her to violate the law. Minn. Stat. Section 181.932. This could involve criminal prosecution.

Id. at 920. In Larson, the plaintiff reported suspected violations of state laws and rules with regard to the employer's patient care, and because she refused to perform actions that she believed violated state law or rules. To determine whether there was a basis for criminal prosecution, the Larson court focused on the actions of the employer, not the employee victim:

> Although the alleged facts are not before us in detail, we note that in a nursing home setting, for example it is a gross misdemeanor for a person intentionally to abuse or neglect a vulnerable adult. Minn. Stat. Section 626.557, subd. 19 (1994)

The district court found that the third prong of the Christenson test "is satisfied because the conduct at issue (drug use) can be the subject of criminal prosecution." It is not the conduct of the employee that is to be examined to determine whether the conduct can be subject to criminal prosecution, but that of the employer. When determining whether an action is a tort, it is only logical to look to the actions of the tortfeasor and not the victim.

In McDaniel v. United Hardware Distributing Co., 469 N.W.2d 84 (Minn. 1991), the Minnesota Supreme Court held that a six-year statute of limitations applied to claims brought under the worker's compensation retaliation statute, Minn. Stat. Section 176.82. The statute provides:

> A person discharging or threatening to discharge an employee for seeking workers' compensation benefits or in a manner intentionally obstructing an employee seeking workers' compensation benefits is liable in a civil action for damages incurred by the employee...

The McDaniel court emphasized that a six-year statute of limitations applies when liability is created by statute:

> In contrast, section 176.82 grants specific rights and remedies, not previously recognized, to employees who are threatened with discharge or are discharged for

> seeking workers' compensation benefits. McDaniel's cause of action depended on rights created by statute. Thus a section 1767.82 cause of action is subject to the six year limitation period for an action upon a statutory liability unless section 176.82 action arises upon a penalty or a shorter period is provided by section 541.07.

Similarly, in this case, Sipe has no common law remedy for a drug testing violation. Liability was created entirely by statute and therefore the six-year statute of limitations applies.

In Manteuffel v. City of North St. Paul, 570 N.W.2d 807 (Minn. App. 1997), the court determined that actions brought under the Minnesota Data Practices Act are governed by a six-year statute of limitations despite the fact that a willful violation of the Data Practices Act is a misdemeanor. In Manteuffel, a discharged probationary police officer made 17 unsuccessful attempts over an approximately 4 month period to access his personnel file. The chief of police stated that the ex-employees' request was on the "back burner". The former officer sued under Minn. Stat. Section 13.04, subd. 3 that grants individuals a right to examine any non-confidential data of which they are the subjects. The court held:

> Notwithstanding this court's dictum in Christenson, we do not believe that the inclusion of libel and slander as subject to the two-year limitation in section 541.07(1) necessarily evinces a legislative intent to include all strict liability or quasi-strict liability torts within the scope of the statute.
>
> Moreover, violation of a statute does not necessarily give rise to strict liability; it may also be categorized as negligence *per se*. See e.g. Boitz v. Preblich, 405 N.W.2d 907, 912 (Minn. App. 1987) (defining negligence per se as where statute imposes duty and damage proximately results from neglect of duty...Actions alleging personal injury grounded in negligence are generally subject to the six-year limitation of Minn. Stat. Section 541.05.
>
> ...
>
> Because we do not believe that violations of duties statutorily imposed only on government officials are sufficiently similar to libel and slander to warrant application of section 541.07(1) by analogy, we conclude that claims under the

> data practices act are not subject to the two-year statute of limitations governing "tort[s] involving personal injury."

Id. at 811-812.

Similarly, all of Sipe's claims should be construed as negligence *per se* because each of them violated different sections of DATWA. In short, DATWA is different from the whistleblower statute because for a whistleblower claim, the employee must prove that the employer intentionally retaliated against him or her for reporting violations of the law. A successful DATWA claim on the other hand requires that the employee prove that the employer violated one or more sections of DATWA, regardless of the employer's intent. Under DATWA, there is no requirement of showing that the employer had an evil motive.

CONCLUSION

Based on the authority cited and the arguments presented herein, this Court should reverse the district court and hold that the statute of limitations under DATWA is six years.

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