
NO. A07-360

State of Minnesota
In Court of Appeals

Michelle Kunza,

Plaintiff/ Appellant,

vs.

St. Mary's Regional Health Center, and
Dr. Wade Wernecke, individually and as an employee
of St. Mary's Regional Health Center,

Defendants/ Respondents.

**APPELLANT'S REPLY BRIEF
AND SUPPLEMENTAL APPENDIX**

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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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INTRODUCTION

The trial court erred in dismissing Appellant Kunza's claims based on the parties' tolling agreement. Respondent Wernecke's letter on September 22, 2004 cancelled the tolling agreement without giving Kunza the required ten days notice. Therefore, Kunza timely served her complaint and did not breach the tolling agreement. The Court should not apply the "erroneous date rule" in this situation because it would impose substantial prejudice on Kunza by depriving her of the opportunity to have her case tried on the merits. Even if the Court finds that Kunza breached the tolling agreement, she substantially performed her obligations under the agreement by refraining from filing suit from mid-August to October of 2004. Moreover, Respondents waived their rights under the tolling agreement by failing to file a motion to dismiss based on their breach of contract defense.

In denying Respondent Wernecke's request for attorney's fees, the district court properly applied the standard for awarding attorneys fees as set forth in Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986). The Sigurdson standard does not support an award of attorney's fees to Wernecke because Kunza's claims were reasonable and had foundation.

Kunza respectfully requests that the Court reverse the district court's dismissal of her claims and affirm the district court's denial of attorney's fees to Wernecke.

ARGUMENT

I. KUNZA DID NOT BREACH THE TOLLING AGREEMENT

As set forth infra., Kunza contends that Wernecke cancelled the tolling agreement on September 22, 2004. Kunza did not breach the tolling agreement regardless of whether the September 22 letter was cancellation of the agreement or merely notice of cancellation.

Kunza mailed the summons and complaint to counsel for St. Mary's on September 30, 2004, and delivered it to counsel for Wernecke, along with an admission of service. (SA.000206). Both parties' counsel agreed to accept service of the Complaint. (SA. 000206). Counsel for St. Mary's signed the admission of service on October 1, 2004. (A. 000016). Counsel for Wernecke signed the admission of service on October 4, 2004, after the alleged ten-day cancellation period. (A. 000017).

Service by mail with an acknowledgement of service under Minn. R. Civ. P. 4.05, is only effective once the defendant signs and returns the acknowledgement of service. Hughes v. Lund, 603 N.W.2d 674, 677 (Minn. Ct. App. 1999); Coons v. St. Paul Companies, 486 N.W.2d 771, 774 (Minn. Ct. App. 1992). A lawsuit only commences upon the return of the acknowledgement of service. Id.; Gulley v. Mayo Foundation, 886 F.2d 161, 164 (8th Cir. 1989) (analyzing Minn. R. Civ. P. 4.05). A defendant has 20 days to return the acknowledgement of service. Minn. R. Civ. P. 4.05.

St. Mary's has argued that they and Wernecke were harmed because they were sued too early under the tolling agreement. Respondents are engaging in gamesmanship. Kunza's provided the complaint and acknowledgement of service to both Respondents.

If the Respondents really were upset about receiving the Complaint before the expiration of the alleged cancellation period, they could have waited up to 20 more days to sign the admission of service and actually commence the lawsuit. But they did not. Instead they signed the acknowledgements of service before the expiration of the cancellation period. This Court should not allow the Respondents to accept early service of the complaint and then argue that such early service constituted a breach of the agreement. By accepting and acknowledging the service, Respondents should be estopped from arguing that such service was in breach of the tolling agreement.

II. THE TOLLING AGREEMENT DOES NOT WARRANT DISMISSAL OF KUNZA'S CLAIMS.

This Court should reverse the district court's order dismissing Kunza's case. The Tolling Agreement provided that Kunza would not sue during the term of the Agreement. Kunza complied with this contract and only sued after the Tolling Agreement was cancelled by Respondent Wernecke.

A. THE TOLLING AGREEMENT IS UNAMBIGUOUS AND MAY NOT SUPPLEMENTED OR MODIFIED BY THE COURT.

The district court erred in dismissing Kunza's claims because it imposed a new term to the tolling agreement that was not agreed upon by the parties. Under the plain language of the contract, the parties agreed that Kunza would not sue during the term of the tolling agreement and that a party could cancel the tolling agreement by providing ten days notice to the other parties. (A. 000012)¹. The plain meaning of Wernecke's letter is a cancellation of the tolling agreement. The district court incorrectly imposed a new term

¹ All citations to Appendix refer to Appellant's Appendix filed with her initial brief.

to the contract, that Kunza was required to wait ten days before commencing her lawsuit after the tolling agreement was cancelled. (A. 000010).

**1. The September 22 Letter Was Not a Notice of cancellation;
Wernecke Cancelled the Tolling Agreement**

Courts should interpret contract language using plain and ordinary meaning. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W. 2d 390, 394 (Minn. 1998), rehearing denied, Oct. 9, 1998 (citing Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 165 N.W.2d 554, 556 (Minn. 1969)). Respondent St. Mary's Regional Health Center ("St. Mary's") acknowledged in its brief that the tolling agreement required ten days notice before cancellation. St. Mary asserts that the abbreviation "i.e." is Latin for *id est*, which means "that is." (Resp. St. Mary's Br. 11). St. Mary's continued, "[t]hus, the Tolling Agreement's cancellation clause must be read as . . . upon short notice, that is, ten days." Id.

Wernecke cancelled the agreement on September 22, 2004 without providing any notice of cancellation, much less a ten day notice of cancellation. (A. 000014). Wernecke's letter simply states, "On behalf of Dr. Wernecke, we hereby cancel and terminate the Agreement to Toll the Statute of Limitations which was executed in connection with this matter." Id. The plain meaning of "hereby" is "by this document; by these very words." Black's Law Dictionary (8th ed. 2004). "Cancel" is defined as "to terminate a promise, obligation, or right." Id. "Terminate" means "to end; to conclude." Id. Thus, Wernecke's letter must be read as "On behalf of Dr. Wernecke, we by this document, terminate our promise and end the Agreement to Toll the Statute of

Limitations which was executed in connection with this matter.” When interpreted using plain and ordinary meaning, these words simply cannot be read as giving Kunza the required ten day advance notice of cancellation. By not providing Kunza with notice of cancellation, Wernecke breached the tolling agreement.

2. The District Court Imposed A New Term to the Tolling Agreement

The district court erred in concluding that Kunza was required to wait ten days after Wernecke cancelled the agreement. “[I]n the interpretation of written agreements construction lies only in the field of ambiguity.” Telex Corp. v. Data Products Corp., 135 N.W.2d 681, 686 (Minn. 1965). The district court did not find the Tolling Agreement to be ambiguous² and therefore should not have supplemented the agreement with additional terms. Apple Valley Red-E-Mix, Inc. v. Mills-Winfield Eng’g Sales, Inc., 436 N.W.2d 121, 123 (Minn. Ct. App. 1989), rehearing denied, Apr. 26, 1989. When contract provisions are fully considered and agreed upon by the parties the court should not rewrite, modify, or set aside the agreement. Telex at 687.

The Tolling Agreement was negotiated by experienced counsel and all parties were represented. The Agreement provided that Kunza could not commence her case while the Agreement was in force. Once Wernecke cancelled the Agreement on September 22, 2004, the Agreement was no longer in force and nothing prevented Kunza from bring suit. As fully considered and agreed upon by the parties, the Tolling Agreement does not provide for an additional ten day tolling period after cancellation of

²(A. 000008.)

the agreement. The district court erred when it extended Kunza's obligation not to sue to ten days after the date that Wernecke cancelled the agreement.

B. THE "ERRONEOUS DATE RULE" WOULD IMPOSE SUBSTANTIAL PREJUDICE ON KUNZA AND SHOULD NOT BE APPLIED TO CURE WERNECKE'S BREACH.

Respondents propose that even if Wernecke failed to give Kunza the required ten day notice of cancellation, his breach is cured as a matter of law by application of the "erroneous date rule." (Resp. St. Mary's Br. 24). Respondents quote a New York case for this proposition, G.B. Kent & Sons, Ltd. v. Helena Rubinstein, Inc., 393 N.E.2d 460, 461 (N.Y. 1979):

The erroneous date rule [holds] that a termination notice which erroneously identifies the termination date is nonetheless sufficient to effect a termination as of the first proper termination date . . .

(Resp. St. Mary's Br. 24). Respondents failed to provide the entire quotation to the court.

The full quotation from the case is as follows:

The erroneous date rule that a termination notice which erroneously identifies the termination date is nonetheless sufficient to effect a termination as of the first proper termination date is applicable notwithstanding that termination triggered certain option rights in the recipient of the notice, *at least where there is no proof that the application of the rule would impose any substantial forfeiture or prejudice.*

G.B. Kent at 461 (emphasis supplied). Respondent St. Mary's also cites to Shain v. Wash. Nat'l Ins. Co., 308 F.2d 611 (8th Cir. 1962) as support for application of the erroneous date rule. Shain is inapplicable. The appellant in Shain argued that a notice from an insurance company canceling his agency contracts failed to meet the contractual time requirements for cancellation and was therefore not effective. Shain v. Wash. Nat'l

Ins. Co., 308 F.2d 611, 613 (8th Cir. 1962). The court, however, held that the cancellation notice was effective upon lapse of the time required by the contract, as the appellant did not have a substantial existing right that would be materially impaired by allowing the contract to terminate when the time required by the contract had run. Id. at 616. Hagstrom is likewise inapplicable to the instant situation. Hagstrom held that a cancellation notice that provided only twenty-nine days of notice, rather than the contractually required thirty, would terminate after the thirtieth day. Hagstrom v. Am. Circuit Breaker Corp., 518 N.W.2d 46, 49 (Minn. Ct. App. 1994), review denied Aug. 24, 1994. This case is distinguishable, however, because the appellant had not claimed any prejudice from the deficient notice. Id.

In contrast to those cases, Kunza possesses a substantial existing right, the right to have her case determined on the merits, which will be substantially impaired by applying the erroneous date rule to cure Wernecke's breach of the Tolling Agreement. Application of the erroneous date rule to the present case results in the dismissal of Kunza's lawsuit. Applying the erroneous date rule to cure Wernecke's breach of the Tolling Agreement results in an inequitable outcome and imposes substantial prejudice on Kunza by depriving her of her day in court and a decision on the merits.

C. EVEN IF THIS COURT CONCLUDES KUNZA BREACHED THE TOLLING AGREEMENT, KUNZA SUBSTANTIALLY PERFORMED HER OBLIGATION UNDER THE TOLLING AGREEMENT.

Respondents assert that Kunza's argument that she substantially performed her obligations under the Tolling Agreement is not properly before this court because it was

not presented to the district court.³ To not allow this argument to be considered by this court, however, does not promote fundamental justice.

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not been previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifices of the rules of fundamental justice.

Hormel v. Helvering, 312 U.S. 552, 557 (1941). The Supreme Court has stated that if a party properly presented a federal claim, they could make any argument in support of that claim, and were not limited to the precise arguments made below. Yee v. City of Escondido, 503 U.S. 519, 534 (1992). Similarly, the Minnesota Supreme Court has allowed parties to argue theories that were not asserted before the trial court. In Cohen, the Minnesota Supreme Court allowed the plaintiff to argue a new theory on appeal because it was a variation of a contract theory presented in the lower courts and relied on the same evidence as that theory. Cohen v. Cowles Media Co., 479 N.W.2d 387, 390 (Minn. 1992). The Court cited to its discretion to “review any matter as the interest of justice required” under Minn. R. Civ. App. P. 103.04. Id. The Court allowed the plaintiff to proceed on a theory that had not been previously pled or presented because it would be “unfair” to not allow it. Id. In this case, it would be unfair to deny Kunza the opportunity to proceed with her substantial performance argument. Substantial performance is a

³ Kunza did in fact raise the doctrine of substantial performance with the district court in a letter requesting permission to file a motion to reconsider the summary judgment order. (A. 000065-66).

variation of the same contract theories that Kunza has already presented and it relies on the same evidence as her prior theory.

Substantial performance allows a party who performs all the essential requirements of a contract to enjoy the benefit of the bargain, even if the performance entailed some trivial defects. Ylijarvi v. Brockphaler, 213 Minn. 385, 390 (1942). The Minnesota Supreme Court describes substantial performance as “performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed . . .” Id. “Deviations or lack of performance . . . so material that the owner does not get substantially that for which he bargained, are not permissible.” Id. at 390.

In this case, Kunza performed all the essentials necessary to the full accomplishment of the purposes of the Tolling Agreement. The purpose of the agreement as noted by the district court was “to allow the parties to engage in settlement discussions without *any* formal legal action.” (A. 000010) (emphasis in original). The court noted this purpose was shown in the parties’ choice of words in the preamble of the Tolling Agreement which says, “. . . attempt to resolve the claims without any civil Complaint or Charge being filed.” Id. The parties “agreed to enter into pre-suit negotiations” and work “in good faith to resolve the claims . . .” (Resp. St. Mary’s Br., p.10). Respondents state that “in furtherance of this goal,” that is the goal of successful pre-suit negotiations, they gave Kunza a suspension of the running of all statutes of limitations, and Kunza gave them a covenant not to sue. Id. Respondents further stated that they wanted to avoid preparing for formal proceedings “while they tried to settle the

dispute.” Id. This exchange of promises, the tolling of the statutes and the temporary relief from legal proceedings, was consideration to support the contract⁴, not the purpose for the contract.

The purpose of the Tolling Agreement was to engage in settlement discussions without any formal legal action. The parties agree that these pre-suit settlement discussions did in fact occur. However, “it eventually became clear that settlement efforts were running out of steam” and Respondents decided to cancel the Tolling Agreement. (Resp. St. Mary’s Br. 1). At the time Respondents made the decision to cancel the Tolling Agreement, they were aware that Kunza was also not interested in continuing negotiations and that she intended to commence a lawsuit. (A. 000015.) There is no question that settlement negotiations had ceased. There is also no question that no formal legal action occurred during the course of the settlement discussions. Therefore, the purpose of the Tolling Agreement was in fact accomplished.

Kunza performed all the essentials necessary to the full accomplishment of the purposes of the Tolling Agreement by not commencing any legal action during the course of settlement negotiations. Respondent received what they bargained for – the opportunity to engage in pre-suit settlement negotiations without any formal legal action. Kunza substantially performed her obligations under the Tolling Agreement and Respondents enjoyed the full benefit of their bargain. This court should reverse the lower court’s order granting summary judgment to the Respondents based on the tolling agreement.

4 (A. 000011.)

D. RESPONDENTS WAIVED THEIR RIGHTS UNDER THE TOLLING AGREEMENT.

Respondents participated in the litigation for almost two years before asserting the breach of contract defense in their motion for summary judgment. Respondents did not assert this defense in a motion to dismiss because if the motion had been decided when the case was first filed, Kunza could have re-filed her complaint without any statute of limitations issues. Instead, Respondents purposefully waited to assert the defense in a motion for summary judgment. By waiting to assert the defense and litigating this case for two years, Respondents waived their right to contend that Kunza breached the contract.

“Waiver may be shown by acts and conduct and sometimes by nonaction.” Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 603 (Minn. 1957). Respondent’s nonaction in the matter at hand was its failure to file a motion to dismiss based on its breach of contract defense. For waiver to be found, prejudice to the party asserting waiver must exist. Fedie v. Mid-Century Insurance Co., 631 N.W.2d 815, 820 (Minn. Ct. App. 2001), rev. denied, (Minn. Oct. 16, 2001). Respondent cites Patterson for its assertion that a defendant does not waive the defense of insufficient service of process by participating in litigation, including engaging in discovery and responding to an opposing party’s motions, for a considerable period of time before bringing a dispositive motion concerning improper service. Patterson v. Wu Family Corp., 608 N.W.2d 863, 868-869 (Minn. 2000). The court noted, however, that while participation in litigation alone was not a determining factor, the defendant’s failure to provide the court

the chance to rule on the jurisdictional defense, prior to invoking the court's jurisdiction on the merits of the case was a problem. Id. at 868. In the cases where courts found that the defendants had not waived a defense, the defendants "did more than simply bring the issue to the plaintiffs' attention," they provided the court with an opportunity to decide the issue before proceeding with the merits of the case. Id. at 869.

This case is distinguishable from Patterson and the cases cited therein. In those cases the parties took the affirmative step of filing a motion to dismiss based on the jurisdictional question prior to proceeding on the merits. As the Court noted, the Minnesota Rules of Civil Procedure are to be used in a way that promotes the "just, speedy and inexpensive" resolution of claims. Respondents should have filed a motion to dismiss based on their breach of contract defense and allowed the court the opportunity to rule on the motion prior to proceeding on the merits. Respondent's strategy did not promote the "just, speedy and inexpensive" resolution of the matter. Patterson at 868.

Respondent's decision to participate in almost two years of litigation rather than to file an immediate motion to dismiss is similar to the fact presented in Preferred Fin. Corp. v. Quality Homes, Inc. v. Pinetree Bus. Sys., Inc., 439 N.W.2d 741, 744 (Minn. Ct. App. 1989). In that case the court determined that the appellant had unfairly prolonged the proceedings. Id. The court concluded that the appellant had waived its right to arbitration by proceeding with the litigation through the trial before asserting that the issue should have been submitted to arbitration per an agreement between the parties. Id. Similarly, in the case at bar, Respondents engaged in unnecessary and expensive litigation by failing to file a motion to dismiss. In doing so, they waived the breach of

contract defense while waiting for the statute of limitations to run on Kunza's claims. This Court should reverse the district court's grant of summary judgment to the Respondents.

III. THE COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF RESPONDENT WERNECKE'S REQUEST FOR ATTORNEY'S FEES

In this case, the district court properly denied Respondent Wernecke's request for attorneys' fees under the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.33, subd. 7. The court correctly held that under Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986), granting Wernecke fees under the MHRA would controvert the public policy behind the MHRA. (Wernecke A. 00048). This court reviews the denial of attorneys' fees under an abuse of discretion standard. Bilal v. Northwest Airlines, Inc., 537 N.W.2d 614, 620 (Minn. 1985).

A. THE SIGURDSON STANDARD APPLIES.

Wernecke argues that this court should expand the law regarding attorneys fees for MHRA claims and not apply the currently used Sigurdson standard to Wernecke because he was a "co-worker" and not an employer. (Wernecke Br., 6). The Sigurdson standard should be applied in this case and there is no need to create a new standard

- 1. The policy rationale for which the Minnesota Supreme Court adopted the Sigurdson standard applies to both organizational and individual defendants.**

The district court properly applied the standard set forth in Sigurdson to Wernecke's request for attorney's fees. In Sigurdson, the Minnesota Supreme Court adopted the federal standard applied to prevailing defendants in the award of attorney's

fees under the MHRA. Id. at 722. In doing so, the court noted that the corresponding statutory provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b) (1982), is virtually identical to the attorney's fees provision of the MHRA, Minn. Stat. § 363.14, subd. 3 (1984). Id. The Sigurdson court pointed out that the Supreme Court "rejected the view that the award of attorney fees to prevailing defendants should be based on the same criteria as an award to prevailing plaintiffs." Id. at 722 (quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412, 419 (1978)). Thus, the court held that "a trial court may, in its discretion, award attorney fees to a prevailing defendant pursuant to section 363.14, subd. 3, only upon a finding that the employee's action was frivolous, unreasonable, or without foundation, or was brought in bad faith." Id. at 723.

The Minnesota Supreme Court adopted the federal standard for awarding attorney fees in order to uphold the policy rationale behind the MHRA, that is, encouraging victims of discrimination to bring suit:

An obvious reason for enactment of subdivision 3 of section 363.14 was to encourage victims of discrimination to bring suit . . . and to make legal counsel available in these cases. Making awards of attorney fees equally available to prevailing defendants would likely produce the reverse of the intended effect. Victims with legitimate cases would be discouraged from filing suit, fearing that if they did not prevail, they might be liable for substantial attorney fees incurred by a defendant.

Id.

The standard for awarding attorney fees should be the same for Wernecke as any other prevailing defendant. The policy rationale underlying the MHRA is the same, regardless of whether the defendant is an employer or individual. Whether the defendant

is an employer or an individual, a victim of discrimination will be discouraged from bringing suit if she fears liability for the defendant's attorney's fees in the event that she should not prevail. This policy would be undermined if this court followed Wernecke's suggestion and adopted a special, new standard for attorneys' fees with individual defendants.

The financial resources of the parties also supports the application of Sigurdson to the instance case. In addition to the policy rationale of encouraging plaintiffs to bring suit, the court in Sigurdson also stated, "the typically substantial difference in resources between plaintiffs and defendants in employment discrimination cases supports the conclusion that awards of attorney fees should not be available to prevailing defendants on the same basis as to prevailing plaintiffs." Id. at 722-23. In this case, a discrepancy in resources undoubtedly exists between Wernecke, an emergency-room physician, and Kunza, a ward clerk. Even if the discrepancy may not be as great as that between St. Mary's and Kunza, the district court still relied upon it in part, to deny Wernecke's request for attorney's fees. The district court explained that "the resources of the parties are such that to award attorney fees under the circumstances would controvert the public policy behind the MHRA." (Wernecke A. 00048). This Court should look at the attorney's fees issue in context. Kunza brought her claims against Wernecke as an individual along with her claims against St. Mary's as the employer, a large organization with substantial resources.

2. There Is No Need For A Special Fee Rule For Individual Defendants.

Under the Sigurdson standard, the Court already has discretion to award attorney's fees to prevailing defendants. If Kunza's claims are unreasonable and frivolous as Wernecke claims, then the Court already has the means to award attorney's fees. Thus, there is no need for the Court to develop a separate standard for different types of defendants. Such a new rule would only serve to make the issue of attorneys fees in MHRA unnecessarily complicated. The Court should not change the Sigurdson standard by adopting a special standard for individual defendants.

B. The District Court Properly Denied Wernecke's Request for Attorney's Fees Under the Sigurdson standard.

Even under Sigurdson, a district has the "*discretion to award attorney's fees to a prevailing defendant in a Title VII case.*" Sigurdson, 386 N.W.2d at 722 (emphasis supplied). Consequently, even if the district court had found that Kunza's claims against Wernecke were unreasonable or without foundation, it still could have denied Wernecke's motion for attorney's fees in its discretion. Bilal, 537 N.W.2d at 620. In Bilal, the Minnesota Supreme Court held that the lower court did not abuse its discretion and affirmed the denial of the defendant's request for attorney's fees, when the plaintiff did not even have standing to bring suit under the MHRA. Id.

In the present case, the district court did not find that Kunza's claims were unreasonable or lacking in foundation. In denying Wernecke's request for attorney's fees, the district court based its decision on two sound reasons. First, it reasoned that because Kunza's MHRA claims against Wernecke were part of a larger action, any

financial burden on Wernecke “was mitigated by the fact that these claims were a part of the overall case, all of which was somewhat tied together.” (Wernecke A. 00047-48). Secondly, the court noted that “the resources of the parties are such that to award attorney fees under the circumstances would controvert the public policy behind the MHRA.” Id. at 48. Unlike Bilal, the district did not find that Kunza’s claims lack foundation.

Although a court need not find that the plaintiff acted in bad faith to award attorney’s fees to a prevailing defendant, “[t]hose factors which have prompted courts to award attorney’s fees to a prevailing defendant are typified by a finding that the plaintiff brought his action in bad faith.” Mosby v. Webster College, 563 F.2d 901, 905 (8th Cir. 1977). Courts do not easily award attorney’s fees to defendants in cases where it finds that the plaintiff acted out of a genuine belief in her discrimination claim. Obin v. Dist. No. 9 of Intern. Ass’n., Etc., 651 F.2d 574, 587 (8th Cir.1981). (denying attorney’s fees to the defendant where the plaintiff failed to make a prima facie case of religious discrimination under Title VII where the plaintiff “commenced his action upon the honest belief that he had reasonable grounds for bringing suit”); Horner v. Mary Inst., 613 F.2d 706, 715 (8th Cir. 1980) (pointing out that the plaintiff was motivated by an earnest belief that she was a victim of sex discrimination in denying the defendant’s motion for attorney’s fees); Mosby v. Webster College, 563 F.2d 901, 905 (8th Cir. 1977) (denying attorney’s fees where the defendant made no attempt to demonstrate that the plaintiff’s action was instituted for any reason other than her “earnest belief that she was a victim of racial discrimination” and pointing out that her legal theories were not “so empty and frivolous as to imply a vexatious motive”). Wernecke has made no attempt to show that

in bringing her suit against him, Kunza was motivated by anything but a sincere belief that she was the victim of discrimination. The district court did not abuse its discretion in denying an award of fees to Wernecke.

1. Kunza's Harassment and Discrimination Claims Against Wernecke as an Individual Were Reasonable and With Foundation.

In this case, Kunza's claims against Wernecke were reasonable and not frivolous. The Supreme Court has warned that in determining whether a plaintiff's claim is frivolous, unreasonable, or without foundation, judges must "resist the understandable temptation to engage in *post hoc* reasoning." Christianson Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). Litigation rarely proceeds in a predictable course. Id. Indeed, "decisive facts may not emerge until discovery or trial. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 422. Thus, whether Kunza ultimately prevails in her claims against Wernecke does not indicate whether her action was reasonable and supported by foundation. See id.

Kunza plead in the complaint a valid claim for sexual harassment and discrimination. Kunza asserted this claim against Wernecke under an aiding and abetting theory. (SA 000013-14). The MHRA authorizes an aiding and abetting claim against any "person." Minn. Stat. § 363A.14. While Minn. Stat. § 363A.08, (defining discrimination and harassment in employment), applies specifically to employers, the aiding and abetting provision of the MHRA is not so limited.

In attempting to overcome the distinction between an aiding and abetting claim and a direct discrimination claim, Wernecke cites to the unpublished federal case of Iyorbo v. Qwest Int'l Food Flavors & Food Ingredients Co., 2003 WL 22999547 (D. Minn. 2003)⁵. Wernecke contends that Iyorbo prohibits aiding and abetting claims against individual defendants because “a person cannot aid and abet oneself.” (Wernecke Br., 17). However, Kunza plead facts that made clear that St. Mary’s and employees of St. Mary’s participated in the discrimination and harassment. (SA 000003) For instance Kunza alleged that the department manager, Tom Alinder, and the administrative director of human resources, Jean Evans, participated in the discrimination and retaliation by not remedying Wernecke’s harassment and discrimination. (SA 000003-5) Kunza also alleged that Dr. Blair Nelson retaliated against Kunza. (A 000036) Kunza also alleged that when she asked not to be scheduled to work with Wernecke because of the harassment, Wernecke stayed after his shifts to intimidate Kunza. (SA 000012). Because St. Mary’s can be liable for the harassment and retaliation, Wernecke was not aiding and abetting himself. After discovery, including written discovery and numerous depositions, Kunza ultimately decided not to proceed with her claims against Wernecke for aiding and abetting. Nonetheless, Kunza’s claim had foundation and were not frivolous because Wernecke could be liable as an individual for aiding and abetting under the MHRA. Simply because the facts did prove sufficient to establish such a claim against Wernecke does not justify an award of attorneys’ fees. The court refused to award attorneys’ fees to the defendant in Bilal where the court was without jurisdiction to even hear the claim

⁵ (Wernecke A. 58-61).

because the plaintiff lacked standing. In contrast in this case, Kunza plead a valid claim that the court had jurisdiction to hear. In this situation the denial of attorneys' fees was proper.

2. Kunza's Reprisal Claim Had Foundation.

Wernecke also claims that Kunza's reprisal claim lacked foundation because there was no evidence that Kunza suffered an adverse employment action. (Wernecke Br. 22). The elements of a claim of reprisal pursuant to the MHRA require that the plaintiff establish an adverse employment action. Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 327 (Minn. 1995). Kunza did, however, suffer several adverse employment actions, and so her reprisal claims did not lack foundation.

Kunza alleged that she was constructively discharged as a result of the harassment, discrimination, and retaliation she experienced, including Wernecke's actions. (A. 000045). A constructive discharge is an adverse action. Jaros v. LodgeNet Entertainment Corp., 294 F.3d 960, 966 (8th Cir. 2002).

Kunza suffered other adverse actions besides her constructive discharge. The Supreme Court recently altered the standard for an adverse employment action in Burlington Northern & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405 (2006). The Court held that retaliation includes "employer actions that would have been materially adverse to a reasonable employee or job applicant. . . . [which means] that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at 2409. In determining whether the employer's actions are sufficiently material to dissuade a reasonable person from

complaining, courts must analyze the reasonable person standard under the particular circumstances facing the plaintiff. Id. at 2414. The Supreme Court “phrase[d] the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” Id.

Considering the context, Wernecke’s actions could well dissuade a reasonable worker from complaining. See id. at 2409. After Kunza complained of the harassment by Wernecke and requested not to work with Wernecke, he stayed after his completed shifts to rudely stare at Kunza when she reported to work. (SA 000012) Wernecke also drafted a letter to St. Mary’s administration saying that he would implement new rules under which Kunza would have to bring problems to him directly. (SA 000177) These events occurred after Wernecke repeatedly harassed Kunza every time they worked together. (SA 000077, SA 000158) A reasonable worker could also be dissuaded from complaining if the harassing doctor with whom she already felt uncomfortable working showed up and stared at her every time she came to work. See id.

Moreover, the adverse employment actions that Wernecke took against Kunza occurred in the context of several other adverse employment actions to which Kunza was subjected. St. Mary’s assigned Kunza to work with Wernecke, Nelson made attempts to sabotage her employment, and she received poor treatment from her co-workers. (A 000048) Considered in light of these other events, the actions taken by Wernecke would dissuade a reasonable worker from complaining. Burlington Northern, 126 S.Ct. at 2409.

3. The Tolling Agreement Did Not Make Kunza's Claims Unreasonable or Lacking in Foundation.

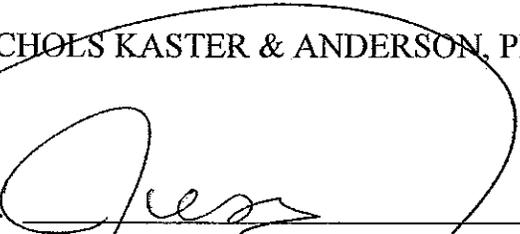
Additionally, Wernecke argues that Kunza's claims are unreasonable and without foundation because she served them in breach of the tolling agreement. (Wernecke Br. 25). Kunza did not breach the tolling agreement, however, as discussed in Section I of this brief. Kunza's claims are non-frivolous, reasonable, and have foundation.

CONCLUSION

The trial court properly denied Wernecke's request for attorney's fees, but erred in dismissing Kunza's claims. Kunza did not breach the tolling agreement. Even if the Court finds that Kunza did breach the tolling agreement, she substantially performed the contract and Respondents waived their rights by failing to file a motion to dismiss. Kunza deserves her day in court to try her case on the merits. Kunza respectfully requests that the Court reverse the district court's dismissal of her claims and affirm the denial of attorney's fees.

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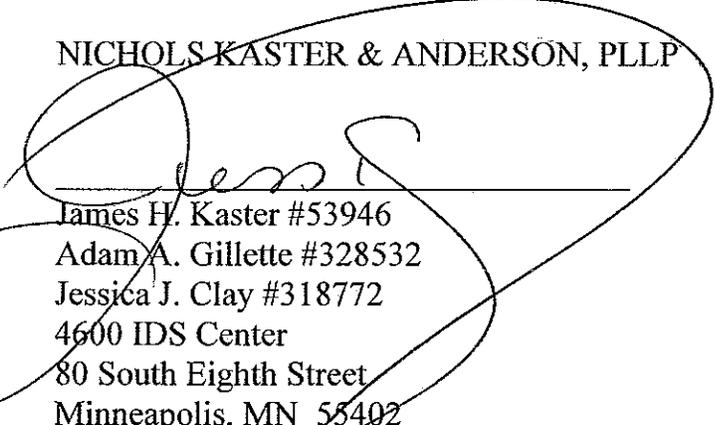
CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant Michelle Kunza certifies that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2000 word processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 5, 888 words in this brief.

Dated: June 7, 2007

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