

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

In the Matter of Rodolfo Rios,

Complainant,

ORDER

v.

Minnesota Department of Corrections,
MCF-Moose Lake,

Respondent.

On December 23, 1996, Respondent filed a Motion for Ruling on Official Immunity and for Reconsideration of Order Vacating Summary Judgment. On December 31, 1996, Complainant filed a Memorandum in Opposition to Respondent's Motion for Ruling on Official Immunity and Motion for Reconsideration of Order Vacating Summary Judgment, a Request for Reconsideration of Age Claim, and a Request for Attorney's Fees. Respondent did not reply to Complainant's Motions, and no further argument on the parties' Motions was requested or scheduled.

Reino J. Paaso, Attorney at Law, 410 Fourth Avenue South, Suite 500, Minneapolis, Minnesota 55415, represented the Complainant. Melissa L. Wright, Assistant Attorney General, Suite 1100, 445 Minnesota Street, St. Paul, Minnesota 55101-2128, represented the Respondent.

Based upon the Memorandum filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

(1) That Respondent's Motion for Ruling on Official Immunity should be and hereby is DENIED;

(2) that Respondent's Motion for Reconsideration of Order Vacating Summary Judgment should be and hereby is DENIED;

(3) that Complainant's Motion for Reconsideration of his Charge of Age Discrimination should be and hereby is DENIED; and

(4) that Complainant's Motion for Attorney's Fees should be and hereby is DENIED.

Dated this 13th day of January, 1997.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

This case involves charges of illegal discrimination in employment under the Minnesota Human Rights Act (Act). Complainant charged the Minnesota Department of Corrections with national origin and age discrimination under the Act in connection with the termination of his employment as a probationary correction officer at the Moose Lake Correctional Facility.

On November 5, 1996, an Order Granting Summary Disposition on both charges was issued in Respondent's favor. On December 10, 1996, Complainant's Motion for Reconsideration was granted and the November 5, 1996 summary judgment order was vacated as to the Complainant's charges of national origin discrimination. However, Complainant's charge of age discrimination was dismissed with prejudice in the December 10, 1996 Order.

On December 23, 1996, Respondent filed a Motion for Ruling on Official Immunity and Reconsideration of Order Vacating Summary Judgment. On December 31, 1996, Complainant filed objections to the Respondent's Motions and filed a Motion requesting reconsideration of the dismissal of his age discrimination charge.

I.

Respondent seeks dismissal of Complainant's charge of national origin discrimination on the grounds that his charge is barred by the doctrine of official immunity because Complainant failed to present any evidence of malicious or willful conduct by any of Respondent's employees. In fact, Complainant's Complaint does not name any public official as a party.

The official immunity doctrine provides that:

A public official charged by law with duties which call for the exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong.

Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn. 1988), citing Susla v. State, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976). The doctrine "protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." Elwood v. Rice County, supra, 423 N.W.2d at 678.

Official immunity only applies when the officer's acts are judgmental or discretionary. It does not apply to ministerial duties. Id. at 677, Susla v. State, supra, 247 N.W.2d at 912. Determining whether a particular act is discretionary or ministerial is often difficult, Larson v. Independent School District No. 314, Braham, 289 N.W.2d 112, 120 (Minn. 1980), and depends on the facts of each case, Elwood v. Rice County, supra, 423 N.W.2d at 678. In determining whether official immunity applies, the "crucial focus is upon the nature of the act." Id. at 677. Among other things, the executive character of the officer's duties and the officer's need for discretion must be considered. Id. at 678.

The Minnesota Supreme Court has recognized that the official immunity doctrine can be raised under the Act. State by Beaulieu v. Mounds View, 518 N.W.2d 567 (Minn. 1994). Under the court's holding in the Mounds View case, official immunity would bar discrimination claims under the Act where there is no showing of willfulness or malice. Id. at 750. In the context of official immunity, willful and malicious acts are synonymous. Rico v. State, 472 N.W.2d 100, 107 (Minn. 1991). Malicious action "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Id.

If Respondent's employees are entitled to protection under the official immunity doctrine, it must still be decided if the Respondent is covered by its employees' official immunity. Prior to 1992, when employees were found to have immunity, claims against municipal employers were routinely dismissed. Pleton v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992). However, in Holmquist v. State, 425 N.W.2d 230, 233 n. 1 (Minn. 1988), the Minnesota Supreme Court noted, in dicta, that governmental entities not infrequently have been required to compensate persons for the harm done by a public official even when the official is not personally liable. The court went on to suggest that it "might under some circumstances find an exception to vicarious official immunity." Pleton v. Gaines, supra, 494 N.W.2d at 42. The court noted that any such determination is a policy question. Id.

In at least two Minnesota cases, the courts have held that hiring is a discretionary act. Kalia v. St. Cloud State University, 539 N.W.2d 828 (Minn. Ct. App. 1995) (college professor); Rico v. State, 472 N.W.2d 100, 105 (Minn. 1991) (assistant commissioner). Whether the removal of lower level employees is discretionary has not been addressed by the parties. Assuming that those employees who participated in the

decision to terminate Claimant's employment were acting in a discretionary manner, and assuming that their official immunity should apply to Respondent under the doctrine of vicarious official immunity, it still must be decided if the employees acted maliciously. That is a factual issue which is in dispute in this case. As noted in the last paragraph of the memorandum to the November 5, 1996 Order for Summary Judgment, the official immunity defense will seldom be successfully asserted in a summary judgment motion because the willful or malicious nature of an act is a factual determination. Although it was stated in that memorandum that the record contained little evidence to support a finding of intentionality, there is now more evidence in the record indicating that prohibited conduct may have occurred. Consequently, a hearing should be held on this issue.

Respondent argued that there is no evidence that the acting warden willfully or maliciously terminated Complainant's job. That argument lacks merit because the charges made against the Respondent relate to the actions of persons other than the acting warden. The charge relates to the acts of several employees who effectively participated in the evaluation process and termination decision. If any of them acted with malice, that malice is vicariously charged to Respondent, not necessarily to the acting warden or some other executive.

II.

In its December 20, 1996 Motion, Respondent argues that Complainant's Motion for Reconsideration and Vacation of Summary Judgment should have been denied because the evidence Complainant submitted to support his motion was not newly discovered evidence for purposes of Minn. Rules pts. 1400.8300 C (1996). The rule states, in part:

In ruling on a motion for reconsideration or rehearing in cases where the judge's decision is binding on the agency, the judge shall grant reconsideration or hearing if it appears that to deny it would be inconsistent with substantial justice and any one of the following has occurred:

* * *

A. irregularity in the proceedings whereby the moving party was deprived of a fair hearing;

B. accident or surprise that could not have been prevented by ordinary prudence;

C. material evidence newly discovered that with reasonable diligence could not have been found and produced at the hearing;

* * *

E. mistake, inadvertence, or excusable neglect; or

F. the decision is not justified by the evidence, or is contrary to law;

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* * *

In his response to the Respondent's Motion, Complainant relies upon the language of subpart E. He stated that it "was a mistake on the part of Complainant's counsel not to submit an affidavit from Complainant with his Motion in Opposition to Summary Judgment" Part 1400.8300 is based on Minn. R. Civ. P. 59 and 60.02. Decisions under the civil rules are pertinent in construing the scope and meaning of the administrative rule. In Ayers v. Rudolfs, Inc., 392 N.W.2d 647, 649 (Minn. Ct. App. 1986), the court addressed the scope of Rule 60.02, stating as follows:

Minn.R.Civ.P. 60.02 (1) provides that a court may relieve a party from a final judgment and grant a new trial based on mistake, inadvertence, surprise or excusable neglect. The Minnesota Supreme Court has stated that courts should relieve a party from the consequences of the attorney's neglect if the party: (1) possesses a reasonable defense on the merits; (2) has a reasonable excuse for the neglect; (3) acted with due diligence after notice of entry of judgment; and (4) shows that no substantial prejudice will result to the other parties. Conley v. Downing, 321 N.W.2d 36, 40 (Minn. 1982). The trial court has discretion to grant relief under Rule 60.02, and this court will not reverse its decision absent an abuse of that discretion. Koslowski v. Jones, 295 Minn. 177, 180, 203 N.W.2d 401, 403 (1973).

See also, Wiethoff v. Williams, 413 N.W.2d 533, 535-36 (Minn. Ct. App. 1987). In applying the criteria set out in the rule, it must always be kept in mind, however, that there is a strong policy for resolving disputes on their merits. See, e.g., Housing & Redevelopment Authority of St. Paul v. Kotlar, 352 N.W.2d 497, 499 (Minn. Ct. App. 1984) (quoting Firoved v. General Motors Corp., 277 Minn. 278, 283-84, 152 N.W.2d 364, 368-69 (1967)).

Although it is questionable whether the Complainant made the showing necessary to obtain relief from the November 5, 1996 Order for Summary Judgment under Ayers, he is not required to make that showing at this time. Complainant's November 15, 1996 Motion to Vacate Summary Judgment was based on an alleged "irregularity" in the proceeding which allegedly deprived him of a fair hearing and which allegedly was not justified by the evidence. Relief on those grounds is specifically authorized by Minn. Rules pt. 1400.8300 A. and F. (1996). In response to the Complainant's November 15 Motion, Respondent argued that no procedural irregularities were identified and that no material facts were shown to be in issue.

The Complainant's Motion was granted on the grounds that Complainant's late-filed affidavit created a factual issue precluding summary judgment. In view of that factual issue, it was concluded that it would be inconsistent with substantial justice to

grant summary judgment. Claimant's entitlement to relief based on a procedural irregularity was not addressed.

When Respondent addressed Complainant's November 15, 1996 Motion, Respondent did not argue that Complainant was not entitled to reconsideration under Minn. Rules 1400.8300. Instead, Respondent argued that there was no genuine issue of material fact and that its Motion for Summary Judgment had been properly granted. See Respondent's Memorandum of Law in Opposition to Complainant's Motion to Vacate Summary Judgment dated November 27, 1996. The Respondent's argument was not persuasive given the Complainant's affidavit. As stated in the December 10, 1996 Order Granting Complainant's Motion for Reconsideration, Complainant's affidavit established that a genuine fact issue existed. The fact issues included those relating to allegations that the Complainant gave keys to inmates and ate pizza with them; that Complainant gave a phone to an inmate; and that Complainant had problems with radio communications. The Administrative Law Judge is still persuaded that a factual issue exists which precludes summary disposition. Furthermore, it must be kept in mind that discrimination can often be a subtle and evasive action. It is difficult to establish and frequently rests on inference. Given its elusive nature and the credibility determinations that must be made, summary judgment frequently is not appropriate in discrimination cases. Here, it is inappropriate because there are factual and credibility determinations that must be made.

In responding to the Complainant's November 15, 1996 Motion, the Respondent did not argue or establish that relief was unavailable under Part 1400.8300. Therefore, whether the Complainant was entitled to reconsideration on the grounds of mistake, surprise or excusable address will not be considered. Likewise, other grounds for granting relief will not be considered, including the question whether procedural irregularities had occurred.

On December 23, 1996, Respondent filed its Memorandum in Support of its Motion for Ruling on Official Immunity and Reconsideration of the Order Vacating Summary Judgment. Respondent seeks relief on the grounds that it was inappropriate for the Administrative Law Judge to consider new material evidence in Complainant's affidavit when ruling on the Complainant's Motion to Vacate Summary Judgment. That issue should have been raised on December 2 when Respondent filed its initial objections to that Motion. Since no objections were made in a timely manner, Respondent's current Motion to reconsider the Order Vacating Summary Judgment must be denied. The time for making that determination has passed. Refusing relief seems appropriate given the factual issues that exist, the due diligence with which the Complainant acted after receiving the Dismissal Order, the lack of any substantial adverse effect to the Respondent if this matter is heard on the merits, and public policies which support resolving disputes on their merits.

III.

On December 21, 1996, Complainant filed a Motion requesting reconsideration of his age discrimination charge. Dismissal of that charge is subject to reconsideration

under Minn. Rules pt. 1400.8300 F., which permits reconsideration or rehearing when an order is not justified by the evidence or is contrary to law. However, Complainant has not made that showing. On motion for summary disposition, a nonmoving party with the burden of proof at trial must offer "significant probative evidence tending to support its complaint". Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989). The Complainant must do more than simply show that there is some metaphysical doubt as to the material facts. Id. Summary judgment is inappropriate if there is a genuine dispute regarding a material fact. A genuine dispute exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In this case, Complainant has failed to present sufficient evidence of age discrimination. There simply isn't any evidence in the record which would withstand a motion for directed verdict and there is no genuine issue of material fact with respect to the age discrimination claim. A "hunch" is not enough.

IV.

In Complainant's Motion for reconsideration of the dismissal of his age discrimination charge, Complainant requested attorney's fees of \$500.00. That request must be denied because Complainant has not shown any authority which would permit an award of attorney's fees to him on this Motion at this time.

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