

EMPLOYMENT DISCRIMINATION ISSUES

George Ellis was 59 years old and had been the men's sports information director (SID) at North Dakota State University (NDSU) for 30 years. He was so enthusiastic about Bison athletics that he dressed in green and gold and drove a green and gold car. But NDSU was going to Division I and was setting the bar higher for all its sports programs. The university contended Ellis didn't make the grade and fired him, citing poor performance. He sued, claiming age and disability discrimination.

Media Information

Ellis initially pointed out that he had been the men's SID for 30 years before his termination. During that time, not only had he received over 150 awards for his work, but he also had been the SID for the North Central Conference – which NDSU anchored – for 16 years. He was responsible for media guides up to 170 pages long and press releases for all men's sports. He also traveled with the team on road trips. Because of his heavy workload, he often worked 60 to 80 hours a week.

NDSU countered with evidence that during most of his recent years of employment, Ellis' job performance declined and he was no longer meeting the requirements of the SID position. Ellis repeatedly failed to meet deadlines for media guides and purportedly failed to communicate with coaching staff. He also failed to attend or participate in staff meetings. Those deficiencies were noted in his recent performance appraisals, and NDSU claimed he failed to correct problems or consistently maintain improvement in his performance.

Ellis presented contrary evidence that, although his media guides were late, so were those of 46-year-old Jeff Schwartz, the women's SID, who wasn't fired. Ellis argued that he had told his superiors on numerous occasions that more help was needed to produce both the men's and the women's media guides on time. Not only that, but in Schwartz's 2003-2004 evaluation, he also was told the timeliness of media guides must continue to improve. But Schwartz wasn't fired, he was promoted!

After Ellis was fired, the sports information department was reorganized. The separate men's and women's SID positions were eliminated, and Jeff Schwartz was hired as director of media relations.

After further review

Ellis' case was heard by Judge Steven Marquart in The Cass County District Court. Judge Marquart first dismissed Ellis' claim of disability discrimination, finding that his diabetes simply wasn't disabling and there was insufficient evidence that NDSU "regarded" him as disabled.

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The court then moved to the issue of age discrimination under the North Dakota Human Rights Act. The court cited the elements of a prima facie (minimally sufficient) case of age discrimination that Ellis needed to establish: (1) he was in a protected class, (2) he was fired, (3) his work was satisfactory, and (4) he was replaced. Ellis obviously met the first and second elements.

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Conferment of Benefits
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in April 2007**

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The third element was disputed because of NDSU's testimony and evidence that Ellis' performance was unsatisfactory. Judge Marquart ruled that Ellis met his burden after considering his testimony and the fact that Schwartz's media guides were also late. Ellis' testimony that he made himself available to meet with coaches to remedy any perceived communication issues was also credited.

The court viewed the fourth element of Ellis' prima facie case as somewhat unclear under North Dakota case law. Although more recent cases have been to the contrary, the court looked to an older case and stated that an employee must establish only that he was replaced to make his case. The court agreed with Ellis that Schwartz replaced him, even though Schwartz had to apply for his new position. Thus, the court concluded that Ellis had met his prima facie case.

The court recognized, however, that more recent North Dakota cases have required that an employee seeking to prove age discrimination must not only show that he was replaced but also meet the additional burden of demonstrating that "others not in the protected class were treated more favorably". If that were the requirement, the court recognized, Ellis couldn't meet his burden because Schwartz, at age 46, was in the same protected class as Ellis. Even so, the court concluded that the university's hiring of younger workers in the department for assistant and graduate assistant positions, while firing Ellis, constituted a showing that others not in the protected class were treated more favorably than he was.

After determining that Ellis had made his prima facie case, the burden shifted to NDSU to prove its legitimate reasons for terminating him. The burden ultimately shifted back to Ellis to prove discrimination. The court concluded that he proved his case primarily with the comments of Lynn Dorn, acting athletic director, three years before his termination.

Dorn had denied a request from Ellis to travel with the baseball team on a trip to Florida. When he met with her, she asked him his age and about his retirement plans. She testified that she was trying to help him because she thought it would be difficult for him to transition to Division I.

Although athletic director Gene Taylor made the decision to fire Ellis, the court concluded that the fact that Taylor consulted Dorn and she concurred in his decision made her comment critical evidence of age discrimination. Even though the court recognized that the discussion between Ellis and Dorn had taken place three years earlier, it didn't consider her remark to be a "stray" one.

Final score

The court ruled for Ellis on the age discrimination claim, but ruled for NDSU on the disability discrimination claim. He earned \$39,126 annually at the time of his termination. The court ordered NDSU to pay him back pay from the date of his termination to the time of the trial plus back benefits in the amount of \$55,884. Although "front pay" or damages in lieu of reinstatement isn't expressly provided for under the North Dakota Human Rights Act, the court awarded two years' salary as front pay plus benefits to Ellis in the amount of \$98,861. In addition, he was awarded more than \$90,000 in attorney's fees. The case is being appealed, so stay tuned for round two.

Coaching tips

This is a classic example of the uncertainty of any termination or lawsuit. In this case, there was documentation – apparently plenty – of poor performance in the employee's personnel file and performance

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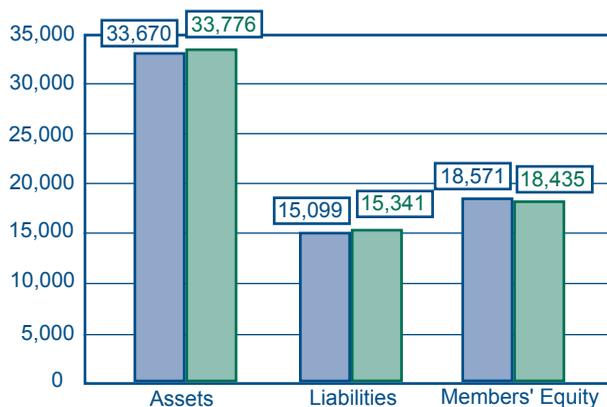
appraisals. The employee himself admitted that some of his work had been embarrassing. The department was restructured. Even though the employee was replaced, an employee in the same protected class replaced him. So, what went wrong? Well, consider these issues before your next termination or employment law trial:

- Are there supervisory-level discriminatory statements out there that you don't know about? A frank discussion with relevant supervisors can be invaluable before making a termination decision. This case demonstrates that even comments made in the fairly distant past could come back to haunt you.
- Have you treated all "similarly situated" employees equally? If so, can you prove it? If you have employees who have had similar performance or disciplinary histories, be prepared to demonstrate that you are treating them equally, particularly if one is in a protected class.
- Do you have a potentially sympathetic employee? This case was a bench trial – or a trial to a judge – so the effect of sympathy was minimized. But, this was a case with a very sympathetic employee – 30 years with the university, drove a Bison green and gold car, and practically lived at the university. How much better could it get? Consider those factors in determining how to handle employee terminations, whether you'll offer severance, and how much severance you'll offer.
- Are you having a knee-jerk reaction? Although it isn't apparent in this case, in many cases employers are prompted to terminate even long-term employees as a knee-jerk reaction to a single incident that occurs in the workplace. Often, this can leave them extremely vulnerable to age discrimination and other claims. Remember: Fire in haste, repent at leisure!

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FINANCIAL INSIGHTS

**Balance Sheet (in thousands)
December 31, 2006 & December 31, 2005**



As of December 31, 2006, NDIRF remains in a strong financial position with members' equity of \$18.6 million. The 2006 assets consist mainly of NDIRF's investment portfolio (\$31.5 million) while the liabilities are primarily loss reserves (\$8.3 million) and the conferment payable in April, 2007 (\$3.6 million). ■

FROM THE CEO

In the most recent issue of the Participator, I mentioned Senate Bill No. 2242 as the NDIRF's most pressing issue this North Dakota Legislative Session. I'm pleased to report that it passed both the Senate and House by a nearly unanimous vote.

SB 2242 amends the North Dakota Political Subdivision Tort Claims Act to add "administrative or legal entities responsible for administration of joint powers agreements" to the definition of a political subdivision. This should forestall any future confusion over the liability status of joint powers agreements (JPA's) and their administration that may have been building as a result of several ND Attorney General's opinions holding that JPA's are not political subdivisions for certain purposes.

Thanks to Senators Dwight Cook, Arden Anderson and David Nething; and Representatives Ole Aarsvold, William Kretschmar and Dwight Wrangham for their sponsorship of SB 2242 and to the entire Legislative Assembly for engaging in sound risk management. ■

2007 COMPUTER EQUIPMENT SALE

The NDIRF has used computer equipment up for bids.

Item 1: Dell 4600 -- Pentium IV 2.66 GHz Processor; 512 MB RAM; CDRW CDROM; 40 GB Hard Drive; WinXP Operating System; MicroSoft Office 2003 Basic; 56K modem; keyboard; mouse; 19" EV910 Gateway monitor; **DOESN'T INCLUDE**: speakers

Item 2: Dell 4600 -- Same as Item #1

Item 3: Dell 4600 -- Same as Item #1

Item 4: Dell 4600 -- Same as Item #1 -- except 1GB RAM and MicroSoft Office XP Professional

Item 5: Dell 4600 -- Same as Item #1 -- except 1GB RAM and MicroSoft Office XP Professional

Item 6: Projector & Rolling Hard Case -- Proxima DP 5900 Projector; 700 lumens; 14 lbs

Item 7: Paper Shredder -- Destroy-It 3802A Automatic Paper Shredder; strip-cut; sheet capacity = 18; 35 ft/min

The equipment was in good condition when taken out of service and is sold strictly on an "as-is" basis with no warranty expressed or implied. If you are interested in placing a bid on one or more of the pieces of equipment, please send your offer to the following address. Include a return address, phone number, the item # and description of desired item, and the bid.

NDIRF Computer Equipment Bid
Attention: Vance Krebs
PO Box 2258
Bismarck, ND 58502-2258

Bid offers must be **received on or before Thursday, March 29, 2007**. Successful bidders will be notified on March 30, 2007 and the equipment must be paid for and picked up from the NDIRF office before **April 5, 2007**. ■

Mark Your CALENDAR

April 2007

- 24: ND League of Cities Regional Meetings, NE Region, Fordville
- 25: SE Region, Wahpeton
- 26: SC Region, Gackle

May 2007

- 1: NW Region, Williston
- 2: NC Region, Rugby
- 3: SW Region, Hazen
- 10: NDIRF Annual Meeting
Ramkota Inn, Bismarck
- 10: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck

North Dakota Insurance Reserve Fund Board of Directors

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MEET
YOUR
BOARD



Mr. Richard Aberle recently joined the NDIRF Board of Directors, representing the Fund's "County" members, upon his appointment in December 2006. Mr. Aberle is a LaMoure County Commissioner and a member of the board of directors of the North Dakota Association of Counties. He is also the current president – elect of the North Dakota Social Service Board and serves or has served on numerous community and regional public service boards.

Richard is a lifelong North Dakota resident, born in Edgeley and raised on a farm near Berlin. He is a graduate of North Dakota State College at Ellendale and the University of Northern Colorado and worked for over 20 years in North Dakota public schools as an educator and administrator. Mr. Aberle reached a high standard for multi-tasking during his career by also owning/operating a 2,000 acre grain farm and completing 35 years of service in the North Dakota National Guard (over 15 years on active duty – retiring as a Sergeant Major).

Richard and his wife Lorraine (a retired educator) are the parents of three adult sons and he cites reading and hunting among his favorite pastimes. Mr. Aberle also devotes considerable time to working on alternative energy and economic development projects, particularly wind energy, ethanol and bio-diesel production.

Commenting on his connection with NDIRF, Mr. Aberle says: "After I was elected as a county commissioner in 1998, I learned in more detail about the NDIRF. A bridge on one of our county roads washed out during the night...Unfortunately, two people were killed... The assistance we received... for that incident was outstanding, not just financially. NDIRF also provided competent professional legal advice. It was very much appreciated." Richard describes his vision for the NDIRF as continuing to be "a stable source of risk services to public entities...and at the same time increasing membership of all political subdivisions in North Dakota." ■