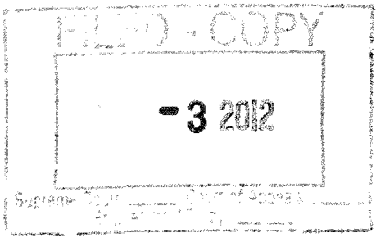
12-3-2012

Frogley v. Meridian Joint School Appellant's Reply Brief Dckt. 39945

IN THE SUPREME COURT OF THE STATE OF IDAHO

WADE FROGLEY, Plaintiff-Appellant, vs. MERIDIAN JOINT SCHOOL DISTRICT NO. 2, IDAHO STATE BOARD OF EDUCATION, an Executive Department of the STATE OF IDAHO; LINDA CLARK, an individual; AARON MAYBON, an individual, Defendants-Respondents.	)	Supreme Court Docket No. 39945-2012 **APPELLANT'S REPLY BRIEF**



APPELLANT'S REPLY BRIEF

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Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada (Case No. CV OC 2010-08779)

****

Honorable Ronald J. Wilper, Presiding

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ARGUMENT

I. MR. FROGLEY PRESENTED MORE THAN SUFFICIENT EVIDENCE OF PRETEXT TO CREATE A TRIABLE ISSUE OF FACT SUCH THAT THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT WAS IMPROPER.

The crux of this appeal is whether or not Mr. Frogley presented sufficient evidence to create a genuine issue of fact that the School District's proffered reasons for the adverse employment actions were pretextual. In the case at bar, the District Court overlooked evidence which, if considered, satisfied Mr. Frogley's burden of establishing the existence of a material issue of fact.

The Respondent attempts to create a greater burden of proof than is required at the summary judgment level. Employment law cases, however, require little evidence for an employee to survive a motion for summary judgment at the pretext level. A common theme among appellate courts is to highlight the nominal burden an employee faces and to warn of the impropriety of granting summary judgment. See, *Wallis v. J.R. Simplot Company,* 26 F.3d 885, 890 (9th Cir. 1994) (When the evidence, whether direct or circumstantial, introduced to establish a prima facie case consists of more than the prima facie presumption, a factual question will almost always exist with respect to any claim of nondiscriminatory reason.) *Payne v. Norwest Corp.,* 113 F.3d 1079, 1080 (9th Cir. 1997) (The plaintiff who has established a prima facie case need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext.); *Palmer v. Pioneer Inn Associates, Ltd.*, 338 F. 3d 981, 984 (2003) (Summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the elusive factual questions of intentional discrimination.) See also, *Lowe v. City of Monrovia*, 775 F.2d

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998 (1985) (Courts are generally cautious about granting summary judgment in Title VII cases where intent involved and "Factual disputes in most Title VII cases preclude summary judgment").

As set forth in *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998), an employee "may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable. When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. *Id.* at 1221.

Mr. Frogley satisfied his burden of proving pretext when he proved that one of the proffered motives was false. He was not required to prove that every claimed motive was false since Title VII is violated when an employer is motivated by retaliatory animus, even if valid objective reasons for the discharge exist. *Cosgrove v. Sears, Robuck & Co.*, 9 F3d 1033, 1039 (1993). In establishing pretext, Mr. Frogley proved that the claim that he had failed to timely complete teacher observations was false. Respondent attempts to minimize this proof by citing to general provisions that allow an employer to be wrong about the claimed reason or have poor reasons for its actions. (Respondent's Brief, P. 27). These sentiments, however, are tempered by the requirement that while an employer may be wrong about the reason, the employer has to believe in the reasoning and certainly cannot lie about the actual motivation behind its actions. *Villarimo v. Aloha Island Air, Inc.*, 281 F. 3d 1054, 1063 (9th Cir. 2002).

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There is no doubt that Mr. Frogley established that Mr. Maybon and the School District knew that the allegation of Mr. Frogley not completing his teacher observation obligations in a timely manner was false. Mr. Frogley finished all his observations and reviews in compliance with the district policy which only required that the observations and written reviews be completed by the end of the school year. (Aff. Frogley ¶ 26, R. pp. 317-318, p 335). Certainly, the School District and Mr. Maybon were aware of the district policy and, thus, cannot legitimately claim a good faith belief in their false accusation. Moreover, at the time Mr. Frogley was being reprimanded for allegedly not timely performing his teacher observations, Mr. Maybon had not completed a single evaluation himself and was aware that Mr. Frogley had completed more teacher observations than any other administrator. Without question, these facts create a material issue of fact as to the true motivation behind the School Districts' adverse employment action.

Additionally, contrary to Respondent's claims, Dr. Clark's instructing Mr. Maybon to initiate disciplinary actions against Mr. Frogley can qualify as direct evidence of retaliatory motivation. Dr. Clark had previously informed Mr. Frogley that she would not get involved in his disputes with Mr. Maybon and that he had to work things out between the two. (Aff. Frogley ¶ 23, R. p. 316) However, immediately after Mr. Frogley met Dr. Clark at her office on November 11, 2008 to discuss his claims of sexual harassment, Dr. Clark called Mr. Maybon and directed him to start disciplinary action. (Aff. Frogley, ¶24 at R. p. 316). As Mr. Maybon told Mr. Frogley, he had not gotten out of the parking lot before Dr. Clark called Mr. Maybon and directed him to initiate disciplinary action. (Aff. Frogley, ¶24 at R. p. 316). Mr. Frogley had done nothing to warrant any

disciplinary action by Dr. Clark; and, she had already asserted that she was not getting involved in the goings on at the school. Thus, the only event which brought about her directing Mr. Maybon to initiate disciplinary action was complaining of sexual harassment. The act of initiating discipline the moment an employee complains of harassment certainly can qualify as direct evidence of motivation. Even if it is classified as circumstantial evidence, the immediacy of the disciplinary action after the complaint creates an issue of fact as to the motivation behind Dr. Clark's initiation of an adverse employment action.

Undoubtedly, the above evidence satisfied Mr. Frogley's burden regarding pretext by establishing a genuine issue as to the true motivations behind the Respondent's actions. Nevertheless, the District Court failed to even consider this evidence in granting summary judgment. As set forth in the Memorandum Decision and Order, the District Court only referenced Mr. Frogley's claims of having an excellent reputation and the suspicious timing of events as his proof of pretext. Memorandum, P. 25-26. Clearly, Mr. Frogley presented far more evidence than referenced by the District Court.

Liberally construing all controverted facts in favor of Mr. Frogley and giving him the benefit of all reasonable inferences, he clearly established a material issue of fact regarding the true motivation behind his employer's actions. Accordingly, the District Court committed error in granting summary judgment on Mr. Frogley's retaliation claim.

CONCLUSION

Based upon the foregoing, the Appellant respectfully requests this Court reverse the District Court's granting of summary judgment.

CLARK and FEENEY, LLP

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of November, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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