

**Filed 7/18/18 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

2018 ND 179

David A. Ramirez,

Plaintiff and Appellant

v.

Walmart,

Defendant and Appellee

No. 20180027

Appeal from the District Court of Stutsman County, Southeast Judicial District,
the Honorable Cherie L. Clark, Judge.

AFFIRMED.

Opinion of the Court by Crothers, Justice.

David A. Ramirez, Jamestown, ND, plaintiff and appellant.

Christopher R. Hedican, Omaha, NE, for defendant and appellee.

Ramirez v. Walmart**No. 20180027****Crothers, Justice.**

[¶1] David Ramirez appeals from an order dismissing his retaliatory discharge action against Walmart without prejudice for failure to state a claim upon which relief could be granted. We affirm, concluding the order is appealable and the district court did not err in dismissing Ramirez’s retaliatory discharge claim on the pleadings.

I

[¶2] Ramirez was employed by Walmart in Jamestown. On April 18, 2017 Walmart terminated Ramirez’s employment. On October 13, 2017 Ramirez sued Walmart under N.D.C.C § 34-01-20, which prohibits retaliatory discharges by employers. Ramirez claimed he was discharged from employment in retaliation for complaining to supervisors about other employees’ “unfair” terminations.

[¶3] Walmart moved to dismiss the action for failure to state a claim upon which relief can be granted under N.D.R.Civ.P. 12(b)(6), arguing Ramirez failed to plead any facts establishing that his complaints about “serial dismissals” constituted protected activity as defined in the statute. The district court granted the motion on December 1, 2017, and dismissed the action without prejudice.

II

[¶4] Although an order dismissing a complaint without prejudice is generally not appealable, when a statute of limitations has run, a dismissal without prejudice is appealable because it forecloses litigation in the plaintiff’s chosen forum. *See James Vault & Precast Co. v. B&B Hot Oil Serv., Inc.*, 2018 ND 63, ¶ 10, 908 N.W.2d 108. Ramirez’s action is premised solely on the retaliatory discharge statute which contains a 180-day statute of limitations running from the date the violation occurred. *See*

N.D.C.C. § 34-01-20(3); *Vandall v. Trinity Hosps.*, 2004 ND 47, ¶ 16, 676 N.W.2d 88.

[¶5] Ramirez commenced this action 178 days after his termination from employment, and the statute of limitations expired by the time the district court rendered its decision. Therefore, the order is appealable.

III

[¶6] Ramirez argues the district court erred in dismissing his retaliatory discharge claim.

[¶7] In *Martin v. Marquee Pacific, LLC*, 2018 ND 28, ¶ 9, 906 N.W.2d 65, we explained:

“A motion to dismiss under N.D.R.Civ.P. 12(b)(6) tests the legal sufficiency of the claim presented in the complaint. *Nandan, LLP v. City of Fargo*, 2015 ND 37, ¶ 11, 858 N.W.2d 892. On appeal, ‘we construe the complaint in the light most favorable to the plaintiff and accept as true the well-pleaded allegations in the complaint.’ *Id.* (quoting *Brandvold v. Lewis & Clark Pub. Sch. Dist. No. 161*, 2011 ND 185, ¶ 6, 803 N.W.2d 827). This Court will affirm a judgment dismissing a complaint for failure to state a claim under N.D.R.Civ.P. 12(b)(6) if we cannot discern a potential for proof to support it. *Nandan*, at ¶ 11. We review a district court’s decision granting a motion to dismiss under N.D.R.Civ.P. 12(b)(6) de novo. *Id.*”

[¶8] North Dakota’s whistle-blower statute is codified at N.D.C.C. § 34-01-20, which provides in relevant part:

“1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee’s compensation, conditions, location, or privileges of employment because:

a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.”

“[A]n employee’s prima facie case for retaliatory discharge requires the employee to show (1) the employee engaged in protected activity; (2) the employer took adverse

action against the employee; and (3) the existence of a causal connection between the employee's protected activity and the employer's adverse action." *Dahlberg v. Lutheran Soc. Servs.*, 2001 ND 73, ¶ 34, 625 N.W.2d 241.

[¶9] Ramirez alleged in his complaint that during a two-year period before his termination the total number of workers at his Walmart location was reduced from 98 to 56. Ramirez alleged he talked to supervisors about the series of layoffs or terminations of the other employees and told them the situation was "unfair." He continued:

"For having complained of the serial dismissals, before the manager's assistant, that they are running, retaliates the cancellation of my job. For this she uses as an excuse, something that is not even a cause of just dismissal[] and where the sole responsible, comes out being the same manager. Therefore when they see the error, cancel it and put another[,] but this is already a lie[]! [A]nd before the court, you will also see that in this, finally the responsible, is also the same manager[]!"

[¶10] In his complaint, Ramirez did not identify any law or regulation allegedly violated by Walmart, but only claims the dismissals were "unfair." "Section 34-01-20, N.D.C.C., prohibits an employer from discharging an employee for reporting illegalities," *Jacob v. Nodak Mut. Ins. Co.*, 2005 ND 56, ¶ 19, 693 N.W.2d 604, and was not "intended to protect an employee who acts for a purpose other than exposing an illegality." *Dahlberg*, 2001 ND 73, ¶ 38, 625 N.W.2d 241. "Unfair" conduct is not synonymous with "illegal" conduct. *See generally Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc.*, 2001 ND 116, ¶ 42, 628 N.W.2d 707.

[¶11] We conclude the district court did not err in dismissing Ramirez's complaint for failure to state a claim upon which relief can be granted.

IV

[¶12] The order is affirmed.

[¶13] Daniel J. Crothers
Lisa Fair McEvers
Jon J. Jensen
Jerod E. Tufte
Gerald W. VandeWalle, C.J.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20180027
Stutsman County Case No. 2017-CV-00651

Appeal from the district court for Stutsman County.

David A. Ramirez,

Plaintiff and Appellant

v.

Walmart,

Defendant and Appellee

[¶1] This appeal having been heard by the Court at the May 2018 Term before:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Lisa Fair McEvers, Justice Jerod E. Tuft, and Justice Jon J. Jensen;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the order of the district court is AFFIRMED.

[¶4] IT IS FURTHER ORDERED AND ADJUDGED that Walmart have and recover from David A. Ramirez costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

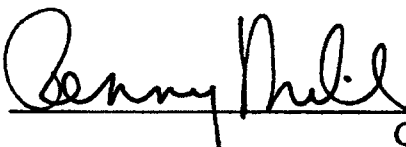
[¶5] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: July 18, 2018

By the Court:


Chief Justice

ATTEST:


Clerk



**STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN**

**IN DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT**

 DAVID A. RAMIREZ,)
)
 Plaintiff,)
)
 v.)
)
 WALMART)
)
 Defendant.)

Case No. 47-2017-cv-651

**[PROPOSED] ORDER ON
MOTION TO DISMISS**

This matter is before the Court on Defendant Wal-Mart Stores, Inc.'s Motion to Dismiss for failure to state a claim upon which relief can be granted. The Court, having reviewed the briefs and positions of each party, finds that such Motion should be granted.

ACCORDINGLY, it is hereby ordered that this matter is dismissed without prejudice, each party to bears their own costs and attorneys' fees, complete record waived.

DATED this 7 day of December, 2017.



DISTRICT COURT JUDGE

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20180027
Stutsman Co. No. 2017-CV-00651

David A. Ramirez,
v.
Walmart,

Plaintiff and Appellant

Defendant and Appellee

[¶1] This appeal having been heard by the Court at the May 2018 Term and an opinion having been filed on July 18, 2018 by:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Lisa Fair McEvers, Justice Jerod E. Tufte, and Justice Jon J. Jensen;

[¶3] and a petition for rehearing having been filed by David A. Ramirez, Appellant, and the Court having considered the matter, it is hereby **ORDERED AND ADJUDGED**, that the petition be and is hereby **DENIED**.

[¶4] **AND IT IS FURTHER ORDERED**, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: August 28, 2018



By the Court:

[Handwritten signature]

[Handwritten signature]

[Handwritten signature]

[Handwritten signature]

[Handwritten signature]

App. 9

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RECEIVED BY CLERK
SUPREME COURT

JUL 31 2018

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 31 2018

STATE OF NORTH DAKOTA

DAVID A. RAMIREZ, }
Plaintiff and Appellant. }

PETITION FOR REHEARING & ADDENDUM

(Denounce of the Appellant.)

Vs. }

WALMART Inc. }
Defendant and Appellee. }

Case No. 47 2017 CV 651

S. C. No. 20180027

Appeal from ORDER ON MOTION TO DISMISS in DISTRICT COURT

COUNTY OF STUTSMAN, SOUTHEAST JUDICIAL DISTRICT.

David Alejandro Ramirez Moreno

1615 Western Park Vlg.

Jamestown, ND 58401

Tel: 701 269 7910

colombiacartago@mail.com

A. TABLE OF CONTENTS.

Pag.	Num.	Sub.	Content.
I	A.		Table of contents.
II	B.		Table of citations.
1	1.		THE EMPLOYEE ENGAGED IN PROTECTED ACTIVITY.
3	2.		THE EMPLOYER TOOK ADVERSE ACTION AGAINST THE EMPLOYEE.
4	3.		RETALIATION CAUSED THE EMPLOYER'S ACTION
6	4.		ACTIVITIES OF THE MANAGERS, BEFORE CARRYING OUT A DISMISSAL.
9			ADDENDUM

B. TABLE OF AUTHORITIES and CITATIONS .

- As EEOC works to address this issue, you can help.
- N.D. C.C. Law 34 - 01- 20.

Respectfully, I address myself to the Supreme Court.

[1] THE EMPLOYEE ENGAGED IN PROTECTED ACTIVITY.

1. If there is a claim, on which relief can be granted. The error that occurs in this case, is because a context, (complete information), is extracted a small part (text) and with it, create a pretext (distorted information.)

2. Following the regular conduit.

WORKER	AUTHORITY	and its	LAW
David Ramirez	Manager Bernice. (Walmart) -		Rules of Procedure.
David Ramirez	Walmart Global Ethics and Open Door		Rules of Procedure.

3. I believe that the court ignored, or misunderstood, my report that I gave to the manager on March 26, 2017. This is the complete information. Appendix page 26.

6. _____

When I entered the warehouse on November 2, 2016. The workers told me: "With you, there are already six who have the name of David." And now that I'm retired, there's only one left.

They also removed five workers against their will. If I remember names or have told me: Derek, Madison, Jake, Tristen, Miron, Justin, Melissa.

I write, only of personnel that worked in the shift of the night. And here's the real reason I was put on the layoff list: March 26, 2017. When the manager's assistant spoke again, that the layoffs can continue, in front of four stockers who were present at the time, I I talked to the assistant manager and I told him that the dismissals considered him unfair and have been doing that for a long time.

7. _____

By law it is known that every company may have the right to dismiss a worker with just cause or without just cause. But when layoffs become serial in time, and in which they apply (just cause) as a (Method). This no longer applies to a labor problem, but it is already a problem of a criminal nature. Because the good name of the worker is vulnerable.

And Appendix page 4 (COMPLAINT)

" in addition to canceling the job, "without just cause", they alter it for a "just cause", what they are doing, is sending it to the street, without the due compensation, which by right

corresponds. (Indemnification) "

4. It is then demonstrated that if there is a claim, the violation of the internal regulations of work, which was being carried out, and which I reported to the Walmart manager and witnesses.

DENOUNCED VIOLATION: Workers' dismissals, where a lie is invented, to justify the dismissal, and thus record in the computer system, which was dismissed for "just cause".

Contacting directly the dismissed workers, also those who forcibly resigned, and contacting the old personnel. It is how the information was obtained of how Walmart store 1649, dismisses a worker. This was collected, long before contacting Walmar's manager on March 26. Report also taken to the internal offices "Open Door and Walmart Global Ethics." Those who also manage the internal work regulations.

5. The numerals and the line were made to avoid a long and monotonous reading. It is understand, that when I spoke with the manager, numerals and stripes do not exist. Note also that there are no "quotes", used to indicate words pronounced or textual, where they are limited to what was said, or what was not said. see: The workers told me: **"With you, there are already six who have the name of David."**
6. Walmart workers, we can not indicate, as is known some rule and number of internal work regulations, because managers, redirect us, to be themselves contacted, if a worker has a problem or complaint. **And if they can not solve it**, they tell us to contact the internal offices of "Open Door and Walmart Global Ethics." Appendix, page 2 and 16 (photo.)
7. Walmart could have had the right, to fire workers, reduce staff, but that also forced him to be honest and to obey the law. But they have made all that work, a fraud. Withdrawing workers' compensation. Giving them a job death, (Appendix, page 4.), because none of them have been able to return, to be able to work with Walmart again. "In eight years, Walmart has hire six hundred associates" Question: "Where are they?" Appendix, pag 29.

8. Enter to work with Walmart, a requirement that they ask the applicant, is to indicate, if you have worked with Walmart before; If the answer is "yes", then indicate, the reasons, why it came out. When these irresponsible managers of Walmart store 1649, they record a "false causal" to a fired worker, they have already killed him at work. because it is recorded in the computer system. And this is also an inconvenience to work with other companies.
9. On the other hand, the hiring of new personnel, permanent and continued over time, (Appendix pages 12, 13, 14, 16 and 29.), something like "serial contracts" are in opposition to "serial dismissals". Therefore, that Walmart, dismiss all its associates with a "just cause" is **unsustainable**. and it shows, why they resort to "false causes" as a quick and easy way to get rid of staff.
10. Before the court, Walmart did not present any evidence that supports, that is true and verifiable, that justifies, why removed any worker with "just cause."
11. Before the court, Walmart did not present any evidence of having fired any worker "without just cause" and having paid him.

Therefore, Walmart, by not presenting evidence before the court, which goes against the workers, shows that the dismissals for "false cause" is a real and true fact.
12. The compliance with the numeral [8] of the Supreme Court is verified:

“[A]n employee’s prima facie case for retaliatory discharge requires the employee to show (1) the employee engaged in protected activity

13. As a neutral authority, I have brought the information provided by the EEOC.

APPEAL, page 14.

"Participating in a complaint process is protected from retaliation under all circumstances. Other acts to oppose discrimination are protected as long as the employee was acting on a reasonable belief that something in the workplace may violate EEO laws, even if he or she did not use legal terminology to describe it. "

- [2] THE EMPLOYER TOOK ADVERSE ACTION AGAINST THE EMPLOYEE.

1. **" (2) the employer took adverse action against the employee "** These are:

- a. Dismissal
 - b. They invent a "false cause" for the dismissal to mark as "with just cause".
2. Before the court, Walmart did not present any evidence against me that justifies and endorses them, because they fired me "with just cause".

[3] RETALIATION CAUSED THE EMPLOYER'S ACTION

" (3) the existence of a causal connection between the employee's protected activity and the employer's adverse action. "

1. As a neutral authority, I have brought the information provided by the EEOC.

APPEAL page 21.

16. What types of evidence may support a claim of retaliation?

In some cases, the employer's own statements may acknowledge or betray its intention to deter an applicant or employee from engaging in protected activity. However, in many cases, there are different pieces of evidence, either alone or together, that may support an inference that retaliation caused a materially adverse action. Examples include:

- suspiciously close timing between the EEO activity and the materially adverse action;
- verbal or written statements demonstrating a retaliatory motive, comparative evidence (e.g., the individual was disciplined for an infraction that regularly goes undisciplined in that workplace, or that another employee who did not engage in EEO activity committed and was not disciplined as severely);
- demonstrated falsity of the employer's proffered reason for the adverse action; or
- any other pieces of evidence which, viewed alone or in combination with other facts, may support an inference of retaliatory intent.

2. Between March 26, 2017 and April 18, 2017, there are 24 days.

3. In court, Walmart did not present any evidence or evidence against me. This proves that what is argued and put into the system is a "false causal."

4. **" For this she uses as an excuse, something that is not even a cause of just dismissal[] and where the sole responsible, comes out being the same manager. Therefore when they see the error, cancel it and put another[,] ... "**

- a. First excuse to cancel my work: It is not related to pending work to be done. The intention of the manager Bernice, to cancel my work, was to write in the computer system, for "not having seen an information". And so it was registered. Therefore, after seeing the error, that this is not cause for dismissal, cancels it and puts another. The aforementioned "Information to see" is programmed by the same manager. Appendix, page 23.
- b. Second excuse to cancel my work: As regards jobs that may be pending to be done; and because the maintenance personnel, including me, are saturated with work, for the same reasons of lack of personnel; The manager must use their support staff, who will do jobs that are pending. which means, that this staff will also be overloaded with work. . Therefore, in the COMPLAINT, Appendix, page 4, it says: **"... finally the responsible, is also the same manager.!** In effect, if the manager believes that some work, still to be done, she can make use of The middle managers, and this has been done, but this is not a daily situation, because normally, the maintenance personnel, including me, give full compliance to the work.
5. Appendix, page 24. Numeral 1. I show that my work performance is 140%. This is due to the fact that not only do I have to answer for my work, but also, I am recharged by the work of personnel who have been fired.
6. Appendix, page 25. Number 5. The manager, involuntarily indicated which is the favorite personnel to be fired. It says: "You can be 8 years old, and you can be fired." Indeed, staff that has been working for eight years, also means that they have a higher salary. For my part, I have a low salary. And if Walmart, claim that they have budget problems; so in the first instance, I am not eligible to be fired.
7. The one who made my dismissal was the manager Bernice; the same before whom I denounced the violations of the law. This is important, because my dismissal did not come from any other person.

8. All steps are met, as indicated in numeral 16. of the EEOC. The numeral is shown"

(3) the existence of a causal connection between the employee's protected activity and the employer's adverse action. "

[4] ACTIVITIES OF THE MANAGERS, BEFORE CARRYING OUT A DISMISSAL.

2. Appendix, page 27

10. _____

TIM: Worker in the freezer area. This is a case where the worker never noticed because he left the warehouse.

Tim is an extrovert worker, always in a good mood, but a few days before his dismissal, his state of mind decays; And he does not speak to anyone and he is noted as having gone. A few days after Tim's firing, in the backroom there are some new tanks, very visible because they were blocked by the passage of pallets (jacks), and rokecs cars; Is the refrigerant R404A, of 20 pounds of weight each. This changes everything, there are no new freezer installations, so the only reason to bring them, is because in some of the freezers, where Tim worked, there was some leakage of the refrigerant. It is known, its chemical composition contains no oxygen, has no odor or color. Tim's brain is not receiving oxygen properly, this explains why his behavior has been altered. The leakage of the refrigerant is in the knowledge of the managers. And in this case, they chose to dismiss the worker. "

Observation: Who has not heard, or read, that a car ignited and with people inside, in a closed garage, can die by inhalation of carbon monoxide?

Or that in a fire, even if people are not touched by fire, and breathing smoke, they can also die?. This case of Tim, is not something similar. ? but I say it's worse, because there are managers who know that there is a continuous leak of refrigerant gas. Perhaps his duty was not to close the freezer, where Tim worked, and wait, until the refrigeration company makes the necessary repair?

Freezer: also known as "walking box"; is an enclosure, the size of a room to store products, the public does not have access to this area.

3. Appendix, page 27.

11. _____

MELISSA: She is stocker, as her problem was not solved by the managers, Melissa opts to exhaust legal days to miss work.

This is what can be recorded in the system, but the real reason is very difernte; She was asking the managers a change to their system of work, to give the best performance in their work. The manager refuses to do this. Time later she requests her vacation, and the manager denies it. So what is recorded in the system is not exactly correct.

Observing: Those who knew Melissa, knew that she had some limitation problem. What was the problem of the managers, give him the proper accommodation?

4. Appendix, page 28.

12. _____

MADISON: She herself has said "I was cast for no reason" Its cause is the assistant manager Bernice.

Everyone, the workers have been surprised, she has gone from her normal work as a stocker to the pet area, here she has been assigned only everything that has to do with weights of 50 pounds, 40, 30, 20 and 16 pounds. Meanwhile young men of 20 years, leave them working with aspirin boxes.

Madison never mentioned that she wanted to be a wrestler or wrestler. And left her permanently, in this work, until the day of her dismissal.

Observing: So that to put under Madison, to a strenuous and heavy work, having personnel more suitable for it?

Before a worker is fired, he is subjected to forced labor or inconsistencies.

5. Final observation:

- a. The managers and the existence of these offices "Open Door and Walmart Global Ethics." The associate is not obliged to know what the regulation is called, or any number of regulations. This is the responsibility of these offices, which act as authority.
- b. Law 34 01 20, does not say explicitly, does not specify, that the complainant, when witnessing a violation of law, must know the name and number, so they identify that fact. But the authorities and the courts, if they are obliged to know; Well that is your job.
- c. Law 34 01 20 does not require from the complainant, a thorough knowledge about what is

called in legal terms, the violation of which he is witnessing. If that were so, then the law would not use terms like: " **in good faith, reports a violation or suspected violation of** " or " **The employee refuses an employer's order to perform an action that the employee believes violates ...** "

ó " **The employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason. "**

d. Law 34 01 20. If it compels the court, to have the proper knowledge, if a violation is occurring. for that reason it appears: " **If the court determines that a violation has or is occurring under this section, the court may ... "**

e. It is necessary to recreate an example of this, but taking it to the extreme:

imagine that a violation of law, are not "false causes", instead, we replace it with a "homicide". I see myself in this scene, and I am the witness; and I know I have identified the murderer. We are before the court, but the judge asks me, as the law is called, and what number it is. I answer that I do not know. and the judge answers; that because he does not know that, he dismisses the case, the murderer can go to his house, and the relatives who bury the dead man.

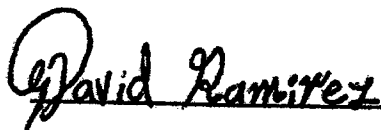
I ask myself, will it be that because I do not know what the law is called, and what number it is, then, there is no crime? Here we find, with this simple example, that it is the authority that determines that.

6. On what the district court concluded:

- **An individual engaged in prior protected activity;**
- **The employer took a materially adverse action; and**
- **Retaliation caused the employer's action.**

By meeting these three basic points, I show that the decision of the district court is wrong. And if

I comply with the state, so that a relief can be granted, as stipulated in law 34 01 20.



DAVID ALEJANDRO RAMIREZ MORENO

July 30, 2018.

ADDENDUM

As EEOC works to address this issue.

APPEAL, page 14.

" The EEO laws prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment. Asserting these EEO rights is called "protected activity," and it can take many forms. For example, it is unlawful to retaliate against applicants or employees for:

- **filing or being a witness in an EEO charge, complaint, investigation, or lawsuit**
- **communicating with a supervisor or manager about employment discrimination...**
- **... , or intervening to protect others "**

For example, depending on the facts, it could be retaliation if an employer acts because of the employee's EEO activity to:

- **reprimand the employee or give a performance evaluation that is lower than it should be;**
- **make the person's work more difficult ...**

APPEAL, page 17.

1. What is retaliation?

Retaliation occurs when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEO laws. Asserting EEO rights is called "protected activity."

2. What must someone show to prove a legal claim of retaliation?

In a case alleging that an employer took a materially adverse action because of protected activity, legal proof of retaliation requires evidence that:

- An individual engaged in prior protected activity;
- The employer took a materially adverse action; and
- Retaliation caused the employer's action.

APPEAL, page 18.

5. What does it mean to "oppose" conduct made unlawful by an EEO law?

Employers must not retaliate against an individual for "opposing" a perceived unlawful EEO practice. This means that an employer must not punish an applicant or employee for communicating opposition to a perceived EEO violation. For example, it is unlawful to retaliate against an applicant or employee for:

- ... or intervening to protect others;
- passive resistance (allowing others to express opposition);

Opposition can be protected even if it is informal or does not include the words "harassment," "discrimination," or other legal terminology. A communication or act is protected opposition as long as the circumstances show that the individual is conveying resistance to a perceived potential EEO violation.

APPEAL, page 20.

10. Can an action be materially adverse even if it does not stop the employee from asserting her EEO rights?

Yes. If the employer's action would be reasonably likely to deter protected activity, it can be challenged as retaliation even if it does not actually stop the employee in a particular case from asserting her EEO rights. An employer can also be liable for retaliation if the materially adverse action does not harm the employee; the extent of the harm only affects the amount of relief the individual might be awarded as compensation.

13. Do the EEO laws or other statutes protect employee communications about pay?

Yes. Taking adverse action for discussing compensation may implicate a number of different federal laws, whether the action is pursuant to a so-called "pay secrecy" policy or is simply discipline of an employee in an individual case.

Under EEOC-enforced laws, when an employee communicates to management or coworkers to complain or ask about compensation, or otherwise discusses rates of pay, the communication may constitute protected opposition under the EEO laws, making employer retaliation actionable based upon the facts of a given case. Moreover, talking to coworkers to gather information or evidence in support of a potential EEO claim is protected opposition, provided the manner of opposition is reasonable.

In addition, there are also other federal protections for discussions related to compensation. For example, under Executive Order (E.O.) 11246, as amended by E.O. 13665 (Apr. 8, 2014), enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs, federal contractors and subcontractors are prohibited from discharging or otherwise discriminating in any way against employees or applicants who inquire about, discuss, or disclose their compensation or that of other employees or applicants. See <https://www.dol.gov/ofccp/>. Moreover, the National Labor Relations Act protects non-supervisory employees who are covered by that law from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved in the effort. See <https://www.nlr.gov/>.

APPEAL, page 21.

15. What is the legal standard for proving that retaliation caused a materially adverse action?

There are different causation standards for proving retaliation, depending on the type of claim and the employer.

- **For retaliation claims against private sector employers and state or local government employers, the Supreme Court has ruled that the causation standard requires that "but for" a retaliatory motive, the employer would not have taken the adverse action. "But for" causation means, even if there are multiple causes, the materially adverse action would not have occurred without retaliation.**

1. APPEAL, page 22.

19. What is "interference" with disability rights under the ADA?

The ADA prohibits not only retaliation but also "interference" with statutory rights. Interference is broader than retaliation. Under the ADA's interference provision, it is unlawful

to coerce, intimidate, threaten, or otherwise interfere with an individual's exercise of ADA rights, or with an individual who is assisting another to exercise ADA rights. Some employer acts may be both retaliation and interference, or may overlap with unlawful denial of accommodation. Examples of interference include:

- **coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled;**
- **intimidating an applicant from requesting accommodation for the application process by indicating that such a request will result in the applicant not being hired;**
- **threatening an employee with loss of employment or other adverse treatment if he does not "voluntarily" submit to a medical examination or inquiry that is otherwise prohibited under the statute;**
- **issuing a policy or requirement that purports to limit an employee's rights to invoke ADA protections (e.g., a fixed leave policy that states "no exceptions will be made for any reason");**
- **interfering with a former employee's right to file an ADA lawsuit against the former employer by stating that a negative job reference will be given to prospective employers if the suit is filed; and**
- **subjecting an employee to unwarranted discipline, demotion, or other adverse treatment because he assisted a coworker in requesting reasonable accommodation.**

A threat does not have to be carried out in order to violate the interference provision, and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference to be actionable.

34-01-20. Employer retaliation prohibited- Civil action for relief - Penalty.

- 1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:**
 - a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.**
 - b. The employee is requested by a public body or official to participate in an**

investigation, a hearing, or an inquiry.

- c. The employee refuses an employer's order to perform an action that the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.
2. An employer who willfully violates this section is guilty of an infraction.
3. An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within one hundred eighty days after the alleged violation, completion of proceedings under subsection 4, or completion of any grievance procedure available to the employee under the employee's collective bargaining agreement, employment contract, or any public employee statute, rule, or policy, whichever is later. If the court determines that a violation has or is occurring under this section, the court may order, as the court deems appropriate, reinstatement of the employee, backpay for no more than two years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee, from the same employer, must reduce backpay otherwise allowable. In any action under this section, the court may award reasonable attorney's fees to the prevailing party as part of the costs of litigation. An employee whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for conduct prohibited by subsection 1 is available must exercise that process to completion before commencing an action under this subsection, and if that process provides for judicial review by statutory appeal, then recourse under this subsection is not available.
4. The department of labor and human rights shall receive complaints of violations of this

section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. In order to receive assistance from the department of labor and human rights , a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the department of labor and human rights under this subsection before proceeding under other provisions of this section.

NORTH DAKOTA SUPREME COURT

DAVID A. RAMIREZ, }
Plaintiff and Appellant. }

Vs. }

WALMART Inc. }
Defendant and Appellee. }

MOTION FOR STAY OF THE MANDATE

Case No. 47 2017 CV 651

S. C. No. 20180027

Request a Stay of Mandate under N.D.R.App.P. 41 (d)(2) as Appellant is filing a Petition for Writ of Certiorari. with The U.S. Supreme Court.

Dated this 2 day of September, 2018.

David Alejandro Ramirez Moreno

1615 Western Park Vlg.

Jamestown, ND 58401

Tel: 701 269 7910

colombiacartago@mail.com



App. 26

Ramirez v. Walmart, Supreme Court No. 20180027

From: "Miller, Penny" <PMiller@ndcourts.gov>
To: "colombiacartago@mail.com" <colombiacartago@mail.com>
Cc: "chedican@bairdholm.com" <chedican@bairdholm.com>
Date: Sep 26, 2018 3:42:47 PM

SUPREME COURT OF NORTH DAKOTA

OFFICE OF THE CLERK

600 E Boulevard Avenue

Bismarck, ND 58505-0530

(701) 328-2221

supclerkofcourt@ndcourts.gov

VIA E-MAIL ONLY

September 26, 2018

David A. Ramirez

1615 Western Park Village

Jamestown, ND 58401

RE: Ramirez v. Walmart

Supreme Court No. 20180027

Stutsman Co. No. 2017-CV-00651

App. 27

Your Second Motion for Stay of the Mandate was filed September 20, 2018, and referred to the Chief Justice. The mandate is stayed until December 1, 2018. If this office receives a copy of petition for writ of certiorari that has been accepted and filed by the U.S. Supreme Court, the mandate will be stayed until disposition of the Petition by the U.S. Supreme Court.

There is no indication that you served Mr. Hedican with your Motion. Please immediately do so.

Sincerely yours,

Penny Miller

Clerk

North Dakota Supreme Court

pc: Christopher Robert Hedican