IN THE COURT OF APPEALS OF IOWA

No. 9-920 / 09-0311
Filed December 30, 2009

DAVID QUICK,
Plaintiff-Appellant,

vs.

EMCO ENTERPRISES, INC. and ANDERSEN CORPORATION,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

David Quick appeals from summary judgment entered in favor of defendants, dismissing his cause of action for discrimination against his employer. **AFFIRMED.**

Thomas A. Newkirk and Jill M. Zwagerman of Newkirk Law Firm, P.L.C., Des Moines, for appellant.

James R. Swanger and Christopher McDonald of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellees.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.

David Quick appeals from summary judgment entered in favor of defendants, EMCO Enterprises, Inc. and Andersen Corporation, dismissing his cause of action for discrimination against his employer.

I. Background Facts & Proceedings.

In April 2003, David Quick began working as a customer service representative for EMCO, a wholly owned subsidiary of Andersen Corporation. In September 2004, Quick filed with the Des Moines Human Rights Commission (city commission) a complaint against EMCO alleging EMCO discriminated against him based upon his sexual orientation. In July 2005, Quick filed another complaint with the city commission alleging EMCO harassed and retaliated against him for filing his previous sexual orientation discrimination claim. In July 2006, Quick requested the city commission issue administrative releases/right-to-sue letters on both complaints. The city commission did so in August 2006.

In June 2006, Quick filed with the Iowa Civil Rights Commission (state commission) a complaint against EMCO alleging EMCO discriminated against him on the basis of his sex.[1] The state commission issued an administrative release/right-to-sue letter on August 14, 2006.

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[1] In 2006 the Iowa Civil Rights Act did not include sexual orientation or gender identity as protected classes. *See*, *e.g.*, Iowa Code § 216.6 (2005) (prohibiting unfair employment practices with respect to any employee "because of the age, race, creed, color, sex, national origin, religion, or disability of such applicant or employee"). In contrast, section 62-1 of the Municipal Code of the City of Des Moines included the following definition:

> *Discriminate, discrimination,* or *discriminatory* means any significant and unreasonable difference in treatment because of age, race, religion, creed, color, sex, *sexual orientation*, national origin, ancestry, disability or familial status and includes any and all of the illegal discriminatory practices enumerated in this chapter. This term shall also mean to

On August 30, 2006, in the Polk County District Court, Quick filed a petition against EMCO and Andersen Corporation alleging violations of the Iowa Civil Rights Act and the Des Moines Municipal Code. He claims he experienced "sexual discrimination, harassment, and retaliation" and "sexual orientation discrimination, harassment, and retaliation" in the workplace.

Defendants moved for summary judgment, claiming Quick's claims should be dismissed for numerous legal and factual failings. Defendants asserted, in part, that his claims of sexual discrimination were disguised claims of sexual orientation discrimination not cognizable under the Iowa Civil Rights Act then in effect. Defendants also claimed the district court had no jurisdiction over the Municipal Code claims.

On January 15, 2009, the district court entered a substantive ruling denying defendants' motion for summary judgment.

On January 16, 2009, the district court reversed itself and entered a ruling granting defendants' motion for summary judgment, without reference to the ruling filed the previous day. The district court noted that Quick's sexual orientation claims were not recognized under the Iowa Civil Rights Act; and that while the city commission could provide for greater protection, the city ordinance did not have the authority to confer jurisdiction upon the district court.

> separate, to segregate, or to make a distinction against any persons, because of age, race, religion, creed, color, sex, *sexual orientation*, national origin, ancestry, disability or familial status. This term shall also include any significant and unreasonable difference in treatment because of a person's association with another of a different age, race, religion, creed, color, sex, *sexual orientation*, national origin, ancestry, disability or familial status.

(Emphasis added.) The Iowa Code was amended in 2007 to include the protected classes of "sexual orientation" and "gender identity." *See*, *e.g.*, Iowa Code § 216.6 (2007).

On January 23, 2009, the court *sua sponte* entered the following order:

> Upon reviewing the court file in this case, it has come to the Court's attention that a ruling entitled "Order and Ruling on Summary Judgment," was signed on December 19, 2008, and filed in this case on January 15, 2009. This ruling was executed and filed in error. The Court's "Ruling on Defendants' Motion for Summary Judgment," executed and filed on January 16, 2009, is the correct ruling in this case.
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> The "Order and Ruling on summary Judgment," file stamped on January 15, 2009, is RESCINDED. The January 16, 2009 "Ruling on Defendants' Motion for Summary Judgment" is the effective order and ruling in this case.

On February 3, 2009,[2] Quick filed a "Motion for Reconsideration and/or Enlargement pursuant to Rule of Civil Procedure 1.904(2)" in which he asked the court to "reconsider its ruling dated January 23, 2009, granting summary judgment in favor of Defendants." Quick argued the court erred in concluding it did not have jurisdiction to hear his sexual orientation claims. Defendants resisted the motion, asserting (1) rule "1.904 cannot be used to review this Court's administrative order entered January 23, 2009"; (2) if the motion sought review of the grant of summary judgment, it was untimely; and (3) the court did not err in determining it lacked jurisdiction of claims arising under the Des Moines Human Rights Ordinance.

On February 20, 2009, Quick filed a notice of appeal to the supreme court. The district court had not ruled on his February 3rd motion. Defendants moved to dismiss the appeal as untimely. The supreme court ordered that the issue of

[2] A rule of civil procedure 1.904 motion must be filed within ten days of the ruling which the party seeks to be modified. See Iowa Rs. Civ. P. 1.904(2) (stating motion "filed within the time allowed for a motion for new trial"), 1.1004 (providing grounds for motion for new trial), 1.1007 (stating rule 1.1004 motions "must be filed within ten days" after the filing of the decision). The plaintiff's rule 1.904 motion was filed eleven days after the January 23 ruling; consequently, even if the January 23 ruling is deemed a final judgment, the rule 1.904 motion was untimely and did not toll the period for filing an appeal. *See Nuzum v. State*, 300 N.W.2d 131, 134 (Iowa 1981).

the timeliness of plaintiff's appeal be briefed and submitted with the appeal. It then transferred the case to this court.

II. Timeliness of Appeal.

> [O]nly final judgments may be appealed. A final judgment is one that "'conclusively adjudicates all of the rights of the parties,'" and places the case beyond the power of the court to return the parties to their original positions. . . . [A]ppeals must be filed with our court within thirty days from entry of the order, judgment or decree. Any appeals not so filed will be dismissed for lack of appellate jurisdiction.

In re Marriage of Welp, 596 N.W.2d 569, 571 (Iowa 1999) (citations omitted).

The question before us is whether the district court's January 23, 2009 order was a final judgment subject to appeal. If not, Quick's appeal must be dismissed as untimely. *Id.*

> Ordinarily the authority of the district court to decide substantive issues in a particular case terminates when a final judgment is entered and postjudgment motions have been resolved. A final judgment, one that conclusively determines the rights of the parties and finally decides the controversy, creates a right of appeal and also removes from the district court the power or authority to return the parties to their original positions.

Franzen v. Deere & Co., 409 N.W.2d 672, 675 (Iowa 1987) (citations omitted).

On January 15, 2009, the district court filed a ruling denying summary judgment. The denial of summary judgment is not a final judgment. *Cf. Mid-continent Refrigerator Co. v. Harris*, 248 N.W.2d 145, 146 (Iowa 1976) ("A ruling or order is interlocutory if it is not finally decisive of the case."); *River Excursions, Inc. v. City of Davenport*, 359 N.W.2d 475, 477 (Iowa 1984) ("Ordinarily a summary judgment that is not dispositive of the entire case is not a final judgment for purposes of appeal. . . . A ruling is not final when the trial court intends to act further on the case before signifying its final adjudication of the

issues."). Whether erroneously filed or not, it was a non-final ruling subject to change by the district court at anytime while it has jurisdiction of the case and the parties. *See Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 396 (Iowa 1988) ("A district court's power to correct its own perceived errors has always been recognized by this court, as long as the court has jurisdiction of the case and the parties involved.").

On January 16, 2009, the district court granted defendants' motion for summary judgment. The court concluded it did not have jurisdiction to hear the sexual orientation case. The court noted that substantive statutory amendments, such as the 2007 amendments to the Iowa Civil Rights Act, are applied prospectively. *See Bd. of Trustees of Mun. Fire & Police Ret. Sys. v. City of West Des Moines*, 587 N.W.2d 227, 230 (Iowa 1998). The court concluded that "Quick has no claim for discrimination based on sexual orientation." The court rejected Quick's attempt to frame the claim as a "gender-based claim," noting "[t]he treatment Quick complains of was the sort of treatment the Iowa legislature had in mind when in 2007 it amended the Iowa Civil Rights Act to include sexual orientation and gender identity claims."

"[A] summary judgment dispositive of the entire case is a final adjudication from which appeal may be taken." *Nuzum*, 300 N.W.2d at 133 (quoting *Mid-Continent Refrigerator Co. v. Harris*, 248 N.W.2d 145, 146 (Iowa 1976)); *accord Peppmeier v. Murphy*, 708 N.W.2d 57, 66 (Iowa 2005) ("[E]xcept in limited situations not relevant here, a summary judgment constitutes a final judgment on the merits."). Except for the January 15th order, the January 16th ruling conclusively adjudicated all of the rights of the parties, placed the case beyond

the power of the court to return the parties to their original positions, and started the time for filing an appeal. *Franzen*, 409 N.W.2d at 675. However, the January 15th order was filed and sent to counsel, who had a right to rely upon it, at least to the extent of being confused by the second, completely opposite, January 16th order.

Quick relies upon a California case, *CC-California Plaza Assocs. v. Paller & Goldstein*, 51 Cal. App. 4th 1042, 1048-49 (Cal. Ct. App. 1996), in arguing that the January 23 ruling materially modified the judgment of the district court. In that California case, before trial, the contractor assigned its rights of indemnity to the building owner; as assignee, the building owner prosecuted the contractor's indemnity claims against the subcontractor. *CC-California Plaza Assocs.*, 51 Cal. App. 4th at 1046. The trial court granted the subcontractor's motion for nonsuit and entered judgment against the building contractor on May 19, 1995. *Id*. After notice of entry of the May 19 judgment, the trial court granted the building contractor's motion to correct the judgment to show the building owner, not the contractor, as the losing party on the judgment of nonsuit. *Id.* The building owner filed a notice of appeal from the judgment on September 14; however, the corrected judgment naming the owner as the losing party was not entered until October 6, 1995. *Id*. The subcontractor moved to dismiss the appeal as untimely as it was filed more than sixty days from the May 19 entry of judgment. *Id*. at 1047.

The appellate court wrote:

> The issue then becomes: When does the time for filing a notice of appeal commence to run in a case where there has been a change in the form of judgment? As might be expected, the

> answer depends on how material a change is involved. The rule has been accurately summarized by the leading text on such matters as follows: "The effect of an amended judgment on the appeal time period depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error: . . . When the trial court amends a nonfinal judgment in a manner amounting to a *substantial modification* of the judgment (e.g., on motion for new trial or motion to vacate and enter different judgment), the amended judgment supersedes the original and becomes the appealable judgment (there can be only one 'final judgment' in an action . . .). Therefore, a new appeal period starts to run from notice of entry or entry of the *amended* judgment. . . . On the other hand, if the amendment merely corrects a *clerical error* and does not involve the exercise of judicial discretion, the original judgment remains effective as the only appealable final judgment; the amendment does *not* operate as a new judgment from which an appeal may be taken."

Id. at 1048. With respect to the corrected judgment, the California court ruled, "we cannot imagine a more substantial or material change in the form of a judgment than in the identity of the losing party." *Id.* at 1049.

Quick argues that the *CC-California Plaza* case is analogous to the one before us. He contends that before the district court's January 23, 2009 ruling, the identity of the prevailing party was not known to a certainty.

Appellees disagree, contending the January 16 ruling clearly identified them as the prevailing party. They argue that the January 23, 2009 ruling, whether characterized as an order nunc pro tunc, an administrative order, or a clerical order, is not the type of ruling subject to appellate review. We conclude Quick has the better position.

In these unique circumstances, having received an order on January 15 in his favor, Quick had every reason to question the finality of the January 16, 2009 contradictory order against him. Until entry of the January 23, 2009 order rescinding the earlier ruling, the court's intent was unclear. These are not

"clerical errors," but changes in judicial thinking that resulted in a switch of "winner" to "loser." Quick's appeal from the January 23, 2009 order was timely filed, and is an appeal from a substantive order rescinding the district court's previously filed substantive order in his favor. The motion to dismiss the appeal is overruled.

III. Merits.

Upon our review of the facts and the law, we find that the district court correctly granted summary judgment in favor of defendants on all counts of Quick's petition. The district court's ruling of January 16, 2009, is affirmed without further opinion. *See* Iowa R. App. P. 6.1203(*a*), (*d*).

AFFIRMED.