IN THE SUPREME COURT OF IOWA

S. Ct. No. 16–1333

Polk County Case No. LACL134859

MARLON MORMANN,
Plaintiff-Appellant,

v.

IOWA WORKFORCE DEVELOPMENT,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT FOR POLK COUNTY
THE HONORABLE DOUGLAS F. STASKAL

APPELLANT'S REPLY BRIEF

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I, Jill Zwagerman, hereby certify that on this 26th day of May 2017, I served the attached Appellant's Reply Brief through Iowa's electronic case filing system to the following attorneys for the Appellees:

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I, Jill Zwagerman, certify that the actual cost of reproducing the necessary copies of the following Appellant's Reply Brief was zero dollars, and that the amount actually has been paid in full by the undersigned firm.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 1,443 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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REPLY ARGUMENT

Standard of Review

Defendant argues that the requirements under chapter 216 are not a statute of limitations, but rather are jurisdictional requirements. However, as the Iowa Supreme Court has held procedural acts, such as when a complaint is filed, cannot affect the court's subject matter jurisdiction. *See Pottawattamie County Dept. of Social Servs. v. Landau*, 210 N.W.2d 837, 843 (Iowa 1973). The 300-day limit is exactly this type of procedural requirement and thus, the motion to dismiss standard is appropriate for this case. *See Sanchez v. State*, 692 N.W.2d 812, 816 (Iowa 2005); *see also Wetter v. Dubuque Aerie No. 568 of the Fraternal Order of Eagles*, 588 N.W.2d 130, 132 (Iowa Ct. App. 1998) (discussing that the procedural timing requirements in chapter 216 are like "any other statute of limitations").

I. THE IOWA CIVIL RIGHTS COMMISSION HAS STATUTORY AUTHORITY FOR RULEMAKING PURSUANT TO ITS POWERS AS AN ADMINISTRATIVE AGENCY.

The Iowa Civil Rights Commission is an administrative body charged with ensuring the purpose and protections of the Iowa Civil Rights Act are afforded to all Iowans. *See* Iowa Code § 216.5. Defendant argues the Commission has overstepped its administrative authority by creating Iowa Administrative Code Rule 161–3.3(3). In support of its argument Defendant

cites *Auen v. Alcoholic Beverages Div., Iowa Dep't of Commerce*, 679 N.W.2d 586 (Iowa 2004). However, as the Supreme Court stated in *Auen* "The power conferred on an agency by the legislature to adopt rules is quite broad." *Id.* at 590 (citing *Sioux City v. Iowa Dep't of Commerce*, 584 N.W.2d 322, 325 (Iowa 1998)). The Court discussed in *Auen* that by conferring the power to the ABD to adopt rules governing "the conditions and qualifications necessary for the obtaining of licenses and permits" the administrative body necessarily had the authority to interpret the limitations of its governing code. *Id.* (quoting Iowa Code § 123.21(11)). Where the Court found the administrative body had erred, was that its interpretation of the language in the statute was illogical. *Id.* at 592. This is distinctly different from the Defendant's argument that *Auen* supports its proposition that the Iowa Civil Rights Commission lacks the requisite authority to promulgate Rule 161–3.3(3).

Here, the Commission has the authority "[t]o adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this chapter." Iowa Code § 216.5 (10). Enforcement of chapter 216 includes the power to "establish rules to govern, expedite, and effectuate the procedures established by [chapter 216] and its own actions thereunder." Iowa Code § 216.15(12). The Commission properly excised its authority by

adopting Rule 161–3.3 and nothing in its interpretation of chapter 216 is "irrational, illogical, or wholly unjustifiable." *Auen*, 679 N.W.2d at 590 (quoting Iowa Code § 17A.19(10) (noting the standard required for a court to reverse an agency's interpretation)). As Plaintiff already noted in his initial briefing to this Court, the Iowa Supreme Court has repeatedly held that the Iowa Civil Rights Act provides at least as much protection to Iowans as the Federal civil rights statutes. *See Goodpaster v. Schwan's Home Serv. Inc.*, 849 N.W.2d 1, 11 (Iowa 2014); *Pippen v. State*, 854 N.W.2d 1, 28 (Iowa 2014). The equitable tolling protections in Title VII are not found in the statute themselves, but rather have been found to exist as necessary to protect the rights of the victim of discrimination. *See Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975). The Commission made the rational determination to go one step further and articulate this long-recognized doctrine in its administrative rules. *See* Iowa Admin. Code r. 161–3.3. Defendant's blanket assertion that Iowa Code § 216.15 has a 300-day limit for filing a claim does not negate the Commission's authority to adopt rules for the interpretation of chapter 216 to include equitable tolling for the time a complainant has to file his or her complaint with the Commission to protect the rights of the victim from employers who, like Defendant, hide their motivations for decision until the time to file has lapsed.

II. MORMANN PLED SUFFICIENT FACTS TO DEMONSTRATE PLAINTIFF'S AGE PLAYED A PART IN DEFENDANT'S EMPLOYMENT DECISION AND THIS MOTIVATION WAS UNDISCOVERABLE BY PLAINTIFF AT THE TIME.

Defendant argues that Wahlert's testimony in her deposition does not constitute vital evidence that was unavailable to Mormann until it was released to the public and he should have been aware that his age was a motivating factor in the decision to pass him over for the position at the time a younger candidate was selected. *See DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 12–13 (Iowa 2009) (finding the protected class only need to play a part or be a motivating factor in the adverse employment decision under the Iowa Civil Rights Act). However, until the testimony was released Mormann had no way of knowing that Wahlert was considering his age and possible retirement due to older age at the time the decision was made. (App. 7–19, 24–33).

Even Walhert herself stated that she did not disclose this motivation to Godfrey at the time in her deposition. (App. 16–19). Therefore, there was no way for Mormann to discover that his age played a part in the decision not to offer him the position, other than mere speculation based upon the fact that a younger candidate was selected. (App. 3–4). Defendant now wants to hold the fact that Mormann did not immediately think the worst of his employer against

him by assuming that their decision was discriminatory from the beginning. At this early stage of the case, Mormann presented the district court with more than sufficient evidence in his pleading and supporting exhibits, that when taken as true, justify equitable tolling of the 300-day requirement to file a civil rights complaint.

Defendant also argues Mormann has not met his burden to prove that the elements for equitable tolling have been met. *See Christy v. Miulli*, 692 N.W.2d 694, 702 (Iowa 2005). However, when the facts as pled are taken as true, Mormann has more than met this burden. Defendant wants to claim that it merely sent out a form letter thanking Mormann for his application and that cannot establish the basis for equitable tolling. (App. 23). But as Mormann argued in his initial brief and the pleadings leading up to the district court's decision to grant Defendant's motion to dismiss, Mormann was relying upon Defendant's statements that he was simply not selected for the position, with no indication that Walhert had more involvement with this decision than previous employment decisions and that she held in her mind the belief that Mormann should not be selected because he would be retiring soon. (App. 7–19, 24–33). It is exactly these types of representations and reliance that the doctrine of equitable tolling was designed to remedy. The district court's assumption of other ways Mormann could have discovered this information

has no weight in this case and Defendant's attempts to minimize the effect of its actions on Mormann's knowledge should not negate his ability to bring a claim for discrimination.

CONCLUSION

Wherefore, Marlon Mormann respectfully requests this Court reverse the District Court's ruling granting the motion to dismiss in part and remand this case back to district court for further proceedings.