STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1620

Vicki Metcalf,
Appellant,

vs.

Allina Health System,
Respondent.

Filed September 7, 2021
Reversed and remanded
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-19-14548

John A. Fabian, David H. Redden, Fabian May & Anderson, PLLP, Minneapolis, Minnesota (for appellant)

Charles F. Knapp, Terran C. Chambers, Faegre Drinker Biddle & Reath, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant-employee challenges summary judgment dismissing her whistleblower claim on the basis that she did not produce evidence linking her protected conduct to her discharge. Because genuine issues of material fact preclude summary judgment as to

whether respondent-employer's stated reasons for discharging appellant are a pretext for retaliation, we reverse and remand.

FACTS

Appellant Vicki Metcalf was discharged from her management position with respondent Allina Health System (Allina) for her role in supervising an employee who was criminally charged with domestic assault. At all relevant times, Metcalf supervised respiratory therapists at Allina's Regina Medical Center (Regina) and River Falls Hospital (River Falls).

On April 27, 2018, a respiratory therapist (employee) notified Metcalf that he had recently been arrested and charged with domestic assault.[1] Metcalf contacted human resources (HR) representative Deb Foster that same day. Foster reviewed Allina's written policy for responding to such incidents. Foster concluded that the policy permitted employee to continue working unless and until he was convicted of the charged crime. Foster told Metcalf to keep her knowledge of employee's arrest "private."

In September, while meeting with her supervisor at Regina, Stephanie Cook, Metcalf mentioned that employee's court date was approaching. Cook did not know about employee's arrest. But she confirmed Foster's recommendation to "wait and see" whether employee was convicted.

On September 21, Metcalf was working a shift at Regina that employee frequently covered. A member of the medical staff made a negative comment about employee, which

[1] Because this case is on appeal from summary judgment, we construe the facts in the light most favorable to Metcalf.

prompted Metcalf to ask others about their experience with him. She learned that several staff members thought employee was incompetent at his job, did not like him, or thought he was "creepy." Some reported that he made inappropriate comments in the workplace. On September 24, a staff member who asked to remain anonymous told Metcalf that (1) he heard employee might have watched pornography on his work computer; (2) outside of work, employee showed staff member an explicit text message employee had sent to his co-worker girlfriend; and (3) employee's ex-girlfriend told him employee used methamphetamine. The staff member also told Metcalf that a doctor had received a complaint from a patient that employee was argumentative.[2]

Metcalf reached out to Foster by email on Monday, September 24, asking to set up a meeting to discuss what she had heard. Foster said she was busy that day, and asked Metcalf if her concerns were "emergent." Metcalf said they were "not emergent, just troubling." Employee worked the following day. Metcalf and Foster met on Wednesday. Metcalf shared the various concerns staff members had expressed about employee, but said she had not noticed these issues first-hand, and indicated he had always been a hard worker and appropriate around her. She noted that employee did seem "hyper" in the afternoon, but she attributed that to his consumption of energy drinks and had not thought anything of it before she heard of his rumored drug use. Foster recommended that Metcalf continue watching employee and explained that Allina could not require drug testing unless a second manager observed employee and agreed testing was warranted.

[2] Metcalf later spoke with the doctor, who did not recall a patient complaining about employee.

When the meeting concluded, Foster provided HR Director Linda McElmurry an email summary that concluded with the recommendations she made to Metcalf:

> Once we learn the outcome of the trial, consult with Legal if he is convicted.
> Monitor his performance and issue corrective action if necessary.
> If staff come forward with concerns, document it.
> Have [the reporting doctor] document the behavior he observed.
> Contact IT and have them do a search of websites Robert has accessed.
> Monitor his behavior and have another manager observe if there is reasonable suspicion.

The next morning, McElmurry met with Foster to discuss the situation. McElmurry determined that employee should not be working "per Allina's policy [regarding] Employee Arrests, Convictions, and Investigations." Foster called Metcalf at around 9:00 a.m., stating that employee needed to immediately leave work. At that time, employee was one of two staff members leading an outpatient pulmonary rehabilitation class. Metcalf asked if employee could continue working until the end of the day, or at least for an hour so that she could arrange for another staff member to cover the class. Foster told Metcalf to call McElmurry. Metcalf did so, explaining that if she sent employee home before finding another staff member, patients could be at risk. McElmurry responded that employee needed to be removed immediately, and told Metcalf to escort him to the HR office right away. Metcalf followed the directive.

On October 4, McElmurry asked Metcalf to meet with her; Metcalf brought Cook along to the meeting.[3] By all accounts, the discussion was heated. McElmurry reviewed the events of employee's removal from the workplace, and told Metcalf that she did not respond appropriately to employee's arrest and the reports she received about him from co-workers. McElmurry also criticized Metcalf for not disclosing the name of the staff member who requested anonymity. During the meeting, Metcalf again told McElmurry that taking employee out of the pulmonary rehabilitation class put patients in danger.

The following day, Metcalf advised her new supervisor at Regina, Christy Iverson, of the situation and said she wanted to file a formal complaint against McElmurry based on her disregard for patient safety. Iverson responded that she would talk to Regina's president, Tom Thompson, about Metcalf's version of events and her desire to file a formal complaint about McElmurry. Iverson later told Metcalf that she met with Thompson who said he would talk to McElmurry and that everything would be fine.

McElmurry summarized her investigation in a six-page report (the report), which includes a timeline containing the following information:

- June 26- Metcalf first learns of employee's arrest
- July 10- Metcalf meets with McElmurry; advises McElmurry of complaints by nursing staff about employee but does not mention his arrest
- Week of July 23- Metcalf first advises HR (Foster) of employee's arrest
- September 12- Metcalf tells supervisor Cook about employee's arrest

[3] Cook's employment with Allina ended the next day.

- September 21- Metcalf receives concerning reports about employee from Regina staff members
- September 24- Metcalf requests meeting with Foster; says the issue is "not emergent"
- September 26- Metcalf meets with Foster who relays information to McElmurry and describes Metcalf as visibly upset and animated; Foster and McElmurry meet and discuss putting employee on leave and investigating
- September 27- Foster calls Metcalf in the morning, stating that she and McElmurry "were stunned [employee] was working" and telling Metcalf to immediately remove employee from the workplace; Metcalf then calls McElmurry expressing concern about attending meetings and covering future shifts, and stating that employee was "fine"
- October 4- McElmurry meets with Metcalf, Cook, and Foster; Metcalf does not reveal the name of the person who requested anonymity; Metcalf first says she told Foster about employee's arrest in July, but then says she must have done so earlier

The report also identifies 11 issues arising from Metcalf's handling of the situation. These issues include the fact that Metcalf did not promptly report employee's arrest to HR, did not confirm whether the arrest implicated employee's licensure, and contradicted herself when explaining when she first knew about employee's arrest. McElmurry also faulted Metcalf's assessment that the concerns she learned from co-workers on or before September 26 were not urgent, and that employee was allowed to work 48 shifts after his arrest. The list of issues also includes Metcalf's dismissal of employee's erratic behavior,

refusal to name the staff member who reported concerns in confidence, and failure to recognize the expressed concerns as serious, instead telling Foster that employee was "fine."

On October 15, Iverson, Thompson, Jen Loesch (Metcalf's supervisor at River Falls), Dave Miller (president of River Falls), and McElmurry met to discuss Metcalf's handling of employee's situation. McElmurry provided her report to the four decision-makers and discussed her investigation. The four ultimately decided to discharge Metcalf from employment. McElmurry was present throughout their discussion.

Three days later, Iverson and McElmurry told Metcalf that Allina was discharging her. They advised her the decision was based on her pattern of negligence in fulfilling her management responsibilities and that permitting employee to continue working may have endangered patients and other staff members.

Metcalf initiated this action alleging Allina discharged her for reporting a patient safety issue in violation of the Minnesota Whistleblower's Act (the act), Minn. Stat. § 181.932 (2020). Allina moved for summary judgment, arguing that Allina's actions in removing employee did not violate the law, that there was no causal connection between Metcalf's alleged protected conduct and her discharge, and that Metcalf could not show pretext for any alleged retaliation. The district court granted Allina's motion, concluding that there is no competent evidence of a causal connection between Metcalf's protected conduct and her discharge. Metcalf appeals.

DECISION

Summary judgment is appropriate where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. In considering a motion for summary judgment, courts view the evidence in the light most favorable to the non-moving party and resolve all factual inferences and doubts against the moving party. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). Summary judgment is not appropriate "when reasonable persons might draw different conclusions from the evidence presented." *Id.* (quotation omitted). We review de novo whether there are genuine issues of material fact and whether the district court properly applied the law. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 228 (Minn. 2020).

Where, as here, there is no direct evidence of retaliation, we apply the three-part *McDonnell Douglas* analysis.[4] *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 1824 (1973)), *rev. denied* (Minn. May 15, 2001). Under *McDonnell Douglas*, the employee has the burden of establishing a prima facie case of retaliation. *Hoover v. Norwest Priv. Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001). If the employee does so, the burden of production shifts to the employer who must show "a legitimate, nonretaliatory reason" for discharging the employee. *Moore v. City of New Brighton*, 932

[4] If a whistleblower claim is based on direct evidence of retaliation, we do not apply the *McDonnell Douglas* analysis. *Friend v. Gopher Co.*, 771 N.W.2d 33, 38 (Minn. App. 2009). Neither party argues that this is a direct-evidence case.

N.W.2d 317, 324 (Minn. App. 2019), *rev. denied* (Minn. Oct. 15, 2019). If the employer makes this showing, "the presumption of [retaliation] disappears and the plaintiff has the burden of establishing that the employer's proffered reason is a pretext for [retaliation]." *Hoover*, 632 N.W.2d at 542.

I. Metcalf established a prima facie case of retaliatory discharge.

To establish a prima facie case of retaliatory discharge under the act, the employee must demonstrate (1) statutorily protected conduct by the employee, (2) an adverse employment action by the employer, and (3) a causal connection between the two. *Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. App. 2005). This step of the *McDonnell Douglas* test is "not onerous." *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995).

A. Statutorily Protected Conduct

The act prohibits an employer from discharging, disciplining, threatening, or otherwise discriminating against or penalizing an employee because

> (1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official; . . .
>
> (3) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;
>
> (4) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally

> recognized national clinical or ethical standard and potentially places the public at risk of harm . . . .

Minn. Stat. § 181.932, subd. 1. A "report" is "a verbal, written, or electronic communication by an employee about an actual, suspected, or planned violation of a statute, regulation, or common law . . . committed by an employer." Minn. Stat. § 181.931, subd. 6 (2020).

To establish protected conduct, an employee

> need not identify the specific law or rule that the employee suspects has been violated, so long as there is a federal or state law or rule adopted pursuant to law that is implicated by the employee's complaint, the employee reported the violation or suspected violation in good faith, and the employee alleges facts that, if proven, would constitute a violation of law or rule adopted pursuant to law.

Abraham v. County of Hennepin, 639 N.W.2d 342, 354-55 (Minn. 2002).

Minnesota law provides that "[a]t all times there shall be enough qualified personnel on duty to provide the standard of care and maintenance in the hospital which is necessary for the well-being of the persons received for care." Minn. R. 4640.0900, subp. 2 (2019). Metcalf testified in her deposition that this rule requires two people to conduct the pulmonary rehabilitation class employee was leading at the time McElmurry demanded his removal. Metcalf stated that the class required two staff members because there were "elderly patients that [were] on oxygen with tanks and tubing and . . . several machines going at one time and [the supervisors] have to monitor the breathing and their rates and their stats and record them and get them on and off the machines and rotate." She further explained that having only one staff member "is not safe enough to just try and handle

everybody. If someone were to fall who is going to watch the other ones." Allina respiratory therapist Cathy Larson shared Metcalf's assessment of the staffing required to safely conduct the class.

Metcalf further testified that McElmurry's demand that she "immediately" remove employee from the class violated Minn. R. 4640.0900 (2019). At the time McElmurry demanded that Metcalf escort him out, employee was helping four of approximately seven patients get onto and use treadmills and monitoring their blood pressures. Metcalf told McElmurry at the time that removing employee from the class created a safety issue for patients. And she repeated her position during the October 4 meeting with Foster, Cook, and McElmurry. The next day, Metcalf told Iverson that she wanted to file a formal complaint against McElmurry.

Allina argues that Metcalf's reports are not protected conduct because Metcalf merely speculates that removing employee implicated patient safety, it is likely other hospital staff members could have taken his place in the class, and Metcalf could have stopped the class and allowed patients to get off of the machines themselves. And Allina contends that neither rule 4640.0900 nor any other law or established standard requires two qualified persons to be in the room during the class. We are not persuaded.

Viewing the evidence in the light most favorable to Metcalf leads us to conclude that her reports that the immediate removal of employee from the class put patients at risk are protected conduct under the act. It is undisputed that the class took place at Regina Hospital and the patient participants were in the hospital's care. While rule 4640.0900 is broad—requiring hospitals to provide enough qualified personnel as "necessary for the

well-being" of their patients—we are satisfied that Metcalf has made a prima facie showing that leaving only one staff member in the pulmonary rehabilitation class implicated patient well-being. It is for the fact-finder to determine whether employee's removal from the class violated a law, rule, professional clinical or ethical standard, or other recognized standard as defined by the act, and whether Metcalf reported it in good faith.[5]

B. Adverse Employment Action

Allina does not challenge the district court's determination that terminating Metcalf is an adverse employment action. The act itself identifies discharge as an adverse action. Minn. Stat. § 181.932, subd. 1. Accordingly, Metcalf has established this element of her prima facie case.

C. Causal Connection Between Metcalf's Reports and Allina's Adverse Employment Action

Metcalf argues that the timing of her termination and the knowledge of her protected reports by at least two of the people who participated in the termination decision give rise to an inference of retaliatory motive. At the prima facie stage, the requisite causal connection may be demonstrated "by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." *Dietrich*, 536 N.W.2d at 327 (quotation omitted). An agent's actual notice of the facts may

[5] While Allina contends that Metcalf's expressed concern about patient safety is not protected conduct under the act, it does not dispute that Metcalf expressed her concern on three separate occasions—to McElmurry directly on September 27; to Foster, Cook, and McElmurry on October 4; and to Iverson on October 5.

be imputed to the principal. *Centennial Ins. Co. v. Zylberberg*, 422 N.W.2d 18, 21 (Minn. App. 1988); *see also Behnke v. Mod. Brotherhood of Am.*, 208 N.W. 542, 543 (Minn. 1926) ("The local secretary, who collected the dues, was the agent of the lodge, and the law imputes her knowledge to the lodge."); Restatement (Second) of Agency §§ 272, 278 (1958); *cf. Blumberg v. Taggart*, 5 N.W.2d 388, 390 (Minn. 1942) ("We think it is well settled law that an agent's knowledge will *not* be imputed to his principal when he is engaged in an independent fraud." (emphasis added)).

It is undisputed that Allina decided to terminate Metcalf's employment within ten days of the last of her three reports. At least two of the four decision-makers (Iverson and Thompson) were aware of the reports, along with McElmurry, who was in the room when the discharge decision was made. Metcalf told Iverson she planned to file a formal report because McElmurry put patients in harm's way. While Iverson recalled that Metcalf's complaint about McElmurry related to bullying conduct, and conveyed that to Thompson, we must view the evidence in Metcalf's favor. And McElmurry herself acknowledged she became aware of Metcalf's reports about patient safety (including Metcalf's intent to file a complaint against her) during the course of her investigation. In her report, McElmurry stated that Metcalf's "response regarding 'missing meetings' and 'patient care' showed lack of judgment."

The record persuades us that a rational trier of fact could find a causal connection between Metcalf's reports and the decision to end her employment. Viewing the evidence in Metcalf's favor, two of the four decision-makers knew that she had engaged in statutorily protected conduct. And the record further persuades us that a rational finder of fact could

impute McElmurry's knowledge of that protected conduct to the rest of the decision-makers. Indeed, Miller testified that "McElmurry provided information and then we looked a lot to Christy Iverson and to Tom Thompson to provide more information about [Metcalf] because they had a lot more experience than I would say [Loesch] or I had." And although he could not remember specifics, he recalled that "what came out of that is discomfort [with] [Metcalf]'s ability to have good judgment in a patient care kind of setting as it related to [employee] and just the series of things that had gone along that she too had come to a point where [Iverson] was uncomfortable."

As noted above, the burden for establishing a prima facie case of retaliation is not onerous. Metcalf has provided competent evidence that Allina's discharge decision is causally connected to her three protected reports. Because reasonable minds could differ regarding whether Metcalf's complaints about patient safety resulted in her discharge, and she established the other elements of her prima face case, we turn to the second step of the *McDonnell Douglas* analysis.

II. Allina's stated reasons for discharge are legitimate and nonretaliatory.

In the second step of *McDonnell Douglas*, we consider whether the employer produced evidence that the adverse employment action was related to "some legitimate business purpose." *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986). "The reason must be offered by admissible evidence, be of a character to justify a judgment for the defendant, and must be clear and reasonably specific enough to enable the plaintiff to rebut the proffered reason as pretextual." *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 711 (Minn. 1992) (stating employee's "substandard and erratic performance as a manager"

were legitimate and nondiscriminatory reasons for discharge); *see also Hoover*, 632 N.W.2d at 545 (discharging employee because her "files failed to comply with internal policy and federal regulations" was on its face legitimate and nondiscriminatory); *Moore*, 932 N.W.2d at 329 (concluding employee's misuse of sick time and pattern of approving overtime in violation of company policy were legitimate reasons for employer to take adverse employment action).

Allina asserts that the decision-makers discharged Metcalf based on the legitimate, nonretaliatory reasons identified as "issues" in McElmurry's report.[6] These "issues" include the following:

> [Metcalf] had knowledge of the arrest for domestic assault back in June of 2018 and did not bring forward to her leader (Sept 12) or HR immediately (week of July 23). She was aware of the order for protection as staff told her that was the reason he was served on site.
>
> [Metcalf] stated she did not confirm with the RT Board herself if their criteria for licensure and arrests and convictions was accurate. She took [employee]'s word and did not confirm with the Board if working with an arrest for domestic assault on your record was ok.
>
> She contradicted herself stating she didn't know about the arrest until the end of July, which was her initial statement when the concern was brought to HR on September 26.
>
> Any one of the issues she brought forward to [Foster] on September 26, should have been urgent. She however, indicated the concerns were not urgent showed a lack of judgement and leadership and told [Foster] it could wait until the 26th.

[6] All of the decision-makers confirmed that they focused on these issues and relied on the report in deciding to discharge Metcalf.

> [Metcalf]'s responses stating on more than one occasion she wished she wouldn't have said anything until after the trial, put both River Falls and Regina Hospital and staff at risk. This also puts into question her integrity, trust and judgement.
>
> [Employee] was allowed to work 48 shifts after [Metcalf] found out he'd been arrested for domestic assault. This potentially put our patients and staff at risk.
>
> Her response regarding "missing meetings" and "patient care" showed lack of judgement when stating she had meetings to attend and that she couldn't do patient care too.
>
> Her dismissal of [employee]'s erratic behavior and attributing it to "power drinks" and not wanting to test him until after there was a suspicion she heard from co-workers about methamphetamine use, shows lack of leadership and judgement.
>
> She refused and continues to refuse on more than one occasion to release the name of the person reporting serious concerns. There is an overall leadership competency concern with regards to her seeing the big picture. She was unable to see the risk to patients and the organization and wants to be a confidant to her staff. In leadership, this can be a slippery slope, especially from a risk mitigation perspective.
>
> [Metcalf] bringing forward numerous serious concerns to HR all at once on September 26 and then allowing him to work because she needed someone on September 27 and stating [employee] was "fine", shows a lack of leadership judgement.

In sum, Allina's evidence shows that it discharged Metcalf because she exercised poor judgment and management skills by permitting employee to continue working after learning of his arrest for a crime of personal violence and concerning behavior in the workplace, and by resisting the direction to immediately remove him from the workplace. We have no difficulty concluding that Allina's concerns about Metcalf's judgment in

leaving employee to care for patients and work closely with other staff members, and her response to contrary direction are legitimate. And Allina articulated its reasons for discharging Metcalf clearly and with sufficient specificity to enable Metcalf to rebut them as pretextual. Because Allina has established legitimate, nonretaliatory reasons for discharging Metcalf, we turn to the third *McDonnell Douglas* step.

III. A rational trier of fact could find Allina's reasons for discharging Metcalf are a pretext for retaliation.

An employee can meet her "burden of showing pretext 'either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Moore*, 932 N.W.2d at 329 (quoting *Sigurdson*, 386 N.W.2d at 720).[7] Our supreme court has held that "proof that the defendant's explanation is unworthy of credence may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is covering up a discriminatory purpose" as long as the trier of fact could infer the reason is not only pretext but pretext for discrimination. *Hoover*, 632 N.W.2d at 545 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S. Ct. 2097, 2108 (2000)).

[7] Allina repeatedly cites *Mudrich v. Wal-Mart Stores, Inc.*, for the proposition that "[a] pretext inquiry is limited to whether the employer gave an honest explanation of its behavior, not whether its action was wise, fair, or correct." 955 F. Supp. 2d 1001, 1020 (D. Minn. 2013) (quotation omitted). We are not bound by federal court opinions interpreting state law, but may consider them as persuasive authority. *Drewitz v. Motorwerks, Inc.*, 867 N.W.2d 197, 206 (Minn. App. 2015). Nevertheless, our pretext analysis focuses on whether Allina's explanation was false or unworthy of credence, not whether the decision to discharge Metcalf was "wise, fair, or correct."

Hoover involved a loan originator who had been a strong bank employee for three years. *Id.* at 546. But soon after she revealed a fibromyalgia diagnosis and requested help to perform her job, the bank had a special audit performed on Hoover's files. *Id.* at 546-47. The auditor found Hoover's files did not comply with company standards, and recommended that Hoover be warned, trained, and monitored. *Id.* at 547. Instead, the bank fired her but not the other loan originators whose files were similarly out of compliance. *Id.* The supreme court concluded that this evidence "casts sufficient doubt on the truthfulness" of the bank's stated reason for dismissing Hoover and could allow a rational finder of fact to conclude the reason was pretext for discrimination. *Id.*

This court reached a similar conclusion in *Moore*, in which we held that summary judgment was inappropriate on the question of pretext. 932 N.W.2d at 329-30. Moore's employer placed him on a nine-month leave after he filed a union grievance. *Id*. at 327. In explaining its legitimate reasons for taking this action, the employer attributed the extended leave to the fact that Moore was discussing a potential early retirement and severance package. *Id.* at 329. Moore disputed this explanation, saying that he never told the city he planned to retire. *Id.* We concluded that the question of pretext could not be resolved on summary judgment because of Moore's conflicting testimony and because the city's explanation for its "extraordinary" extension of the employee's leave was "sufficiently dubious that a factfinder might well conclude that it is merely pretextual." *Id.*

Metcalf argues that Allina's proferred reasons for discharging her are similarly unworthy of credence and that the evidence could persuade a reasonable jury that her discharge was motivated by retaliatory animus because it was based on McElmurry's

falsehoods and material misrepresentations.[8] On this record, we agree that a rational trier of fact could conclude that Metcalf was discharged based on retaliatory animus.

As a whole, McElmurry's report paints a picture in which Metcalf did not timely or appropriately respond to employee's arrest, failed to respond to concerns raised by other staff, and failed to take on a leadership role to mitigate risk. But the record contains evidence that this picture is not entirely accurate. One of the most damning statements in the report—that Metcalf did not advise anyone of the arrest for at least one month and exercised poor judgment by allowing him to work—is dubious at best. Metcalf and Foster both testified that Metcalf promptly reported the arrest and followed Foster's direction to allow employee to work under observation by Metcalf and another supervisor. Moreover, after learning for the first time in late September of additional staff and physician concerns about employee, Metcalf again reached out to HR immediately. Foster, the appropriate HR person, was not only aware of Metcalf's concerns regarding employee, she again guided Metcalf's response. Cook's affidavit testimony and Foster's September 26 email to McElmurry confirm that Foster advised Metcalf to allow employee to continue working.

[8] Metcalf urges us to adopt and apply the "cat's paw" theory of liability. Under the cat's paw theory, "if a supervisor performs an act motivated by [an unlawful] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Staub v. Proctor Hosp.*, 562 U.S. 411, 422, 131 S. Ct. 1186, 1194 (2011). Under this theory, the employer's final decision-makers need not know of the supervisor's bias or animus to engage in discrimination. *Id.* at 421, 131 S. Ct. at 1193. We need not reach the question of whether the "cat's paw" theory applies because the evidence, when viewed in the light most favorable to Metcalf, reveals that at least two of the decision-makers knew about Metcalf's protected reports.

In short, Metcalf's evidence could support a finding that she acted appropriately to mitigate risk.

Moreover, the record shows that the fact-finders relied on the report. For example, Miller testified that he was not told that Metcalf reached out to HR as soon as employee told her about his arrest or that she, in fact, followed HR's advice. Similarly, Loesch testified that the reported timeline led her to believe that Metcalf was aware of concerns regarding employee's conduct at Regina before late September, and intentionally withheld the information from Loesch. In Loesch's mind, termination was appropriate because she could no longer trust Metcalf, and questioned Metcalf's ability to make sound management decisions.

In short, Metcalf has produced competent evidence that could allow a rational fact-finder to disbelieve Allina's stated reasons for discharging her and infer retaliatory intent. *See Hoover*, 632 N.W.2d at 545 ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993)). Because Metcalf has met her burden of showing there are genuine issues of material fact as to whether she was discharged in violation of the act, we reverse summary judgment and remand for further proceedings.

Reversed and remanded.