**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-1355**

Greg Denoto,
Appellant,

vs.

Sears Imported Autos, Inc., et al.,
Respondents.

**Filed April 9, 2012**
**Affirmed**
**Schellhas, Judge**

Hennepin County District Court
File No. 27-CV-10-22598

Steve G. Heikens, Heikens Law Firm, Minneapolis, Minnesota (for appellant)

Thomas A. Harder, Greta Bauer Reyes, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

**U N P U B L I S H E D  O P I N I O N**

**SCHELLHAS**, Judge

Appellant challenges the district court's summary-judgment dismissal of his common-law claim of wrongful discharge in violation of public policy. We affirm.

## FACTS

Appellant Gregory Denoto began working as a BMW salesperson for respondent Sears Imported Autos Inc. in 1991. In 2008, Denoto leased a BMW 5 Series vehicle from Sears. In December 2008, Denoto complained to the Sears service department that the heat in the vehicle was inadequate. The service notes indicate that, on December 5, Denoto complained that the heat in his car was inadequate and it took 15 minutes for the car to start to warm up. On December 16, a day on which the air temperature was below zero, Denoto complained that after running the vehicle's engine for 45 minutes, it did not produce heat. Sears performed a heat test and flushed the heater core. According to Denoto, also on December 16, he discovered that BMW 5 Series owners had reported problems with heat output and there had been a buy-back or trade assist on a few vehicles because of these problems. On January 9, 2009, Denoto again complained of poor heat in the vehicle. Sears installed an air diffuser, which Denoto concedes substantially reduced the heat issue.

Also on January 9, Denoto met with Todd Olson, the Sears BMW sales manager and Denoto's immediate supervisor. Denoto and Olson dispute what occurred in that meeting, but according to Denoto, the discussion became heated, and Olson told Denoto that he was complaining too much about the heating problem in his vehicle. And Denoto claims that Olson told him that he felt that Denoto should not "express to BMW clients that [their vehicles] had a heating and a defrosting problem, because it was only on certain cars." Denoto asserts that he left the meeting believing that he was fired. He did not appear for work the following day, missing a mandatory meeting. He alleges that he

e-mailed Olson that day to inform him that he would not be reporting to work. On January 14, Olson sent Denoto a letter confirming Denoto's resignation and stating that if Denoto had not resigned, he would have been terminated for his failure to perform certain requirements of his position. The parties agree that Denoto's last day of employment was January 9, 2009.

Between December 16, 2008, and January 9, 2009, Denoto sold one BMW 5 Series vehicle. Before his employment ended, Denoto told this client that some of the BMW 5 vehicles had heat and defrost problems. He asked the client whether she had experienced problems with the heat or defrost in her vehicle, and she said, "[N]o."[1] In April 2009, Denoto sent the Sears service manager an e-mail in which he mentioned the vehicle's "defrost." This e-mail is the only documentation in this case that evidences any complaint by Denoto about the impact of the vehicle's heat problem on the defrost system. In November 2009, Sears installed a permanent fix in Denoto's vehicle.

On December 15, 2009, Denoto commenced an action against Sears and Olson, alleging a statutory whistleblower violation, common-law wrongful discharge in violation of public policy, age discrimination, aiding and abetting age discrimination, and tortious interference with a contract. Sears and Olson moved for summary judgment on all claims.

[1] Service records indicate that as early as 2007, owners of a few BMW 5 Series vehicles complained of heat problems in the vehicles on days when the temperature was below zero. These records do not show that any of the owners complained of a problem with the defroster. Sears worked with the regional service technician of BMW of North America, the manufacturer of BMW vehicles, to try to fix the heating issues. BMW of North America authorized a buy-back or trade assist on three vehicles where there had been multiple complaints. According to the deposition testimony of Sears and BMW NA officials, a buy-back or trade assist does not reflect the seriousness of a problem but can occur for a variety of reasons.

In opposition to summary judgment, Denoto argued that Sears and Olson discharged him because of his "refusal to lie [about an] unfixable defect" in the heating and defroster systems in the BMW 5 Series vehicles. He also argued that his discharge violated a clear public policy—protecting the safe operation of motor vehicles and highway safety, as reflected in Minn. Stat. § 169.71, subd. 3 (2010), which prohibits driving when frost impedes proper vision. For purposes of the summary-judgment motion, the district court assumed that Sears and Olson had terminated Denoto's employment. The court granted summary judgment to Sears and Olson, concluding that Denoto's common-law retaliatory-discharge claim failed as a matter of law because he failed to show that the reason for his discharge violated a clear public policy. On appeal, Denoto challenges only the court's dismissal of his common-law claim of wrongful discharge in violation of public policy.

**D E C I S I O N**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal we determine whether genuine issues of material fact exist and "whether the [district] court erred in its application of the law." *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). "[T]he party resisting summary judgment must do more than rest on mere averments"; it must provide concrete evidence of genuine and material fact issues for the elements necessary to prove its claim. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71

(Minn. 1997). We "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

In Minnesota, the employee-employer relationship is generally at-will; the employer or employee can terminate the relationship at any time for any reason or no reason at all. *Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., Inc.*, 637 N.W.2d 270, 273 (Minn. 2002). In *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 571 (Minn. 1987), the Minnesota Supreme Court recognized an exception to this general rule: a common-law cause of action for wrongful discharge in violation of public policy. The court held that

> an employee may bring an action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

408 N.W.2d at 571. An employee must demonstrate that his discharge was "motivated by his good faith refusal to violate the law." *Id.* at 572. The scope of this action is extremely limited because only fundamental and important policies justify a judicially created exception to the at-will doctrine. *Nelson v. Productive Alts., Inc.*, 715 N.W.2d 452, 456 (Minn. 2006). A "clear public policy [must be] at stake." *Id.* at 457. In *Nelson*, the supreme court noted that, in considering such a claim, it "has generally been reluctant to undertake the task of determining public policy since this role is usually better performed by the legislature." *Id.* at 457 n.5.

Indeed, the Minnesota Supreme Court has allowed a common-law cause of action for wrongful discharge in violation of public policy to proceed in very limited

circumstances. In *Phipps*, an employee alleged he was discharged for refusing his employer's order to pump leaded gasoline into a vehicle designed for unleaded gasoline. 408 N.W.2d at 571. The employee pointed to a specific regulation under the Clean Air Act that expressly prohibited this activity. *Id.* In *Freidrichs v. W. Nat'l Mut. Ins. Co.*, 410 N.W.2d 62, 63 (Minn. App. 1987), a boiler inspector alleged he was discharged from his employment for his refusal to refrain from reporting violations of safety standards. The inspector pointed to the specific statutes that set forth boiler-inspection mandates and the penalties for violating the mandates. 410 N.W.2d at 65.

Unlike the appellants in *Phipps* and *Freidrichs*, Denoto fails to point to a statute that expressly prohibits the conduct Sears allegedly requested of Denoto. Denoto alleges that Sears's concealment of the heating problems in the vehicles violated a clear public policy found in Minn. Stat. § 169.71, subd. 3. This statute states, "No person shall drive any motor vehicle with the windshield or front side windows covered with steam or frost to such an extent as to prevent proper vision." Minn. Stat. § 169.71, subd. 3. Denoto argues that "[t]his statute provides a tether to the clear mandated public policy of public safety on highways" and that

> [w]ithout a working defroster, the driver will be surprised to find himself or herself with frost or steam on their windshield and inability to remedy the problem. The driver there[by] endangers the public. Where a dealer knows of the problem and conceals it from the driver, the dealer's conduct places the public in jeopardy.

We conclude that Denoto's allegation that Sears discharged him for refusing to conceal from customers that some owners of BMW 5 Series vehicles reported heat

problems does not implicate a clear public policy. Minnesota Statutes section 169.71, subdivision 3, on which Denoto relies as the source of a public policy that Sears violated, prohibits very specific conduct by drivers operating motor vehicles. The statute does not regulate any type of conduct or disclosures of car dealership employers or their employees. Nor does the statute embody a clear public policy that supports a cause of action for an employee of a car dealership who is discharged for refusing to conceal from vehicle owners or prospective vehicle owners that a few vehicles of the same model had heating problems. *See Nelson*, 715 N.W.2d at 456–57 (dismissing claim of wrongful discharge in violation of public policy because statutes neither expressly prohibited employer's actions nor contained clear public policy to protect employee from employer's actions).

Moreover, even if Sears's alleged conduct implicated a clear public policy of public safety on highways, no facts in the record support a conclusion that the alleged conduct violated the public policy; nothing in the record establishes that Denoto or a vehicle owner with heating problems drove with improper vision in violation of the statute. *See Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 352 (Minn. 2002) (recognizing that in common-law cause of action for wrongful discharge, "common law protects those fired for their refusal to violate the law" (citing *Phipps*, 408 N.W.2d at 571)).

Denoto argues that the district court erred in applying the law to his common-law claim because in stating the applicable rule the court stated, "when the reason for the discharge clearly violates a legislative or judicially recognized public policy," rather than

stating when the reason violates a *clear* public policy. Because we review the district court's conclusion of law de novo, we need not consider Denoto's argument. *See SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011) (stating that appellate courts apply de novo standard of review to district court's legal conclusion on summary judgment).

Denoto also argues that summary judgment is precluded by conflicting evidence and facts in the record that give rise to reasonable inferences in his favor. *See Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007) (stating that on summary judgment weighing evidence is error); *Wagner v. Schwegmann's S. Town Liquor, Inc.*, 485 N.W.2d 730, 733 (Minn. App. 1992) (stating that on summary judgment "factual inferences must be resolved in favor of the nonmoving party"), *review denied* (Minn. July 16, 1992). Denoto's argument is unavailing. First, no weighing of evidence is required to determine as a matter of law that Denoto's common-law claim for wrongful discharge in violation of public policy fails. Second, Denoto's proposed factual inferences are not reasonable. *See Superior Constr. Servs., Inc. v. Belton*, 749 N.W.2d 388, 393 (Minn. App. 2008) (stating at summary judgment courts are "required to draw only *reasonable* inferences" in favor of nonmoving party); *City of Savage v. Varey*, 358 N.W.2d 102, 105 (Minn. App. 1984) ("The court is not required to save the non-moving party by drawing unreasonable inferences."), *review denied* (Minn. Feb. 27, 1985).

We conclude that as a matter of law the district court did not err by dismissing Denoto's common-law claim for wrongful discharge in violation of public policy.

**Affirmed.**