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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-1577**

Mitch Absey,
Respondent,

vs.

Dish Network Service, LLC,
Appellant.

**Filed June 10, 2013**
**Reversed**
**Bjorkman, Judge**

Ramsey County District Court
File No. 62-CV-10-6691

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

Kerry L. Middleton, Joseph Weiner, Littler Mendelson, P.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

**BJORKMAN**, Judge

On appeal from judgment following a jury verdict in a whistleblower action, appellant employer argues the district court erred by (1) submitting special-verdict question four to the jury, (2) denying appellant's motion for judgment as a matter of law,

(3) permitting respondent to amend his complaint, (4) allowing the jury to consider punitive damages, and (5) awarding attorney fees for time spent on unsuccessful and unrelated claims. Because we conclude there is no evidence to support an affirmative answer to special-verdict question four, appellant is entitled to judgment as a matter of law, and we reverse.

## FACTS

In 1999, appellant Mitch Absey began working for respondent DISH Network Service LLC (Dish) as a technician at the company's Chanhassen office. In 2002, Dish promoted Absey to the position of quality assurance supervisor (QAS) and transferred him to its Maplewood office.

Marshall Hood was the general manager of Dish's Maplewood office. In the summer of 2008, Hood became angry and smashed a satellite dish in the middle of the office. The following spring, Absey reported the incident and other instances of Hood's violent and aggressive behavior to Dyann Turner, a human-resources representative. Turner did not investigate the 2008 incident because it occurred before she began working at Dish. On January 21, 2010, Hood got into an argument with a Dish employee and punched his office door, leaving a crack in the door. Absey reported Hood's conduct to Turner and filed a formal complaint.[1]

[1] Turner investigated Absey's 2010 report; Hood self-reported the incident, saying that he tapped the door and there was an indentation in the door. Hood initially received a warning for his conduct but later received a three-day paid suspension and was put on a coaching plan after his supervisors learned the full extent of his conduct.

On February 2, Hood and Turner informed Absey that his position would be eliminated on February 19 as part of a reduction in force (RIF), which cut 77 QAS positions nationwide.[2] Dish planned the RIF in the fall of 2009. At that time, Dish had six QAS positions in Minnesota: three in Chanhassen, two in Maplewood, and one in Baxter. As part of the RIF, Dish eliminated one QAS position in Chanhassen and one QAS position in Maplewood. The decision to eliminate Absey's position was made in December 2009.

Hood informed Absey that he could request a transfer to another position within the company. Hood said there were openings for technicians in Minnesota and for the manager of training and quality (MTQ) position in Chanhassen. To transfer within Dish, an employee must (1) complete an internal transfer request, (2) prepare a resume, and (3) deliver the request and resume to his manager for submission to human resources. Absey requested a transfer to and interviewed for the MTQ position but was not selected. He did not request a transfer to any other position within the company. His last day of employment was February 19, 2010.

In January 2010, one of the three QASs in Chanhassen voluntarily transferred to another position. Dish eliminated that QAS position as part of the RIF. Shaun Jastraub, Dish's training manager at the time Absey was discharged, was aware in early 2010 that one of the two remaining QASs in Chanhassen was planning to transfer to a technician position. But this QAS did not officially request a transfer until March 2010, after

[2] Dish created 10 or 11 new QAS positions across the country around the time of the RIF, but no QAS positions were added in Minnesota.

Absey's discharge. In July 2010, Todd Sery, the MTQ at the Chanhassen office, considered hiring Absey for this vacant QAS position. Sery spoke with Turner, who discouraged him from hiring Absey, saying, "Well, do you really want to hire him? He was let go for a reason." Absey did not apply for and was not offered this QAS position.

On August 26, 2010, Absey commenced this action alleging that he reported Hood's violation of Minn. Stat. § 1.50 (2008), which recites Minnesota's policy of zero tolerance for violence, and that Dish retaliated against him by (1) discharging him in the RIF and (2) not offering him the MTQ position in Chanhassen.[3]

A jury trial was held from January 23 to February 2, 2012. On the first day of trial, the district court granted Absey's motion to amend his complaint to assert that Dish retaliated against him by not offering him a QAS position in Chanhassen. During trial, the district court allowed Absey to further amend his complaint to assert that he reported to Dish a violation of Minn. Stat. § 609.72 (2008) (criminal disorderly conduct) and to claim punitive damages. Dish moved for judgment as a matter of law (JMOL) after Absey presented his case and renewed this motion at the close of the evidence, arguing that the evidence did not establish that Absey reported a violation of law or that Dish retaliated against Absey. The district court denied both motions.

In its special verdict, the jury found that Absey made a good-faith report of a suspected violation of state law to Dish. But the jury found that Absey's spring 2009 report was not a motivating factor in Dish's decision to eliminate his position as part of

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[3] Absey also alleged that Hood interfered with his employment contract with Dish. Absey settled his claim against Hood.

the RIF and that his January 2010 report was not a motivating factor in Dish's decision not to transfer Absey to the MTQ position in Chanhassen. Special-verdict question four asked, "Was the report on or about January 21, 2010 a motivating factor in [Dish's] decision to not offer [Absey] a QAS position in Chanhassen?" The jury answered in the affirmative and awarded Absey $50,000 in lost wages and $20,000 in damages for his emotional distress. In the punitive-damages phase of the trial, the jury awarded Absey $200,000.

After trial, Dish again moved for JMOL and, in the alternative, a new trial. Absey moved for attorney fees and costs. The district court denied Dish's motions and awarded Absey $308,150 in attorney fees and $8,636.25 in costs. This appeal follows.

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

Dish argues for reversal and judgment in its favor as a matter of law. Specifically, Dish contends the district court erred by denying its motion for JMOL because the jury's answer to special-verdict question four is inconsistent with Minnesota law and not supported by the evidence.

JMOL is appropriate when there is not a legally sufficient evidentiary basis for a jury to find for a party on an issue or the verdict is contrary to law. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007); *see also* Minn. R. Civ. P. 50.01(a). We review de novo the denial of a motion for JMOL, viewing the evidence in the light most favorable to the prevailing party. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009).

Minnesota's whistleblower act prohibits employers from discharging or otherwise retaliating against an employee who, "in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official." Minn. Stat. § 181.932, subd. 1(1) (2012). An employee seeking to recover for a violation of the whistleblower act must establish (1) statutorily protected conduct, (2) adverse action by the employer, and (3) a causal link between the two. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). To satisfy the adverse-action element of the claim, the employee must show that "the employer's conduct resulted in a material change in the terms or conditions of her employment." *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841-42 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 7, 2007). The whistleblower act only protects current employees.[4] *Lee v. Regents of Univ. of Minn.*, 672 N.W.2d 366, 374-75 (Minn. App. 2003); *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 389 (Minn. App. 2003). Former employees cannot bring a whistleblower claim based on an employer's failure to rehire them. *Guercio*, 664 N.W.2d at 389.

We turn first to Dish's argument that the district court erred by submitting special-verdict question four to the jury because it is contrary to Minnesota law. Dish contends that Absey's allegations regarding the Chanhassen QAS position assert a nonactionable

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[4] Absey argues that, under *Calvit v. Minneapolis Pub. Schs.*, 122 F.3d 1112, 1119 (8th Cir. 1997), a former employee may bring a whistleblower claim so long as the protected conduct occurred while the person was employed. We disagree. *Guercio* concluded that a former employee could not assert a whistleblower claim even though he engaged in protected conduct while employed. 664 N.W.2d at 383, 388-89.

failure-to-rehire claim. While we agree that a failure-to-rehire claim is not actionable under the whistleblower act, special-verdict question four does not, on its face, misstate the law. Because the question does not have a temporal component, it does not require the jury to make a finding contrary to Minnesota law. Accordingly, we reject this aspect of Dish's argument.

The focus of our analysis is whether there is any evidence to support submitting special-verdict question four to the jury and to sustain the jury's affirmative response. Absey acknowledges that it is improper to ask a jury to decide matters about which there is no genuine issue of material fact. *See Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997) (stating that, on a motion for JMOL, the district court examines whether, as a matter of law, there is sufficient evidence to present a fact question for the jury to decide). The role of the jury is to resolve disputed issues of fact. *See Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1 (Minn. 1989); *Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 n.1 (Minn. App. 1992). When a party does not present evidence to support his claims, there is no issue for the jury to decide. *See Kozak v. Weis*, 348 N.W.2d 798, 801 (Minn. App. 1984) (concluding that, in a trespass action, plaintiff did not raise a fact question for the jury when he failed to present evidence establishing the boundary line of his property). Submission of unsubstantiated claims to a jury is inappropriate because it invites jurors to reach a verdict based on speculation and conjecture. *Cf. E.H. Renner & Sons, Inc. v. Primus*, 295 Minn. 240, 243, 203 N.W.2d 832, 834 (1973) (stating that jury verdicts may not be based on mere conjecture or speculation).

Special-verdict question four asks the jury whether Dish decided not to offer Absey a QAS position in Chanhassen because of his January 2010 complaint. An employer's decision not to grant an employee's transfer request could satisfy the adverse-action element of a whistleblower claim. But Absey failed to establish that Dish committed an action with respect to the Chanhassen QAS position that materially changed the terms or conditions of his employment. The uncontested evidence shows that Absey never requested a transfer to a QAS position in Chanhassen. Moreover, the undisputed evidence demonstrates that there were no open QAS positions in Chanhassen during the period between Absey's reports about Hood's conduct and his discharge.[5] In short, there is no evidence that, during Absey's employment, Dish was ever faced with a decision whether to offer Absey a QAS position in Chanhassen. Accordingly, there is no evidence that Dish committed an adverse action against Absey to support an affirmative answer to special-verdict question four.

The only evidence that could potentially support the jury's answer relates to events that occurred when Absey no longer worked for Dish. Following Absey's discharge, a QAS position opened in Chanhassen. Sery testified that he considered hiring Absey for the position; but Turner discouraged him from doing so, stating Absey was "let go for a reason." The jury likely considered this testimony in answering "yes" to special-verdict question four. Therein lies the problem. The whistleblower act does not apply to former employees; Absey cannot recover on a failure-to-rehire theory. *See Guercio*, 664 N.W.2d

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[5] As noted above, the QAS position of the Chanhassen employee who transferred to another position in January 2010 was eliminated in the RIF.

at 389. Special-verdict question four invited the jury to speculate and make a finding that is inconsistent with the law. On this record, we conclude that there is no evidence to support the jury's answer to special-verdict question four.

Absey nonetheless argues that Dish is not entitled to JMOL because it should have protected him by transferring him to the Chanhassen office after he reported Hood's conduct. We are not persuaded. Absey cites no legal authority to support this argument, and he did not assert any claims against Dish based on Hood's misconduct, such as negligent hiring or retention.[6] More importantly, Absey did not raise this failure-to-protect argument in the district court. We decline to consider the argument for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Although we hesitate to overturn a jury verdict, our careful review of the record demonstrates there is no evidence that Dish committed an adverse action against Absey by not offering him a QAS position in Chanhassen.[7] We observe that Absey had his day in court; he presented sufficient evidence to ask the jury whether Dish committed adverse actions by discharging him and not offering him the MTQ position. The jury explicitly rejected these claims in its answers to special-verdict questions two and three. Because

[6] Absey, moreover, cites no legal authority that supports the proposition that an employer's inaction—not offering a position for which the employee did not apply—constitutes adverse action under the whistleblower act.

[7] We note that Absey's ever-changing theories of liability made it difficult for the district court to discern what evidence corresponded with each of his claims. And Absey did not seek to amend his complaint to assert the basis of liability embodied in special-verdict question four until the first day of trial, making it difficult for the court to assess Dish's JMOL motions.

Dish is entitled to JMOL, we reverse the judgment in its entirety and do not address Dish's other arguments.

**Reversed.**