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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1658

Nuvit Alagok,
Appellant

vs.

State of Minnesota,
Respondent.

Filed April 22, 2013
Affirmed
Chutich, Judge

Ramsey County District Court
File No. 62-CV-11-1417

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Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant Nuvit Alagok challenges the summary-judgment dismissal of her claim of discriminatory discharge on the basis of national origin, religion, and gender. Alagok argues that the district court erred by determining that no genuine issue of material fact

existed, by rejecting her “cat’s paw” theory of discrimination, and by applying a same-actor inference to her claims. Because the district court properly granted summary judgment on all of Alagok’s claims, we affirm.

FACTS

Alagok is a Muslim woman originally from Turkey who has resided in the United States for 14 years. After being terminated from her probationary position with the Minnesota Department of Transportation (the department), Alagok asserted a number of discrimination claims against the department. The following are the relevant and, unless otherwise noted, undisputed underlying facts.

In April 2009, the department hired Alagok as an entry-level transportation associate. Transportation associates clear snow and debris from roadways to ensure the safe flow of traffic. As one of the top-ranking applicants for the position, Alagok received her first choice of station and shift, and she selected the day shift at the Maple Grove truck station. Alagok was hired for a one-year probationary period. If she successfully completed the probationary period, Alagok would become a permanent transportation generalist.

Alagok’s supervisor at the Maple Grove station was John Hanzalik. Hanzalik advocated for Alagok during the hiring process because he wanted her to be placed at the Maple Grove station. Hanzalik assigned Alagok to drive with Ray Kroyer, a transportation generalist, during her probationary period. Alagok claimed that Kroyer said “all Muslims are terrorists.” Alagok was aware of the department’s complaint process, but she never filed a formal complaint about Kroyer’s statements.

At Alagok's three-month evaluation, Hanzalik found that she generally "meets expectations." He also noted that "culture differences and language differences are sometimes a challenge for all of us, we just continue communicating."

On July 20, 2009, Alagok took an unpaid leave to travel to Turkey for family reasons. During her leave, Hanzalik was diagnosed with cancer. Alagok alleges that shortly after Hanzalik's diagnosis and her return from leave, Hanzalik's attitude towards her changed drastically. Hanzalik yelled at Alagok numerous times for her performance and, on at least one occasion, yelled at her in his office with the door open so her co-workers could hear his criticisms. Alagok claims that Hanzalik teased her about her inability to speak English and how she pronounced certain words. Alagok never filed a formal complaint about Hanzalik's behavior.

Because of Hanzalik's illness, some of his supervisory duties were assigned to William Augello, a senior transportation generalist at the Maple Grove station. Augello began to supervise Alagok and was concerned about her performance. On September 21, 2009, Augello gave Alagok a non-disciplinary warning for not responding to a call from dispatch ordering her to remove debris from the roadway. Rather than following the instructions, Alagok remained in the truck station and ate her lunch. Alagok thought, apparently mistakenly, that she had already picked up the piece of debris. When he coached her about this incident, Augello thought that she had a "cavalier" and dismissive attitude about her mistake and did not appreciate the safety risks of her actions. Alagok believes that the department's reaction to the incident was overblown.

On the morning of December 8, 2009, Alagok and other employees were dispatched to address snowy and icy road conditions. Hanzalik instructed Alagok to salt the freeway ramps as needed but not to salt the main roadway because it could make it icier in extremely cold weather. Despite the instructions, Hanzalik, Augello, and other co-workers observed Alagok salting the main roadways. Alagok was instructed over the radio several times by Hanzalik and others to stop salting the highway, and each time she responded "10-4," indicating that she understood. Alagok claims that she tried to stop distributing salt on the highway, but her truck malfunctioned. Hanzalik eventually instructed Alagok to stop her truck. The department claims that she stopped abruptly and dangerously in the middle of a ramp, but Alagok testified that she pulled over on the side of a ramp to speak with Hanzalik. When Hanzalik and Augello spoke to her after the incident, Alagok told them that they were making a big deal out of nothing.

On December 10, 2009, the department terminated Alagok's employment. Beverly Farraher, Hanzalik's supervisor, made the final decision not to certify Alagok as a transportation associate. Farraher stated that the decision was based on the December 8 incident and prior occasions when Alagok failed to follow directions and showed poor judgment. Alagok's termination letter stated that she was not being certified due to unsatisfactory performance and

> [Alagok's] inability to confidently and safely demonstrate success in operating heavy equipment: snow-plowing with the confidence and ability to clear the roadways as well as distributing salt and de-icing chemicals to achieve clear roadways in a safe and timely manner; the inability to act in emergency situations with immediate supervisory direction;

> and [Alagok's] inability to be self directed in performing the day-to-day operations required in [her] position.

Farraher also thought that Alagok's dismissive reaction to being coached about the December 8 incident demonstrated a lack of appreciation by Alagok for the seriousness of the incident.

Alagok filed a complaint in district court asserting several claims of discrimination on the basis of gender, religion, and national origin in violation of the Minnesota Human Rights Act, Minn. Stat. § 363A.08, subd. 2(3) (2010), and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2006). The department moved for summary judgment on all of Alagok's claims.

The district court granted the department's motion, concluding that Alagok "presented neither direct evidence of discrimination nor sufficient circumstantial evidence for a reasonable fact finder to infer that her sex, religion or national origin 'actually motivated' defendant's decision to discharge her." This appeal followed.

D E C I S I O N

A motion for summary judgment shall be granted when "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. "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

"We review a decision to grant or deny summary judgment de novo." *Premier Bank v. Becker Dev., LLC*, 785 N.W.2d 753, 758 (Minn. 2010). Appellate courts do not resolve issues of fact but only determine whether factual issues exist and whether the district court erred in applying the law to the facts. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 866 (Minn. 2000). In doing so, we construe the facts in the light most favorable to the party opposing summary judgment and review questions of law de novo. *Bearder v. State*, 806 N.W.2d 766, 770 (Minn. 2011).

I. *McDonnell Douglas*

Alagok asserted claims of national origin and religious discrimination under both the Minnesota Human Rights Act and Title VII.[1] *See* Minn. Stat. § 363A.08, subd. 2(3) (stating that employers are prohibited from discriminating against an employee based on her "race, color, creed, religion, national origin, sex, . . . or age"); 42 U.S.C. § 2000e-2(a)(1) (stating that it is unlawful for employers to discharge a person "because of such individual's race, color, religion, sex, or national origin"). To support a discrimination claim, the employee must first "present a prima facie case of discrimination by a preponderance of the evidence," which requires her "to present proof of discriminatory motive." *Sigurdson v. Isanti Cnty.*, 386 N.W.2d 715, 720 (Minn. 1986). The employee can show discriminatory motive either by employing the *McDonnell Douglas* framework

[1] Alagok also asserted two claims for discrimination on the basis of gender. The district court concluded that these claims had no merit and Alagok does not appear to contest these findings on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived). Thus, we construe her appeal as relating only to her claims for national origin and religious discrimination.

or by direct proof of motive, which may consist of direct and circumstantial evidence. *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37–38 (Minn. App. 2009).

Claims under both Title VII and the Minnesota Human Rights Act are analyzed under the *McDonnell Douglas* framework. *Sigurdson*, 386 N.W.2d at 719–20. Under the *McDonnell Douglas* burden-shifting test, if an employee establishes a prima facie showing of discriminatory motive through circumstantial evidence, the burden of production "shifts to the employer to present evidence of some legitimate, non-discriminatory reason for its actions." *Sigurdson*, 386 N.W.2d at 720. If the employer can do so, the employee has the burden of "establishing that the employer's proffered reason is a pretext for discrimination." *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001).

The district court concluded that Alagok established a prima facie case and that the department articulated a non-discriminatory reason for her termination. Neither party contests these conclusions. Therefore, the issue on appeal is whether Alagok identified a fact question that the department's proffered reason was mere pretext. To avoid summary judgment under the third step of the *McDonnell Douglas* framework, "the employment discrimination plaintiff must put forth sufficient evidence for the trier of fact to infer that the employer's proffered legitimate nondiscriminatory reason is not only pretext but that it is pretext for discrimination." *Id*. at 546.

Alagok contends that a fact question exists as to whether the department's stated reason was mere pretext because (1) Hanzalik criticized her ability to communicate, (2) the department changed its reasons for her termination, and (3) Farraher's affidavit,

upon which the district court relied, contained hearsay. Because none of the reasons cited by Alagok create a genuine issue of material fact that the department's stated reason was mere pretext, we conclude that the district court did not err in granting summary judgment.

Language Criticisms

First, Alagok argues that Hanzalik's criticisms demonstrate his discriminatory animus. At Alagok's three-month evaluation, Hanzalik found that she generally "meets expectations," but he noted that "culture differences and language differences are sometimes a challenge for all of us, we just continue communicating." The context of Hanzalik's statement, a positive performance review, implies that it was not a derogatory reference to Alagok's national origin. Moreover, this review took place more than four months before her termination. Hanzalik subsequently conducted a six-month review, where he gave Alagok a mix of "meets expectations" and "needs improvement" ratings.

Nothing in the record indicates that Farraher relied on Hanzalik's comment about communication when she terminated Alagok's employment. Because of the timing and lack of connection to Alagok's discharge, Hanzalik's comment does not create a fact issue. *See DLH*, 566 N.W.2d at 71 ("[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.").

Shifting Reasons for Termination

Next, Alagok contends that the department's reasons for her termination shifted from Hanzalik's "on-the-job criticism of culture/language" into the performance and safety concerns articulated in Farraher's termination letter. When an employer gives multiple reasons for firing an employee, it may indicate that the employer's proffered reason is a mere pretext for discrimination. *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 570–71 (8th Cir. 1997). Here, the department did not give multiple reasons for firing Alagok, but has always claimed that it fired Alagok for her performance, particularly her performance on December 8. And as noted above, Hanzalik's statements about communication with Alagok were statements in her three-month review and were never cited as a reason for her termination.

Hearsay

Finally, Alagok argues that the district court improperly relied on Farraher's affidavit, including inadmissible hearsay evidence. Specifically, Farraher's affidavit contains information about Alagok's performance that Farraher did not witness firsthand but that she heard from Augello and Hanzalik.

Alagok is correct that when deciding a summary-judgment motion, "[t]he district court must disregard inadmissible hearsay evidence." *Bersch v. Rgnonti & Assocs., Inc.*, 584 N.W.2d 783, 788 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998). But Alagok failed to object to Farraher's affidavit before the district court, and therefore she has waived this argument on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also In re Trusts A & B of Divine*, 672 N.W.2d 912, 921 (Minn. App. 2004)

(declining to address appellant's hearsay argument on appeal in part because "nothing in the record shows that appellant objected in the district court to admission of the evidence"). Nevertheless, we note that because Farraher did not have direct contact with Alagok, Augello's and Hanzalik's reports demonstrate Farraher's knowledge about Alagok's performance. Therefore, the statements are relevant to establish the basis for Farraher's decision to terminate Alagok.

Thus, the district court properly concluded that Alagok failed to identify specific evidence that created a genuine issue of material fact that the department's stated reason was a pretext for discrimination.

II. Cat's Paw Argument

Alagok next contends that she presented sufficient evidence to overcome summary judgment under the "cat's paw" theory of discrimination. "In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 566 F.3d 733, 742 (8th Cir. 2009) (quotation omitted). Under this theory, even though the final decision maker does not know of the subordinate's bias, the employer can still be held liable for discrimination "because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011). To support a discrimination claim under the cat's paw theory, the employee must demonstrate that her supervisors were motivated by discrimination, that the supervisors

were causal factors in the final decisionmaker's termination, and that the supervisors had specific intent to cause the employee to be terminated. *Id.*

Alagok claims that Hanzalik and Augello manipulated Farraher to get Alagok fired. The record demonstrates that Farraher had no direct contact with Alagok and thus based her termination decision solely on Hanzalik's and Augello's reports on Alagok's performance. To survive summary judgment under the cat's paw theory, Alagok must demonstrate genuine issues of material fact as to whether Hanzalik's and Augello's actions were motivated by discriminatory animus and whether they had specific intent to cause her termination. Alagok relies heavily on Hanzalik's statement during her performance review that "culture differences and language differences are sometimes a challenge for all of us, we just continue communicating." As we discussed above, however, this general statement made several months before her termination is insufficient to create a fact issue as to whether Hanzalik was motivated by discriminatory animus.

Alagok points to no direct evidence in the record that demonstrates Hanzalik and Augello were motivated by Alagok's national origin or religion. As the district court concluded "Alagok cites only speculation, hearsay and her own mere averments to support an argument that either Hanzalik or Augello had discriminatory animus." "A nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). Accordingly, the district court did not err in declining to apply the "cat's paw" theory.

III. Same-Actor Inference

In addition, the same-actor inference undermines Alagok's cat's paw theory. When a protected class member is hired and fired by the same person "within a relatively short period of time," there is "a strong inference that discrimination was not a motivating factor." *Herr v. Airborne Freight Corp.*, 130 F.3d 359, 362–63 (8th Cir. 1997). "This inference arises because it is unlikely that the same supervisor would hire a woman, only to turn around and discharge her for that reason." *Id.* at 363.

Here, Alagok was not hired and fired by the same person; Hanzalik hired her and Farraher fired her. But, under Alagok's theory of the case, the same-actor inference still applies. Alagok admits that Hanzalik, with full knowledge that she was a Muslim Turkish woman, advocated for her during the hiring process and was excited about her joining the Maple Grove shop. Alagok further claims that Hanzalik manipulated Farraher to fire her based on his own discriminatory animus because of Alagok's national origin and religion. Under these circumstances, however, it is unlikely that Hanzalik would hire her only to advocate for her termination months later based on those attributes. Alagok points to no evidence in the record to rebut this inference. *See Southcross Commerce Ctr., LLP v. Tupy Props., LLC*, 766 N.W.2d 704, 710 (Minn. App. 2009) ("[W]hen a rebuttable presumption exists in favor of the *moving* party, the nonmoving party is required to rebut the presumption in order to survive summary judgment."). Accordingly, the district court did not err in concluding that the same-actor inference defeated Alagok's claims.

Even viewing the facts in the light most favorable to Alagok, and considering the record as a whole, the evidence is insufficient to enable a rational trier of fact to find that the department's stated reason for termination was a mere pretext for discrimination. Alagok has failed to identify a genuine issue of material fact to show that her discrimination claims should proceed to trial. *See* Minn. R. Civ. P. 56.05 (stating that summary judgment is appropriate when the nonmoving party has failed to "present specific facts showing that there is a genuine issue for trial"). Accordingly, we affirm the district court's grant of summary judgment in favor of the department.

Affirmed.