STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1615

Thomas Bicha,
Appellant,

vs.

Water Gremlin Company,
Respondent.

Filed September 2, 2008
Affirmed
Collins, Judge[*]

Ramsey County District Court
File No. C9-06-009342

Philip G. Villaume, Villaume & Schiek, P.A., BLN Office Park, 2051 Killebrew Drive, Suite 611, Bloomington, MN 55425 (for appellant)

Joseph F. Lulic, Hanson, Lulic & Krall, LLC, 700 Northstar East, 608 Second Avenue South, Minneapolis, MN 55402 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.

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

COLLINS, Judge

Appellant challenges the district court's grant of summary judgment to respondent, arguing that the district court erred by concluding that he had not (1) made a

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

report in good faith under the Minnesota Whistleblower Act, (2) established that he was discharged in violation of public policy, or (3) shown that he was entitled to proceed to trial on his claim for negligent infliction of emotional distress. Because there are no genuine issues of material fact, and the district court did not err as a matter of law, we affirm.

FACTS

In 1984, Thomas Bicha was hired as a machine operator by Water Gremlin Company, a manufacturer of battery terminals and sinkers for weighting fishing lines. Bicha was later assigned to a position in Water Gremlin's maintenance department, and, approximately three years before his termination, was promoted to first-shift supervisor. In this capacity, he supervised approximately 39 full-time and temporary employees, including die operators. His additional duties included ensuring that Water Gremlin complied with local, state, and federal laws. Bicha was an at-will employee for the entire term of his employment with Water Gremlin.

To produce the battery terminals and sinkers, Water Gremlin injects molten metal, including lead, into a die. As a result of this process, oil smoke is created. As first-shift supervisor, Bicha would relay various complaints from the die operators to upper management. Bicha contends that he repeatedly complained about the presence of excess smoke to upper management for the purpose of "exposing illegalities and . . . to promote the safety, health, and welfare of his co-workers and the general public."

In April 2005, Water Gremlin terminated Bicha's employment, citing his repeated failure to comply with attendance policies. Bicha subsequently sued Water Gremlin,

asserting a claim under the Minnesota Whistleblower Act ("the Act"), Minn. Stat. § 181.932 (2006); a claim for wrongful termination; a claim for negligent infliction of emotional distress; and respondeat superior. After conducting discovery, Water Gremlin moved for summary judgment. The district court granted the motion and ordered judgment to the company on all of Bicha's claims. Bicha's appeal followed.

D E C I S I O N

When reviewing a grant of summary judgment, this court determines whether there are genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court reviews the record in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). And we may affirm a district court's grant of summary judgment if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 827 (Minn. App. 1995).

I. The district court did not err by concluding that Bicha had not established a prima facie violation of the Minnesota Whistleblower Act.[1]

In Minnesota, whistleblower claims are analyzed under the *McDonnell Douglas* burden-shifting test. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). Under this test, the employee must first establish a

[1] Bicha's complaint asserted violations of Minn. Stat. § 181.932, subd. 1(a), the provision of the Act protecting an employee who reports violations, and Minn. Stat. § 181.932, subd. 1(c) (2006), the provision of the Act protecting employees who refuse an employer's order to participate in an illegal act. The district court granted summary judgment to Water Gremlin on both claims, but Bicha's brief does not raise the subd. 1(c) issue on appeal, and, therefore, it appears that he does not challenge it. And, in any event, it is waived. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

prima facie case of retaliatory discharge under Minn. Stat. § 181.932, subd. 1(a), by showing: (1) statutorily protected conduct, (2) adverse employment action, and (3) a causal nexus between the two. *Id.* If the employee can establish a prima facie case, the burden of production then shifts to the employer to articulate a legitimate, nonretaliatory reason for its action. *Id.* If the employer meets its burden of production, the employee must demonstrate that the employer's articulated justification is pretextual. *Id.* The employee bears the overall burden of persuasion. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 445 (Minn. 1983).

Assuming, without deciding, that Bicha's behavior was protected by the statute and that he was subject to adverse employment action, there is insufficient evidence in the record to support the third element of his prima facie case. To establish a prima facie case of retaliatory discharge, it is incumbent upon Bicha to demonstrate a causal connection between his statutorily protected conduct (in this case, his reports) and his termination. *See Cokley*, 623 N.W.2d at 630. The record contains no direct evidence that Water Gremlin terminated Bicha because of his complaints about alleged illegalities. And Water Gremlin vigorously disputes Bicha's assertion that he was terminated for that reason, contending that Bicha's discharge was the result of his tardiness and poor attendance during the final months of his employment.

This court has acknowledged that retaliatory motive is difficult to prove by direct evidence. *Id.* at 632. Thus, "an employee may demonstrate a causal connection by circumstantial evidence that justifies an inference of retaliatory motive." *Id.* But we have also cautioned that mere "speculation . . . is not circumstantial evidence." *Id.* at

633. One way to establish an inference of reprisal is by showing a close temporal proximity between the statutorily protected activity and the termination. *Id.* At oral argument, Bicha's counsel conceded that the record does not reveal when Bicha began making reports to Water Gremlin management about the plant's air quality. And Bicha stated in his complaint that he reported Water Gremlin's alleged violations of the Minnesota Occupational Health and Safety Act as early as 1989. Thus, the timing of Bicha's termination in relation to protected activity does not support an inference of causation. *See Freeman v. Ace Tel. Ass'n*, 467 F.3d 695, 697-98 (8th Cir. 2006) (holding that a one-month period between allegedly protected conduct and termination was insufficient to create fact issue on the causal-connection element under the Act); *cf. Hubbard*, 330 N.W.2d at 445 (finding genuine issue existed when plaintiff was terminated two days after serving complaint alleging retaliation under the Minnesota Human Rights Act (MHRA)); *Tretter v. Liquipak Intern., Inc.*, 356 N.W.2d 713, 715 (Minn. App. 1984) (finding that an inference of causal connection was established under the MHRA when an employee was demoted 3 months after complaining about her manager and was terminated 6 months later).

Bicha essentially argues that he has shown a causal connection because he claims that the more he complained "the more trouble [he] was getting in." But Bicha cites no authority for the proposition that such an assertion, without more, is sufficient to create a genuine issue of material fact on the casual-connection element of his prima facie case. Because the facts in the record are insufficient to establish Bicha's prima facie case of

employment discrimination under the Act, the district court did not err by granting summary judgment to Water Gremlin on his whistleblower claim.

II. The district court did not err by concluding that Bicha's common-law wrongful-termination claim failed as a matter of law.

Bicha next contends that the district court erred by granting summary judgment to Water Gremlin on his wrongful-termination claim. Generally, the employee-employer relationship in Minnesota is at-will, meaning that the relationship can be terminated for any reason or for no reason at all. *Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270, 273 (Minn. 2002). But Minnesota courts have acknowledged a common-law cause of action for wrongful discharge in violation of public policy. *See Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588, 592 (Minn. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987). An employee has a common-law wrongful-discharge cause of action "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." *Phipps*, 408 N.W.2d at 571. Similar to the *McDonnell Douglas* test, after a plaintiff demonstrates that the discharge resulted from his refusal to engage in an illegal activity, the burden shifts to the employer to articulate a different reason for the discharge. *Id*. at 572. Then, to prevail, the plaintiff must prove that the discharge was actually motivated by an improper reason. *Id.* The supreme court recently held that "the Whistleblower Act does not preclude common-law wrongful-discharge actions premised on *Phipps.*" *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 456 (Minn. 2006).

Bicha argues that his common-law unlawful-discharge claim survives summary judgment because he "did in fact report violations of public policy because he believed he would be subjected to serious physical harm." But Bicha's argument is without merit. To avoid summary judgment on his *Phipps* claim, Bicha must produce evidence that he was discharged as a result of his refusal to engage in an illegal activity. *See* 408 N.W.2d at 571. There is no such evidence in the record. Indeed, Bicha's affidavit focuses primarily on the circumstances surrounding his termination, not on an assertion that he refused to engage in illegal conduct. And in his deposition, Bicha admitted that he did not recall whether he had ever "refused to do something that [management] told [him] to do." Although Bicha alleged in his complaint that he was "terminated in retaliation for his good faith refusal to violate some . . . safety laws and environmental laws," this assertion standing alone is insufficient to defeat summary judgment. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) ("[T]he party resisting summary judgment must do more than rest on mere averments."). Because Bicha failed to provide evidence that he refused to engage in an illegal activity, the district court did not err by granting summary judgment to Water Gremlin on Bicha's *Phipps* claim.

Lastly, Bicha makes the related argument that the district court erred by granting summary judgment to Water Gremlin on his claim of negligent infliction of emotional distress, stating that: "[i]f [this court] determines that Bicha has provided sufficient facts for the Whistle Blower violation or the Public Policy exception violation (intentional torts by definition) then Bicha respectfully requests that [this court] allow for [negligent infliction of emotional distress]." Bicha adds the assertion that the district court

improperly denied his "claim" for respondeat superior. But because we have determined that the district court did not err by granting summary judgment to Water Gremlin, and thus there is no surviving basis for such claims, we conclude that (1) the district court did not err by granting summary judgment to Water Gremlin on Bicha's negligent infliction of emotional distress claim and (2) vicarious liability does not lie.

Affirmed.