STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1878

Charles D. Hayes,
Appellant,

vs.

George C. Dapper, as personal representative
of the estate of Charles Dapper, Sr.,
d/b/a Chuck's Automotive Service,
Respondent.

Filed September 23, 2008
Reversed and remanded
Shumaker, Judge

Hennepin County District Court
File No. 27-CV-06-5047

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Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

SHUMAKER, Judge

Appellant challenges the district court's decision granting summary judgment in favor of respondent on appellant's whistleblower claim under Minn. Stat. § 181.932

(2004). Because the district court erred in determining that there were no genuine fact issues, we reverse and remand for further proceedings.

FACTS

On appeal following a jury trial on his claim of retaliation for filing a workers' compensation claim, appellant Charles Hayes challenges the district court's pretrial decision to grant summary judgment on his whistleblower claims in favor of his former employer, Charles Dapper, Sr., d/b/a Chuck's Automotive Service (Dapper).[1]

Hayes began his employment with Dapper in September 1988, performing general automotive work. He worked for Dapper for 16 years, until he was terminated on September 13, 2004.

In the months leading up to his termination, Hayes argued with another employee, Ben Politte, on numerous occasions. There are disputed facts in the record regarding Politte's employment position. At their depositions, Politte characterized his position as that of service manager or service writer, and Dapper testified that Politte was a service writer. Politte testified that he did not have authority to hire or fire other employees, and Hayes's deposition testimony is inconsistent on this issue, indicating both that Politte "had authority as far as the last few months" that Hayes worked for Dapper and that Politte "was doing most of the estimating and stuff."

[1] Charles Dapper, Sr., died during the pendency of the action, and George C. Dapper, as personal representative of the estate, was substituted as the defendant and is the respondent on this appeal.

Some arguments between Hayes and Politte occurred in Dapper's presence and concerned Politte's sales tactics, which Hayes considered fraudulent. Hayes claims that Politte sold customers unnecessary parts and overcharged customers for labor.

On September 13, 2004, Hayes called in sick to work. Later that day, Dapper telephoned Hayes to inform him that he was going to be permanently laid off. Hayes objected and suggested that Dapper lay off Politte instead because Politte had only been working for Dapper for 8 years, whereas Hayes had worked for Dapper 16 years. Dapper allegedly stated that he was keeping Politte because he was better at sales. Before hanging up, Dapper also allegedly told Hayes, "You don't have no f---in' workers' comp case," referencing a workers' compensation claim that Hayes had submitted less than a month earlier.

Following his layoff, Hayes brought retaliation claims against Dapper, alleging violations of the Minnesota Whistleblower Act and the Minnesota Workers' Compensation Act. The district court granted Dapper's motion for summary judgment on the whistleblower claim, concluding that Hayes had failed to show that he could establish a prima facie case of retaliatory discharge. But the district court denied Dapper's motion for summary judgment on the retaliation claim.

A jury trial was held on Hayes's retaliation claim, and the jury returned a verdict for Dapper. The district court denied Hayes's posttrial motions and entered judgment. This appeal follows.

D E C I S I O N

On appeal from summary judgment, we view the evidence in the light most favorable to the party against whom judgment was granted, and we determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Borgersen v. Cardiovascular Sys., Inc.*, 729 N.W.2d 619, 623 (Minn. App. 2007). No genuine issues of fact exist when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

Our reasoning is guided by *Donnay v. Boulware*:

> Summary judgment is a "blunt instrument" and should not be employed to determine issues which suggest that questions be answered before the rights of the parties can be fairly passed upon. It should be employed only where it is perfectly clear that no issue of fact is involved, and that it is not desirable nor necessary to inquire into facts which might clarify the application of the law.

275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966). *See also Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (acknowledging summary judgment is a blunt instrument). "[A] weak showing and unlikely success at trial does not justify a grant of summary judgment." *Rixmann v. City of Prior Lake*, 723 N.W.2d 493, 497 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

Minnesota's Whistleblower Act provides that "[a]n employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize 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(a) (2004).

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 prima facie case of retaliatory discharge by showing (1) statutorily protected conduct, (2) adverse employment action, and (3) a causal connection between the two. *Id.* If the employee can establish this prima facie case, "the burden of production then shifts to the employer to articulate a legitimate, nonretaliatory reason for its action." *Id.* Finally, the employee may 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). On summary judgment, the employee is not required to "establish" the claim but rather must show that genuine issues of material fact exist on the elements of a prima facie case.

Here, the district court determined that Hayes had not made a "report" as required by the whistleblower statute. The court "may determine as a matter of law that certain conduct does not constitute a 'report'" under the whistleblower statute. *Rothmeier v. Inv. Advisers, Inc.*, 556 N.W.2d 590, 593 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997). The statute does not define "report" or provide guidance on its interpretation. In the past, we have applied the ordinary meaning of the term and defined "report" as "'1. To make or present an often official, formal, or regular account of. 2. To relate or tell about; present.'" *Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs*, 536

N.W.2d 20, 23 (Minn. App. 1995) (quoting *The American Heritage Dictionary* 1531 (3d ed. 1992)), *aff'd*, 552 N.W.2d 711 (Minn. 1996).

In *Janklow*, we concluded that an employee who had contacted governmental entities to express his concerns about various violations had made a report because his "conduct amount[ed] to relating or presenting concerns in an essentially official manner." *Id*. Although we noted the "official manner" of the report, we did not require that the report be "official." *Id.* Indeed, the definition we adopted encompasses reports that are not necessarily official. *Id.* (defining "report," in part, as presenting a regular account of or relating or telling about); *see also Skare v. Extendicare Health Servs., Inc.*, 515 F.3d 836, 841 (8th Cir. 2008) (agreeing that an employee need not report a violation in a formalized manner to gain the protection of the whistleblower statute). *But see Buytendorp v. Extendicare Health Servs., Inc.*, 498 F.3d 826, 834-35 (8th Cir. 2007) (determining that "Minnesota courts have interpreted the [whistleblower] statute as containing a formality requirement," but concluding that "[t]he contours of the formality requirement . . . remain cloudy"). Moreover, the express language of the whistleblower statute does not contain a formality requirement. We will not read into a statute a requirement that the legislature has purposefully or inadvertently omitted. *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006).

Other caselaw further defines the parameters of the term "report." For instance, we have stated that "the *mere mention* of a suspected violation already acknowledged by one's employer does not constitute a 'report'." *Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A.*, 586 N.W.2d 811, 813 (Minn. App. 1998) (emphasis added),

review denied (Minn. Feb. 18, 1999), *abrogated on other grounds by Anderson-Johanningmeier v. Mid-Minnesota Women's Ctr., Inc.*, 637 N.W.2d 270 (Minn. 2002). Similarly, asking a question or providing feedback is not the same as making a "report." *See Gee v. Minn. State Colls. & Univs.*, 700 N.W.2d 548, 555 (Minn. App. 2005) (explaining that employee's inquiries were not "reports"); *Michaelson v. Minn. Mining & Mfg. Co.*, 474 N.W.2d 174, 180 (Minn. App. 1991) (characterizing employee's "report" as feedback which was insufficient to establish retaliatory discharge claim), *aff'd*, 479 N.W.2d 58 (Minn. 1992). And statements expressing an employee's mere dissatisfaction have been found, at least by the federal courts construing Minnesota law, not to be "reports." *Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006).

Hayes alleges, in broad terms, that he "made numerous reports . . . of violations of both federal and state laws." It is undisputed, however, that Hayes made no reports "to any governmental body or law enforcement official," and therefore the only question is whether he made a "report" to his employer. *See* Minn. Stat. § 181.932, subd. 1(a) (requiring that a "report" be made to the employer if not to a government body or official). As examples of his reports, Hayes says he complained that customers were sold unnecessary parts and overcharged for labor and parts and that he objected to these practices on numerous occasions. Many of Hayes's complaints were directed at Politte, with whom Hayes apparently argued frequently. Hayes testified that Dapper was present during some of these arguments, though it is unclear from the record whether Dapper was simply in the vicinity of the argument, or standing directly beside his two arguing

employees. Hayes points to at least one instance in which he complained directly to Dapper that Politte had unnecessarily replaced a belt tensioner. At his deposition, Hayes testified that during the last six months of his employment he told Dapper on one or two occasions that customers were being sold new belt tensioners, even though their cars did not need them.

This testimony indicates that Hayes brought up the potentially illegal activities—the sale of unnecessary parts and overcharging customers—to his employer over a lengthy period. His objections were not formal and were not in writing, but they did not need to be. Hayes's testimony indicates that he repeatedly objected to the practices by arguing with Politte while Dapper was present and by complaining directly to Dapper on at least one or two occasions.

Although Hayes's objections were not official or formal, given their apparent frequency, they could be interpreted as "regular account[s] of" the allegedly fraudulent practices. *See Janklow*, 536 N.W.2d at 23 (giving two definitions of "report," including "[t]o make or present an often . . . regular account of" (quotation omitted)). Moreover, Hayes's objections could be interpreted as "relating" to his employer his awareness of the practices of selling unnecessary parts and overcharging for labor and his belief that these practices violated the law. *See id.* (providing that another definition of "report" is "[t]o relate or tell about; present" (quotation omitted)). In light of the record and the definition of report, we cannot agree that, as a matter of law, Hayes did not make a report to his employer. Therefore, summary judgment on that ground was not appropriate. *See Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (explaining that summary judgment

appropriate only when record shows that either party is entitled to judgment as a matter of law).

The whistleblower statute requires not only that a report have been made, but also that it have been made in good faith. Minn. Stat. § 181.932, subd. 1(a). To establish that the report was made in good faith, the employee must show that "the report[] [was] made for the purpose of blowing the whistle, i.e., to expose an illegality." *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000). In assessing good faith, we look to "the content of the report" and to "the reporter's purpose in making the report . . . at the time the report[] [was] made, not after subsequent events have transpired." *Id.*

Here, the district court determined that Hayes did not make any report in good faith because Hayes lacked the intent to blow the whistle. But "[w]hether an employee made a report in 'good faith' is a question of fact." *Cokley*, 623 N.W.2d at 630. Hayes testified that he objected to the allegedly fraudulent practices because he "was trying to correct the problem." A fact-finder could conclude that Hayes was objecting to the practices to expose them, or to blow the whistle, by informing his employer that he knew of his coworker's illegal activities or practices and wanted them to stop.

Hayes broadly alleges that the reports he made "implicated well recognized state and federal regulations regarding consumer protection." A specific rule or law need not be named if the alleged facts, "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). And an actual violation of law is not necessary, but "the reported conduct must at least implicate a violation of law." *Obst*, 614 N.W.2d at 200. On appeal, Hayes

has pointed out that his reports, at the very least, implicated Minn. Stat. § 325F.59 (2004), which provides:

> No shop shall charge for unauthorized repairs. No shop shall perform repairs it knows or has reason to know are unnecessary to the restoration of a motor vehicle, appliance, or dwelling place unless the customer authorizes the repairs after the shop informs the customer that they are unnecessary.

We agree. Hayes claims that Politte sold customers unnecessary parts, such as belt tensioners and rotors, and that he complained about this practice to Dapper directly and to Politte while Dapper was present. During his deposition, Hayes testified that he saw Politte tell customers that their rotors "were junk," even though "the rotors were perfectly within specs and smooth." Viewing the facts in a light most favorable to Hayes, we conclude that this conduct, at the very least, implicates section 325F.59.

The district court also concluded that Hayes did not make a report because Dapper was already aware of the allegedly fraudulent business practices when Hayes expressed his objections. On prior occasions, Minnesota courts have explained that when an employer is aware of a violation of law, the employee's report of that known violation is not statutorily protected conduct because there was no whistle for the employee to blow. *See, e.g.*, *Obst*, 614 N.W.2d at 203 (concluding that an employee "cannot be said to have been trying to expose what was so openly known and acknowledged" by his employer); *Rothmeier*, 556 N.W.2d at 593 (finding that employee's mention of a suspected violation that the employer already acknowledged was not a report).

But an employer's previous knowledge does not necessarily lead to the conclusion that the employee lacked good faith. The Minnesota Supreme Court has cautioned that

an employer does not automatically escape liability under the whistleblower statute simply because the employer knew of the violation or suspected violation before the employee reports it. *Obst*, 614 N.W.2d at 203; *see also Rothmeier*, 556 N.W.2d at 593 (noting that an employer need not be "ignorant of a suspected violation before an employee makes a report"). "For example, there may be instances in which the employee is unaware that the employer already knows of the alleged violation and the employee otherwise acts in good faith." *Obst*, 614 N.W.2d at 203 n.5. We conclude that Dapper's awareness of the practices would not, in this case, bar Hayes's whistleblower claim as a matter of law.

Fact questions exist that preclude the district court from determining whether Hayes engaged in statutorily protected conduct. Viewing the evidence in the light most favorable to Hayes, a jury could conclude that he made reports of violations or possible violations to his employer. But we would be remiss if our analysis ended here, because in order to demonstrate a prima facie case of a retaliatory discharge, an employee must also show adverse employment action and a causal connection between his reports and that adverse action. *Cokley*, 623 N.W.2d at 630.

We conclude that Hayes has demonstrated at least a fact issue as to adverse employment action because his employment was terminated and a person with less seniority was retained. Furthermore, Dapper showed hostility toward Hayes in the conversation about termination when he said Hayes had no workers' compensation claim.

We further conclude that Hayes has demonstrated a sufficient fact question as to a causal connection between his statutorily protected conduct and his termination.

"[R]etaliatory 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.* Mere "speculation, however, is not circumstantial evidence." *Id.* at 633. Rather, "close proximity" between the statutorily protected activity and the termination may "support an inference of reprisal." *Id.* Hayes claims that he made reports about the sale of unnecessary parts on numerous occasions, and he specifically testified that he made reports about the sale of unnecessary belt tensioners within the last six months of his employment. Dapper similarly testified that Hayes had complained about overcharges and undercharges for labor "a dozen times maybe" over the course of his employment. The connection, though arguably weak, is sufficient to create a question of fact sufficient to survive summary judgment.

On appeal, Hayes also claims that he is protected by the Minnesota Whistleblower Act because he refused to participate in the alleged consumer fraud. An employer cannot discharge or otherwise retaliate against an employee when

> 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.

Minn. Stat. § 181.932, subd. 1(c) (2004). The district court's summary-judgment order does not address this issue, and Dapper suggests that Hayes did not raise this issue below. Hayes agrees that the issue was not addressed by the district court, but he contends that the issue was presented to the district court, and in support of that contention he points to

various pages of his memorandum in opposition to summary judgment. Although Hayes's memorandum in opposition to summary judgment indicates that he refused to participate in the allegedly illegal or fraudulent practices, his memorandum does not refer to or make any specific argument addressing Minn. Stat. § 181.932, subd. 1(c). Because Hayes did not raise this argument before the district court, we will not address it further here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.").

Reversed and remanded.