STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0823

Paul Allen Bray,
Appellant,

vs.

Starbucks Corporation, et al.,
Respondents.

Filed December 26, 2017
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-16-3979

Zorislav R. Leyderman, The Law Office of Zorislav R. Leyderman, Minneapolis, Minnesota (for appellant)

Mary S. Young, Charmaine K. Harris, Blackwell Burke P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

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

LARKIN, Judge

Appellant challenges the district court's summary-judgment dismissal of his public-accommodation, negligent-retention, and negligent-supervision claims against

respondents, a coffee shop proprietor and its corporate parent. Because there is a genuine issue of material fact regarding whether respondents discriminated against appellant based on appellant's transgender status, we reverse in part and remand. But because appellant's negligence claims are statutorily preempted, we affirm the summary-judgment dismissal of those claims.

FACTS

This case comes to us on appeal from the district court's summary-judgment dismissal of appellant Paul Allen Bray's public-accommodation discrimination claim against respondents Starbucks Corporation and Starbucks Coffee Company (Starbucks) under the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.44 (2016 & Supp. 2017), as well as his negligent-retention and negligent-supervision claims. The summary-judgment record contains the following assertions, which are disputed.

Eden Prairie Starbucks

Between 2012 and 2013, Bray frequently visited a Starbucks coffee shop in Eden Prairie. Bray became personally acquainted with Sophia Peka, a Starbucks employee who often worked at the drive-through when Bray visited. Peka was friendly and provided Bray good customer service. Bray invited Peka to lunch during one of their conversations. Peka agreed to have lunch with Bray, but the lunch never occurred.

In his complaint, Bray identifies himself as a "transgender/transsexual male." He began hormone therapy in September 2012. In March 2013, Bray legally changed his name to Paul Allen Bray. Shortly after changing his name, Bray informed Adam Voth, an Eden Prairie Starbucks employee, that he was transitioning from female to male and had legally

changed his name. Bray shared this information to avoid confusion or suspicion about the new name on his credit card. Voth promised that he would keep this information confidential.

On July 3, 2013, Bray visited the Starbucks drive-through in Eden Prairie. Peka took Bray's order at the speaker in the drive-through. When Bray pulled up to the pick-up window, Peka appeared to be very angry, did not greet him, grabbed his debit card from his hand, and "slammed the window very hard." After approximately three to five minutes, another Starbucks employee opened the window and handed Bray his drink and debit card. As Bray left the drive-through, he observed Peka at the pick-up window serving other customers. Following the July 3 incident, Bray observed Peka serve and interact with other customers when he visited the Eden Prairie Starbucks, including those going through the drive-through ahead of him, but he observed her walk away from the pick-up window when he approached it.

On July 10, Bray visited the Eden Prairie Starbucks to speak with a manager about Peka's behavior. Bray described his interactions with Peka and the incident on July 3 to a shift manager. The shift manager explained that Peka was uncomfortable interacting with Bray because he was not "a real man." Bray asked the shift manager for clarification, and the shift manager stated, "Oh, I mean it's because you're transgender." The shift manager stated that he would pass Bray's complaint on to the store manager. Bray continued to visit the Eden Prairie location from July 11 to August 23. Peka did not serve or interact with Bray, but Bray received adequate service from other Starbucks employees.

The Eden Prairie Starbucks was closed for renovations at the end of August 2013 and reopened at the end of September. Bray visited the Eden Prairie location on September 26, September 27, and October 3 and received satisfactory customer service from an employee other than Peka. On October 5, Bray visited the Eden Prairie location and that same employee served him. Bray observed Peka point her finger at Bray and state, "That's him," to the Starbucks employee. After Peka's statement, the Starbucks employee had a disgusted look on her face, hesitated when handing Bray his drink, and did not say anything as she gave him his drink. Bray alleges that following the incident on October 5, other Starbucks employees were unfriendly and rude to him and had a "disgusted look on their faces" when they served him. Bray also experienced a wait time that was five to ten minutes longer than he had previously experienced. Bray returned to the Eden Prairie Starbucks two or three times to complain to the manager. Bray left his phone number with an employee and requested that the manager call him to speak about his treatment by Starbucks employees. The manager did not respond to Bray's requests. At the end of November 2013, Bray stopped patronizing the Eden Prairie Starbucks because of his treatment by employees there.

Edina Starbucks

In December 2013, Bray began to patronize a Starbucks in Edina. Amanda Bretvold, a Starbucks employee at the Edina location, often served Bray during his visits in December 2013. Bray and Bretvold had friendly conversations, and Bretvold served Bray in a professional manner. During a conversation with Bretvold, Bray invited her to

lunch. Bretvold replied that she "had a boyfriend." Bray responded that he "wasn't looking for a relationship." Bray did not bring up having lunch to Bretvold after this conversation.

On December 28 or 29, Bray noticed a Starbucks employee sitting inside the Edina Starbucks who appeared to be on break. Bray thought he recognized the employee from the Eden Prairie Starbucks. On December 30, Bray returned to the Edina location. Bretvold and Sheila, another Starbucks employee, were behind the counter when Bray entered.[1] Bretvold and Sheila abruptly left the counter as soon as they saw Bray. Bray waited at the counter for approximately five to ten minutes before another Starbucks employee took his order. That employee was rude to him. Bray received his drink, sat down in one of the chairs at the Starbucks, and placed a call to a friend using his cell phone. Sheila approached Bray, stopped close to him, and stared at his body, including his breasts and pelvic area. Sheila then said to Bretvold, using her headset, "I want to have sex with him." Bray asked if there was a problem, Sheila said no, and he left Starbucks shortly after.

On January 1, 2014, Bray visited the Edina location again. A few days later, Bray called the manager of the Edina Starbucks. Bray summarized the incidents at the Edina and Eden Prairie locations to the manager, told her that he was very upset about the incidents, and told the manager that he wanted something to be done about it. The manager asked Bray to give her a few days to look into the problem and talk to the people involved. The manager called Bray two or three days later, denied that her employees did anything wrong, and stated that Bretvold and Sheila did not treat customers badly.

[1] Sheila's last name is not in the record.

In July 2014, Bray sued Starbucks, asserting a "public accommodations discrimination and harassment/hostile environment" claim under the MHRA, as well as negligent retention and supervision claims. Bray alleged that prior to the July 3, 2013 incident with Peka, Peka "found out that [he] was a transgender/transsexual male and decided that, as a Starbucks employee, she would terminate all future interactions with [him] because of his status as a transgender/transsexual male." Bray alleged that the Starbucks employee he recognized from the Eden Prairie location at the Edina location disclosed Bray's "sex and/or gender," "[his] status as a transgender/transsexual male," and "[Peka]'s dislike of [him]," to Edina Starbucks employees. Bray alleged that his treatment by Starbucks employees caused him to suffer "significant emotional distress, shame, humiliation, and embarrassment."

In January 2017, Starbucks moved for summary judgment, arguing that (1) Bray did not meet his burden to establish a prima face case of discrimination based on his transgender status and (2) Bray's discrimination claims based on events prior to July 29, 2013 were time-barred. The district court granted Starbucks's motion, reasoning that because of the MHRA's one-year statute of limitations, "the only conduct properly considered by the Court is that which allegedly occurred from July 29, 2013 onward." The district court also reasoned that Bray had not demonstrated a prima facie case of discrimination and that, because Bray had not demonstrated actionable discrimination, "it follows that [Starbucks was] not negligent in retaining or supervising its employees." This appeal follows.

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 of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists "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." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). If reasonable minds might draw different conclusions from the evidence presented, summary judgment is inappropriate. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 665 (Minn. 2015).

This court reviews a district court's grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). "[Appellate courts] view the evidence in the light most favorable to the party against whom summary judgment was granted to determine whether there are any genuine issues of material fact and whether the district court correctly applied the law." *Id.* This court will affirm a district court's grant of summary judgment if it can be sustained on any grounds. *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171, 175 (Minn. App. 2010). Summary judgment is "not intended as a substitute for trial," and "its use should be limited to cases in which it is perfectly clear that no issue of fact is involved." *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 506 (Minn. App. 1989) (quotations omitted), *review denied* (Minn. Feb. 9, 1990).

I.

Before we consider the elements of Bray's public-accommodation discrimination claim under the MHRA, we address several related issues.

Factual Allegations Regarding Conduct Before July 29, 2013

As a threshold matter, Starbucks argues that the district court correctly concluded that Bray's "claims related to pre-July 29, 2013 contacts at the Eden Prairie, Minnesota Starbucks location" are time-barred. The district court ruled that the only conduct it could consider "is that which allegedly occurred from July 29, 2013 onward."

This court reviews the application of a statute of limitations de novo. *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013). "A claim of an unfair discriminatory practice must be brought as a civil action . . . within one year after the occurrence of the practice." Minn. Stat. § 363A.28, subd. 3(a). A lawsuit is commenced on the day it is served. Minn. R. Civ. P. 3.01(a). Bray served Starbucks on July 29, 2014. Thus, discriminatory acts occurring before July 29, 2013 are outside the statute of limitations and generally cannot be the basis for a discrimination claim.

Bray argues that his entire MHRA claim is timely under the continuing-violations doctrine. The continuing-violations doctrine is an exception to the MHRA's one-year statute of limitations and applies when an unlawful discriminatory practice "manifests itself over time, rather than as a series of discrete acts." *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn. App. 1994). Courts apply the continuing-violation doctrines to toll the statute of limitations in discrimination actions when discriminatory acts of a party "over a period of time indicate a systematic repetition of the same policy and constitute a

sufficiently integrated pattern to form, in effect, a single discriminatory act." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 440 n.11 (Minn. 1983). To establish a continuing violation, a plaintiff must show that at least one incident of discriminatory conduct occurred within the limitations period. *Giuliani*, 512 N.W.2d at 595.

The key question here is whether the alleged discriminatory acts that Bray experienced at the Eden Prairie Starbucks before July 29, 2013, are sufficiently connected to the alleged discriminatory practices that he experienced after July 29, 2013, to constitute a continuing violation. Bray's deposition testimony indicates that the July 3, 2013 incident, in which Peka allegedly grabbed Bray's debit card and slammed down the drive-through window, was the only discriminatory act that he experienced at the Eden Prairie Starbucks prior to July 29, 2013. Bray stated that Peka avoided serving him after that incident, but he received adequate services from other Starbucks employees. Bray further stated that he received satisfactory customer service from another employee when he visited the Eden Prairie Starbucks on September 26 and 27 and October 3. Bray indicated that, following the October 5 incident, when Peka pointed out Bray to another employee, other Starbucks employees at the Eden Prairie location began to treat him rudely.

Bray's deposition testimony suggests that he did not experience a continuous pattern of discriminatory treatment at the Eden Prairie Starbucks from July 2013 through October 2013. Instead, it indicates that there was a significant period of time following the July 3, 2013 incident during which he received adequate service from Starbucks employees and did not experience discrimination. Because the alleged discriminatory conduct of Starbucks employees at the Eden Prairie Starbucks before and after July 29, 2013, does not

constitute a sufficiently integrated pattern to form a single discriminatory act, the continuing-violation doctrine does not apply to conduct prior to July 29, 2013 and claims based on such conduct are time-barred.

However, the MHRA's statute of limitations "does not refer to evidence and, like other statutes of limitations, does not bar evidence relevant to a timely filed claim, especially otherwise admissible evidence that would assist a fact-finder in ascertaining the truth." *Kalia v. St. Cloud State Univ.*, 539 N.W.2d 828, 833 (Minn. App. 1995). Evidence of discriminatory acts that occurred prior to the statute-of-limitations period may be probative of a defendant's motive or intent regarding any of a plaintiff's timely filed claims. *Id.* at 835; *see also Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1, 10 (Minn. 1984) (holding that statements made prior to statute of limitations period showing willfulness of defendant's indifference to plaintiff's rights were admissible). Thus, evidence regarding the conduct of Starbucks employees before July 29, 2013, is properly considered if it is probative of whether Peka or other Starbucks employees acted with discriminatory intent on or after that date. *See Kalia*, 539 N.W.2d at 835 (stating that evidence of discriminatory acts that occurred prior to the statute of limitations period may be probative of a defendant's motive or intent regarding any of a plaintiff's timely filed claims).

Deposition Testimony Regarding Statements of the Shift Manager

Starbucks argues that Bray's deposition testimony regarding the shift manager's alleged statement that Peka was uncomfortable interacting with Bray because he is transgender is "inadmissible hearsay that must be disregarded on a motion for summary

judgment." Bray counters that the shift manager's statement is admissible as a statement of a party-opponent.

Starbucks made its hearsay argument in district court. The district court did not decide the issue because it determined that, "even assuming [the shift manager's statement] is not inadmissible hearsay, this statement by [the shift manager] does not link [Peka's] perceived rudeness to Bray's status as a transgender/transsexual male."

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). A statement is not hearsay if the statement is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Minn. R. Evid. 801(d)(2)(D). To the extent that evidence is inadmissible hearsay, it must be disregarded on a motion for summary judgment. *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976); *Blackwell v. Eckman*, 410 N.W.2d 390, 391 (Minn. App. 1987).

The shift manager's comments to Bray at the Eden Prairie Starbucks regarding another Starbucks employee's conduct at that location appear to be within the scope of the shift manager's employment with Starbucks. Indeed, Starbucks does not argue otherwise or offer any argument to support its assertion that the statement is inadmissible hearsay. We therefore treat Bray's deposition testimony regarding the shift manager's explanation of Peka's conduct as a statement of a party-opponent, and we consider this evidence in our de novo summary-judgment analysis.

Bray's Reliance on Allegations in the Complaint

Starbucks argues that Bray impermissibly relies on unsupported allegations in his complaint to oppose summary judgment. To prevent summary judgment, "the nonmoving party must do more than rely on unverified or conclusory allegations in the pleadings or postulate evidence which might be produced at trial." *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998). "The nonmoving party must present specific facts which give rise to a genuine issue of material fact for trial." *Id.* Because Bray's deposition testimony is consistent with the allegations in his complaint, his reliance on the allegations in opposing summary judgment is immaterial.

II.

We now turn to the elements of Bray's public-accommodation discrimination claim. The MHRA provides:

> It is an unfair discriminatory practice:
>
> (1) to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of . . . sexual orientation . . . [.]

Minn. Stat. § 363A.11, subd. 1(a)(1).

The MHRA defines "[s]exual orientation" to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03, subd. 44. A "[p]lace of public accommodation" is "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to

the public." *Id.*, subd. 34. The provisions of the MHRA are "construed liberally" to accomplish the anti-discrimination purpose of the statute. Minn. Stat. § 363A.04.

A plaintiff may prove a discrimination claim under the MHRA using one of two evidentiary frameworks. *Goins v. W. Grp.*, 635 N.W.2d 717, 722-24 (Minn. 2001); *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37 (Minn. App. 2005). If a plaintiff has affirmative evidence of a party's discriminatory motive, the plaintiff may establish a discrimination claim based on that evidence under the direct method. *Friend*, 771 N.W.2d at 37-38, 40. A plaintiff may also establish a discrimination claim under the three-part test established by the U.S. Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *Goins*, 635 N.W.2d at 724; *Hubbard*, 330 N.W.2d at 441-42.

Direct Method

Under the direct method, a plaintiff relies on evidence of a party's discriminatory motive, that is, evidence showing that the party's "discrimination was purposeful, intentional or overt." *Goins*, 635 N.W.2d at 722. A discrimination claim may be proved under the direct method using direct or circumstantial evidence, or a combination of direct and circumstantial evidence. *Friend*, 771 N.W.2d at 34.

"'Direct evidence' is '[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.'" *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (alteration in original) (quoting *Black's Law Dictionary* 596 (8th ed. 2004)). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). "Thus, circumstantial evidence

always requires an inferential step to prove a fact that is not required with direct evidence." *Id.*

When the record is viewed in the light most favorable to Bray, it reveals circumstantial evidence of discriminatory motive. Evidence that Bray disclosed his transgender status to Voth and that the shift manager told Bray that Peka was uncomfortable interacting with him because he is not "a real man" and because he is "transgender" allows a reasonable inference that Peka discovered that Bray is transgender and began treating Bray poorly because of his transgender status. It also allows a reasonable inference that the October 5, 2013 incident, in which Peka allegedly pointed out Bray to another Starbucks employee, who then had a disgusted look on her face, hesitated when handing Bray his drink, and did not say anything as she gave him his drink, was motivated by discriminatory intent. Lastly, it allows a reasonable inference that the delayed service and rude treatment that Bray allegedly experienced from other Eden Prairie Starbucks employees after the October 5 incident was based on Bray's transgender status.

Evidence that the Edina Starbucks employees allegedly treated Bray poorly after Bray observed an employee at the Edina Starbucks whom he thought he recognized from the Eden Prairie Starbucks—including evidence that Sheila approached Bray, stared at his breasts and pelvic area, and said to Bretvold, "I want to have sex with him"—is circumstantial evidence that discriminatory intent motivated the employees' conduct at the Edina Starbucks.

In sum, the record contains circumstantial evidence of discriminatory motive sufficient to raise a genuine issue of material fact under the direct method. Bray's

discrimination claim therefore survives summary judgment under that method. We nonetheless consider application of the *McDonnell-Douglas* method.

McDonnell-Douglas Method

Under the *McDonnell-Douglas* method, the plaintiff must establish, by a preponderance of the evidence, a prima facie case of discrimination. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995). To establish a prima facie case of public-accommodation discrimination under the MHRA, a plaintiff must demonstrate that (1) the plaintiff is a member of a protected class, (2) the defendant discriminated against the plaintiff in the provision of its services, and (3) the discrimination was because of the plaintiff's membership in the protected class. *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 63 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009).

If a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Id.* If the defendant carries that burden, the plaintiff must prove, by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*

When the record is viewed in the light most favorable to Bray, it reasonably supports a conclusion that Starbucks treated Bray more adversely than other customers after Bray disclosed his transgender status to Voth. The record shows that, prior to disclosure of Bray's transgender status, Peka treated Bray well. After Bray disclosed his transgender status to Voth, Peka refused to serve Bray. Other Starbucks employees also began to treat Bray rudely, and he experienced wait times that were five to ten minutes longer than

normal. When Bray experienced some of this negative treatment, he observed other customers being treated appropriately. For example, he observed Peka serve and interact with other customers when he visited the Eden Prairie Starbucks, including customers who went through the drive-through ahead of him. Lastly, Sheila's actions in approaching Bray at the Edina Starbucks, standing very close to him, staring at his breasts and pelvic area, and saying, "I want to have sex with him," are far beyond the treatment a customer in a coffee shop could reasonably anticipate from an employee.

Starbucks argues that Bray "cannot meet his burden of establishing a *prima facie* case because the conduct of which he complains does not rise to the level of actionable discriminatory conduct under the MHRA." Starbucks contends that because Bray "was not denied access to Starbucks stores" or "ever refused service," his discrimination claim "fail[s] as a matter of law."

Starbucks acknowledges that there is no precedent establishing a threshold level of adverse conduct necessary to sustain a public-accommodation discrimination claim. And Starbucks does not cite any precedential public-accommodation caselaw stating that, so long as a person is provided access to and service from a place of public accommodation, that person cannot sustain a public-accommodation discrimination claim. Starbucks instead relies on caselaw regarding employment discrimination under the MHRA, arguing that Bray's allegations do not amount to "objectively offensive conduct," particularly when compared to the factual allegations in employment-discrimination cases under the MHRA. The district court agreed with Starbucks's approach, relying on hostile-work-environment

cases to find that "the conduct at issue in this case does not rise to the level of discrimination as contemplated by the MHRA."

As noted above, the MHRA defines public-accommodation discrimination as denying "any person the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation" because of the person's membership in a protected class. Minn. Stat. § 363A.11, subd. 1(a)(1) (emphasis added). Neither the MHRA nor caselaw expressly limits public-accommodation discrimination claims to those in which a person is denied access to or refused service by a place of public accommodation. Given the broad "full and equal enjoyment" language in Minn. Stat. § 363A.11, subd. 1(a)(1), it is not apparent why, as a matter of law, this court should read that provision so narrowly, especially when the legislature has indicated that the MHRA should be liberally construed to accomplish its anti-discrimination purpose. *See* Minn. Stat. § 363A.04. Indeed, the district court acknowledged that there may be some situations in which "a person within a protected group could be humiliated enough to the point that they are constructively denied full use and enjoyment of services and/or goods."

Although the decision is not precedential, we note that the federal district court for the District of Minnesota has considered and rejected an argument that a public-accommodation discrimination claim fails if the place of public accommodation provided service. In *Longen v. Fed. Express*, the plaintiff entered a FedEx delivery driver's truck to open boxes for plaintiff's employer. 113 F. Supp. 2d 1367, 1369 (D. Minn. 2000). While inside the truck, the delivery driver "allegedly ran his hands over [the plaintiff's] body from below her buttocks up to her neck, then reached around with his right hand across her body

and tightly grabbed ahold of her left breast." *Id.* The plaintiff brought a public-accommodation discrimination claim under the MHRA against FedEx, contending that the delivery driver's assault denied her full and equal enjoyment of FedEx's services because of her sex. *Id.* at 1376. FedEx argued that the plaintiff "was not denied any goods or services and that she lacks any evidence that any such denial was because of her sex." *Id.* The federal district court rejected that argument, reasoning that "there is no requirement that FedEx actually deny a good or service, only that it deny [the plaintiff] the 'full and equal enjoyment' of its goods and services." *Id.*; *see also Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415, at *19 (D. Minn. Mar. 16, 2015) (rejecting argument that because a plaintiff was not denied access to a hospital or prevented from receiving medical care, he did not have a plausible public-accommodation discrimination claim).

We agree with the reasoning of the federal district court: the plain language of the MHRA allows claims based on denial of equal enjoyment even if service was provided. Thus, the fact that the Eden Prairie and Edina Starbucks did not deny Bray access to their facilities or refuse to serve him does not prevent Bray from establishing a prima facie case of public-accommodation discrimination.

As to Starbucks's reliance on hostile-work-environment caselaw, Bray argues that such cases are inapposite because they involve "discrimination in the context of an employment relationship," rather than "acts of discrimination in the context of provision of services." Other than noting that it "is unaware of any on-point case law in the context of a discrimination in public accommodation claim" or "any Minnesota case law

recognizing a 'hostile environment'-type theory in a public accommodation case," Starbucks's brief does not provide authority or legal argument suggesting that this court should rely on hostile-work-environment caselaw in this case. At oral argument, this court invited Starbucks to provide such authority, but it failed to do so. In the absence of legal authority or legal argument providing a basis to apply hostile-work-environment caselaw in this public-accommodation case, we decline to do so. But we leave the possibility of that application open for a case in which the issue is adequately briefed.

We recognize that Bray's claim of adverse treatment is less severe than those in cases involving complete denial of access to goods or services from a place of public accommodation. And it may be that in another case, we could be persuaded that some threshold severity level is necessary to sustain a public-accommodation discrimination claim under the MHRA. But we are not persuaded to establish or impose such a threshold in this case. In the absence of controlling authority limiting public-accommodation discrimination claims as suggested by Starbucks, we cannot say, as a matter of law, that the alleged conduct in this case does not rise to the level of public-accommodation discrimination contemplated by the MHRA. Such a determination would essentially require us to weigh the evidence, a task that is impermissible at the summary-judgment stage. *See McIntosh Cty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008) (stating that appellate courts do not weigh the evidence on appeal from summary judgment); *DLH*, 566 N.W.2d at 70 (stating that a district court "must not weigh the evidence on a motion for summary judgment").

In sum, Bray has established a prima facie case of discrimination. Yet Starbucks has not articulated a legitimate, nondiscriminatory reason for its employees' actions. Indeed, Starbucks did not attempt to do so, relying instead on its assertion that Bray failed to establish a prima facie case. Bray's discrimination claim therefore survives summary judgment under the *McDonnell-Douglas* method.

III.

Bray contends that Starbucks is not entitled to summary judgment on his negligent-retention and negligent-supervision claims. Negligent retention occurs when "during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated [the employee's] unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment." *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 423 (Minn. App. 1993), *review denied* (Minn. Apr. 20, 1993). "Negligent-supervision claims are premised on an employer's duty to control employees and prevent them from intentionally or negligently inflicting personal injury." *Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. App. 2007).

The MHRA contains an exclusivity provision, which provides that "the procedure herein provided shall, while pending, be exclusive." Minn. Stat. § 363A.04. However, the exclusivity provision does not apply to a common-law tort claim arising from the same facts as an MHRA claim where the tort claim requires "different elements of proof and address[es] different injuries." *Williams v. St. Paul Ramsey Med. Ctr.*, 551 N.W.2d 483, 486 (Minn. 1996); *see also Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990)

("The legislature did not design the MHRA to redress intentional offensive physical contact already addressed by a tort battery action.").

Bray's negligence claims are based on the same facts and underlying conduct as his MHRA claims. And Bray identifies the same injuries for his MHRA and negligence claims. Bray's negligence claims therefore do not fall within the exception to the MHRA's exclusivity provision for independent common-law torts, and they are preempted by the MHRA. Thus, Bray's negligence claims were properly dismissed.

Conclusion

We reverse summary judgment on Bray's public-accommodation discrimination claim under the MHRA and remand for further proceedings on that claim. Consistent with this opinion, only alleged discriminatory acts that occurred on or after July 29, 2013, may serve as a basis for the claim. However, reliance on otherwise admissible, relevant evidence regarding conduct occurring prior to July 29, 2013, is not barred by the statute of limitations. We affirm the district court's grant of summary judgment on Bray's negligent-retention and negligent-supervision claims.

Affirmed in part, reversed in part, and remanded.