**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-0060**

Thaleaha McBee,
Appellant,

vs.

Team Industries, Inc.,
Respondent.

**Filed January 16, 2018**
**Affirmed**
**Reyes, Judge**

Becker County District Court
File No. 03-CV-15-1470

Daniel Gray Leland, Leland Law, P.L.L.C., Minneapolis, Minnesota; and

Ryan T. Conners, Conners Law, P.L.C., Minneapolis, Minnesota (for appellant)

Christopher J. Harristhal, John A. Kvinge, Larkin, Hoffman, Daly & Lindgren, Ltd., Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

**S Y L L A B U S**

I. The Minnesota Human Rights Act (MHRA) does not require an employer to engage in an interactive process to determine whether an appropriate reasonable accommodation is necessary.

II. Where a reprisal claim based on retaliatory discharge mirrors a disability-discrimination claim in both facts and law, a successful serious-threat defense may apply to preclude the retaliatory-based reprisal claim.

# O P I N I O N

**REYES**, Judge

In this appeal from a grant of summary judgment, appellant, former employee Thaleaha McBee, argues that the district court erred in dismissing her MHRA disability-discrimination, failure-to-accommodate, and reprisal claims, as well as her workers' compensation retaliation claim against her former employer, respondent Team Industries, Inc. (Team). We affirm.

## FACTS

Team is an engineering and manufacturing company. Its Detroit Lakes facility is a foundry and aluminum die-casting facility. Team employed McBee as a "cell member," or machine operator, in the production department. The cell-member job required operators to be able to operate, maintain, and repair heavy machinery, move heavy metal parts, and lift objects weighing 30 pounds or more.

In February 2015, McBee sought medical attention for severe pain in her hands, back, and neck, including numbness in her hands and arms. In March 2015, McBee's doctor gave her a ten-pound lifting restriction due to disc narrowing, a bulged disc, and bone spurs in her vertebrae. On March 10, 2015, McBee informed her supervisors at Team of her lifting restriction, who then instructed her to discuss the restriction with human resources. McBee's supervisors placed her on a machine that produced parts weighing less than ten pounds, and she finished her shift. The next day, McBee met with human

resources to discuss possible accommodations. Team terminated McBee on March 12, 2015, due to concerns relating to her medical restriction.

McBee filed suit in district court alleging violations of the MHRA, Minn. Stat. §§ 363A.01-.43 (2016 & Supp. 2017), and the Minnesota workers' compensation act (MWCA), Minn. Stat. §§ 176.001-176.862 (2016). The district court granted Team's motion for summary judgment, concluding as to the disability-discrimination and failure-to-accommodate claims that (1) McBee was not a qualified person with a disability because she could not perform an essential function of her job; (2) no reasonable accommodation could have allowed McBee to continue her employment; (3) even if McBee could have been accommodated, her continued employment posed a threat of serious harm to herself and others; (4) the MHRA does not require an employer to engage in an interactive process; and (5) McBee's use of sedating medications did not render her unqualified. On the reprisal claim, the district court determined that "allowing [it] to continue after finding a 'serious threat' would completely abrogate the statutory exception." As to the workers' compensation claim, the district court determined that McBee did not engage in protected conduct. This appeal follows.

**ISSUES**

I. Did the district court err in dismissing McBee's MHRA disability-discrimination and failure-to-accommodate claims on summary judgment?

II. Did the district court err in dismissing McBee's MHRA reprisal claim on summary judgment based on the determination that allowing her claim to continue would abrogate the serious-threat affirmative defense?

III. Did the district court err in dismissing McBee's workers' compensation retaliation claim on summary judgment based on the determination that she did not engage in protected conduct?

## ANALYSIS

"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 judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see* Minn. R. Civ. P. 56.03. "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). "We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

### I. The district court did not err in dismissing McBee's MHRA disability-discrimination and failure-to-accommodate claims on summary judgment.

Under the MHRA, an employer may not discharge an employee because of the employee's disability. Minn. Stat. § 363A.08, subd. 2(2) (2016). To prevail on her disability-discrimination claim, McBee must first establish that she: "(1) is a member of [a] protected class; (2) was qualified for the position from which she was discharged; and

(3) was replaced by a non-member of the protected class." *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001) (quotation omitted).

The MHRA also requires employers to "make reasonable accommodation to the known disability of a qualified person." Minn. Stat. § 363A.08, subd. 6(a) (2016). A failure-to-accommodate claim requires that the employee establish she is a qualified person, who "(1) possess[es] the requisite skill, education, experience, and training for [her] position, and (2) [is] able to perform the essential job functions, with or without reasonable accommodation." *Fenney v. Dakota, Minn. & E. R.R.*, 327 F.3d 707, 712 (8th Cir. 2003) (quotation omitted). In applying the MHRA, we may look to federal caselaw interpreting similar language in federal anti-discrimination statutes. *Lang v. City of Maplewood*, 574 N.W.2d 451, 453 (Minn. App. 1998) (applying federal caselaw interpreting the Americans with Disabilities Act (ADA) to an MHRA claim), *review denied* (Minn. Apr. 14, 1998). Disability-discrimination claims are analyzed on a summary-judgment motion using the burden-shifting test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

While disability-discrimination and failure-to-accommodate claims involve different analyses under the MHRA, both require an employee to be qualified, with reasonable accommodation, or to be able to perform the essential functions of her job. *See* Minn. Stat. § 363A.08, subd. 6 (2016); *Hoover*, 632 N.W.2d at 542, 547. On appeal, only this prong of McBee's claims is at issue.

### A. McBee was not qualified to perform an essential function of her job.

McBee contends that the ability to lift ten pounds was not an essential function of the cell-member position, but was rather only a nominal skill. We disagree.

The essential-function analysis is amenable to summary judgment. *See, e.g.*, *Scruggs v. Pulaski Cty., Ark.*, 817 F.3d 1087, 1093 (8th Cir. 2016) (holding ability to lift forty pounds was an essential function of employee's job); *Kammueller*, 383 F.3d at 787 (concluding dispute of material fact existed precluding summary judgment on essential-function analysis, but not holding that essential-function analysis is improper on summary judgment); *Dropinski v. Douglas Cty., Neb.*, 298 F.3d 704, 709 (8th Cir. 2002) (holding contested job duty was an essential function of employee's job). Essential functions are the "fundamental job duties of the employment position" or the critical elements that must be performed to achieve the objectives of the job. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). When determining whether a job duty is an essential function, courts review the following factors:

> (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the current work experience of incumbents in similar jobs.

*Id.* (quotation omitted).

Here, McBee has not provided evidence sufficient to create a genuine dispute of material fact under the essential-function analysis. McBee does contend as to the third factor that she personally spent little time lifting ten pounds, but an employee's "specific

personal experience is of no consequence in the essential functions equation." *Dropinski*, 298 F.3d at 709. McBee's arguments, supported only by her own testimony, do not make this dispute material: "the party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Applying the undisputed evidence to the essential-function analysis shows that the ability to lift ten pounds was an essential function of McBee's position. Because it is undisputed that McBee's medical status restricted her from performing this function, we conclude that the district court did not err in determining that McBee was not able to perform an essential function of her job without reasonable accommodation.[1]

**B. McBee could not be reasonably accommodated.**

McBee contends that Team could have reasonably accommodated her by (1) assigning her to a different machine; (2) allowing her to lift less than ten pounds; and (3) providing assistance when she had to lift more than ten pounds. We are not persuaded.

When an employee is unable to perform her position without reasonable accommodations by her employer, she must "make a facial showing that reasonable accommodation is possible and that the accommodation will allow her to perform the essential functions of the job." *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003). "'Reasonable accommodation' may include but is not limited to, nor does it necessarily

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[1] The parties also dispute whether the ability to look upward was an essential function of McBee's position. Team argues that McBee's risk of paralysis if she looked upward rendered her unqualified. McBee argues that her risk of paralysis is overstated. The record is much less developed on this disputed function than the ability to lift ten pounds. However, because we conclude that her inability to lift ten pounds with or without accommodation rendered her unqualified for her position, we need not address this issue.

require:" position reassignment, job restructuring, and providing periodic assistance. Minn. Stat. § 363A.08, subd. 6(a).

McBee does not explain how working on a machine that produces smaller parts would be a reasonable accommodation when the record shows that she would still have to perform other tasks that require lifting ten pounds. The same is true for her second and third requested accommodations: an employer is not required to reallocate or eliminate essential functions of a job to accommodate an employee with a disability. *See Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999). Because McBee's requested accommodations would not be reasonable, we conclude that Team could not reasonably accommodate McBee.

**C. McBee posed a serious threat to herself and others.**

Because we conclude that McBee's lifting restriction rendered her an unqualified person with a disability, we need not address Team's serious-threat defense. However, we address this defense because it relates to our holding regarding McBee's reprisal claim, *infra*.

The MHRA provides an affirmative defense to disability-discrimination claims if, even with reasonable accommodation, an employee "poses a serious threat to the health or safety of [herself] or others." Minn. Stat. § 363A.25 (2016). The employer bears the burden of proving that "it relied upon competent medical advice that there exists a reasonably probable risk of serious harm." *Lewis v. Remmele Eng'g, Inc.*, 314 N.W.2d 1, 4 (Minn. 1981).

On this issue, the MHRA standard differs from the ADA standard. The ADA requires an employer to rely on the "best current medical or other objective evidence" in proving its affirmative defense. *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007) (quotation omitted). In contrast, Minnesota courts only require an employer to rely on competent medical advice. *State, Dep't of Human Rights v. Hibbing Taconite Co.*, 482 N.W.2d 504, 507 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). Under Minnesota law, such an employer "should be allowed some discretion in determining whether an individual should be disqualified from employment. An employer need not establish to a certainty that its decision was sound. If an employer errs at all, it should be allowed to err on the side of safety." *Id.* at 509. "It is not reasonable to expect an employer to disregard an employee's treating physician's opinion expressly imposing physical restrictions." *Scruggs*, 817 F.3d at 1094.

The record shows that in deciding to terminate McBee, Team relied on McBee's doctor's written lifting restriction and oral warning against the dangers of paralysis. McBee's doctor recommended against lifting ten pounds as well as any neck motion beyond basic movement. The doctor testified that lifting more than ten pounds or moving her neck in certain ways could compromise her spinal cord or, in an extreme situation, cause paralysis. Since McBee has not shown that any accommodation would have enabled her to lift more than ten pounds or avoid having to move her neck, Team could have reasonably concluded that her continued employment risked serious harm to herself and her coworkers. Applying the undisputed facts, we conclude that the district court did not err in determining that McBee posed a serious threat as a matter of law.

### D. Team was not required to engage in an interactive process.

McBee argues that Team failed to engage her in a required interactive process to survey possible accommodations. McBee's argument lacks merit.

While federal cases interpreting the ADA generally guide our interpretation of the MHRA, the interactive-process requirement is one area where the two laws diverge. The regulations promulgated under the ADA suggest, and in the Eighth Circuit require, that an employer engage in an interactive process with an employee to determine if an appropriate reasonable accommodation is necessary. 29 C.F.R. § 1630.2(o)(3) (2017) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, *interactive process* with the individual with a disability in need of the accommodation." (emphasis added)); *see also Burchett*, 340 F.3d at 517. However, such a requirement does not appear in the MHRA, *see* Minn. Stat. § 363A.08, subd. 6 (lacking any reference to interactive process), in any state administrative rules, or in any published Minnesota state caselaw. Because the ADA predates the MHRA, we must assume that the Minnesota legislature consciously refrained from including in the MHRA the interactive-process language from the ADA regulations.

We acknowledge that the Eighth Circuit has held that the MHRA requires an interactive process. *Burchett*, 340 F.3d at 517. But the Eighth Circuit cited federal law for this ruling based on language in the ADA, not language in the MHRA. *Id.* (citing *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir. 2002) (citing *Fjellestad*, 188 F.3d at 951 (quoting 29 C.F.R. § 1630.2(o)(3)))). Based on the statutory language omitting such a process, we hold

that the MHRA does not require an employer to engage in an interactive process to determine an appropriate reasonable accommodation.

### E. The district court did not err in rejecting evidence of McBee's use of sedating medications.

McBee argues that the district court properly determined that evidence of sedating medications indicated McBee's misconduct rather than her lack of qualifications. We agree.

After-acquired evidence of an employee's lack of qualifications may be used to bar a disability-discrimination claim. *See Frey v. Ramsey Cty. Cmty. Human Servs.*, 517 N.W.2d 591, 598 (Minn. App. 1994). However, the court in *Frey* distinguished from such bars to claims cases "in which an employee, although initially qualified for the job, commits misconduct which would justify termination regardless of whether the actual reason for discharge was discriminatory." *Id.* at 597. Such cases provide a defense to discriminatory termination on the theory that, since an employer could have properly fired the employee had it known of her misconduct, there is no reason in inquire whether the termination was discriminatory. *Id.* at 596, 597.

Team argues that McBee's use of sedating medications rendered her unqualified to operate heavy machinery. But the record on this point is inadequate. Although both job descriptions require the ability to monitor a machine effectively, McBee's doctor did not categorically restrict her from operating machines beyond simply recommending against it. Based on the incomplete record, it is unclear whether McBee's medications rendered her unqualified for her position. At most, McBee engaged in misconduct by violating a

workplace rule requiring her to notify her supervisor of her use of any medication that could interfere with her ability to safely perform her job, which would justify termination anyway.

**II. The district court did not err in dismissing McBee's MHRA reprisal claim on summary judgment based on the determination that allowing her claim to continue would abrogate the serious-threat affirmative defense.**

McBee argues that she could have pursued her reprisal claim even after the district court dismissed her disability-discrimination claim. We are not persuaded.

An employer may not "engage in any reprisal against any person because that person" opposed a practice forbidden under the MHRA. Minn. Stat. § 363A.15 (2016). "Reprisal" can include "any form of intimidation, retaliation, or harassment." *Id.* "In order to establish a prima facie case where an alleged retaliatory discharge is involved, an employee must establish: (1) statutorily protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). Resolving this issue requires us to engage in statutory interpretation, "a question of law that we review de novo." *J.D. Donovan, Inc. v. Minn. Dep't of Transp.,* 878 N.W.2d 1, 4 (Minn. 2016).

We first address Team's contention that an unqualified employee is precluded from pursuing a reprisal claim under the MHRA. Under the ADA, "[a]n individual who is adjudged not to be a 'qualified individual with a disability' may still pursue a retaliation claim." *Heisler v. Metro. Council*, 339 F.3d 622, 632 (8th Cir. 2003)[2] (quoting

[2] The court in Heisler concluded that the employee had failed to present sufficient evidence establishing that she had a disability to pursue a discrimination claim. 339 F.3d at 630.

*Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 786 (3d Cir. 1998)). Like the ADA, a prima facie MHRA-discrimination case requires an employee to prove that she is qualified, *Hoover*, 632 N.W.2d at 542, but *any* person may pursue a reprisal claim, Minn. Stat. § 363A.15.

Team cites cases from federal circuits other than the Eighth Circuit holding that an employee must be qualified to pursue a reprisal claim. But those cases, and the cases they cite, seem to conflate discrimination and retaliation claims and do not explain the statutory language differences articulated in the Eighth Circuit cases. The Eighth Circuit analysis is more germane to the facts and law here. We conclude that an unqualified employee may still pursue a reprisal claim under the MHRA.

We next address the relationship between McBee's reprisal claim and Team's successful serious-threat defense. Reprisal is an "unfair discriminatory practice." Minn. Stat. § 363A.15. The serious-threat defense is located in the "Exemptions to Unfair Discriminatory Practices" sub-chapter. *See generally* Minn. Stat. §§ 363A.20-.26 (2016). The serious-threat defense applies "to a complaint or action brought under the employment provisions of" chapter 363A. Minn. Stat. § 363A.25. "Employment provisions" is not defined, so it is unclear whether reprisal claims may always be brought under employment provisions and therefore are subject to the serious-threat affirmative defense. However, based on this statutory landscape, we discern no reason why a reprisal claim brought in the employment context is precluded from being subject to the serious-threat defense.

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However, the employee was still allowed to pursue her retaliation claim because her requested accommodation was made in good faith. *Id.* at 632.

Moreover, if "[i]t is not reasonable to expect an employer to disregard an employee's treating physician's opinion expressly imposing physical restrictions," *Scruggs*, 817 F.3d at 1094, then it is equally unreasonable to find an employer liable for a retaliatory reprisal claim for heeding that employee's physician's warning.

Here, if Team concluded that McBee's employment posed a risk of serious harm to herself and others based on her doctor's competent medical advice, then finding Team liable for reprisal for so concluding would directly contradict public policies valuing safe work spaces. While we refrain from holding that the serious-threat defense categorically applies to all reprisal claims, we hold that where, as here, a reprisal claim based on retaliatory discharge mirrors a disability-discrimination claim in both facts and law, the serious-threat defense can apply to, and when successful, preclude the reprisal claim. Therefore, we conclude that the district court properly dismissed McBee's reprisal claim.

**III. The district court did not err in dismissing McBee's workers' compensation retaliation claim on summary judgment based on the determination that she did not engage in protected conduct.**

McBee argues that the district court misinterpreted the protections of the MWCA. We disagree.

Minnesota law precludes an employer from "discharging or threatening to discharge an employee for seeking workers' compensation benefits or in any manner intentionally obstructing an employee seeking workers' compensation benefits." Minn. Stat. § 176.82, subd. 1 (2016). An employee need not actually seek benefits to be protected under the MWCA; instead, an employee is protected if she "is perceived to be endeavoring to obtain workers' compensation benefits." *Schmitz v. U.S. Steel Corp.*, 831 N.W.2d 656, 666

(Minn. App. 2013), *aff'd*, 852 N.W.2d 669 (Minn. Aug. 27, 2014). "*[A]ny* employee who has suffered a workplace injury may be perceived to be 'seeking workers' compensation benefits.'" *Id.* at 667.

While the MWCA covers the future *filing* for benefits, it does not cover future *injuries*. Because McBee's proposed MWCA-retaliation claim is based on injuries she might sustain in the *future* because of her lifting restriction, we conclude that she has not engaged in a protected activity.[3] The district court properly dismissed her MWCA-retaliation claim.

## D E C I S I O N

The district court did not err in dismissing McBee's MHRA and MWCA claims. Because McBee's medical restrictions rendered her unqualified for her position with or without reasonable accommodation, her employment posed a serious threat of harm to herself and her coworkers, Team's successful serious-threat defense precludes her reprisal claim, and she did not engage in conduct protected by the workers' compensation act, we affirm.

**Affirmed.**

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[3] This opinion does not preclude any MWCA claims based on injuries McBee may have already sustained at work. Our conclusion is limited to the evidence presented on appeal.