STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0745

Vickie Apel,
Appellant,

vs.

Mankato Rehabilitation Center, Inc.,
d/b/a MRCI WorkSource, et al.,
Respondents.

Filed February 4, 2019
Affirmed
Bratvold, Judge

Blue Earth County District Court
File No. 07-CV-16-3366

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Considered and decided by Reilly, Presiding Judge; Cleary, Chief Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

In this appeal from the summary-judgment dismissal of an age-discrimination claim under the Minnesota Human Rights Act, appellant argues that respondent wrongfully

terminated her employment when it eliminated her position after she discussed retiring within the next year. Appellant argues that the district court erred in dismissing her claim because she is entitled to summary judgment against respondent; alternatively, appellant contends there are genuine issues of material fact that preclude summary judgment. Appellant also claims that the district court erred in denying her motion to amend the complaint. Because we conclude that appellant has not established a genuine issue of material fact regarding whether her age motivated respondent's decision to eliminate her position, we affirm summary judgment for the respondent employer. We also conclude that the district court did not abuse its discretion in denying appellant's motion to amend her complaint.

FACTS

MRCI WorkSource (MRCI) was established in 1953 and is a nonprofit corporation whose mission is "to create innovative and genuine opportunities for people with disabilities or disadvantages to support their community participation." MRCI employs more than 400 people and services more than 5,000 clients. Brian Benshoof became MRCI's chief executive officer in 2010.

The MRCI Foundation (the foundation) was established in 1998 and is a separate nonprofit corporation from MRCI. Its mission was "to support the activities of [MRCI]." The foundation had its own board of trustees, but it had no employees of its own, and its board of trustees was not compensated. MRCI employed the foundation's director. The foundation director's duties included working with the foundation's board of trustees to

develop "financial support from individuals, corporations, and foundations" and to increase "community awareness" of MRCI's programs and services.

Benshoof hired appellant Vickie Apel to be the foundation's director in November 2010. Although Apel ran the foundation, she was an MRCI employee. At the time she was hired, Apel was 59 years old. Her duties included raising awareness of MRCI, coordinating public relations, developing MRCI communications and special events, and raising funds for MRCI through grant writing, annual funds, major gifts, and planned giving. She was also responsible for creating an annual budget for the foundation.

Apel's job performance was good. She had two employment reviews in 2012, which both rated her as having an overall "solid performance," and, apparently, had no other reviews. In 2014, Apel helped the foundation net $300,000 in grants for the first time. Apel also organized several non-revenue-generating events that were designed to raise community awareness of MRCI.

In October 2015, Apel attended a foundation budget meeting along with three others. MRCI's chief financial officer stated that the foundation was likely to lose money by year end. Apel responded that she did not understand why, and the chief financial officer told her she did not need to "understand those numbers." In response, Apel stated: "I guess you can do whatever you want because in 2017, I'll be 66 years old." Apel also stated that she would be of "full retirement age." The chief financial officer responded by saying, "Really?" Apel then repeated her earlier statements. Apel later testified that she made these statements "out of frustration" because she did not understand the foundation's financial

performance. The chief financial officer repeated Apel's statements to Benshoof, who was not at the budget meeting.

During an MRCI board meeting in December 2015, Benshoof proposed eliminating the foundation. Benshoof stated that the foundation had lost $23,000 as of October 2015. He also discussed Apel, stating that she did not work well with MRCI's development staff and that "she is going to retire" within "the next year." Benshoof did not want to "wait a whole year," potentially giving up "the opportunity to raise more money." Benshoof also discussed other reasons to eliminate the foundation, for example, the foundation's board had difficulty maintaining trustees and had limited assets.

Benshoof told the board that, if MRCI eliminated the foundation, then MRCI would need to raise money. He stated that MRCI was "already a 503 charitable organization," and could "do a lot more" with regard to fundraising, such as tapping into "new energy" in the metro area. Benshoof told the board that MRCI has "a team," led by the then-acting business development manager, T.O., who could take over fundraising efforts. T.O. was hired in 2013. The board voted to authorize Benshoof to work with the executive committee and dissolve the foundation.

On January 1, 2016, MRCI dissolved the foundation. Also in January, Benshoof reported to the board that T.O.'s duties would expand and include fundraising and marketing, with the assistance of his "team." T.O. was 56 years old at the time of the transition. T.O. set a fundraising goal of $300,000 for 2016.

No one disputes that MRCI could have better handled how it notified Apel that the foundation was dissolved and her position was eliminated. Apel first learned of the

foundation's dissolution from a colleague on Friday, January 15. The following Monday, Apel approached Benshoof and asked him if the foundation had been dissolved and whether she needed to look for a job; Benshoof responded affirmatively to both questions. Apel testified that Benshoof also said, "You know, we knew that you were going to be retiring."

Benshoof sent Apel a termination letter on January 25, 2016, setting her last day of employment as February 19, 2016. The next day, Benshoof sent foundation trustees a letter notifying them of the foundation's dissolution and Apel's termination. The letter also stated that MRCI was moving forward with development plans. The letter explained that MRCI was "mak[ing] this change now" because of significant turnover in foundation trustees and Apel's "anticipated retirement . . . at the end of 2016."

MRCI claims that the dissolution of the foundation was part of an overall restructuring of who performed the tasks of the foundation. Beginning in late 2015, MRCI had expanded its business development and marketing department to include two new coordinator positions. T.O. was responsible for managing the new department and hired employees for the two positions. The first coordinator, who was 51 years old, was hired in October 2015. The second coordinator, who was 23 years old, was hired in January 2016, at roughly the same time that Apel learned the foundation had been dissolved. The two coordinators' job responsibilities included working with T.O. to develop and implement marketing plans. After Apel's termination, T.O.'s team coordinated fundraising and other efforts to promote MRCI, some of which Apel had performed. MRCI also hired a new

chief operations officer in March 2016 after the person previously holding the position retired.

Ultimately, T.O. did not reach his fundraising goal of $300,000; in fact, his team did not come close. In January 2017, MRCI hired a "chief business development and marketing officer" (marketing officer), who was 39 years old. T.O. was demoted to a coordinator position and the marketing officer supervised T.O. and the two other coordinators. The marketing officer testified that her duties included fundraising. She also testified that T.O.'s team did not have the "skillset" for fundraising. In mid-2017, MRCI terminated T.O. and one other coordinator.

Apel sued MRCI and the foundation in June 2016 and alleged that her termination violated the Minnesota Human Rights Act because it was motivated by age discrimination. MRCI and the foundation filed a motion for summary judgment. Apel also filed a motion to amend her complaint and for summary judgment.[1] The district court denied Apel's summary-judgment motion and granted MRCI and the foundation's summary-judgment motion in March 2018. The district court denied Apel's motion to amend her complaint and directed entry of judgment. Apel appeals the judgment in favor of MRCI.[2]

[1] Around the same time, Apel filed a second motion to amend her complaint. Apel's first motion sought to add a claim for punitive damages; her second motion asked to amend the complaint to conform to new evidence. Because Apel's motions to amend were filed so close in time, this opinion will refer to them as a single motion.

[2] On appeal, Apel does not challenge the district court's entry of judgment in favor of the foundation.

D E C I S I O N

I. The district court did not err in determining that there was no genuine issue of material fact regarding whether age motivated MRCI's decision to terminate Apel's employment.

Summary judgment is only granted when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01.[3] On appeal, we view the evidence "in the light most favorable to the party against whom summary judgment was granted." *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). This court reviews a district court's summary-judgment decision de novo to "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).

Apel's claim for age discrimination is based on the Minnesota Human Rights Act (MHRA), which provides that an employer cannot discharge an employee based on age. Minn. Stat. § 363A.08, subd. 2(2) (2018). To survive summary judgment on an employment-discrimination claim under the MHRA, a plaintiff can use either of two methods: (1) the direct method of proof or (2) the three-part *McDonnell Douglas* burden-

[3] The district court applied the former version of rule 56, which was recently "revamped" to more "closely follow" the federal rules. Minn. R. Civ. P. 56 2018 advisory comm. cmt. When promulgating amendments to rule 56, effective on July 1, 2018 and applicable to pending cases, the supreme court specifically indicated that amended language on the standard for granting summary judgment reflects recent Minnesota caselaw. *Order Promulgating Amendments to Rules of Civil Procedure*, No. ADM04-8001 (Minn. Mar. 13, 2018). Because the legal standard is unchanged, we cite to the current version of rule 56.01, even though the district court's decision was issued before the amended rule took effect.

shifting test. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001).[4] The distinction between claims made under the direct method and the *McDonnell Douglas* framework is the intentionality or overtness of the discrimination. *Goins v. W. Grp.*, 635 N.W.2d 717, 722 (Minn. 2001). For direct claims, an employee must show a "specific link" between discrimination and termination to prove that the discrimination motivated the termination. *See Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1153 (8th Cir. 2007).

A. Apel offered no direct evidence of age discrimination.

Apel argues that she offered direct evidence of discrimination because Benshoof's comments about her retirement are discriminatory on their face.[5] Under the direct method, an employee can prove a claim using either direct or circumstantial evidence, or a combination of the two. *Friend v. Gopher Co.*, 771 N.W.2d 33, 40 (Minn. App. 2009). "Stray remarks" in the workplace, which are removed from the decision-making process, cannot serve as direct evidence of discrimination. *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997).

[4] Caselaw interpreting federal discrimination laws has guided Minnesota courts when analyzing MHRA claims. *Wenigar v. Johnson*, 712 N.W.2d 190, 205 (Minn. App. 2006) ("To help us determine if a cause of action exists under the MHRA, it is appropriate to call on the interpretations of the federal anti-discrimination statutes when the provisions of the federal statute and the MHRA are similar.").

[5] Apel also argues that Benshoof's comments about "new energy" are direct evidence of discriminatory motive. But Apel offered no evidence from which a jury could infer that Benshoof was referring to Apel, her age, or her potential replacements. Instead, when read in context, Benshoof discussed the "new energy" MRCI would generate by fundraising in the metro area.

The district court determined that Benshoof's remarks regarding Apel's retirement were stray remarks and therefore they cannot be considered as direct evidence of discrimination. The district court relied on several federal and state opinions, which Apel contends we must distinguish, arguing that in each case the remarks were unrelated to the alleged discriminatory employment decision.

Apel's point is well-taken.[6] In *Ramlet*, the comment was a stray remark because there was a four-month gap between when a supervisor commented about hiring younger employees and the plaintiff's termination. 507 F.3d at 1152-53. In *Diez*, the comment was a stray remark because it was made by someone who did not make the challenged employment decision. 564 N.W.2d at 580. In *Nash v. Optomec, Inc.*, the terminated employee did not rely on direct evidence, and the court's opinion referred to a stray remark in a footnote. 185 F. Supp. 3d 1129, 1134 n.4, 1138 n.7 (D. Minn. 2016), *aff'd*, 849 F.3d 780 (8th Cir. 2017).

Here, Benshoof's comments about Apel's retirement are materially different. Benshoof, who certainly qualifies as a decisionmaker regarding Apel's termination, referred to Apel's retirement on three occasions. First, he commented on Apel's retirement

[6] The district court also relied on an unpublished decision of this court which is not precedent. *See* Minn. Stat. § 480A.08, subd. 3(c) (2018) (stating that "[u]npublished opinions of the court of appeals are not precedential"). Nor is the unpublished opinion persuasive support for the district court's conclusion that Benshoof's comments were stray remarks. In *Ludwig v. Church of Epiphany of Coon Rapids*, No. A12-1185, 2013 WL 401361, at *2, *6 (Minn. App. Feb. 4, 2013), the plaintiff was discharged "several months" after his superior made a single remark, stating "[o]ut with the old" with regard to the plaintiff's participation in a voluntary retirement program. Here, there was more than one remark and all of the remarks occurred within one month of Apel's notice that she would be terminated.

during the December 2015 board meeting where he recommended dissolving the foundation and terminating Apel. Second, Benshoof repeated similar comments in a face-to-face discussion with Apel on the same day he told her she was terminated. Third, Benshoof referred to Apel's retirement in a January 2016 letter to the foundation's board of trustees when he informed the board that the foundation had been dissolved and Apel had been terminated. When the evidence is viewed in the light most favorable to Apel, there is a genuine issue of material fact regarding whether Benshoof's comments were "stray remarks."

Despite the timing of Benshoof's comments and the connection between those comments and Apel's termination, we conclude that his comments about Apel's retirement are not direct evidence of discrimination. References to retirement alone are not discriminatory on their face. *See Ramlet*, 507 F.3d at 1153; *see also Hilde v. City of Eveleth*, 777 F.3d 998, 1004 (8th Cir. 2015) (noting that although decisionmakers considered an employee's retirement eligibility when they declined to hire him, they "did not directly reference [his] age in their hiring process," therefore, there was no "specific link" to age discrimination).

Apel voluntarily stated during the October 2015 budget meeting that she would be retiring when she reached "full retirement" at age 66 in 2017. After Benshoof learned of Apel's disclosure, he made several statements regarding Apel's impending retirement at the same time he discussed dissolving the foundation. Because Benshoof's statements about Apel's anticipated retirement were made in the context of dissolving the foundation, these comments do not provide a "specific link" to age discrimination in MRCI's decision

to terminate her. Taking the evidence in the light most favorable to Apel, the statements only show that Benshoof inferred that Apel was actually going to retire and that this was a good time to dissolve the foundation. In sum, Benshoof's comments about Apel's retirement do not directly prove that age was a motivating factor in MRCI's decision to terminate Apel.

B. Apel failed to prove a prima facie case under the McDonnell Douglas *framework.*

The *McDonnell Douglas* burden-shifting framework contains three steps: first, an employee must prove a prima facie case of discrimination by a preponderance of the evidence. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323 (Minn. 1995). If the employee proves a prima facie case, then in the second step, the employer has the burden of production to prove a nondiscriminatory reason for the termination. *Id.* If the employer establishes a nondiscriminatory reason, then in the third step, the employee must prove by a preponderance of the evidence that the employer's legitimate reasons for terminating the employee were a pretext for discrimination. *Id.*

In the first step, an employee making a prima facie case of age discrimination under the MHRA usually must satisfy four requirements: (1) she is a member of a protected group, (2) she was qualified for her position, (3) she was terminated, and (4) she was replaced by someone sufficiently younger to permit an inference of age discrimination. *See Ward v. Employee Dev. Corp.*, 516 N.W.2d 198, 201 (Minn. App. 1994), *review denied* (Minn. July 8, 1994); *see also Ramlet*, 507 F.3d at 1153 (providing the same elements).

The parties agree that Apel established the first three *McDonnell-Douglas* requirements for a prima facie case and dispute the fourth requirement: whether Apel has proved that she was replaced by someone sufficiently younger to permit an inference of age discrimination. Apel was 64 years old at termination. She contends that she was replaced by T.O. and the two coordinators, who were ages 56, 51, and 23, respectively, the marketing officer, who was 39 years old, or by the new chief operations officer, who was 40 years old. MRCI contends that Apel was not replaced at all because her position was eliminated when the foundation was dissolved. MRCI also claims that Apel's termination occurred because of a reduction in force. Because our analysis of Apel's proof under the fourth requirement depends on whether this is a reduction-in-force case, we first address the law relating to this issue.

In a reduction-in-force case, an employer must prove that the employee's position was completely eliminated and/or the employee's duties were redistributed to other workers. *Ward v. Int'l Paper Co.*, 509 F.3d 457, 461 (8th Cir. 2007). Caselaw instructs that the employee's burden under the fourth requirement increases when the employer terminates the employee as part of a bona fide reduction in force. *See Ramlet*, 507 F.3d at 1153; *see also Dietrich*, 536 N.W.2d at 324. Specifically, when an employee is terminated as part of a bona fide reduction in force, the employee must make "some additional showing," such as statistical or circumstantial evidence, that age was a factor to make a prima facie case of age discrimination. *Dietrich*, 536 N.W.2d at 324 (quoting *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985)).

The Minnesota Supreme Court has adopted a standard from the Sixth Circuit for determining whether a reduction-in-force has occurred:

> A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another person is hired or reassigned to perform the plaintiff's duties.

Dietrich, 536 N.W.2d at 324 (quoting *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990)). However, employers cannot avoid liability for discrimination under a reduction in force "by changing the job title or by making minor changes to a job indicative of an attempt to avoid liability." *Barnes*, 896 F.2d at 1465 n.10.

Here, the district court determined that MRCI's reduction in force led to Apel's termination, primarily relying on *Ward*, in which a 53-year-old employee's position was eliminated about six months after he was asked about retirement, and his duties were spread among "remaining employees"—both younger and older—but their jobs as a whole were not the same as the 53-year-old employee's. 509 F.3d at 460-62. The Eighth Circuit affirmed the district court's determination that the employer's reallocation of duties was insufficient to support an inference of age discrimination. *Id.*

The district court accepted MRCI's evidence that Apel's position was eliminated as a reduction in force because she was terminated at the same time that the foundation was dissolved. And while some younger employees assumed Apel's duties, the district court

determined this was insufficient to demonstrate that age was a factor in her termination because Apel's duties were redistributed among existing employees who had responsibilities different from Apel's duties; thus "the job as a whole is not the same" as the job Apel performed.

We agree with the district court that Apel has failed to raise a question of fact regarding whether she was terminated as part of a reduction in force. Apel's former duties were divided largely among three positions in MRCI—T.O. in his role as business development and marketing manager, and two coordinator positions. For example, one of the coordinators testified that there "was a distribution of duties that were formerly [Apel's] throughout [her] department." T.O. coordinated "several events" for fundraising and, after her termination, the two coordinators "helped with the events." T.O. also created a budget, raised public awareness about MRCI, and monitored expenses to assure MRCI had profitable fundraisers.

When viewed in the light most favorable to Apel, this evidence demonstrates that Apel's duties were absorbed by MRCI's existing employees. T.O. and one coordinator were employees before Benshoof recommended dissolving the foundation. Similarly, MRCI planned to hire the second coordinator before the board considered dissolving the foundation. Moreover, T.O. performed duties that Apel never had, such as developing client employment sites, which was described as his team's "primary focus." The two coordinators also had responsibilities related to client development and job opportunities that Apel never performed; for example, one coordinator called employers and looked for

jobs for clients.[7] Because Apel's duties were reassigned to MRCI's existing business development employees, all of whom had "additional responsibilities," we conclude that Apel has failed to generate a jury issue regarding MRCI's evidence of a reduction in force. *See Dietrich*, 536 N.W.2d at 324. As the district court stated, "the job as a whole [was] not the same."

Because there is no genuine issue of material fact regarding whether MRCI underwent a reduction in force,[8] Apel must make "some additional showing" to support an inference that age was a factor in her termination to make a prima facie case. *Id.* The additional showing "may take many forms and is not intended to be overly rigid." *Id.* at 325. In making this inquiry, "[t]he only question is whether the circumstances are such

[7] Apel also argues that MRCI replaced her with the marketing officer, but the marketing officer's job duties went beyond Apel's, including responsibilities related to "organizational strategic planning" and "operational compliance." There were also five employees who directly reported to the marketing officer. Apel had no direct reports and worked by herself with only occasional help from other employees. Also, the marketing officer was hired nearly a year after Apel was terminated. A similar analysis applies to Apel's claim about the chief operations officer, whose duties were materially different from Apel's duties. Additionally, Apel contends that she was replaced by a strategic writer, who was hired more than a year after she was terminated. The record contains limited information about the strategic writer, but her responsibilities included proofreading and grant writing. It is true that Apel did grant writing. But MRCI's decision to hire additional employees substantially after Apel's termination supports only the inference that MRCI incorrectly anticipated that the three business development employees could accomplish the company's new goals and that MRCI continued to restructure after Apel left.

[8] Even if this were not a reduction-in-force case, the employee who initially took over most of Apel's responsibilities, T.O., was 56 years old when he transitioned to his new position as the business development and marketing manager. T.O. was only eight years younger than Apel, and this age disparity may not be enough to support a prima facie case. *See, e.g.*, *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412 (8th Cir. 1997) (noting an age disparity of five years is not sufficient).

that, in the absence of an explanation from the defendant, a fact finder may reasonably infer intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995).

Apel asserts her additional showing is that retirement eligibility is correlated with age because the two "cannot be divorced and an employment decision based on the claimant's retirement is the same as basing the employment decision on age." But caselaw recognizes that "[e]mployment decisions motivated by factors other than age (such as salary, seniority, or retirement eligibility), even when such factors correlate with age, do not constitute age discrimination." *Anderson v. City of Coon Rapids*, 88 F. Supp. 3d 977, 984 (D. Minn. 2015) (quoting *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 952 (8th Cir. 1999)). The key is "what the employer supposes about age" and whether retirement acts as a "proxy" for the employer's presumptions. *EEOC v. City of Independence*, 471 F.3d 891, 896 (8th Cir. 2006).

Apel relies on *Hilde*, where a 51-year-old lieutenant applied to be police chief in a city. 777 F.3d at 1001. The lieutenant was the most qualified candidate before interviews were conducted, but the city did not hire him. *Id.* at 1002, 1007. The lieutenant was retirement-eligible at age 50, and the commissioners "were all aware" that he could retire at any time. *Id.* at 1003. The lieutenant "never told the commissioners he was seeking retirement or would not be committed to the position." *Id.* The district court granted summary judgment for the employer. *Id.* But the Eighth Circuit determined that the facts demonstrated that the city assumed that an older employee may be less committed because he could retire at any time, and this assumption "figured in the [c]ity's decision" not to hire

the lieutenant. *Id.* at 1006. The Eighth Circuit reversed after concluding that fact issues precluded summary judgment in favor of the city. *Id.* at 1008.

We are not persuaded that *Hilde*'s evidence is similar to Apel's evidence. The lieutenant in *Hilde* never mentioned retirement, and the hiring commissioners never asked about it. *Id.* at 1003, 1007. Here, MRCI did not infer retirement based on Apel's age—she volunteered that she was planning to retire when she turned 66 at "full retirement age." So, unlike *Hilde*, Apel offers no evidence that MRCI used retirement eligibility as a proxy for age discrimination. In sum, we conclude that Apel does not make the necessary "additional showing" by asserting that MRCI's employment decision was based on her anticipated retirement.

C. Alternatively, Apel failed to offer evidence of pretext.

Even if we assume that Apel has established a prima facie case of age discrimination, she would still fail on the third step of the *McDonnell-Douglas* test. The second step places the burden of production on MRCI to show a nondiscriminatory reason for Apel's termination. *Dietrich*, 536 N.W.2d at 323. MRCI offered evidence that dissolution of the foundation was a legitimate, nondiscriminatory reason for terminating Apel. When Benshoof recommended that the board vote to dissolve the foundation, he did so because the foundation was losing money and had a dysfunctional board, neither of which is disputed by Apel. MRCI contends that Benshoof acted within his legitimate business judgment.

Apel herself acknowledged the legitimacy of Benshoof's concerns, noting that "[i]t was hard to get board members to come to [foundation] meetings" and that they had

difficulty obtaining a quorum to conduct foundation business. Apel also told Benshoof "maybe a couple of times" that the foundation was unnecessary because "you don't need to have that separate structure and layer of administrators." Apel also described the foundation as "archaic" and an "unnecessary structure."

In the third step of *McDonnell Douglas*, the burden shifts back to Apel to show that MRCI's nondiscriminatory reason is a pretext for age discrimination. *Id.* To establish pretext, a plaintiff can directly demonstrate that a discriminatory reason likely motivated the employer or indirectly demonstrate discrimination by showing that the nondiscriminatory reason is "unworthy of credence." *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 153 (Minn. App. 2001) (citation omitted), *review denied* (Minn. Feb. 19, 2002). Here, Apel claims that the foundation's dissolution was a pretext for her termination because Benshoof suggested at a board meeting that he would not terminate her unless the "foundation goes away." But Benshoof's comment does not establish or allow a jury to infer pretext. At the December 2015 board meeting, Benshoof recommended the foundation's dissolution for several reasons unrelated to Apel and tells the board that the timing is right because of Apel's impending retirement. For example, in the meeting, Benshoof stated that "the opportunity is here with retirement and large board turnover, it is an ideal time to do this now and move forward with it." Apel also does not show that she retracted her statements about retirement. Apel testified that when she learned of her termination from Benshoof, she "just shut up and listened to what he had to say." Because Apel lacks evidence of pretext, summary judgment is appropriate.

Our conclusion that Apel lacks evidence of pretext is bolstered by the fact that Benshoof hired and terminated Apel. At the time Benshoof hired Apel, she was 59 years old. At the time she was terminated, she was 64 years old—just five years older. While this evidence raises an inference that we do not draw against Apel as the nonmoving party, the facts are undisputed and underscore the absence of evidence of pretext. Other courts examining similar evidence have noted that it is unlikely that the same company official who hired an employee "suddenly developed an aversion to older people" after the same employee aged a few more years. *See LeBlond v. Greenball Corp.*, 942 F. Supp. 1210, 1219 (D. Minn. 1996) (noting that when the same officials hire and fire a person within short timeframe, it is not indicative of age discrimination) (citing *Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174-75 (8th Cir.1992)).

Apel also argues that, even if MRCI's reason for terminating her is legitimate, Minnesota recognizes a "mixed motive" theory of discrimination where a legitimate reason coupled with an illegitimate one is actionable. Apel fails to cite and we are unaware of any Minnesota precedent holding that the mixed motive theory applies to an age discrimination claim. In Minnesota, even if an employer supplies a legitimate reason for a discharge, "a plaintiff may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision." *McGrath v. TCF Bank Sav., FSB*, 509 N.W.2d 365, 366 (Minn. 1993) (citations omitted). Given Apel's failure to provide evidence sufficient to make a prima facie case, and her failure to offer evidence of pretext, we are not persuaded that Apel established an illegitimate reason for termination. As a result, we discern no mixed

motive and conclude there is no genuine issue of material fact whether age discrimination motivated MRCI to terminate Apel.

II. Apel's motion to amend her complaint

Apel argues that she should have been allowed to amend her complaint to clarify allegations that MRCI discriminated when it failed to hire Apel for one of the new positions created by the expanded fundraising department. Apel next argues that she should have been allowed to amend her complaint to include punitive damages.

After a responsive pleading is served, a party can amend its pleadings only by leave of the court, "and leave shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. "Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). In determining whether to allow an amendment, the district court may consider "the stage of the proceedings." *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 597 (Minn. App. 1987), *review denied* (Mar. 25, 1987).

The district court addressed Apel's motion to add punitive damages and rejected it because it granted MRCI's motion for summary judgment in the same order. Because we agree that the grant of summary judgment in MRCI's favor was proper, the district court did not abuse its discretion in denying this motion. *See Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001) ("A motion to amend a complaint is properly denied when the additional claim could not survive summary judgment."), *review denied* (Minn. Oct. 16 2001).

The district court did not expressly rule on Apel's motion to clarify her theory of discrimination. In district court, Apel framed the motion as a request to allow her complaint to "conform to the evidence." It appears that the district court implicitly denied the motion because it otherwise considered the evidence during the course of summary-judgment proceedings. For example, in its reduction-in-force analysis, the district court credited Apel's evidence that her position was eliminated and that some of her duties were assumed by "[s]ome other younger employees." As discussed above, this evidence was insufficient to raise a fact issue regarding MRCI's evidence of a reduction-in-force because her duties were reallocated among several employees, each of whom had additional duties that were substantially different from Apel's duties. For similar reasons, Apel's claim that MRCI discriminated against her when it did not hire her for a new position does not raise a genuine issue of material fact. Not only did Apel fail to apply for any of these positions, but also the new positions included additional duties that were substantially different from Apel's duties. The district court did not abuse its discretion when it implicitly denied Apel's motion to amend her complaint because it fully considered Apel's evidence in a light favorable to her, yet found the evidence unable to generate a fact issue for the jury. *See Palladium Holdings, LLC v. Zuni Mortg. Loan Tr. 2006-OA1*, 775 N.W.2d 168, 177-78 (Minn. App. 2009) ("Appellate courts cannot assume a district court erred by failing to address a motion, and silence on a motion is therefore treated as an implicit denial of the motion."), *review denied* (Minn. Jan. 27, 2010).

In sum, we affirm the district court's grant of summary judgment for MRCI. We also conclude that the district court did not err in denying Apel's motions to amend her complaint, either to add punitive damages or to conform to the evidence.

Affirmed.