STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2027

A Xiong,
Appellant,

vs.

Minneapolis Public Schools,
Special School District No. 1,
Respondent.

Filed September 16, 2019
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CV-18-1047

Scott Cody, Kyle S. Kosieracki, Tarshish Cody, PLC, Richfield, Minnesota (for appellant)

Susanne J. Fischer, Thomas E. Marshall, Engelmeier & Umanah, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

REYES, Judge

Appellant challenges the summary-judgment dismissal of his retaliation claim under the Minnesota Whistleblower Act (MWA), arguing that the district court erred by

determining that no causal connection exists between his protected conduct and respondent-employer's termination of his employment. We affirm.

FACTS

Respondent Minneapolis Public Schools (MPS) employed appellant A Xiong as a probationary special-education teacher at Hmong International Academy (HIA) from August 2015 until June 2017.

During his first year of teaching, Xiong received low ratings on his teaching abilities and classroom management from several staff members who observed his classroom. Ultimately, Xiong's mentor recommended against rehiring him for a second year. Xiong continued to work at HIA a second year despite the negative recommendation. During Xiong's second year of teaching, he continued to receive low marks. Staff observed that his teaching skills had not improved. HIA's principal, Dr. Debora Brooks-Golden, personally observed Xiong's classroom and found his teaching to be incompetent, lacking differentiation based on the needs of individual students and classroom management.

On March 9, 2017, Dr. Brooks-Golden and HIA's assistant principal met with Xiong to discuss concerns with his performance. On March 13, Dr. Brooks-Golden, the assistant principal, and the school administration manager met to finalize rehiring decisions. They agreed not to rehire Xiong and two other probationary teachers. On that day, at the direction of Dr. Brooks-Golden, the school administration manager entered the decision not to rehire Xiong into the Probationary Teachers Rehire Decision Dashboard (the dashboard).

On March 17, at the direction of Dr. Brooks-Golden, the assistant principal asked Xiong to create a document compiling information so that HIA could make a request to have a student assessed for special-education eligibility. Dr. Brooks-Golden also asked Xiong to create the document. Xiong refused both requests, believing that the school had not followed proper procedures before it could lawfully request a special-education assessment. On March 21, the assistant principal asked Xiong to sign a separation form, which indicated that his employment would end at the completion of the 2016-2017 school year.

Xiong filed suit against MPS, alleging violation of the MWA and wrongful discharge, claiming that MPS terminated him in retaliation for his refusal to create the document at the request of the assistant principal and Dr. Brooks-Golden. The district court granted summary judgment in favor of MPS, concluding that Xiong failed to establish a prima facie case under the MWA because he could not establish a causal connection between the protected conduct and his termination. This appeal follows.

D E C I S I O N

Xiong argues that the district court erred in finding that MPS's adverse employment action of terminating his employment occurred prior to Xiong's protected conduct of refusing to compile information and create the document. Xiong contends an issue of material fact exists on whether there is a causal connection between the protected conduct and the adverse-employment action. We disagree.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P 56.01.

We review the grant of summary judgment de novo to determine whether genuine issues of material fact exist and whether the district court erred in applying the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). We view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

A genuine issue of material fact exists "when reasonable persons might draw different conclusions from the evidence presented." *DLH Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "[T]here is no genuine issue of material fact . . . when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue." *Id.* at 71. For summary judgment, the nonmoving party may not rely upon mere averments in the pleadings or unsupported allegations, but must come forward with specific facts to satisfy its burden. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

Under the MWA, an employer may not take adverse action against an employee for the employee's refusal to perform an order by the employer that the employee has an objective basis in fact to believe violates any law, if the employee informs the employer that the action is being refused for that reason. Minn. Stat. § 181.932, subd. 1(3) (2018).

We analyze whistleblower claims under the *McDonnell Douglas* burden-shifting framework. *Grundtner v. Univ. of Minnesota*, 730 N.W.2d 323, 329 (Minn. App. 2007) (applying *McDonnell Douglas* test in review of summary-judgment decision in retaliation claim under MWA). The *McDonnell Douglas* burden-shifting framework requires the plaintiff to first establish a prima facie case of retaliatory action, then the employer to

articulate a legitimate, nonretaliatory reason for its action, and the plaintiff to demonstrate that the articulated reason is a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)

Xiong must first make a prima facie showing that (1) he engaged in protected activity; (2) MPS subjected him to an adverse-employment action; and (3) there is a causal link between the protected conduct and the adverse-employment action. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 548 (Minn. 2001). Xiong ultimately must prove by a preponderance of evidence that the employer engaged in action for an impermissible reason. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 572 (Minn. 1987). If Xiong fails to produce evidence sufficient to create an issue of fact under any of these elements, summary judgment in MPS's favor is appropriate. *See Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) ("A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim.").

The parties only dispute the third element of causation.[1] A causal connection exists between protected conduct and an adverse-employment action when one event is generated by the other. *Freeman v. Ace Tel. Ass'n*, 404 F.Supp.2d 1127, 1142 (D. Minn. 2005)

[1] Xiong states that "the issue on appeal is precisely *when* the adverse employment action occurred." He relies on *Turner v. IDS Fin. Servs., Inc.*, 471 N.W.2d 105 (Minn. 1991), which held that, in an employment-discrimination claim, the triggering event for the statute of limitations is when notice of termination is communicated to the employee. *Turner*, 471 N.W.2d at 108. But *Turner* does not bear on this issue of causation in a retaliation claim. Therefore, Xiong's argument is misguided, and the sole issue is whether the evidence presented creates a genuine issue of material fact on the element of causation.

(analyzing MWA claim). In order to show causation, a plaintiff must show evidence of a retaliatory motive. *Harnan v. Univ. of St. Thomas*, 776 F.Supp.2d 938, 948 (D. Minn. 2011) (analyzing MWA claim). An employee may demonstrate causation by circumstantial evidence that justifies an inference of retaliatory motive. *Cokley v. City of Ostego*, 623 N.W.2d 625, 632 (Minn. App. 2001), *review denied* (Minn. May 15, 2001).

Xiong relies heavily on the close proximity of his protected conduct and MPS communicating its termination decision to him just one day later. The causal connection may be established "by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." *Hubbard v. United Press Int'l*, 330 N.W.2d 428, 444 (Minn. 1983). Close proximity between a complaint of discrimination and a termination decision can support an inference of retaliation. *Cokley*, 623 N.W.2d at 633. But generally, more than a temporal connection is required to create an issue of fact on retaliation. *Freeman*, 404 F.Supp.2d at 1141. "[C]ourts have been hesitant to find pretext or discrimination on temporal proximity alone and look for proximity in conjunction with other evidence." *Hansen v. Robert Half Intern., Inc.*, 796 N.W.2d 359, 367 (Minn. App. 2011) (quotation omitted).

Xiong contends that, in addition to temporal proximity, there is other evidence of retaliation that occurred after the protected conduct. Xiong points to evidence that, on March 22, 2017, an MPS human-resources employee requested more information regarding the decision not to rehire Xiong. In response, Dr. Brooks-Golden supplied the following supplemental information:

> He was recommended for no-rehire in [2016] by mentors and [special education due process facilitator]. He was rehired despite deficit. He continues to perform below district standards. He was sent to training and was resistant to attend training. Lack of evidence in understanding [special education] law and [individual education plan] due process. Poor classroom management and limited content knowledge for math and literacy as evidenced in the [standards of effective instruction].

Xiong testified in his deposition that Dr. Brooks-Golden threatened to fire him for insubordination when he refused to compile the information and create the requested document. Xiong further alleges that Dr. Brooks-Golden referred to Xiong as "non-compliant" and "obstructing process" based on handwritten notes from a human-resources employee taken during a conversation with Dr. Brooks-Golden. In a summary of Xiong's termination prepared for the school board, human resources described Xiong as "insubordinate by refusing to assist in compiling information to complete a special education proposal for a student." But these statements occurred after MPS already made a formal decision not to rehire Xiong and entered that decision into the dashboard.

Xiong also argues that he can establish causation because Dr. Brooks-Golden did not follow procedures regarding terminations. He relies on *Weiss v. CPC Logistics, Inc.*, No. 10-117 (MJD/JJG), 2011 WL 3610124, at *7 (D. Minn. Aug. 15, 2011) (applying MWA), which held that temporal proximity, coupled with evidence that the employer's termination deviated from set disciplinary policies, established a prima facie case on causation. *Id.* But unlike here, the employer in *Weiss* did not make a decision to terminate the employee *before* the employee engaged in protected conduct.

Xiong attempts to distinguish *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 1510-11 (2001). In that case, the Supreme Court stated that, when an employer contemplated transferring the employee before learning of the employee's Title VII suit, continuing with the transfer, even if the decision was not final, after the suit had been filed, is not evidence of causation. *Id.* ("Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed. . . .").

Similarly, here, the evidence is clear that MPS planned to discharge Xiong before the protected conduct occurred. On March 9, Dr. Brooks-Golden met with Xiong to discuss concerns about his performance. Xiong acknowledged her concerns and the possibility that he may not be rehired for the following school year. On March 13, MPS decision-makers met and decided not to rehire Xiong, then entered the decision into the dashboard. Dr. Brooks-Golden gave the following reason for Xiong's termination: "He is below district standard for [special education] and has compliance issues. He is below standards for analysis of data resulting in inadequate [individual education plan] performance." "Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity." *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002). MPS's continuing with the already-planned discharge is not evidence of causation.

The evidence here clearly establishes that MPS was dissatisfied with Xiong's performance, had concerns about his teaching abilities, and made the decision not to rehire him before he engaged in protected conduct. While Dr. Brooks-Golden's statements expressed dissatisfaction with Xiong's refusal to create the document, because MPS not

only contemplated but decided not to rehire him and entered that decision into the dashboard before the protected conduct occurred, the termination did not generate from the protected conduct. The district court appropriately granted summary judgment.

Affirmed.